



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 6, 2020

Ciara Torres-Spelliscy
Professor of Law
Stetson University College of Law
Gulfport, Florida 33707

Re: Testimony before the U.S. House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Dear Professor Torres-Spelliscy:

I write in response to your presentation at today's hearing before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties. In support of your claim that the Federal Election Commission does not enforce the law against foreign spending in U.S. elections, the *only* example you gave was, as you put it, "a particularly colorful episode" in which "a foreign pornographer spent [money] in a Los Angeles election in 2012."¹ You stated that this "spending violated longstanding bans on foreign money in American elections . . . but the FEC would not enforce the law against the foreign pornographer." And you posed the rhetorical question, "If the FEC is not going to stand up against a foreign pornographer, . . . who would they stand up against?"

It appears you were attempting to refer to the Commission's Matter Under Review 6678 (MindGeek), in which a foreign national spent money in connection with a local ballot measure — not an election. As a law professor, I am sure you recognize the distinction under campaign finance law between an election, which involves the nomination or election of candidates to office,² and a ballot measure, which does not. The foreign national ban at 52 U.S.C. § 30121 addresses elections, not ballot measures.

Because MUR 6678 (MindGeek) pertained to a ballot measure, and the Commission's Office of General Counsel found "no information to suggest that any of those candidates [who

¹ *Citizens United* at 10: The Consequences for Democracy and Potential Responses by Congress, House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2781> (remarks of Professor Ciara Torres-Spelliscy at 1 hour 21 minutes); *see also* Testimony of Professor Ciara Torres-Spelliscy Before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Regarding the Tenth Anniversary of *Citizens United v. FEC* at 8-9 (Feb. 6, 2020) (incorrectly describing spending by foreign national as "in favor of President Obama's reelection").

² *See* 11 C.F.R. § 100.2(a).

appeared on the same ballot as the ballot measure] were involved in any way whatsoever with the Ballot Measure Committee or [the ballot measure],”³ the Commission’s dismissal of MUR 6678 (MindGeek) was legally correct. Your description of the “episode” in your testimony, however “colorful” it may have been, was legally and factually incorrect.

Today is not the first time MUR 6678 (MindGeek) has been mischaracterized in congressional testimony. Your September 2019 testimony before the Committee on House Administration contained the same misrepresentation.⁴ Nor are you the first person to have erred by describing MUR 6678 (MindGeek) in this way.⁵

Please find attached my statement on MUR 6678 (MindGeek), which provides further information about the facts and applicable law.⁶ I invite you to review the Commission’s closed enforcement files on the Commission’s website, where you will find that I have repeatedly voted to investigate and punish violations of the foreign national ban, as well as other information about the Commission’s longstanding enforcement of the law against foreign spending in U.S. elections.⁷

If you have any questions, please do not hesitate to contact me.

Sincerely,



Caroline C. Hunter
Chair

³ MUR 6678 (MindGeek), First General Counsel’s Report at 17.

⁴ Testimony of Professor Ciara Torres-Spelliscy before the Committee on House Administration at 5 (Sept. 25, 2019), <https://www.congress.gov/116/meeting/house/109983/witnesses/HHRG-116-HA00-Wstate-Torres-SpelliscyC-20190925-U1.pdf>.

⁵ Statement of John Pudner, Take Back Our Republic, Forum: Corporate Political Spending and Foreign Influence Hosted by Commissioner Ellen L. Weintraub at 7 (June 23, 2016), <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Pudner.pdf>.

⁶ Respected practitioners agreed with my interpretation of the law. See, e.g., Bob Bauer, *FEC Conflicts: the Choices of the Chair and the Responsibility for Non-Enforcement*, More Soft Money Hard Law (May 4, 2015), <http://www.moresoftmoneyhardlaw.com/2015/05/fec-conflicts-choices-chair-responsibility-non-enforcement/> (“A regulatory position that puts less emphasis on legal authority and conventional legal analysis, and more on policy and public opinion, . . . would not be the answer supported by the best reading of the law.”); Frederika Schouten, *Condoms-in-porn initiative spurs concern about foreign money in elections*, USA Today (May 18, 2015), <https://www.usatoday.com/story/news/politics/elections/2015/05/18/federal-election-commission-foreign-donations-ballot-initiative-condoms-adult-films/27530379/> (stating, “[s]everal election lawyers agree with the Republican commissioners” and quoting former Commission Associate General Counsel Kenneth Gross).

⁷ See, e.g., MUR 7122 (American Pacific International Capital) (conciliating violations of foreign national ban); MUR 6184 (Skyway Concession Company, LLC) (same); MUR 6093 (Transurban) (same).



FEDERAL ELECTION COMMISSION
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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
 MindGeek S.A.R.L. f.k.a.) MUR: 6678
 Manwin Licensing International S.A.R.L.;)
 Fabian Thylmann)
 Andrew Link)
 Froytal Services Limited)
 No on Government Waste/No on Measure B)
 —Major funding by Manwin USA)

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND
 COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN**

This matter presented a straightforward question: does a state or local ballot initiative¹ constitute an “election” under the Federal Election Campaign Act of 1971, as amended (the “Act”)? The Act’s text and relevant Commission interpretation, as well as court precedents, clearly demonstrate that the answer is *no*. Because the complaint in this matter involved alleged contributions by foreign nationals to a local ballot measure committee, we agreed with the Office of General Counsel’s recommendation and voted to dismiss this matter.²

The Act prohibits donations by foreign nationals “in connection with a Federal, state, or local election,” as well as the solicitation, acceptance, or receipt of such donations.³ The term “election” encompasses only candidate elections.⁴ Accordingly, for over three decades the Commission has recognized a limit on the Act’s scope: activities in connection with elections of

¹ We use the terms “ballot measure,” “ballot referenda,” and “ballot initiative” interchangeably.

² See generally MUR 6678 (MindGeek), Compl.; see also *id.*, Certification (March 17, 2015). The ballot measure committee was formed under California law in 2012 to oppose the electorate’s passage of a ballot initiative known as Measure B, “Safer Sex in the Adult Film Industry Act,” which proposed enactment of a local health ordinance relating to adult films shot in Los Angeles County. The ballot measure committee engaged in activities related only to the ballot initiative. See MUR 6678 (MindGeek), First General Counsel’s Report at 18.

³ 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e(a)).

⁴ See 11 C.F.R. § 100.2(a) (defining “[e]lection” as “the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office”).

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candidates fall under the Act's purview, but activities in connection with votes on ballot initiatives do not.⁵

Indeed, as explained in *Bluman v. FEC*⁶ — a decision summarily affirmed by the Supreme Court⁷ — the Act “does not bar foreign nationals from issue advocacy” or other forms of civic engagement in this country, such as lobbying.⁸ This includes financial support or opposition of ballot initiatives, which directly implement the electorate's public-policy preferences. *Bluman* specifically addressed ballot initiatives and accepted that the Act does not regulate that type of foreign national participation in the political process.⁹

Our colleagues, in explaining why they did not support dismissing this matter, largely ignore Commission precedents and the relevant judicial analysis in *Bluman*. Rather, they make policy arguments focused on perceived vulnerabilities of the ballot-initiative process to advocate for FEC regulation in this area.¹⁰ Such arguments are irrelevant as a legal matter. Unless and until Congress expands the Act's foreign national ban to encompass state and local ballot initiatives, we are constrained by the law Congress actually has written. The Commission has no authority to otherwise interpose itself as arbiter of who can participate in state and local ballot initiatives.¹¹

In short, dismissal of this matter was required as a matter of law. Accordingly, we supported the Office of General Counsel's recommendation and disposed of this matter.

⁵ See, e.g., Advisory Op. 1984-62 (B.A.D. Campaigns), at 1 n.2 (“[C]ontributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act.” (citing Advisory Op. 1980-95 (First Nat'l Bank of Fla.))). No developments in the intervening years — including passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) — have altered this understanding of the Act's scope. Cf. Concurring Op. of Vice Chairman Michael E. Toner & Commissioner David M. Mason, Advisory Op. 2005-10 (Berman/Doolittle), at 1 (“Commission regulations . . . define election as limited to candidate elections.” (citing 11 C.F.R. § 100.2(a)). Indeed, after passage of BCRA, the Commission continued to advise the public that ballot measures are not elections covered by the Act and that the Act does not regulate foreign nationals' participation in such elections. *FEC, Foreign Nationals* (July 2003), available at <http://www.fec.gov/pages/brochures/foreign.shtml>.

⁶ 800 F. Supp. 2d 281 (D.C. Cir. 2011).

⁷ 132 S. Ct. 1087 (2012) (Mem.).

⁸ *Bluman*, 800 F. Supp. 2d at 292; see also Foreign Agents Registration Act of 1938, 22 U.S.C. § 611–621 (imposing registration and disclosure requirements on individuals or organizations who lobby on behalf of “foreign principals,” which include foreign governments, political parties, organizations, and individuals).

⁹ See *Bluman*, 800 F. Supp. 2d at 291 (analyzing and rejecting plaintiffs' argument that 52 U.S.C. § 30121 (formerly 2 U.S.C. § 441e) is unconstitutionally “underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives”).

¹⁰ See generally MUR 6678 (MindGeek), Statement of Reasons of Chair Ann M. Ravel; MUR 6678 (MindGeek), Statement of Reasons of Commissioner Ellen L. Weintraub.

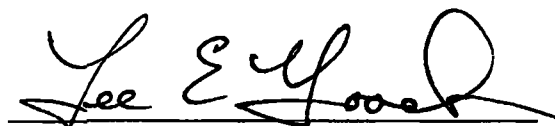
¹¹ We note that, although not addressed by federal law, a California statute in effect for over fifteen years appears to prohibit the donations at issue in this matter. See Cal. Gov't Code § 85320 (“No . . . foreign principal shall make, directly or through any other person, any contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, any state or local ballot measure.”).


MATTHEW S. PETERSEN
Vice Chairman

4/30/2015
Date


CAROLINE C. HUNTER
Commissioner

4/30/15
Date


LEE E. GOODMAN
Commissioner

April 30, 2015
Date

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