



FEDERAL ELECTION COMMISSION

Washington, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)	
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Stop I-186 to Protect Mining and Jobs)	MUR 7523
<i>et al.</i>)	
)	
and)	
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Pembina Pipeline Corporation, <i>et al.</i>)	MUR 7512
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STATEMENT OF REASONS OF CHAIR SHANA M. BROUSSARD

For over three decades, Commission precedents and guidance treated spending on efforts to influence state and local ballot initiatives as generally outside of the agency’s regulatory authority.¹ This treatment flowed from the fundamental distinction campaign finance laws have long made between efforts to influence candidate elections, which are subject to regulation, and issue advocacy, which generally is not. In these matters, the Office of General Counsel (“OGC”) recommended that the Commission depart from this well-settled distinction and conclude that the foreign national ban encompasses ballot initiatives.² On July 13, 2021, three of my colleagues and I voted to support OGC’s recommendation to dismiss these matters, but we declined to adopt OGC’s new interpretation of the foreign national prohibition.³ Our reasons for doing so are provided in the Commission’s Factual and Legal Analyses.⁴ I write here to elaborate on the regulatory and legislative events that informed my decision.

The Federal Election Campaign Act of 1971, as amended (the “Act”), prohibits any “foreign national” from making a contribution, donation of money, or other thing of value “in

¹ See Advisory Op. 1989-32 (McCarthy) (“AO 1989-32”); AO 1984-62 (B.A.D. Campaigns) at 1 n.2 (“The Commission has previously held that contributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act”); AO 1984-41 (National Conservative Foundation) at 1-2; AO 1982-10 (Syntex) at 2-3; see also FOREIGN NATIONALS, FEC (June 23, 2017), <https://www.fec.gov/updates/foreign-nationals/> (“[F]oreign nationals may lawfully engage in *political activity* that is not connected with any election to political office at the federal, state, or local levels.” (emphasis added)).

² See First Gen. Counsel’s Rpt. at 2, 5, 12, MUR 7523 (Stop I-186); First Gen. Counsel’s Rpt. at 35-36, 40-41, 43, MUR 7512 (Pembina Pipeline Corporation)

³ Certification ¶ 2, MUR 7523 (Stop I-186) (July 13, 2021); Certification ¶ 2, MUR 7512 (Pembina Pipeline Corporation) (July 13, 2021).

⁴ See Factual & Legal Analysis, MUR 7523 (Stop I-186); Factual & Legal Analysis, MUR 7512 (Pembina Pipeline Corporation).

connection with a federal, state, or local election.”⁵ This provision reflects amendments Congress made to the Act with the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁶ Prior to 2002, the Act prohibited foreign national contributions “in connection with an election to any political office.”⁷ Construing this predecessor statute, the Commission explained in Advisory Op. 1989-32 (McCarthy) that foreign national donations made in connection with ballot initiatives are not subject to the Act because such initiatives are not in connection with elections for political office.⁸ But according to the First General Counsel’s Reports, BCRA’s changes to the Act, which removed, among other things, references to “political office,” indicate that Congress intended *to expand* the prohibition beyond candidate-focused elections to include non-candidate elections such as ballot initiatives.⁹ An examination of the relevant events leading up to and surrounding BCRA’s enactment reveals that Congress amended the Act with a specific purpose that had nothing to do with ballot initiatives.

Since 1976, the Commission consistently applied the foreign national ban to federal, state, and local elections.¹⁰ Following the 1996 elections, a federal district court issued two decisions holding that the foreign national ban applied only to “hard money” contributions for use in financing federal election campaigns.¹¹ The Act’s ban, the court reasoned, defined “contributions” in terms of “federal elections” and did not include “soft money” contributions used by state and local campaigns.¹² The D.C. Circuit rejected the district court’s interpretation and agreed with the Commission,¹³ but the court noted that “the ban can hardly be read as making [the Commission’s] case conclusively.”¹⁴ Because of these court decisions, the Commission, in its 2000 and 2001 Legislative Recommendations, recommended that Congress clarify that the foreign national prohibition applied to federal, state, and local elections.¹⁵ Consistent with the Commission’s Legislative Recommendations and in light of these court

⁵ 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

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

⁷ See 2 U.S.C. § 441e(a) (2000).

⁸ See AO 1989-32. The Commission explained that a foreign national would not be permitted to make donations to a ballot initiative that was inextricably linked to a candidate. *See id.* at 3-6.

⁹ See First Gen. Counsel’s Rpt. at 2, 5, 12, MUR 7523; First Gen. Counsel’s Rpt. at 35-36, 39, 43, MUR 7512.

¹⁰ Establishment of Chapter, 41 Fed. Reg. 35,931, 35,959 (Aug. 25, 1976).

¹¹ See *United States v. Trie*, 23 F. Supp. 2d 55, 59-60 (D.D.C. 1998); *United States v. Kanchanalak*, 41 F. Supp. 2d 1, 7 (D.D.C. 1999).

¹² See *Trie*, 23 F. Supp. 2d at 59-60.

¹³ See *United States v. Kanchanalak*, 192 F.3d 1037, 1047-50 (D.C. Cir. 1999).

¹⁴ *Id.* at 1049.

¹⁵ *FEC Legislative Recommendations* at 44-45 (2000), <https://www.fec.gov/resources/cms-content/documents/legrec2000.pdf> (“While the Commission continues to believe that the statute permits, and the legislative history supports, application of section 441e to nonfederal elections, statutory clarification of this point would be useful.”); *FEC Legislative Recommendations* at 8 (2001), <https://www.fec.gov/resources/cms-content/documents/legrec2001.pdf>; see also Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69944 (Nov. 19, 2002) (“2002 E&J”) (“In 1999, 2000, and 2001 the Commission included in its legislative recommendations to Congress a proposal that [the Act] be amended to clarify that the statutory prohibition on foreign national contributions extends to State and local elections.”).

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cases, Congress amended the Act through BCRA to settle any doubt about whether the Act applied to state or local elections.¹⁶

Not only are there no indicia of congressional intent in BCRA to include ballot initiatives in the foreign national prohibition, but it also appears that Congress deliberately chose not to do so. On at least three occasions prior to BCRA, bills were introduced in Congress to amend the Act to clarify that it “prohibits contributions by foreign nationals in elections for Federal, State, and local offices, *and to provide for an additional prohibition on contributions by foreign nationals in initiative, referendum, and recall elections.*”¹⁷ Neither of these specific bills made it out of committee. And when Congress later amended the Act in BCRA to clarify that the foreign national ban applied to nonfederal elections, it did not include ballot initiatives. That Congress included the former but not the latter in BCRA after both were previously introduced together and in multiple bills strongly suggests that it did not intend to alter the Commission’s longstanding treatment of ballot initiatives vis-à-vis the Act’s foreign national prohibition.¹⁸

In conclusion, I remain strongly committed to enforcing the foreign national prohibition to protect our democratic processes. But there are limits to the Commission’s authority to regulate in this space. When the federal government regulates in areas involving traditional state authority, it must be especially mindful of the scope of its statutory authority and also sensitive to the unique balance of power between the federal government and the states.¹⁹ The foreign national prohibition already operates as a general exception to the Commission’s regulatory authority because, unlike other provisions of the Act, which generally regulate *federal campaign finance*, the prohibition touches state and local campaign finance activities. To expand it further to encompass state and local ballot initiatives requires evidence of clear congressional intent.²⁰

¹⁶ See 147 Cong. Rec. S2773-74 (daily ed. Mar. 22, 2001) (statement of Sen. Thompson) (noting the Commission “asked for clarification regarding the legality of foreign soft money” after court decisions in the wake of the 1996 election and explaining that the bill seeks “to clarify current provisions of law regarding donations from foreign nationals”); 148 Cong. Rec. S1991-94 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold); 147 Cong. Rec. S2421-23 (daily ed. Mar. 19, 2001) (statement of Sen. Specter); see also 2002 E&J, 67 Fed. Reg. at 69,944.

¹⁷ H.R. 1628, 103d Cong. (1993) (emphasis added); see also H.R. 3592, 102nd Cong. (1991); H.R. 1540, 101st Cong. (1989).

¹⁸ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137(1985) (finding legislative acquiescence in “a refusal by Congress to overrule an agency’s construction of legislation” where “the administrative construction has been brought to Congress’ attention through legislation specifically designed to supplant it”); *Jackson v. Modly*, 949 F.3d 763, 773 (D.C. Cir. 2020) (finding legislative acquiescence where Congress has amended several parts of Title VII over the years, including the specific provision at issue, but did not seek to override judicial interpretation of statute). In the soft money context, the Commission, in its 2004 Legislative Recommendations, asked Congress to “clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are “in connection with a Federal election” and thus subject to the §441i(e)(1) [now § 30125(e)(1)] restrictions.” *FEC Legislative Recommendations* at 13 (2004), <https://www.fec.gov/resources/cms-content/documents/legrec2004.pdf#441ie>. Congress declined to act on this recommendation.

¹⁹ See *Bond v. United States*, 572 U.S. 844, 857-58 (2014); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

²⁰ See *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (requiring clear congressional intent where agency action would result in an expansion of federal regulation into activities involving traditional state authority).

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Until Congress expands the Act's foreign national prohibition to encompass state and local ballot activities, which I urge it to do,²¹ the Commission is bound by the law as it currently stands.²²

11/2/2021

Date



Shana M. Broussard
Chair

²¹ I am encouraged by recent bills introduced in Congress that would expand the foreign national prohibition to include ballot initiatives. *See, e.g.*, S. 443, 117th Cong. (2021); H.R. 1334, 117th Cong. (2021); H.R. 1516, 117th Cong. (2021). In addition, at least seven states have enacted statutes prohibiting foreign nationals from spending to influence the outcome of ballot measures. *See* Cal. Gov't Code § 85320; Colo. Rev. Stat. § 1-45-107.5; Md. Code, Election Law § 13-236.1; Nev. Rev. Stat. § 294A.325; N.D. Cent. Code § 16.1-08.1-03.15; S.D. Codified Laws § 12-27-2; Wash. Rev Code § 42.17A.417.

²² *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (explaining that the agency's power is "not the power to make law" but the "power to carry into effect the will of Congress as expressed by the statute" (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965))).