FIU Law Review

Volume 19 | Number 1 Article 7

Spring 2025

# Interesting Intersections of Immigration and First Amendment Law

David Hudson
*Belmont College of Law*, david.hudson@belmont.edu

Maximiliano Gluzman
*Belmont University School of Law*, maximiliano.gluzman@belmont.edu

Follow this and additional works at: https://ecollections.law.fiu.edu/lawreview

 Part of the Election Law Commons, First Amendment Commons, and the Immigration Law Commons

Online ISSN: 2643-7759

Recommended Citation
David Hudson & Maximiliano Gluzman, *Interesting Intersections of Immigration and First Amendment Law*, 19 FIU L. Rev. 215 (2025).
DOI: https://dx.doi.org/10.25148/lawrev.19.1.7

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

# INTERESTING INTERSECTIONS OF IMMIGRATION AND FIRST AMENDMENT LAW

By David L. Hudson, Jr. and Maximiliano Gluzman

Many may not naturally associate immigration law and First Amendment law, but we—a First Amendment expert[1] and an immigration law scholar[2]—have noticed several interesting intersections between our two disciplines that merit discussion. This essay identifies four areas of immigration law in which pressing First Amendment claims play a prominent and dominant role.

The first area involves denial of admission or deportation based on pure or symbolic speech. At various times, Congress has enacted grounds of inadmissibility and deportability that squarely fall within the purview of the First Amendment. The second area involves so-called retaliatory deportations, which occur when the government initiates or accelerates removal proceedings against a noncitizen who is in violation of immigration laws allegedly for the noncitizen's activism, protest activity, or other First Amendment speech or expressive conduct. The third area involves First Amendment-based challenges to a provision of federal immigration law that prohibits even the encouragement of illegal immigration—an issue that has reached the U.S. Supreme Court. The fourth area concerns immigration issues arising in the ability, or lack thereof, to participate meaningfully in the electoral process.

These issues are vitally important, particularly as more and more noncitizens live in the United States of America. Many of these individuals live in fear of deportation or government surveillance. Furthermore, as Professor Michael Kagan has aptly stated, "[i]mmigrants' freedom of speech is far from secure under existing jurisprudence."[3] Similarly, Professor Gregory P. Magarian has memorably noted that "[n]oncitizens in the United States get the First Amendment's table scraps."[4]

---

1 Professor David L. Hudson, Jr. is an associate professor of law at Belmont University School of Law who specializes in First Amendment issues.

2 Professor Maximiliano Gluzman is an assistant professor of law at Belmont University School of Law who specializes in immigration law.

3 Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1270 (2016).

4 Gregory P. Magarian, *Centering Noncitizens' Free Speech*, 56 GA. L. REV. 1563, 1565 (2022). Professor Magarian also eloquently makes the case that "[i]f we want constitutional speech protection to

These issues intersecting immigration and First Amendment law are part of a larger discussion concerning what rights noncitizens possess under the Constitution and Bill of Rights. These rights are subject to the "plenary power doctrine," which was first stated in the infamous *Chinese Exclusion Case*,[5] in which the Supreme Court held that "the power of exclusion of foreigners . . . cannot be granted away or restrained on behalf of any one."[6] Under this doctrine, "[w]hen regulating immigration, Congress may discriminate on the basis of race. It may discriminate on the bases of gender and legitimacy. It may restrict aliens' political speech without having to establish a clear and present danger. With some qualifications, Congress may disregard procedural due process when excluding aliens."[7] In connection with the rights of noncitizens searching admission to the United States, the Supreme Court has applied the doctrine in unequivocal terms: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[8]

To a certain degree, the Supreme Court has curtailed the application of the plenary power doctrine. For instance, in *Landon v. Plasencia*, the Supreme Court held that a legal permanent resident returning to the United States after a short absence was entitled to due process when placed in exclusionary proceedings.[9] Similarly, the U.S. Supreme Court has at times broadly protected immigrants' constitutional rights. In *Bridges v. Wixon*, the Court ruled that it would violate due process to deport Australian Harry Bridges because of his supposed "affiliation" with the Communist Party.[10] In his majority opinion, Justice William O. Douglas reminded readers that "[h]ere the liberty of an individual is at stake."[11]

But the Court also has a long history of not according immigrants free speech and other constitutional protections. Consider the Court's decision in *United States ex rel. Turner v. Williams*, in which the Court allowed the government to deport an immigrant for advocating an anarchist point of view

---

mean something honorable and to accomplish something worthwhile, courts and free speech advocates should move noncitizens from the fringes to the center of First Amendment thinking." *Id.* at 1566.

5 *See, e.g.*, Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 435 (1999).

6 Ping v. United States, 130 U.S. 581, 609 (1889).

7 Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Power Doctrine*, 35 WILLAMETTE L. REV. 147, 149–50 (1999) (citing STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 178 (1987)).

8 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (internal citations omitted).

9 Landon v. Plasencia, 459 U.S. 21, 32 (1982).

10 Bridges v. Wixon, 326 U.S. 135, 156–57 (1945).

11 *Id.* at 154.

and found that he did not deserve constitutional protections.[12] Later, the Supreme Court even denied the First Amendment claims of U.S. citizens who requested the admission of a noncitizen scholar, who was barred because of his advocacy of communism.[13]

## I. INADMISSIBILITY AND DEPORTABILITY BASED ON SPEECH

At various points in American history, immigrants were seen as the importers of dangerous ideas.[14] Given Congress's plenary power on immigration, it is not surprising that it has at times sanctioned grounds of inadmissibility and deportation that squarely fall within the purview of the First Amendment. For example, the Alien Immigration Act of 1903 prevented entrance and authorized removal of those who spoused anarchist beliefs.[15] Similarly, several statutes enacted throughout the twentieth century were aimed at preventing the immigration of communists.[16]

Noncitizens invoking First Amendment protections against such statutes have historically been unsuccessful.[17] An early exception is that of Australian-born labor leader Harry Bridges. The government spent years attempting to deport Bridges because of his consistent vocal opposition to various governmental policies.[18] Justice Frank Murphy inveighed against the decade-long attempt to deport Bridges, writing in his concurring opinion:

> The record in this case will stand forever as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.
>
> For more than a decade, powerful economic and social forces have combined with public and private agencies to seek the deportation of Harry Bridges, who came to this country in 1920 from Australia. Emerging from the Pacific

12 United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

13 Kleindienst v. Mandel, 408 U.S. 753, 754 (1972).

14 *See, e.g.*, Julia Rose Kraut, *Fear, Foreigners, and Free Expression: A Brief Reflection on Ideological Exclusion and Deportation in the United States*, 56 GA. L. REV. 1531, 1536 (2022).

15 *Id.* at 1536.

16 *See, e.g.*, *Bridges*, 326 U.S. at 141; Harisiades v. Shaughnessy, 342 U.S. 580, 581 (1952).

17 *See generally Harisiades*, 342 U.S. 580; Reply Brief for the Appellants, Kleindienst v. Mandel, 408 U.S. 753, 1972 WL 135748 (No. 71-16) (1972) .

18 *Bridges*, 326 U.S. at 137.

> Coast maritime strike of 1934 as a recognized labor leader in that area, Bridges incurred the hatred and hostility of those whose interests coincided directly or indirectly with the "vicious and inhumane practices toward longshoremen" that Bridges was combatting. His personal viewpoint on certain matters also antagonized many people of more conservative leanings. Agitation for his deportation arose.[19]

However, while the Supreme Court ultimately granted habeas in *Bridges v. Wixon*,[20] it did not base its decision in the First Amendment. In *Bridges*, the noncitizen's removal order was predicated on a statute that made deportable those who were, had been members of, or were affiliated with organizations that advocated to the overthrow of the government by force.[21] The Attorney General, at the time charged with the enforcement of immigration statutes, found that the noncitizen had been a member of and affiliated with the Communist Party and issued an order for the removal of the noncitizen.[22] After the Ninth Circuit affirmed the decision,[23] the Supreme Court reversed after holding that the facts on the record did not warrant the findings of membership or affiliation.[24] The Court did not need to reach the constitutional issue.

When the Court addressed a similar statute under the scope of the First Amendment, it ruled against the noncitizens.[25] *Harisiades v. Shaughnessy* involved the consolidated cases of three noncitizens who had been ordered removed upon unquestioned findings of membership in the Communist Party.[26] The Supreme Court quickly dismissed the noncitizens' First Amendment claims, reasoning that, while the First Amendment protects the freedom to advocate for Communism "by means of the ballot box,"[27] it does not protect "the practice or incitement of violence."[28] The Court, which did not disturb the lower court's findings that the Communist Party was an

19 *Id.* at 157 (Murphy, J., concurring).

20 *Id.* at 156.

21 *Id.* at 138–39.

22 *Id.* at 140.

23 *Id.*

24 *Id.* at 156.

25 Harisiades v. Shaughnessy, 342 U.S. 580, 581 (1952).

26 *Id.* at 581–83.

27 *Id.* at 592.

28 *Id.*

organization which incited the overthrow of the government by violent means,[29] affirmed.[30]

Some scholars argue that *Harisiades* is "ripe for overturning."[31] Far from that, the U.S. Supreme Court seemed to foreclose selective deportation-type claims in *Reno v. American-Arab Anti-Discrimination Committee*.[32] The case arose from the removal proceedings initiated against the "L.A. Eight," who were believed to be members of the Popular Front for the Liberation of Palestine (PFLP), a splinter group of the Palestine Liberation Organization.[33] While the noncitizens' charges ranged from support of communism to ordinary immigration violations such as visa overstays, the government made clear that the motive behind the deportation efforts was the alleged belonging to PFLP.[34] The noncitizens brought a First Amendment claim in Federal Court, laterally attacking the removal proceedings.[35] After prolonged litigation, the Ninth Circuit ruled for the noncitizens.[36] However, the Supreme Court reversed based on a legislative amendment—enacted after litigation had commenced—that prevented challenging the "decision to 'commence proceedings'" except after a final order of removal had been entered.[37] But the court's opinion, penned by Justice Scalia, went beyond that, determining that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[38] The court, however, did not rule out a different outcome in "a rare case in which the alleged basis of discrimination is . . . outrageous."[39] While the court's statements on selective prosecution

29 *Id.* at 584.

30 *Id.* at 596.

31 Burt Neuborne, *Harisiades v. Shaughnessy: A Case Study in Vulnerability of Resident Aliens*, *in* IMMIGRATION STORIES 87, 105 (David A. Martin & Peter H. Schuck eds., 2005).

32 *See* 525 U.S. 471, 473, 492 (1999).

33 William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479, 479–81 (2000).

34 *Id.* at 481.

35 *Reno*, 525 U.S. at 474.

36 *Id.* at 475.

37 *Id.* at 487.

38 *Id.* at 488.

39 *Id.* at 491.

may arguably constitute dicta,[40] this troubling decision remains a key case in First Amendment cases involving noncitizens.[41]

## II. RETALIATORY DEPORTATIONS

The essence of a retaliatory deportation claim is that immigration officials target a noncitizen for his or her criticisms of U.S. immigration policy and institute or accelerate removal or deportation proceedings against that individual. The legal ground for removal, however, may or may not be protected by the First Amendment. The issue is whether the First Amendment protects a removable noncitizen from being *selected* for removal based on their speech. Sadly, this has happened far too often in recent years.[42] Many undocumented immigrant activists feared speaking out when immigrant children were placed in cages in recent years for fear of being deported.[43] A scholar recently said this has become "an alarming and frequent occurrence."[44]

The threat of retaliatory deportations is real and has been for a long time.[45] Perhaps there has been no more infamous case of retaliatory deportation than that of musician and activist John Lennon in the 1970s.[46] At that time, when Lennon was at the peak of his fame,[47] the Nixon administration tried to deport him because of his political activism.[48] Lennon had entered the United States on a nonimmigrant visa in 1971.[49] After he

40 *Id.* at 501, 510 n.5 (Souter, J., dissenting).

41 Koh, *infra* note 44, at 1483 ("*Reno v. AADC* remains a critical case for assessing the ability of noncitizens, particularly undocumented individuals, to enforce First Amendment free speech protections in federal court.").

42 *See* Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1443–45 (2018); Joel Rose, *An Immigrant Activist Says ICE Deported him in Retaliation. Now He's Back in the U.S.*, NPR (Dec. 15, 2021, 10:40 AM), https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas [https://perma.cc/X7WL-8M4J].

43 Vanessa Canuto, *Immigrants Are "People" Too: Constitutionalizing Free Speech Protections for Undocumented Immigrants*, 17 FIRST AMEND. L. REV. 403, 405 (2019).

44 Jennifer Lee Koh, *Executive Discretion and First Amendment Constraints on the Deportation State*, 56 GA. L. REV. 1473, 1476 (2022).

45 *See, e.g.*, Julia Rose Kraut, *Fear, Foreigners, and Free Expression: A Brief Reflection on Ideological Exclusion and Deportation in the United States*, 56 GA. L. REV. 1531, 1543 (2022) (citing JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES 155 (Harv. Univ. Press ed., 2020)).

46 Kraut, *supra* note 45.

47 *See* Lennon v. Immigr. & Naturalization Serv., 527 F.2d 187, 188 (2d Cir. 1975).

48 Kraut, *supra* note 45.

49 Lennon, 15 I&N, Dec. 9, 10 (B.I.A. 1974).

overstayed his visa, he was placed in removal proceedings.[50] Lennon tried to adjust his status to that of a legal permanent resident before the immigration court, but the immigration judge found him inadmissible based on a 1968 British guilty plea for possession of marijuana.[51] The Board of Immigration Appeals (BIA) affirmed.[52] On appeal, the Second Circuit reversed.[53] The court stated, in dicta, that "courts will not condone selective deportation based on secret political grounds."[54] However, the court based its decision on the holding that the British conviction did not render Lennon inadmissible under the INA.[55] A First Amendment lateral effort to stop the retaliatory deportation was then rendered moot.[56]

More recently, the U.S. Immigration and Customs Enforcement (ICE) retaliated against prominent immigration activists Jean Montrevil and Ravi Ragbir.[57] Ragbir alleged that officials in the U.S. Department of Justice, ICE, and the Department of Homeland Security sought to execute a final order of removal against him selectively because of his prominent and vocal criticisms of U.S. immigration policy.[58] A native of Trinidad and Tobago, Ragbir became a lawful permanent resident of the U.S. in 1994.[59] However, he was convicted of mail fraud in 2001.[60] After he served a thirty-month sentence, ICE detained him in 2006.[61] An immigration judge issued an order of removal against him later that year.[62] However, ICE released him from detention in February 2008, determining him not to be a flight risk.[63]

---

50 *Id.*

51 *Id.* at 9, 16–17.

52 *Id.* at 27.

53 Lennon v. Immigr. & Naturalization Serv., 527 F.2d 187, 195 (2d Cir. 1975).

54 *Id.*

55 *Id.* at 194.

56 While his immigration proceedings were ongoing, Lennon also tried to enjoin them laterally in Federal District Court. *See* Lennon v. United States, 387 F. Supp. 561, 564 (S.D.N.Y. 1975). In those proceedings, the court rejected the government's motion for dismissal, holding that "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *Id.* (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)). The lateral challenge was, however, rendered moot when the Second Circuit overturned the BIA's decision on Lennon's removal. *See* Lennon v. Immigr. & Naturalization Serv., 527 F.2d 187, 198 (2d Cir. 1975) (Mulligan, J., dissenting).

57 Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225, 226–27 (2020–21).

58 Ragbir v. Holman, 923 F.3d 53, 57 (2d Cir. 2019).

59 *Id.* at 58.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

After his release, Ragbir founded the New Sanctuary Coalition of New York City and became a vocal critic of U.S. immigration policy.[64] He received several awards for his zealous work on behalf of immigrants and for challenging restrictive policies.[65] In March 2017, Ragbir checked in with ICE officials, accompanied by New York politicians and religious leaders. The matter reflected negatively on ICE officials. Ragbir alleged that, shortly after that check-in, ICE officials sought to deport him.[66] He accused ICE of retaliation and viewpoint discrimination in violation of the First Amendment.[67]

A federal district court dismissed Ragbir's lawsuit, finding that it lacked subject matter jurisdiction pursuant to a provision in federal immigration law.[68] However, the U.S. Circuit Court of Appeals for the Second Circuit reversed, finding that Ragbir presented a cognizable claim of retaliation. Further, the Second Circuit bluntly stated that "[t]he Government's [a]lleged [r]etaliation [w]as [e]gregious."[69] "Ragbir's plausible allegations and evidence, which we must accept as true at this juncture, support that the Government singled him out for deportation based not only on the viewpoint of his political speech, but on the public attention it received," the majority wrote.[70]

Another co-founder of New Sanctuary Coalition, Jean Montrevil, was actually deported.[71] Like Ragbir, Montrevil had also been ordered removed due to a criminal conviction.[72] Montrevil's removal, however, had been stayed multiple times.[73] Montrevil was warned to "ke[ep] his head down" and was arrested and deported to his native Haiti.[74] After his deportation in 2018, he filed a habeas claim, whose settlement included allowing him to reenter the U.S. under humanitarian parole.[75]

The speech of noncitizens who actively oppose immigration policy should receive protection as core political speech—the core type of speech

64 *Id.* at 59.

65 *Id.*

66 *Id.* at 60.

67 *Id.* at 61.

68 *Id.* at 62.

69 *Id.* at 70.

70 *Id.*

71 *Id.* at 60.

72 Ellyn Jameson, *Outrageous Retaliation As A Removal Defense*, 46 N.Y.U. REV. L. & SOC. CHANGE 43, 47 n.15 (2022).

73 *Id.*

74 *Id.* at 49.

75 *Id.* at 49–50.

the First Amendment was designed to protect.[76] As legal commentator Katherine Griffin has noted, "the choice between suffering in silence and speaking knowing the likelihood of deportation is an impossible one that no individual should have to make."[77] While the government should retain the right to deport individuals, the government should not exercise its power to deport in a retaliatory fashion, thereby imposing a massive chilling effect on those who criticize U.S. policy.

But the massive chilling effect is far from the only harm of retaliatory deportations. Silencing the voices of immigration activists not only silences their free-speech rights, but also impacts the right of the general public to receive information and ideas.[78]

## III. ENCOURAGING ILLEGAL IMMIGRATION

Federal law prohibits the encouraging or inducing of illegal immigration.[79] Flouting such prohibition has both immigration consequences, leading any noncitizen violator inadmissible[80] or deportable,[81] and criminal consequences.[82] Supporters argue that such a law is necessary to prohibit even more widespread violations of immigration law and to protect the security of the United States. Opponents of the law contend that the law is too broad and can criminalize immigration advocacy and other speech that ought to be protected.

The United States Supreme Court waded into these troubled waters in *Hansen v. United States*.[83] The case involved the "adult adoption" program of Helaman Hansen, which the Supreme Court called a "scam" that led many noncitizens to come to the United States and remain there unlawfully.[84] U.S. authorities eventually charged Hansen with violating the law that prohibits the encouragement or inducement of illegal immigration.[85] A federal jury

76 *Id.* at 80.

77 Katherine Griffin, *Speech as a Pretext for Deportation: When the Only Choice is Silence*, 29 WILLAMETTE J. INT'L L. & DISP. RESOL. 187, 191 (2022).

78 Canuto, *supra* note 43.

79 8 U.S.C. § 1324(a)(1)(A)(iv).

80 8 U.S.C. § 1182(a)(6)(E)(i).

81 8 U.S.C. § 1227(E)(i).

82 8 U.S.C. § 1324(a)(1)(A)(iv).

83 United States v. Hansen, 599 U.S. 762 (2023).

84 *Id.* at 767.

85 *Id.*

convicted him.[86] However, the Ninth Circuit reversed, relying on one of its earlier rulings that the federal law was overbroad.[87]

The case eventually reached the U.S. Supreme Court, which reversed the Ninth Circuit and upheld the statute. In her majority opinion, Justice Amy Coney Barrett addressed the overbreadth issue. She noted that the terms "encourage" and "induce" are common verbs in criminal solicitation laws.[88] "We hold that clause (iv) uses 'encourages or induces' in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation."[89]

Hansen argued that the legislative history of the statute—which originally also included the words "assist" and "solicit"—turned a narrower law into a much broader one.[90] Justice Barrett disagreed, stating that "[w]e do not agree that the mere removal of the words 'assist' and 'solicit' turned an ordinary solicitation and facilitation offense into a novel and boundless restriction on speech."[91] Rather, Congress simply "streamlined" the statute.[92]

Hansen also contended that the statute lacked the necessary mens rea language.[93] But, Justice Barrett reasoned that the most common-sense reading of the statute was that Congress included an implicit incorporation of the traditional state of mind necessary for the requisite level of mens rea.[94] Barrett explained:

> But there is a simple explanation for why "encourages or induces" is not modified by an express *mens rea* requirement: There is no need for it. At the risk of sounding like a broken record, "encourage" and "induce," as terms of art, carry the usual attributes of solicitation and facilitation—including, once again, the traditional *mens rea*.[95]

Implicitly, the *Hansel* opinion harmonizes the meaning of "encourages or induces" in the criminal statute[96] with the meaning lower courts assigned to similar language in the inadmissibility grounds. In *Marquez-Reyes v.*

86 *Id.*

87 *Id.* at 768 (citing United States v. Sineneng-Smith, 910 F.3d 461 (9th Cir. 2018)).

88 *Id.* at 771–73.

89 *Id.* at 774.

90 *Id.* at 776–77.

91 *Id.* at 777.

92 *Id.* at 778

93 *Id.*

94 *Id.* at 778–79.

95 *Id.* at 780.

96 8 U.S.C. § 1324(a)(1)(A)(iv).

*Garland*,[97] the noncitizen was found ineligible for an immigration benefit based on having "encouraged" his adult son from coming to the United States under the inadmissibility statute.[98] In a decision that forecasts the *Hansel* opinion, the Court found that the word "encouraged" in the statute does not have the same meaning as in common parlance, but rather has the meaning ordinarily used in criminal statutes.[99] The Court then concluded that the statute was not constitutionally overbroad.[100]

Justice Jackson, joined by Justice Sotomayor, wrote the dissent in *Hansen*. Jackson reasoned that the federal law at issue, which prohibits the "encouraging" of individuals to enter the United States unlawfully was overbroad.[101] She reasoned that, "on its face, the encouragement provision's use of the terms 'encourage' and 'induce' seems to encompass any and all speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law."[102] For example, she wrote that this law could apply to a grandmother who says she misses her grandchild, who is a noncitizen living outside of the United States or a doctor who informs a noncitizen that medical treatments are better in the United States.[103] This persuading by the grandmother or the doctor could be interpreted as encouraging the grandchild or patient, who are noncitizens, to enter the United States illegally.[104]

She also reasoned that a broad reading of the statute's plain language prohibits the abstract advocacy of illegal conduct—speech that is protected speech under the First Amendment.[105] She quoted the Court in the virtual child pornography case of *Aschroft v. United States* for the proposition that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[106] She concluded that the statute is facially overbroad and, thus, unconstitutional.[107]

---

97 Marquez-Reyes v. Garland, 36 F.4th 1195, 1200 (9th Cir. 2022).

98 8 U.S.C. § 1182(a)(6)(E)(i).

99 *Marquez-Reyes*, 36 F.4th at 1202–03.

100 *Id.* at 1207.

101 United States v. Hansen, 599 U.S. 762, 794 (2023). (Jackson, J., dissenting).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 794–95.

106 *Id.* at 795 (quoting Aschroft v. United States, 535 U.S. 234, 253 (2002)).

107 *Id.* at 793.

## IV. CONTRIBUTING AND VOTING IN POLITICAL ELECTIONS

There are strict limits on foreign nationals and those who are not citizens from participating in the American political process. For example, the Bipartisan Campaign Finance Reform Act (BCRA) forbids foreign nationals from contributing money to any federal, state, or local election.[108] However, the law also holds that a foreign national does not include lawful permanent residents.[109]

A special three-judge federal district court—which included then federal appeals court Judge Brett Kavanaugh—upheld this provision from a First Amendment challenge in *Bluman v. FEC*.[110] Benjamin Bluman, a citizen of Canada on a work visa in the United States, and Asenath Steiman, a dual citizen of Canada and Israel who also had a work visa, wanted to contribute money to a Democratic and Republican candidate respectively.[111] Bluman, an associate at a New York law firm, wanted to contribute money to President Barack Obama, while Steiman wanted to contribute to Senator Tom Coburn.[112]

The court noted that noncitizens have many of the same constitutional rights as citizens.[113] However, the court also noted that the Supreme Court had noted that noncitizens often do not have the same rights as citizens.[114] For example, the court cited U.S. Supreme Court decisions prohibiting noncitizens from voting, serving on juries, working as probation officers or police officers, or serving as public school teachers.[115] For example, the U.S. Supreme Court ruled that noncitizens could not serve as probation officers in *Cabell v. Chavez-Solido*,[116] police officers in *Foley v. Connelie*,[117] or public school teachers in *Ambach v. Norwick*.[118]

The federal district court reasoned that these and other decisions established a fairly clear line—that the United States can exclude noncitizens

---

108 52 U.S.C. § 30121(a)(1)(A) (The law provides, "[i]t shall be unlawful for . . . a foreign national, directly or indirectly, to make . . . a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election . . . . ").

109 52 U.S.C. § 30121(b)(2).

110 Bluman v. FEC, 800 F. Supp. 2d 281, 283 (D.D.C. 2011).

111 *Id.* at 285.

112 *Id.*

113 *Id.* at 286.

114 *Id.* at 287.

115 *Id.*

116 Cabell v. Chavez-Salido, 454 U.S. 432, 445 (1982).

117 Foley v. Connelie, 435 U.S. 291, 299–300 (1978).

118 Ambach v. Norwick, 441 U.S. 68, 80–81 (1979).

from activities "intimately related to the process of democratic self-government."[119] The court reasoned:

> We read these cases to set forth a straightforward principle: It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.[120]

The court then reasoned that political contributions and express-advocacy expenditures directly contribute to the process of democratic self-governance, because they are directly related to how citizens elect their governing officials.[121]

The plaintiffs argued that while this may be true for noncitizens who are in the United States illegally, it should not apply to noncitizens who are in the United States lawfully on work visas or other temporary visas.[122] But the court was not persuaded by this argument and instead focused on the clear distinctions between citizen and noncitizen.[123] The court added that "distinguishing citizens from non-citizens in this context is hardly unusual or deserving of scorn; rather, it is part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections."[124]

The plaintiffs petitioned for U.S. Supreme Court review, but the U.S. Supreme Court summarily affirmed with two words: "Judgment affirmed."[125]

A Washington appeals court recently upheld state laws that prohibit foreign nationals from making campaign contributions and from participating in organizational decisions on campaign contributions.[126] The state appeals court found that there was no greater right for foreign nationals

---

119 *Bluman*, 800 F. Supp. 2d at 287 (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

120 *Id.* at 288.

121 *Id.*

122 *Id.* at 289.

123 *Id.*

124 *Id.* at 292.

125 Bluman v. FEC, 565 U.S. 1104, 1104 (2012).

126 OneAmerica Votes v. State, 518 P.3d 230, 235 (Wash. Ct. App. 2022).

to engage in campaign contributions and related electoral activity under the Washington State Constitution than under the U.S. Constitution.[127] The appeals court also noted that the *Bluman* decision, especially because the U.S. Supreme Court affirmed the special federal district court's decision, was binding precedent.[128]

Critics have charged that these decisions do not adequately consider the First Amendment rights of those noncitizens who are located and impacted by the decisions of government officials in the United States.[129] Others have pointed out that historically, the United States has not always prohibited noncitizens from voting.[130] Furthermore, others have contended that *Bluman* and related decisions do not adequately consider a significant reality from the Supreme Court's seminal campaign finance decision in 2010—*Citizens United v. FEC*—that speaker-based distinctions on speech are problematic under the First Amendment.[131]

## CONCLUSION

First Amendment issues will continue to assert themselves in immigration cases, particularly as immigration remains a chief policy perspective and controversial issue in modern America.[132] The issues could become even more pressing now that Donald Trump has begun his second term as President and has initiated his promised mass deportation of those in the country illegally.[133]

---

127 *Id.* at 245.

128 *Id.* at 245–46.

129 *See*, *e.g.*, Alyssa Markenson, *What's at Stake?: Bluman v. Federal Election Commission and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech*, 109 NW. U. L. REV. 209, 213 (2015) ("Specifically, when confronting issues involving aliens' First Amendment rights, courts should focus on the alien's location, not stake.").

130 David M. Howard, *Potential Citizens' Rights: The Case for Permanent Resident Voting*, 95 TEX. L. REV. 1393, 1396 (2017) (noting a significant history of noncitizens voting in the United States from the founding era until the 1920s).

131 Asaf Wiener, *A Speaker-Based Approach to Speech Moderation and First Amendment Analysis*, 31 STAN. L. & POL'Y REV. 187, 209 (2020) (noting that the Court in Citizens United "explicitly held that speaker-based regulation of speech—or discrimination based on the identity of the speaker—violates the First Amendment, *regardless of its effect on content discrimination*").

132 Jonathan J. Cooper, *Biden is Left with Few Choices as Immigration Takes Center Stage in American Politics*, ASSOCIATED PRESS (Feb. 2, 2024, 5:27 PM), https://apnews.com/article/biden-trump-border-immigration-election-c37b1596ecf27d208e94bef592e7e616 [https://perma.cc/7P7E-2K3U].

133 Maggie Astor, *Trump Pushes Immigration Conspiracy Theories and Mass Deportations*, N.Y. TIMES (Feb. 4, 2024), https://www.nytimes.com/2024/02/04/us/politics/trump-fox-interview.html [https://perma.cc/M3XC-Y9XV].