No. 11-275

IN THE

Supreme Court of the United States

BENJAMIN BLUMAN, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The suggestion that this case presents no "substantial" question and should be disposed of summarily is, frankly, disingenuous.

The Government opens with the claim that the decision below follows from "straightforward application of settled legal principles." (MTD.10.) But this Court has *never* held that lawful resident aliens have any less right to speak than citizens do. This Court has *never* held that Congress may prohibit all campaign contributions from specified individuals. This Court has *never* permitted a limit on individuals' independent expenditures, much less a complete ban. This Court has *never* upheld a legislative finding that a class of residents has no role to play in political debate. This Court has *never* recognized as legitimate, let alone compelling, a state interest in preventing constitutionally protected speakers from influencing the American public. And this Court has *only twice* in its history upheld a restriction on speech under strict scrutiny.

If the constitutionality of § 441e were settled, this Court would not have expressly reserved the question just two years ago, in *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). Nor would scholars *friendly* to campaign finance restrictions have concluded, following over a decade of robust academic debate, that it is "difficult to see" how the statute could survive under current law. Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605-610 (2011); *see also* Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J. L. & PUB. POL'Y 663 (2011); 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); Note, *"Foreign" Campaign Contributions and the First Amendment*, 110 HARV. L. REV. 1886 (1997).

In fact, the Government's motion is irreconcilable with this Court's doctrine, and it is *Appellants'* position that follows from "straightforward application of settled legal principles." The Government questions whether resident aliens have First Amendment rights at all. (MTD.27.) But this Court has said, in no uncertain terms, that "resident aliens have First Amendment rights." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing *Bridges v. Wixon*, 326 U.S. 135, 148 (1945)). The Government asserts a compelling interest in preventing constitutionally-protected persons from "attempting to sway American elections." (MTD.2.) Yet this Court has repeatedly affirmed that "fear that speech might persuade provides no lawful basis for quieting it." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011). The Government protests that campaign advocacy cannot be differentiated from "participation in democratic self-government." (MTD.22.) This Court, however, has always distinguished between "performing a governmental act" and exercising "personal First Amendment rights." *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 n.5 (2011). The Government implicitly suggests that it has a stronger interest in preventing political *spending* by aliens than in limiting their speech on a soapbox. (MTD.10, 26.) But this Court squarely rejected that distinction in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

Notwithstanding its ambitious opening claim, the Government's affirmative argument—for upholding under strict scrutiny a flat ban on core political speech by lawful residents of the United States—ultimately hinges on nothing more than an alleged "insight that has guided the Court's equal-protection jurisprudence." (MTD.13.) This "insight"—that aliens may be treated differently from citizens with respect to "political functions of government"—has no force in defending a ban on political *speech*. Even if it did, however, extension of that "insight" to support a compelling interest in silencing political speech would be an unprecedented holding with wide-ranging implications. However this Court resolves it, the question presented by Appellants' challenge is undoubtedly a "substantial" one.

I. "SETTLED LEGAL PRINCIPLES" PROVIDE THAT THE FIRST AMENDMENT PROTECTS RESIDENT ALIENS.

The starting point of Appellants' argument is that, as lawful resident aliens, they are entitled to the full protections of the First Amendment. The Government initially describes this as an "unremarkable proposition." (MTD.14.) Quite so. Indeed, were it otherwise, individuals such as Appellants—who have lawfully resided, worked, and paid taxes in the United States for years—could be imprisoned for criticizing the President in a park or practicing their religion of choice.

But then the Government hedges. It disputes that Appellants are entitled "to invoke every aspect of 'the freedom of speech' that the First Amendment guarantees *to citizens,*" and questions whether they may claim "the full panoply of rights guaranteed *to citizens*." (MTD.27 (emphases added)). It contends,

instead, that "[c]itizenship is a permissible criterion" for determining who may invoke the constitutional right to freedom of speech. (MTD.15.)

The district court assumed that § 441e was subject to strict scrutiny; that the Government finds it necessary to retreat from that opinion itself demonstrates the need for plenary review. But, in all events, the claim that the First Amendment does not apply in full to resident aliens is hardly "settled." To the contrary, "[i]t is well settled that 'freedom of speech and of press *is* accorded aliens residing in this country.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring in part and in the judgment) (emphasis added). In fact, Appellants are aware of *no* decision by *any* court holding—or even hinting—that lawful resident aliens lack full First Amendment rights. And the Government does not cite one.

At times, the Government suggests (again, without citation) that First Amendment rights accrue gradually, with various "aspect[s]" of the freedom of speech kicking in at different indeterminate times, as an alien develops greater connections with the United States. (*See* MTD.27.) But there is no support for such a piecemeal, standardless approach, under which an alien is entitled to constitutional protection only after a case-by-case analysis of the activity in question and the alien's connections to the United States. Aliens obtain the protections of some constitutional provisions, such as the Due Process Clause, upon entering the "territorial jurisdiction" of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). They may invoke other provisions, like the First and Fourth Amendments, once they

"lawfully enter[] *and reside[]* in this country." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring) (emphasis added)). And they receive a final set of rights, "to vote, or to run for elective office," upon naturalizing as citizens. *Foley v. Connelie*, 435 U.S. 291, 296 (1978). To the extent that the Government is offering an alternative "sliding scale" approach to constitutional rights, it is unworkable and without legal precedent—certainly not a "settled legal principle."

Any attempt to justify the decision below on the alternative ground that resident aliens like Appellants have less than full-fledged First Amendment rights would be both novel and highly important, affecting a substantial number of people living in the United States as to a wide range of constitutional liberties. This Court should not accept any such justification without at least granting plenary consideration.

II. "SETTLED LEGAL PRINCIPLES" ESTABLISH THAT SPEECH IS *NOT* "PARTICIPATION" IN GOVERNMENT.

When the Government does attempt to defend § 441e under strict scrutiny, its principal claim is that resident aliens may permissibly be precluded from "participat[ing] in the fundamental operations of democratic self-government." (MTD.14.) Like the district court, the Government relies exclusively on equal protection cases—cases that apply rational basis review, not strict scrutiny. (MTD.11-12.) The Government admits as much, but insists that the "insight that has guided the Court's equal protection jurisprudence in this area . . . is equally relevant to the First Amendment inquiry here." (MTD.13.)

It is not. That certain criteria (like alienage, or prior convictions) are reasonable bases for disparate treatment as to voting or government hiring does not imply that aliens or felons lack First Amendment rights. In all events, as Appellants have explained, political *speech* is not *participation in government*. (JS.21-24.) The two are fundamentally different as a matter of theory and doctrine.

This Court has correctly recognized that, as a matter of constitutional history and understanding, "a democratic society is ruled by its people." *Foley*, 435 U.S. at 296. As such, aliens have no right to govern American society, whether directly (running for office) or indirectly (voting), on a large scale (as President) or within a minor bureaucratic fiefdom (as a police officer or school teacher). *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley*, 435 U.S. 291. Appellants have no quarrel with these decisions.

But they have no relevance here. Speaking *about* government is not participating *in* it. Campaign advocacy seeks *to persuade*, not *to govern*. Appellant Bluman, by distributing pamphlets in support of the President, is not "ruling" American society. Nor is Appellant Steiman, when she makes a $100 candidate contribution. This is participation in political *dialogue*, to be sure, but not in *self-government*. Only if Americans find Appellants' views convincing will those *citizens* choose to govern themselves accordingly. The Government's theory ignores voters and demeans their role as independent actors; on its view, campaign advocates themselves pull the lever rather than relying on the persuasive effect of their speech to convince *voters* to do so.

The Government's vision of political speech is not only demeaning to voters, but also contrary to this Court's cases. In *Carrigan*, a restriction on *voting* for a bill while under a conflict of interest was treated differently from a restriction on *debating* that bill, because "[t]he former is performing a governmental act . . . the latter is [an exercise of] personal First Amendment rights." 131 S. Ct. at 2351 n.5. And while this Court has recognized that the right to govern is a zero-sum game, in which one vote dilutes others, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964), it has squarely rejected that view of the marketplace of ideas: When it comes to political expression, "more speech, not less, is the governing rule," *Citizens United*, 130 S. Ct. at 911. The Government entirely ignores these crucial distinctions between political speech and participation in self-government.

The Government also refuses to admit the inescapable implications of its position that the two are one and the same. *First*, if paid-for campaign speech constitutes proscribable participation in government, so too must campaign speech on a soapbox. *See Buckley*, 424 U.S. at 16. *Second*, if election-related speech can be prohibited as participation in self-government, there is no reason why issue advocacy, petitioning, or contacting elected representatives—all of which equally relate to democratic government—could not also be prohibited. *Third*, if the U.S. may forbid aliens to participate in American self-government through campaign spending, then Oregon may prohibit non-Oregonians from participating in Oregon self-government through such spending. *But see Vannatta v. Keisling*, 151 F.3d 1215, 1218 (9th Cir. 1998) (invalidating such a law). The Government responds

that non-residents of Oregon are members of the *American* political community (MTD.16), but the essential point is that they are not members of *Oregon's* political community.

The Government's refusal to acknowledge these striking implications reflects the novelty and ambition of its endeavor. The Government relies on a phrase, "democratic self-government," plucked from an inapposite body of equal-protection law, and attempts to apply it for the first time as a ground for banning speech. Yet the Government offers no definition of that critical phrase and no basis for limiting the striking implications of its position. If § 441e is to be upheld on this theory, it must at least be following plenary consideration and a reasoned opinion defining and explaining its limits.

III. "SETTLED LEGAL PRINCIPLES" MAKE CLEAR THAT CONGRESS HAS NO LEGITIMATE INTEREST IN PREVENTING "INFLUENCE" ON VOTERS.

The Government, like the district court, is open about the goals of § 441e. The purpose of silencing resident aliens is "to prevent [them] from attempting to sway American elections." (MTD.2.) Congress worried that aliens' campaign speech might "interfere" with "American democratic governance," by *convincing Americans* to take action. (MTD.10.)

That this could be a "compelling" interest under strict scrutiny—analogous to prevention of terrorism, *see Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010)—is a novel claim with far-reaching implications. How anyone could believe that "settled legal principles" make it so is beyond comprehension. Over and over, this Court has said just the opposite. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2671 ("That the State

finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."); *Citizens United*, 130 S. Ct. at 908 ("The First Amendment confirms the freedom to think for ourselves."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("[T]hat advocacy may persuade the electorate is hardly a reason to suppress it."). Against all this, the Government does not cite *any* case recognizing an interest in "influence prevention" as even *legitimate*, much less *compelling*.

The Government contends that it may stamp out influence from resident aliens' speech because Congress has determined that resident aliens "have no legitimate role to play" in the political debate. (MTD.17 n.6.) But, in the realm of political speech, that is not Congress' decision to make. Rather, the Constitution assigns to *voters* "the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791-92.

If this Court is to add a new "compelling interest" to the strict scrutiny lexicon—especially one that, at best, appears to be in considerable tension with basic First Amendment values—it certainly should not do so on a summary basis, without plenary review.

IV. UNDER "SETTLED LEGAL PRINCIPLES," § 441e IS FATALLY OVERBROAD AND UNDERINCLUSIVE.

Having staked out the novel position that resident aliens may be barred from speaking based on a "compelling interest" in silencing their speech, the Government attempts to explain away the failures of § 441e to serve its supposed goal. Its attempt reduces strict scrutiny to a shadow of its normal self and only highlights how the Government's position steers it into uncharted constitutional waters.

If Congress believed a ban on campaign speech was justified by a compelling need to root out non-citizen influence on democratic actors, then it should also have banned aliens from lobbying or spending on ballot initiatives. As to the latter, the Government contends that "this Court has firmly distinguished the governmental interests in safeguarding candidate elections from the interests implicated by ballot measures." (MTD.24 (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981)). But, as Appellants explained (JS.26), that case distinguished candidate elections based on the risk of *corrupting candidates*. That is irrelevant where the alleged state interest is not preventing corruption but rather preventing "influence" on voters.

Likewise, if Congress sought to prevent non-citizen influence on democratic governance, it should have banned campaign spending by LPRs. Yet § 441e *consciously excludes* LPRs. The Government responds that LPRs have more "durable" ties to the United States (MTD.22), but, as the Government's equal-protection cases hold, those ties do *not* allow them to participate in American self-government—which the Government's theory makes paramount.

The proffered defense of § 441e's overinclusion fares no better. While the law concededly bars campaign spending even by those aliens who *can* participate in government, the Government says Appellants cannot raise this objection because *they* cannot so participate. (MTD.25.) But the narrow tailoring requirement calls for just this type of inquiry. *See, e.g.*, *Citizens United*, 130 S. Ct. at 911. Analyzing overinclusion routinely requires looking at how the challenged law treats non-litigants.

Section 441e also goes too far by prohibiting contributions even to *domestic* advocacy groups like the Club for Growth. The Government's response is mysterious at best. It seems to suggest—contrary to the FEC's position below and the district court's holding (App.6a)—that such donations are *permitted*. (MTD.25.) But it also says that donations to advocacy groups are *prohibited* if the funds "are given or spent in connection with an election." Since the Club for Growth does spend *some* funds on independent expenditures, that suggests that aliens' donations to it *are* forbidden. The resulting uncertainty concerning whether resident aliens may lawfully contribute to § 501(c)(4) organizations is itself enough reason for this Court's plenary review.

Finally, § 441e cannot survive unless the Government shows that less-restrictive alternatives, such as special disclosure requirements, would be insufficient. The Government says that "Congress tried that approach in 1938 [and i]t did not work." (MTD.26.) This is revisionist history. What Congress tried was to require disclosure by agents of *overseas* principals. (MTD.2.) It "did not work" because it did not prevent foreign agents from "funneling campaign contributions" from *overseas* or prevent *overseas* principals from spending directly. (MTD.2-3). It was to fill *this* gap that Congress banned contributions from all foreign nationals, except permanent residents. (MTD.3-6.) Despite its artful wording, the Government's historical overview does not contain a single anecdote in which Congress expressed concern about the speech in this case: political spending by a U.S. resident not on behalf of an overseas principal. And the Government cites no evidence suggesting that, if Congress had concerns

with such speech, strict disclosure requirements would not have ameliorated them.

Indeed, far from showing a concerted attempt to stamp out the political speech of resident aliens, the history of § 441e demonstrates that Appellants were almost certainly swept up unintentionally in efforts to ban political spending from overseas, whether funneled indirectly through an agent or injected directly from abroad. (JS.4.) It is therefore not surprising that § 441e fails to align with the Government's *post hoc* vision of it. The statute was not designed to eliminate the influence of political speech by resident aliens, is not remotely tailored to that end, and cannot be upheld on that basis.

CONCLUSION

The Court should deny the Government's motion to dismiss or affirm, note probable jurisdiction, and set this case for oral argument.

Respectfully submitted,

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