No. 11-275

In the Supreme Court of the United States

BENJAMIN BLUMAN, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

ANTHONY HERMAN
General Counsel
DAVID KOLKER
Associate General Counsel
KEVIN DEELEY
Assistant General Counsel
STEVE N. HAJJAR
ADAV NOTI
Attorneys
Federal Election Commission
Washington, D.C. 20463

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Congress may constitutionally prohibit aliens who are temporarily employed in the United States, but who have not been admitted to this country for permanent residence, from making campaign contributions and other disbursements in connection with elections for public office.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 11-275

BENJAMIN BLUMAN, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court granting appellee's motion to dismiss (J.S. App. 1a-23a) is not yet published in the *Federal Supplement*, but is available at 2011 WL 3443833.

JURISDICTION

The judgment of the three-judge district court was entered on August 8, 2011. A notice of appeal was filed on August 12, 2011, and the jurisdictional statement was filed on September 1, 2011. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114.

STATEMENT

Federal law prohibits foreign nationals from making contributions, expenditures, or other disbursements in

connection with federal, state, or local candidate elections. 2 U.S.C. 441e. Section 441e is the current manifestation of Congress's longstanding efforts to prevent aliens from attempting to sway American elections and governmental decisions by disbursing funds within the United States.

1. In 1935, a congressional investigation found that the Nazi party of Germany and other foreign organizations had paid for propaganda disseminated by "a large number of aliens who, although they ha[d] resided in this country for a number of years, had never made an effort * * * to become citizens." H.R. Rep. No. 153, 74th Cong., 1st Sess. 7 (1935) (1935 House Report). In response, Congress enacted the Foreign Agents Registration Act of 1938 (FARA), ch. 327, 52 Stat. 631, to "identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment." *Viereck* v. *United States*, 318 U.S. 236, 241 (1943). FARA required each agent of a foreign principal to register with the government and disclose certain information, including the principal's identity and the contractual terms of the agent's representation. See FARA § 2, 52 Stat. 632.

2. FARA, however, did not limit the amounts that agents could spend to achieve their foreign principals' goals. In the early 1960s, an extensive series of hearings explored the effects of such spending. See *Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the S. Comm. on Foreign Relations*, 88th Cong., 1st Sess. (1963). Agents of foreign principals testified regarding their efforts to induce policy decisions favorable to foreign governments and businesses, including by funneling campaign contri-

butions from their foreign principals to Members of Congress. See, *e.g.*, *id.* at 195-212, 1575, 1627-1631. For example, the Philippine sugar industry—which had an interest in the United States government's allocation of federal sugar import quotas—contributed through the industry's registered agent to the campaigns of 20 Members of Congress. See *id.* at 195-212. In 1966, Congress amended FARA to prohibit any person acting under the direction or control of a foreign principal from knowingly making any contribution "in connection with an election to any political office." Act of July 4, 1966, Pub. L. No. 89-486, § 8(a), 80 Stat. 248 (originally codified at 18 U.S.C. 613 (1970)).

3. Even as amended, FARA did not prohibit foreign principals from making contributions directly rather than through agents. During the Watergate investigation, allegations surfaced that the Nixon campaign had received contributions from citizens of foreign countries. One such contribution investigated by the Watergate special prosecutor was made by a Greek industrialist soon after his firm was awarded a contract to supply fuel to the U.S. Sixth Fleet. See Seth Kantor, *Jaworski Eyes Probing Foreign '72 Gifts*, Wash. Post, Jan. 25, 1974, at A9.

Congress sought to close that "giant loophole," 120 Cong. Rec. 8782 (1974) (statement of Sen. Bentsen), when it enacted the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat. 1267 (amending 18 U.S.C. 613 (1970)). That law expanded FARA's prohibition on campaign contributions by agents of foreign principals to encompass contributions by any "foreign national," defined as any person who is not a citizen or lawful permanent resident (LPR) of the United States. See *ibid.* In 1976, Con-

gress transferred that prohibition into the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and re-codified it as 2 U.S.C. 441e. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 324, § 112, 90 Stat. 493; § 201, 90 Stat. 496.

4. a. During the 1995-1996 election cycle, foreign nationals exploited the "soft money" loophole, through which "nonfederal funds"—*i.e.*, funds that do not comply with FECA's contribution limits, including foreign donations—were given to the major political parties ostensibly to finance activity only on the state and local level. See, *e.g.*, *United States* v. *Trie*, 23 F. Supp. 2d 55, 60-61 (D.D.C. 1998) (holding that FECA did not prohibit foreign soft-money donations);[1] see also *McConnell* v. *FEC*, 540 U.S. 93, 122-124 (2003) (describing soft money generally). The political parties spent hundreds of millions of soft-money dollars on federal election activity, including television advertising and other support for presidential and congressional candidates, and provided soft-money contributors with preferential access to elected officials. See *id.* at 123-125, 131.

In response to the controversy generated by reports of such political fundraising and spending practices, the Senate Committee on Governmental Affairs investigated various aspects of how the 1996 election campaigns had been financed, including any "[f]oreign contributions and their effect on the American political system." S. Rep. No. 167, 105th Cong., 2d Sess. 11 (1998) (Thomp-

[1] In 1999, the D.C. Circuit disapproved the holding of *Trie* and held that the statute did prohibit soft-money contributions by foreign nationals, as the Federal Election Commission (FEC) had "consistently interpreted [Section 441e] * * * since 1976." *United States* v. *Kanchanalak*, 192 F.3d 1037, 1047-1050 & n.21 (1999) (citing 11 C.F.R. 110.4(a) (1999) and 41 Fed. Reg. 35,950 (1976)).

son Committee Report). The committee, chaired by Senator Fred Thompson and generally known as the "Thompson Committee," conducted an exhaustive investigation throughout 1997, culminating in a written report of nearly 10,000 pages. See *id.* at v-vi. Among the Thompson Committee's primary findings was that foreign nationals, including several whom the Committee believed to have acted on behalf of foreign governments, had successfully used political contributions to purchase access to powerful American officials. See generally *id.* at 781-2710 (majority report on foreign influence), 4619-5925 (minority report on same). Those contributions had "allowed wealthy and well-connected foreign nationals to arrange almost unlimited access to the President and other top U.S. policymakers." *Id.* at 46.

The Thompson Committee documented many examples of such foreign spending.[2] Its report devoted particular attention to the activities of Ted Sioeng, a foreign national who "worked * * * on behalf of the Chinese government" while spending "a substantial amount of time in the United States" without becoming a permanent resident. See Thompson Committee Report 47, 5574; see also 147 Cong. Rec. 3869 (2001) (statement of Sen. Collins) ("[Sioeng], we later discovered, was a self-described agent of the Chinese government"). Sioeng dined with the President and "gain[ed] access to high-

[2] See, *e.g.*, Thompson Committee Report 4832-4834 (foreign national who donated to Democratic National Committee and was granted meeting with President Clinton to press business interests); *id.* at 39, 2519, 2524-2536 (foreign national "with reputed links to organized crime who advises the Chinese government" and "purchased access * * * to the highest levels of our government"); *id.* at 4562, 4667-4668 (foreign national who "hosted the chairman of the Republican National Committee on a yacht in Hong Kong Harbor and [later] provided $2 million in collateral for a loan used to help elect Republican candidates to office").

ranking officials of both parties" as a result of his contributions to those parties, see Thompson Committee Report 37, 4567, 4601—contributions that may have been funded by the Chinese government itself. See *id.* at 2505. Indeed, the Committee

> found a broad array of Chinese efforts designed to influence U.S. policies and elections through, among other means, financing election campaigns. * * * Among these efforts were the devising of a seeding strategy of developing viable candidates sympathetic to the [People's Republic of China] for future federal elections * * * [and] financing American elections through covert means.

Id. at 47; see *id.* at 2501-2512 (discussing activities of Chinese government). These efforts included not only congressional elections, but "the 1996 Presidential race and state elections as well." *Id.* at 2509. The Thompson Committee concluded that the events of the 1990s "expose[d] existing vulnerabilities in federal election law, which, although intended to prohibit foreign money in U.S. elections, [was] not always as clear or as strong as required." *Id.* at 4578.

b. Responsive legislation was proposed almost immediately, see H.R. 3526, 105th Cong., 2d Sess. § 506, at 48 (1998), and reintroduced in subsequent Congresses, see H.R. 417, 106th Cong., 1st Sess. § 506(a), at 52 (1999); H.R. 2356, 107th Cong., 1st Sess. § 303, at 41 (2001), until it was ultimately enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA, which comprehensively amended FECA, included several provisions to strengthen and clarify the law governing foreign nationals' participation in the electoral process, and propo-

nents of those measures referred repeatedly to the conduct described in the Thompson Committee report.[3] The provision at issue here, BCRA Section 303, bars "foreign national[s]" (but not LPRs) from disbursing funds (A) in connection with any "Federal, State, or local election"; (B) to any political party; or (C) to finance independent expenditures or electioneering communications.[4] 116 Stat. 96 (2 U.S.C. 441e(a)(1)(A)-(C)).

5. The Federal Election Commission (FEC or Commission) is vested with exclusive statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8); see 2 U.S.C. 438(a)(8) and (d); to issue advisory opinions concerning the application of FECA and the Commission's regulations to proposed transactions

---

[3] See 147 Cong. Rec. at 5060-5061 (statement of Sen. Thompson) (noting during BCRA debate committee's findings regarding foreign contributions); *id.* at 3842 (statement of Sen. Specter) (same); 148 Cong. Rec. 1309 (2002) (statement of Rep. Kirk) (same).

[4] An "electioneering communication" is a television or radio communication that refers to a clearly identified federal candidate and is broadcast in the relevant jurisdiction in the 30 days before a primary election or 60 days before a general election. See 2 U.S.C. 434(f)(3). An "independent expenditure" is a communication that expressly advocates the election or defeat of a candidate and is not coordinated with any candidate or political party. 2 U.S.C. 431(17). Since 1989, the FEC had interpreted Section 441e as prohibiting foreign nationals from financing independent expenditures. See *Contributions and Expenditures; Prohibited Contributions*, 54 Fed. Reg. 48,580-48,581 (1989) (amending 11 C.F.R. 110.4(a) (1990)).

or activities, 2 U.S.C. 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. 437g (2006 & Supp. IV 2010).

6. Appellants are two foreign nationals who temporarily reside and work in the United States. J.S. App. 1a. They are neither citizens nor permanent residents of this country. *Ibid.* Each appellant's current authorization to work in the United States commenced in 2009 and is scheduled to expire in 2012. See *id.* at 7a.

7. Appellants' complaint alleged that 2 U.S.C. 441e violates the First Amendment as applied to "foreign nationals who lawfully reside and work in the United States." Compl. ¶ 1. Appellants contended that Section 441e unconstitutionally restricts their ability to (1) contribute to candidates for federal office, (2) contribute to national political parties, (3) finance candidate advocacy through independent organizations, (4) contribute to candidates for state office, and (5) make independent expenditures advocating the re-election of the President. See J.S. App. 7a. A three-judge district court was convened pursuant to BCRA Section 403, 116 Stat. 113-114. See 766 F. Supp. 2d 1, 3-4 (D.D.C. 2011).[5] The Commission moved to dismiss, and appellants cross-moved for summary judgment.

8. The three-judge district court assumed arguendo that Section 441e is subject to strict scrutiny (J.S. App. 8a-9a) and unanimously held that the statute is constitutional under that standard.

a. While acknowledging that "foreign citizens in the United States enjoy many of the same constitutional

[5] Appellants also challenged 11 C.F.R. 110.20, the Commission's regulation implementing Section 441e. That challenge was not cognizable by the three-judge court, see 766 F. Supp. 2d at 4, and the single-judge district court has not issued a judgment with respect to the regulation.

rights that U.S. citizens do" (J.S. App. 9a), the district court found conclusive this Court's repeated holdings that the Constitution permits Congress and the States to exclude aliens from certain aspects of civil society. See *id.* at 11a-12a. The district court explained that, under this Court's precedents, aliens may constitutionally be barred from voting or from serving as teachers, police officers, or jurors. *Ibid.* The court concluded that what emerges from these cases is "a fairly clear line: The government may exclude foreign citizens from activities 'intimately related to the processes of democratic self-government.'" *Id.* at 12a (quoting *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984)).

The district court found that because "[p]olitical contributions and * * * expenditures are an integral aspect of the process by which Americans elect officials," the activities regulated by Section 441e constitute "part of the overall process of democratic self-government." J.S. App. 13a-14a. The court observed that election-related spending is "probably far more" a part of the democratic process than is serving as a teacher or in other positions from which aliens may constitutionally be excluded. See *id.* at 14a-15a. The three-judge court accordingly found that Section 441e, like the other alien-regulating statutes this Court has upheld, "serves the compelling interest of limiting participation of non-Americans in the activities of democratic self-government." *Id.* at 17a.

b. The district court rejected appellants' arguments that Section 441e is insufficiently tailored to the government's interest. See J.S. App. 16a-21a. The court noted that the statute reaches only those aliens whose presence in this country is temporary, *i.e.*, aliens whose permanent allegiance by definition lies outside the "national

community" of the United States. See *id.* at 19a. In contrast, the court observed, Section 441e does not regulate noncitizens who are lawfully admitted to the United States for permanent residence, who may serve in our armed forces and are "more similar to citizens than they are to temporary visitors." *Ibid.* The court therefore concluded that, by permitting permanent-resident noncitizens to make contributions and expenditures, while prohibiting aliens less connected to this country from doing so, Congress had narrowly tailored Section 441e to further the government's compelling interest in "minimizing *foreign* participation in and influence over American self-government." *Id.* at 19a-20a.

ARGUMENT

The three-judge district court's decision rests on a straightforward application of settled legal principles. This Court has repeatedly affirmed the power of state governments to prohibit aliens from engaging in a wide range of conduct that might interfere, even indirectly, with American democratic governance. The Court has also recognized that Congress has significantly broader authority than do state legislatures to regulate the conduct of aliens within this country.

The long and well-documented history of attempts by foreign nationals to exert financial influence over American elections amply demonstrates that direct electoral spending is well within the range of alien activity that Congress has a compelling interest in preventing. Section 441e is narrowly tailored to further that interest by reaching only the specific categories of alien spending that Congress has found to pose the greatest risk to American self-government. The appeal should therefore be dismissed for lack of a substantial federal question.

In the alternative, the judgment of the district court should be affirmed.

1. The district court assumed arguendo that Section 441e is subject to strict scrutiny. The court concluded that the law satisfies that standard of review because it is narrowly tailored to further a compelling interest. That conclusion was correct, and this Court need proceed no further to dismiss the appeal or affirm the judgment. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

a. "Self-government * * * begins by defining the scope of the community of the governed and thus of the governors as well." *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 439 (1981). The district court properly recognized that the federal and state governments have a compelling interest in excluding foreign citizens "from activities 'intimately related to the process of democratic self-government.'" J.S. App. 12a (quoting *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984)). This Court has repeatedly upheld state restrictions that prohibit aliens from participating in such activities. Thus, the "State's historical power to exclude aliens from participation in its democratic political institutions" was held to justify state laws that exclude aliens from voting or from holding high public office. *Sugarman* v. *Dougall*, 413 U.S. 634, 648-649 (1973). When a "state function[]" is "bound up with the operation of the State as a governmental entity," the State has the power to "exclu[de] from those functions * * * all persons who have not become part of the process of self-government." *Ambach* v. *Norwick*, 441 U.S. 68, 73-74 (1979). Accord *Cabell*, 454 U.S. at 439 ("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."); *Foley* v. *Connelie*, 435 U.S.

291, 296 (1978) (upholding a state statute requiring police officers to be citizens and noting that "a democratic society is ruled by its people").

Faithful to these precedents, the district court recognized that "the government may reserve 'participation in its democratic political institutions' for citizens of this country." J.S. App. 12a (quoting *Foley*, 435 U.S. at 295). The court observed that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Id.* at 13a. "Those limitations," the court explained, "are of a piece and are all 'part of the sovereign's obligation to preserve the basic conception of a political community.'" *Id.* at 14a (quoting *Foley*, 435 U.S. at 296).

Appellants seek to distinguish the foregoing precedents on the ground that the aliens in those cases sought government benefits rather than the opportunity to engage in constitutionally protected activities. See J.S. 21. But the Fourteenth Amendment right to equal protection of the laws is as much a constitutional right as is the First Amendment right to freedom of speech. The Court's rationale for applying rational-basis review in the cases cited above, notwithstanding the general rule that state-law distinctions based on alienage are subject to heightened scrutiny, was that state governments must be given a wider berth to regulate where aliens seek access to "basic governmental processes" and the "most essential" "aspects of democratic self-government." *Cabell*, 454 U.S. at 439-440. "While not retreating from the position that [state-law] restrictions on lawfully resident aliens that primarily affect economic inter-

ests are subject to heightened judicial scrutiny," the Court "ha[s] concluded that strict scrutiny is out of place when the restriction primarily serves a political function." *Id.* at 439. The insight that has guided the Court's equal-protection jurisprudence in this area—*i.e.*, the recognition that citizens and aliens inherently have different relations to the political functions of government—is equally relevant to the First Amendment inquiry here.

b. For the foregoing reasons, a state law that barred temporary-resident aliens from spending money to influence electoral campaigns would be a valid exercise of the State's power to protect its processes of democratic self-governance. The constitutionality of Section 441e is particularly clear, however, because it was enacted by Congress rather than by a state legislature. "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." *Nyquist* v. *Mauclet*, 432 U.S. 1, 7 n.8 (1977); accord, *e.g.*, *Toll* v. *Moreno*, 458 U.S. 1, 11 (1982); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 95 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 84-85 (1976). Because the States lack authority to regulate immigration as such, a state law that distinguishes between citizens and aliens requires some special justification. By contrast, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules [for aliens] that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80.

"[A]ny policy toward aliens is vitally and intricately interwoven with" not only "foreign relations [and] the war power," but also "the maintenance of a republican form of government" at home. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Appellants acknowl-

edge "that the government may bar foreign citizens abroad from making contributions or express-advocacy expenditures in U.S. elections." J.S. App. 15a; see J.S. 12. The thrust of their constitutional argument is that their admission to this country for temporary residence inexorably carries with it a right to engage in campaign-related spending. But the First Amendment does not require Congress to make an all-or-nothing choice between excluding an alien from the United States and allowing him to participate in the fundamental operations of democratic self-government.

c. Appellants rely (J.S. 13-14) on other decisions of this Court holding that aliens in the United States have First Amendment rights. But that unremarkable proposition does not resolve the question presented here. Indeed, appellants' authority says little about the First Amendment rights even of LPRs.

Bridges v. *California*, 314 U.S. 252 (1941), involved multiple petitioners, and the Court did not discuss the citizenship or alienage of any of them. *Bridges* v. *Wixon*, 326 U.S. 135 (1945), involved the deportation of a *permanent* legal resident engaged in non-election activity (labor organizing), and the Court set aside the deportation on statutory grounds without considering larger constitutional questions (except for the single statement that "[f]reedom of speech and of press is accorded aliens residing in this country"). *Id.* at 148, 156-157. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), involved a due-process issue, *id.* at 596 & n.5, and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), involved the inapplicability of the Fourth Amendment to an alien with "no previous significant voluntary connection with the United States," *id.* at 271. None of those decisions addressed the extent to which resident aliens

may participate in democratic self-governance within this country.

Section 441e is not, as appellants assert (J.S. 6, 17, 18, 31, 33), an invidious attack on "politically disfavored" or "suspect" speakers. "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition." *Cabell*, 454 U.S. at 439. The process of self-government necessarily requires identification of "the People" who subscribe to the constitutional order. Citizenship is a permissible criterion for making that determination.

"The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Ambach*, 441 U.S. at 75. Citizenship status, "whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ibid.*; see *Foley*, 435 U.S. at 295 ("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.") (citation omitted). "Aliens are by definition those outside of this community." *Cabell*, 454 U.S. at 439-440. Government can thus exclude noncitizens from the activities of self-government not because they are a "politically disfavored" minority (J.S. 18), but because noncitizens' temporary admission gives them no right to participate in American electoral processes.

Indeed, the distinction between citizens and nonresident aliens is starker here than in other contexts in which this Court has upheld classifications as "political" in nature. In *Foley*, the Court upheld a state-law re-

quirement that police officers be United States citizens, explaining that such a rule would help to 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 this Court in *Ambach* upheld a state-law citizenship requirement for teachers, its ruling turned on the critical role teachers played in "influenc[ing] the attitudes of students toward government, the political process, and a citizen's social responsibilities." 441 U.S. at 79. As the district court correctly recognized, "spending money to influence voters and finance campaigns is at least as (and probably far more) closely related to democratic self-government than serving as a probation officer or a public schoolteacher." J.S. App. 14a.

d. Appellants argue that, because some persons who are ineligible to vote (*e.g.*, minors and corporations) have a constitutional right to spend money in connection with elections, aliens' lack of voting rights cannot support the restrictions on their campaign spending that Section 441e imposes. J.S. 24; see J.S. 33-34. But as the district court correctly noted, domestic nonvoters, unlike resident aliens, are "members of the American political community." J.S. App. 18a. The contributions and expenditures covered by Section 441e are integral to the democratic process, see, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam) (analyzing contributions as part of "our system of representative democracy"), and such spending therefore falls within the range of self-governing activity that the government can reserve for citizens.

For similar reasons, Section 441e does not impose an impermissible speaker-based restriction akin to the ban on corporate electoral expenditures that this Court struck down in *Citizens United* v. *FEC*, 130 S. Ct. 876

(2010). In holding that ban invalid, the Court in *Citizens United* emphasized not only that the prohibition applied to certain speakers and not others, but that it discriminated in order to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 904 (quoting *Buckley*, 424 U.S. at 48). The Court rejected "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." *Ibid.* (quoting *Buckley*, 424 U.S. at 48-49). The Court in *Citizens United* noted repeatedly that the ban on corporate electoral spending was problematic because the affected corporations were "associations of citizens." *E.g.*, *id.* at 906-907 ("[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."). For that reason, the Court declined to address in that case "whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *Id.* at 911 (citing 2 U.S.C. 441e).[6]

[6] Amicus Institute for Justice argues (Br. 6-8) that the government is categorically prohibited from regulating speech on the ground that it may affect the choices voters make. But none of the decisions it cites for that proposition involves aliens or the "preliminary and foundational question[s]" about sovereignty and the "definition of the American political community" (J.S. App. 9a) that are implicated by this case. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-770 (1972) (upholding the exclusion of an alien on ideological grounds, declining to review the Executive Branch's plenary determination not to waive that exclusion, and rejecting the claim of listeners that they had a First Amendment right to have the alien admitted and hear his views). In any event, Congress has the power to exclude aliens from American candidate elections not

Section 441e does not single out foreigners in order to equalize speech, or because they are wealthy, or because the volume of their spending would distort the political marketplace. And there is no merit to appellants' suggestion that the logic of the district court's decision would allow similar restrictions to be placed on citizens or citizen groups who are "disfavored" or deemed "insufficiently loyal." J.S. 31-33. Rather, both the statute and the district court's reasoning rest on the absence of any lasting legal tie between temporary resident aliens and the United States. With respect to participation in the political process, the distinction between citizens and aliens is grounded in this Court's decisions, in centuries of history,[7] and in the fundamental significance of American citizenship. Congress has a compelling interest in preserving that distinction.[8]

---

only because of their potentially harmful influence, but because aliens have no legitimate role to play in the processes of American self-government.

[7] Although some States allowed certain noncitizens to vote in early republican times (see J.S. 12), others required such aliens to first take a loyalty oath. See Chilton Williamson, *American Suffrage: From Property to Democracy 1760-1860*, at 96-99, 119-120 (1960). Many of those States changed their constitutional definitions of voters from "inhabitants" to "citizens" between 1810 and 1831, and several States admitted to the Union during that period did likewise. See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 Mich. L. Rev. 1092, 1097 (1977).

[8] Appellants have manifested no intent to become citizens or even LPRs. J.S. App. 19a. They hold nonimmigrant visas, see *id.* at 9a, which generally require the recipient to "hav[e] a residence in a foreign country which he has no intention of abandoning." 8 U.S.C. 1101(a)(15)(J). Section 441e does not reflect any assumption that persons in appellants' position are "disloyal" to the United States in the sense of bearing ill will toward this country or its govern-

2. Section 441e furthers the government's compelling interest in preventing foreign subversion of the American electoral system. Congress enacted and amended the statute in response to specific incidents in which foreign interests sought to manipulate the United States government. That concrete and extensive historical record fully supports Congress's decision to ban campaign-related spending by temporary resident aliens.

a. From the Nazi propaganda of the 1930s to the direct campaign contributions of the Watergate era to the soft-money donations of the 1990s, foreign interests have consistently demonstrated their desire and willingness to spend money to sway American elections and governmental decisions. As discussed above, pp. 2-6, *supra*, such efforts have been undertaken by a wide variety of foreign interests, including governments, corporations, and individuals. Foreign financing has come not only directly from overseas, but also routed through foreign nationals in the United States.

For example, when the German Nazi party tried to influence American politics through the dissemination of propaganda here in the 1930s, it enlisted the aid of sympathetic aliens, as well as United States citizens. See 1935 House Report 7. Similarly, Ted Sioeng funneled foreign money to American candidates and political parties while in the United States as a nonimmigrant. See Thompson Committee Report 5574, 5577-5581. After exploring such events, Members of Congress concluded that injections of foreign money into American political campaigns "threaten the integrity of our electoral sys-

---

ment. As temporary resident aliens, however, appellants are by definition persons who owe primary allegiance to foreign sovereigns.

tem, foreign policy, and national security." *Id.* at 4577; see also, *e.g.*, 148 Cong. Rec. 1309 (2002) (statement of Rep. Kirk). The evidentiary record of foreign nationals trying to influence American elections via campaign-related spending amply supports that conclusion.

b. The evidentiary record also supports Congress's determination that Section 441e's restrictions remain necessary to further the government's compelling interest. For example, the possibility of foreign governments financing political candidates in the United States deeply troubled Congress and was cited repeatedly in connection with the passage of BCRA Section 303. See note 3, *supra*. Invalidating Section 441e would leave each of the millions of foreign nationals who lawfully enter and temporarily reside in the United States[9] free to spend unlimited sums on electoral advocacy, or to contribute money directly to candidates, even at the behest of a foreign government hostile to the interests of the United States. Cf. Thompson Committee Report 2509 (noting allegations that the Chinese government had planned to "organize Chinese communities in the U.S." to "develop viable candidates sympathetic to the PRC"); Evan Hill, *Libyans in US Allege Coercion*, Al Jazeera English (Feb. 17, 2011), http://english.aljazeera.net/news/africa/2011/02/201121718494950249 3.html (describing Libyan government's threat to revoke scholar-

[9] For the three-year period spanning 2008-2010, the government issued more than 2.4 million nonimmigrant work visas and more than 1.1 million student visas. See Bureau of Consular Affairs, U.S. Dep't of State, *Nonimmigrant Visa Statistics*, http://www.travel.state.gov/visa/statistics/nivstats/nivstats_4582.html (last visited Nov. 13, 2011); see also Bureau of Consular Affairs, U.S. Dep't of State, *Nonimmigrant Visa Issuances by Visa Class and by Nationality FY 1997-2010 NIV Detail Table*, http://www.travel.state.gov/xls/FYs97-10_NIVDetailTable.xls (last visited Nov. 13, 2011) (visas by nationality).

ships of Libyan students in United States if students did not travel to Washington to support Qaddafi regime).

The problem of foreign intrusion would be magnified in state and local elections, where campaigns are generally less expensive, and large contributions or expenditures therefore are more influential. Cf. *Randall* v. *Sorrell*, 548 U.S. 230, 252 (2006) (plurality opinion) (examining contribution limits in comparison to cost of campaigns). Indeed, the Thompson Committee identified at least one case in which a foreign national gave $100,000 to the elected state treasurer of California, see Thompson Committee Report 971-972, 5576-5581, 5584, an office with responsibility for the investment of billions of dollars in pension assets.

3. Section 441e is narrowly tailored to address only the types of spending as to which Congress had the greatest concern and the fullest evidentiary record. To avoid reaching other political activity, Congress built two significant limitations into the statute. Section 441e does not apply to noncitizens who are granted permanent legal residence in the United States, and it does not limit any alien's ability to engage in issue advocacy.

a. Section 441e does not affect noncitizens who "hav[e] been lawfully accorded the privilege of residing permanently in the United States." 8 U.S.C. 1101(a)(20); see 2 U.S.C. 441e(b)(2) (defining "foreign national").[10] Appellants argue (J.S. 26-27) that Section 441e is underinclusive because it permits LPRs, who are noncitizens, to engage in political spending. But a statute will be struck down as underinclusive only if the ex-

[10] Section 441e also does not apply to United States nationals, *i.e.*, 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).

emptions belie the government's asserted justification for the general restriction or suggest that the government's true motive is to advantage one side of a debate. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51, 52-53 (1994); *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011); *Republican Party* v. *White*, 536 U.S. 765, 780 (2002).

That is not the case here. The exception for LPRs allows the class of aliens with the closest and most durable ties to the United States to engage in election-related spending on the same terms as United States citizens. That exception is fully consistent with Congress's stated and compelling purpose of limiting participation in democratic self-government to persons who are properly viewed as part of the American political community. See *McConnell*, 540 U.S. at 178 ("[Statutes] are not rendered unconstitutional by the mere fact that Congress chose not to regulate the activities of another group as stringently as it might have.").

As the district court explained, "[l]awful permanent residents have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community. * * * [L]awful permanent residents share important rights and obligations with citizens; for example, lawful permanent residents may—and do, in large numbers—serve in the United States military." J.S. App. 19a. Appellants object that *some* temporary residents may be allowed to renew their visas many times, and *some* LPRs may lose their status or leave. J.S. 26-27. Nevertheless, a temporary resident's continued presence in the United States is a matter of grace, and he must agree to leave whenever his visa expires. 8 C.F.R. 214.1(a)(3)(ii). Indeed, as noted above,

most temporary residents are admitted on the express condition that they do not plan to stay permanently. See 8 U.S.C. 1101(a)(15)(F)(i), (H)(ii)(a) and (b), (M)(i), (O)(ii)(IV) (alien must "ha[ve] no intention of abandoning" his foreign residence to be eligible for student or specialized work visa); note 8, *supra*.[11] By contrast, permanent residents are entitled to remain so long as they obey the law. Cf. *Mathews*, 426 U.S. at 83 ("In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.").

b. Neither Section 441e nor any other provision of federal law prohibits foreign nationals from speaking out on issues of public policy. The statute thus leaves open to appellants a broad range of expressive activity, from contributing to issue groups, to creating advocacy websites, to funding mass television advertising. 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 whomever they please."). By regulating only campaign-related spending, Congress has tailored Section 441e to address the financial activity most likely to influence elections. See J.S. App. 17a ("When an expressive act is directly targeted at influencing the outcome of an election, it is

[11] For the proposition that "[m]any 'nonpermanent' residents are permitted to remain in the United States indefinitely" (J.S. 26 (emphasis omitted); J.S. 4 n.1), appellants cite an inapposite provision of the immigration laws, 8 U.S.C. 1101(a)(13)(C), which deals with when an LPR is regarded as seeking admission to the United States again; and 42 C.F.R. 435.408 (2005), a Medicaid regulation that was repealed in 2006. 71 Fed. Reg. 39,220 (2006) ("We are removing § 435.408 * * * because the immigration status described [therein] no longer has any effectiveness."). Unless they are granted extensions, appellants' authorizations to reside and work in the United States will expire in 2012. J.S. App. 7a.

both speech and participation in democratic self-government.").

Appellants argue that Section 441e is underinclusive because it does not regulate speech in connection with state ballot initiatives and referenda. J.S. 25-26. But this Court has firmly distinguished the governmental interests in safeguarding candidate elections from the interests implicated by ballot measures, and Congress was not foreclosed from taking that distinction into account. Cf. *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 299 (1981) ("Whatever may be the state interest * * * in regulating and limiting contributions to or expenditures of a candidate * * * there is no significant state or public interest in curtailing debate and discussion of a ballot measure."); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788 n.26 (noting that the "right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office").

In addition, the long history of Section 441e and its statutory predecessors provides no indication that foreign nationals had attempted to influence state ballot measures. This Court has repeatedly approved legislation that "take[s] one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley*, 424 U.S. at 105 (citation and internal quotation marks omitted); see *Burson* v. *Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion) ("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."). For the same reasons, the fact that Section 441e leaves aliens free to lobby (J.S. 25) and to volunteer for candi-

dates (Inst. for Justice Amicus Br. 13) does not render it impermissibly underinclusive.

c. Appellants also assert that Section 441e is overinclusive because it applies to state and local elections, including in localities that permit aliens to vote. See J.S. 27. But Congress strengthened this restriction in response to extensive evidence that foreign nationals had exploited the nonfederal "soft money" loophole. See pp. 4-6, *supra*. Such evidence amply supports Congress's amendment of Section 441e to further the compelling interest in protecting American democracy from foreign infiltration at all levels of government. Cf. U.S. Const. Art. IV, § 4 (Republican Form of Government Clause). As explained above, Congress's power to act in this area is particularly clear because Congress, unlike the States, has broad, general authority to regulate the terms on which aliens will be admitted to this country. See pp. 13-14, *supra*. That some local governments grant noncitizens limited voting rights is irrelevant to the proper disposition of appellants' as-applied challenge, since appellants have not alleged a desire to spend money to influence any local election in which they have the right to vote.

Appellants also contend that Section 441e is overinclusive because "the Government has conceded" that the statute prohibits foreign nationals from donating to a domestic organization, such as the Club for Growth's 501(c)(4) affiliate, "that engages occasionally, but not primarily, in political activity." J.S. 27-28; see also J.S. 10. To the contrary, Section 441e does *not* prohibit temporary resident aliens from donating to advocacy groups unless (1) the group is a "political committee" with its major purpose being campaign activity (the Club for Growth's 501(c)(4) entity currently is not registered as

such), or (2) the foreign funds are given or spent in connection with an election. See 2 U.S.C. 441e(a)(1); *Buckley*, 424 U.S. at 79 (narrowly construing statutory definition of "political committee"). Thus, by definition, the statute applies only to donations made to election-related groups or for election-related purposes.

d. Finally, appellants argue that Congress could further its interest in reducing foreign electoral influence by implementing a less restrictive disclosure regime in lieu of Section 441e's spending prohibition. J.S. 28-29. Congress tried that approach in 1938. See *supra* p. 2 (discussing FARA). It did not work. See *supra* pp. 2-6 (discussing 1950s-1990s).

4. None of the dire consequences that appellants foresee (J.S. 34-36) is plausible or presents any reason for the Court to review this case. Nonimmigrant aliens remain free to speak out on issues, to seek redress of grievances, and to spend their designated time in this country in peace. Section 441e has never applied to LPRs, and the court below expressly declined to decide whether the statute could permissibly be extended to that category of aliens. J.S. App. 22a. There is likewise no basis for appellants' assertions (J.S. 30-34) that the decision below could threaten the established rights of citizens to spend money on electoral speech. Political spending is "an integral aspect of the process by which Americans elect officials to federal, state, and local government offices." J.S. App. 13a. Congress's constitutional authority to exclude foreign nationals from that process (*id.* at 14a-15a) is not a generalized or plenary power to regulate the electoral "influence" of American citizens or the organizations they form. See J.S. 31, 33.

5. For the foregoing reasons, appellants cannot prevail on the merits even under the district court's as-

sumption (J.S. App. 8a) that strict scrutiny applies. As the Commission argued in the district court, however, strict scrutiny is not appropriate here.[12] That is so both because rational-basis review applies to state-law alienage classifications that involve sovereign functions of government, and because Congress has substantially broader authority than do state legislatures to regulate the terms on which aliens will be admitted.

This Court has never held that an alien's entry into the United States immediately entitles him to invoke every aspect of "the freedom of speech" that the First Amendment guarantees to citizens. As the Court stated in *Verdugo-Urquidez*, the text of the Bill of Rights "suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. To prevail on their claims, appellants must demonstrate that, despite the absence of any evidence that they intend to form a more permanent connection with the United States, their three-year work visas are a sufficient basis to extend to them the full panoply of rights guaranteed to citizens. That they cannot do.

[12] See FEC Mot. to Dismiss 13-18; FEC Opp. to Pls.' Mot. for Summ. J. & Reply in Supp. of Mot. to Dismiss 8-18.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

ANTHONY HERMAN
General Counsel
DAVID KOLKER
Associate General Counsel
KEVIN DEELEY
Assistant General Counsel
STEVE N. HAJJAR
ADAV NOTI
Attorneys
Federal Election Commission

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General

NOVEMBER 2011