

# Barring Foreigners from Participating in Referenda Elections

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## KEY TAKEAWAYS

There is almost universal agreement that foreigners should not have a role in U.S. elections.

The Supreme Court has held that foreign nationals can be excluded from activities that are part of democratic self-government.

Congress should extend the ban on foreign nationals participating in candidate elections to include participation in referenda and issue-based ballot measures.

Federal campaign finance law clearly prohibits foreign governments and foreign nationals from participating in local, state, and federal elections of candidates for office in the United States, but it does not prevent them from participating in elections involving referenda and issue-based ballot measures.

The same rationale for preventing foreign nationals and particularly foreign governments from interfering with and intruding into the choices made by American citizens voting in elections for President, Congress, state legislatures, and other state and local offices applies to referenda and issue-based ballot measures. Those votes affect the personal and professional lives and economic opportunities of citizens and the power of local government to regulate. Congress should amend the law to extend the federal ban to all elections involving referenda and issue-based ballot measures to prevent foreign interference and intrusion into our democratic process.

This paper, in its entirety, can be found at <http://report.heritage.org/lm296>

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## Federal Law Bans Foreign Nationals and Governments from Participating in U.S. Elections

In 1966, Congress for the first time prohibited agents of foreign governments and foreign entities from making contributions to candidates.<sup>1</sup> Congress expanded that prohibition with the Federal Election Campaign Act Amendments of 1974 (FECA), which barred all “foreign nationals” from making any contribution or donation “directly or indirectly” 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.”<sup>2</sup> Later amendments included the barring of any donation or contribution to “the committee of a political party.”

Similarly, foreign nationals are barred from making an “expenditure, independent expenditure, or disbursement for an electioneering communication.” Moreover, no person is allowed to “solicit, accept, or receive a contribution or donation...from a foreign national.”<sup>3</sup> The ban on foreign donations and expenditures does not apply just to federal elections, but to all state and local elections as well.

A foreign national is defined as anyone who is not a U.S. citizen or national and has not been “lawfully admitted for permanent residence.” This allows permanent resident aliens to participate in our elections, but no other aliens.<sup>4</sup> A foreign national also includes a “foreign principal,” defined as the “government of a foreign country and a foreign political party” or a “partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.”<sup>5</sup>

The Federal Election Commission,<sup>6</sup> the independent federal agency tasked with the administration and civil enforcement of FECA, has issued extensive regulations implementing this ban on foreign participation in elections.<sup>7</sup>

### Ban on Foreign Nationals Has Been Upheld in the Courts

This ban on foreign nationals has been upheld by the courts because although aliens “enjoy many of the same constitutional rights that U.S. citizens do,” they can “be denied certain rights and privileges that U.S. citizens possess.”<sup>8</sup> This was succinctly explained in a District of Columbia district court decision in 2011 in *Bluman v. FEC* when the court dismissed a challenge by two aliens who were lawfully present in the U.S. with temporary work visas. They claimed that their inability to donate to candidates and

political parties or to make expenditures expressly advocating for the election or defeat of those candidates violated the First Amendment.<sup>9</sup>

In ruling against them, the three-judge panel led by Judge (now Justice) Brett Kavanaugh said that when it comes to determining what constitutional rights can be denied to aliens, the Supreme Court of the United States has “drawn a fairly clear line”:

The Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government. For example, the Supreme Court has ruled that the government may bar aliens from voting, serving as jurors, working as police or probation officers, or teaching at public schools. Under those precedents, the federal ban at issue here readily passes constitutional muster.<sup>10</sup>

As the Supreme Court has said, “a State’s historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign’s obligation to preserve the basic conception of a political community.”<sup>11</sup> In other words, “the government may reserve” participation in the democratic political process to U.S. citizens.<sup>12</sup>

## Definition of Election Under FECA

Determining the extent to which foreign nationals, whether they are governments, individuals, or corporations, are barred from participating in U.S. elections, however, depends on the definition of “election” within the governing federal statute. FECA defines an election as:

- A general, special, primary, or runoff election;
- A convention or caucus of a political party which has authority to nominate a candidate;
- A primary election held for the selection of delegates to a national nominating convention of a political party; and
- A primary election held for the expression of a preference for the nomination of individuals for election to the office of President.<sup>13</sup>

In 1995 in *McIntyre v. Ohio Elections Commission*, the U.S. Supreme Court concluded that this definition of election “regulates only candidate

elections, not referenda or other issue-based ballot measures.”<sup>14</sup> Judge Kavanaugh elaborated on that limitation in the *Bluman* decision when he wrote that the statute “does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate.”<sup>15</sup>

The FEC has consistently enforced the foreign nationals’ ban to comply with this interpretation, most recently in an enforcement action involving Sandfire Resources American, Inc. (Sandfire), a Canadian subsidiary of an Australian company, Sandfire Resources NL (Sandfire NL), over its involvement in a referendum in Montana.<sup>16</sup> The November 2018 Montana election included a ballot initiative, I-186, that would have imposed new requirements for hard rock mine permits based on water quality standards in land restoration plans. It was defeated.<sup>17</sup>

According to the FEC’s “Factual and Legal Analysis,” the facts in the case were not in dispute. Sandfire made donations to the Montana Mining Association and to Stop I-186, political action committees that were opposing the initiative, to help fund an advertising campaign. However, there was no link between the donations and any candidates. Stop I-186 ran a political issue ad in which two state legislators, a Republican and a Democrat, voiced their joint opposition to the initiative. Neither of them mentioned their own elections.

Both the parent company and the subsidiary are foreign nationals within the definition of FECA. However, as the FEC said, there was no “information available” that “inextricably linked” Sandfire or either of the two political committees to “any federal, state, or local candidate for election.”<sup>18</sup> Nor was there any evidence that any candidates “were involved in the operation of the ballot measure committees, fundraising for the ballot measure committees, or otherwise linked their candidacy to the passage or failure of the ballot measure.”<sup>19</sup>

Given the “relevant court and agency precedents,” the FEC voted four to two on July 13, 2021, to dismiss the complaint. According to a majority of the FEC commissioners, neither Sandfire nor Sandfire NL violated the ban on prohibited foreign donations, and neither the Montana Mining Association nor Stop I-186 violated the ban on the acceptance of prohibited foreign donations.

One of the commissioners who voted against dismissing the complaint, Ellen Weintraub (D), argued that when Congress amended FECA with the Bipartisan Campaign Reform Act of 2002 (BCRA), it got rid of this limitation. In her “Statement of Reasons,” she approvingly cited Judge Kavanaugh’s opinion in *Bluman* when he wrote that “foreign citizens do not have a

constitutional right to participate in, and thus may be excluded from, the activities of democratic self-government.”<sup>20</sup> However, she ignored the fact that the *Bluman* decision was issued in 2011, almost a decade after BCRA became law. Thus, the court was well aware of the changes made by BCRA that Weintraub cites and held that the definition of election had not been changed and still did not include referenda and issue-based ballot measures.

In voting to dismiss the *Sandfire* complaint, FEC Chair Shana Broussard (D) noted that “there are 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” FECA specifically to extend its foreign national ban to “initiative, referendum, and recall elections.” None of those bills ever made it out of committee.<sup>21</sup>

The authority of a federal agency like the FEC is derived from the statutory power it is given by Congress; it cannot simply override federal law because two of its commissioners want to regulate an activity that Congress has not given it the power to regulate. As Broussard correctly said:

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. The foreign national prohibition already operates as a general exception to the Commission’s regulator authority because, unlike other provision of [FECA], 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.<sup>22</sup>

## **FECA Should Be Amended to Prohibit Foreign Interference in Referenda Elections**

Congress should express its “clear congressional intent” by amending FECA to expand the prohibition on contributions and expenditures by foreign nationals in candidate elections to all elections with referenda, initiatives, and issue-based ballot measures.

There is no doubt that the political activity of American citizens, including the ability to contribute to candidates, political parties, and issue organizations or to make expenditures on behalf of candidates and causes in which they believe, is not only protected by the First Amendment, but also is vital to the political health of our democratic republic and our constitutional

form of government. The Supreme Court itself has said so in several important decisions over the reach and extent of campaign finance laws that limit and restrict such activity, including in *Citizens United v. FEC*<sup>23</sup> and *Buckley v. Valeo*.<sup>24</sup> Those First Amendment protections and concerns apply equally to debates and political fights over issue-based ballot measures.

But as Judge Kavanaugh properly recognized in *Bluman*, the issue over foreign participation in our elections, whether it is in candidate or referenda elections, “does not implicate those debates” about the First Amendment.<sup>25</sup> Rather, it raises a “foundational question about the definition of the American political community and in particular, the role of foreign citizens in the U.S. electoral process.”

There seems to be almost universal agreement that foreigners should not have a role in the U.S. electoral process, whether it is in electing our representatives at the local, state, and federal levels or in deciding ballot issues that affect how and to what extent state and local governments exercise their power over citizens. As the Supreme Court has outlined, the “exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.”<sup>26</sup>

Since foreigners are barred from voting in all federal and state candidate elections,<sup>27</sup> as well as in referenda elections, there are no rational or reasonable public policy grounds for allowing them to participate in trying to influence the votes of citizens and the outcomes of elections on those same issue-based ballot measures by contributing money to support or oppose them. As Commissioner Weintraub said in the *Sandfire* matter, “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.”<sup>28</sup>

Her only mistake is thinking that the FEC can do this under current federal law; instead, it requires a change in the law by Congress.

## A FECA Amendment

The amendment required to prevent foreign nationals from participating in referenda elections is very straightforward. 52 U.S.C. § 30101 simply needs to be amended as follows (new language is italicized):

### When used in this Act:

#### (1) The term “election” means—

- (A) A general, special, primary, or runoff election;

- (B) A convention or caucus of a political party which has authority to nominate a candidate;
- (C) A primary election held for the selection of delegates to a national nominating convention or a political party; ~~and~~
- (D) A primary election held for the expression of a preference for the nomination of individuals for election to the office of President; *and*
- (E) *An election held for the purpose of deciding a referendum, initiative, or any other issue-based ballot measure.*

The “compelling interest that justifies Congress in restraining foreign nationals’ participation in American [candidate] elections—namely preventing foreign influence over the U.S. government,”<sup>29</sup> applies equally to restraining their participation in issue elections in order to prevent foreign influence over state and local governments.

Congress should act accordingly.

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## Endnotes

1. Pub.L. No. 89-486, § 8, 80 Stat. 244, 248–49 (1966).
2. 52 U.S.C. § 30121(a)(1). The ban was further expanded to its current form by the Bipartisan Campaign Reform Act of 2002, Pub.L. No. 107-155, § 303, 116 Stat. 81, 96.
3. 52 U.S.C. § 30121(a)(1)(C) and (a)(2).
4. *Id.* at (b)(1) and (2).
5. 22 U.S.C. § 611(b).
6. The author served as a commissioner on the FEC from 2006 to 2007.
7. The FEC has civil enforcement authority; the U.S. Department of Justice has criminal enforcement authority under FECA. 52 U.S.C. §§ 30106(b) and 30109. For the applicable FEC regulation, see 11 CFR § 110.20.
8. *Bluman v. FEC*, 800 F.Supp.2d 281, 286–287 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).
9. *Bluman*, 800 F.Supp.2d 281.
10. *Id.* at 283, 287.
11. *Id.* at 287, citing *Foley v. Connelie*, 435 U.S. 291, 295–296 (1978).
12. *Id.*
13. 52 U.S.C. § 30101(1).
14. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 356 (1995), citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
15. *Bluman*, 800 F.Supp.2d at 284.
16. MUR 7523, Stop I-186 to Protect Mining and Jobs, et al., Federal Election Commission.
17. “Montana I-186, Requirements for Permits and Reclamation Plans of New Hard Rock Mines Initiatives (2018,” [Ballotpedia.org](https://ballotpedia.org/Montana_I-186_Requirements_for_Permits_and_Reclamation_Plans_of_New_Hard_Rock_Mines_Initiative_(2018)); [https://ballotpedia.org/Montana\\_I-186\\_Requirements\\_for\\_Permits\\_and\\_Reclamation\\_Plans\\_of\\_New\\_Hard\\_Rock\\_Mines\\_Initiative\\_\(2018\)](https://ballotpedia.org/Montana_I-186_Requirements_for_Permits_and_Reclamation_Plans_of_New_Hard_Rock_Mines_Initiative_(2018))). The initiative was not approved by voters, who voted against it by a margin of 55.64 percent to 44.36 percent.
18. “Factual & Legal Analysis,” MUR 7523, pp. 5–6.
19. *Id.* at 6.
20. “Statement of Reasons of Commissioner Ellen L. Weintraub,” MUR 7523 (Oct. 29, 2021).
21. “Statement of Reasons of Chair Shana M. Broussard,” MUR 7523 (Nov. 2, 2021).
22. *Id.* (emphasis in original), citing *Bond v. U.S.*, 572 U.S. 844, 857–58 (2014); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); and *Rapanos v. U.S.*, 54 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).
23. *Citizens United v. FEC*, 558 U.S. 310 (2010).
24. *Buckley v. Valeo*, 424 U.S. 1 (1976).
25. *Bluman* 800 F.Supp.2d at 286.
26. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).
27. A handful of jurisdictions such as San Francisco and some towns in Maryland and Vermont allow noncitizens to vote in local elections. Lalee Ibssa, “New York City Poised to Give Noncitizens Right to Vote in Local Elections,” ABC News (Dec. 8, 2021).
28. “Statement of Reasons of Commissioner Ellen L. Weintraub,” MUR 7523 (Oct. 29, 2021).
29. *Bluman*, 800 F.Supp.2d at 290.