UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN BLUMAN, *et al*.,	)	
Plaintiffs,	)	Civ. No. 10-1766 (RMU)
v.	)	
	)	MOTION TO DISMISS
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Federal Election Commission respectfully moves this Court for an order dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted. Pursuant to LCvR 7, a memorandum of points and authorities and a proposed order accompany this motion.

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v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM OF POINTS AND AUTHORITIES
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Federal Election Commission respectfully moves the Court to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because Congress is well within its constitutional authority to conduct foreign policy and protect American democracy by prohibiting foreign nationals from financing candidates and candidate advocacy in the United States, plaintiffs' complaint fails to state a claim on which relief can be granted.

I. BACKGROUND

A. The Federal Election Commission

The FEC is the agency of the United States government vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-457, and other federal campaign finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. §§ 437d(a)(8), 438(a)(8); to issue advisory opinions concerning the

application of FECA or the Commission's regulations to proposed transactions or activities, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. § 437g.

B. Statutory and Regulatory Background

Foreigners have repeatedly attempted to influence the American political system, in many cases by or through residents of the United States. Congress has acted to rebuff such foreign interference, in particular by limiting foreign-national contributions and other electoral spending. Each time Congress took action, legislators were responding to specific incidents of foreign countries or individuals seeking to alter American policy. The legislative history of those Congressional efforts demonstrates that lawmakers believed that prohibiting foreigners living abroad or only temporarily residing here from financial participation in American elections was necessary to protect the national security of the United States.

1. Fulbright Hearings and the Foreign Agents Registration Act

Before the outbreak of World War II, representatives of the Nazi party and the German government directly and indirectly assisted United States citizens and aliens in disseminating propaganda by, for example, financing newspapers and providing pamphlets. H.R. Rep. No. 74-153, at 3-9 (1935). A House committee appointed to investigate Nazi and other propaganda concluded that "attempts have been made and [were] being made from abroad and in some instances by diplomatic and consular agents of foreign countries to influence the political opinions of many of our people." *Id.* at 22. In response, Congress passed a law whose primary purpose was to identify agents of foreign nations and organizations that "might engage in subversive acts or in spreading foreign propaganda" and to disclose their foreign connections. *Viereck v. United States*, 318 U.S. 236, 241 (1943). The Foreign Agents Registration Act of 1938 ("FARA"), required agents of "foreign principals," generally defined as foreign

governments and organizations, to register with the Secretary of State before they could distribute material intended to influence United States foreign policy, or what the statute termed "propaganda." Pub. L. No. 75-593, 52 Stat. 631 (then-codified at 22 U.S.C. § 611 *et seq*. (1939)).

Dedicated as it was to publicizing foreign sources of communications disseminated here, FARA did not prohibit campaign contributions. But by the early 1960s, reports of contributions to federal candidates by foreign nationals on behalf of foreign principals led to congressional hearings chaired by Senator William J. Fulbright. *See Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the Senate Comm. on Foreign Relations*, 88th Cong. (1963) ("Fulbright Hearings"). Witnesses testified about the efforts of foreign governments and businesses to ensure the reelection of federal officeholders by funneling campaign contributions through agents in the United States. *See id*. Among the most notable examples were the contributions of unnamed members of the sugar industry in the Philippines — who had an interest in how United States sugar import quotas were allocated — through the industry's registered agent to the campaigns of some twenty incumbent Members of Congress. *Id*. at 195-212.

Concerned by these revelations and seeking to limit the ability of foreigners to influence United States policy through campaign contributions, Senator Fulbright introduced a bill to amend FARA to prohibit contributions by agents of foreign principals. 111 Cong. Rec. 6984-85 (Apr. 5, 1965). Congress enacted this bill, thereby making it unlawful for an "agent of a foreign principal" to knowingly make or solicit any direct or indirect contribution "in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office." Pub. L. No. 89-486, 80 Stat. 248 (1966). The

1966 amendments to FARA defined an "agent of a foreign principal" as, *inter alia*, any person under the control or direction of a foreign principal. *Id*. at 249 (then-codified at 18 U.S.C. § 613 (1967)).

2. Watergate Investigation and the Federal Election Campaign Act

Foreign interests quickly discovered another way to attempt to influence American policy through campaign contributions. The prohibition against contributions by agents of foreign nationals contained a significant loophole: Though it prohibited persons from making contributions *on behalf of* foreign principals, FARA did not prohibit contributions *directly* from foreign nationals. This loophole would prove to play a significant role in the events that led to the Watergate investigation. Although overshadowed by the scandal's other revelations, allegations surfaced indicating that the Nixon campaign had received contributions from citizens of foreign countries, including Canada and Uruguay, and from various sources in Greece. *See*, *e.g.*, Morton Mintz, *Hill Action Asked on Overseas Gifts*, Wash. Post, May 25, 1973, at A29; Morton Mintz, *Winners Still Get Money: $10 Million Given Nixon After Oct. 26*, Wash. Post, Feb. 4, 1973, at A1. One such contribution, investigated by the Watergate special prosecutor, was made to the Nixon campaign by a Greek industrialist soon after his firm was awarded a contract to supply fuel to the U.S. Sixth Fleet. *See, e.g.*, *Jaworski Studies '72 Foreign Gifts*, N.Y. Times, Jan. 25, 1974, at 16; Seth Kantor, *Jaworski Eyes Probing Foreign '72 Gifts*, Wash. Post, Jan. 25, 1974, at A9.

In the wake of Watergate, Congress sought to amend FECA to address the loopholes exploited during the 1972 presidential campaign, including the loophole allowing contributions by foreign nationals. "[A]ll of us have heard the stories . . . in recent months," Senator Bentsen explained in 1974, "of the enormous amounts of money contributed in the last political campaign

by foreign nationals. We have heard of the hundreds of thousands of dollars sloshing around from one country to another, going through foreign banks, being laundered through foreign banks; and we have heard allegations of concessions being made by the Government to foreign contributors." 120 Cong. Rec. 8782 (Mar. 28, 1974). Noting that the prohibition against contributions by agents of foreign nationals "left a giant loophole for contributions to be made by foreign individuals," *id*., Senator Bentsen introduced an amendment to prohibit contributions by foreign nationals themselves.

Enacted as part of amendments to FECA in 1974, Senator Bentsen's amendment prohibited foreign nationals from making contributions in connection with federal, state, or local elections. FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1267.[1] The prohibition defined foreign national as a foreign principal or as an individual who is not a citizen or permanent resident of the United States.[2] *Id*. Senator Bentsen minced no words explaining the purpose of the prohibition: "[C]ontributions by foreigners are wrong and they have no place

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[1] In 1976, Congress moved the foreign national prohibition from Title 18 to FECA, codifying it at 2 U.S.C. § 441e. Amendments to Fed. Election Campaign Act of 1971, Pub. L. No. 94-283, 90 Stat. 475, 486, 493, 496 (1976). The following year, the Commission promulgated a regulation implementing the new FECA provision. 11 C.F.R. § 110.4 (1978). In 1989, the Commission amended its foreign national regulation in 11 C.F.R. § 110.4(a) to expressly prohibit foreign nationals from making expenditures of any kind. FEC, *Contributions and Expenditures; Prohibited Contributions*, 54 Fed. Reg. 48,580-81 (Nov. 24, 1989).

[2] As explained by Senator Bentsen, permanent residents are treated the same as citizens under section 441e: The "privilege to contribute ought to be limited to U.S. citizens and to those who have indicated their intention to live here, are here legally, and are permanent residents." 120 Cong. Rec. 8784. Permanent residents "for all intents and purposes are citizens of the United States except perhaps in the strictest legal sense of the word." *Id.* at 8783. Lawful permanent residents "hav[e] been lawfully accorded the privilege of residing permanently in the United States as an immigrant." 8 U.S.C. § 1101(a)(20). In contrast, a holder of a nonimmigrant work or student visa generally must "hav[e] a residence in a foreign country which he has no intention of abandoning." *E.g.*, 8 U.S.C. § 1101(a)(15)(F),(H),(J),(O),(P). Unlike a legal permanent resident, a nonimmigrant may not serve in the military, *see* 10 U.S.C. § 504(b), may not receive public benefits, *see* 8 U.S.C. § 1611(a), and must leave the country upon the expiration of her visa, *see* 8 C.F.R. § 214.1(a)(3)(ii).

in the American political system. . . . The American political process should be left to American Nationals . . . ." 120 Cong. Rec. 8782-83. Senator Griffin echoed his colleague's sentiments: "[B]y and large, our political process should be in the hands of those who are citizens and have the right to vote." *Id*. at 8784.

3. Thompson Committee and the Bipartisan Campaign Reform Act

Despite the 1974 FECA amendments, foreign nationals again devised methods of injecting substantial funds into American elections, most notably during the 1995-96 election cycle. During that cycle, foreign nationals exploited the "soft money" loophole, through which "nonfederal funds" — *i.e.*, funds that did not comply with the source and amount limitations of FECA, including foreign donations — were donated to the major political parties, ostensibly on the grounds that these funds would be used only for state-level activity, not for federal campaigns. *See, e.g.*, *United States v. Trie*, 23 F. Supp. 2d 55, 60-61 (D.D.C. 1998) (holding that FECA did not prohibit foreign soft-money donations); *see also McConnell v. FEC*, 540 U.S. 93, 122-24 (2003) (describing soft money generally).[3] Nonetheless, the political parties spent hundreds of millions of their soft-money dollars on federal election activity, including television advertising and other direct campaign advocacy for presidential and congressional candidates. *See McConnell*, 540 U.S. at 123-24, 131.

[3] The Commission had interpreted section 441e as prohibiting all political donations by foreign nationals, including soft money donations to political parties. *See* 11 C.F.R. § 110.4(a) (1996) (providing that foreign national prohibition applied to federal, state, and local elections); FEC Advisory Op. 1987-25, 1987 WL 61721; *see also* 147 Cong. Rec. S2774 (Mar. 22, 2001) (statement of Sen. Thompson) (mentioning *Trie* and noting that "I think we all thought foreign soft money contributions were illegal"). In 1999, the D.C. Circuit overruled *Trie* and held that section 441e did, in fact, prohibit soft-money contributions by foreign nationals. *United States v. Kanchanalak*, 192 F.3d 1037, 1047-50 (D.C. Cir. 1999) (also noting that Commission had "consistently interpreted § 441e as applicable to federal, state, and local elections since 1976").

In response to the widespread uproar generated by reports of such political fundraising practices, *see, e.g.,* 143 Cong. Rec. S2058 (Mar. 10, 1997) (statement of Sen. Glenn) ("The American people are disgusted by what they see in campaign finance."); *Rotten Campaign Finance*, Roanoke Times & World News, Oct. 30, 1996, *available at* 1996 WLNR 1221190 (encouraging "public outcry" over "Buddhist temple" fundraising scandal and others), the Senate charged its Committee on Governmental Affairs to investigate various troubling aspects of how the 1996 elections had been financed, including any "[f]oreign contributions and their effect on the American political system." S. Rep. No. 105-167 at 11 (1998) (internal quotation marks omitted). The Senate Committee — chaired by Senator Fred Thompson and often referred to as the "Thompson Committee" — conducted an exhaustive investigation throughout 1997, culminating in a written report nearly 10,000 pages long. *See id*.[4]

Among the Thompson Committee's primary findings was that foreign individuals — including several whom the Committee believed to be acting on behalf of foreign governments — had successfully used political contributions to purchase access to powerful American officials. *See generally* S. Rep. No. 105-167 at 781-2710 (majority report on foreign influence), 4619-5925 (minority report on same).[5] These contributions "allowed wealthy and well-connected foreign nationals to arrange almost unlimited access to the President and other top U.S. policymakers." *Id*. at 46. For example, one South Korean national gave $250,000 in foreign corporate funds to the Democratic National Committee ("DNC") in exchange for the

[4] In the course of its investigation, the Committee "issued 427 subpoenas . . . [reviewed] 1,500,000 pages of documents, . . . took 200 depositions and conducted over 200 witness interviews . . . [and] held 32 days of hearings, taking testimony from 72 witnesses." S. Rep. No. 105-167 at 15.

[5] As the Supreme Court noted, "[t]he committee's principal findings relating to Democratic Party fundraising were set forth in the majority's report, while the minority report primarily described Republican practices. The two reports reached consensus, however, on certain central propositions" regarding campaign finance abuses. *McConnell*, 540 U.S. at 129.

opportunity to press his company's business interests in a personal meeting with the President of the United States. *See id*. at 4832-34; *see also id*. at 37 (summarizing incident). In another case, fundraiser Charlie Trie raised a total of $645,000 for the DNC from 1994-1996 — money that originated largely from Ng Lap Seng, a foreign national "hotel tycoon in Macao with reputed links to organized crime who advises the Chinese government." *Id*. at 39. Ng was rewarded for his contributions with ten visits to the White House between 1994 and 1996. *See id*. The purpose of these visits was not conclusively determined, *see id*. at 39 & n.5, but the evidence before the Committee established that foreign-funded contributions "purchased access for [Trie] and Ng to the highest levels of our government." *See id*. at 2519; *see also id*. at 2524-36 (describing Ng's activities in detail). And the Republican National Committee received substantial foreign funds as well, such as from the "wealthy Hong Kong businessman" who "hosted the chairman of the Republican National Committee on a yacht in Hong Kong Harbor and provided $2 million in collateral for a loan used to help elect Republican candidates to office." *See id*. at 4562, 4667-68 (noting that funds were wired from Hong Kong corporation).

Most troubling to the Senate Committee was the case of Ted Sioeng, a foreign national who "worked, and perhaps still works, on behalf of the Chinese government." *See* S. Rep. No. 105-167 at 47; *see also* 147 Cong. Rec. S2449 (Mar. 19, 2001) (statement of Sen. Collins) ("Sioeng, we later discovered, was a self-described agent of the Chinese government."). Sioeng dined with the President twice and "gain[ed] access to high-ranking officials of both parties" as a result of his contributions to those parties, *see* S. Rep. No. 105-167 at 37, 4567, 4601 — contributions that may have been funded by the Chinese government itself. *See id.* at 2505. And Sioeng was not the only potential foreign agent to seek influence over elected officials through campaign contributions; to the contrary, the Committee found that

> high-level PRC [People's Republic of China] government officials devised plans to increase China's influence over the U.S. political process . . . . Indeed, [the Committee] . . . found a broad array of Chinese efforts designed to influence U.S. policies and elections through, among other means, financing election campaigns. . . . The Committee has identified specific steps taken in furtherance of . . . these plans. . . . Among these efforts were the devising of a seeding strategy of developing viable candidates sympathetic to the PRC for future federal elections . . . [and] financing American elections through covert means.

Id. at 47; *see also id*. at 2501-12 (discussing activities of Chinese government). These efforts included not just congressional elections, but "the 1996 Presidential race and state elections as well." *Id*. at 2509. "[T]he government of China may have allocated millions of dollars in 1996 alone to achieve its objectives." *Id*.

The Committee found that these events "expose[d] existing vulnerabilities in federal election law, which, although intended to prohibit foreign money in United States elections, [was] not always as clear or as strong as required." S. Rep. No. 105-167 at 4578. Accordingly, the Committee urged the rest of Congress to "rely" on the report as "a factual record . . . in formulating legislative proposals." *Id*. at 8 ("[I]t is the expectation of the Committee that the facts developed by its investigation . . . will be of use . . . when [Congress] considers legislation to reform campaign finance laws . . . .").

Such legislation was proposed almost immediately, *see Trie*, 23 F. Supp. 2d at 60 n.7 (noting March 1998 introduction of bill in House of Representatives), and after failing to pass campaign finance reform bills in its 1997-1998 and 1999-2000 sessions, Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. BCRA, which comprehensively amended FECA, included several provisions that strengthened and clarified the foreign national prohibition, largely in response to the conduct described in the

1998 Senate Committee report.[6] First, BCRA section 303 amended 2 U.S.C. § 441e to explicitly prohibit foreign nationals from disbursing funds:

- in connection with any "Federal, State, or local election";
- to any political party; or
- to finance independent expenditures or electioneering communications.[7]

116 Stat. 96 (codified at 2 U.S.C. § 441e(a)(1)(A)-(C)). Second, BCRA section 308 prohibited foreign nationals from financing presidential inaugurations. *See* 116 Stat. 103-04 (codified at 36 U.S.C. § 510(c)). Third, BCRA section 314(b)(2)(A) directed the United States Sentencing Commission to increase the criminal penalties for illegal conduct involving foreign contributions. 116 Stat. 107.[8]

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[6] *See* 147 Cong. Rec. S3127 (Mar. 29, 2001) (statement of Sen. Thompson) (supporting bill and discussing committee's finding of "a wide-ranging effort to circumvent the federal election laws by funneling campaign contributions, sometimes from foreign sources"); 147 Cong. Rec. S2449 (Mar. 19, 2001) (statement of Sen. Collins) (supporting bill's "prohibit[ing] foreign nationals from contributing soft money in connection with federal, state, or local elections" and noting that "[t]he problem with soft money was evident during the 1997 hearings by the Senate Committee on Governmental Affairs"); 147 Cong. Rec. S2423 (Mar. 19, 2001) (statement of Sen. Specter) ("Anyone who watched the Governmental Affairs hearings in 1997 knows the alarming role of illegal foreign contributions in our 1996 campaigns."); 148 Cong. Rec. H355 (Feb. 13, 2002) (statement of Rep. Kirk) (supporting bill and discussing Chinese nationals' use of soft-money loophole); *see also McConnell*, 540 U.S. at 132 ("In BCRA, Congress enacted many of the [Senate] committee's proposed reforms.").

[7] An independent expenditure is a communication that expressly advocates the election or defeat of a candidate and is not coordinated with any candidate or political party. 2 U.S.C. § 431(17). An electioneering communication is a broadcast communication that refers to a clearly identified federal candidate and is broadcast in the relevant jurisdiction in the 30 days before a primary election or 60 days before a general election. *See* 2 U.S.C. § 434(f)(3).

[8] BCRA section 317 also codified an earlier Commission finding that residents of American Samoa, who have non-voting representation in Congress and "owe[ ] permanent allegiance to the United States," 8 U.S.C. § 1101(a)(22)(B), are not subject to the prohibition. 116 Stat. 109 (codified at 2 U.S.C. § 441e(b)(2)) (excluding noncitizen "nationals" of the United States from definition of "foreign national"); *see also* 8 U.S.C. § 1408(1); 8 U.S.C. § 1101(a)(29).

After BCRA was enacted, the Commission promulgated a regulation to implement the new provisions regarding foreign nationals, moving the prohibition from 11 C.F.R. § 110.4(a) to 11 C.F.R. § 110.20. FEC, *Contribution Limitations and Prohibitions*, 67 Fed. Reg. 69,928, 69,940-46 (Nov. 19, 2002). In relevant part, the Commission's regulation essentially tracks and incorporates the language of section 441e. *See* 11 C.F.R. § 110.20(a)(3) (defining "foreign national"), 110.20(b)-(c) (prohibiting foreign disbursements in connection with elections and to political parties), 110.20(f) (prohibiting foreign disbursements for independent expenditures).

C. Plaintiffs

Plaintiffs are two foreign nationals who temporarily reside and work in the United States. (*See* Compl. ¶¶ 10-11, 15.)[9] They are neither citizens nor permanent residents of the United States. (*See id*. ¶¶ 10, 15.) Each plaintiff's current authorization to reside and work in the United States commenced in 2009 and is scheduled to expire in 2012. (*See id*.)

Collectively, plaintiffs wish to (1) contribute to candidates for federal office, (2) contribute to a national political party, (3) finance candidate advocacy through an independent organization (*i.e.*, the Club for Growth), (4) contribute to a candidate for state office, and (5) make independent expenditures advocating the re-election of the President. (*See id*. ¶¶ 13, 18.) Plaintiffs also anticipate wishing to make "similar contributions and expenditures" in the future. (*Id*. ¶¶ 14, 19)

Plaintiffs filed this suit on October 19, 2010, alleging that 2 U.S.C. § 441e violates the First Amendment as applied to all foreign nationals who lawfully reside and work in the United States. (Compl. ¶ 1.) Plaintiffs have requested (Docket No. 2) a three-judge district court

[9] Unless otherwise noted, all facts regarding plaintiffs are derived from their complaint, which is assumed to be true for purposes of this motion only. *See infra* p. 12.

pursuant to BCRA section 403, 116 Stat. at 113-14, and the Commission has opposed that request (Docket No. 10).

II. ARGUMENT

The Constitution vests Congress and the President with plenary power over the nation's foreign affairs and charges the elected branches to protect the United States against foreign enemies. Accordingly, any judicial review of congressional judgments regarding matters of foreign policy must be exceedingly deferential. Plaintiffs' complaint does not and cannot provide allegations sufficient for this Court to overturn Congress's determination that the protection of American democracy is best served by prohibiting temporarily resident aliens from underwriting American candidates and campaigns. The statutory prohibition on electoral financing by foreign nationals rationally relates to the governmental interest of limiting opportunities for those whose fundamental allegiances lie elsewhere to influence American elections.

A. Standard of Review

Dismissal of a complaint is appropriate where, accepting the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (holding dismissal appropriate "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief"); *Kassem v. Wash. Hosp. Ctr*., 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). In deciding a motion to dismiss, the court may consider the complaint itself and "'matters about which the Court may take judicial notice,'" *Camp v. Kollen*, 567 F. Supp. 2d 170, 172 (D.D.C. 2008) (quoting *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C.

2002)), including public governmental records. *See Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004).

B. The Authority of the Elected Branches of the Federal Government over Alienage and Immigration Matters Is Subject to Rational Basis Review

"[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs . . . ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). As a result, for almost as long as there has been a Constitution, courts have routinely deferred to the government's broad authority to legislate over matters of foreign affairs and national security. "As the Supreme Court suggested in *Marbury* and made clear in later cases, 'The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — the political — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)); *see also id.* at 194-96 ("Absent precedent, there could still be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government."); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

Inextricably bound up with the authority of the political branches over foreign affairs and national security matters is the government's power to regulate in the field of alienage and immigration. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). "Such matters are so exclusively entrusted to the political branches of

government as to be largely immune from judicial inquiry or interference." *Id.* at 589; *see also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) ("[A]lienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation."); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.").

In the contexts of deportation and exclusion, the government's power is thus plenary, *see Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), allowing it to regulate aliens even on the basis of their ideology and the content of their ideas. In *Harisiades*, for example, the Court held that the First Amendment did not prevent the government from choosing to deport, pursuant to the Alien Registration Act of 1940, a resident alien because he had formerly been a member of the Communist party. 342 U.S. 580. Likewise, the First Amendment posed no bar to the government choosing to deport, consistent with the Internal Securities Act of 1950, another individual due to his former membership in the Communist party. *Galvan v. Press*, 347 U.S. 522 (1954). And in *Kleindienst v. Mandel*, the Court held that the First Amendment rights of listeners in the United States did not bar the government from refusing to issue a visa to an alien because he espoused political views that rendered him ineligible for a visa under the Immigration and Nationality Act of 1952. 408 U.S. 753.

Even outside the context of deportation and exclusion, the Constitution permits the federal government to treat citizens differently from noncitizens and to draw distinctions

between classes of aliens. *See Mathews*, 426 U.S. at 80 ("Congress regularly makes rules that would be unacceptable if applied to citizens."). "[C]lassifications based on alienage . . . are permissible so long as the challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose." *Moving Phones P'ship v. FCC*, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (quoting *Mathews*, 426 U.S. at 83). In *Mathews*, for example, the Court unanimously upheld under rational basis review the denial of Medicare benefits to certain classes of aliens. 426 U.S. at 82-83 (holding that Congress could condition program eligibility of aliens on continuous residence for period of five years and admission for permanent residence). Similarly, in *Moving Phones Partnership*, the Court of Appeals for the D.C. Circuit upheld under rational basis review a statute that prohibited the grant of radio licenses to aliens and to corporations with more than a certain level of alien ownership or control. Noting that the ownership restrictions "reflect a long-standing determination to safeguard the United States from foreign influence in broadcasting," the Court of Appeals held that the limits were rationally related to this "national security policy." 998 F.2d at 1055-56 (internal quotation marks omitted).

Deference to the government's broad authority over immigration and alienage matters is particularly apt regarding political functions. In numerous cases the Supreme Court has subjected state laws that exclude aliens from participating in the process of self-government to rational basis review. In fact, the Supreme Court has expressly noted that "strict scrutiny is out of place when the restriction primarily serves a political function." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1981). Recognizing the "[s]tate's historical power to exclude aliens from participation in its democratic political institutions," the Court in *Sugarman v. Dougall* held that states could reasonably exclude aliens from holding high public office and from voting. 413 U.S. 634, 648-49 (1973) ("[I]mplicit in many of this Court's voting rights decisions is the notion

that citizenship is a permissible criterion for limiting" the rights to vote or hold public office.). "[O]ur scrutiny," the Court explained, "will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives . . . [and] constitutional responsibility for the establishment and operation of its own government." *Id*. at 648.

In *Foley v. Connelie*, the Court upheld under rational basis review a state statute requiring police officers to be United States citizens. 435 U.S. 291 (1978). And in *Ambach v. Norwick,* the Court similarly upheld under rational basis review a state provision that prohibited the certification as a public school teacher of any person not a citizen of the United States. 441 U.S. 68 (1979). The Court explained that "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Id*. at 73-74; *see also Cabell*, 454 U.S. at 439 (holding that state statute that required peace officers to be United States citizens was constitutional under lower level of scrutiny articulated in *Sugarman*).

The Supreme Court has applied strict scrutiny, on the other hand, to the exclusion of aliens as a class only to "'exclusions [which] struck at the noncitizens' ability to exist in the community' by denying them essential welfare assistance, educational benefits, or the right to engage in public employment or the practice of licensed professions," *i.e.*, those benefits that, "if withheld, would directly cause economic dependence or physical harm." *Moving Phones*, 998 F.2d at 1056 & n.3 (quoting *Foley*, 435 U.S. at 295) (alteration in original). As the Supreme Court has explained, "It would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship." *Foley*, 435 U.S. at 295 (internal quotation marks omitted).

The opportunity to make monetary contributions to candidates, unlike the ability to earn a living or receive emergency medical care, is "hardly a prerequisite to existence in a community." *See Moving Phones*, 998 F.2d at 1056. Indeed, only approximately 0.3% of the population availed themselves of the opportunity to make federal political contributions over $200 to a given recipient in the 2009-2010 election cycle.[10] Millions of nonimmigrant aliens have "exist[ed] in the communit[ies]" of this country for over forty years while enjoying many benefits of residence other than financial participation in American elections; Congress's choice to so exclude them is thus subject to rational basis review.

Finally, although efforts by United States citizens to influence policy through lawful contributions or expenditures and the subsequent election of like-minded candidates are permissible — *see Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) ("[A] substantial and legitimate reason . . . to make a contribution . . . is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.") (internal quotation marks omitted) — that analysis is inapplicable to foreigners' intervention in the process of self-government. *See infra* pp. 18-28. Courts review restrictions on campaign expenditures by *citizens* under strict scrutiny and limits on campaign contributions by *citizens* under intermediate scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 25, 44-45, 58-59 (1976) (concluding that while contribution ceilings at issue did not impermissibly impinge upon rights of "individual citizens and candidates," independent expenditure limits unconstitutionally restricted "ability of candidates, citizens, and associations" to exercise their First Amendment

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[10] *See* FEC, *Detailed Files about Candidates, Parties, and Other Committees*, http://www.fec.gov/finance/disclosure/ftpdet.shtml#a2009_2010 (last visited Dec. 16, 2010) (data revealing approximately 1 million unique contributors); U.S. Census Bureau, *Population Finder*, http://factfinder.census.gov/servlet/SAFFPopulation (last visited Dec. 21, 2010) (noting 2009 United States population of approximately 307 million).

rights). As the Supreme Court's cases involving aliens show, however, Congress is permitted to exclude foreigners from participation in self-rule where there is a rational reason for doing so. Indeed, *Citizens United* expressly disclaimed any application of its holding regarding corporate political expenditures to foreign nationals. *See* 130 S. Ct. at 911 (declining to address government's interest "in preventing foreign individuals or associations from influencing our Nation's political process"). Congress may prohibit noncitizens from having any influence on American policy through contributions or expenditures so long as its legislation withstands the lower level of judicial scrutiny applied to such alien exclusions.

C. Protecting the Nation's Self-Government from Foreign Interference Is a Legitimate Governmental Purpose

The constitutionality of prohibiting contributions and expenditures by foreign nationals follows inexorably from the most basic tenets of our democratic system of governance. "[A] democratic society is ruled by its people." *Foley*, 435 U.S. at 296. The process of self-government must therefore begin by identifying who "We the People" are who subscribe to the constitutional order and come within its protections. "Self government . . . begins by defining the scope of the community governed and thus of the governors as well . . . ." *Cabell*, 454 U.S. at 439.

The Supreme Court has repeatedly explained that citizenship vel non is a permissible means of determining who can directly participate in the nation's processes of self-government. "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State," *Ambach*, 441 U.S. at 75, and "[t]he right to govern is reserved to citizens." *Foley*, 435 U.S. at 297. Thus, "[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition . . . . Aliens are by definition

those outside of this community." *Cabell*, 454 U.S. at 439-40. The Court has "recognized a State's historical power to exclude aliens from participation in its democratic political institutions as part of the sovereign's obligation to preserve the basic conception of a political community." *Foley*, 435 U.S. at 295-96 (citation and internal quotation marks omitted). "[I]t represents the choice, and right, of the people to be governed by their citizen peers." *Id*. at 296. Thus, "it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions." *Id.* As these cases demonstrate, courts defer to legislative distinctions drawn between citizens and noncitizens in the area of direct political participation. "Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it." *Cabell*, 454 U.S. at 440.

The concept of citizenship is, indeed, ancient. "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950). In this country, it separates those the nation can presume to be loyal by virtue of birth or oath from those who are merely transient. Citizenship status, "whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ambach*, 441 U.S. at 75; *see also id.* ("[C]itizenship represents" an "unequivocal legal bond.")[11] *Id.* In order for persons to become

[11] The concept of self-government, of course, implies "others" who are not part of the nation's political community and who may not participate in the processes of governing. The federal government is vested with powers that do "not depend upon the affirmative grants of the Constitution," *Curtis-Wright*, 299 U.S. at 318, which the government can exercise to protect its sovereignty against infringement by foreign sources. As Chief Justice Marshall long ago explained:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from external source, would imply a diminution of its sovereignty . . . . This perfect equality

citizens through naturalization, they must publicly attest to their loyalty to the Constitution and acknowledge their concomitant obligations to the United States. They must swear "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; [and] (4) to bear true faith and allegiance to the same . . . ." 8 U.S.C. § 1448(a). An alien's "primary allegiance" is, conversely, to a "foreign power." *Zweibon v. Mitchell*, 516 F.2d 594, 657 (D.C. Cir. 1975).[12]

In light of the fundamental differences between citizens and noncitizens, Congress reasonably prohibited campaign contributions by foreign nationals. After Senator Fulbright's committee heard testimony on the efforts of foreigners to influence American elections through contributions, he spoke on the Senate floor of the importance of protecting "the integrity of the decision-making process of our Government" and "the growing use . . . of nondiplomatic means to influence Government policies." 111 Cong. Rec. 6984-85 (Apr. 5, 1965). Less than a decade later, after Watergate disclosures added to the public record of foreign contributions compiled by the Fulbright Hearings, Congress acted to ensure that neither foreign principals nor their agents, nor foreign nationals acting on their own, could influence American election campaigns. During

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> and absolute independence of sovereigns . . . has been stated to be the attribute of every nation.

Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136-37 (1812).

[12] Citizenship is an essential distinction drawn in numerous federal statutes, which provide for disparate treatment of aliens and citizens. *Mathews*, 426 U.S. 67, 78 n.12. Various federal statutes limit the private employment of aliens, *see* 12 U.S.C. § 72; the investments and businesses of aliens, *see* 12 U.S.C. § 619; and the benefits available to aliens, *see* 46 U.S.C. § 1171(a). The judicial code provides that non-United States citizens cannot serve as petit jurors. 28 U.S.C. § 1865(b)(1). And as observed by the *Mathews* Court, the entirety of Title 8 of the United States Code is "founded on the legitimacy of distinguishing between citizens and aliens." 426 U.S. at 78 n.12.

debate on his amendment, Senator Bentsen explained that the purpose of the prohibition was to ensure the integrity of United States elections and to limit influence over them to voters and those allegiant to the United States:

> [W]ithout this ban American elections will continue to be influenced by contributions of foreign nationals. I do not think foreign nationals have any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments. . . . The American political process should be left to American Nationals.

120 Cong. Rec. 8783 (Mar. 28, 1974). The views of Senators Fulbright and Bentsen regarding the pernicious influence of foreign money in American elections were hardly a unique product of the eras in which they served. During Congress's most recent revision to the foreign national prohibition, supporters again explained this purpose of the Act. *See* 148 Cong. Rec. H355 (Feb. 13, 2002) (statement of Rep. Kirk) ("In the wake of September 11, global security is one of the highest priorities for the United States. We must not undermine our nation's federal election process by leaving a gaping loophole for foreign nationals to exert their potentially harmful influence."); 147 Cong. Rec. S2423 (Mar. 19, 2001) (statement of Sen. Specter) ("We need to make it 100 percent clear that foreign nationals cannot contribute to U.S. political parties or candidates under any circumstances.").

Congress appropriately prohibits the direct political participation of foreign nationals whose loyalties lie elsewhere to "exclude aliens from participation in [this country's] democratic political institutions as part of the sovereign's obligation to preserve the basic conception of a political community." *Foley*, 435 U.S. at 295-96 (citation and internal quotation marks omitted).

D. Section 441e Rationally Relates to the Governmental Interest in Limiting Foreign Influence over American Elections[13]

Each time that Congress has enacted legislation limiting foreign involvement in American elections, it has done so against the factual backdrop of foreign interests actively seeking such involvement. From the Nazi propaganda of the 1930s through the influence-buying of the 1990s, foreign interests have consistently demonstrated that they will use their money to sway American elections when they can devise a way to do so. *See supra* pp. 2-11. Congress has studied these events extensively and has concluded that injections of foreign money into American political campaigns "threaten the integrity of our electoral system, foreign policy, and national security." S. Rep. No. 105-167 at 4577. Congress has therefore repeatedly and carefully refined the foreign national prohibition in response to attempts to circumvent it. This historical record and legislative history are real, concrete, and sufficient to show that section 441e is not "a 'wholly irrational' means of effectuating a legitimate government purpose." *Moving Phones*, 998 F.2d at 1056.[14]

The scandals of the past suggest what could recur without limit if the statute were declared unconstitutional as to all foreign nationals who temporarily work and reside in the United States, as plaintiffs request. (Compl., Request for Relief ¶ 1.) For example, the 1998

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[13] Because the challenged regulation, 11 C.F.R. § 110.20, does not differ substantively from section 441e, the Commission does not address the regulation separately in this brief. In any event, should a three-judge court be convened pursuant to BCRA section 403, it would not have jurisdiction to determine the constitutionality of a regulation. *See* BCRA § 403(a) (establishing procedure for "any action . . . to challenge the constitutionality of *any provision of this Act or any amendment made by this Act*") (emphasis added); *McConnell*, 540 U.S. at 223 (holding that BCRA review provisions do not apply to challenges to regulations).

[14] Although rational basis review is the appropriate standard in this case, *see supra* pp. 13-18, section 441e readily satisfies *any* level of scrutiny because of the important and compelling governmental interest in limiting foreign influence over American elections. *See supra* Part II.C, *infra* Part II.D. The provision is also closely drawn and narrowly tailored, for it, *inter alia*, does not apply to permanent legal residents, *see supra* p. 5 & n.2, and does not limit any alien's ability to engage in non-candidate issue speech, *see infra* p. 27.

Senate Committee report explored in detail the lengths to which the Chinese government was prepared to go to buy the loyalty of American officials, including through campaign spending. *See supra* pp. 8-9. The specter of foreign governments financing political candidates in the United States deeply troubled Congress and was cited repeatedly in the passage of BCRA section 303. *Id*. Nonetheless, if plaintiffs were to prevail in this case, even foreign nationals who work *directly* for a foreign government would be able to give money to candidates or to spend money advocating for or against them. Thus, a foreign intelligence agent living in Washington, D.C., and working in a foreign embassy — an individual paid by a foreign government to conduct espionage on the United States and harm American interests — would have a *constitutional right* to finance attack ads against American candidates for office. A prohibition on this conduct is clearly rational, and the Commission is aware of no legal authority holding that the Constitution prohibits Congress from restricting foreign governmental agents — or other persons of non-American allegiance — from infiltrating the American political system. *See supra* Part II.C.

Furthermore, although most of plaintiffs' currently planned contributions are to federal candidates and parties (*see* Compl. ¶¶ 13, 18), section 441e applies to all elections — federal, state, and local. 2 U.S.C. § 441e(a)(1)(A). The problem of influence-buying can be heightened in the state and local context, where campaigns are generally less expensive, so a large contribution would constitute a greater proportion of the funds needed to win office and thereby purchase more influence. *Cf. Randall v. Sorrell*, 548 U.S. 230, 252 (2006) (plurality) (examining contribution limits in comparison to cost of campaigns). Indeed, the 1998 Senate Committee report found at least one case in which a foreign national gave $100,000 to the elected treasurer of the state of California, *see* S. Rep. No. 105-167 at 971-72, 5576-81, 5584 — a substantial sum for any campaign, much less for most down-ballot state contests. Given the responsibilities that

many state elected officials hold — such as the investment of billions of dollars in pension assets[15] — the incentives to buy influence over such officers is great. *See id*. at 1186 (noting that fundraiser arranged meeting between business and state treasurer, resulting in business receiving "bond work" from state). Providing the means for foreign agents to capitalize on that incentive by bankrolling candidates would end the protection that section 441e has long provided to every state and local government in the United States. *See United States v. Kanchanalak,* 192 F.3d 1037, 1047-50 (D.C. Cir. 1999) (noting that Commission "consistently interpreted § 441e as applicable to federal, state, and local elections since 1976").

The problem of foreign influence in state and local elections is magnified by the fact that, apart from the nationwide prohibition of section 441e, some states place few or no additional restrictions on political contributions. Virginia and Oregon, for example, allow unlimited contributions to state candidates from any source.[16] While such states have made a policy decision to permit large contributions by United States citizens, that in no way implies that they would reach the same conclusion as to foreign nationals. *See* Nat'l Conf. of State Legislatures, *Prohibited Donors*, http://www.ncsl.org/Default.aspx?TabId=16557 (last visited Dec. 19, 2010) (noting that although some states have banned foreign contributions, state prohibitions are "unnecessary" in light of § 441e). Yet if section 441e were struck down on constitutional grounds, foreign nationals would be permitted to give millions of dollars to purchase access to, and loyalty of, candidates in those states.

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[15] *See* Calif. State Treasurer, *Responsibilities and Functions*, http://www.treasurer.ca.gov/inside/functions.asp (last visited Dec. 19, 2010).

[16] *See* Va. State Bd. of Elections, *Candidate Campaign Committees*, at 19, http://www.sbe.virginia.gov/cms/Campaign_Finance/2009_Cidate_Summary_Rev10-1-09.pdf (Oct. 1, 2009); Or. Sec'y of State, *Candidate 'Quick Guide' on Campaign Finance Reporting in Oregon*, http://www.oregonvotes.org/publications/candidatequickguide.html (last visited Dec. 19, 2010).

When foreign nationals working in the United States are considered in the aggregate, the justification for the foreign national prohibition becomes even more apparent. In 2009 alone, the government issued approximately 800,000 visas under the H-, J-, L-, O-, and P-visa categories, each of which allows the visa-holder to work in the United States, as well as over 350,000 student visas.[17] For the three-year period spanning 2007-2009, the government issued approximately 2.7 million work visas and over 1 million student visas. Thus, during the course of an election cycle, there are *millions* of nonimmigrant foreign nationals who have permission to live and work in the United States. A concerted financial effort by even a portion of this alien population could generate enough money to skew many congressional, state, or local elections.

Moreover, plaintiffs' complaint on its face encompasses all "foreign nationals" who "reside" and "work" in the United States — a category that seemingly includes foreign corporations. *See* 2 U.S.C. § 441e(b)(1) (defining "foreign national" to include "foreign principal"); 22 U.S.C. § 611(b)(3) (defining "foreign principal" to include corporations); 18 U.S.C. § 1391(c) (providing that, for venue purposes, "a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction"). While all corporations are prohibited from contributing directly to candidates, *see* 2 U.S.C. § 441b(a), the Supreme Court has rejected the distinction between individuals and corporations in the context of independent campaign spending. *See generally Citizens United*, 130 S. Ct. 876. If this reasoning were

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[17] Visa issuance data is available at Travel.State.Gov, *Classes of Nonimmigrants Issued Visas*, http://www.travel.state.gov/pdf/MultiYearTableXVI.pdf (last visited Dec. 19, 2010). Summary information regarding each type of nonimmigrant visa is available at Travel.State.Gov, *Types of Visas for Temporary Visitors*, http://travel.state.gov/visa/temp/types/types_1286.html (last visited Dec. 19, 2010). It is not clear from their complaint whether plaintiffs consider students to be "working" in the United States for purposes of plaintiffs' prayer for relief, but, regardless, the student "F" visa also allows students to work in many cases. *See* U.S. Citizenship & Immigration Servs., *Extension of Optional Training Program for Qualified Students*, http://www.uscis.gov/files/article/OPT_4Apr08.pdf (revised April 10, 2008).

applied to plaintiffs' broad request for relief for foreign nationals, it could open the door to millions — or even billions — of dollars of campaign advocacy by foreign corporations. Indeed, three of the five largest corporations in the world, with combined annual revenues of over $735 billion, are foreign corporations that do business in the United States.[18] Accordingly, all of the Commission's arguments regarding the need for section 441e to protect the United States from the influence of foreign individuals apply *a fortiori* to the influence that foreign corporations could exert over the entire American political system.

The foregoing concerns regarding concerted efforts by foreign nationals are not hypothetical. The 1998 Senate Committee noted that part of the Chinese government's plan to influence American elections involved a "strategy, under which PRC officials would organize Chinese communities in the U.S.," with the long-term goal of "develop[ing] viable candidates sympathetic to the PRC for future federal elections." *See* S. Rep. No. 105-167 at 2509. In 1996, this strategy was limited by section 441e's prohibition on using foreign nationals to "develop" candidates, at least financially. But if plaintiffs were to prevail in this lawsuit, that would change: With approximately 140,000 Chinese nationals granted work and student visas in 2009 -— and roughly 340,000 total from 2007-2009 — a collection of contributions made by temporarily resident Chinese nationals at the direction of the Chinese government could easily raise sufficient funds to skew or determine outright the result of a targeted election.[19] *Cf.* S. Rep. No. 105-167 at 5685 (noting congressional election in which candidate won by 898 votes after raising almost $150,000 in foreign funds). And this problem, of course, is in no way limited to

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[18] *See* Fortune, *Global 500*, http://money.cnn.com/magazines/fortune/global500/2010/full_list/index.html (last visited Dec. 19, 2010) (listing Royal Dutch Shell, BP, and Toyota Motor).

[19] Visa data by country of visa recipient is available in Microsoft Excel format at http://www.travel.state.gov/xls/FYs97-09_NIVDetailTable.xls (last visited Dec. 20, 2010).

China, as countries whose governments openly promote harm to the United States are well-represented in the pool of temporary workers and residents. For example, from 2007-2009 the United States issued thousands of student and work visas to citizens of Iran — a nation that has been formally designated a "state sponsor of terrorism" since 1984. *See* U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/s/ct/c14151.htm (last visited Dec. 20, 2010).

While the United States government may continue to welcome citizens of these countries for a variety of reasons, Congress must have the power to admit such persons for temporary work without also necessarily allowing them access to the core of American democracy. Temporarily resident aliens do have First Amendment rights to speak out on the issues of the day, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), and section 441e does not in any way prevent them from doing so. Indeed, to the extent that plaintiffs "hold strong political views on a variety of matters of public concern" and "wish to express and actualize those views" (Compl. ¶ 2) — whether it be on "the environment, . . . same-sex marriage, and . . . 'net neutrality'" (*id.* ¶ 12) or on "the health-care system . . . tax reductions and . . . increasing economic liberty" (*id.* ¶ 17) — they may do so at will. With respect to candidate elections, however, Congress has determined, in the exercise of its constitutionally imposed responsibilities, that such access would pose too great a threat to the national security of the United States, and this Court owes deference to that determination.[20]

[20] Federal Election Commission employees — citizens of the United States whose positions exist only by virtue of congressional action — are similarly prohibited by law from making campaign contributions to Members of Congress. 5 U.S.C. § 7323(b)(1). Such restrictions do not violate the First Amendment. *See generally Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding statute that prohibited state government employees from, *inter alia*, "taking part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote") (internal quotation marks and brackets omitted).

Thus, given the historical record and the measured congressional response thereto, the foreign national prohibition is rationally related to Congress's interest in self-government and in protecting American democracy from foreign threats.

III. CONCLUSION

By the grace of Congress and the President, millions of foreign nationals temporarily reside and work in the United States. The ability to finance American elections, however, is a right held only by the citizens and others who owe permanent allegiance to this nation. In legislating accordingly, Congress is well within its constitutional authority to protect the security and democracy of the United States. The Commission thus respectfully moves this Court to dismiss plaintiffs' complaint for failure to state a claim on which relief can be granted.

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