IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Benjamin Bluman, et al.,

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civ. No. 10-1766

(Three Judge Court)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
[ORAL ARGUMENT REQUESTED]

Pursuant to Federal Rule of Civil Procedure 56 and this Court's Local Rule 7, Plaintiffs Benjamin Bluman and Dr. Asenath Steiman respectfully move this Court for entry of an Order granting summary judgment in their favor. Specifically, Plaintiffs move for summary judgment on their claim that 2 U.S.C. § 441e violates their rights under the First Amendment.

In support of this Motion, Plaintiffs are filing a Memorandum of Points and Authorities and Statement of Material Facts, along with two Declarations and a Proposed Order. Plaintiffs request oral argument on this Motion.

For the reasons provided in the supporting Memorandum, Plaintiffs contend that there is no genuine disputed issue as to any material fact and that they are entitled to judgment as a matter of law on their claim. Consequently, Plaintiffs respectfully pray that this Court grant summary judgment in their favor, declare that 2 U.S.C. § 441e is unconstitutional as applied to them, and enjoin the Defendant from enforcing the statute against them.

Dated: January 18, 2010

Respectfully submitted,

/s/ Jacob M. Roth

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MEMORANDUM OF POINTS AND AUTHORITIES

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

All that Plaintiffs seek in this lawsuit is to vindicate their core First Amendment rights to political association and expression. They lawfully reside in the United States. They lawfully work in the United States. They pay taxes imposed by the United States. They abide by the laws of the United States. And they will be doing all of this for *years*. Yet, under 2 U.S.C. § 441e, it is a *crime* for Plaintiffs to engage in basic political expression by making campaign contributions or spending money on election-related speech. A crime, simply because Plaintiffs are not U.S. citizens or permanent residents. As applied to Plaintiffs, this content-discriminatory, speaker-discriminatory Alien Gag Law cannot remotely withstand scrutiny under the First Amendment. Accordingly, Plaintiffs seek appropriate declaratory and injunctive relief.

The Federal Election Commission has moved to dismiss, arguing that Plaintiffs have failed to state a claim. [Dkt. No. 15 ("MTD")] They have no claim, the Commission argues, because § 441e is constitutional: Congress has "plenary power" over immigration and national security and, as a result, effectively unreviewable discretion to prohibit political speech by foreign nationals. This defense is, frankly, puzzling. Longstanding bodies of Supreme Court precedent hold that foreign nationals who lawfully reside in the United States have First Amendment rights; that the First Amendment embraces the right to make political contributions and expenditures; and that constitutional rights cannot be superseded by vague assertions of "plenary power." The Commission's motion flatly ignores these bodies of law. It fails to engage with Plaintiffs' claim, instead citing inapposite cases about *non-resident* foreign nationals or aliens who were not engaged in First Amendment activity at all. And it resorts throughout to trumped-up fearmongering, which may be common currency in the court of public opinion, but cannot substitute for constitutional argument in a court of the United States.

It is easy in a case like this to fall back upon conclusory assertions of legislative prerogative; upon fear of Nazi propaganda and terror-supporting Iranians and covert coups launched from Beijing; upon a parochialism that would deny to "others" the right to make their voices heard. But that is precisely why courts have developed doctrines that test and probe such claims—for their truth, for their good-faith, and for their sufficiency as a basis to strip lawful residents of the United States of their fundamental civil rights. This case presents the question not whether § 441e is a "good idea," but rather whether the Alien Gag Law can be reconciled with First Amendment doctrine. It cannot.

Because the Commission fails entirely to engage with the relevant precedent, Plaintiffs respond by first presenting the well-established doctrinal framework that governs their claim. Thereunder, this Court must determine (I) whether Plaintiffs possess First Amendment rights (they do); (II) whether the conduct banned by § 441e is protected by the First Amendment (it is); and (III) whether the Government can overcome the presumption of unconstitutionality that attaches to restrictions on First Amendment activity by showing that they are narrowly tailored to further a compelling interest (it cannot). Finally, Plaintiffs explain why the Commission's attempts to short-circuit this constitutional analysis are irreconcilable with settled precedent.

The Commission's defense of § 441e's constitutionality as applied to Plaintiffs thus fails as a matter of law, and its motion to dismiss must be denied. Moreover, for the same reasons, the statute violates Plaintiffs' First Amendment rights. In light of that conclusion (and the undisputed facts about Plaintiffs' residency, employment, and immigration status), Plaintiffs are further entitled to judgment in *their* favor as a matter of law. As such, Plaintiffs have moved for summary judgment and hereby submit this memorandum both in opposition to the Commission's motion to dismiss and in support of Plaintiffs' motion for summary judgment.

FACTUAL BACKGROUND

I. PLAINTIFFS

Plaintiffs are foreign nationals who have been authorized to live and work in the United States for periods of at least three years. Each holds strong political views, but is precluded by federal law from expressing those views through contributions to political candidates or independent expenditure that advocate for (or oppose) their election.

Plaintiff Bluman is a Canadian citizen who has been lawfully residing in the United States since November 2009. Plaintiffs' Statement of Material Facts ("SMF") ¶¶ 1, 2-4. Prior to that time, he lived in the U.S. while attending Harvard Law School. *Id.* ¶ 2. His authorization permits him to remain in the country until November 2012, after which he anticipates applying for a second three-year term. *Id.* ¶¶ 6-7. He works as an attorney and is admitted to the New York Bar. *Id.* ¶¶ 8-9. Mr. Bluman holds progressive political views, and seeks to express them by contributing to three candidates for federal and state office. *Id.* ¶¶ 10-12. Additionally, he wants to print and then distribute flyers in support of President Obama's reelection campaign. *Id.* ¶ 13. However, he is foreclosed from all of these activities by federal law. *Id.* ¶ 15.

Plaintiff Steiman is also a Canadian citizen, and holds dual citizenship from the State of Israel. *Id.* ¶ 16. She has resided in the United States since June 2009, and works as a doctor at a hospital in New York, at which she is completing her medical residency. *Id.* ¶¶ 17-19. She is authorized to remain in the country until June 2012, and that term is likely to be extended when she chooses her area of specialization. *Id.* ¶ 21. Dr. Steiman is a conservative, and wants to express her views by contributing to two federal candidates and a party-affiliated political committee. *Id.* ¶¶ 23-28. Further, she wants to independently spend money to help elect fiscally conservative candidates by donating to the independent Club for Growth. *Id.* ¶ 29. Like Mr. Bluman, she is foreclosed by federal law from doing any of the above. *Id.* ¶ 31.

II. THE STATUTORY FRAMEWORK

Section 441e prohibits all foreign nationals, other than lawful permanent residents, from:

> (i) making any "contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election";
>
> (ii) making "a contribution or donation to a committee of a political party"; or
>
> (iii) making any "expenditure," "independent expenditure," or "disbursement for an electioneering communication."[1]

A willful violation of § 441e is punishable by a civil penalty not exceeding the greater of $10,000 or 200 percent of any sum involved in the violation, and is punishable criminally by up to five years' imprisonment. 2 U.S.C. § 437g(a)(6), (d).

The history of the statute shows that Congress' purpose was to limit domestic political activity by overseas actors. The prohibitions embodied in § 441e trace their origins to 1966, when Congress amended the Foreign Agents Registration Act ("FARA"). *See* Pub. L. No. 89-486, 80 Stat. 244. In the 1966 amendments, Congress responded to evidence that foreign governments and foreign corporations had contributed large sums to federal candidates, banning any "agent of a foreign principal" from "mak[ing] any contribution of money or other thing of

[1] Section 441e in its entirety provides:

> (a) Prohibition
>
> It shall be unlawful for—
>
> > (1) a foreign national, directly or indirectly, to make—
> >
> > > (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;
> >
> > > (B) a contribution or donation to a committee of a political party; or
> >
> > > (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 434(f)(3) of this title); or
> >
> > (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.
>
> (b) "Foreign national" defined
>
> As used in this section, the term "foreign national" means—
>
> > (1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or
> >
> > (2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 1101(a)(22) of title 8) and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.
>
> 2 U.S.C. §441e.

value, or promis[ing] expressly or impliedly to make any such contribution, in connection with an election to any political office." *Id.* § 8(a), 80 Stat. at 248; *see* Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 Am. J. Int'l L. 1, 21-23 (1989) (describing legislative history). The term "foreign principal" was defined by FARA to embrace a host of overseas entities: "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization." 52 Stat. 632-33 (1938).[2] Thus, the amendments prohibited these overseas entities from participating in U.S. politics by employing agents inside the country to make contributions to candidates.

Congress soon discovered an apparent loophole in FARA: The Justice Department had interpreted the term "foreign principal" to include only those overseas entities who in fact had agents in the United States. *See* 120 Cong. Rec. 8782 (Mar. 28, 1974) (statement of Sen. Bentsen). As a result, overseas entities were free to make unlimited contributions *directly*, simply by bypassing use of an agent. *Id.* ("We have heard of the hundreds of thousands of dollars sloshing around from one country to another . . . ."). To close this loophole, Congress in 1974 applied FARA's contribution ban to all "foreign nationals." *See id.* (emphasizing need to fix the "giant loophole" left by FARA); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat. 1263, 1267. The amendment thus extended the ban on political contributions to any "individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence." Pub. L. No. 93-443, § 101(d)(3), 88 Stat. at 1267.[3]

[2] An "agent of a foreign principal" was defined as "any person who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal." 52 Stat. 633.

[3] "Permanent residence" is an immigration classification, developed in the twentieth century, that permits certain aliens to reside in the U.S. indefinitely, *i.e.*, as immigrants. *See* 8 U.S.C. § 1101(a)(13)(C). The law also recognizes various categories of aliens who are authorized to reside in the U.S. on a temporary basis, *i.e.*, as nonimmigrants. *See id.* § 1101(a)(15).

Although the 1974 amendment succeeded in meeting Congress' objective of closing the loophole available to overseas entities, it also had broader effects. By extending the contribution ban from just *overseas* entities and their agents, to all foreign nationals except permanent residents regardless of where they live, the ban swept in lawful but non-permanent residents of the U.S., who had not previously been covered by the ban. The legislative history indicates that Congress paid little attention to this particular expansion of the law's applicability.

In introducing the amendment, Senator Lloyd Bentsen argued that foreign nationals "cannot vote in our elections so why should we allow them to finance our elections?" 120 Cong. Rec. 8783 (Mar. 28, 1974). He explained, however, that his amendment would "exempt foreigners with resident immigrant status" because such individuals, "who have lived here for years and who spend most of their adult lives in this country" and "pay American taxes," should be permitted to make political contributions. *Id.* Senator Howard Cannon pointed out that, by excluding only permanent residents from the definition of "foreign national," the ban would apply to "a pretty substantial number of people who were here properly in this country . . . who are not here as permanent residents." *Id.* He worried that the amendment might go "further than would be intended by Members of this body if they were here to hear the discussion on it." *Id.* at 8784. Senator Bentsen responded by insisting that "th[e] amendment was carefully drawn to try to exclude certain people who might be legally in this country passing through here as tourists," *id.*, apparently missing Senator Cannon's point—that the ban would apply not just to foreign *non-residents* such as tourists, but also to *non-permanent* residents of the United States. Congress then promptly and unanimously passed the amendment. *Id.* at 8786. This brief floor exchange between Senators Bentsen and Cannon appears to be the only point at which Congress considered the amendment's impact on non-permanent resident aliens.

Congress re-codified the foreign contribution ban at its current location, 2 U.S.C. § 441e, as part of 1976 amendments to the Federal Election Campaign Act ("FECA"), *see* Pub. L. 94-283, 90 Stat. 475; and replaced FECA's version of the ban with the current language as part of BCRA, Pub. L. No. 107-155, 116 Stat. 96 (2002). Among other things, BCRA expanded the ban beyond contributions, to expenditures and independent expenditures. It also clarified that the ban—unique among campaign-finance restrictions—applies not only to federal campaigns, but also to state and local elections. *See* Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69940 (Nov. 19, 2002). At neither time, however, did Congress revisit the ban's applicability to lawful non-permanent residents or make any findings relevant to that question.

ARGUMENT

To the extent that the Alien Gag Law prohibits contributions and expenditures by foreign nationals residing abroad, it is entirely unobjectionable. Such a restriction—which was the central objective of Congress in enacting the predecessor to § 441e and reflects the vast majority of the law's applications—is valid, for it has long been accepted that aliens outside the United States have no rights at all under the First Amendment. *See United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904). However, while Congress properly carved out permanent resident aliens from the statute, it overlooked that many *lawful* residents are not *permanent* residents under the immigration laws. Text, history, and precedent make clear that such individuals who—like Plaintiffs here—live, work, and pay taxes in the United States, are just as entitled to First Amendment protections as permanent residents and citizens. Nor can there be any doubt that flat bans on contributions and expenditures—like those imposed by § 441e—are presumptively unconstitutional when applied to individuals protected by the First Amendment. To overcome this presumption, the Government must satisfy exacting scrutiny by identifying a sufficiently weighty interest that the Alien Gag Law is carefully tailored to protect. It cannot.

Plaintiffs' challenge follows the clear doctrinal path set by the portion of the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), that addressed Congress' attempt in § 318 of BCRA to ban political contributions by individuals under the age of 18. Like the Alien Gag Law, enacted by § 303 of BCRA, § 318 imposed a flat ban on contributions by an entire category of individuals who are unable to vote. Chief Justice Rehnquist, joined by seven other Justices,[4] analyzed the First Amendment claim in three straightforward steps. 540 U.S. at 231-32. *First*, he affirmed that "[m]inors enjoy the protection of the First Amendment," *id.* at 231, citing the speech rights of minors recognized in other, non-electoral contexts, *id.* (citing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511-513 (1969)). *Second*, he reiterated that restrictions on political contributions "impinge on the protected freedoms of expression and association" and therefore are subject to "heightened scrutiny," 540 U.S. at 231, citing for that proposition the seminal opinion in *Buckley v. Valeo*, 424 U.S. 1, 20-22, 25 (1976) (per curiam). *Third*, he considered whether the Government's proffered reason for the ban—to prevent parents from circumventing contribution limits—could withstand scrutiny. 540 U.S. at 232. It could not: Congress had only "scant" evidence that the "claimed evil" existed, and the flat ban was in any event overinclusive given the existence of narrower alternative measures. *Id.*

Under the same mode of analysis, the Alien Gag Law must fall as applied to lawful residents of the United States like Plaintiffs. *First*, as shown in Part I, such aliens "enjoy the protections of the First Amendment." *Second*, as shown in Part II, § 441e imposes restrictions that "impinge on the protected freedoms of expression and association" and therefore must satisfy "heightened scrutiny." *Third*, none of the reasons that the Government could offer for the ban withstands this scrutiny. *Finally*, while the Commission's motion to dismiss makes several attempts to evade this analytical framework, each is irreconcilable with established law.

[4] Justice Thomas concurred in the judgment. 540 U.S. at 265 (opinion of Thomas, J.).,

I. THE FIRST AMENDMENT PROTECTS ALL LAWFUL RESIDENTS OF THE UNITED STATES, INCLUDING PLAINTIFFS.

There can be no legitimate debate over the fact that Plaintiffs—as lawful residents of the United States—are entitled to the same First Amendment protections as citizens. Constitutional text directs as much; history bolsters this reading; and an unbroken line of direct precedent from the Supreme Court, consistently followed by lower courts (including this Court), confirms the proposition. Indeed, the Commission concedes this point in its motion to dismiss (although fails to appreciate its significance). MTD 27 ("Temporarily resident aliens do have First Amendment rights to speak out on the issues of the day . . . .").

A. ***Text*: The Constitution Does Not Limit Free Speech Rights to Citizens.**

The constitutional text does not limit the protections of the First Amendment to American citizens. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring) ("The Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker . . . ."). This is notable, because the Constitution elsewhere *does* distinguish between "Persons" generally and "Citizens" in particular. *Compare* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . . "); U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."), *with Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy J., concurring) ("None of these provisions [of the Bill of Rights] acknowledges any distinction between citizens and resident aliens. They extend their inalienable

privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority."). Where rights are limited to citizens, the Constitution says so.

The particularly broad text of the First Amendment reflects the Framers' view that government restrictions on the flow of information are incompatible with a free society. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."). Both the letter and the spirit of the First Amendment require that resident aliens be afforded the same freedoms of speech and association guaranteed to citizens.

B. ***History*: At the Founding and Beyond, Aliens Broadly Participated in First Amendment Activities, Including Domestic Political Expression.**

From the very founding of the Republic, aliens routinely engaged in a variety of First Amendment activities. This historical practice corroborates the textual evidence that resident aliens are included within the Amendment's reach.

For example, consider the First Amendment right to petition the government. *McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression."). Aliens exercised this basic right in the earliest years of the Republic and even beforehand. *See generally* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667 (2003). Petitioning "never depended on citizenship status," whether in the colonial period, under the Articles of Confederation, or under state constitutions at the time. *Id.* at 692. Indeed, the First Congress considered—and *granted*—many petitions from aliens. *Id.* at 698-701 (giving examples of petitions from British, French, and German citizens).

Furthermore, aliens before and after the Founding were permitted even to *vote*. This practice began during the colonial period. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399 (1993). In colonial South Carolina, for example, "it was said, that with only a property qualification every pirate of the Red Sea operating from a Carolina base could vote." *Id.* (*quoting* Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860*, at 53 (1960)). Congress endorsed political participation of aliens in the Northwest Ordinance, which allowed non-citizens meeting residency and property requirements the right to vote and even to serve in office. *See* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 Mich. J. Int'l L. 259, 295 (1992) (citing Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (1789)). Aliens were also authorized to participate in state constitutional conventions. *See* Raskin, *supra*, at 1402. Finally, many States continued to allow alien voting after the Founding, some as late as the twentieth century. *See generally* Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 Am. Pol. Sci. Rev. 114 (1931).

To be sure, the right to political *participation* can be—and often has been—denied to persons endowed with the right to political *expression*. *E.g.*, *Minor v. Happersett*, 88 U.S. 162, 170, 176 (1875) (holding that women are "entitled to all the privileges and immunities of citizenship" yet are not "invested with the right of suffrage"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1279-80 (1992) (noting that women were "central exercisers of First Amendment freedoms" before women's suffrage, and that blacks exercised free-speech rights before the Civil War and Reconstruction Amendments). But the converse does not follow: The Framers would not have intended to deny freedom of speech to a class of persons, like aliens, who were regularly entitled to vote at the time.

C. ***Precedent*: The Supreme Court Has Long Accorded First Amendment Rights to Lawful Residents.**

In keeping with the text and history of the Constitution, the courts have consistently held that, while aliens have virtually no constitutional rights prior to entering the United States, aliens lawfully residing in this country are protected in full by the Bill of Rights, including the First Amendment, to the same degree as American citizens. Even in cases that upheld the power of the federal Government to exclude from the country "aliens whose race or habits render them undesirable"—and which reflect one of the most xenophobic periods in our Nation's history—the Supreme Court simultaneously affirmed that, once admitted for residence, aliens may not be subjected to government action that "pass[es] out of the sphere of constitutional legislation." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) ("[A]liens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution . . . .").

In particular, the Supreme Court has long held that the protections of the First Amendment extend to resident aliens. In a case decided seventy years ago, the Supreme Court invoked the First Amendment to overturn a contempt conviction based upon the speech of an alien defendant. *See Bridges v. California*, 314 U.S. 252 (1941). The defendant's alienage was no secret; Justice Frankfurter expressly referenced it in his dissenting opinion. *Id.* at 280 (Frankfurter, J., dissenting). As the Court explained in a subsequent opinion:

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

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges*, 326 U.S. at 161) (internal quotation marks omitted); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 592 & nn.18-19 (1952) (holding that resident alien could be deported for membership in the Communist Party only after applying First Amendment scrutiny and concluding that speech likely to incite violence was unprotected (citing *Dennis v. United States*, 341 U.S. 494 (1951))).

These cases have stood the test of time. The Supreme Court recently confirmed their vitality in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). There, the Court held that an alien arrested in Mexico and then involuntarily transported into the United States was not entitled to the protections of the Fourth Amendment. *Id.* at 274. The defendant was "a citizen and resident of Mexico with no voluntary attachment to the United States" and was therefore not entitled to the constitutional protection he sought. *Id.* at 274-75. The Court further suggested that aliens with such profiles cannot claim the protections of the First Amendment either. *Id.* at 265. In so holding, however, the Court reaffirmed that these provisions extend not only to citizens, but also to "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* Giving that vague standard a more concrete meaning, the Court described *Bridges* as standing for the proposition that "resident aliens have First Amendment rights." *Id.* at 271 (citing *Bridges*, 326 U.S. at 148).

A consistent line of lower court decisions likewise holds that the First Amendment protects aliens while they lawfully reside in the United States. For example, in *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995), the court rejected the suggestion that aliens residing in the United States could not assert First Amendment rights as a defense to deportation. *Id.* at 1063-65. The fact that the federal Government possesses plenary

power over immigration did not change the analysis. *Id.* Rather, the Ninth Circuit explained that "[t]he Supreme Court has consistently distinguished between aliens in the United States and those seeking to enter from outside the country, and has accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens." *Id.* at 1063-64. Other courts have reached the same holding. *E.g.*, *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985) (agreeing that "aliens residing in this country enjoy the protection of the First Amendment"); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (opinion of Blackmun, J.) ("The Supreme Court has stated clearly that resident aliens are to be accorded the first amendment guarantees of free speech and free press."); *see also Edwards v. Johnson*, 209 F.3d 772, 779 (5th Cir. 2000) (adjudicating, on the merits, a First Amendment claim of alien awaiting deportation).

This Court, too, has rejected the notion that resident aliens are somehow entitled to lesser First Amendment protections than citizens. *Rafeedie v. INS*, 795 F. Supp. 13, 22 (D.D.C. 1992) ("Plaintiff [a resident alien] is entitled to the same First Amendment protections as United States citizens, including the limitations imposed by the overbreadth and vagueness doctrines."); *see also Brunnenkant v. Laird*, 360 F. Supp. 1330, 1332 (D.D.C. 1973) (noting that Government was correct to concede that First Amendment rights of an immigrant alien are "to be judged by the same standards applicable to a citizen of the United States, born or naturalized").

In short, "[i]t is well settled that 'freedom of speech and of press is accorded aliens residing in this country.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Bridges*, 326 U.S. at 148 (majority opinion)). The precedent is uniform, unambiguous, and controlling. There is no authority to the contrary, and the Commission offers none.

D. Plaintiffs Lawfully Reside and Work in the United States, and Therefore Qualify for First Amendment Protection.

Plaintiffs are lawful residents of the United States. Thus, under the law articulated above, they are entitled to the full protections of the First Amendment during their time in the country.

Mr. Bluman was admitted to the country as a "TN-status" nonimmigrant. SMF ¶ 3; 8 U.S.C. § 1184(a)(1); 8 C.F.R. § 214.6. This status permits Canadian citizens to enter the United States to engage in certain professional activities. Such individuals may reside within the United States for up to three years. 8 C.F.R. § 214.6(e). Moreover, extensions are permitted, and "[t]here is no specific limit on the total period of time an alien may be in TN status provided the alien continues to be engaged in TN business activities . . . and otherwise continues to properly maintain TN nonimmigrant status." *Id.* § 214.6(h)(1)(iv). Mr. Bluman was admitted for a period of three years, and anticipates applying for an additional three-year term. SMF ¶¶ 6-7. He is a member of the Bar of the State of New York, lives in Manhattan, and works as an associate attorney for a law firm in New York City. *Id.* ¶¶ 4, 8-9.

Dr. Steiman was admitted to the United States as a "J1 status" nonimmigrant, which is a status available to "a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description" who comes to the United States "for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training." 8 U.S.C. § 1101(a)(15)(J); *see also* SMF ¶ 17. Dr. Steiman was admitted for a period of three years, and that term is subject to further potential extension for an additional four years. SMF ¶ 21. She is a member of the American Medial Association and is currently fulfilling her medical residency at a hospital in New York City. *Id.* ¶¶ 18-19, 22.

Because Plaintiffs live and work in the United States, they are plainly "residents." The Government itself admits as much: It characterizes TN and J1 aliens as "Short-term Residents" in its annual statistical reports. *See* Dep't of Homeland Security, Office of Immigration Statistics, *Nonimmigrant Admissions to the United States: 2009*, App. A (Apr. 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2009.pdf. By contrast, other nonimmigrants are classified as "Non-residents." *Id.* The Government also treats Plaintiffs as residents for tax purposes. *See* I.R.C. § 7701(b)(1), (3); SMF ¶¶ 5, 20.

To be sure, probably not *all* "Short-term Residents" under the immigration laws satisfy the *Verdugo-Urquidez* standard of having developed "sufficient connections" to be considered part of a "national community." For example, aliens admitted as "A" or "G" nonimmigrants—*i.e.*, diplomats and other representatives of foreign governments, 8 U.S.C. § 1101(a)(15)(A), (G)—are present in the United States as *agents* of foreign powers, and seek not to be part of a "national community" but rather to represent their own foreign communities. As such, they would fall outside *Verdugo-Urquidez*'s definition despite otherwise appearing to be "residents." Likewise, some temporary workers or visiting students may be admitted for periods of time so short that they cannot truly be considered "residents" for purposes of the First Amendment.

Whatever the precise location of the constitutional "residency" line—and *Verdugo-Urquidez* does require that such a line be drawn—Plaintiffs are well inside it. They live in the United States; work in the United States; pay taxes in the United States; worship in the United States; participate in civic life in the United States—and will be doing so for multiple years. If Congress wants to gag aliens who *lack* constitutional protections, it may do so; but where, as here, a law attempts to ban the speech of aliens who *are* constitutionally protected, it is subject to the exacting scrutiny mandated by the First Amendment.

II. THE FIRST AMENDMENT PROTECTS THE EXPRESSION OF POLITICAL VIEWS THROUGH CONTRIBUTIONS AND EXPENDITURES.

The second undeniable principle of law that underlies Plaintiffs' case is that the First Amendment protects political contributions and expenditures as acts of political expression and association. The central premise of the foundational *Buckley* decision is that such spending "operate[s] in an area of the most fundamental First Amendment activities," 424 U.S. at 14, and "implicate[s] fundamental First Amendment interests," *id.* at 23. And this principle has been repeatedly affirmed over several decades. Limitations on campaign contributions and expenditures are accordingly subject to demanding scrutiny, and any suggestion that such restrictions merely regulate political *participation*, as opposed to political *expression*, is irreconcilable with settled precedent.

A. A Complete Ban on Contributions Is Subject to Strict Scrutiny Under the First Amendment.

As the Supreme Court explained in *Buckley*, a political contribution lies at the core of the First Amendment as both an act of political expression and an act of political association. 424 U.S. at 23. Limitations on such activities are generally "subject to the closest scrutiny." *Id.* at 25. To be specific, the Court has held that limitations on the *amounts* of political contributions are subject to something more than intermediate scrutiny but less than strict scrutiny—they must be "closely drawn" to accomplish a "sufficiently important interest." *Id.* Reasonable contribution limits may be sustained under this level of scrutiny in light of the Government's interest in preventing political corruption or the appearance of such corruption. *Id.* at 26-27. However, the Court has held that highly restrictive contribution limits cannot satisfy scrutiny under *Buckley*, as "a contribution of say, $250 (or $450) to a candidate's campaign [is un]likely to prove a corruptive force." *Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (plurality opinion).

Moreover, while limits on the *amounts* of political contributions are subject to less than strict scrutiny, the logic of the Court's decisions dictates that *flat bans* on contributions must be subject to strict scrutiny. The rationale for *Buckley*'s reduced scrutiny for contribution limits is that, because "[a] contribution serves as a general expression of support for the candidate and his views, ... [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." 424 U.S. at 21. Thus, "[a] limitation on the *amount* of money a person may give to a candidate . . . involves little direct restraint on his political communication, *for it permits the symbolic expression of support evidenced by a contribution*." *Id.* at 21 (emphasis added). However, such a rationale does not apply to a total ban on contributions, which completely deprives an individual of the "fundamental First Amendment interests" in expressing support for their candidate of choice through even a nominal donation. *Id.* at 23. Rather, complete bans on political contributions, like restrictions on expenditures, reduce "the quantity of political speech." *Id.* at 39. Under *Buckley*, § 441e's total prohibition of Plaintiffs' desired contributions, *see* SMF ¶¶ 12, 27-28, must be subjected to strict scrutiny.

B. A Complete Ban on Expenditures Is Subject to Strict Scrutiny Under the First Amendment.

Even more so than limits on contributions, limitations on political expenditures constitute direct restrictions on the right "to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59. "[I]t can hardly be doubted that the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Expenditure *limits*, not to mention flat *bans*, must therefore "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," *Buckley*, 424 U.S. at 44-45, *i.e.*, strict scrutiny. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 461 (2007) (plurality opinion).

In theory, a law restricting expenditures could survive strict scrutiny if the Government were able to prove that it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 464. In practice, the Supreme Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). The only line of cases upholding restrictions on independent political expenditures—by corporations, based on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—was recently overruled in *Citizens United*, 130 S. Ct. at 913 (majority opinion). Thus, any limits on independent expenditures should be regarded as presumptively unconstitutional, and that is true *a fortiori* of § 441e's complete ban on Plaintiffs' desired direct expenditures on leafleting activity and donations to independent political groups like the Club for Growth, *see* SMF ¶¶ 13, 29.

III. THE GOVERNMENT CANNOT MEET ITS BURDEN TO JUSTIFY THE RESTRICTIONS IN THE ALIEN GAG LAW.

The First Amendment plainly (i) applies to Plaintiffs and (ii) protects the speech banned by § 441e. The only remaining question, then, is whether the statute can survive the rigors of strict scrutiny. In fact, the Supreme Court itself framed the question in those terms, in the course of declining to resolve the issue in *Citizens United*. The Court noted, citing § 441e, that it "need not reach the question" whether the Government could justify the law as necessary to further "a compelling interest." 130 S. Ct. at 911.

In order to justify the Alien Gag Law under strict scrutiny, the Government must identify a compelling state interest in precluding Plaintiffs' participation in the political marketplace of ideas, and prove that the statutory restrictions are narrowly tailored to safeguard that interest.[5]

[5] To the extent that this Court disagrees that strict scrutiny applies to § 441e's flat ban on political contributions, the governing test would be whether the law is closely drawn to further a sufficiently important interest. However, as explained in this Part, the outcome is the same under either test.

The Supreme Court has emphasized that strict scrutiny is the "most rigorous and exacting standard of constitutional review." *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Under this demanding standard, the interest served must be truly compelling and, even then, a restriction of speech is not permitted where it is "plausible" that the same interest can be furthered by a lesser imposition on speech. *United States v. Playboy Ent'mt Group, Inc.*, 529 U.S. 803, 813-14 (2000). Moreover, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The Government "may not suppress lawful speech as the means to suppress unlawful speech," *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002), and a court applying strict scrutiny "must ensure that a compelling interest supports *each application* of a statute restricting speech," *Wisc. Right to Life, Inc.*, 551 U.S. at 478. As a result, "[o]nly rarely are statutes sustained in the face of strict scrutiny. . . . [S]trict-scrutiny review is strict in theory but usually fatal in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (internal quotation marks omitted).

As commentators have observed, the Government cannot honestly meet its burden with respect to the Alien Gag Law.[6] Indeed, the Commission hardly tries to do so, arguing only that the law is "rational" and then adding—in a conclusory footnote—that it also satisfies heightened scrutiny. MTD 22 n.14. In contending that the Alien Gag Law is supported by a rational basis, the Commission identifies two distinguishing features of Plaintiffs—their inability to vote, and their potential "foreign" perspective (MTD 18-27); yet neither feature gives rise to a legitimate interest in prohibiting Plaintiffs' political speech, much less a sufficiently weighty interest that is furthered with any precision by this statute.

[6] *See, e.g.*, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 605-610 (2011) (noting that it is "difficult to see" how the arguments in favor of foreign-spending ban could succeed under current law); *see also generally* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503 (1997); *cf.* Note, *"Foreign" Campaign Contributions and the First Amendment*, 110 Harv. L. Rev. 1886 (1997).

A. The Government Cannot Prohibit Political Speech Merely Because the Speaker Lacks the Right To Vote.

The legislative history of § 441e's predecessor suggests Congress believed that it could (and should) restrict the political contributions and expenditures of foreign nationals because foreign nationals do not possess the right to vote. *See, e.g.*, 120 Cong. Rec. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen) ("They cannot vote in our elections so why should we allow them to finance our elections?"); *id.* at 8784 (statement of Sen. Griffin) ("I agree with [Sen. Bentsen] that, by and large, our political process should be in the hands of those who . . . have the right to vote."). Likewise, the Commission in defending the statute argues that a ban on contributions and expenditures by foreign nationals "follows inexorably" from the fact that they are not eligible to "directly participate in the nation's processes of self-government." MTD 18. The suggestion is that, because the "right to govern is reserved to citizens," *Foley v. Connelie*, 435 U.S. 291, 297 (1978), non-citizens may also be stripped of the right to associate with and financially support candidates for political office, directly or independently.

As a justification for the Alien Gag Law, this rationale fails. *First*, it confuses the right to participate in the marketplace of ideas with the right to make the ultimate purchase. The latter, as the Commission correctly observes, is a special privilege of citizens. The former is a core speech right, available to voters and non-voters alike. *Second*, § 441e is not in any event closely or narrowly drawn to target non-voters. Rather, it is both overinclusive and underinclusive, and the Commission makes no genuine attempt to show otherwise. MTD 22 n.14.

1. Even those who cannot vote are entitled to express their views on matters of public concern.

There is a basic flaw in the suggestion that those who cannot vote are not entitled to contribute and spend money in relation to an election: It negates the key insight of *Buckley* that the right to engage in such activities is an application of the fundamental First Amendment rights

to speak and associate. Once it is accepted (as it must be) that campaign contributions and independent expenditures are a form of political speech, it is simply a *non sequitor* to observe that plaintiffs cannot vote, as the right to political *expression* is not dependent on the right to political *participation*. One need not be able to *decide* a matter in order to have a right to *speak* about it. Numerous real-life examples demonstrate this point:

1. Children, of course, cannot run for elective office or vote in elections. *See* U.S. Const. art. I, §§ 2-3; *id.* art. II, § 1, *id.* amend. XXVI. Yet the Supreme Court did not hesitate to extend to children the same rights as adults to contribute to candidates of their choice. *McConnell*, 540 U.S. at 231-32. The Court did not analyze whether minors have the capacity to participate in the political process. Rather, following *Buckley*, the Court affirmed that minors have First Amendment rights in general and proceeded to apply heightened scrutiny. *Id.*

2. Corporations cannot vote or run for office either. Yet, although the dissent in *Citizens United* raised that very point, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part) ("They cannot vote or run for office."), the Supreme Court held that corporations have the same rights as natural persons to make independent expenditures, *id.* at 917 (majority opinion). Again, the Court did not frame the question in terms of the right to participate in the political process, but rather in terms of the right to *speak*. The value of speech "[did] not depend upon the identity of its source." *Id.* at 904 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)) (internal quotation marks omitted).

3. Citizens who live in one State or municipality are not eligible to participate in the political processes of another jurisdiction. For example, a resident of New York cannot vote in a gubernatorial election in Iowa, a federal Senate election in Massachusetts, or a mayoral race in Los Angeles. Thus, if the right to make contributions and expenditures flowed from the right to

"directly participate" in self-government, that New Yorker could be prohibited from donating money or running advertisements in connection with those campaigns. Yet, not only is such cross-jurisdictional speech extraordinarily routine,[7] the only federal court to have considered a ban on it found the law unconstitutional. In *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), the Ninth Circuit considered an amendment to Oregon's Constitution that prohibited out-of-district campaign contributions in state elections. *Id.* at 1218. The court applied heightened scrutiny and invalidated the law, distinguishing cases relating to political participation as implicating "the right to vote and not the right to First Amendment speech." *Id.*

4. Residents of the District of Columbia have no congressional representation and no right to vote for members of the House of Representatives or the Senate, because the District is not a "State." *See* U.S. Const. art. I, § 8, cl. 17. Yet many in this country would surely find it remarkable if (following the Commission's logic) there were no constitutional right to engage in political fundraising or political advocacy in the Nation's capital.

All of these examples expose the false premise underlying the Commission's defense of the statute. If *Buckley* established anything, it held that spending money in support of a candidate for office—whether directly as a contribution, or indirectly as an expenditure—is a form of speech. Accordingly, foreign nationals who reside in the United States, though unable to vote or wield political power, are constitutionally empowered to make their views known, leaving the voters to decide whether they are convinced.

There is nothing peculiar about freedom of speech serving this persuasive, educational role. To the contrary, the central purpose of the First Amendment is "to supply the public need

[7] *E.g.*, Jonathan Allen, *Oberstar Has One Donor in District*, Politico.com, Oct. 13, 2010, *available at* http://www.politico.com/news/stories/1010/43557.html (reporting that, other than a single donation, "all of [Rep. Oberstar's] contributions came from political action committees, Native American tribes or individual donors in other districts and states"); Brian C. Mooney, *Outside Donations Buoyed Brown*, Boston Globe, Feb. 24, 2010 ("In the last 19 days of the race, nearly 70 percent of the 12,773 contributors who gave more than $200 to the Brown campaign were from outside Massachusetts . . . .").

for information and education with respect to the significant issues of the times." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). In the political context, the Constitution thus guarantees that voters "be free to obtain information from diverse sources in order to determine how to cast their votes," including sources who cannot themselves cast votes. *Citizens United*, 130 S. Ct. at 899.

In short, to contend that the right to engage in political spending flows from the right to engage in "direct political participation" (MTD 19) is to reject the notion that such spending is a form of political speech, which is to reject decades of campaign-finance jurisprudence.

2. In any event, the statutory restrictions are not tied to the right to vote.

Even if the Government had a legitimate interest in "protecting" American democracy from the threat of "interference" from those who cannot directly participate in the political process, the Alien Gag Law is not tailored to that interest. To the contrary, the statute is patently overinclusive and underinclusive. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984) ("The patent overinclusiveness and underinclusiveness of § 399's ban 'undermines the likelihood of a genuine governmental interest. . . . '" (quoting *Bellotti*, 435 U.S. at 793)).

Underinclusive: The Alien Gag Law is dramatically underinclusive, and therefore cannot possibly satisfy heightened (let alone strict) scrutiny. "[A] law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). The statute does not prohibit expenditures by minors, who are ineligible to vote. It does not proscribe expenditures by corporations, who have no capacity for self-government. And it does not bar residents of one state (or D.C.) from donating money or running advertisements in another jurisdiction.

Likewise, the statute has no application to disenfranchised felons; even the worst criminals remain free to spend in support of their chosen candidates while lawful residents are banned.

Even more obvious is the statute's express carve-out for U.S. permanent residents. Those individuals have no more right than temporary residents to vote or exert political authority. Yet, under § 441e, they are permitted to donate and to spend as much money as they wish to advocate for political candidates. Indeed, Congress recognized this disconnect between the purpose identified by the Commission and the actual statutory scheme. *See* 120 Cong. Rec. 8784 (Mar. 28, 1974) (statement of Sen. Griffin) ("[B]y and large, our political process should be in the hands of those who are citizens and have the right to vote. Actually, our amendment does not really close it up that much. It acknowledges and permits contributions by those who have been admitted for permanent residence. So even though they do not have the right to vote in that instance, they would have the right to make financial contributions.").

Similarly, the statute is underinclusive to the extent that it permits even temporary residents to spend unlimited sums of money in connection with *ballot initiatives*. The law bans only spending "in connection with a Federal, State, or local *election*" or for "*electioneering* communication." § 441e(a)(1) (emphases added); *see also* FEC Advisory Op. 1984-62, n.2; FEC Advisory Op. 1980-95. If anything, such initiatives—which *directly* implement policy—are even more vulnerable to "interference" by those who would not otherwise have any say in policy decisions (and cannot even vote on the initiatives). Yet, when *candidates* are out of the picture, the law gives aliens a green light. That speaks volumes about the true purposes of § 441e, suggesting a possible ulterior motive such as protecting incumbents from well-funded adversaries,[8] unprincipled pandering to xenophobia, or at least a lack of care in setting statutory

[8] *See Colo. Republican Fed. Campaign Comm v. FEC.*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in judgment and dissenting in part) (noting that electoral regulations such as campaign-finance restrictions are often adopted in order to advantage incumbents).

parameters. Whatever the reason, "[t]his differential treatment cannot be squared with the First Amendment." *Citizens United*, 130 S. Ct. at 906.

Overinclusive: Even if it were permissible to ban the political speech of those who cannot "directly participate" (MTD 18) in the domestic political process, such a rationale would not support § 441e's blanket ban on contributions and expenditures by resident aliens. This is so, because, while it is undoubtedly true that foreign nationals residing in the United States possess no *constitutional right* to vote or run for office, *see Foley*, 435 U.S. at 296, nothing prevents States or local governments from granting such rights to their alien residents as a matter of grace. And, indeed, some have done just that. In Chicago, for example, non-citizen parents are entitled to vote in school board elections. *See* Ill. Rev. Stat. Ch. 122, 34-1-1, 34-2-1 (1989). The same was true in New York City until school boards were disbanded in that jurisdiction. *See* N.Y. Educ. L. § 2590-c(4) (McKinney Supp. 1978–1979); *see also Ambach v. Norwick*, 441 U.S. 68, 81 n.15 (1979). In Maryland, six different municipalities have enfranchised non-citizen residents.[9] And, as discussed in Part I.B, *supra*, non-citizens in numerous other jurisdictions have historically been permitted to vote and to participate in the political process.

If the Government truly wanted to block those who cannot participate in self-government from spending money in relation to elections, it could easily have tied the prohibitions of § 441e to the right to vote. But it did not, and the distinction is not simply theoretical. As a result, non-citizens in Chicago, for example, or Takoma Park, Maryland, can lawfully vote in local elections but are prohibited by federal law from donating to, or even spending money to advocate for, their chosen candidate. No system that permits such a bizarre result could be defended as "narrowly tailored" or even "closely drawn." *See League of Women Voters*, 468 U.S. at 396.

[9] *See* Barnesville, Md., Town Charter § 74-3; Village of Martin's Addition, Md., Town Charter art. III, § 30; Somerset, Md., Town Charter art. V, § 83-21; Chevy Chase, Md., Town Charter art. III, § 301; Garrett Park, Town Charter art. III, § 78-20; Takoma Park, Md., Town Charter art. VI, § 601.

In sum, the patchwork scheme that emerges from § 441e fatally undermines the notion that Congress in enacting the law was narrowly tailoring, or closely drawing, a prohibition that would prevent those who cannot vote from indirectly "interfering" in the political process.

B. Plaintiffs' Nationalities and the Threat of "Foreign Influence" Provides No Justification for Gagging Them.

Another distinguishing feature of foreign nationals is, of course, their relationship to foreign nations. The Commission seizes upon that relationship in suggesting that § 441e serves to prevent "foreign influence" on domestic politics. MTD 23-27.

The precise meaning of the suggestion is not entirely clear. If the Commission means to argue that an alien's financial support for a candidate is *itself* illegitimate "foreign influence," that argument fails for the reasons described above. Whether or not such support is "foreign," and whether or not it has "influence," it is not illegitimate; rather, it is a form of core political expression that the First Amendment protects for all residents of the United States.

If the specter of "foreign influence" adds anything new to the Commission's argument, the claim must be that foreign nationals can be barred from protected political advocacy because either (1) they lack allegiance to the United States and therefore are likely to support candidates who will support the interests of a foreign nation, or (2) their connection to foreign powers makes it likely that they will be used as agents of such, in circumvention of the statute. The Commission appears to alternate between these distinct theories. *See* MTD 23 (referring to aliens as "persons of non-American allegiance" and also citing efforts of "the Chinese government" to "buy the loyalty of American officials").

Either way, the argument fails. The suspected "allegiances" of an entire class of persons cannot sustain the law, because such speaker-based and viewpoint-based regulation is anathema to the First Amendment. At most, the threat of corruptive foreign influence can justify the extant

disclosure rules and contribution caps that apply to all individuals; it cannot justify a *complete* ban on contributions (much less expenditures), any more than the ability of any other "special interest" to curry favor with candidates can. Nor can an anti-circumvention rationale suffice, in light of the slim evidence of circumvention and the narrower means available to stop it.

1. *Foreign Allegiance*: The First Amendment does not countenance criminalization of speech based on its source.

The Commission implies that a ban on political spending by resident foreign nationals is permissible because, otherwise, individuals of "non-American allegiance" would be able to "sway" elections. MTD 22-23; *see also* 120 Cong. Rec. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen) ("Their loyalties lie elsewhere; they lie with their own countries and their own governments."). This is nothing more than an argument that certain individuals should be prohibited from speaking because their views may be harmful or dangerous.

The First Amendment does not lightly tolerate speaker-based restrictions, particularly those that rely on generalizations about the likely views or motivations of a class of speakers:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Citizens United, 130 S. Ct. at 898-99 (citations omitted). Thus, the Court refused to accept the submission that corporations, because their "interests may conflict in fundamental respects with the interests of eligible voters," can be banned from spending money on election campaigns. *Id.* at 930 (Stevens, J., concurring in part and dissenting in part). Rather, the Court reaffirmed that it is not for Congress to determine whose views are sufficiently well-intentioned to merit expression. *Id.* at 904-07 (majority opinion). "In the realm of protected speech, the legislature is

constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-85.

Here, the Commission affirmatively argues that the speaker-based bans imposed by § 441e are justified by the need to shelter voters from foreign viewpoints, *i.e.*, as "a means to control content." *Citizens United*, 130 S. Ct. at 899. That is plainly not a legitimate government interest. Concerns about the dangerous content of speech can only justify restrictions if the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Hence, the First Amendment protects the right of a resident of the United States to advocate for the interests of a foreign government—or even for the *overthrow* of the U.S. Government—unless the Government can show a likelihood of "imminent lawless action." *See Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 448, 450 (1974).

A fortiori, the Government must make at least as compelling a showing when attempting to suppress speech based on the *supposition* that the speaker may support or advocate views that would serve the interests of a foreign nation—which is in substance the Commission's defense of § 441e. In other words: If, absent a genuine threat of "imminent lawless action," *Brandenburg*, 395 U.S. at 447, the Government cannot ban direct expressions of support for pro-Canada policies, then it surely cannot ban Plaintiffs from supporting *any* candidate based on the mere possibility that they *might* support a candidate whom they want, in turn, to support pro-Canada policies. Nor could any fear of harmful foreign viewpoints justify a ban on expenditures through political committees, such as the Club for Growth, whose political agendas are independently defined by the American citizens who create and operate them. Such a law neither serves a compelling interest nor is closely drawn to advance one.

Setting aside the insinuation that those with "foreign" loyalties can be gagged because Congress perceives their views to be peculiarly dangerous, all that is left of the Commission's "foreign influence" argument is the vanilla suggestion that political spending will result in "influence-buying" by resident aliens. MTD 23. Yet this risk of undue influence is no different than the problem posed by spending by labor unionists, or large corporations, or pro-life activists (all of whom, incidentally, advocate positions that others believe to be dangerous). Namely, "the danger of actual *quid pro quo* arrangements" and "the appearance of corruption stemming from public awareness" thereof. *Buckley*, 424 U.S. at 27.

Yet the Court has made clear that such concerns over corruption and its appearance can be adequately addressed by setting *limits* on contributions (so they are not too large) and mandating disclosure (so the public can see if a candidate is beholden). *See Buckley*, 424 U.S. at 28; *Citizens United*, 130 S. Ct. at 908, 914. Neither *complete* bans on contributions nor *any* restrictions on expenditures can be justified by those concerns. *See Randall*, 548 U.S. at 261 (invalidating low contributions limits because small amounts are "less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases"); *Buckley*, 424 U.S. at 45 ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures.").

If § 441e is invalidated, political spending by aliens would be subject to the same ceilings and disclosure rules applicable to other individuals. *See* 2 U.S.C. §§ 431(11), 434, 441a.[10] Settled precedent holds that these measures are sufficient to address fears of "influence-buying," and indeed, Congress itself has determined that contributions below those ceilings are too minimal to effect any corruption or create any appearance thereof. The Commission cannot

[10] Congress could also require disclosure of contributing aliens' nationalities, because disclosure rules can "be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 66).

identify a basis for reaching a different conclusion here. There is no reason to think that U.S. politicians are more tempted by foreign contributors than domestic, more willing to sell out to the Canadian dollar than the American.

2. *Anti-Circumvention*: The Alien Gag Law is not tailored to prevent a demonstrated danger of donations by foreign sovereigns.

At times, the Commission appears to argue that the Alien Gag Law is necessary in order to prevent foreign governments from utilizing their nationals, temporarily resident in the United States, as pawns in some kind of plot to take control of the federal or state governments. MTD 23 (referring to contributions by "foreign governmental agents"). The Government cannot show, however, (i) a real record of any such plots; or (relatedly); (ii) that other measures already in place—including a direct prohibition on funneling contributions through an agent—do not suffice to address the threat of circumvention by foreign powers; or (iii) that, if the problem exists and is not deterred by anti-funneling rules, an additional ban on spending by the conduit would add any value; or (iv) that there are no possible narrower means of pursuing the same objective. Yet heightened scrutiny demands that the Government show all of the above.

McConnell is again instructive. There, the Government proffered a similar anti-circumvention rationale in defense of the ban on contributions by minors. 540 U.S. at 232 (asserting that the provision prevented "donations by parents through their minor children to circumvent contribution limits applicable to the parents"). The Court, applying heightened scrutiny, was not satisfied. The Government had only "scant evidence of this form of evasion," perhaps due to "sufficient deterrence" from the law prohibiting individuals from making contributions in others' names. *Id.* In addition, the Government could not show that less burdensome measures—*e.g.*, "imposing a lower cap on contributions by minors"—would not suffice to address the problem. *Id.*

Here, 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. In 1998, a Senate Committee speculated that the Chinese government had funneled funds to Chinese nationals in the United States in order to "develop" China-friendly candidates. MTD 26. That unique episode, however, largely involved *U.S. citizens* and *permanent residents* (who are not even covered by the Alien Gag Law) and was redressed using *different* statutory provisions (not the Alien Gag Law). It thus makes a particularly unconvincing justification for a comprehensive, across-the-board ban on *all* contributions and *all* expenditures by *all* temporary residents of *all* nationalities. As explained below, heightened scrutiny precludes the Commission from using this single example of a problem to defend a sweeping prophylactic of dubious value.

First, this lone example does not show the type of pervasive, repeated pattern that courts demand before accepting an anti-circumvention approach as sweeping as § 441e. In *McConnell*, the Government had offered "some examples" of parents circumventing contribution limits by donating through their children, but the Court said that was not enough. 540 U.S. at 232 & n.3. "Unusual cases fall far short of a showing that there is a 'need . . . of the highest order'" for a broad, open-ended prohibition. *Bartnicki v. Vopper*, 532 U.S. 514, 531-32 (2001) (quoting *Smith*, 443 U.S. at 103).

Second, the maneuvering alleged by the Committee Report is *already* illegal, both for the true contributor (the foreign sovereign) and the straw contributor (the resident alien). Under 2 U.S.C. § 441f, it is illegal to "make a contribution in the name of another person or knowingly permit [one's] name to be used to effect such a contribution." That includes efforts to funnel funds through another. 11 C.F.R. § 110.4(b)(2). The Commission does not explain why this rule is inadequate. To the contrary, the episode it highlights suggests that current law (beyond

§ 441e) *does* effectively address circumvention: Chinese nationals caught up in the cited scandal were criminally prosecuted, and had their donations returned, precisely because they had violated § *441f* and related disclosure laws. *See, e.g., United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999); *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999); Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503, 505 (1997) (noting that "millions of dollars" were returned). Thus, § 441e had no role in either preventing or remedying the sole example the Government cites to justify it.

The Commission might contend that the prophylactic of § 441e is needed because the direct anti-funneling prohibition of § 441f is insufficient. But "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation . . . do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki*, 532 U.S. at 529-30. At the very least, before resorting to a sweeping prophylactic like § 441e, the Government must demonstrate that direct prohibitions have not or will not work. As explained, it has not done so here.

Third, even if funneling by foreign governments were a problem that could not be solved by § 441f, it is far from clear that § 441e would provide any marginal value. Why would someone who disregarded the threat of punishment under § 441f be deterred by § 441e? Moreover, § 441e would do *nothing* to prevent permanent residents or citizens from acting as conduits, and "a U.S. citizen is just as capable as a non-citizen of fronting for overseas contributors." *Brown*, *supra*, at 507. Indeed, the major players in the Chinese episode that the Commission identifies were *U.S. citizens* and *permanent residents*. *See id.*; Roberto Suro,

Clinton Fund-Raiser to Plead Guilty, Wash. Post, May 22, 1999, at A2 (describing "alleged scheme to enlist *citizens and legal* [*permanent*] *residents* as 'straw donors' who made contributions to the DNC and were then reimbursed with funds collected from nonresident foreign nationals" (emphasis added)). Thus, the Commission's only example of circumvention took place *notwithstanding* § 441e, involved conduits who are expressly *permitted* to contribute under § 441e, and was exposed and punished using a *different* law. Yet the Commission somehow invokes it as the rationale for § 441e.

Finally, even if § 441e would succeed where § 441f fails, the Government still cannot show that other "more tailored approaches," *McConnell*, 540 U.S. at 232, would not suffice. If the Government were truly concerned about meddling by America's enemies, it could target the nationals of *specific* enemy countries with histories of such meddling, just as it targets specific troublesome countries in its export-control laws, 50 U.S.C. App. § 2404(b), and other sanctions regimes, 22 U.S.C. § 2370(f). But it "may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255.

In sum, the Commission cites a *single* episode in which *contributions* may have been illegally funneled from a *single country* through *U.S. citizens* and *permanent* residents, and which was redressed through § *441f*, in order to support § *441e*, which expressly *allows* political spending by permanent residents and instead imposes a *blanket ban* on *all* contributions *and* expenditures by all *non-permanent* residents from *all* countries. That is not even a rational policy response to the purported problem, let alone the sort of carefully crafted measure demanded under heightened (or strict) scrutiny.

IV. THE GOVERNMENT'S ATTEMPTS TO EVADE HEIGHTENED SCRUTINY ARE IRRECONCILABLE WITH DECADES OF CONTROLLING PRECEDENT.

In its motion to dismiss, the Commission does not engage at all with the doctrinal framework analyzed above. Its brief hardly mentions the First Amendment, and makes no real effort to demonstrate that § 441e satisfies any form of heightened scrutiny. Instead, the Commission attempts to short-circuit the analysis by insisting that federal "plenary power" over immigration, buttressed by "the government's broad authority to legislate over matters of foreign affairs and national security" (MTD 13-14), allows the Government to restrict fundamental First Amendment rights upon a bare showing that the restriction is "rational." MTD 13-17. That is an incredible claim. It is also wrong. The precedent cited by the Commission is not on-point, and direct Supreme Court authority refutes its position. The Commission's other tactic is to engage in transparent fearmongering (MTD 22-27), but the horribles that it parades simply do not follow from Plaintiffs' positions and would not justify stripping Plaintiffs of their constitutional rights in any event. In truth, it is the Commission's position that would lead to indefensible results.

A. The Government's "Plenary Power" Cannot Justify The Prohibitions of the Alien Gag Law.

The Commission's primary claim is that the Alien Gag Law should be subjected to only rational basis scrutiny—the most lax standard known to constitutional law—because it relates to immigration, an area over which the Government exercises so-called "plenary power." MTD 22-23. That is not the law: The Bill of Rights is not superseded whenever the Government regulates aliens. The contrary claim is especially weak here, given that § 441e is not even a genuine immigration law, but rather a campaign-finance law that imposes criminal sanctions on aliens, entirely outside of the immigration system. If laws enjoy rational basis review simply because they regulate the activity of aliens, then aliens have no constitutional rights.

1. Congress's "plenary power" over immigration does not override the First Amendment.

Granted, Congress has "plenary authority" over immigration. *INS v. Chadha*, 462 U.S. 919, 940-41 (1983). But this phrase does not mean what the Commission thinks it means.

In most domestic areas of legislation, the federal Government possesses only the powers enumerated in the Constitution, while the States possess general "police power." *United States v. Morrison*, 529 U.S. 598, 618 & n.8 (2000). There are exceptions, however—areas such as immigration where a need for uniformity or lack of an alternative sovereign led the Framers to provide the federal Government with exclusive authority. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936); *United States v. Comstock*, 130 S. Ct. 1949, 1978 n.10 (2010) (Thomas, J., dissenting) ("The Constitution grants Congress plenary authority over certain jurisdictions where no other sovereign exists."). Moreover, immigration and foreign affairs sometimes touch on questions not susceptible to judicially manageable standards. *See, e.g.*, *Chadha*, 462 U.S. at 940-41. Courts often use the term "plenary authority" to describe the distinctive role of the federal Government in these exclusive domains. *See, e.g.*, *id.*; *Fong Yue Ting*, 149 U.S. at 712.

"Plenary power" does *not* allow Congress to disregard the Bill of Rights, however. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction," but only "so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley*, 424 U.S. at 132 (citation omitted). The Commission's contrary position is demonstrably incorrect, both from the implications that would flow from it and from the cases that reject it. And its own cited cases do not hold otherwise.

On the Commission's theory, the Government could go far beyond § 441e and flatly ban non-citizens from discussing *any* political matters, as a rational means of preventing "foreign

influence" in the domestic political process. Congress could even prohibit resident aliens from speaking to family members in their native countries, because that would be a "rational" way to prevent overseas actors from directing domestic speech. For that matter, the Government could prohibit resident aliens from practicing Islam, citing the attacks of September 11, 2001, as supporting this "rational" ban. Or, a statute could direct that resident aliens' homes be subject to monthly suspicionless searches as a "rational" tool to promote national security. In each case, the Bill of Rights would offer no refuge. This cannot be the law; and it is not the law.

The law, as explained in Part I.C, *supra*, is that resident aliens "are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution." *Fong Yue Ting*, 149 U.S. at 724. In his concurring opinion in *Bridges*, Justice Murphy emphatically rejected the Government's claim that "the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights." 326 U.S. at 160. He wrote that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders," and as such, "it follows that Congress may not ignore them in the exercise of its 'plenary' power." *Id.* at 161. The full Court later adopted Justice Murphy's concurrence. *Kwong Hai Chew*, 344 U.S. at 596 n.5; *Verdugo-Urquidez*, 494 U.S. at 271. Likewise, in *Chadha*, the Court quickly dispatched the argument that "plenary authority" precluded constitutional review of the deportation at issue: "The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." 462 U.S. at 940-41.

The Commission's "plenary power" argument is thus an attempt to relitigate a fight that was settled decades ago and has not been seriously questioned by any court since. As the Ninth

Circuit held in *American-Arab Anti-Discrimination Committee*, there is "no merit in the Government's argument that the broad authority of the political branches over immigration matters justifies limited First Amendment protection for aliens." 70 F.3d at 1065. Indeed, this Court has *twice* ruled that resident aliens are "entitled to the same First Amendment protections as United States citizens," *Rafeedie*, 795 F. Supp. at 22, and that laws infringing upon those protections are "judged by the same standards applicable to a citizen of the United States," *Brunnenkant*, 360 F. Supp. at 1330 (emphasis added).

Not one of the cases cited by the Commission stands for the contrary proposition, that the First Amendment is superseded by the federal power over immigration:

Two of the cited cases did not involve claims of individual constitutional rights at all. *See Curtiss-Wright Export Corp.*, 299 U.S. 304 (articulating foreign-affairs powers of the President vis-à-vis Congress); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (applying political-question doctrine to dismiss tort claims against former Secretary of State). These cases simply do not speak to the relationship between "plenary power" and constitutional rights.

Eight of the cited cases do involve claims of constitutional right—but not under the First Amendment. Rather, they address claims by aliens who were *not* engaged in any constitutionally protected activity, but rather invoked principles of equal protection in seeking affirmative government support (employment or other benefits) on the same terms as U.S. citizens. *See Plyler v. Doe*, 457 U.S. 202 (1982) (free public education); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1981) (employment as probation officers); *Mathews v. Diaz*, 426 U.S. 67 (1982) (federal medical insurance); *Ambach*, 441 U.S. 68 (employment as public school teachers); *Foley*, 435 U.S. 291 (employment as police officers); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (federal civil-service employment); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state civil-

service employment); *Moving Phones P'ship v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993) (broadcast licenses). The aliens won some of these cases (*Plyler*, *Hampton*) and lost others, but in all of them the question was how to evaluate alienage classifications under the Equal Protection Clause (or its federal equivalent, *see Bolling v. Sharpe*, 347 U.S. 497 (1954)). They say nothing about the application of, or standard of scrutiny under, the First Amendment.

Moreover, to the extent these cases are even tangentially relevant, they support Plaintiffs' position. The common principle underlying these cases is that the courts generally assess alienage classifications under heightened scrutiny, but apply relaxed scrutiny to classifications that exclude aliens from positions involving the *exercise of governmental authority*. *See Foley*, 435 U.S. at 297 ("The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, . . . the right to govern is reserved to citizens."); *see also Cabell*, 454 U.S. at 439. That is, while aliens may constitutionally be excluded from employment as police officers or civil servants, nothing in these cases suggests that they could be imprisoned for protesting such policies or objecting in a newspaper editorial. Here, Plaintiffs do not seek "to govern," *Foley*, 435 U.S. at 297—only to speak to those who do, *see* Part III.A, *supra*. Their position is therefore consistent with the equal protection cases, which allow lesser scrutiny *only* for classifications that exclude aliens from *participation* in government.

Only four of the cited cases arise under the First Amendment. Of these, one involved a *non-resident* alien *outside* the United States. It has, of course, always been the law that such individuals lack First Amendment rights, which is what the Court held. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (describing Mandel as "unadmitted and nonresident alien"). Another of the cases, *Haig v. Agee*, 453 U.S. 280 (1981), did not involve an alien at all. It concerned the revocation of the passport of a citizen—a former CIA agent who was engaged in a campaign to

disrupt U.S. intelligence. *Id.* at 283-86. The Court rejected Agee's First Amendment claim because his disclosures of confidential information, with the express purpose of harming U.S. national security, were "clearly not protected by the Constitution." *Id.* at 309.

Only two of the Commission's cases involve First Amendment claims by resident aliens. Yet, in both, the Court actually applied the same First Amendment scrutiny previously applied in analogous cases involving *citizens*, rejecting the aliens' claims by reference to those decisions.

In *Harisiades*, the Court held that the First Amendment does not embrace the "the practice or incitement of violence." 342 U.S. at 592. As authority, the Court cited *Dennis v. United States*, 341 U.S. 494 (1951), which just a year earlier had upheld over constitutional challenge the convictions of *U.S. citizens* for joining the Communist Party. 342 U.S. at 592 nn.18-19 (citing *Dennis* and noting that the applicable test "has been stated too recently to make further discussion at this time profitable"). Thus, "read properly, *Harisiades* establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights." T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 869 (1989). Certainly it cannot be read to establish the opposite proposition, which would run squarely into the plain and indisputable authority described by Plaintiffs above. A few years after *Harisiades*, in *Galvan v. Press*, 347 U.S. 522, 529-30 (1954), the Court relied on its earlier decision to reach a similar result. Even the dissenters in that case reluctantly acknowledged that, under the precedents, the statute did "not violate the First Amendment's clear ban against abridgment of political speech and assembly." 347 U.S. at 533 (Black, J., dissenting). Of course, speech protections for Communists have expanded since 1954, but the essential point is that these cases were decided as a matter of ordinary First Amendment law, not special "alien" standards.

2. In any event, the Alien Gag Law does not regulate immigration.

Even if the Government could override the Bill of Rights in the course of exercising its "plenary" authority over immigration, that would at most allow it some additional leeway when it executes the immigration laws. But the Alien Gag Law is not an immigration law. It does not punish non-compliant aliens with removal; it sends them to prison. And outside the deportation context, the nexus to the federal Immigration Power is highly attenuated. Whatever the scope of the federal Government's power over *immigration*, it does not embrace laws like § 441e.

In arguing otherwise, the Commission is taking a position even *broader* than the one rejected over fifty years ago in *Bridges*. There, the Government sought to *deport* the alien, and Justice Murphy assumed that *everyone agreed* that the Government was "precluded from *enjoining* or *imprisoning* an alien for exercising his freedom of speech." 326 U.S. at 162 (emphases added). Yet it is this greater power that the Commission now asserts.

This is no small step since, even if federal plenary power did trump constitutional rights in the unique deportation setting (which it does not), one cannot maintain that plenary power trumps the First Amendment here without also maintaining that the Government can flout any constitutional protection with any domestic law that applies to aliens. A law banning other forms of political speech by resident aliens, a law banning resident aliens from practicing a particular religion, a law requiring suspicionless and generalized searches of resident aliens' homes—on the Commission's view, all would be reviewed only for a rational basis because any regulation of foreign nationals is an exercise of congressional "plenary power" over immigration.

B. <u>The Commission's Parade of Horribles Is Unfounded and Anyway No Reason To Abandon the First Amendment.</u>

Perhaps because the law is so clear that Plaintiffs' claims are subject to ordinary First Amendment review and not overcome by *ipse dixit* assertions of federal power, the Commission

also employs a more rhetorical strategy. Repeatedly, its brief argues from the harmful consequences that would supposedly flow from a ruling in Plaintiffs' favor. However, many of these consequences are derived from legal positions wrongly attributed to Plaintiffs, and the rest are extremely unlikely as a factual matter. In any event, the suggestion that courts should blindly defer to vague invocations of foreign dangers is flatly inconsistent with the rule of law. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

1. The Commission suggests that, under Plaintiffs' view, even "a foreign intelligence agent living in Washington, D.C., and working in a foreign embassy" would have the right to "finance attack ads" against candidates. MTD 23. Not so. To qualify for First Amendment protection, an alien must be "part of a national community or . . . have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. Plainly, a foreign diplomat or other agent, who lives in the United States only as a means of representing his own foreign community, does not meet the test. Tellingly, such individuals are not even counted as part of the U.S. Census—unlike Plaintiffs—because they reside on "embassy grounds (which is considered 'foreign soil,' and thus not within any state)." *Fed. for Am. Imm. Reform v. Klutznick*, 486 F. Supp. 564, 567 (D.D.C. 1980).[11]

2. The Commission also sounds the alarm because some States apparently allow unlimited political contributions. "While such states have made a policy decision to permit large contributions by United States citizens," the Commission warns, "that in no way implies that they would reach the same conclusion as to foreign nationals." MTD 24. The implication is that Plaintiffs' argument would somehow prevent those States from imposing caps on contributions

[11] This is not to say that foreign diplomats have *no* protections. The Due Process Clause provides basic protection for anyone within U.S. "territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

by aliens. But reasonable contribution caps are entirely permissible, *Buckley*, 424 U.S. at 26-27, and if Virginia or Oregon decides to impose them, that is not a problem. Nothing in Plaintiffs' argument stands in their way. Saving "reckless" States from their own campaign-finance recalcitrance hardly constitutes a compelling government interest. *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (recognizing that Constitution mandates "state control over the election process for state offices").

3. The Commission speculates that "[a] concerted financial effort by even a portion of [the] alien population could generate enough money to skew many congressional, state, or local elections." MTD 25. But, apart from the fact that such rank speculation does not satisfy any type of heightened scrutiny, it strains credulity to suggest that individuals who come from a multitude of countries to work in thousands of jobs and hold views that run the ideological gamut might form a homogeneous or coordinated bloc. Israelis and Arabs living in the United States are not likely to find a consensus candidate to support. Nor are nationals of the *same* country likely to share a broad political agenda, as the American experience itself amply illustrates. Even assuming such an alien "flash mob" were plausible, this legitimate First Amendment activity by a segment of society would be no different than concerted attempts of, for example, public-service employees, school-teachers, or seniors, to join together to "skew" elections. To the extent these constituencies unite into "factions," that has long been understood to be an inevitable feature of democracy. *See The Federalist* No. 10 ("Liberty is to faction what air is to fire . . . [b]ut it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.").

4. Next, the Commission assumes that, if Plaintiffs are correct, then foreign *corporations* would be entitled to the same constitutional protections. MTD 25-26. That does not follow. *No* corporation is permitted to contribute directly to candidates, 2 U.S.C. § 441b(a), a rule that is necessary to prevent individuals from artificially inflating contribution caps. So all that is at stake is independent expenditures. And a victory for Plaintiffs, who reside *domestically*, would not require that *foreign* corporations have a right to make political expenditures. The concept of "residency" does not translate in any obvious way to the corporate context, and therefore it is not clear—whatever the outcome of this case—how to treat foreign corporations that do business in the United States or domestic corporations that are owned in whole or in part by non-resident foreign nationals. These are complex questions with which Congress has been struggling, *see* DISCLOSE Act, 111th Cong., 2d Sess., S.3295 (2010), and which will undoubtedly come before the courts in the future, but Plaintiffs' claims have no bearing on them: Even if Plaintiffs are correct that natural persons residing in the United States are protected by the First Amendment, the same does not necessarily follow for corporations—fictional persons—that are incorporated in foreign countries. These are fundamentally different and independent questions.

5. Finally, the Commission ominously warns that the United States Government has granted "thousands of student and work visas to citizens of Iran—a nation that has been formally designated a 'state sponsor of terrorism.'" MTD 27. It is hard to take seriously the suggestion that the Government allows possible terrorists to enter the country willy-nilly and live here without monitoring, but that the *real* danger is that, when they coordinate their energy to attack the Nation, it will be by donating a few hundred dollars each to a local congressional candidate.

More generally, the Commission's fearmongering is legally irrelevant. Its brief repeatedly invokes enemies of the United States—Nazis, Iranian terrorists, and a coordinated army of Chinese resident aliens, to name a few—all of whom apparently stand ready to use contributions of $2,400 per candidate and independent expenditures to trick voters into electing representatives who will give material assistance to these enemies. *See, e.g.*, MTD 26, 27. Such a suggestion is demeaning to the American electorate, which the Commission appears to believe would vote for Khalid Shaikh Mohammed if presented with sufficiently expensive advertising. But in any event, the courts have developed tests to determine whether individual rights must give way to other important interests, like public safety or national security. *See* Part III.B.1, *supra*. The Commission, however, cannot plausibly satisfy those standards here; it does not even try to. In our constitutional system, the Government does not get a free pass to avoid settled legal standards and wipe out fundamental rights by incanting the phrase "national security."

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss, and enter summary judgment in favor of Plaintiffs.

Dated: January 18, 2010

Respectfully submitted,

/s/ Jacob M. Roth_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Benjamin Bluman, et al.,

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civ. No. 10-1766

(Three Judge Court)

STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Plaintiffs submit the following statement of material facts as to which they contend there is no genuine disputed issue.

Material Facts About Plaintiff Bluman

1. Benjamin Bluman is a citizen of Canada. *See* Declaration of Benjamin Bluman ("Bluman Decl.") ¶ 1.

2. Mr. Bluman attended Harvard Law School, located in Cambridge, Massachusetts, between September 2006 and June 2009. During those years, he lawfully resided on a nearly continuous basis in the United States, as an "F-1" nonimmigrant. *See* Bluman Decl. ¶ 2.

3. On November 12, 2009, Mr. Bluman applied for admission to the United States as a "TN" nonimmigrant. On that same date, he was so admitted. *See* Bluman Decl. ¶ 3.

4. Since his admission on November 12, 2009, Mr. Bluman has lawfully resided in the United States, specifically, in New York City. *See* Bluman Decl. ¶ 4.

5. Mr. Bluman pays applicable federal state, and local taxes. *See* Bluman Decl. ¶ 5.

6. As a "TN" nonimmigrant, Mr. Bluman is authorized to remain in the United States until November 11, 2012. *See* Bluman Decl. ¶ 6.

7. Upon expiration of his authorized term in the United States, Mr. Bluman anticipates applying for an additional three-year term. *See* Bluman Decl. ¶ 7.

8. Mr. Bluman is employed by a law firm in New York. *See* Bluman Decl. ¶ 8.

9. Mr. Bluman is an active member of the Bar of the State of New York. Upon his admission to the Bar, he swore an oath to uphold the United States Constitutions and the Constitution of the State of New York. *See* Bluman Decl. ¶ 9.

10. Mr. Bluman holds strong political views. Among other things, he believes that gay and lesbian individuals should have full civil rights, including the right to marry; that the United States must take robust action to prevent the threats posed by climate change; and that "net neutrality" should be mandated for internet service providers. *See* Bluman Decl. ¶ 10.

11. Mr. Bluman wants to express his views on these and related issues by contributing money to political candidates who agree with them, and by independently spending money to advocate for the election of such candidates. *See* Bluman Decl. ¶ 11.

12. Specifically, Mr. Bluman wants to contribute $100 each to Representative Jay Inslee, Democrat of Washington, who has taken a lead role in advocating for net-neutrality; New York State Senator Diane Savino, who has eloquently defended the right of gays and lesbians to marry; and President Barack Obama, whose views and policies are largely in accord with his own. *See* Bluman Decl. ¶ 12.

13. Mr. Bluman also wants to pay for the printing of flyers that support the re-election of President Barack Obama, and distribute those flyers near his home, in Central Park. *See* Bluman Decl. ¶ 13.

14. Mr. Bluman anticipates wanting to make similar contributions and expenditures in the future, during the time that he remains resident in the United States. *See* Bluman Decl. ¶ 14.

15. Mr. Bluman cannot engage in the above activities because they are illegal under current law and would subject him to severe sanctions. However, if the law prohibiting the activities were invalidated, he would engage in those activities. *See* Bluman Decl. ¶ 15.

Material Facts About Plaintiff Steiman

16. Asenath Steiman is a dual citizen of Canada and the State of Israel. *See* Declaration of Asenath Steiman ("Steiman Decl.") ¶ 1.

17. On June 23, 2009, Dr. Steiman applied for admission to the United States as a "J-1" nonimmigrant. On that same date, she was so admitted. *See* Steiman Decl. ¶ 2.

18. Since her admission on June 23, 2009, Dr. Steiman has lawfully resided in the United States. *See* Steiman Decl. ¶ 3.

19. Dr. Steiman is lawfully employed as a physician by the Beth Israel Medical Center in New York City, where she is fulfilling her medical residency. *See* Steiman Decl. ¶ 4.

20. Dr. Steiman pays applicable federal, state, and local taxes. *See* Steiman Decl. ¶ 5.

21. As a "J-1" nonimmigrant, Dr. Steiman is authorized to remain in the United States until June 22, 2012. That term is likely to be extended by up to four years, depending on the course of her medical specialization. *See* Steiman Decl. ¶ 6.

22. Dr. Steiman belongs to the American Medial Association. *See* Steiman Decl. ¶ 7.

23. Dr. Steiman holds strong political views. She considers herself a conservative, and believes that government should be smaller and taxes lower. As a medical professional, she is especially concerned about recent political developments relating to healthcare and fears the growing role of the government in the delivery of medical services. *See* Steiman Decl. ¶ 8.

24. When Dr. Steiman lived in Canada, she paid membership fees to join the Conservative Party of Canada and its predecessor. Further, as a college student in Toronto, Canada, she served on the executive of the party's campus association. *See* Steiman Decl. ¶ 9.

25. Dr. Steiman receives regular email updates from the Club for Growth, an organization devoted to supporting candidates who promote economic growth and economic liberty. *See* Steiman Decl. ¶10.

26. Dr. Steiman wants to express her political views by contributing money to political candidates who agree with them and by independently spending money to advocate for such candidates. *See* Steiman Decl. ¶ 11.

27. Specifically, Dr. Steiman wants to contribute $100 each to Senator Tom Coburn, Republican of Oklahoma, who has taken a lead role in opposing government intrusion into the healthcare system; and to her preferred candidate for the Republican nomination to challenge President Barack Obama in the next presidential election. *See* Steiman Decl. ¶ 12.

28. Dr. Steiman further wants to donate $100 to the National Republican Senatorial Committee, a party-affiliated political committee that helps to elect candidates who share her views. *See* Steiman Decl. ¶ 13.

29. Dr. Steiman also wants to donate $100 to the Club for Growth, in order to help advocate for the election of fiscally conservative candidates. *See* Steiman Decl. ¶ 14.

30. Dr. Steiman anticipates wanting to make similar contributions and expenditures in the future, during the time that she remains resident in the United States. *See* Steiman Decl. ¶ 15.

31. Dr. Steiman cannot engage in the above activities because they are illegal under current law and would subject her to severe sanctions. However, if the law prohibiting the activities were invalidated, she would engage in those activities. *See* Steiman Decl. ¶ 16.

Dated: January 18, 2010

Respectfully submitted,

/s/ Jacob M. Roth_____

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