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 *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1991, the Institute for Justice is a public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring appropriate constitutional limits on the power of government. It seeks a rule of law under which individuals can control their destinies as free and responsible members of society. Through its Center for Judicial Engagement, the Institute also works to educate the public about the importance of judicial review to the protection of individual liberty. As part of its mission to defend individual liberty, the Institute has long opposed restrictions on political speech in the form of campaign-finance regulations, both through *amicus* briefs in cases including *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and *Citizens United v. FEC*, 130 S. Ct. 876 (2010); and as counsel for the petitioners in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The law challenged in this case, 2 U.S.C. § 441e, bans political speech precisely because it does what speech is always intended to do: convince listeners to adopt a particular viewpoint or take particular actions. In the context of elections, the obvious purpose of speech is to convince voters to vote a certain way. The First Amendment, and indeed our system of government, is based on the premise that voters are not only free to consider this information and make up their own minds, but are fully capable of doing so for themselves without government intervention, no matter how well-meaning. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."); *id.* at 791 n.31 ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."). Thus, this Court has on two recent occasions noted the danger of permitting government to regulate the funding of political speech for the purpose of influencing electoral outcomes. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) ("[M]aking and implementing judgments about which strengths should be permitted to contribute to the outcome of an election [is] a dangerous enterprise and one that cannot justify burdening protected speech." (internal citation and quotation marks omitted)); *Davis v. FEC*, 554 U.S. 724, 742 (2008) ("[I]t is a dangerous business for

Congress to use the election laws to influence the voters' choices."). And this Court has held that government may not determine what voices Americans may hear during elections or who may attempt to convince them to vote one way or another. *See Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010).

Although the panel below purported to apply these precedents, and to review § 441e with "strict scrutiny," App. 8a-9a, there can be no doubt that it did not engage with the facts or the law as required under that most stringent standard of review. Rather, in conflict with decades of First Amendment caselaw, the panel improperly recognized a brand-new "compelling" government interest in preventing efforts to "influence" electoral outcomes, so long as that influence comes from individuals who were not born in this country. App. 13a. Compounding this error, the panel failed to address seriously § 441e's extreme underinclusiveness. The result is that some foreign speakers may spend enormous sums for the purpose of influencing American politics while the modest efforts of individuals like Appellants are outlawed.

This Court should note probable jurisdiction to make clear that speaker-based burdens are presumptively unconstitutional, are subject to strict scrutiny, and are only permissible if the government can show that they address real harms backed up by actual evidence, not speculation. This Court should also make clear that a crucial component of strict scrutiny is examining speech-burdening laws for underinclusiveness, to ensure that the government's

alleged interests are genuinely compelling and not pretextual.

ARGUMENT

This Court has done much in recent years to reaffirm the long-standing principle that, when it comes to laws restricting speech, "the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (Roberts, C.J., plurality opinion). In case after case, this Court has held that the First Amendment ensures that Americans are free to hear all perspectives and viewpoints and to make up their own minds on important issues. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *Randall v. Sorrell*, 548 U.S. 230 (2007). This principle has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

The logical consequence of this foundational principle is that government must meet a high standard to justify restrictions on speech. The legal expression of this principle is strict scrutiny, "which requires the Government to prove that [any such] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *See Citizens United*, 130 S. Ct. at 898. As discussed below, the

panel failed to apply that standard in accordance with this Court's precedents. Instead, it wrongly held that speech can be regulated merely based on its ability to persuade, and it sanctioned a ban on speech that cannot plausibly be considered narrowly tailored.

I. THE GOVERNMENT FAILED TO DEMONSTRATE ANY HARM SUFFICIENT TO JUSTIFY § 441e's BAN ON POLITICAL SPEECH.

Because of the inherent danger of permitting the government to regulate speech, this Court has long held that government must justify burdens on speech by showing that they address real harms. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (noting that "[a]bridgment of the liberty of [speech] can be justified only where [there is a] clear danger of substantive evils aris[ing] under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."). The panel below purported to find such harm in the supposed danger of "foreign influence" over American politics. App. 13a.

The panel's ruling is unprecedented. This Court has never before recognized the prevention of "foreign influence" over American politics as a "compelling" justification for limiting political speech or

association.[2] Instead, the Court has held, repeatedly and emphatically, that the persuasive effect of peaceful speech about issues of public concern is not a "harm" at all. *See Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."); *Bellotti*, 435 U.S. at 790 ("[C]orporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . ."); *Thornhill*, 310 U.S. at 104 ("The group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."); *see also Citizens United*, 130 S. Ct. at 910 ("The fact that a corporation, *or any other speaker*, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." (emphasis added)). The lesson of these cases is clear: The government cannot regulate political speech merely because it may persuade listeners to take political action.

The panel's ruling sets a dangerous precedent not just for speakers, but for listeners and, in particular,

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[2] To date, the only interest that this Court has recognized as sufficiently compelling to justify limits on the financing of political speech is the prevention of *quid pro quo* corruption or its appearance. *See Davis v. FEC*, 554 U.S. 724, 741 (2008).

voters. As this Court recently stated, "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves." *Citizens United*, 130 S. Ct. at 908.

Although this Court has recognized that government may regulate the mechanics of elections – to prevent fraud and to maintain the integrity of elections – it has made clear that these interests do not extend to the conduct of campaigns. *Compare, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.") *with Citizens United*, 130 S. Ct. at 898, ("Laws that burden political speech are 'subject to strict scrutiny'. . . ."). Indeed, this Court has held that when government attempts to control the process of political campaigns, it improperly arrogates to itself a role that the Constitution reserves to the people. *See Davis v. FEC*, 554 U.S. 724, 753-54 (2008) ("The Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.").

There is nothing about foreigners, as a class, that justifies departing from these well-established First Amendment principles. Foreigners, like corporations,

do not have monolithic views. *Cf. Citizens United*, 130 S. Ct. at 912 ("Corporations, like individuals, do not have monolithic views."). The facts of this case bear that out: Appellant Bluman supports Democratic candidates while Appellant Steiman supports Republicans. App. 7a. The mere fact that a speaker was born in another country no more renders his speech inherently harmful than would the fact that he and others choose to speak through a corporation. In both cases, Americans should be permitted to hear the views expressed. *See Citizens United*, 130 S. Ct. at 899 (stating that "voters must be free to obtain information from diverse sources in order to determine how to cast their votes").

As a result, the FEC in this case had an affirmative obligation to identify some other harm caused by speech like Appellants'. The FEC did not do so, but even if it had, strict scrutiny requires more than the mere articulation of a possible harm; it requires the government to support its claim with actual evidence. *See Bellotti*, 435 U.S. at 789-90 (invalidating under strict scrutiny a prohibition on corporate political speech where "there [had] been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there [had] been any threat to the confidence of the citizenry in government"); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more

than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." (internal citation omitted)). "[M]ere conjecture" is never enough to carry a First Amendment burden. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that "mere speculation or conjecture" is insufficient to carry a First Amendment burden even in the commercial-speech context). Moreover, as this Court made clear in *Citizens United*, the government cannot satisfy its evidentiary burden merely by claiming that political contributions or expenditures might result in access to or influence over elected officials. *See* 130 S. Ct. at 910 ("Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" (ellipsis in original)).

The FEC did not satisfy this evidentiary standard. Indeed, the panel never required it to do so, as it resolved this case on a Rule 12(b)(6) motion to dismiss. App. 24a. Thus, the panel concluded as a matter of law that § 441e was constitutional with or without evidence. That decision cannot be squared with this Court's decisions, which have *never* upheld a campaign-finance law on a Rule 12(b)(6) motion to dismiss. *See Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3543 (2010) (summarily affirming summary judgment in favor of FEC); *McConnell v. FEC*, 540 U.S. 93

(2003) (arising out of three-judge panel's merits ruling under 2 U.S.C. § 437h); *FEC v. Beaumont*, 539 U.S. 146 (2003) (arising out of trial-court ruling on cross-motions for summary judgment); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (same); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (same); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (arising out of trial-court ruling in non-jury trial); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (arising out of en banc court's merits ruling under 2 U.S.C. § 437h); *Buckley v. Valeo*, 424 U.S. 1 (1976) (same).

This Court should note probable jurisdiction and make clear that the government carries an affirmative evidentiary burden to demonstrate harm in every First Amendment case, that this harm cannot flow merely from the persuasiveness of the regulated speech, and that the government's evidentiary burden cannot be met at the motion-to-dismiss stage.

II. SECTION 441e UNCONSTITUTIONALLY PREFERS SOME SPEAKERS OVER OTHERS.

As this Court made clear in *Citizens United*, the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." 130 S. Ct. at 898. Section 441e violates this rule, most obviously, by treating non-permanent residents like Appellants differently from citizens and permanent residents. But § 441e also

violates this rule through its extraordinary underinclusiveness – silencing Appellants' modest political expenditures while leaving a vast array of other foreign political expenditures wholly unregulated. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("[T]he notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.").

Reviewing statutes for underinclusiveness is a critical part of the "narrow tailoring" component of strict scrutiny. This is not because expansive regulations of speech are preferable to narrower regulations; instead, it is because the underinclusiveness of a law is itself evidence that the law serves no genuinely compelling interests or does not actually advance that interest. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring [] particular speaker[s] or viewpoint[s]."). As this Court has noted, where First Amendment rights are at stake, underinclusiveness is fatal:

> Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "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 Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546-47 (1993) (ellipsis in original). Legislating in an ad hoc manner "is not how one addresses a serious social problem." *Entm't Merchs. Ass'n*, 131 S. Ct. at 2740.

The panel performed only the most cursory examination of § 441e's underinclusiveness before affirming the government's alleged interest in preventing foreign influence over American politics. This was inconsistent with strict scrutiny. Although the panel considered two types of underinclusiveness – the law's inapplicability to permanent residents or to ballot-issue contributions and expenditures, App. 18a-21a – the panel failed to acknowledge numerous other ways in which the law is underinclusive. To name just a few examples:

- Under the Foreign Agents Registration Act, 22 U.S.C. §§ 611-621, foreigners – and even *foreign governments* – are permitted to spend unlimited amounts of money directly lobbying elected officials;[3]

[3] *Cf. Bellotti*, 435 U.S. at 791 n.31 ("The State's paternalism evidenced by this statute [prohibiting corporate political speech regarding ballot issues] is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as

(Continued on following page)

- Foreigners, even those living abroad, are permitted to make unlimited "in-kind" contributions of volunteer services to political candidates, even if the value of those services is significantly greater than the legal limit for monetary contributions;[4] and
- Foreign-owned magazines and newspapers – like the British-owned weekly magazine, *The Economist* – routinely advocate the defeat or election of American political candidates through editorial endorsements.[5]

The panel's ruling leads to particularly absurd results in light of these last two examples of underinclusiveness. For example, in 2009 the FEC concluded that musician Elton John did not violate

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their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate.").

[4] *See* Fed. Election Comm'n, MUR 5987 (Feb. 30, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044230277.pdf.

[5] *See* The Economist, *From the Archive: U.S. Presidential Endorsements* (Oct. 28, 2008), http://www.economist.com/node/12499760 (last visited Sep. 30, 2011); *see also* Oliver Burkeman, *My Fellow Non-Americans . . .* , The Guardian (Oct. 12, 2004), *available at* http://www.guardian.co.uk/world/2004/oct/13/uselections2004.usa11 (urging British citizens to make financial contributions to "officially non-partisan groups whose activities, none the less, have the practical effect of helping one candidate over the other," in order to promote Senator John Kerry's presidential campaign).

§ 441e when he volunteered his services as a performer at a fundraiser for then-Senator Hillary Clinton's presidential campaign. The performance raised more than $2.5 million for Clinton's campaign. *See* Fed. Election Comm'n, MUR 5987, *supra* n.4, at 1. Thus, under the panel's ruling, celebrities like Elton John may contribute services that are worth millions to candidates, while the Appellants may not contribute even a few hundred dollars or simply pass out leaflets in the park.

Equally inexplicable under the panel's theory of the case is the law's exclusion of foreign media publications. *See* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). This Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United*, 130 S. Ct. at 905 (internal citations omitted). Yet while Appellant Bluman is prohibited from distributing handbills in Central Park advocating the reelection of President Obama, *The Economist* – which has a U.S. circulation of over 760,000[6] – has endorsed American presidential candidates since 1980. Surely if the danger posited by the FEC of "foreign influence" over American politics were genuine, the threat from widely circulated publications like *The Economist* would dwarf that of lone pamphleteers like Appellant Bluman. That the law treats

[6] *See* The Economist Group, *Circulation/Traffic*, http://www.economistgroupmedia.com/planning-tools/circulation/?circ_id=2&productid=1 (last visited Sept. 30, 2011).

these two speakers differently is – as this Court has recognized in a similar context – "all but an admission of the invalidity" of the FEC's anti-foreign-influence rationale. *See Citizens United*, 130 S. Ct. at 906, ("The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale.").

None of this, of course, is to suggest that the government should silence Elton John or the owners of *The Economist*. But the fact that their activities *are* permitted fatally undermines the government's allegedly compelling interest in preventing "foreign influence" over American politics. Under strict scrutiny, the government can offer evidence of harm posed by foreigners speaking during American elections. But short of that, the government may not be given the benefit of the doubt, especially where, as here, foreigners have been speaking in this country, and thus exerting "influence" over our elections – sometimes even with the express approval of the FEC – for years. *Cf. Citizens United*, 130 S. Ct. at 896 (observing that the FEC, whose "business is to censor," exercises power "analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit"). Accordingly, this Court should note probable jurisdiction so that it can make clear that such underinclusive speaker-based restrictions are inconsistent with the First Amendment.

CONCLUSION

For the foregoing reasons and for the reasons expressed in Appellants' jurisdictional statement, *amicus curiae* the Institute for Justice respectfully requests that this Court note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

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