UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN BLUMAN, *et al.*,	)	
Plaintiffs,	)	Civ. No. 10-1766 (RMU/Three-Judge Court)
v.	)	
	)	OPPOSITION AND REPLY
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF THE COMMISSION'S MOTION TO DISMISS

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Defendant Federal Election Commission respectfully submits this opposition to plaintiffs' motion for summary judgment and reply in support of the Commission's motion to dismiss. Pursuant to LCvR 7(h), a Statement of Genuine Issues is attached to this brief.

Plaintiffs' complaint should be dismissed because the Constitution provides the political branches of government with the power — indeed, the duty — to preserve American democracy for the citizens of the United States. The long, documented history of attempts by foreign nationals to exert influence over this system of self-government amply demonstrates that Congress had a rational basis for prohibiting foreign nationals from spending money in American elections. And because the Supreme Court has repeatedly upheld statutes excluding aliens from positions in which they might interfere, even tangentially, with the democratic process, direct electoral spending by aliens is well within the sphere of conduct the Court has found Congress can reserve to citizens under the Constitution.

Even if the prohibition on foreign national campaign spending were subject to heightened judicial scrutiny, the statute would be constitutional because it furthers Congress's important and compelling interest in preventing foreign influence over American democracy. The statute is closely drawn and narrowly tailored to apply only to the category of aliens that poses the greatest risk of subverting the electoral system, *i.e.*, aliens with no permanent legal tie to the United States. The statute is also narrowly tailored to apply only to spending on candidate campaigns, not to issue speech, such that even the most temporarily resident alien can engage in such speech without limit. Regardless of the standard of scrutiny, therefore, the foreign national statute passes constitutional muster, and plaintiffs' complaint fails to state a claim on which relief can be granted.

I. THE CONSTITUTION GRANTS THE FEDERAL GOVERNMENT AUTHORITY TO EXCLUDE ALIENS FROM PARTICIPATING IN THE PROCESS OF SELF-GOVERNMENT

The federal government's broad authority over aliens derives directly from the text of the Constitution. As we have shown (FEC Mem. of P. & A. in Supp. of Mot. to Dismiss ("FEC Mem.") at 13-14 (Docket No. 15)), the government may — pursuant to that authority — treat citizens differently from noncitizens and draw distinctions among aliens.

First, the federal government's power over aliens emanates from its constitutional authority over foreign affairs and national security. *See*, *e.g.*, *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (explaining that "[f]ederal authority to regulate the status of aliens derives from various sources," including the federal government's "broad authority over foreign affairs"); *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982). Section 8 of Article I, which enumerates congressional powers, is "richly laden with delegation of foreign policy and national security powers." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005); *see also id.* ("'[F]oreign policy decisions are the subject of . . . a textual commitment.'") (*quoting Comm. of U.S. Citizens v. Reagan*, 859 F.2d 929, 933-34 (D.C. Cir. 1988)). "Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive." *Id.* at 195. Second, in addition to these foreign affairs powers, the federal authority to regulate aliens derives from the Constitution's Naturalization and Commerce Clauses. U.S. Const. art. I, § 8, cl. 4 ("[t]o establish [a] uniform Rule of Naturalization"); cl. 3 ("[t]o regulate Commerce with foreign Nations").

Plaintiffs do not dispute that the Constitution commits to the political branches authority over foreign affairs and national security matters. Nor do plaintiffs assert that section 441e does not implicate the foreign relations or national security of the United States. Instead, plaintiffs

erroneously contend that: (1) The Commission's position is that the federal government has unreviewable, plenary power over all matters involving aliens; and (2) the foreign national prohibition, 2 U.S.C. § 441e, does not implicate the authority granted Congress over immigration matters. Neither contention is accurate.

According to plaintiffs (Mem. in Supp. of Pls.' Mot. for Summ. J. & in Opp. to Def.'s Mot. to Dismiss ("Pls.' Mem.") 1, 35-37 (Docket No. 19)), the Commission has argued that the foreign national prohibition is an unreviewable exercise of the government's plenary power over aliens. The Commission made no such argument. As background to the deference owed to the federal political branches in alienage matters, the Commission noted the government's power is plenary "[i]n the contexts of deportation and exclusion," allowing it "to regulate aliens even on the basis of their ideology and the content of their ideas." (FEC Mem. 14 (citation omitted).) And the government's authority over aliens is indeed at its zenith and considered plenary in those contexts. *See*, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."); *Scales v. United States*, 367 U.S. 203, 222 (1961) (noting that federal statute requiring deportation of alien members of Communist Party "rested on Congress' . . . plenary power over aliens"). But the Commission did not contend that Congress acted pursuant to its plenary power in enacting section 441e.[1]

"Even outside" the contexts of deportation and exclusion (FEC Mem. 14), the authority granted the political branches by the Constitution allows the federal government to treat citizens differently from noncitizens in many circumstances. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)

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[1] Plaintiffs object that *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *Schneider*, 412 F.3d 190, do not address the relationship between plenary power and constitutional rights, but those cases nevertheless demonstrate the broad authority the political branches enjoy over foreign affairs and national security matters.

("Congress regularly makes rules that would be unacceptable if applied to citizens."); *see* FEC Mem. 14-15. The political and sovereign functions of governance are one such context. (*See* FEC Mem. 15-16.) Provided there is a rational basis for them, provisions that exclude aliens from participating in the democratic process of self-government are thus constitutional because of the foundational government interests furthered by those exclusions. *See*, *e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982) ("The exclusions of aliens from basic governmental processes is . . . a necessary consequence of the community's process of political self-definition.").

The fundamental interest in protecting self-governance has allowed the government to deny noncitizens the right to vote, serve as police officers, or be certified as teachers. (*See* FEC Mem. 15-16.) The Commission does not, however, contend that Congress has plenary, unreviewable authority over any and all matters involving noncitizens, or that the Court may uphold the foreign national prohibition that plaintiffs challenge without determining whether a rational basis supports it. Nor does the Commission argue, as the government did in *INS v. Chadha*, 462 U.S. 919, 940 (1983), that this case presents a non-justiciable political question. Rather, section 441e is constitutional because it rationally relates to the governmental interest in limiting foreign influence over American elections. (*See* FEC Mem. 22-28.) Plaintiffs' plenary power straw man argument (Pls.' Mem. 36-37) allowed them to conjure up mosques shuttered by the government and random searches of nonimmigrant alien homes, but that parade of horribles does not follow from the limited authority the government possesses to exclude aliens from directly participating in the basic processes of self-government.

Plaintiffs try to distance section 441e from the political branches' constitutionally assigned authority over foreign affairs and national security by claiming (Pls.' Mem. 35, 41) that

the provision is not a "genuine immigration law." But the government's power over aliens extends beyond deportation and exclusion matters to the terms of their conduct while here. *See, e.g.*, *Mathews*, 426 U.S. at 81 (holding that regulation of "our alien visitors" has long "been committed to the political branches of the Federal Government"); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[T]he power over aliens is of a political character . . . .").[2] Alienage policy is not just loosely related to foreign policy and "the maintenance of a republican form of government"; it is "vitally and intricately interwoven" with them. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Section 441e represents an exercise of the federal government's authority over the foreign affairs and national security of the United States, an authority textually committed to the political branches.

II. CONGRESS HAD A WELL-FOUNDED BASIS FOR ACTING TO PROTECT AMERICAN ELECTIONS FROM ALL FINANCIAL INFLUENCE BY FOREIGN NATIONALS

Members of Congress who enacted and amended section 441e concluded, based on an ample evidentiary record of foreign nationals trying to influence American elections through campaign finance schemes, that the provision furthers the foreign affairs and national security interests of the United States. (*See* FEC Mem. 2-11.) In the 1990s, for example, a Senate Committee examined efforts by the Chinese government to use campaign spending to influence American officials and concluded that injections of foreign money into American political campaigns "threaten the integrity of our electoral system, foreign policy, and national security." S. Rep. No. 105-167 at 4577 (1998). Congress relied on such findings and reiterated the

[2] "Immigration law" has been traditionally understood as relating to the admission and expulsion of aliens; "alienage law" refers to other matters related to their status and conduct. *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int'l L. 201, 202-03 (1994). Plaintiffs appear to contend erroneously that courts accord no particular deference to the federal government regarding the entire latter field of law.

importance of section 441e as a national security initiative when strengthening it early last decade. *See*, *e.g.*, 148 Cong. Rec. H355 (Feb. 13, 2002) (statement of Rep. Kirk) ("In the wake of September 11, global security is one of the highest priorities for the United States. We must not undermine our nation's federal election process by leaving a gaping loophole for foreign nationals to exert their potentially harmful influence."); *see also* FEC Mem. 8-9.

Plaintiffs inexplicably attempt to narrow the relevant inquiry to whether there have been instances of foreign *governments* financing electoral efforts here *from overseas*, and then contend that the Commission has put forth but one example. (*See* Pls.' Mem. 32, 34; *infra* pp. 26-27.) But foreign individuals, commercial interests, and governments have for decades financed contributions, both directly and through citizen and alien intermediaries. Congress thus had good reason to prohibit contributions and expenditures by all persons who have not chosen to live in the United States permanently.

When Nazi representatives tried to influence American politics through the dissemination of propaganda in the 1930s, they were aided by both sympathetic citizens and noncitizens. (FEC Mem. 2-3.) Until 1966, foreign governmental and non-governmental entities funneled campaign contributions through agents located in the United States, including the Philippine Sugar Association's attempt to influence American import quotas by subsidizing contributions to approximately twenty congressional campaigns. (*Id.* at 3.)

Foreigners subsequently made contributions either directly to campaigns or indirectly through American citizens who were not agents of foreign principals. The Nixon campaign received contributions from citizens of various countries — including a Greek individual whose firm had obtained an American military contract (FEC Mem. 4) — and even contributions from the ruling Greek junta through an intermediary American citizen. *See* Stanley I. Kutler, *The*

Wars of Watergate 205-08 (1990). The United States government allegedly made concessions to foreign contributors as a result of the enormous sums contributed in 1972. 120 Cong. Rec. 8782 (Mar. 28, 1974) (statement of Sen. Bentsen).

Foreign individuals and apparently even the Chinese government have also used political parties as recipients for both direct and indirect contributions to garner access to policy makers. (FEC Mem. 6-10.) Nationals of South Korea and Hong Kong contributed directly to the Democratic party and indirectly to the Republican party, respectively, including with funds from foreign corporations. (*Id*. at 7-8.) Ted Sioeng, a self-described agent of the Chinese government, contributed either his own money, or Chinese government funds, to both parties. (*Id*.) Sioeng made his contributions while spending "a substantial amount of time in the United States" without becoming a permanent resident, S. Rep. No. 105-167 at 5574 — similar to plaintiffs' timing and status in this country. Plaintiffs accuse the Commission of "legally irrelevant" fearmongering (Pls.' Mem. 45), but the above are historical events, not rhetoric.

Plaintiffs' suggestion (Pls.' Mem. 25-26) that improper congressional motives haunt section 441e's legislative past is similarly unfounded. Plaintiffs cite no committee report or floor debate from the long legislative history of the foreign national prohibition to support their suggestion that Congress sought to protect incumbents. Plaintiffs' only proffered support is a footnote from Justice Thomas's partial concurrence in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 644 n.9 (1996), in which he theorized that electoral regulations are often adopted to advantage incumbents. But a broad-brush characterization is hardly sufficient to strike down section 441e. Contribution restrictions are upheld against accusations that they advantage incumbents unless evidence demonstrates that the limits at issue, *inter alia*, affect "the ability of a candidate running against an incumbent officeholder to mount an effective

challenge." *Randall v Sorrell*, 548 U.S. 230, 253, 255 (2006); *see also McConnell v FEC*, 540 U.S. 93, 185 n.72 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 n.4 (2000). Plaintiffs have not even attempted to explain how section 441e actually furthers a pro-incumbent purpose, *i.e.*, why foreign nationals would be more likely to support challengers if permitted to make contributions and expenditures.

Members of Congress were transparent about their purpose in enacting section 441e, and the long historical record supported a genuine concern about foreign interference with the nation's self-governance. Against the backdrop of reported foreign contributions, Senator Bentsen explained that because the "loyalties [of foreign nationals] lie elsewhere; they lie with their own countries and their own governments" they have no "business in our political campaigns." (FEC Mem. 21.) "The American political process," he concluded, "should be left to American nationals." (*Id*. at 6.)

III. COURTS HAVE REPEATEDLY UPHELD RATIONAL EXCLUSIONS OF ALIENS FROM PARTICIPATING IN DEMOCRATIC PROCESSES

A. Aliens Are Excluded from the Self-Government of the People

Before the Constitution divides sovereign power between into three branches, declares that states much honor each other's public acts, and sets forth the means for its own ratification, it begins with the simple phrase, "We the People of the United States." The preeminence of these words is not accidental. It embodies and represents the most fundamental principle of democratic self-government: "[A] democratic society is ruled by its people" and no one else. *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *see also Buckley v. Valeo*, 424 U.S. 1, 34 (1976) ("In a republic . . . the people are sovereign . . . ."). As explained by the Commission (FEC Mem. 18-21), that fundamental principal lies at the heart of this case. It is a principle so basic and compelling that the both the Supreme Court and the D.C. Circuit have upheld government

restrictions on aliens' ability to affect the sovereign functions of government, including exclusions that have prevented noncitizens from engaging in First Amendment activity.

As the Commission has explained (FEC Mem. 15-19), courts defer to regulations excluding aliens from the processes of self-government; such exclusions are a "necessary consequence of the community's process of political self-definition." *Cabell*, 454 U.S. at 439-40 (upholding state requirement that peace officers be United States citizens); *see*, *e.g.*, *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state provision that prohibited noncitizens from being certified as public school teachers); *Foley*, 435 U.S. 291 (upholding state statute requiring police officers to be United States citizens). In these cases, the Court applied rational basis review in recognition of the "'[s]tate's historical power to exclude aliens from participation in its democratic political institutions' as part of the sovereign's obligation 'to preserve the basic conception of a political community.'" *Foley*, 435 U.S. at 295-96 (*quoting Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973)); *see also id*. at 296 ("A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking.") (internal citation omitted); *Cabell*, 454 U.S. at 438 ("[C]itizenship . . . is a relevant ground for determining membership in the political community."); *Ambach*, 441 U.S. at 75 ("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."). Thus, plaintiffs are not part of the political community for purposes of participating in the process of self-government: "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. . . . Aliens are by definition those outside of this community." *Cabell*, 454 U.S. at 439-40.[3]

Congress's authority exceeds even the "historical power" of states recognized in *Sugarman*, *Foley*, *Ambach,* and *Cabell*: The Constitution grants the federal government even more latitude to draw distinctions between citizens and aliens. *See Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); *Toll*, 458 U.S. at 11 (explaining that federal government has broader powers under Constitution than states do to regulate conduct of aliens); *Hampton*, 426 U.S. 88 (explaining that citizenship requirement imposed by political branches could be justified by legitimate immigration or foreign affairs ends, *e.g.*, as incentive for naturalization or for treaty negotiating purposes). *A fortiori*, if state statutes that exclude aliens from participating in self-government survive constitutional muster under rational basis review, federal provisions that draw the same distinctions and further interests plainly within Congress's constitutional powers must as well, under the same low level of scrutiny.

B. The Federal Power to Exclude Aliens from Self-Governance Extends to Restrictions that Involve First Amendment Activity

Plaintiffs object that the cases the Commission relies upon regarding the federal government's power to exclude aliens from processes of self-government are equal protection

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[3] The concept of a "political community" from which aliens stand apart is distinct from the "national community" referred to in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). In that case, the Supreme Court observed, *inter alia*, that the reference to "the people" in the First, Second, and Fourth Amendments "suggests" that persons who have "sufficient connections" with the United States are part of the "national community" and have those constitutional rights. It is undisputed that plaintiffs have some First Amendment rights, but *Verdugo-Urquidez* does not support plaintiffs' claims here. *See infra* p.29 n.10. Whether or not plaintiffs are part of the "national community" for First Amendment purposes, they are plainly not part of the "political community" with rights to participate in the processes of self-government under the cases cited above.

cases that do not involve aliens not engaged in any constitutionally protected activity, but rather aliens simply seeking affirmative government support. (Pls.' Mem. 38-39.) These cases cannot, however, be so easily pigeonholed. Congress's interest in insulating American democracy from foreign influence applies to cases in which litigants characterize their claims either as First Amendment or as equal protection challenges.

In fact, at least two of the alien exclusion cases upon which the Commission relies — *Ambach* and *Moving Phones Partnership v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993) — involved First Amendment activity, and in *Ambach*, the plaintiffs expressly raised a First Amendment claim that was rejected. 441 U.S. at 79 n.10. Thus, these cases indeed speak to the applicable level of scrutiny when a restriction on noncitizens may affect First Amendment rights. In *Ambach*, the noncitizen teacher applicants had alleged that the citizenship requirement was unconstitutional in light of the principles of diversity of thought and academic freedom protected by the First Amendment. The Court rejected that argument and explained that the citizenship requirement did not deprive the alien plaintiffs of any constitutional right: "The only asserted liberty . . . withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection." *Id*. Indeed, the Court held that states may "promote particular values and attitudes toward government" in that context. *Id.* Here, plaintiffs are nonimmigrant aliens who have not manifested an intent to remain in the United States permanently. Because plaintiffs have not elected to pursue citizenship, limiting their opportunity to directly participate in the processes of self-government does not violate the First Amendment, so long as the exclusion satisfies rational basis review, as the exclusion in *Ambach* did.

The court in *Ambach* further explained that the citizenship restriction did not inhibit the noncitizen teacher applicants from "expressing freely their political or social views or from associating with whomever they please." 441 U.S. at 79 n.10. As the Commission discusses *infra* pp. 37-39, plaintiffs can still freely express their political views on the issues they hold dear. They can speak out on, and produce content for, the internet and traditional media. And they can attempt to contact elected representatives. Section 441e leaves open many potential avenues for political speech that do not implicate core self-government.

The citizenship requirement upheld in *Moving Phones* affected paradigmatic speech activity. Cellular telephone partnerships sought in that case to invalidate a federal regulatory scheme that prohibited the grant of radio licenses, including licenses in the common carrier service, to aliens and to corporations with more than a certain level of alien ownership or control. 998 F.2d at 1053-55. As applicants for radio licenses, the claimants were thus seeking to engage in activity protected by the First Amendment. *Cf. FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) ("[B]roadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area."). Despite these First Amendment interests, the D.C. Circuit upheld the alien ownership limits under rational basis review, finding that the restrictions were rationally related to the "national security policy" advanced, namely to "safeguard the United States from foreign influence in broadcasting." *Moving Phones*, 998 F.2d at 1055-56 (internal quotation mark omitted).

The threat of foreign influence over United States elections is even more clear than the threat posed by foreign broadcasting, as campaign funds are by definition used for campaign activity, and broadcasting is in most cases devoted to other topics. In light of that weighty

interest in preventing foreign influence, this Court need only find that this prohibition on alien interference in the processes of democratic self-government rationally relates to a legitimate state purpose. *See Cabell*, 454 U.S. at 439 ("'[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government.'") (quoting *Sugarman*, 413 U.S. at 648) (alteration in original). Indeed, as we have explained (FEC Mem. 16-17), the Supreme Court has applied strict scrutiny only to state law alien exclusions that strike "'at the noncitizens' ability to exist in the community'" by denying them benefits or rights that "if withheld, would directly cause economic dependence or physical harm." *Moving Phones*, 998 F.2d at 1056 & n.3 (quoting *Foley*, 435 U.S. at 295). Plaintiffs do not even attempt to establish that section 441e has harmed them physically, rendered them economically dependent, or otherwise affected their ability to exist in the community. It has done nothing of the sort.

Plaintiffs contend that cases applying heightened scrutiny to campaign contribution or expenditure restrictions dictate the level of scrutiny here, but those cases all concerned United States citizens or associations of citizens. As shown above, the Constitution grants Congress greater power to regulate the democratic participation of noncitizens than it does of citizens. Thus, it would not be constitutionally appropriate to subject section 441e to the standard of scrutiny that applies to limits imposed on citizens; the Court should instead defer to Congress's greater authority over aliens by employing lesser scrutiny than it would if presented with citizen-plaintiffs seeking to participate in American elections. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country . . . gives him certain

rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

Contrary to the suggestions of plaintiffs and amicus (Pls.' Mem. 19; Br. of Amicus Curiae Ill. Coalition for Immigrant & Refugee Rights ("Amicus Br.") 14-15), the Court's reference in *Citizens United* to the government's potentially "compelling interest in preventing foreign [nationals] from influencing our Nation's political process," *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010), has no bearing on the standard of scrutiny applicable here. That statement related to whether the government's interest in preventing foreign influence would be sufficient to uphold the entire prohibition on corporate independent expenditures, 2 U.S.C. § 441b — a statute that was subject to strict scrutiny. *See id.* ("*Section 441b* therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest . . . .") (first emphasis added). In any event, the Court explicitly declined to opine on any hypothetical challenge to section 441e. *Id.*

Plaintiffs also cite *Bridges v. Wixon*, 326 U.S. 135 (1945) (Murphy, J., concurring), and several nonbinding circuit court opinions to support plaintiffs' argument that First Amendment scrutiny is identical for citizens and noncitizens. (*See* Pls.' Mem. 12-14, 37-40). But these cases merely stand for the unremarkable proposition that aliens in the United States have First Amendment rights — a proposition that the Commission has not disputed (*see* FEC Mem. 27), and that does not resolve the question presented here, *i.e.*, whether the First Amendment prohibits Congress from restricting noncitizen participation in the processes of democratic self-rule.[4] Furthermore, Justice Murphy's concurrence in *Bridges* was not joined by any other

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[4] The other Supreme Court case on which plaintiffs rely (Pls.' Mem. 13, 40) is *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), in which the Court held that deporting aliens for being members of the Communist party did *not* violate the First Amendment. *Id*. at 592. The Court's

Justice, and plaintiffs' statement (Pls.' Mem. 37) that the concurrence was subsequently "adopted" by the full Court is misleading: The Court merely cited the concurrence in restricting aliens' Fourth Amendment rights, *see infra* p. 29 n.10, and in holding that an alien "may not be deprived of his life, liberty or property without due process of law" under the Fifth Amendment, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).[5] The Court has never "adopted" Justice Murphy's concurrence in the First Amendment context. Even if it had, this is not a case like *Bridges* involving a *permanent* legal resident engaged in non-election activity (labor organizing) whom the government had singled out for deportation. 326 U.S. at 137-41. Consistent with his intention to reside in the United States permanently, the petitioner in *Bridges* had been here for twenty-five years. *Id*. at 140. The government is not selectively placing nonimmigrant aliens into jail pursuant to section 441e as plaintiffs contend (at 41); the provision instead functions as a constitutionally permissible requirement for aliens who choose to reside here temporarily.

On even shakier legal footing is plaintiffs' extensive reliance on *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995). Plaintiffs fail to note that the case was vacated by the Supreme Court because the claims fell outside the federal courts' jurisdiction. 525 U.S. 471, 492 (1999).

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brief analysis in that case explicitly declined to decide whether or to what extent the First Amendment's protection of citizens' communist activities would apply to aliens: "Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable. We think the First Amendment does not prevent the deportation of these aliens." *Id*.

[5] Similarly, plaintiffs cite (Pls.' Mem. 12, 37) *Wong Wing v. United States*, 163 U.S. 228 (1896), which held that due process considerations did not allow aliens to be ordered to perform hard labor before being deported, and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), which upheld what would now be considered grotesquely unconstitutional procedures for deporting Chinese immigrants. Neither of these cases remotely touched on the First Amendment rights of aliens, much less their specific rights to participate in the democratic process.

Finally, plaintiffs cite this Court's decisions in *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992), and *Brunnenkant v. Laird*, 360 F. Supp. 1330, 1332 (D.D.C. 1973), for the proposition that the First Amendment applies to temporarily resident aliens in exactly the same manner it applies to citizens, at least outside the context of exclusion and deportation matters. (*See* Pls.' Mem. 14, 38.) But the plaintiffs in these cases were legal permanent residents of the United States. *See Rafeedie*, 795 F. Supp. at 16; *Brunnenkant*, 360 F. Supp. at 1332 (describing plaintiff as "an immigrant alien who has not completed his naturalization"). Legal permanent residents are categorically exempt from section 441e, *see infra* pp. 33-37, and their constitutional rights are neither the same as those of nonimmigrants, *see id*., nor at issue in this case.

C. Courts Use Rational Basis Review for Alienage Classifications that Involve Sovereign Functions of Government

The common principle underlying the cases the Commission relies upon is that courts address certain state law alienage classifications that primarily affect economic interests under heightened scrutiny, but apply relaxed scrutiny to state law classifications that affect the sovereign functions of government, as well as to all federal classifications other than those that affect the ability of aliens to exist in the community. Thus, in all cases involving the "sovereign" — as opposed to "economic" — functions of government, citizenship restrictions that advance those sovereign interests are not subject to strict scrutiny. *Cabell*, 454 U.S. at 438-39 (citing *Ambach*, 441 U.S. at 73-74, and *Foley*, 435 U.S. at 295). "While not retreating from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny, we have concluded that strict scrutiny is out of place when the restriction primarily serves a political function . . . ." *Id*. at 439 (citations omitted). The Court has explained that such political functions include "a state's interest in establishing its own form of government, and in limiting participation in that government to those who are within the basic

conception of a political community." *Id*. at 438 (internal quotation marks omitted). The national security interests advanced in *Moving Phones* clearly involve the sovereign functions of government. Thus, as *Ambach* and *Moving Phones* amply demonstrate, regarding the sovereign or political functions of government, strict scrutiny is "out of place," *Cabell*, 454 U.S. at 439, even when exclusions have prevented noncitizens from engaging in First Amendment activity.

Plaintiffs cannot diminish these cases as standing only for the principle that courts apply relaxed scrutiny to classifications that exclude aliens from positions involving the exercise of governmental authority. (*See* Pls.' Mem. 38-39.) According to the Supreme Court, citizen restrictions are permissible in more than just employment matters. In *Cabell*, the Court explained that "political function[s]" include those "'matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the *establishment and operation* of its own government, *as well as* the qualifications of an appropriately designated class of public office holders.'" 454 U.S. at 439 (quoting *Sugarman*, 413 U.S. at 648) (emphasis added). Because section 441e advances just such a matter resting firmly within the federal government's constitutional responsibility, strict scrutiny is not the appropriate standard against which to measure it.

Indeed, section 441e promotes an interest more important and fundamental than even the employment restrictions upheld in *Foley* and *Ambach*. In *Foley*, the Court held that the state could require police officers to be United States citizens to help ensure that those who participate directly in the execution of public policy are "more familiar with and sympathetic to American traditions." 435 U.S. at 299-300. Similarly, when the Court in *Ambach* upheld a citizenship requirement for teachers, its ruling turned on the critical role teachers played in developing students' attitudes toward government and the political process. 441 U.S. at 75-77. While

"[p]ublic education, like the police function, *fulfills* a most fundamental obligation of government to its constituency," *id*. at 76 (internal quotation marks omitted and emphasis added), ensuring that government represents its constituency *is* the most fundamental obligation of government. Section 441e furthers that interest, and this Court should therefore review it under a relaxed standard of scrutiny.

D. Plaintiffs' Ties to the United States Are Temporary and in Some Instances Shorter than the Terms of Offices They Seek to Influence

The governmental interests in this case are foundational and permanent; the plaintiffs' interests are not. The importance of an American election to a nonimmigrant alien — no matter how strong the alien's views on issues of American public policy — is inherently limited by the fact that the alien's exposure to the result of the election is temporary. Here, for example, unless she is granted an extension, plaintiff Steiman's authorization to reside and work in the United States will expire in June 2012. (*See* Compl. ¶ 15; *see also* FEC Statement of Genuine Issues ¶ 7 (noting that visa extension is not granted automatically).) Yet she wishes to contribute to a candidate for President of the United States (Compl. ¶ 18(b)) — a candidate who would not be nominated until August 2012, who would not stand for general election until November 2012, and who, if elected, would not take office until January 2013, more than six months after plaintiff had returned to one of her home countries. Her interest in that election, therefore, is considerably more attenuated than the equivalent interest of United States citizens or permanent residents, who will remain here permanently when the administration takes office in 2013 and beyond. Indeed, even for elections that occur during plaintiffs' stay in the United States, the limit on their time in this country means that they will be subject to few, if any, of the effects that arise from the elections they wish to influence. Whether before or after the election, nonimmigrant aliens will inevitably be required to leave the United States, while the laws and

policies established as a result of the elections will endure for citizens and permanent residents. Plaintiffs' interest in influencing American elections therefore pales in comparison to the interests of those who have a right of self-governance and will be subject to the decisions of elected officials long after plaintiffs have departed.

Plaintiffs' claimed First Amendment interests in directly participating in American elections are not only ephemeral, but also find little support in the voting history upon which they rely. Plaintiffs claim (Pls.' Mem. 10-11) that they have a right under the First Amendment to participate directly in elections because aliens were once permitted to vote. But that history suggests instead that aliens who remained loyal to another country did not vote as a matter of right. Although some states allowed certain noncitizens to vote in early republican times, some, including Pennsylvania, South Carolina, and Vermont, required such aliens to first take a loyalty oath. *See* Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860* at 96-99, 119-20 (1960). Even the states referenced by plaintiffs thus did not view noncitizen voting as automatically conferred, and imposed a condition plaintiffs have not met. Moreover, those voting rights were soon — within the lifetimes of many of the Constitution's framers and ratifiers — revoked. Maryland changed its constitutional definition of voters from "inhabitants" to "citizens" in 1810, Connecticut in 1818, New York and Massachusetts in 1821, Vermont in 1828, and Virginia in 1831. *See* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 Mich. L. Rev. 1092, 1097 (1977). Similarly, many of the newly admitted states — Indiana in 1816, Mississippi in 1817, Alabama in 1819, Maine in 1820, and Missouri in 1821 — confined the right to vote to citizens. *Id.* In any event, plaintiffs do not now have the right to vote, *see Sugarman*, 413 U.S. at 648-49, and they have not claimed otherwise. *See infra* pp. 40-43 (discussing plaintiffs' arguments regarding voting). Thus, plaintiffs cannot rely on any

flexibility that may exist to allow noncitizens limited voting rights to suggest that the First Amendment grants aliens the right to participate directly in elections.

E. Section 441e Is Content Neutral and Viewpoint Neutral

Plaintiffs do not dispute that their primary loyalties are *not* to the United States, the nation whose policies they seek to affect. Rather, plaintiffs attempt to convert Congress's legitimate interest in protecting "the integrity of the decision-making process of our Government" from those whose "loyalties lie elsewhere" into content or viewpoint discrimination. (Pls.' Mem. 27-29.) The foreign national prohibition represents neither. It does not merely target certain nonimmigrant aliens because their views may be inimical to the foreign policy and national security of the United States; it prohibits all of them from making contributions and expenditures because foreign nationals have no legitimate role to play in American elections, whether their views and objectives are innocuous or not.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As the Court explained in *Ward*, the government's purposes control in this analysis. A regulation that "serves purposes unrelated to the content of expression" is neutral. *Id.* By vindicating the elemental proposition that "a democratic society is ruled by its people," *Foley*, 435 U.S. at 296, and that "[s]elf-government . . . begins by defining the scope of the community of the governed and thus of the governors as well," *Cabell*, 454 U.S. at 439, the foreign national prohibition serves purposes unrelated to whatever message nonimmigrant aliens may wish to express through election contributions or expenditures. Under section 441e, plaintiffs are prohibited from making contributions or expenditures whether they wish to demonstrate admiration for candidates who they feel best

represent American democratic traditions or to influence candidates to actively press the interests of a foreign power. *Cf. Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010) (explaining that federal statute was content-based regulation because "[p]laintiffs want to speak . . . and whether they may do so under [the statute] depends on what they [may] say").[6]

Nor is the foreign national prohibition viewpoint discriminatory. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Section 441e does not prohibit certain viewpoints based upon the government's agreement or disagreement with the viewpoint expressed. *See Hill v. Colorado*, 530 U.S. 703, 723-25 (2000) (holding that statute limiting protests at abortion facilities drew no distinctions between types of speech and so was viewpoint neutral); *Ruggiero v. FCC*, 317 F.3d 239, 244 (D.C. Cir. 2003) (en banc) (rejecting argument that regulation applying only to unlicensed broadcasters was viewpoint discrimination: "[T]he [regulation] applies equally to all unlicensed broadcasters regardless of the motivation for, or the message disseminated by, their illegal broadcasting."). It applies with equal justification and to equal effect no matter the ideology or opinion of the alien who falls within its prohibitions. Indeed,

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[6] Plaintiffs object that they do not seek to govern, but only to speak to those who do. (Pls.' Mem. 39.) But as the Commission explained in its opening brief (FEC Mem. 27) and again here (*see supra* p. 12 and *infra* pp. 37-39), plaintiffs can speak out without limit on any issue. There are, in fact, an ever-expanding number of avenues through which plaintiffs can press specific issues like "net neutrality" (Compl. ¶ 12) or advance more general principles such as "increasing economic liberty" (*id.* ¶ 17). *See generally* Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 Berkeley J. Int'l L. 162, 173-80 (2009) ("[P]eople outside the country may not give money to political candidates. Nonetheless, almost all other political tools are accessible to people around the globe," including broadcast media, blogs, email, text, instant messaging, and social networking) (footnote omitted).

plaintiffs themselves have illustrated this point by alleging that they espouse opposing political views.[7]

In sum, section 441e rationally relates to Congress's legitimate interest in limiting the opportunities of those whose allegiances lie with another sovereign to influence American elections.

IV. EVEN IF REGULATION OF ALIEN CONTRIBUTIONS WERE SUBJECT TO THE SAME SCRUTINY AS REGULATION OF CITIZEN CONTRIBUTIONS, THE APPROPRIATE STANDARD WOULD BE INTERMEDIATE SCRUTINY

Plaintiffs rely on *Buckley* for their argument that strict scrutiny applies to section 441e's prohibition on foreign contributions. (*See* Pls.' Mem. 17-18.) Yet even if *Buckley*'s analysis of limits on citizen contributions were applicable here, *Buckley* did not apply strict scrutiny in analyzing and upholding FECA's contribution limits, as plaintiffs acknowledge (Pls.' Mem. 17). In fact, the standard the Court applied — sustaining the statute because it was closely drawn to further the government's "sufficiently important interest," *Buckley*, 424 U.S. at 25 — is a "lesser demand" than strict scrutiny, *Shrink Mo.*, 528 U.S. at 387-88, and is a form of what the Court generally refers to as intermediate scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220 (1995) (noting that intermediate scrutiny standard requires statute to be "substantially related to the achievement of an important governmental objective" (internal quotation marks omitted)).

Plaintiffs nonetheless assert (Pls.' Mem. 18) that the "logic" of *Buckley*'s analysis "dictates" that strict scrutiny apply here because the provisions at issue in *Buckley* merely limited

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[7] Plaintiffs' attempt (Pls.' Mem. 29) to import the incitement test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), into this case is unavailing. Neither *Brandenburg* nor *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974), involved election spending by aliens, resident or otherwise. Moreover, because section 441e is not a regulation targeting advocacy that poses a threat of producing imminent lawless action, the *Brandenburg* test does not apply here.

contributions, while section 441e is a contribution ban. But the Supreme Court has twice addressed contribution bans directly, and it has applied intermediate scrutiny both times. First, in *FEC v. Beaumont*, 539 U.S. 146 (2003), the Court rejected the exact argument plaintiffs raise here and upheld under intermediate scrutiny FECA's prohibition on political contributions by corporations:

> [The would-be contributor] argues that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that § 441b does not merely limit contributions, but bans them on the basis of their source. . . . [I]nstead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest. . . . It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.

Beaumont, 539 U.S. at 161-62 (internal quotation marks and citations omitted). Then, in *McConnell*, eight Justices applied the same intermediate scrutiny standard in striking down the prohibition on contributions by minors in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). *See* 540 U.S. at 231-32 (Rehnquist, C.J.) (applying "sufficiently important interest" test); *see also id*. at 136 (upholding prohibition on all "soft-money" contributions to political parties under intermediate scrutiny). In light of these explicit holdings, plaintiffs' appeal to the generalized "logic" of *Buckley* fails: Under the standard applied by *Buckley* and its progeny to regulation of contributions by citizens, section 441e's prohibition of foreign national contributions would be subject only to intermediate scrutiny.[8]

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[8] In any event, plaintiffs misread *Buckley*. *Buckley* reasoned that lesser scrutiny applies to contribution limits because they restrict "one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally . . . on behalf of candidates.'" 424 U.S. at 22; *see also McConnell*, 540 U.S. at 141 (quoting *Buckley*). Because section 441e places no restriction on foreign nationals' ability

As to prohibitions on expenditures, the Commission agrees with plaintiffs (Pls.' Mem. 18-19) that courts have historically subjected prohibitions on citizens' expenditures to strict scrutiny.[9]

V. SECTION 441e IS CONSTITUTIONAL UNDER ANY LEVEL OF SCRUTINY

Even if this Court were to apply the intermediate scrutiny applicable to limitations on citizens' contributions and strict scrutiny applicable to domestic expenditure restrictions, plaintiffs' challenge to section 441e would fail. The statute furthers the important and compelling governmental interest of preventing foreign nationals from influencing American elections. Section 441e is also closely drawn and narrowly tailored: It reaches only financial expenditures regarding candidate campaigns — not issue advocacy — and it does not apply to aliens who have established permanent legal ties to the United States.

A. Section 441e Furthers the Important and Compelling Governmental Interest of Protecting American Democracy from Foreign Influence

Plaintiffs do not appear to dispute, at least in principle, that protecting the American democratic system from foreign influence is an important and compelling governmental interest. Nor could they, for not since the Declaration of Independence has there been any question that the American people are the only proper sovereign in this nation. Thus, short of defending the country from *physical* attack by foreign powers, *cf. Holder*, 130 S. Ct. at 2728-29 (upholding

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"to become a member of any political association" or to "assist personally . . . on behalf of candidates," *Buckley*'s rationale would support the application of intermediate scrutiny, at most.

[9] In discussing the scrutiny applicable to expenditure restrictions, plaintiffs conflate independent expenditures with "donations to independent political groups." (*See* Pls.' Mem. 19.) A donation to a "political group" is a contribution, not an independent expenditure. *See* 2 U.S.C. § 441a(a)(1) (setting limits on contributions to political committees or "PACs"); 2 U.S.C. § 431(17) (defining "independent expenditure"). In any event, the specific political group to which plaintiff Steiman allegedly wishes to contribute (Compl. ¶ 18(d)) "do[es] not accept donations from . . . foreign nationals." Club for Growth, *Frequently Asked Questions*, http://www.clubforgrowth.org/aboutus/?subsec=0&id=17#M10 (last visited Feb. 28, 2011).

statute banning, *inter alia*, speech that provides support to terrorist groups), it is difficult to conceive of an interest more compelling than preserving the exclusive ability of Americans to govern themselves. Indeed, compelling governmental interests have been found in legislation addressing concerns that, while serious, are not as foundational as citizen self-governance. *See*, *e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) ("On various occasions we have accepted the proposition that States have a compelling interest in the practice of professions within their boundaries . . . .") (internal quotation marks omitted); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009) ("[I]t is plain that the government has a compelling interest in providing the public . . . with information regarding who is being hired, who is putting up the money, and how much they are spending to influence public officials.") (internal quotation marks omitted); *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995) (finding compelling governmental interest in "protecting investors in municipal bonds from fraud").

Rather than dispute the compelling nature of the government's interest, plaintiffs raise a variety of objections to the wealth of evidence Congress amassed in designing section 441e to further that interest. None of these objections advances plaintiffs' challenge.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo.*, 528 U.S. at 391 (finding state contribution limits justified by evidence of illegal contributions in other cases, despite absence of legislative history regarding specific statutes at issue); *see also McConnell*, 540 U.S. at 144 (quoting *Shrink Missouri* and examining evidence Congress collected in passing BCRA). The "empirical evidence" requirement is at its nadir "where, as here, we deal with a congressional judgment that has remained essentially

unchanged throughout a century of careful legislative adjustment." *See Beaumont*, 539 U.S. at 162 n.9 (internal quotation marks omitted).

In its opening brief and again *supra*, the Commission has set forth at length the decades-long history of congressional factfinding that led to each refinement of what is now section 441e. *See* FEC Mem. 2-11; *supra* pp. 5-7. This record demonstrates beyond any doubt the reality that foreign nationals have repeatedly attempted to infiltrate the American government monetarily, from German propaganda in the 1930s through the covert funneling of campaign funds in the Watergate era to the brazen soft-money contributions of the 1990s. Yet plaintiffs disregard almost the entire evidentiary record, declaring that the Commission "offers but a single example suggestive of any attempt by a foreign sovereign to circumvent the (legitimate) ban on political spending from overseas." (Pls.' Mem. 32; *see also id*. at 34 (referring to same incident as "the Commission's only example of circumvention").) Plaintiffs' assertion is both misleading and false. It is misleading because the evidence of foreign attempts to infiltrate American elections encompasses far more than activities by "foreign sovereign[s]": Foreign individuals and corporations, too, have spent money to influence American campaigns, and section 441e is directed to preventing these well-documented efforts as much as it is to the efforts of foreign governments. *See* FEC Mem. 3-4, 7-8; *supra* pp. 6-7. And plaintiffs' statement is false because, even if the record were arbitrarily narrowed to foreign governmental activity, there are numerous documented instances of such activity. (*See*, *e.g.*, FEC Mem. 2 (discussing activity of Nazi party), 8-9 (Chinese government); *supra* pp. 6-7 (Greek government).)

The only basis plaintiffs articulate (*see* Pls.' Mem. 32-34) as to why the Court should disregard the remainder of the evidentiary record is that some of the congressionally documented instances of foreign spending were so-called "conduit" contributions — *i.e.*, contributions

funneled through an intermediary — which are separately prohibited by 2 U.S.C. § 441f. Because such activity is already illegal, plaintiffs argue, "it is far from clear" that the additional prohibitions of section 441e "provide any marginal value" that would outweigh their First Amendment implications. (*See* Pls.' Mem. 33.) But, as noted above, Congress uncovered many examples of *direct* foreign spending on American elections — activity that section 441f does not reach. For example, citizens of Canada and Greece helped finance President Nixon's reelection campaign in 1972 (FEC Mem. 4), and a South Korean national gave $250,000 to the Democratic National Committee to further his own business interests by gaining access to President Clinton (*Id*. at 7-8). Indeed, the primary purpose of the 1974 amendments to the foreign national statute, which had previously reached spending only by *agents* of foreign nationals (*i.e.*, indirect spending), was to ensure that it would also reach direct spending. (*Id*. at 4-5.) And BCRA section 303, 116 Stat. 96, eliminated any remaining ambiguity by adding the phrase "directly or indirectly" to modify the entire spending prohibition. *See* 2 U.S.C. § 441e(a)(1). Thus, section 441e reaches not only the indirect foreign spending that is also illegal under section 441f, but also the well-documented direct foreign spending that troubled Congress enough to pass new legislation in 1974 and again in 2002.

Furthermore, even as to indirect spending, section 441e provides considerable "marginal value." First, unlike section 441f, it applies to state and local elections, making it the sole nationwide restriction on foreign conduit contributions in such elections. Second, as the Commission noted in its opening brief (FEC Mem. 26-27), one of the many troubling scenarios to which plaintiffs' relief might give rise is an authoritarian government pressuring or ordering its citizens who temporarily live in the United States to contribute *their own money* to specified parties or candidates. *Cf*. Evan Hill, *Libyans in US Allege Coercion*, Al Jazeera English (Feb.

17, 2011), http://english.aljazeera.net/news/africa/2011/02/2011217184949502493.html (describing Libyan government's threat to revoke scholarships of Libyan students in United States if students did not travel to Washington and participate in pro-government demonstration). Such contributions would not be illegal under section 441f, so they would not be prohibited at all if plaintiffs were to prevail here. With hundreds of thousands of subjects of authoritarian governments residing and working in the United States, the only statute preventing this flow of money into American elections is section 441e.

In addition to the problems documented above, the Commission has demonstrated (FEC Mem. 22-27) additional dangers that would be posed by a declaration that section 441e is unconstitutional "as applied to foreign nationals lawfully residing and working in the United States." (Compl. at 7 (Request for Relief).) Attempting to backtrack from the plain language of their complaint, plaintiffs now assure the Court that such scenarios "are derived from legal positions wrongly attributed to Plaintiffs." (Pls.' Mem. 42.) Yet plaintiffs provide no principled basis for distinguishing any of these scenarios from their own case. (*See* Pls.' Mem. 42-44.)

1. The Commission noted that plaintiffs' relief would grant an agent of a foreign government working in the United States on behalf of his home country a constitutional right to spend money on American campaigns (FEC Mem. 23), despite the fact that one of the most problematic historical examples of foreign involvement in domestic campaigns involved contributions by just such an agent (*see id*. (discussing Sioeng case)). Plaintiffs respond by adding an enormous caveat to their entire cause of action: They now assert (Pls.' Mem. 42) that the only aliens entitled to relief are those with "sufficient connection" to the United States, and that a foreign agent "plainly" does not meet that test. But what constitutes a "sufficient connection" under plaintiffs' theory is entirely unclear, as plaintiffs themselves seem to

acknowledge. (*See* Pls.' Mem. 16 (arguing that plaintiffs should prevail "[w]hatever the precise location" of the constitutional boundary); Amicus Br. 12 (arguing that "nonpermanent" residents satisfy test "[w]hatever the precise boundaries of the line").)[10] Indeed, this tautological assertion — that an alien's connection to the United States is sufficient for constitutional purposes if it constitutes a "sufficient connection" — is so vague as to be meaningless as a limiting principle. Plaintiffs' inability to offer a more principled distinction between themselves and these other aliens "lawfully residing and working in the United States" therefore highlights even more starkly the conflict between the dangers identified by Congress and the result plaintiffs seek.

2. The Commission noted that many states have chosen not to impose contribution limits on United States citizens, and so, if plaintiffs were to prevail, foreign nationals living and working in the United States would be permitted to spend unlimited amounts of money in these states' elections.[11] (FEC Mem. 23-24.) Plaintiffs respond that the states could simply impose limits on everyone. (Pls.' Mem. 43.) But that is no small matter: The states are sovereign powers that have chosen, as a matter of public policy and in an exercise of representative democracy, not to limit the size of citizens' contributions. A judgment in plaintiffs' favor, therefore, would require these states either to accept unlimited foreign money, or their

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[10] Plaintiffs and amicus derive their proposed test from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Court held that a Mexican citizen who had been arrested in Mexico and then incarcerated in the United States was not entitled to Fourth Amendment protection. Because the plaintiff in *Verdugo-Urquidez* raised no claim under the First Amendment — and he lost the Fourth Amendment claim he did raise — it is implausible at best to read this case as addressing, much less deciding, the extent of temporarily resident aliens' First Amendment rights. Indeed, the quotations on which plaintiffs rely (one of which is a parenthetical from the middle of a string citation) explicitly *distinguish* the Fourth Amendment question in *Verdugo-Urquidez* from other provisions of the Bill of Rights. *Id*. at 265, 271 (quoted at Pls.' Mem. 13).

[11] According to the National Conference of State Legislatures, these states are Alabama, Indiana, Iowa, Mississippi, Missouri, Nebraska, North Dakota, Oregon, Pennsylvania, Texas, Utah, and Virginia. *See* State Limits on Contributions to Candidates, http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf (revised Jan. 20, 2010).

legislatures and governors would be forced to override their own citizens' wishes by imposing blanket limits on all contributors.

3. The Commission noted that, given the large number of foreign nationals living and working in the United States, any concerted financial effort by even a portion of the alien population would be sufficient to sway many elections, at least at the state and local level. (FEC Mem. 25.) Plaintiffs respond (Pls.' Mem. 43) that foreign nationals are hardly a monolithic political entity (which the Commission does not dispute), and that an "inevitable feature of democracy" is like-minded people banding together politically. But plaintiffs fail to account for the fact that the domestic groups they mention comprise free *citizens*, and there is no question that citizens have the right to pool their resources in an exercise of democratic self-government while excluding noncitizens from that exercise. In addition, many foreign nationals are subjects of authoritarian countries, which can direct — or even force — their citizens to spend money as a bloc; no entity possesses that power over the groups of Americans that plaintiffs mention, such as public employees and teachers.

4. The Commission noted that foreign corporations doing business in the United States appear to meet plaintiffs' criteria for relief, *i.e.*, transacting business and having legal "residence." (FEC Mem. 25-26.) Plaintiffs respond that "it is not clear" whether plaintiffs' conception of alien residence would apply to corporations. (Pls.' Mem. 44.) Plaintiffs fail, however, to offer any principled distinction between themselves and foreign corporations transacting business domestically. Thus, plaintiffs' relief may enable such corporations to make expenditures nationwide and to make contributions in the states where domestic corporations are allowed to do so. And even if this is not plaintiffs' intent, the Supreme Court has rejected the principle that corporations may be prohibited from engaging in expenditures that are legal for

individuals. *See generally Citizens United*, 130 S. Ct. 876. So, whatever rights plaintiffs claim for themselves as to expenditures may very well apply to every foreign corporation that has established residence in the United States. If plaintiffs intend the Court's ruling to stop short of extending to foreign corporations, they have failed to supply the reasoning that would so limit it.

5. The Commission noted (FEC Mem. 27) that a significant number of foreign nationals meeting plaintiffs' criteria for relief are citizens of countries that are openly hostile to the United States and its interests. Plaintiffs question whether such aliens could do any meaningful harm to the United States "by donating a few hundred dollars each to a local congressional candidate." (Pls.' Mem. 44-45.) That glib response ignores the dangers at hand. While a limited number of hundred-dollar donations to a federal candidate is unlikely to drastically sway the candidate's election, those contributions have *some* effect; indeed, that is why most people contribute and what makes them contributions under the law. *See* 2 U.S.C. § 431(8) ("The term 'contribution' includes any . . . deposit of money . . . *for the purpose of influencing* any election for Federal office.") (emphasis added).

Because *no* foreign influence over American elections is appropriate, Congress has the authority to prohibit even limited foreign contributions. *See infra* pp. 43-44. Furthermore, many American elections at the state or local level do not have contribution limits. A six-figure donation to a candidate for state treasurer, for example, can not only alter the course of a campaign, but can also significantly influence the winner's actions in office. (*See* FEC Mem. 23-24 (discussing case in which foreign national gave $100,000 to California state treasurer and later arranged for business to receive work from treasurer).) Striking down section 441e would therefore provide an opportunity for foreign nationals from hostile nations to generate officeholders indebted to them. *See McConnell*, 540 U.S. at 153 (upholding contribution limits

in light of "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions"). Congress has determined that section 441e is the best means of furthering the government's important and compelling interest in preventing that scenario, and plaintiffs offer no substantive argument to the contrary.

6. Finally, plaintiffs refer repeatedly to the fact that they live, work, and pay taxes in the United States as a basis for their claims.[12] (*See*, *e.g.*, Pls.' Mem. 1, 7, 16.) Yet they explicitly acknowledge that mere residence is insufficient to warrant their claimed relief (*id*. at 16), and they tacitly acknowledge the same regarding employment (*see id*. (excluding "some temporary workers" from category entitled to relief)). Even weaker is their appeal to taxation, as some people who have never set foot in the United States pay taxes here, *see* 26 U.S.C. §§ 871(a)(1)(A), 872(a) (defining nonresident taxable income); *Comm'r v. Wodehouse*, 337 U.S. 369, 377 (1949) (finding British citizen residing in France liable for taxes on income from royalty payments received from United States), and plaintiffs concede that such aliens do not have the right to spend money in American elections (Pls.' Mem. 7).

Thus, none of plaintiffs' criteria is individually sufficient to lead to the result they seek, and plaintiffs provide no argument or authority showing that the result should be any different when these factors are combined. Indeed, even when the three criteria *are* present, plaintiffs' analysis remains arbitrary: For example, many illegal immigrants meet all three conditions. *See*

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[12] Many nonimmigrants — including some J-1 visa holders, such as plaintiff Steiman — are exempt from payroll taxes for their first two years in the United States. *See* Internal Revenue Serv., *Alien Liability for Social Security and Medicare Taxes of Foreign Teachers, Foreign Researchers, and Other Foreign Professionals*, http://www.irs.gov/businesses/small/international/article/0,,id=188413,00.html (last visited Mar. 1, 2011). In any event, unlike residence and employment, plaintiffs' payment of taxes is not mentioned as a basis for relief in their complaint, so it appears that plaintiffs would claim the same right to engage in campaign spending even if they did not pay United States taxes.

Travis Loller, *Many Illegal Immigrants Pay Up at Tax Time*, USA TODAY, Apr. 11, 2008 ("Social Security Administration estimates that about three-quarters of illegal workers pay taxes . . . ."). Thus, according to plaintiffs' logic, if they were to overstay their visas but otherwise continue their activities here, they would become illegal immigrants yet remain entitled to spend money on American elections. There is no basis for any interpretation of the First Amendment that would lead to this bizarre result.

In sum, the troubling evidentiary record of foreign activity Congress developed in the course of carefully and repeatedly revising section 441e "demonstrate[s] that the recited harms are real, not merely conjectural, and that the regulation [does] in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

B. Section 441e Is Closely Drawn and Narrowly Tailored Not to Apply to Aliens Who Have Permanent Ties to the United States, and Not to Apply to Issue Speech

Even if Congress were required to narrowly tailor legislation that distinguishes between citizens and noncitizens (which it is not, *see supra* pp. 2-22), section 441e would amply satisfy that requirement. Two significant tailoring limitations are built directly into the statute: Section 441e does not apply to noncitizens who have permanent legal ties to the United States, and it does not limit any alien's ability to engage in issue speech.

First, the foreign national prohibition does not apply to noncitizens who hold permanent legal ties to the United States, specifically United States nationals and legal permanent residents ("LPRs"). *See* 2 U.S.C. § 441e(b)(2) (defining "foreign national"). For purposes of section 441e, United States nationals are noncitizens who owe "permanent allegiance" to this country, *see* 8 U.S.C. § 1101(a)(22)(B), such as American Samoans, *see* 8 U.S.C. §§ 1408(1), 1101(a)(29). On the basis of this allegiance and the treatment of United States nationals as essentially equivalent to citizens under immigration law, the Commission has long held that

United States nationals are not subject to section 441e. *See* FEC Advisory Op. 1994-28 at 2, 3 n.3, http://saos.nictusa.com/aodocs/1994-28.pdf. Congress codified that exclusion in BCRA. *See* BCRA § 317, 116 Stat. 109.

LPRs similarly hold permanent ties to this country: They "hav[e] been lawfully accorded the privilege of residing *permanently* in the United States as an immigrant," 8 U.S.C. § 1101(a)(20) (emphasis added), and "their lives are generally indistinguishable from those of United States citizens." *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part); *see also* 120 Cong. Rec. 8783 (statement of Sen. Bentsen) ("[LPRs] for all intents and purposes are citizens of the United States except perhaps in the strictest legal sense of the word.").[13] Indeed, when an amendment was proposed to BCRA that would have prohibited contributions by LPRs, the principal sponsor of BCRA urged the amendment's rejection, distinguishing campaign spending by foreign nationals from LPRs' "being allowed to participate in our government." 148 Cong. Rec. H451 (Feb. 13, 2002) (statement of Rep. Shays). Congress voted down the amendment on a bipartisan basis, *see id*. at H452 (209 Democrats and independents and 59 Republicans voting no), with Members noting, for example, that tens of thousands of legal permanent residents serve in the military and that "[m]ore than 20 percent of Americans who have received the Congressional Medal of Honor were legal residents." *See*, *e.g.*, *id*. at H448 (statement of Rep. Mink); *id*. at H449 (statement of Rep. Menendez) ("This

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[13] Amicus supporting plaintiffs argues that statutory residence classifications are "ever-shifting" (Amicus Br. 11) and that such classifications do not effectively distinguish aliens who hold permanent ties to the United States from those whose ties are merely temporary (*see generally id*. at 7-20). But the statutory definition of an LPR has not changed since 1952, *see* 8 U.S.C. § 1101(a)(20), and the immigration code notes a wealth of substantive differences between LPRs and nonimmigrants. *See generally* 8 U.S.C. § 1101(a)(15)(A)-(V) (describing categories of nonimmigrants); *see also infra* pp. 35 (noting that most nonimmigrants must not abandon their foreign residence). Congress has thereby drawn clear distinctions in classifying permanent and temporarily resident aliens, and there is no constitutional error in Congress's incorporation of those distinctions into section 441e. 2 U.S.C. § 441e(b)(2).

[amendment] is not about foreign influence. . . . [LPRs] fight for the country, they die for the country . . . .").

Plaintiffs argue that section 441e is underinclusive because it permits LPRs, who are noncitizens, to engage in political spending, and therefore that the statute is not narrowly tailored to further the government's interest in preventing foreign influence. (Pls.' Mem. 25.)[14] But as the foregoing demonstrates, nonimmigrants such as plaintiffs are in a categorically different legal position vis-à-vis the United States than are LPRs and United States nationals. By definition, nonimmigrants' authorized time in the United States is temporary, and nonimmigrant visas cannot be used to obtain or facilitate permanent residence: To obtain a nonimmigrant work or student visa, the applicant generally must "hav[e] a residence in a foreign country *which he has no intention of abandoning*," *see*, *e.g.*, 8 U.S.C. § 1101(a)(15)(J) (emphasis added), and must leave the country upon the expiration of her visa, *see* 8 C.F.R. § 214.1(a)(3)(ii). A wealth of legal distinctions flow from this lack of permanent ties to the United States. For example, unlike an LPR or a United States national, a nonimmigrant may not serve in the military, *see* 10 U.S.C. § 504(b), or receive public benefits, *see* 8 U.S.C. § 1611(a). Thus, because nonimmigrants have no permanent legal ties to this nation, they not only have a smaller stake in American elections than LPRs do, *see supra* pp. 18-19, but they also pose a greater risk than LPRs of injecting distinctly *foreign* influence into elections, either directly or as conduits.

In enacting legislation to prevent foreign influence, the fact that Congress was comfortable permitting LPRs to participate financially in campaigns does not call the statute's validity into question:

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[14] Plaintiffs' argument that the statute is underinclusive because it does not apply to minors and other United States citizens is discussed *infra* p.42.

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals. . . . Because the primary purpose of underinclusiveness analysis is simply to ensure that the proffered state interest actually underlies the law, a rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest [or] because it provides only ineffective or remote support for the asserted goals . . . .

Blount, 61 F.3d at 946 (emphasis in original; internal quotation marks and citations omitted); *see also McConnell*, 540 U.S. at 178 (holding that statute is "not rendered unconstitutional by the mere fact that Congress chose not to regulate the activities of another group as stringently as it might have"). Because plaintiffs do not and cannot demonstrate that section 441e "provides only ineffective or remote support" for the government's interest in preventing foreign influence over American elections, *see supra* pp. 25-33, their underinclusiveness argument fails.

Furthermore, in *Ruggiero* the D.C. Circuit considered and rejected an argument similar to the one plaintiffs raise here. The *Ruggiero* plaintiff, who had a history of conducting unlicensed broadcasting (*i.e.*, broadcast "piracy"), challenged an FCC regulation that sought to discourage piracy by barring individuals who had engaged in it from receiving certain FCC licenses, while permitting individuals who had been convicted of other crimes to apply for those licenses on a case-by-case basis. 317 F.3d at 243, 246. The plaintiff argued that the regulation was underinclusive, and therefore void under the First Amendment, because the criminals it did not ban posed as much risk of unlawful activity as did the singled-out pirates. The en banc court rejected this argument, noting that, by identifying the group that logically posed the greatest risk of the targeted illegal activity, the government had tailored its action appropriately and narrowly, not underinclusively. *Id*. at 246 (quoting *Blount*). That rationale applies with full force here, where Congress has tailored section 441e to reach only those noncitizens who pose the greatest

risk — *i.e.*, temporarily resident nonimmigrants, such as plaintiffs, who owe no allegiance to the United States — and not to reach aliens who have permanent legal ties to this nation.

The second aspect of section 441e's narrow tailoring is that nothing in that section — or in any other provision of FECA — prohibits foreign nationals from speaking out on issues of public policy. As the Commission noted in its earlier brief (at 27), plaintiffs are entirely unconstrained in their ability to express and advocate for their views on "the environment, . . . same-sex marriage, and . . . 'net neutrality'" (Compl. ¶ 12) and on "the health-care system . . . tax reductions and . . . increasing economic liberty." (*Id.* ¶ 17; s*ee also* Pls.' Statement of Material Facts ¶ 22 ("Dr. Steiman belongs to the American Medi[c]al Association.").) By regulating only campaign-related spending, Congress has tailored section 441e to address the financial activity most likely to influence elections and officeholders. *See McConnell*, 540 U.S. at 138 (holding that contribution limits "have only a marginal impact on the ability of contributors . . . to engage in effective political speech" but limit contributors' ability "to influence federal elections, federal candidates, and federal officeholders"). The enormous range of activity available to plaintiffs on their chosen issues — from personal speech, to creating advocacy websites,[15] to mass television advertising[16] — belies plaintiffs' characterization of section 441e as a "gag law." *Cf. Ambach*, 441 U.S. at 79 n.10 ("[The statute] does not inhibit [noncitizens] from expressing freely their political or social views or from associating with

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[15] The Commission's regulations provide that uncompensated individual political activity on the internet, such as blogging, is categorically excluded from regulation as a contribution or expenditure, even if includes campaign advocacy. 11 C.F.R. §§ 100.94, 100.155.

[16] During this year's Super Bowl, which was watched by over 100 million Americans, an advocacy group ran a television advertisement opposing tax increases, *see* Americans Against Food Taxes, "Give Me a Break," *available at* http://www.nofoodtaxes.com/ads/ (last visited Feb. 28, 2011) — an issue that plaintiff Steiman allegedly wishes to speak out on as well (*see* Compl. ¶ 17). Section 441e would not have placed any restrictions on plaintiffs' ability to run ads of this kind.

whomever they please. Nor are [noncitizens] discouraged from joining with others to advance particular political ends.”).

Unable to demonstrate, or even plausibly argue, that the statute reaches too far with regard to issue speech (*see* Pls.’ Mem. 36-37 (acknowledging that “ban[ning] non-citizens from discussing any political matters” would be “far beyond § 441e”)), plaintiffs assert instead that it does not reach far *enough*. Specifically, plaintiffs note that section 441e does not apply to spending regarding state ballot measures and referenda[17] — an exclusion that plaintiffs assert is evidence of Congress’s “unprincipled pandering to xenophobia.” (Pls.’ Mem. 25-26.) But the Supreme Court has distinguished spending on advocacy regarding ballot measures from spending on candidate elections. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981). And there is no indication in the long history of section 441e that Congress was ever presented with evidence that foreign nationals had attempted to influence ballot measures. *See Burson v. Freeman*, 504 U.S. 191, 207 (1992) (“States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.”); *Buckley*, 424 U.S. at 105 (“[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did . . . 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 quotation marks and citations omitted)); *cf. McConnell*, 540 U.S. at 158 (rejecting underinclusiveness argument and noting that “we respect Congress’ decision to proceed in incremental steps in the area of campaign finance regulation”). Thus, the

[17] In an advisory opinion issued shortly after BCRA was enacted, the Commission indirectly indicated that it might interpret revised section 441e to apply to ballot initiatives. *See* FEC Advisory Op. 2003-12 at 5-6, http://saos.nictusa.com/aodocs/2003-12.pdf. The Commission has since suggested that it does not. *See* FEC Advisory Op. 2005-10, http://saos.nictusa.com/aodocs/2005-10.pdf (finding fundraising for ballot measures to not be in connection with an “election” under FECA).

exemption of ballot measures, like all other issue speech, further demonstrates that section 441e is narrowly tailored to address Congress's concern regarding proven attempts to exert foreign influence over American candidate elections.

Plaintiffs propose two additional flaws in the tailoring of section 441e. They argue that Congress could have tailored the statute to apply only to foreign nationals who are citizens of countries hostile to the United States, not to citizens of Canada and other friendly nations. (Pls.' Mem. 34.) Plaintiffs are free, of course, to suggest such a limitation to Congress, but the Constitution does not require it. *See Meese v. Keene* 481 U.S. 465, 469-70 (1987) (noting that FARA's registration requirement was "comprehensive, applying equally to agents of friendly, neutral, and unfriendly governments"). To the contrary, the First Amendment does not excuse individuals from broadly applicable legislation simply because those individuals claim not to be within the core group about which the government was most concerned. *See Holder*, 130 S. Ct. at 2728-29 (upholding ban on providing, *inter alia*, "advice" to designated terrorist groups "even if the supporters meant to promote only the groups' nonviolent ends"); *Hill*, 530 U.S. at 729 (finding statutory "buffer zone" around abortion facilities narrowly tailored, even though this "prophylactic approach . . . will sometimes inhibit a demonstrator whose approach in fact would have proved harmless"); *Buckley*, 424 U.S. at 29-30 (upholding political contribution limit as closely drawn even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"). And finally, plaintiffs argue that section 441e is overinclusive because it applies even in localities that permit aliens to vote. (Pls.' Mem. 26.) Under this theory, every state and city in the nation would have the power to render a federal statute overinclusive by adopting a more permissive approach in a related area. That is not how the Constitution operates. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

C. Plaintiffs' Remaining Arguments Mischaracterize the Government Interests and Statute at Issue

Because the government has an important and compelling interest in preventing foreign influence over American elections and section 441e is closely drawn and narrowly tailored to further that interest, the statute is constitutional. The hodgepodge of caselaw plaintiffs cite in support of their secondary arguments to the contrary is not relevant to — and certainly cannot change — this outcome.

1. The Rights to Vote and to Engage in Political Spending Are Not Coextensive, but Each Is a Form of Political Participation that the Government May Reserve for Citizens

Plaintiffs argue at length that the Commission has improperly conflated the right to vote with the right to engage in campaign-related spending. Specifically, plaintiffs argue that many people who cannot vote in American elections nonetheless have a constitutional right to spend money in connection with them. (Pls.' Mem. 21-27.) Therefore, plaintiffs argue, the Commission is wrong to assert that Congress's compelling interest in denying aliens the right to vote is coextensive with Congress's interest in prohibiting foreign contributions and expenditures. (*See id*.)

Plaintiffs' argument is a straw man: The Commission has never equated the right to vote with the right to spend. Indeed, the only references to voting in the Commission's prior brief were in direct quotations from the legislative history of section 441e (*see* FEC Mem. 6, 21), and in support of the legal proposition that "[d]eference to the government's broad authority over immigration and alienage matters is particularly apt regarding *political functions*." (*Id*. at 15-16, 19 (emphasis added) (citing, *inter alia*, cases in which exclusion of aliens from voting was discussed).) Even the specific portion of the Commission's brief that plaintiffs cite as purportedly making this argument refers to "the nation's processes of self government" as a

whole, not to the specific governmental interests in voter qualifications. (Pls.' Mem. 21 (quoting FEC Mem. 18).)

This is not to say that voting and political spending are entirely unrelated. Like voting, making contributions to candidates and spending money to get them elected are, indeed, "political functions" — *i.e.*, they are one form of democratic participation. *See*, *e.g.*, *Buckley*, 424 U.S. at 26-27 (analyzing contributions as part of "our system of representative democracy"). And as the Commission demonstrated in its prior brief, there is ample authority for the proposition that the government can limit democratic participation to those who have concrete legal ties to the United States. (*See* FEC Mem. 15-16; *see also supra* pp. 8-10.) Thus, it is well established that the government may deny a noncitizen the right to vote, *Sugarman*, 413 U.S. at 648-49 ("[I]mplicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting [voting] rights."), to serve as a police officer, *Foley*, 435 U.S. at 299-300, or even to be certified as a teacher, *Ambach*, 441 U.S. at 80-81. Spending money to elect candidates to the offices that govern the nation (including all of its states and cities) may not be as democratically foundational as voting, but it is more inherently and directly tied to self-governance than is hiring police officers or certifying teachers. Political spending therefore falls squarely on the spectrum of democratic participation from which the Supreme Court has held that foreign nationals may constitutionally be excluded. *See Foley*, 425 U.S. at 296 (collecting cases holding that aliens may be excluded from functions that "lie at the heart of our political institutions"). Because Congress possesses the power to limit all of these forms of democratic participation to citizens, plaintiffs' single-minded focus on the differences between voting and other rights is irrelevant.

Plaintiffs add stuffing to their straw man by reciting a litany of what they term "underinclusiveness" in the Commission's (nonexistent) voting-spending analysis: Plaintiffs identify groups and entities who cannot vote but can make contributions or expenditures. (Pls.' Mem. 22-23.) This is doubly unresponsive, for not only is the comparison to voting irrelevant, but most of the categories that plaintiffs identify do not even involve aliens. (*See id*. at 22 (discussing felons and domestic corporations), 22-23 (minors), 23 (residents of the District of Columbia).) Minors and residents of the District of Columbia cannot vote in certain elections because they are, respectively, immature and reside in a district that is not a state, not because they lack sufficient ties to the United States. The only instances plaintiffs note that actually relate to activity by noncitizens under section 441e are those regarding LPRs and state ballot measures. But, as discussed *supra* pp. 35-39, these permissible activities do not render the statute underinclusive; rather, they are the products of Congress's careful efforts to tailor section 441e to close the specific opportunities and loopholes that allowed foreigners to gain influence over American elections in the past.

2. Section 441e Is an Influence-Prevention Statute, Not a Speech-Equalization Statute

Plaintiffs argue that section 441e is an impermissible "speaker-based restriction[ ]" akin to the ban on corporate expenditures that the Supreme Court struck down in *Citizens United*. (*See* Pls.' Mem. 28-30.) It is true, of course, that section 441e applies only to foreign nationals, and to that extent it is speaker-based. But the infirmity of the statute struck down in *Citizens United* was not merely that it discriminated against corporate speakers, but that it did so to "'equalize[e] the relative ability of individuals and groups to influence the outcome of elections.'" 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48). Because "'the concept that government may restrict the speech of some *elements of our society* in order to enhance the

relative voice of others is wholly foreign to the First Amendment,'" *id*. (quoting *Buckley*, 424 U.S. at 48-49) (emphasis added), the Court held that Congress's attempt to enhance individual speech at the expense of corporate speech was unconstitutional. *See id*. at 913.

Section 441e does not serve an impermissible speech-equalization purpose. The statute does not single out foreigners because they are wealthy or because their spending would have "distorting effects" on the political marketplace. *Cf. Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 130 S. Ct. at 913. Rather, in the language of *Citizens United*, aliens simply are not "elements of our society" when it comes to elections. *See supra* pp. 8-10, 40-42 (discussing exclusion of aliens from democratic process). *Citizens United* noted repeatedly that the expenditure ban in that case was problematic because the affected corporations were "associations of citizens." *E.g.*, 130 S. Ct. at 906-07 ("[The statute] permits the Government to ban the political speech of millions of associations of citizens."); *id*. at 908 (noting that statute created "disfavored associations of citizens"); *see also id*. at 898 ("The right of *citizens* . . . to speak . . . is a precondition to enlightened self-government and a necessary means to protect it.") (emphasis added). Thus, it is not surprising that *Citizens United* explicitly declined to address the application of its holding to "the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." 130 S. Ct. at 911 (citing 2 U.S.C. § 441e). As the Commission has demonstrated at length, the government does indeed have a compelling interest in preventing foreign influence over "our Nation's political process," and section 441e is narrowly tailored to further that interest; nothing in *Citizens United*'s rejection of the speech-equalization rationale stands to the contrary.

Plaintiffs argue that the government's anti-influence interest could nonetheless be furthered by a contribution limit, and that a complete ban on contributions is therefore unnecessary. (Pls.' Mem. 30.) This argument conflates the government's interest in preserving democracy for citizens with its distinct interest in reducing the actual and apparent corruption arising from large contributions. *See Buckley*, 424 U.S. at 26-27 (describing anticorruption interest). In the context of anticorruption provisions that apply to citizens — whose legitimate power to sway elected officials is part and parcel of representative democracy — a contribution limit strikes a balance between (1) limiting the ability of any single contributor to give "to secure a political *quid pro quo* from current and potential office holders," *see id*. at 26, and (2) permitting contributors to express their support for a candidate financially and thereby influence his or her policies. *See Citizens United*, 130 S. Ct. at 910 ("[A] substantial and legitimate reason . . . to make a contribution . . . is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.") (internal quotation marks omitted). In the context of foreign nationals, however, the balancing of legitimate and undue influence is unnecessary, for American democracy is not premised on the responsiveness of our government to foreign interests. Thus, just as the government can prohibit aliens from voting in *any* election, *see Sugarman*, 413 U.S. at 648-49, or serving in *any* "police function," *Foley*, 435 U.S. at 300, or teaching *any* course in *any* public school, *Ambach*, 441 U.S. at 79-80, so must the government have the power to prohibit foreign nationals from engaging in *any* financial activity to help or hinder the election of the people who govern the nation. This is not an anticorruption measure; it is a basic tenet of self-governance.

VI. CONCLUSION

Plaintiffs conclude their brief with a sarcastic allusion to the architect of the September 11 attacks running for public office, thereby demonstrating insensitivity to the

security, foreign-affairs, and democratic interests at stake in this matter. The Constitution grants Congress and the President the authority — indeed, the duty — to protect the nation from foreign harm. Attempts to cause such harm take many forms, including, as history shows beyond any doubt, financial interference with American elections. Preventing that interference is thus a compelling governmental interest of the highest order — an interest that Congress has carefully furthered by prohibiting aliens who hold no permanent legal ties to the United States from bankrolling American candidates. Nothing in the Constitution prohibits this reasonable and tailored protection of the American system of self-government.

Respectfully submitted,

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March 1, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN BLUMAN, *et al.*, Plaintiffs,	Civ. No. 10-1766 (RMU/Three-Judge Court)
v.	
FEDERAL ELECTION COMMISSION, Defendant.	STATEMENT OF GENUINE ISSUES

FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES

Pursuant to LCvR 7(h), defendant Federal Election Commission respectfully submits the following Statement of Genuine Issues in response to plaintiffs' Statement of Material Facts (Docket No. 19).

1-6. No response.

7. Renewal or extension of nonimmigrant visas is not automatic. *See* U.S. Citizenship & Immigration Servs., *How Do I Extend My Nonimmigrant Stay in the United States*, at 2, http://www.uscis.gov/USCIS/Resources/C1en.pdf (Aug. 2008) ("An extension of stay is not automatic. We will look at your situation . . . and decide whether or not to grant your application. If we grant it, we will also decide how long to extend your stay. We will not grant an extension if circumstances indicate that an extension is not warranted."). A nonimmigrant must leave the United States "at the expiration of his or her authorized period of admission or extension." 8 C.F.R. § 214.1(a)(3)(ii).

8-9. No response.

10. The strength and substance of plaintiffs' "political views" are not material to this action, as section 441e does not prohibit foreign nationals from expressing such views on any issue. *See* 2 U.S.C. § 441e.

11-20. No response.

21. *See supra* ¶ 7.

22. No response.

23. *See supra* ¶ 10.

24-28. No response.

29. The Club for Growth does not accept donations from foreign nationals. *See* Club for Growth, *Frequently Asked Questions*, http://www.clubforgrowth.org/aboutus/?subsec=0&id=17#M10 (last visited Feb. 28, 2011) ("We do not accept donations from corporations, labor unions, foreign nationals, or federal contractors.").

30-31. No response.

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