



FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Stop I-186 to Protect Mining and Jobs)	MUR 7523
Sandfire Resources America, Inc.)	
Sandfire Resources, NL)	
Montana Mining Association)	

**STATEMENT OF REASONS OF
COMMISSIONER ELLEN L. WEINTRAUB**

A cornerstone principle of federal campaign-finance law is that foreign nationals are barred from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, in connection with a federal, state, or local election.¹ This principle has been called “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.”²

Since *Buckley v. Valeo*,³ the constitutionality of campaign-finance laws directed at the activities of American citizens has depended on how well they serve the government’s interest in limiting “the actuality and appearance of corruption.”⁴ But restrictions on foreign-national involvement in American politics serve a different governmental interest: “preventing foreign influence over the U.S. political process.”⁵

In the Bipartisan Campaign Reform Act of 2002 (“BCRA”),⁶ Congress amended the Federal Election Campaign Act of 1971, as amended (the “Act”)⁷ to change its ban on contributions or donations from foreign nationals “in connection with an election to any political office,” to any such spending “in connection with a Federal, State, or local election.” The

¹ 52 U.S.C. § 30121(A).

² *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (Kavanaugh, J.), *aff’d*, 565 U.S. 1104 (2012).

³ 424 U.S. 1 (1976).

⁴ *Id.* at 26.

⁵ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

⁶ Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁷ 52 U.S.C. § 30101, *et. seq.*

question that had remained unsettled was whether by this statutory change Congress had expanded the provision to include spending on state and local ballot measures.

I have long held that Congress did do so. “From the voter’s perspective,” I wrote in 2015, “this is a distinction without a difference. When Americans go to the polls to vote on Election Day (or mark our mail-in ballots), the choices we make – whether as to candidates or referenda – are part of the same expression of democratic self-governance. Whether exercising our rights to self-government through representative democracy (choosing a candidate for office) or direct democracy (adopting a law via ballot measure), these are choices in which only Americans [should] have a say.”⁸

This matter, which involved foreign spending against an environmental measure in Montana, provides an excellent case in point. The Complaint alleged that Sandfire Resources NL, an Australian company, through its Canadian subsidiary (Sandfire Resources America, Inc., which then had “no sources of revenue in the United States, and a cash flow of zero,”⁹ but had an interest in a potential mining project), donated \$287,857 to the Montana Mining Association (“MMA”) and Stop I-186 to Protect Mining and Jobs (“Stop I-186”). The purpose of these donations, according to the Complaint, was to oppose “a Montana ballot initiative that the Complaint states would ‘increase [Montana’s] ability to deny permits for hardrock mines . . . to avoid polluting the state’s waters.’”¹⁰ As noted by the Office of General Counsel, “Respondents do not dispute the facts alleged in the Complaint.”¹¹

So a company based halfway around the world made a sizable donation, interjecting itself in hopes of future profits, into a political debate in Montana over mining and the quality of Montana’s waters. Balancing the economic and environmental concerns reflected in the ballot measure and uniquely affecting the State’s residents is precisely the type of exercise of democratic self-government that should be protected from foreign influence. Nor did Sandfire have any First Amendment right to participate in this process: the Supreme Court has plainly held that “foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.”¹²

In this matter, I concurred with the analysis of the Commission’s Office of General Counsel that the best read of the state of the law was that “the only Commission-approved interpretation of the meaning of the Act’s post-BCRA foreign national prohibition’s use of

⁸ Ellen L. Weintraub, Statement of Reasons at 3, MUR 6678 (MindGeek USA, Inc., *et al.*) (Apr. 23, 2015).

⁹ Complaint, paragraph 12.

¹⁰ First General Counsel’s Report, MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et al.*) (“FGCR”) at 1-2, quoting Compl. at 2.

¹¹ *Id.*

¹² *Agency for International Development v. Alliance for Open Society International, Inc.*, — U.S. —, 140 S. Ct. 2082 (2020).

“election” with respect to non-candidate elections” specifically explained “that its application is not limited to ‘elections for political office.’”¹³

As of today, though, the Commission has reversed course, deciding that under the Act, the term “election” does not encompass state and local ballot issues. For the first time, the Commission has voted to allow political donations by foreign nationals to a domestic ballot initiative committee.

Under the circumstances presented by this matter – where the ballot initiative at issue did not have anything to do with a candidate election, and no other evidence suggested that the initiative effort was inextricably linked to a candidate election – my colleagues voted against investigating the allegations presented by the complaint.

This decision, however, should not be read as open season on foreign spending in connection with ballot measures. There have been, and will be again, ballot measures that are inextricably linked to candidate elections.¹⁴ Moreover, this decision does not preclude other paths by which a ballot initiative could fall within the scope of the Act’s wide ban on foreign-national spending in connection with a federal, state, or local election. Consider a ballot initiative that directly affects the election process. While a ballot initiative may not *per se* fit within the Act’s definition of “election,” when the *topic* of an initiative is federal, state, or local elections – for example, provisions regarding redistricting, recall elections, voter registration, vote-by-mail eligibility, election systems, early voting, drop boxes, etc. – then spending relating to such an initiative appears to remain very much in connection with an election, and foreign nationals would therefore be banned from such spending.¹⁵

But ballot initiatives cover plenty of other types of topics. And spending on ballot-initiative campaigns that have nothing on their face to do with candidate elections can still have the *intent* of affecting candidate elections. That intent could cause that spending to be ‘in connection with’ those elections, but that link would likely be quite difficult to prove. It was not

¹³ FGCR at 7, *citing* Advisory Op. 2003-37 (Americans for a Better Country) at 20 (superseded on other grounds by Political Committee Status & Definition of Contribution, 69 Fed. Reg. 68056, 68063 (Nov. 23, 2004)) (“The Act, as amended by BCRA, prohibits foreign nationals from, among other things, directly or indirectly making a contribution or donation of money or other thing of value, or to expressly or impliedly promise to make a contribution or donation, in connection with a Federal, State, or local election (*this prohibition is not limited to elections for political office*)” (emphasis added)).

¹⁴ *See* Advisory Op. 1989-32 at 3-6 (McCarthy) (“AO 1989-32”) (detailing ways in which a candidate and a ballot initiative committee seeking to accept foreign national funds were “inextricably linked,” including through overlapping staff between candidate and ballot initiative committee, linking the name of the candidate and committee in public communications, the candidate soliciting for the committee, and appearance of candidate and initiative on same ballot, concluding that because of these links the activities of the ballot initiative committee were campaign-related and thus the foreign national prohibition applied to the ballot initiative committee).

¹⁵ *See* “2020 ballot measures,” Ballotpedia.org (“Eighteen measures were on the ballot in 14 states concerning election policy, including campaign finance, election dates, election systems, redistricting, suffrage, and term limits”), *found at* https://ballotpedia.org/2020_ballot_measures.

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likely a surprise to conservative organizers in the early 2000s that the ballot initiatives they sponsored opposing marriage equality also boosted turnout for Republican state and federal candidates on Election Day,¹⁶ but proving that that was their intent might have been challenging.

And that is why Congress and the states should act quickly and decisively to protect *all* ballot initiatives from foreign influence. Ballot initiatives can reach deeply into the laws of a state or locality and directly rewrite both statutes and constitutions. They are vulnerable to manipulation, as they skip the legislative gauntlet – and the checks and balances integral to that process – that ordinary legislation must run. They are deserving of no less protection from foreign influence than are our candidate elections.

October 29, 2021



Ellen L. Weintraub
Commissioner

¹⁶ See, e.g., James Dao, “Same-Sex Marriage Issue Key to Some G.O.P. Races,” N.Y. Times (Nov. 4, 2004) (“Proposed state constitutional amendments banning same-sex marriage increased the turnout of socially conservative voters in many of the 11 states where the measures appeared on the ballot on Tuesday, political analysts say, providing crucial assistance to Republican candidates including President Bush in Ohio and Senator Jim Bunning in Kentucky.”)