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THE FECA'S FOREIGN NATIONALS PROHIBITION IN UNITED STATES V. SINGH: CRIMINALIZING CAMPAIGN CONTRIBUTIONS WITHOUT THE REQUISITE MENS REA AND THE RAMIFICATIONS FOR FOREIGN CORPORATIONS WITH DOMESTIC SUBSIDIARIES

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I. INTRODUCTION

During the 2019 fiscal year, the U.S. Department of State issued over eight million temporary work visas.[1] The Federal Election Campaign Act's ("FECA") foreign nationals prohibition prevents each of these individuals from contributing campaign funds to U.S. candidates at the local, state, and federal levels because they lack lawful permanent residence in the United States.[2] The FECA authorizes the Federal Election Commission ("FEC") and the Department of Justice ("DOJ") to bring civil or criminal enforcement actions, respectively, against individuals who contribute campaign funds in violation of the foreign nationals prohibition.[3] Enforcement actions may be brought against both the party accepting a donation from an individual of foreign national status and the individual contributing funds to a campaign as a foreign national.[4]

A successful criminal enforcement action under the FECA requires the government prove the defendant "knowingly and willfully" violated the law.[5] However, courts reviewing FECA violations demonstrate a lack of

1. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, FY2019 NONIMMIGRANT VISA DETAIL TABLE 42 (2019), https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY19NIVDetailTable.pdf.

2. *See* 52 U.S.C. § 30121 (prohibiting campaign contributions from temporary residents, foreign principals, and individuals lacking lawful permanent residence); Myles Martin, *Foreign Nationals,* FED. ELECTION COMM'N (June 23, 2017), https://www.fec.gov/updates/foreign-nationals/ (outlining the prohibited campaign activities and contributions for foreign nationals).

3. *See* 52 U.S.C. § 30109(a)(4)(C), (a)(5), (a)(6), (d)(1) (creating separate civil and criminal penalties for various election offenses, including for violations of the foreign nationals prohibition).

4. *See id.* § 30121(a).

5. *See id.* § 30109(d)(1); Andy Grewal, *The DOJ Quietly Made Campaign Finance Violations Easier to Prosecute*, YALE J. REGUL. (May 3, 2018) [hereinafter Grewal, *The DOJ Quietly Made Campaign Finance Violations Easier to Prosecute*], https://www.yalejreg.com/nc/the-doj-quietly-made-campaign-finance-violations-easier-to-prosecute-2/ (explaining that the FECA's "knowingly and willfully" violation standard creates a high bar for prosecution).

unanimity when addressing the requisite mens rea sufficient to satisfy the knowing and willful violation standard of the statute.[6] As the U.S. Supreme Court indicated when it affirmed the district court's decision in *Bluman v. FEC*,[7] the foreign nationals prohibition creates unique obstacles for the government to prove the intent necessary to obtain a criminal conviction.[8]

In May of 2019, the Ninth Circuit heard *United States v. Singh*[9] and affirmed the convictions of a foreign national donor and a recipient of funds for violating the foreign nationals prohibition.[10] However, the Ninth Circuit failed to consider factors indicative of the donor's foreign national status or the recipient's knowledge thereof,[11] clouding any remnants of clarity for the foreign nationals prohibition's mens rea standard. In failing to find actual knowledge, the Ninth Circuit set a dangerous precedent for the FECA's intent standard for criminal liability because the factors relied on by the Ninth Circuit are not indicative of foreign national status and will have inadvertent and disadvantageous impacts on the electoral participation of individuals, entities, and corporations.[12]

The Ninth Circuit's reliance on foreign involvement in *Singh* obscured the distinction between the foreign nationals prohibition and how domestic subsidiaries of foreign corporations function under the prohibition because the court's analysis failed to address the status of the donor as an individual or entity.[13] The FEC should revisit the proposed regulation outlining

6. *See, e.g.*, United States v. Whittemore, 776 F.3d 1074, 1080–81 (9th Cir. 2015) (requiring that the defendant only have a general awareness that his conduct was illegal); United States v. Curran, 20 F.3d 560, 568 (3d Cir. 1994) (requiring the government to prove that the defendant had specific intent to commit the crime); United States v. Danielczyk, 788 F. Supp. 2d 472, 486 (E.D. Va. 2011) ("'[K]nowingly' is a 'general intent' *mens rea* standard . . . ."), *rev'd on other grounds* 683 F.3d 611 (4th Cir. 2012), *cert. denied*, 568 U.S. 1193 (2013).

7. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

8. *See id.* at 292 (cautioning reviewing courts against the adoption of the ordinary mens rea standard for the foreign nationals prohibition because both the recipient and the donor may have ignorance of the law and a language barrier).

9. 924 F.3d 1030 (9th Cir. 2019).

10. *See id.* at 1047 (considering involvement with a foreign corporation and foreign election in favor of constructive knowledge of the donor's foreign national status).

11. *See id.* (relying solely on factors which would indicate constructive knowledge).

12. *Compare id.* (weighing factors indicative of foreign business transactions and foreign electoral involvement in favor of the recipient's actual knowledge), *with* 52 U.S.C. § 30109(d)(1) (criminalizing a recipient's acceptance of contributions from a foreign national only if the donor "knowingly and willfully" violates the statute), *and* 11 C.F.R. § 110.20 (2020) (stating that a recipient may meet the knowing and willful violation standard through actual knowledge or constructive knowledge).

13. *See* Monica Sanders, *Relations Between International Companies and Their Subsidiaries*, HOUS. CHRON., https://smallbusiness.chron.com/relations-between-international-companies-subsidiaries-24591.html (last visited Mar. 11, 2021) (defining multinational corporations and their subsidiaries and explaining how and why they are

constructive knowledge as sufficient to satisfy the FECA's mens rea requirement and restrict judicial analysis to provide crucial clarity to the requisite mens rea of recipients, donors, individuals, entities, and corporations.[14]

Broadly, this Comment addresses the intent standard under the FECA's foreign nationals prohibition through the court's analysis in *Singh*.[15] Part II provides the necessary background on the FECA, the intent standards the government must prove to successfully prosecute a criminal violation of the FECA, the foreign nationals prohibition, Circuit Court decisions analyzing the mens rea for FECA violations, and *Singh*. Part III analyzes the intent standard outlined in *Singh*, where the Ninth Circuit held a campaign contribution recipient criminally liable under the foreign nationals prohibition despite his presumption that the donor was a lawful citizen.[16] Part IV recommends that the FEC revise or eliminate the constructive knowledge prong of the foreign nationals prohibition and require actual knowledge of the donor's foreign national status to satisfy the FECA's intent standard.

II. SAFEGUARDING THE ELECTORAL PROCESS: FINDING ENFORCEMENT POWER AND VIOLATORS

In 1867, the U.S. Congress began its initial attempts to restrict campaign financing and combat candidate reliance on funds from wealthy donors.[17] However, the turn of the twentieth century marked a proliferation of legislative concern with consolidated fiscal involvement in politics.[18] Despite legislative efforts to expand the legal framework surrounding campaign finance, many early efforts lacked efficacious enforcement mechanisms.[19] It was not until Congress granted the FEC exclusive

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formed).

14. *See* FED. ELECTION COMM'N, PROPOSED STATEMENT OF POLICY: APPLICATION OF THE FOREIGN NATIONAL PROHIBITION TO DOMESTIC CORPORATIONS OWNED OR CONTROLLED BY FOREIGN NATIONALS AND SAFE HARBOR FOR KNOWLEDGE STANDARD 13 (2016) [hereinafter FEC, PROPOSED STATEMENT OF POLICY] (stating that the FEC need not promulgate additional rulemaking to close the gaps between the foreign nationals prohibition and domestic subsidiaries of foreign corporations because there is no evidence that the current statutory framework is defective).

15. *See Singh*, 924 F.3d at 1044–48.

16. *See id.* at 1044–45, 1047.

17. *See* 106 CONG. REC. S12,928 (daily ed. Oct. 20, 1999) (statement of Sen. Patrick Moynihan) (recognizing that the Naval Appropriations Bill of 1867 began initial attempts to restrict campaign funds).

18. *See* Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After* Citizens United v. FEC, 44 LOY. L.A. L. REV. 951, 967–68, 971 (2011) (citing Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864).

19. *See* Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System*

enforcement power under the FECA that the beginnings of the campaign finance legal framework became marginally compulsory.[20]

Congress amended the FECA in the 1970s to further restrict money in politics and specifically target foreign involvement in U.S. elections.[21] The FECA provisions defined foreign national status and subsequently prohibited foreign nationals from contributing to campaigns altogether.[22] In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), attempting to combat foreign involvement in elections by providing enforcement mechanisms to hold both the foreign actors and domestic recipients criminally liable.[23] Harmonization of the FECA and BCRA frameworks occurred when the FEC revised its regulatory framework to mirror the BCRA and facilitate efficient regulatory enforcement actions under the new legal framework.[24]

A. Intent Under the FECA

For a court to hold a defendant criminally liable under the enforcement prong of the FECA, the defendant must "knowingly and willfully commit[]

in Search of Reform, 9 YALE L. & POL'Y REV. 279, 281 (1991) (stating the FEC lacked effective enforcement mechanisms and disclosure requirements before the FECA).

20. *See* FED. ELECTION COMM'N, FEC REPORT TO THE COMMITTEES ON APPROPRIATIONS ON ENFORCING THE FOREIGN NATIONAL PROHIBITION 3–4 (2018) [hereinafter FEC, REPORT TO THE COMMITTEES ON APPROPRIATIONS] (explaining that the FEC may bring enforcement actions *sua sponte*, as Matters Under Review, or through Alternative Dispute Resolution); Vega, *supra* note 18, at 971–72 (noting that Congress failed to give the FEC essential mechanisms to combat the growing role of money in politics).

21. *See* FECA Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1267 (1974); FECA Amendments of 1976, Pub. L. No. 94-283, §§ 323, 324, 90 Stat. 475, 493 (1976); *see, e.g.*, 52 U.S.C. § 30116 (providing limitations on campaign contributions and expenditures); *id.* § 30121 (prohibiting contributions both to and from foreign nationals); *id.* § 30122 (prohibiting campaign contributions in the name of another).

22. *See* FECA Amendments of 1974 § 101 (defining a noncitizen as an individual unlawfully residing in the United States, or a corporation with a foreign principal); FECA Amendments of 1976 §§ 323, 324 (repealing the statute that placed the foreign nationals prohibition under the criminal code); *see also* Vega, *supra* note 18, at 971–73 (noting that Congress amended the FECA in 1974 to no longer permit direct donations from foreign nationals or corporations to candidates).

23. *Compare* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96 (holding both recipients of funds from foreign nationals and foreign nationals criminally liable), *with* 52 U.S.C. § 30121 (holding donors and recipients criminally liable regardless of their status).

24. *See* FED. ELECTION COMM'N, REPORT TO THE COMMITTEES ON APPROPRIATIONS, *supra* note 20, at 1–2. *Compare* 36 U.S.C. § 510 (prohibiting individuals of foreign national status from contributing to the presidential inaugural committee), *with* 52 U.S.C. § 30121(a) (prohibiting individuals of foreign national status from contributing to elections).

a violation."[25] Reviewing courts consider the knowing and willful prongs in tandem, not with individualized attention to each prong.[26] Thus, when the government seeks criminal liability against both the recipient and the donor, the government must offer evidence that both the individual of foreign national status and the recipient of the contribution intended to violate the law when accepting and/or making the contribution.[27]

The FEC set forth a narrowly tailored three-pronged test to determine if a recipient knows of the donor's foreign national status.[28] While not exhaustive, the FEC considers whether a recipient has knowledge of a donor's foreign national status based on the following factors: a foreign passport, foreign bank transfers, and a foreign address.[29] No factor is dispositive, and a campaign contribution recipient may ascertain knowledge of the donor's foreign national status based on one or none of the factors.[30]

The government seldomly prosecutes campaign violations under the foreign nationals prohibition, and those prosecutions rarely reach the sentencing phase.[31] As one of the few cases brought under the foreign nationals prohibition, the Ninth Circuit's decision in *Singh* to uphold the district court's finding was instrumental in determining how foreign corporations could exert influence in elections.[32] The Eighth and Ninth Circuits found individuals criminally liable under the FECA and relied on one of two interpretations to determine intent under the FECA: (1) whether a defendant generally recognized that his conduct was unlawful; or (2) whether a defendant knew his conduct violated a specific law.[33]

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25. 52 U.S.C. § 30109; *see also* L. PAIGE WHITAKER, CONG. RSCH. SERV., R45320, CAMPAIGN FINANCE LAW: AN ANALYSIS OF KEY ISSUES, RECENT DEVELOPMENTS, AND CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATION 32–33 (2018).

26. *See* U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 152–55 (Richard C. Pilger et al. eds., 8th ed. 2017).

27. *See* 52 U.S.C. § 30109(d)(2).

28. *See* 11 C.F.R. § 110.20(a)(4) (2020) (providing that a violator of the foreign nationals prohibition knows of the foreign national donor's status through one of the following: (1) actual knowledge; (2) constructive knowledge indicating a substantial probability of foreign national donor status; and (3) constructive knowledge that would lead a reasonable recipient to inquire into donor status); *see also* WHITAKER, *supra* note 25, at 32–33.

29. *See* 11 C.F.R. § 110.20(a)(5).

30. *See id.*

31. *See* Sean J. Wright, *Reexamining Criminal Prosecutions Under the Foreign Nationals Ban*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 563, 577–78 (2018) (stating that the sentencing guideline for FECA violations, U.S. SENT'G GUIDELINES MANUAL § 2C1.8 (U.S. SENT'G COMM'N 2018), "has only been applied fifty-nine times in the last decade [and] [n]one have involved a foreign national").

32. *See id.* at 582–83.

33. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 191–94 (1998) (explaining that cases involving technical legal language require knowledge of the specific legal

i. The Bryan Standard

In *Bryan v. United States*,[34] the U.S. Supreme Court pioneered the analysis for knowing and willful intent standards under the U.S. Criminal Code.[35] In *Bryan*, the U.S. Supreme Court upheld the conviction of the defendant for engaging in the sale of firearms without a federal license.[36] The defendant argued that although he dealt firearms, he failed to meet the willfulness standard for intent because he was unaware of the specific federal licensing requirements at the time he dealt the firearms.[37] The U.S. Supreme Court rejected the defendant's argument that his actions failed to meet the willfulness standard of intent because the following facts supported the jury's finding that the defendant willfully violated the statute: he used an intermediary to acquire firearms he would not otherwise be able to obtain, filed off the serial numbers, and sold the firearms on a street known for drug trafficking.[38] The U.S. Supreme Court held that a statute with a "willfulness" requirement does not require specific intent unless the statute itself is highly specialized and implicates seemingly innocent conduct.[39]

Further, the U.S. Supreme Court explained that proof of knowledge that an act would surmount to a criminal offense, rather than knowledge of the specific statutory provision, was sufficient to satisfy the knowing and willful standard.[40] Thus, the Court rejected the defendant's request to overturn precedent and apply the ignorance of law defense, which states that the defendant may be immune from liability when he was unaware that his actions violated any law.[41] Since the foundational decision regarding knowing and willful crimes in *Bryan*, reviewing courts have largely applied

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provision); United States v. Benton, 890 F.3d 697, 715 (8th Cir. 2018); United States v. Whittemore, 776 F.3d 1074, 1080 (9th Cir. 2015); United States v. Danielczyk, 788 F. Supp. 2d 472, 486 (E.D. Va. 2011), *rev'd on other grounds* 683 F.3d 611 (4th Cir. 2012).

34. 524 U.S. 184 (1998).

35. *See* Robert D. Probasco, *Prosecuting Conduit Campaign Contributions — Hard Time for Soft Money*, 42 S. TEX. L. REV. 841, 864 (2001) (elaborating that *Bryan* set forth a new standard that would require prosecutors merely to show the defendant knew his actions were culpable).

36. *Bryan*, 524 U.S. at 189, 193.

37. *Id.* at 189–90.

38. *See id.* at 193 (requiring the defendant only to have "acted with knowledge that his conduct was unlawful" to meet the "willfulness" requirement of criminal conduct).

39. *Id.* at 194, 196–98.

40. *See id.* at 193 (citing Staples v. United States, 511 U.S. 600, 602 (1994)) (explaining that facts brought before the defendant would bring them into the realm of the statutory definition).

41. *See id.* at 194–96 (citing Ratzlaf v. United States, 510 U.S. 135, 138, 149 (1994); Cheek v. United States, 498 U.S. 192, 201 (1991)) (explaining that the exception would not extend to facts where the plaintiff already knew the conduct was unlawful).

this standard for criminal FECA violations.[42]

ii. Circuit Courts Interpreting Bryan's Knowing and Willful Conduct Standard Under the FECA

In grappling with the knowing and willful standard, three key decisions found that the *Bryan* standard applied to the FECA. In *United States v. Danielczyk*,[43] the U.S. District Court for the Eastern District of Virginia determined that the FECA was not an overly technical statute that required a heightened mens rea standard.[44] In reaching that conclusion, the court considered the DOJ's prosecution of the defendants for illegally soliciting and disbursing campaign contributions during Hillary Clinton's 2006 and 2008 senatorial and presidential campaigns.[45] The defendants promised to reimburse the donors for the campaign contributions and attempted to conceal the reimbursements by relabeling the contributions as "consulting fees" and back-dated letters to create a paper trail for the fees and services.[46] In assessing the nature of the FECA, the court relied on the Internal Revenue Code's reasonable cause defense under section 6664(c),[47] clarifying that a statute requires a heightened mens rea when a defendant could consult the law and remain unclear as to the requirements placed upon him.[48] The court distinguished provisions in the FECA governing disclosure of campaign funds from specialized provisions in the Internal Revenue Code because the defendants demonstrated their knowledge of the conduct's unlawfulness by backdating letters and concealing the funds.[49] The case was appealed by the government to the Fourth Circuit for reconsideration, but the court did not address the mens rea standard under the statute.[50]

In *United States v. Whittemore*,[51] the Ninth Circuit held that the government needed to prove that the defendant knew his actions constituted

42. *See* United States v. Whittemore, 776 F.3d 1074, 1080–81 (9th Cir. 2015). *But see* United States v. Curran, 20 F.3d 560, 567–69 (3d Cir. 1994) (suggesting that the government must prove that the defendant "specifically intended to violate federal law").

43. 788 F. Supp. 2d 472 (E.D. Va. 2011).

44. *Id.* at 487–93.

45. *Id.* at 476.

46. *Id.*

47. I.R.C. § 6664(c).

48. *See Danielczyk*, 788 F. Supp. 2d at 490 (citing United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974)).

49. *See id.* at 489–92 (stating that criminal tax liability requires that the defendant voluntarily and intentionally violated the tax code).

50. *See generally* United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012) (considering only the constitutionality of a restriction on corporate electoral spending).

51. 776 F.3d 1074 (9th Cir. 2015).

a crime, but not that the defendant knew of the specific crime he committed.[52] The defendant distributed his own funds to employees and relatives and instructed them to contribute those funds to a candidate in the employees' names.[53] The defendant's actions circumvented federal reporting requirements under the guise of several donors.[54] However, the defendant argued that at the time he transferred the funds to his family and friends, he believed the monetary transfers became unconditional gifts to those parties.[55] Despite the defendant's statutory interpretation, the court determined that he knew that he was the source of the funds.[56] Therefore, the identity of the ultimate donor was irrelevant to whether the defendant's conduct was a knowing and willful violation of the FECA.[57] The Ninth Circuit ultimately determined that the knowing and willful standard was not dependent upon how each individual interpreted the statute, but the general culpability of the conduct was sufficient to satisfy the knowing and willful standard.[58]

In *United States v. Benton*,[59] the Eighth Circuit determined that a defendant did not need to meet the heightened standard of specific intent for a successful criminal conviction under the FECA.[60] The government offered evidence that the defendants, Benton and Tate, campaign officials for Ron Paul during his 2012 presidential campaign, sent an Iowa state senator money for public endorsement and engaged in a coordinated effort to conceal the transfer.[61] Benton argued that the presence of multiple standards for willfulness required that the Eight Circuit apply the standard most favorable to him.[62] The defendant's argument did not persuade the court, which ultimately found that Benton failed to prove that the FECA fits within the *Bryan* standard.[63] *Benton*, as a case demonstrative of the fragmented application of the *Bryan* standard to criminal convictions for campaign finance violations,[64] begins the discussion of *Bryan*'s inapplicability to the

52. *Id.* at 1080.
53. *Id.* at 1076–77.
54. *Id.* at 1076.
55. *Id.* at 1079.
56. *Id.*
57. *See id.*
58. *Id.* at 1080.
59. 890 F.3d 697 (8th Cir. 2018).
60. *Id.* at 714–15.
61. *Id.* at 704, 710.
62. *Id.* at 715.
63. *Id.*
64. *See* Andy Grewal, *If Trump Jr. Didn't Know Campaign Finance Law, He Didn't Break It*, YALE J. REGUL. (July 16, 2017) [hereinafter Grewal, *If Trump Jr. Didn't Know Campaign Finance Law*], https://www.yalejreg.com/nc/if-trump-jr-didnt-know-campaign-finance-law-he-didnt-break-it/.

FECA.

iii. The Cheek and Ratzlaf Standard

Despite the prevalence of courts applying the *Bryan* standard when determining knowing and willful violation of the FECA, many courts do not apply the standard to highly specialized areas of the law.[65] Pioneered in *Cheek v. United States*[66] and affirmed in *Ratzlaf v. United States*,[67] courts have held that violations of highly technical statutes require a willful violation because the public is generally unaware of such statutory requirements.[68]

In *Cheek v. United States*, the U.S. Supreme Court held a defendant airplane pilot criminally liable for failing to file his income tax return for five years.[69] The defendant testified at trial that he believed the tax regime was unconstitutional and that the wages he received were not income to him.[70] The Court considered that during the five years the defendant was not filing his income tax returns, he attended four civil cases challenging the U.S. tax regime and two trials of individuals charged with violating tax laws.[71] Although the Court found that the defendant's view on the constitutionality of the law was irrelevant, the Court determined that the misunderstanding of the law may negate willfulness, even if the misunderstanding is not objectively reasonable.[72]

In *Ratzlaf v. United States*, the U.S. District Court for the District of Nevada found a defendant criminally liable for structuring his financial transactions to strategically avoid reporting requirements.[73] In that case, the

65. *Cf.* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L. J. 341, 361–63 (1998) (stating that while U.S. Supreme Court jurisprudence suggests that complex or technical statutes "may impose a knowledge of the law requirement" to willfulness, courts have continued to "impose their own subjective judgments" in deciding when this heightened standard should be applied).

66. 498 U.S. 192 (1991).

67. 510 U.S. 135 (1994).

68. *See Cheek*, 498 U.S. at 205 (finding that a defendant charged with failing to file his income tax return and willfully evading taxes requires the government to prove that he knew of the specific law); *Ratzlaf*, 510 U.S. at 146–48 (finding that the court could not convict the defendant regardless of his knowledge of the illegality of the offense). *But see* United States v. Starnes, 583 F.3d 196, 211–13 (3d Cir. 2009) (stating that even though the defendant did not know the exact statutory provision, was aware reports he made were false, and that misrepresentation was unlawful, this was not enough to satisfy the heightened intent standard).

69. *Cheek*, 498 U.S. at 194.

70. *Id.* at 195–96, 207.

71. *Id.* at 195.

72. *Id.* at 206–07.

73. *See Ratzlaf*, 510 U.S. at 137–38 (summarizing the trial judge's jury instructions

defendant incurred a debt in excess of $160,000 at a local casino and had a week to pay the debt.[74] The defendant returned to the casino with $100,000, but upon arrival was informed by the casino manager that under 31 U.S.C. § 5313 and 31 C.F.R. § 103.22(a), both local casinos and financial institutions must file reports with the Secretary of Treasury for cash transactions over $10,000.[75] To avoid triggering the reporting requirement, the defendant went to different banks and purchased cashier checks.[76] Upon appeal to the U.S. Supreme Court, the Court determined that violations of the anti-structuring statute, which prohibited structuring transactions in this way to avoid reporting requirements, were not so inherently "evil" that a court could hold the defendant criminally liable without specific knowledge that structuring financial transactions were illegal.[77]

In *United States v. Curran*,[78] the Third Circuit extended the *Cheek* and *Ratzlaf* standard to the FECA.[79] The defendant employer instructed his employees to write personal checks to potential political officeholders, reimbursed the employees for their contributions, and gave employees lists of their colleagues to solicit personal checks from on behalf of candidates.[80] The defendant argued that he utilized the aforementioned donation scheme to avoid other candidates seeking campaign contributions from him, not to necessarily violate the law.[81] The court determined, however, that to hold the defendant culpable, the government must prove three things: (1) that the "defendant knew of [his] reporting obligations"; (2) "that he attempted to frustrate those obligations"; and (3) "that he knew [the] conduct was unlawful."[82] The court was not willing to extend a general intent standard to the whole of the FECA because general intent failed to capture whether the defendant knew his conduct violated the FECA.[83] The Third Circuit ultimately vacated the U.S. District Court for the Eastern District Court of Pennsylvania's judgment because the lower court erroneously instructed the jury to consider criminal liability under a general intent standard when it

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that they did not have to prove the defendant knew this structuring was unlawful, only that the defendant had knowledge of and attempted to avoid the banks' reporting obligations).

74. *Id.* at 137.

75. *Id.* at 136–37.

76. *Id.* at 137.

77. *See id.* at 146–47 (stating that if Congress had intended absolute liability under the statute, the structure of the statute would not require both knowledge and willfulness).

78. 20 F.3d 560 (3d Cir. 1994).

79. *See id.* at 567.

80. *Id.* at 562–63.

81. *Id.* at 563.

82. *Id.* at 569.

83. *Id.* at 569–70.

found the defendant liable for concealing the campaign contributions from the FEC.[84]

B. A Cautioning Court: Bluman v. FEC

In *Bluman v. FEC*, the U.S. Supreme Court affirmed the D.C. District Court's consideration of the foreign nationals prohibition and cautioned against criminal penalties for FECA violations.[85] The plaintiffs were lawful temporary residents of the United States on temporary work visas that brought this action against the FEC, alleging that the statutory bar violated their First Amendment rights as temporary residents.[86] Ultimately, the court granted the FEC's motion to dismiss, stating that the government may exclude noncitizens from the democratic process because the government may restrict the rights of those involved in its political community.[87] The U.S. Supreme Court cautioned Congress that criminal penalties for willful campaign violations require the government to assess the defendant's knowledge of the relevant law.[88]

C. United States v. Singh: The Ninth Circuit Grappling with the Knowing and Willful Standard

In May of 2019, the Ninth Circuit affirmed the lower court's decision in *United States v. Singh* and held a defendant recipient criminally responsible for receiving a campaign contribution from an individual of foreign national status.[89] Defendant donor, Jose Susumo Azano Matsura ("Azano"), sought to contribute campaign funds to a California mayoral candidate seeking to develop the waterfront area near Azano's residence.[90] Azano met the definition of a foreign national under 52 U.S.C. § 30121 because he was not a lawful permanent resident of the United States.[91] Consequently, Azano could not legally contribute campaign funds to a candidate under the FECA,[92] and no individual could receive campaign funds from Azano

84. *Id.*

85. Bluman v. FEC, 800 F. Supp. 2d 281, 285–86, 292 (D.D.C. 2011), *aff'd* 565 U.S. 1104 (2012).

86. *Id.* at 285 (explaining that one plaintiff was a medical resident and dual citizen of Canada and Israel, and the other was an associate at a law firm).

87. *Id.* at 292.

88. *See id.* (stating that there are likely individuals of foreign national status that are unaware of the foreign nationals prohibition).

89. United States v. Singh, 924 F.3d 1030, 1040, 1047 (9th Cir. 2019) (affirming the conviction of a defendant campaign donation recipient under the FECA and foreign nationals test).

90. *Id.* at 1040.

91. *See* 11 C.F.R. § 110.20(a)(3)(ii) (2020); *Singh*, 924 F.3d at 1047.

92. *Compare* 11 C.F.R. § 110.20(a)(3)(ii) (stating that an individual of foreign

without facing the potential for criminal liability under 52 U.S.C. § 30121.[93]

Azano contributed funds through Singh, the CEO of ElectionMall, as an intermediary recipient, seeking to influence the candidate to advance development at a waterfront area.[94] The lower court convicted Singh under 52 U.S.C. § 30121 for accepting a campaign contribution from a foreign national.[95] Singh's primary defense was that he lacked knowledge of Azano's foreign national status at the time of the transaction.[96] Despite Azano's foreign national status, he had various ties to the United States including: a residence in California, his wife and children's lawful citizenship, and lawful entrance into the country on a temporary B1/B2 visa.[97]

In determining that Singh knew of the defendant donor's foreign national status, the court considered: the initiation of contact between the defendants during a foreign election, involvement with a foreign corporation, and attempts to conceal campaign involvement.[98] The Ninth Circuit ultimately affirmed the lower court's conviction of both defendants but reversed a count for falsification of campaign records based on insufficient evidence.[99]

D. The Impact of the Foreign Nationals Prohibition on Corporations

After the U.S. Supreme Court handed down its controversial opinion in *Citizens United v. FEC*,[100] a rising public fear of foreign corporate influence emerged in the gaps of the foreign nationals prohibition.[101] In *Citizens*

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national status includes individuals lacking citizenship or lawful permanent residence), *with Singh*, 924 F.3d at 1040, 1047 (applying the foreign nationals prohibition to Azano because he possessed a B1/B2 visa).

93. *See* 52 U.S.C. § 30121(a)(2); *id.* § 30109(a)(11); *Singh*, 924 F.3d at 1040.

94. *See Singh*, 924 F.3d at 1040–41 (explaining that ElectionMall is an organization providing services to candidates).

95. United States v. Singh, No. 14-cr-00388, 2017 WL 4540747, at *1 (S.D. Cal. Sept. 6, 2017).

96. Appellant's Opening Brief at 31–32, United States v. Singh, 924 F.3d 1030 (9th Cir. 2018), (No. 3-14-cr-0388-MMA) (stating that trial court heard testimony from Singh's family indicating that they assumed Azano was a legal permanent resident of the United States).

97. *Singh*, 924 F.3d at 1040.

98. *See id.* at 1047 (explaining that each of these factors was indicative of knowledge and went to the required mental state of Singh when he accepted the donations as an intermediary recipient).

99. *Id.* at 1061.

100. 558 U.S. 310 (2010).

101. *See id.* at 372 (overruling precedent and finding that corporations have a right to political speech under the First Amendment); *see, e.g.*, Micheal Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, CTR. FOR AM. PROGRESS (Nov. 21, 2019, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2019/

United, the U.S. Supreme Court reviewed a nonprofit corporation's request for injunctive relief to prevent the application of BCRA to its film about presidential candidate Hillary Clinton.[102] The U.S. Supreme Court determined that corporate political donations were political speech and restrictions placed on those contributions must survive strict scrutiny, the same standard as individuals, and that the BCRA could not limit corporate funding of the film.[103] The majority opinion determined that it need not assess whether legal limitations on corporate speech applied to foreign corporations because the plaintiffs brought the case under the provision preventing corporations from participating in electioneering with funds from their general treasury, not the foreign nationals prohibition.[104] The Court's consideration of 2 U.S.C. § 441(e), the former codification of the foreign nationals prohibition, would unnecessarily limit the holding of the case.[105]

Justice Stevens's key concern in his dissenting opinion was that the majority's decision afforded equal protection to foreign corporations and individual U.S. citizens.[106] This brief consideration of the foreign nationals prohibition by Justice Stevens illuminated the public's growing concern with foreign involvement in the electoral process.[107]

III. THE COURT'S ANALYSIS IN UNITED STATES V. SINGH FAILS TO REFLECT THE REQUISITE MENS REA FOR FECA VIOLATIONS

Although FEC and DOJ enforcement actions of the FECA's foreign nationals prohibition are relatively recent in U.S. jurisprudence, reviewing courts must ensure that the government meets its burden of proof because the provision has the potential to hold both recipients and donors criminally liable.[108] Each reviewing court must adequately assess the government's

11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/ (explaining that because the legislature enacted the FECA prior to the U.S. Supreme Court handing down *Citizens United*, it left loopholes for foreign corporations with domestic subsidiaries to impact the electoral process).

102. *Citizens United*, 558 U.S. at 321–22.

103. *Id.* at 371–72.

104. *See id.* at 362 (stating that the plaintiff brought the case under the provision which mandated disclosure of certain information instead of the foreign nationals prohibition). *But see* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 610 (2011) (stating that upholding the ban on foreign national campaign contributions after *Citizens United* would ignore precedent because the ban cannot require distinguishing foreign and domestic contributions based on normative concerns rather than legal).

105. *See Citizens United*, 558 U.S. at 362.

106. *See id.* at 424 (Stevens, J., dissenting).

107. *See* Vega, *supra* note 18, at 956–57.

108. *Cf.* Gross, *supra* note 19, at 292 (arguing that administrative and civil enforcement mechanisms are important to implicate lesser offenses and result in frequent

allegation that the defendant acted with the requisite mens rea for the crime as to each party individually; therefore, the court may not consider the recipient and donor's mens rea collectively. [109]

The Ninth Circuit failed to consider the entire breadth of the recipient's mens rea requirement in *United States v. Singh* in two ways: (1) it neglected to find that the foreign nationals prohibition falls within the *Cheek* and *Ratzlaf* standard; and (2) it failed to address whether Singh had actual versus constructive knowledge of the donor's foreign national status.[110] The Ninth Circuit's omissions will have important implications for foreign corporations with domestic subsidiaries because corporations often engage in foreign involvement regardless of principality.[111] The Ninth Circuit's inattention to the mens rea standard runs the risk of expanding the breadth of criminal liability under the FECA.[112]

A. The Ninth Circuit Failed to Determine that the Foreign Nationals Prohibition Falls Within the Cheek and Ratzlaf Standard

The Ninth Circuit failed to recognize that the foreign nationals prohibition statute, when applied to a recipient of funds, becomes highly technical because enforcement of criminal liability against a violating recipient requires actual knowledge of the donor's foreign national status.[113] The foreign nationals prohibition falls within the highly technical statute exception set forth in *Cheek* and *Ratzlaf* because Singh's defense extended

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enforcement action); Jeffery K. Powell, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 963 (1996) (stating that campaign finance laws fluctuate in clarity and mens rea requirements); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 579–87 (2000) (arguing that enforcement of the FECA remains stunted by budgetary constraints and dual civil and criminal penalties).

109. *See* Gross, *supra* note 19, at 293–94 (explaining that intent for FECA violations is difficult to prove and results in the DOJ bringing very few effective criminal enforcement actions).

110. *See* United States v. Singh, 924 F.3d 1030, 1045–46 (9th Cir. 2019).

111. *See, e.g.*, Dov H. Levin, *Partisan Electoral Interventions by the Great Powers: Introducing the PEIG Dataset*, 36 CONFLICT MGMT. & PEACE SCI. 88, 92, 96–97 (2016) (outlining the variety of political motives the United States may have for intervening in foreign elections, particularly wartime initiatives).

112. *Cf.* Nick Thompson, *International Campaign Finance: How do Countries Compare?*, CNN (Mar. 5, 2012, 4:54 PM), https://www.cnn.com/2012/01/24/world/global-campaign-finance/index.html (demonstrating through explorative examples that international campaign finance is common and presents unique challenges to global governance).

113. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (arguing that the foreign national test may be different from other FECA violations because even the individual of foreign national status may not know of the prohibition).

beyond ignorance of the law.[114] Similar to the defendant in *Cheek*, general awareness of the relevant provision was not sufficient to hold the defendant criminally liable because he operated under the good faith belief that his conduct was not within the confines of the statute.[115] In *Curran*, the court determined that an individual must know of his specific reporting requirements and attempt to frustrate those obligations.[116] The government alleged that Singh had knowledge of his obligation not to accept the donation from the donor and sufficiently attempted to frustrate that obligation.[117] However, even if Singh had a general awareness of the FECA or the foreign nationals prohibition, he was unaware of the donor's citizenship status or that he would fall within the statute and its corresponding criminal penalties.[118] As stated in *Ratzlaf*, the defendant's conduct was not sufficiently blameworthy to eliminate the willfulness analysis entirely.[119]

The Ninth Circuit was required to apply the *Cheek* and *Ratzlaf* standard to determine whether Singh met the heightened mens rea standard under the foreign nationals prohibition because Singh's conduct was similarly facially noncriminal if the defendant lacked knowledge that the donor was of foreign national status.[120] Statutes operating under the *Cheek* and *Ratzlaf* standard require a heightened mens rea because they run the risk of implicating conduct that would otherwise be legal.[121] Singh's conduct, as to the charge

114. *See* Cheek v. United States, 498 U.S. 192, 204–05 (1991) (explaining that even if the defendant disagreed with the formation of the law and the underlying constitutionality, his only legal defense was that he "believed in good faith that" he was exempt from filing personal income taxes); Ratzlaf v. United States, 510 U.S. 135, 138 (1994) (explaining that even though the defendant knew there was a law requiring reporting of transactions over $10,000, he was not necessarily on notice that structuring transactions to avoid the reporting requirements would subject him to criminal penalties).

115. *See Cheek*, 498 U.S. at 194–95, 206 (explaining that the defendant was involved in at least four civil trials related to taxes).

116. *See* United States v. Curran, 20 F.3d 560, 567–68 (3d Cir. 1994) (expressing concern with holding laypersons criminally liable for campaign finance violations, a highly specialized area of the law).

117. *See* United States v. Singh, 924 F.3d 1030, 1040 (9th Cir. 2019) (stating that the acceptance of a donation from an individual of foreign national status provides legal grounds for prosecution under 52 U.S.C. § 30121).

118. *See id.* at 1044 (stating that a criminal violation of the FECA requires that the defendant "knowingly and willfully" violate the statute).

119. *See Ratzlaf*, 510 U.S. at 146–47 (stating that a crime may not be subject to a heightened intent standard when the crime is of an "evil" nature "irrespective of the defendant's knowledge").

120. *See Singh*, 924 F.3d at 1045; 52 U.S.C. § 30121; *see also Curran*, 20 F.3d at 567–68 (stating that without the defendant's knowledge that the structuring of financial transactions was unlawful, he would not sufficiently frustrate those obligations to meet the mens rea standard).

121. *See* Bryan v. United States, 524 U.S. 184, 194–96 (1998) (distinguishing *Bryan* from *Cheek* and *Ratzlaf* based on the language of the criminal statute, the general

under 52 U.S.C. § 30121, fell entirely within the *Cheek* and *Ratzlaf* standard. While accepting a campaign contribution from an individual is a noncriminal act, without U.S. citizenship, that acceptance of a campaign contribution transforms into a crime under 52 U.S.C. § 30121.[122] Thus, the statute endangers recipients that are not fully aware of the donor's foreign national status or do not sufficiently inquire in order to ascertain such a level of knowledge.[123]

Singh's conduct did not fall within the *Bryan* standard because the conduct in his case was not accompanied by additional overt acts of illegal activity.[124] In *Bryan*, the defendant's conduct consisted of several consecutive steps including: obtaining illegal firearms, filing off the serial numbers, and selling firearms in a high crime area.[125] Singh committed no additional crimes indicating that he knew the acceptance of a campaign contribution was illegal, outside of stating that the contribution should maintain a status of secrecy.[126] A generalized intent standard applies to generalized illegal schemes, as set forth in *Bryan*.[127] Without additional facts, Singh's conduct fails to demonstrate an equivalent scheme.[128]

The Ninth Circuit improperly determined in *Singh* that the foreign nationals prohibition involved the same knowledge inquiry for the donor and the recipient.[129] In reaching this conclusion, the court considered a distinguishable case, *Whittemore*.[130] In *Whittemore*, the defendant violated the FECA's provision prohibiting donors from making donations in the name of another, requiring only the contributor to have actual knowledge that he

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knowledge of the law, and the implication generally).

122. *See id.*; 52 U.S.C. § 30121; *see also Singh*, 924 F.3d at 1044 (elaborating that an essential element of the foreign nationals prohibition is that the defendant knew of the donor's foreign national status).

123. *See* Grewal, *If Trump Jr. Didn't Know Campaign Finance Law*, *supra* note 64; *accord* Zachary J. Piaker, *Can "Love" Be A Crime? The Scope of the Foreign National Spending Ban in Campaign Finance Law*, 118 COLUM. L. REV. 1857, 1881 (2018) (explaining that campaign finance regulations require a unique intent standard in order to satisfy the motive of combatting corruption).

124. *See Singh*, 924 F.3d at 1046; *Bryan*, 524 U.S. at 194–96.

125. *See Bryan*, 524 U.S. at 189.

126. *See Singh*, 924 F.3d at 1047.

127. *See Bryan*, 524 U.S. at 194–96.

128. *Compare id.* at 189, 194–96 (stating that the illegal act consists of several sequential steps committed by a single defendant), *with Singh*, 924 F.3d at 1047 (explaining that there are two defendants in this case that required knowledge of each other's actions in order for the conduct to surmount to a crime).

129. *See Singh*, 924 F.3d at 1047 (analyzing part of the "knowing and willful" standard for the defendant donor and another for the defendant recipient such that they are synonymous throughout the case).

130. *See id.* at 1044–46.

sourced the campaign contributions himself.[131] In *Singh*, the defendant recipient needed actual knowledge of another's ability to make a campaign contribution.[132] The facts in *Singh* are distinguishable because *Whittemore* solely required the court to inquire into the defendant's knowledge of the law, not whether the other parties were eligible to make campaign contributions.[133] The court's reliance on this case was improper because *Singh* implicates both the recipient and the donor equally under the foreign nationals prohibition.[134] The court's analysis must consist of two distinct and complete assessments of knowingly and willfully violating the foreign nationals prohibition.[135]

The *Singh* court failed to consider *Danielcyzk*, where the donor had actual knowledge that he made a donation in violation of the law when exceeding the limitation on corporate campaign expenditures.[136] In that case, the court held the actors criminally liable for reimbursing donors for their individual contributions.[137] Even though the transaction consisted of multiple parties and the donors, the court did not hold the intermediary recipients criminally liable for their role in exceeding the corporate campaign expenditures.[138] Instead, the court considered the recipient's involvement in favor of the defendant concealing the crime.[139] The defendant in *Singh* is not similarly situated to the defendants in *Benton*, who offered funds to another in exchange for a campaign contribution.[140] For the conduct to transform into a crime, the recipient needed no additional information about the contributors.[141] The role of the defendant in *Singh* as the recipient required

131. *See* United States v. Whittemore, 776 F.3d 1074, 1078–79 (9th Cir. 2015) (explaining that the defendant took steps to conceal the donations under the names of his family and friends by using their names to make the donations and give the appearance that they are from a different donor).

132. *See Singh*, 924 F.3d at 1044–46.

133. *See Whittemore*, 776 F.3d at 1078–79 (elaborating that the only consideration made concerning the intermediaries was whether they thought that the transfer was a gift to them from the defendant at the time of acceptance).

134. *See id.* at 1080 (analyzing solely the defendant donor and not any other party's knowledge of the law); 52 U.S.C. § 30121; *id.* § 30109.

135. *See Whittemore*, 776 F.3d at 1080–81.

136. *See* United States v. Danielczyk, 788 F. Supp. 2d 472, 486 (E.D. Va. 2011) (explaining that the language of the statute was clear and that the defendant took steps to conceal the transferred funds in excess of the limitation amount).

137. *See id.* at 476–78; United States v. Danielczyk, 683 F.3d 611, 614 (4th Cir. 2012) (disguising the donations as "consulting fees" and back-dating letters with modified amounts to conceal the reimbursement of the fees).

138. *See Danielczyk*, 788 F. Supp. 2d at 481 (assessing solely what the employees conceived their instructions were in relation to the funds given by their employer).

139. *See id.*

140. United States v. Benton, 890 F.3d 697, 704 (8th Cir. 2018).

141. *See id.* at 714–15 (stating that offering a sum for endorsement of a candidate

a heightened mens rea standard to satisfy knowledge of the pertinent facts because the court held both recipient and donor criminally liable for a single transaction.[142]

B. The Ninth Circuit Failed to Determine that the Recipient Knew of the Donor's Foreign National Status

The Ninth Circuit failed to reach the conclusion that Singh knew or should have reasonably known of the donor's foreign national status.[143] Instead, the court relied on three key factors demonstrative of foreign involvement rather than foreign national status.[144]

The Ninth Circuit's reliance on Singh's involvement with the donor's foreign businesses failed to prove he knew of the donor's foreign national status because business relationships are not indicative of a donor's citizenship status when globalization has facilitated extensive international business involvement.[145] As enumerated in 11 C.F.R. § 110.20, factors that indicate foreign national status are as follows: a foreign passport, foreign bank transfers, or a foreign address.[146] Foreign business relationships are notably different from these enumerated factors because business relationships are not indicative of foreign principality.[147] The involvement of foreign business is not exclusive or unique to individuals of foreign national status.[148] Reliance on factors universally present across recipient

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violates the relevant provision of the FECA regardless of the individuals' status or intention behind the exchange of funds).

142. *See* United States v. Singh, 924 F.3d 1030, 1044–47 (9th Cir. 2019).

143. *Id.* at 1045.

144. *See id.* at 1047 (considering factors not of foreign status of the donor, but of involvement in foreign business); *cf.* Grewal, *If Trump Jr. Didn't Know Campaign Finance Law*, *supra* note 64 (arguing that the foreign nationals prohibition requires a heightened standard for mens rea for an agent of Trump whose ignorance of the law may be a defense to a violation of the foreign nationals prohibition).

145. *See* Emilio Carrillo Gamboa, *Globalization of Industry Through Production Sharing*, *in* GLOBALIZATION OF TECHNOLOGY: INTERNATIONAL PERSPECTIVES 86, 86–87 (Janet H. Muroyama & Guyford Stever eds., 1988) (stating that globalization in the market has emerged to such an extent that business relationships can no longer be indicative of principality).

146. 11 C.F.R. § 110.20(a) (2020).

147. *See* Rick Newman, *Why U.S. Companies Aren't So American Anymore,* U.S. NEWS (June 30, 2011, 3:58 PM), https://money.usnews.com/money/blogs/flowchart/2011/06/30/why-us-companies-arent-so-american-anymore (stating that corporations may go overseas to avoid taxes, procure cheaper labor, or expand their empire, but this does not change the principal of the corporation).

148. *Cf.* Robert E. Litan, *The "Globalization" Challenge: The U.S. Role in Shaping World Trade and Investment*, BROOKINGS INST. (Mar. 1, 2000), https://www.brookings.edu/articles/the-globalization-challenge-the-u-s-role-in-shaping-world-trade-and-investment/ (advocating for a heightened U.S. role and responsibility in shaping the future of global organizations and economies through its involvement with and influence

status diminishes the efficacy of the foreign nationals prohibition because it fails to illustrate the intent of the recipient.[149]

The Ninth Circuit's reliance on Singh interacting with the donor during a foreign election fails to prove Singh knew of the donor's foreign national status because foreign electoral involvement is not indicative of the donor's immigration status or residence.[150] This factor would not put Singh on notice of the donor's foreign national status.[151] Involvement in a foreign election may surmount to notice of foreign status when the donor runs for public office in a foreign country,[152] but the facts the government presented to the court failed to allege that Singh's involvement in foreign elections escalated to candidacy.[153]

The Ninth Circuit properly relied on Singh's concealment because the enforcement mechanism under the FECA explicitly states that concealment may weigh in favor of an offender's knowledge of unlawful conduct.[154] This consideration would weigh against Singh because he sent emails to the donor indicating his desire not to leave a paper trail.[155] Singh's concealment was

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of the International Monetary Fund and World Trade Organization).

149. *Cf.* Douglas A. Hass, *Employers and Immigration Law: Be Careful Who You Hire — and Who You Don't*, 101 ILL. BAR J. 360, 361, 372 (2013) (demonstrating the dangers of constructive knowledge tests for knowledge of illegal working status).

150. *See* Scott Shane, *Russia Isn't the Only One Meddling In Elections. We Do It, Too.*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/sunday-review/russia-isnt-the-only-one-meddling-in-elections-we-do-it-too.html (outlining the U.S. historical precedent for intervening in a foreign election when it achieves political and economic incentives); Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 509 (1997) (stating that the passage of the foreign nationals prohibition attempted to target a perceived problem that could not be eliminated by an outright ban of foreign funds and came with new enforcement issues); *see, e.g.*, Melissa Gomez, *Trump Said It's OK to Take Campaign Dirt from Foreign Powers. Is It Legal?*, L.A. TIMES (June 15, 2019, 10:10 AM), https://www.latimes.com/politics/la-na-pol-2020-trump-foreign-election-interference-20190615-story.html.

151. *See* Shane Dixon Kavanaugh, *US Interfered in Elections of at Least 85 Countries Worldwide Since 1945*, GLOB. RSCH. (Dec. 31, 2019), https://www.globalresearch.ca/us-interfered-in-elections-of-at-least-85-countries-worldwide-since-1945/5601481 (stating that between 1946 and 2000, the United States interfered in approximately eighty-one elections).

152. *Cf. Advice About Possible Loss of U.S. Nationality and Seeking Public Office in a Foreign State*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS (Mar. 12, 2019), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Loss-US-Nationality-Foreign-State.html ("A U.S. national's employment . . . with the government of a foreign country . . . is a potentially expatriating act . . . .").

153. *See generally* United States v. Singh, 924 F.3d 1030, 1047–50 (9th Cir. 2019) (limiting the defendant's foreign electoral involvement services performed in Mexico City to the 2011 presidential election).

154. *See* 52 U.S.C. § 30109(a) (detailing the procedures for enforcement).

155. *See Singh*, 924 F.3d at 1052; *see also* Gross, *supra* note 19, at 294 (stating that

similar to the defendant's in *United States v. Danielcyzk*, where the defendant back-dated letters to mask the donations as "consulting fees."[156] The defendant in *Danielcyzk*, however, had actual knowledge that he transferred the funds to another person.[157] Singh accepted an otherwise lawful transfer.[158] Without sufficient mens rea, the court may not properly hold Singh criminally liable under the FECA.[159]

Collectively, the factors considered by the court failed to indicate Singh's knowledge of the donors' foreign national status at the time Singh accepted the campaign contribution.[160] Under the test outlined in *Curran*, Singh must have: (1) known of his duty not to accept a donation from the donor; (2) attempted to frustrate that duty; and (3) known accepting the donation was unlawful.[161] Singh cannot meet any factors of the *Curran* test because he was unaware of his duty not to accept the campaign contribution without actual knowledge of the donor's foreign national status.[162]

C. The Ninth Circuit Filling the Gaps in the Foreign Nationals Prohibition Left After Citizens United v. FEC

The divergence of these factors from those listed under 11 C.F.R. § 110.20 creates a heavy burden on campaign contribution recipients from here forth, particularly for foreign corporations with domestic subsidiaries.[163] As the U.S. District Court for the District of Columbia cautioned in *Bluman*, holding parties criminally liable under a knowing and willful standard for accepting campaign contributions proves challenging because it requires a duality of knowledge: knowledge of the law and knowledge of another's immigration

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concealing an FECA violation generally weighs against a defendant when he egregiously violates the statute).

156. *See* United States v. Danielczyk, 788 F. Supp. 2d 472, 496 (E.D. Va. 2011).

157. *See id.* at 480.

158. *See Singh*, 924 F.3d at 1043.

159. *See* Grewal, *The DOJ Quietly Made Campaign Finance Violations Easier to Prosecute*, *supra* note 5 (arguing that the knowing and willful standard attempts to combat the high mens rea requirement for FECA criminal prosecutions and has permitted the DOJ to increase flexibility in FECA prosecutions).

160. *See* 11 C.F.R. § 110.20 (2020) (explaining that factors indicative of citizenship include documentation, public awareness of foreign status, and usage of foreign banks, but distinguishing foreign corporations with domestic subsidiaries as involving foreign corporate involvement); *Singh*, 924 F.3d at 1045; Martin, *supra* note 2 (listing knowledge of a donor's foreign passport in favor of a recipient knowing a donor's foreign national status).

161. *See* United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994).

162. *See Singh*, 924 F.3d at 1050.

163. *See* FED. ELECTION COMM'N, PROPOSED STATEMENT OF POLICY, *supra* note 14, at 14–15 (stating that recipient of campaign contributions from foreign corporations with domestic subsidiaries will assumedly conduct a reasonable inquiry for the foreign nationals test).

status.[164] The U.S. Supreme Court briefly mentioned the foreign nationals prohibition in *Citizens United v. FEC*, but notably absent from both the Stevens and the majority opinions are clarifications of the foreign national test and the constructive knowledge prong for corporations.[165] The Ninth Circuit considered factors that were largely met by domestic subsidiaries of foreign corporations, regardless of the U.S. Supreme Court's reluctance to restrict this type of political speech.[166]

Domestic subsidiaries of foreign corporations often engage in foreign elections as a mechanism to influence favorable policies.[167] Domestic subsidiaries are often involved in business with foreign corporate entities because their corporate structure and globalization incentivize international and broadscale transactions.[168] These factors impede legislative intent to distinguish the role of corporate speech under the foreign nationals prohibition because U.S. citizens and corporations are routinely involved in foreign business transactions and foreign elections.[169] The court's failure to adequately address the corporate role within the foreign nationals prohibition blurs the lines between recipients, donors, and their respective corporate equivalents.[170]

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164. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (stating that imposing criminal penalties for FECA violation requires the court to assess knowledge of the law, creating a difficult standard for the courts to exact on recipients and donors of campaign contributions).

165. *See generally* Citizens United v. FEC, 558 U.S. 310, 362 (2010) (stating that the Court need not reach the foreign nationals prohibition because the lower court's decision may be overruled on other grounds).

166. *See* CYNTHIA BROWN & L. PAIGE WHITAKER, CONG. RSCH. SERV., R44447, CAMPAIGN CONTRIBUTIONS AND THE ETHICS OF ELECTED OFFICIALS: REGULATION UNDER FEDERAL LAW 4–5 (2016) (stating that FEC guidance on the foreign nationals prohibition does not apply to foreign corporations with domestic subsidiaries).

167. *See, e.g.*, Thompson, *supra* note 112 (providing a comparative study of corporate involvement across democratic nations and stating that corporate involvement is not uncommon outside of the United States).

168. *See* Sanders, *supra* note 13. *But see Defining the Future of Campaign Finance in an Age of Supreme Court Activism: Hearing Before the H. Comm. on H. Admin.*, 111th Cong. 70 (2010) (arguing that the FECA already presents large gaps in the foreign nationals prohibition for corporate interference).

169. *See* FED. ELECTION COMM'N, PROPOSED STATEMENT OF POLICY, *supra* note 14, at 7 (quoting Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,943–44 (Nov. 19, 2002) (to be codified at 11 C.F.R. pt. 102, 110)) ("The Commission based its decision 'upon the lack of evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections . . . .'"); *cf.* Jieun Lee, Foreign Direct Investment in Political Influence 5 (Oct. 28, 2018) (unpublished manuscript), https://www.internationalpoliticaleconomysociety.org/sites/default/files/paper-uploads/2018-10-28-21_42_07-leejieun@umich.edu.pdf (stating that the FEC has characterized foreign PACs as "instruments of the US employees of foreign-owned companies").

170. *See* Ben Freeman, *America's Laws Have Always Left Our Politics Vulnerable to Foreign Influence*, WASH. POST (Oct. 18, 2019, 10:23 AM), https://www.washington

IV. RESOLVING AND CONSOLIDATING THE FOREIGN NATIONALS TEST

The nature of the foreign nationals prohibition is such that it encompasses a wide array of foreign actors and entities.[171] The foreign nationals prohibition's definitional structure applies to entities, corporations, and individuals, but its sanctions fail to distinguish between recipients and donors.[172] Recipients of campaign contributions from a foreign national are subject to the sanctions for accepting a campaign contribution, but the recipients are not prohibited from making contributions themselves, a distinction the structure of the statute fails to reconcile.[173]

A. A Clearer Definition of Foreign National

The governing statutes surrounding the foreign nationals prohibition requires further definitional clarity with caveats for corporations, recipients, and donors.[174] Although 11 C.F.R. § 110.20 seeks to provide some clarity to the required mens rea for a recipient to knowingly accept funds from a foreign national, efforts to develop analyzing case law are largely stunted by the high bar for criminal violations of the FECA.[175] Rather than permitting the reviewing courts to analyze factors that do not support a heightened or ordinary mens rea standard for the crime, the legislature should revise the

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post.com/outlook/americas-laws-have-always-left-its-politics-vulnerable-to-foreign-influence/2019/10/18/3fb7db62-f0f3-11e9-89eb-ec56cd414732_story.html (claiming that it is difficult to discern whether foreign PAC spending stems from domestic or foreign revenue).

171. *See* Martin, *supra* note 2 (including temporary residents, foreign corporations with domestic subsidiaries, and recipients of foreign campaign contributions).

172. *See* 52 U.S.C. § 30121(b) (defining a foreign national as either a corporation with a foreign principal or an individual who is not a lawful permanent resident of the United States).

173. *Cf.* Sozan, *supra* note 101 (critiquing the structure of the foreign nationals prohibition due to its inability to recognize that foreign and domestic interests diverge); *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1437 (2018) (quoting Nathan J. Muller, *Reflections on the Election Commission: An Interview with Neil O. Staebler*, AM. ENTER. INST. (Apr. 5, 1979), https://www.aei.org/articles/reflections-on-the-election-commission-an-interview-with-neil-o-staebler/) (characterizing the FEC as a flawed and "captive province" of Congress, overly influenced by incumbent politics).

174. *See* Robert Kelner et al., *Compliance with Ban on Contributions from Foreign Nationals*, COVINGTON & BURLING LLP (May 5, 2016), https://www.cov.com/-/media/files/corporate/publications/2016/05/compliance_with_ban_on_contributions_from_foreign_nationals.pdf (stating that although foreign national status appears facially straightforward, the definition contains applicative ambiguities).

175. *See* Robert Lenhard, *The FEC Revisits the Ban on Foreign Nationals' Financing of American Elections*, COVINGTON & BURLING LLP (June 20, 2017), https://www.insidepoliticallaw.com/2017/06/20/fec-revisits-ban-foreign-nationals-financing-american-elections/ (stating that enforcement of the foreign-nationals prohibition is largely dependent on the Commissioners' interpretation).

prohibition in 52 U.S.C. § 30121 and provide explicit provisions for: (1) donors of foreign national status; (2) recipients of foreign national status; and (3) domestic subsidiaries of foreign corporations.[176]

Explicit provisions would increase the clarity of the foreign nationals prohibition and outline the burden placed on a third party accepting a campaign contribution. Enumeration of these provisions would eliminate the court's reliance on 52 U.S.C. § 30121's correction provision, which requires a recipient to return a donation if they acquire knowledge of the donor's foreign national status because the violating recipient is unlikely to engage in a subsequent status inquiry after obtaining a donation.[177]

B. Including Language on Actual Versus Constructive Knowledge

The legislature should amend 11 C.F.R. § 110.20 to provide a more holistic view of the mens rea requirement for campaign contribution recipients.[178] It is particularly difficult to determine whether a recipient knew of a donor's foreign national status upon receipt of a donation.[179] Thus, courts must have a fully developed analytical framework, not merely the non-dispositive enumerated list provided in 11 C.F.R. § 110.20.

The foreign nationals test provides explicit indicators of citizenship, but prong three of 11 C.F.R. § 110.20 only requires a defendant to have constructive knowledge sufficient to spark an inquiry into a donor's citizenship status.[180] Cohesivity between these two tests would assist courts in implementing the foreign nationals prohibition against recipients in subsequent cases because it would acknowledge the current immigration structure.

V. CONCLUSION

The foreign nationals prohibition serves an essential function, namely to insulate the U.S. electoral process from corrupt foreign intervention.[181]

176. *See* Corey R. Sparks, Note, *Foreigners United: Foreign Influence in American Elections After* Citizens United v. Federal Election Commission, 62 CLEV. STATE L. REV. 245, 253 (2014) (stating that *Citizens United* failed to remedy the convergence of the foreign nationals prohibition with foreign corporations with domestic subsidiaries).

177. *See* 52 U.S.C. § 30121.

178. *See* 11 C.F.R. § 110.20 (2020); Rick Hasen, *Will Trump Jr's Ignorance of Campaign Finance Law Let Him Off the Hook? What About Manafort?*, ELECTION L. BLOG (July 16, 2017, 10:47 AM) [hereinafter Hasen, *Will Trump Jr's Ignorance of Campaign Finance Law Let Him Off the Hook?*], https://electionlawblog.org/?p=93877 (explaining that as written, FECA mens rea requirements have extensive gaps for those ignorant of the law to avoid criminal liability).

179. *See* WILLIAM THOMAS, ADVERSE REPORT, H.R. Rep. No. 106-297, at 40–41 (1999) (permitting a constructive knowledge standard to avoid willful blindness).

180. 11 C.F.R. § 110.20(a)(5); Thomas & Bowman, *supra* note 108, at 596.

181. *See* R. SAM GARRETT, CONG. RSCH. SERV., IF10697, FOREIGN MONEY AND U.S.

Enforcement of the foreign nationals prohibition has varied,[182] but enforcement actions are hindered by the generalized standard of intent for corporations, donors, and recipients alike, irrespective of their interactions with and proximity to the donor.[183] Each of these groups and entities will necessarily have different intents and abilities to obtain knowledge of the donor's citizenship status.

The Ninth Circuit's reliance on foreign involvement in *United States v. Singh* obscured the distinction between the foreign nationals prohibition and the domestic subsidiaries exception because the court's analysis failed to address the status of the individual and corporate donors.[184] Thus, the FEC should revisit the regulation, outline how constructive knowledge may satisfy the mens rea standard, and restrict judicial analysis to provide clarity as to the requisite mens rea of recipients, donors, and corporations.[185]

These steps will provide additional safeguards to effectively ensure that individuals lacking sufficient knowledge of a donor's foreign national status either become aware of sufficient facts to reject the donation altogether, or are exempt from criminal liability.[186] In sum, the FEC must insulate the electoral process from corrupt foreign powers, and Congress and the FEC must revisit the foreign nationals prohibition and the standard for knowing and willful violation thereof.

CAMPAIGN FINANCE POLICY 2 (2019) (stating that in response to Russian involvement in the 2016 elections, enforcement of the foreign nationals prohibition will likely increase in the near future).

182. Wright, *supra* note 31, at 578.

183. *See* Kelner et al., *supra* note 174.

184. *See* Sanders, *supra* note 13.

185. *See* Hasen, *Will Trump Jr's Ignorance of Campaign Finance Law Let Him Off the Hook?*, *supra* note 178.

186. *See generally* United States v. Singh, 924 F.3d 1030 (9th Cir. 2019) (holding both the donor and recipient liable for violating the foreign nationals prohibition).