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

BRIEF OF *AMICI CURIAE* THE ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS AND THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Other Authorities

INTEREST OF *AMICI CURIAE*

Amicus Curiae the Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a coalition of 130 community neighborhood advocacy organizations that promotes the rights of refugees and immigrants to full and equal participation in the civic, cultural, social, and political life of our diverse society.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a nonprofit organization accredited by the Board of Immigration Appeals to provide immigration assistance. NIJC represents, among others, asylees, refugees, survivors of domestic violence, victims of human trafficking, and nonimmigrant fiancées and spouses of U.S. citizens; all of whom reside permanently in the United States in nonimmigrant status.

The speech restriction challenged here, 2 U.S.C. § 441e, applies to all foreign nationals except for those designated "permanent residents." This sweeping prohibition not only imposes an impermissible restriction on the First Amendment rights of individuals *amici* serve, but by its very existence lends credence to the erroneous but prevalent view that foreign nationals living within our borders are not entitled to the protections of the Constitution. *Amici* therefore have a strong interest in Appellants' constitutional challenge to § 441e.[1]

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Pursuant to this Court's Rule 37.2, ICIRR provided notice of its intent to file

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to clarify two crucial issues regarding the First Amendment rights of aliens. First, the Court can confirm that aliens present in the United States are protected by the First Amendment as soon as they have "developed sufficient connection with this country to be considered part of [the national] community," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); that at a minimum this includes all aliens who, like Appellants here, are lawfully and voluntarily present in the United States, *cf. Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893); and that the same constitutional levels of scrutiny apply to restrictions on such persons' speech as would apply to speech by similarly situated U.S. citizens. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952).

Second, assuming *arguendo* that the Constitution would permit intrusion into the political speech of some non-citizens, *see Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (reserving "the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process"), the Court can clarify that the constitutional line is not conveniently coterminous with what the Immigration and Nationality Act ("INA"), 66 Stat. 163 (1952), defines as "nonimmigrants," and that by adopting this definition as the basis for its speech restrictions, § 441e therefore fails strict scrutiny.

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this brief to counsel of record for all parties more than 10 days before the filing. All parties consent to the filing.

"Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (internal quotation marks omitted). The district court recognized this rule in name, Jurisdictional Statement Appendix ("J.S. App.") 9a, but ignored it in application. Appellants have pointed out that the district court relied almost exclusively on rational basis cases in finding a compelling government interest in excluding foreign voices from political discourse. Jurisdictional Statement ("J.S.") 9. *Amici* will focus on the district court's failure to ensure that the prohibition is narrowly tailored to the supposed governmental interest.

Even assuming a compelling governmental interest in "preventing foreign influence over the U.S. political process," J.S. App. 13a, the district court made no effort to determine whether § 441e's prohibition reaches only those non-citizens whose speech would reflect "foreign influence." Instead, it accepted as "narrowly tailored" for strict scrutiny purposes the statutory line in the INA distinguishing "lawful permanent residents" from other aliens lawfully admitted and residing in the United States. United States citizens residing abroad, foreign citizens visiting the United States, foreign citizens lawfully residing in the United States, and even some United States citizens residing in the U.S. all bear some degree of "foreign influence" in their speech. Distinguishing between "lawful permanent residents" and other lawful residents may well serve certain administrative

purposes—say, facilitating pre-admission inspections—but it cannot support the kind of narrow tailoring that strict scrutiny constitutional analysis requires.

For one thing, strict scrutiny requires more than mere conjecture that "lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors." J.S. App. 19a. In many contexts, the INA's designation of certain aliens as "permanent residents" stems from factors that bear little resemblance to ordinary notions of "residence." At the very least, narrow tailoring analysis requires a court to test its assumption that lawful permanent residents are indeed quasi-citizens and to ask whether other alien residents are likewise "more similar to citizens than visitors." J.S. App. 19a.

The history and nature of the distinction between "permanent" residents and other foreign nationals reveals it unfit to bear the heavy constitutional weight the district court placed on it. The statutory category of "permanent" residents was coined by Congress in the 1920s, and an examination of its contours shows that they have much more to do with administrative convenience and political expedience than with the actual strength and permanence of a foreign citizen's connections with this country. As a result, the INA and implementing regulations expressly contemplate that many thousands of foreign citizens are admitted to this country on technically "nonpermanent" visas despite having the entirely legitimate expectation of living here for the rest of their lives, or for many years. With respect to refugees in particular, the statutory scheme plainly contemplates that persons admitted as

nonpermanent residents will remain in the United States indefinitely and later be converted to permanent resident status as a matter of course. By contrast, even persons approved for "permanent" residence remain citizens of foreign nations and are free to move back home after a much shorter time in this country than is spent by many "nonpermanent" residents.

In any event, narrow tailoring under strict scrutiny, as opposed to close fit under intermediate scrutiny, requires a court to be more exacting in its demand that the prohibitory means match the policy ends. Criminalizing the speech of all persons who happen not to carry a green card simply sweeps too broadly. It assumes that all alien nonimmigrants, however transient or permanent, are infused with "foreign influence"—exactly the kind of overinclusive generalization that narrow tailoring under strict scrutiny seeks to weed out.

ARGUMENT

I. THERE IS NO MEANINGFUL CONSTITUTIONAL DISTINCTION BETWEEN ALIENS CLASSIFIED AS "PERMANENT RESIDENTS" UNDER THE INA AND OTHER FOREIGN CITIZENS RESIDING IN THIS COUNTRY.

In determining that § 441e satisfies strict scrutiny, the district court assumed that the distinction between permanent and nonpermanent residents is so great that nonpermanent residents are entitled to lesser constitutional protections than permanent residents. *See, e.g.,* J.S. App. 22a (noting that extending the ban to permanent residents "would raise substantial questions"). This assumption is flatly wrong: that distinction cannot withstand scrutiny, let alone *strict* scrutiny, with respect to many "nonpermanent" residents.

A. "Permanent" Residence Has Never Been Regarded as a Relevant Constitutional Status.

The INA distinguishes between "permanent residents," also known as "immigrants," who are exempted from § 441e, and "nonimmigrants." *See* 8 U.S.C. § 1101(a)(15) & (20). Lengthy portions of the INA and related regulations are devoted to describing the nonimmigrant classes and the particular rules that apply to them. *See id.*; 8 C.F.R. § 214.1(a).

This distinction between "immigrant" and "nonimmigrant" aliens—or in other words, between "permanent" resident aliens and others—has no Constitutional roots. In defining the scope of First

Amendment rights, this Court has recognized that, while aliens *outside* the country cannot claim First Amendment protections, *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) the Constitution protects "aliens residing in the United States *for a shorter or longer time*," *Fong Yue Ting*, 149 U.S. at 724 (emphasis added).[2] Indeed, the Court has noted that the applicability of constitutional rights held by "the people" does not depend on residence at all, but rather on whether a particular alien is within "a class of persons who are part of [our] national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. In *Verdugo-Urquidez*, for purposes of this analysis the Court ignored the foreign residency of the alien in question. *Id.* at 262; *cf., e.g., Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (foreign national's authorized once-a-month visits and "acquiescence in the U.S. system of immigration

[2] As commonly understood, of course, having a "residence" in the United States does not require that an individual be a "permanent" resident. *See, e.g.*, Black's Law Dictionary 1335 (8th ed. 2004) (defining "residence" as "[t]he act or fact of living in a given place for some time"); Black's Law Dictionary 1473 (4th ed. 1957) (defining "residence" as "[a] factual place of abode" or "[l]iving in a particular locality," and "reside" as "[l]ive, dwell, abide, sojourn, stay, remain, lodge"); *Savorgnan v. United States*, 338 U.S. 491, 504–05 & n.24 (1950) (contrasting "residence" with "permanent residence," in the context of a denaturalization statute). Indeed, the government itself recognizes as much when it suits its purposes. *See, e.g.*, 26 U.S.C. § 7701(b)(3)(A) (deeming an alien present in the United States for half the days in a tax year a "resident" for income tax purposes).

constitute her voluntary acceptance of societal obligations, rising to the level of 'substantial connections'").

Instead, the distinction between "permanent" and "nonpermanent" residents is purely a statutory one, and of relatively recent vintage. For nearly a century after the adoption of the Constitution, Congress did little to regulate the admission of aliens to this country.[3] Congress did not begin forbidding the admission of certain classes of persons until the late 19th century and, even then, with minor exceptions,[4] made no distinctions based on a foreign citizen's intended length of stay in this country. *See, e.g.*, Immigration Act of 1875, ch. 141, § 3, 18 Stat. 477, 477 (excluding criminals and prostitutes); Immigration Act of 1891, ch. 551, § 1,

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[3] Early Congresses required persons wishing to be *naturalized* as citizens to declare in advance their intention to do so, but imposed no similar requirement with respect to incoming aliens' intended length of stay. *See, e.g.*, Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414; Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566–67.

[4] *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, § 3, 22 Stat. 58, 59 (permitting excluded aliens to come ashore temporarily if they were bound for a foreign port but made an emergency landing in the United States); Chinese Exclusion Act of 1902, ch. 641, § 3, 32 Stat. 176, 177 (temporary admission for workers in exhibitions or concessions); Immigration Act of 1903, § 19, 32 Stat. 1213, 1218 (suspension of deportation for cooperating witnesses); Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898–99 (admission for those in immediate and continuous transit through the United States); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876–77 (permitting otherwise-barred "travelers for curiosity and pleasure" or persons in continuous transit).

26 Stat. 1084, 1084 (excluding persons likely to become public charges, persons with contagious diseases, and polygamists); Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (excluding the ill and disabled, persons unable to support themselves, beggars, and others); *id.*, §§ 38–39, 32 Stat. at 1221–22 (excluding anarchists and revolutionaries); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–76 (excluding alcoholics, illiterates, and persons from a large region of Asia).[5]

Only after Congress decided in the 1920s to start imposing restrictions on the number of aliens it would accept from certain countries did Congress begin to comprehensively distinguish between "immigrants" (who would count toward the quota for their country of origin) and persons merely visiting or passing through (who would not). *See* Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (establishing

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[5] Indeed, in the late 1800s and early 1900s the political branches considered and rejected various bans on incoming foreigners who did not intend to stay permanently. *See, e.g.*, H.R. Rep. No. 54-1597, at 1 (1896) (recommending legislation preventing aliens from "com[ing] to the United States with no intention of making this country their permanent abode"). One such bill was vetoed in 1897 by President Grover Cleveland, who in his veto message deemed the restriction "illiberal, narrow, and un-American." Veto Message of President Grover Cleveland, Mar. 2, 1897, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=70845&st=&st1=#ixzz1ZZSrTrTR. (discussing H.R. 7864, 54th Cong., at § 4 (1st Sess. 1896)) Decades later, a House Report criticized a similar bill as "of apparently but slight practical value," noting that "its enforcement would necessitate the accurate ascertainment of the intention of the persons thereby affected." H.R. Rep. No. 64-1291, at 3 (1917).

quota system). Thus, for example, the Immigration Act of 1924 excluded from "immigrant" status persons coming to this country as government officials, tourists or business visitors, aliens in continuous transit through the country, seamen, and treaty traders. Immigration Act of 1924, ch. 190, § 3, 43 Stat. 153, 154–55.

As this Court recognized, the statutory category of "immigrants" that Congress created included many aliens who would not ordinarily be regarded as "residents" of the United States at all, let alone "permanent" ones. *See Karnuth v. United States,* 279 U.S. 231, 242–43 (1929) ("The term ['immigrant' in the 1924 Act] thus includes every alien coming to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the [statute's nonimmigrant] exceptions."). Thus, although the term "lawfully admitted for permanent residence" developed as a means of referring to those admitted under "immigrant" status, *see United States ex rel. Stapf v. Corsi*, 287 U.S. 129, 132–33 (1932); *Werblow v. United States*, 134 F.2d 791, 792 (2d Cir. 1943); INA, ch. 477, § 101(a)(20), 66 Stat. at 169, that term plainly included persons who had not designated the United States their indefinite permanent residence.

The INA, which was enacted in 1952 and (as amended) remains the governing statute in the immigration field, followed the same approach of designating as "immigrants" all aliens save those who fall within statutory exceptions. *See* 8 U.S.C. § 1101(a)(15).

B. Many "Nonimmigrant" Residents Have Just As Strong A Connection To This Country As Many "Immigrants."

Since their first enactment, the statutory "nonimmigrant" categories have hypertrophied both in number and in complexity, producing reams of regulations making classifications that have little or nothing to do with how permanently an alien intends to remain in the United States. As a result, a great many people who are permitted by the current immigration scheme to live in this country indefinitely, or for many years, are nevertheless technically categorized as "nonpermanent," and thus come within § 441e's bans on political speech.

In many cases, Congress has decided to permit aliens to live in this country permanently, but has required them to wait for years to obtain technical "immigrant" status due to limitations on the number of permanent visas available. A prime example is the case of persons admitted as refugees or who are granted asylum after their arrival. Such persons are not designated "permanent residents" under the INA and have no guarantee of obtaining that technical status. *See* 8 U.S.C. §§ 1157(a), 1158(c)(2); 8 C.F.R. §§ 209.1(a) & (b), 209.2. Yet both groups are entitled by law to apply for permanent resident status after having lived here for one year. *See* 8 C.F.R. § 209. Moreover, those who obtain asylum are typically authorized to remain in the United States indefinitely, *see* 8 C.F.R. § 208.14(e); refugees who may also remain in this country indefinitely, perhaps for years, while their applications for permanent residency are pending, *see Romanishyn v.*

Att'y Gen., 455 F.3d 175, 182 (3d Cir. 2006). If a refugee is granted permanent residence, the grant is retroactive to the date of his or her arrival. 8 U.S.C. § 1159(a)(2). Similarly, while non-citizen spouses, fiancé(e)s, and children of citizens or lawful permanent residents are not automatically granted "permanent resident" status, tens of thousands of them are authorized to reside and work in this country indefinitely until an immigrant visa becomes available. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(K), (V); 8 C.F.R. §§ 214.2(k)(8), (10)(i), 214.15(g). These groups are not negligible in size: from 2007 through 2010, the President authorized the admission of 310,000 refugees to the United States,[6] and approximately 40,000 persons were granted asylum.[7] In the same period, nearly 250,000 people were admitted as spouses or children of U.S. citizens or permanent residents.[8]

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[6] Presidential Determination No. 2009-32, 74 Fed. Reg. 52,385 (Sept. 30, 2009); Presidential Determination No. 2008-29, 73 Fed. Reg. 58,865 (Sept. 30, 2008); Presidential Determination No. 2008-1, 72 Fed. Reg. 58,991 (Oct. 2, 2007); Presidential Determination No. 2007-1, 71 Fed. Reg. 64,435 (Oct. 11, 2006).

[7] U.S. Dep't of Justice Exec. Office for Immigration Review, Office of Planning, Analysis & Technology, *Immigration Courts Asylum Statistics*, 2007–2010, *available at* http://www.justice.gov/eoir/efoia/foiafreq.htm (follow links for "FY2010," "FY2009," "FY2008," and "FY2007").

[8] *See* Randall Monger and Megan Mathews, *Annual Flow Report: Nonimmigrant Admissions to the United States: 2010* ("2010 Flow Report"), p. 5 Table 3, http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2010.pdf; Randall Monger and Macreadie Barr, *Annual Flow Report: Nonimmigrant Admissions to the United States: 2009* ("2009 Flow Report"), p.

The legal status of these persons is purely a matter of administrative classification, and bears no relation to their actual intention or likelihood to make this country their permanent home. The district court's suggestion that such people are mere "temporary visitors" with only a "short-term interest in the national community," whose speech may be restricted by Congress in the interest of "minimizing *foreign* . . . influence," J.S. App. 19a, thus is inconsistent with reality. That is particularly true with respect to refugees: such individuals must show that they are "unable or unwilling to return to, and . . . unable or unwilling to avail [themselves] of the protection of, [their home] countr[ies] because of persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42). The notion that those who come to the United States for the express purpose of escaping persecution by their own government are likely to then support some "foreign" interest—presumably that of their persecutor—in U.S. elections is nothing short of absurd. Even if it could be assumed that refugees may seek to influence U.S. elections to help their former countrymen escape the same persecution, speech aimed at encouraging the United States to help end persecution by foreign governments is hardly the kind of "foreign influence" the government might have a compelling interest in suppressing.

Other immigration categories reflect the same congressional intent to ultimately permit nonimmigrants to live in the United States on a

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3 Table 1, http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2009.pdf.

permanent basis. Many immigration regulations permit a foreign citizen to have a "dual intent"—entering the country as a nonimmigrant, but simultaneously applying for permanent residence while residing here in that "temporary" status. *See, e.g.*, 8 C.F.R. § 214.2(e)(5), (h)(16)(i), (l)(16), (o)(13), (p)(15), and (r)(15). These individuals (and their families) are authorized to live and work in the United States, often for years at a time with indefinite renewals, and may—with the government's blessing—attempt to become permanent residents while they do so. *See, e.g.*, 8 C.F.R. §§ 214.2(e)(19)(i)–(ii), (20)(iii), 214.6(h)(iv), 216.6(e). Many of these "nonpermanent" residents therefore come to this country hoping and planning to stay for the rest of their lives, as a practical matter residing here every bit as permanently as those designated "permanent residents" and ultimately making a seamless transition to formal permanent resident status. The district court's conclusion that speech by such persons somehow poses the threat of "foreign influence," in a way that the speech of nominally "permanent residents" does not, cries out for this Court's correction.

Other immigration provisions contemplate that foreign citizens may establish a permanent home in this country through a series of legal "temporary" stays, interrupted every five to seven years by one-year sojourns abroad. *See, e.g.*, 8 C.F.R. § 214.2(h)(13)(iii)(A), (l)(12)(i), (r)(1), (r)(5)–(6). Again, individuals repeatedly admitted on this "temporary" basis will often develop vastly stronger connections with the United States than with any foreign nation. Under the district court's reasoning,

these individuals, whose permanent homes are in the United States and who have lived here and plan on remaining here for the majority of their lives, "by definition have only a short-term interest in the national community" such that there is a compelling government interest in criminally punishing them for engaging in political speech. Pl's. App. 19a. This is unsupportable.

Millions of other foreign citizens come to the United States on long-term "nonimmigrant" visas that permit them to remain in this country for years at a time, under circumstances that provide no basis for suspicion of their intentions in seeking to exercise First Amendment rights. *See, e.g.*, 8 C.F.R. §§ 214.2(h)(13)(iii)(A) (persons in "specialty occupations"), (o)(10) (persons with "extraordinary abilities"), (p)(12) (athletes), (r)(1), (r)(5)–(6) (religious workers), 214.6 (citizens of NAFTA countries). For example, from 2007–2010, nearly one million persons from NAFTA countries were admitted in multi-year and often infinitely renewable network statuses. *See* 2009 Flow Report at 4, Table 2; 2010 Flow Report at 5, Table 3. These individuals are authorized to live here and work here, and to bring their families with them while they do so. *See* 8 C.F.R. § 214.6.

Far from the mere "temporary visitors" the district court dismissed them as, "nonpermanent" resident aliens thus live and work side by side with American citizens; they buy or rent houses; they pay taxes; they send their children to school and extracurricular programs; and they participate in neighborhood or community organizations—in short, they do all of the ordinary things a member of our

national community does.[9] Conversely, foreign nationals with "immigrant" status are not necessarily any more "permanent"—such individuals remain citizens of foreign countries and typically remain free to return home to those countries, and they can and often do forfeit or relinquish their immigrant status. *See, e.g.*, 8 U.S.C. § 1227(a)(2) (providing for deportation of foreign nationals, including permanent residents, who commit certain crimes); 8 C.F.R. § 299.1 (providing form for voluntary abandonment of permanent residence); *Katebi v. Ashcroft*, 396 F.3d 463, 466 (1st Cir. 2005) (immigrant who travels abroad without intention to return to United States "as soon as practicable" abandons permanent residence).[10] Thus, just as very little prevents many "nonpermanent" residents from effectively making the United States their home, nothing prevents "permanent" residents from maintaining significant ties to their home countries.

Although the district court emphasized that "permanent" residents "may . . . serve in the United

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[9] And of course, "nonpermanent" resident aliens experience various major life events in the United States such as changing jobs and getting married. Some of these events, for example, marriage to a U.S. citizen, or working for a U.S. employer who petitions on their behalf, may lead to permanent residence. *See, e.g.*, 8 U.S.C. § 1203(b); 8 C.F.R. § 204.2(a).

[10] Indeed, the class of "permanent residents" includes such persons as the children of high-ranking foreign diplomatic officials born in the United States—including the offspring of representatives of regimes that are decidedly not our allies. 8 C.F.R. § 101.3. Needless to say, political speech by such persons—which is permitted by § 441e—brings to bear an obvious "foreign influence."

States military," J.S. App. 19a, that distinction adds little to the analysis because it is grounded in the same statutory distinction between "immigrants" and "nonimmigrants." In any event, of the estimated 12.5 million permanent resident aliens in the United States,[11] only 35,000—far less than one percent—are serving in the active military,[12] and the district court offered no explanation of how mere statutory *eligibility* for service might somehow lessen the "foreign" nature of the speech of aliens who do not choose to serve.[13]

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[11] Nancy Rytina, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2009*, *available at* http://www.aila.org/content/default.aspx?docid=33709.

[12] Anita U. Hattiangadi, *et al.*, *Non-Citizens in Today's Military*, http://www.cna.org/centers/marine-corps/selected-studies/non-citizens-brief (last visited Oct. 2, 2011). Although these numbers do not include permanent residents who are *former* service members, the yearly number of persons accepted for permanent residency also vastly outstrips the yearly number of enlistments by permanent-resident aliens. *Compare* Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2010*, p. 1, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf (more than 1 million people became permanent residents in 2010), *with* United States Dep't of Defense, *Military Accessions Vital to Nat'l Interest Recruitment Pilot*, *available at* http://www.defense.gov/news/mavni-fact-sheet.pdf (8000 yearly enlistments by permanent residents).

[13] Nor is it true that nonimmigrants are categorically ineligible for military service. Otherwise-ineligible persons may be permitted to enlist "vital to the national interest," 10 U.S.C. § 504(b)(2) and in recent years many nonimmigrants have enlisted under that provision. *See* Margaret D. Stock, *Ten Things That Immigration Lawyers Should Know About the Army's New Non-Citizens Recruiting Program*, 14-6 Bender's

II. THE DISTRICT COURT FAILED TO APPLY THE NARROW TAILORING ANALYSIS REQUIRED UNDER STRICT SCRUTINY, AND FAILED TO RECOGNIZE THAT § 441E IS NOT NARROWLY TAILORED.

The district court did not so much as acknowledge the highly relevant facts just described. In fact, the court engaged in very little inquiry at all into the characteristics of "nonimmigrant" residents such as Appellants, before categorizing them as "temporary visitors" who present such a risk of "foreign influence" that the government may criminally punish their political speech. J.S. App. 19a–20a. In so doing, the district court not only failed to apply in fact the strict scrutiny analysis that it acknowledged in theory, but also reached the wrong constitutional conclusion regarding the threatening nature of political speech by the thousands of "nonimmigrant" foreign citizens who make this country their home.

A. The District Court at Best Subjected § 441e to a "Close Fit" Requirement, Not Narrow Tailoring.

Under strict scrutiny, "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986)

Immigr. Bull. 1 (Mar. 15, 2009), *available at* http://www.entrylaw.com/images/stock_mavni_2-22-09.pdf. Nonimmigrants eligible for military service have included doctors in the United States on a J-1 visa, such as Appellant Steiman here. Stock, *supra*, p. 4.

("*MCFL*"). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Indeed, "there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means." *Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC*, 518 U.S. 727, 807 (1996) (plurality opinion). Accordingly, under strict scrutiny this Court has consistently held that even if many or most applications of a speech restriction arguably are justified by a compelling government interest, the First Amendment still prohibits its enforcement in the those applications that are not. *MCFL*, 479 U.S. at 264; *cf. Citizens United*, 130 S. Ct. at 911.

By contrast, when government regulates less-protected forms of speech, such as commercial speech, the Court has made it clear that the restriction "need only be tailored in a reasonable manner to serve a substantial state interest." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). As the Court observed in *Board of Trustees of State University of New York v. Fox*, regulations rarely if ever fail this intermediate level of scrutiny if they go "only marginally beyond what would adequately have served the government interest. To the contrary, almost all of the restrictions [struck down under this standard] have been substantially excessive, disregarding far less restrictive and more precise means." 492 U.S. 469, 479 (1989) (internal quotation marks omitted). Thus, under this lower level of scrutiny the Court has upheld speech restrictions notwithstanding arguments that the

restrictions were considerably more over- or underinclusive than would be permissible under strict scrutiny. *E.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632-33 (1995) (interest in privacy and reputation of the legal profession warranted regulation of direct-mail solicitations by lawyers following injury or death; state was not required to regulate only mail to persons who were most likely to be disturbed because they suffered more serious injuries); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342-43 (1986) (interest in "reducing demand for games of chance" justified restrictions on casino advertising, despite lack of similar restrictions on advertising for other forms of gambling).[14]

Although the district court stated that it was applying strict scrutiny, J.S. App. 8a–9a, in reality it at best applied this second, more relaxed, form of scrutiny. Having found a compelling government interest in "preventing foreign influence over the U.S. political process," J.S. App. 13a, the district court then concluded with little analysis that the INA's distinction between "permanent residents" and other foreign citizens exactly coincides with the dividing line as to whose speech is sufficiently "foreign" to be prohibited. Citing no evidence other than "permanent" residents' eligibility for military service, the district court found them to be "more

[14] Even under intermediate scrutiny, the Court has often struck down laws as simply prohibiting too much speech. *E.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-67 (2001). As is explained in the Jurisdictional Statement, § 441e cannot properly survive even the intermediate scrutiny that the district court (on a generous reading) applied.

similar to citizens than they are to temporary visitors." J.S. App. 19a. Concomitantly, the district court categorized "nonimmigrant" residents as "temporary visitors" without any inquiry into the actual terms on which such persons are permitted to reside in this country, and without any explanation of how that label could be used to describe the many "nonimmigrants" lawfully living in this country for years. J.S. App. 19a. Indeed, notwithstanding the narrow tailoring that strict scrutiny plainly requires, the district court went so far as to say that "Congress may proceed piecemeal in an area such as this." J.S. App. 20a.

Thus, based on little more than the actual words of the statute, the district court simply accepted that the INA's categorization is in some rough sense a sufficient approximation of the class of non-citizens whose political speech involves so much "foreign influence" that the government may prohibit it. This might—barely—suffice under a relaxed form of intermediate scrutiny. It clearly does not comport with the narrow-tailoring analysis required by this Court's strict scrutiny precedents. This alone requires reversal.

B. Section 441e Is Not Narrowly Tailored to Target Only and All Speech With Foreign Influence.

Had the district court properly applied a strict scrutiny analysis, it could not have reached the result that it did. This case is markedly similar to *MCFL*, in which this Court considered a restriction on corporate political speech that purportedly was justified by "Congress' concern that organizations

that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." 479 U.S. at 263. Applying strict scrutiny, the Court concluded that it need not decide "whether that concern is adequate to support application of [the speech restriction] to commercial enterprises," because it unquestionably did *not* support regulation of the respondent in that case—a non-profit advocacy corporation with no shareholders, which did not take donations from business corporations or labor unions. *Id.*; *see also Citizens United*, 130 S. Ct. at 911 ((finding corporate speech restrictions unjustified by "shareholder-protection interest" because, *inter alia*, "the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders").[15]

Much like in *MCFL*, the Court need not decide whether the government interest in "preventing foreign influence" that might justify *some* applications of § 441e; for example, the Court need not decide whether the statute might constitutionally be applied to the broad class of nonimmigrant foreign citizens who come to this country on truly short-term visits and retain homes elsewhere. The question before this Court, and the question the district court answered neither sufficiently nor correctly, is whether Congress swept too broadly when it included within its restrictions individuals like Appellants, who actually reside here

[15] The Court later rejected in *Citizens United* the argument that the interest at stake in *MCFL* was a compelling one.

and have deeper attachments to this country than most "nonimmigrants," Plainly, it did.

There is no persuasive evidence that foreign citizens who are approved to reside in the United States, oftentimes indefinitely, present any greater danger of imposing "foreign influence" than do the "permanent resident" aliens whose speech the district court (rightly) suggested cannot be restricted. While the Court need not chart the precise outer boundaries of the class of foreign citizens whose political speech may not constitutionally be curtailed while they are in the United States, it should affirm that, at a minimum, the government has no compelling government interest (or even an important one) in prohibiting speech by persons who have lawfully established their primary, full-time residence here.[16]

Moreover, because a great number of "nonimmigrant" residents pose no greater threat of "foreign influence" than do many "permanent resident" aliens, *see supra*, Part I.B, § 441e's express exemption for the latter group confirms that there can be no genuine compelling interest in prohibiting speech by the former. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks omitted).

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[16] This case also does not present the necessity of precisely defining "residency" for First Amendment purposes, since whatever the exact definition may be, plaintiffs here obviously satisfy it, having both lived here for lengthy periods. *See* J.S. 5.

Under any level of review, this Court has long rejected the notion that a proffered government interest can justify a speech restriction if other speech—or even non-speech matters—implicating the same interest are left unregulated. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-25 (1993) (ban on newsrack distribution of commercial publications not justified by interest in aesthetics, where unregulated newspapers implicated the same interest); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119–20 (1991) (internal quotation marks omitted) (rejecting justification of "ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries," where the government had not justified "a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims"); *Carey v. Brown*, 447 U.S. 455, 464-65 (1980) ("State's interest in residential privacy" could not justify ban on residential picketing that exempted labor picketing).

If the district court's judgment is allowed to stand, Congress will have the power to eliminate crucial Amendment rights—and, quite possibly, other constitutional rights—of persons who have made their lives in the United States by the simple expedient of passing a statute labeling such persons "nonpermanent" residents. To treat with so little respect the rights of people we have invited to this country is consistent with neither the constitutional

traditions nor the historical roots of the United States.

CONCLUSION

For the reasons stated herein, this Court should grant plenary consideration and reverse the judgment of the district court.

Respectfully submitted,

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