FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Mindgeek USA, Inc., *et al.*	)	MUR 6678

STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

This case (MUR 6678, MindGeek S.A.R.L., *et al.*) raises the novel issue of whether the Federal Election Campaign Act, as amended ("the Act") prohibits foreign nationals from donating to ballot measure campaigns. No court has squarely considered this issue and neither has the Commission.[1] The Commission deadlocked on a motion to dismiss this complaint; I opposed that motion.[2] In this case, foreign nationals contributed $327,000 to oppose a California ballot measure.[3] The Act's foreign national ban is broad enough to encompass ballot measures. And there are strong policy reasons why the Act should be read to prohibit foreign funding of ballot measure committees and to exclude foreign nationals from participating in lawmaking by popular referendum in the United States.

The relevant facts of this case and the resulting question are not complex. On November 6, 2012, California held its general election for federal, state, and local offices. Included on the ballot in Los Angeles County was Measure B. A local ballot measure committee, "No On Government Waste, No On Measure B-Major Funding by Manwin USA Committee" ("No On Measure B"), opposed Measure B. Forty-seven percent of No On Measure B's total reported receipts ($693,948) came from two corporations – Manwin USA, Inc. and Froytal Services Ltd.[4] These contributions – $252,000 from Manwin USA and $75,000 from Froytal Services – were either foreign-generated funds or domestically-generated funds that were donated at the direction of a foreign national. Respondents do not contest that the funds at issue came from foreign

[1] Specifically, the Commission has not addressed whether section 30121 (formerly section 441e) applies to activity solely related to ballot measures (*i.e.*, activity not linked with any candidates) since the Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the foreign national ban.

[2] Vice Chair Petersen, Comissioner Goodman, and Commissioner Hunter voted to dismiss the complaint. Chair Ravel, Commissioner Walther, and I opposed the motion. The Commission subsequently voted to close the file. *See* Certification in MUR 6678 (Mindgeek USA, Inc., *et al.*), dated Mar. 17, 2015.

[3] *See* First General Counsel's Report in MUR 6678 (Mindgeek USA, Inc., *et al.*), dated Sept. 15, 2014, at 4-5.

[4] *Id.* at 4.

nationals.[5] The President of the AIDS Healthcare Foundation in Los Angeles filed a complaint asking the Commission to enforce the foreign national contribution ban against the respondents in this case.[6]

The Act contains an expansive ban on foreign money in American elections. Under 52 U.S.C. § 30121 (formerly 2 U.S.C. § 441e), it is unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value "in connection with a Federal, State, or local election."[7] The Act defines "election" to include general, special, primary, runoff, convention, or caucus elections.[8]

Before the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Act prohibited foreign national contributions or donations "in connection with an election to any political office."[9] In 2002, BCRA amended section 30121 (formerly section 441e) to prohibit foreign national contributions or donations "in connection with a Federal, State, or local election,"[10] thus expanding the prohibition. The question raised by this case is whether, in so broadening the prohibition beyond elections "for any political office," Congress included within the prohibition elections on ballot measures.

[5] *See* Thylmann Resp. (Jan. 7, 2013); No On Measure B Resp. (Feb. 28, 2013). Manwin Licensing International S.A.R.L, Manwin USA, Froytal Services and Andrew Link adopted Thylmann's response by letter dated January 7, 2013..

[6] *See* Compl. at 1. Complainant asked the Commission to commence enforcement proceedings against Manwin Licensing International S.A.R.L., Manwin USA, Fabian Thylmann, Andrew Link, No On Measure B, and Froytal Services. The Commission's Office of General Counsel identified each listed individual and corporation as a Respondent in this matter.

[7] 52 U.S.C. § 30121(a)(1)(A) (formerly 2 U.S.C. § 441e(a)(1)(A)); 11 C.F.R. § 110.20(b). A number of other provisions amplify this ban. Foreign nationals may not, directly or indirectly, make an expenditure, independent expenditure, or disbursement in connection with a federal, state, or local election. 52 U.S.C. § 30121(a)(1)(C) (formerly 2 U.S.C. § 441e(a)(1)(C)); 11 C.F.R. § 110.20(f). Nor may foreign nationals direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, with regard to such person's federal or nonfederal election-related activities, including decisions concerning the making of contributions or donations in connection with elections for any federal, state, or local office. *Id.* § 110.20(i). And no person may knowingly provide substantial assistance in the solicitation, making, acceptance, or receipt of a prohibited foreign national contribution or donation. *Id.* § 110.20(h). No person may solicit, accept, or receive a foreign national contribution or donation. 52 U.S.C. § 30121(a)(2) (formerly 2 U.S.C. § 441e(a)(2)). In addition, under 52 U.S.C. § 30125(e) (formerly 2 U.S.C. § 441i(e)), the Act prohibits candidates, individuals holding Federal office and their agents from soliciting, receiving, directing, transferring or spending contributions from prohibited sources, including foreign nationals, in connection with an election for "Federal office" or "any election other than an election for Federal office."

[8] 52 U.S.C. § 30101(1) (formerly 2 U.S.C. § 431(1)). While Commission regulations explain that "[e]lection means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office," 11 C.F.R. § 100.2(a), section 30121 (formerly section 441e) by its terms is broader and includes state and local elections. 52 U.S.C. § 30121(a)(1)(A) (formerly 2 U.S.C. § 441e(a)(1)(A)).

[9] *See* 2 U.S.C. § 441e(a) (2000) (current version at 52 U.S.C. § 30121(a)).

[10] *See* 52 U.S.C. § 30121(a)(1)(A) (2004) (formerly 2 U.S.C. 441e(a)(1)(A)) (amending 2 U.S.C. § 441e(a) (2000)).

Respondents argue that it did not, that the Act does not prohibit the foreign national donations at issue in this case because the money was directed at a ballot measure election, not a candidate election.[11] From the voter's perspective, however, 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 have a say. Imagine, for example, a foreign billionaire who was dissatisfied with U.S. immigration policy and decided to try to change it more to his own liking, one statewide ballot measure at a time. The ballot measure is the mechanism designed to most directly express the will of the American people regarding the laws that govern us. I think most Americans would be disturbed by the notion that a wealthy foreigner could freely spend to rewrite our laws.

U.S. Supreme Court jurisprudence on the Act's foreign national ban has carved out a no-go zone for general participation of foreign nationals in the American political community.[12] The line the Court has repeatedly drawn upholds state laws that exclude foreign nationals from activities "intimately related to the process of democratic self-government."[13] In defining the term, "democratic self-government," the Court has cast a wide net, including the work of probation officers, police officers, and public school teachers as core to our democracy, and therefore work that may be placed off-limits to foreign nationals.[14]

Ballot measures are an even more basic exercise of democratic self-government. The U.S. District Court for the District of Columbia used analogous reasoning in *Bluman v. FEC* to uphold section 30121 (formerly section 441e) as it relates to candidate contributions, political party contributions, and expenditures made to expressly advocate for and against candidates.[15] In making its decision, the court attempted to assess the proposed contribution activity in light of the Supreme Court's definition of democratic self-government. *Bluman* cogently summarized the Supreme Court's teaching as follows:

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[11] Fabian Thylmann responded to the Complaint by arguing that Measure B is not an "election" under the Act, making the foreign national contribution ban inapplicable. Thylmann Resp. at 2-3. No On Measure B similarly argues that the Act's foreign national prohibition does not apply to state and local ballot measure committees. No On Measure B Resp. at 1, 3-4.

[12] *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (Mem.).

[13] *Id.* (citing *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982)) (upholding a law barring foreign citizens from working as probation officers).

[14] *See Bluman*, 800 F. Supp. 2d at 287 (citing *Cabell*, 454 U.S. at 444-47; *Ambach v. Norwick*, 441 U.S. 68, 75-81 (1979) (upholding a law barring foreign citizens from teaching in public schools unless they intend to apply for citizenship); *Foley v. Connelie*, 435 U.S. 291, 297-300 (1978) (upholding a law barring foreign citizens from serving as police officers); *Perkins v. Smith*, 370 F.Supp. 134 (D.Md. 1974), *aff'd* 426 U.S. 913 (1976) (upholding a law barring foreign citizens from serving as jurors); *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973) ("citizenship is a permissible criterion for limiting" the "right to vote or to hold high public office")).

[15] *See Bluman*, 800 F. Supp. 2d at 287.

> 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.[16]

The *Bluman* court ultimately concluded that the Act prohibits the proposed contributions by foreign nationals because "spending money to influence voters and finance campaigns is at least (and probably far more) closely related to democratic self-government than serving as a probation officer or public schoolteacher."[17] Here, too, the process by which voters consider adopting laws via ballot measure goes to the very heart of democratic self-government and should be protected from foreign intervention, and specifically from foreign spending to influence the outcome.

It is important to note that the foreign national ban is not animated by the typical campaign finance concerns about preventing corruption. This case raises more fundamental questions about who gets to fully participate in the American political community, with all the attendant rights and privileges. In my opinion, the better view is that foreign nationals, who have "no basic investment in the well-being of the country,"[18] do not.

4/23/15
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

[16] *Id.* at 288.

[17] *Bluman,* 800 F. Supp. 2d at 288-289. In *Bluman*, the court assumed, but explicitly did not decide whether foreign nationals could be banned from donating to ballot measure campaigns, as that question was not before it. *Id.* at 292. The Supreme Court, too, has not yet squarely considered the question whether section 30121 (formerly section 441e) applies to ballot measures. The Court has only weighed in on the question whether the Act can prohibit corporate contributions to influence the vote on local referenda. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). As the Bluman court recognized, foreign nationals do not have the same First Amendment rights as U.S. citizens, corporate or otherwise. *Bluman,* 800 F. Supp. 2d at 290.

[18] *Citizens United*, 558 U.S. 310, 424 n.51 (2010) (Stevens, J., joined by Ginsburg, Breyer, Sotomayor, JJ., concurring in part and dissenting in part), *cited in Bluman,* 800 F. Supp. 2d at 289.