

Joint Standing Committee on Veterans and Legal Affairs
Maine State Legislature

RE: Supplemental written testimony in rebuttal
Political spending by foreign-influenced corporations
LD 479, 194, 641

March 17, 2021

Dear Senator Luchini, Representative Caiazzo, and Members of the Committee,

I am submitting this supplemental testimony, in addition to my earlier-submitted (March 12) written testimony,¹ to briefly respond to certain points made by opponents of some or all of these bills (Mr. Dudley, Mr. Petrucelli, Mme. Brochu, Mr. Pease, Mr. Hudson, and Mr. Woodcock) in their written and/or oral testimony.² Because I already submitted written testimony, and out of respect for the principle that all written testimony should be submitted before the hearing, I have kept this supplemental written testimony short to address the major points raised by various opponents of these bills. Although they variously framed their arguments in opposition to some or all of the bills, since our view is that LD 479 provides the most productive starting point for comprehensive legislation to challenge foreign-influenced corporations from interfering in Maine state elections, in this response I will apply their comments to LD 479.³

Distinction from federal law. Several witnesses complained that the proposed legislation would go above and beyond the requirements of federal law. That is correct. In our federal system, a sovereign state such as Maine may enact legislation that sets protective standards that surpass the minimum floor set by federal law. Of course, in some cases federal statutes may *preempt* state legislation, either if a federal statute has occupied the entire field (thus leaving no room for states to legislate at all) or if a state law actively *conflicts* with federal law so that there is no way to comply with both federal and state law. But the Federal Election Campaign Act (FECA) does not occupy the entire field of regulating campaign finance in *state* elections, and LD 479 does not *conflict* with FECA—it is simply more protective, and regulated entities can comply with both simultaneously. The same point applies to the claim that no action is needed because companies are currently complying with FECA. As U.S. Federal Election Commissioner Ellen Weintraub (who enforces

¹ <https://legislature.maine.gov/testimony/resources/VLA20210315Fein132600518995189729.pdf>.

² I had intended to present these points live at the hearing on Monday, at which I had registered to testify by invitation of Representative Bailey; unfortunately, a family medical need called me away at 11:25am, and by the time I returned, the hearing had ended.

³ We take no position whatsoever on the proposed New England Clean Energy Connect project, nor on the referendum regarding that project. Our concern is solely the law of campaign finance.

FECA) noted in her testimony to the Seattle City Council, the statute (as interpreted by her own agency) is woefully inadequate.

The shareholders of publicly traded corporations can change rapidly. This point is accurate so far as it goes, but its relevance was refuted by a January 3, 2020 letter from Professor Coates of Harvard Law School (now Acting Director of the Division of Corporate Finance at the Securities and Exchange Commission) to the Seattle City Council (which considered, and then passed, legislation similar to that which we urge), which was attached to my earlier testimony. On page 11 of his letter, Professor Coates explains how publicly traded corporations *can* and *do* determine their exact shareholders as of any particular “record date.” Our proposed amendment to LD 479 (see p.12 of my original testimony) would require the corporation to certify that it did not meet those threshold levels “on the date such contribution, expenditure, or other covered activity occurred”—a date which, of course, is under the corporation’s own control. If it can do this for a shareholder meeting, it can do this before dumping millions of dollars into Maine elections.

Constitutionality of the legislation. My earlier testimony (including the letter from Professor Laurence Tribe) set forth the affirmative case for the constitutionality of the legislation from my earlier testimony, but I wish here to simply observe how the opponents of LD 479 address—or avoid addressing—the most important precedent, *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012). Mr. Petrucelli’s written testimony devoted over two single-spaced pages to the “The Constitutional Issues” but never once mentioned *Bluman*.

Mr. Woodcock’s oral testimony did mention *Bluman*, mainly to observe that in this decision, Judge (now Justice) Kavanaugh expressly noted that the case involved *candidate* elections and did not address issue advocacy. That is accurate: the conduct at issue in *Bluman* involved two Canadian citizens, in the United States on temporary visas, who wished to contribute or spend in federal elections. For example, Mr. Bluman himself wished “to print flyers supporting President Obama’s reelection and to distribute them in Central Park.” *Id.* at 285. Judge Kavanaugh’s opinion upheld the federal law that prevented Mr. Bluman from printing and distributing those flyers. But since there is no such thing as a federal referendum, the court did not have occasion to address that hypothetical. That said, the principles upon which Kavanaugh’s opinion in *Bluman* rested—that foreign entities “do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government,” *id.* at 288—would logically apply here too.

“Silencing” American investors. Various opponents raise the specter of American investors in a partially-foreign-owned company somehow being “silenced” by the legislation. This is absurd. In the scenarios that the opponents conjure—such as “a small company in northern Maine with Maine owners and Canadian owners

(who might even all be cousins)”—nothing prevents the American investors from spending *their own* money on the referendum. The legislation would only apply to the corporate funds, which partly belong to the Canadian investors, and for which corporate decisionmaking is made partly with Canadian investor interests in mind. This illustrates the flaw in Mr. Petrucelli’s claim that “the remaining equity ownership in American hands is barred from participating in a referendum election.” The American cousins are not barred from doing anything.

But what if the American cousins want to spend *company* money on the referendum? The company can issue a special dividend to all of its investors. Then the American cousins can spend the money on the referendum (if they are so inclined), while the Canadian cousins in Canada—who are already barred from spending on U.S. elections, *see* 52 U.S.C. § 30121, and in fact, according to a 2020 Supreme Court opinion by now-Justice Kavanaugh, have *no constitutional rights* whatsoever, *see Agency for Int’l Dev. v. All. for Open Soc’y Int’l*, 140 S. Ct. 2082, 2086–87 (2020)—can spend it on something else.

The legislation would have broad reach. As my earlier written testimony noted, we believe it should be broader. As set forth in a 2019 report from the Center for American Progress,⁴ setting foreign-investment thresholds of 1% for a single foreign investor and 5% for multiple foreign investors would cover most large publicly traded corporations. At the same time, it would cover only a minority of smaller (“microcap”) publicly traded corporations, and few small businesses. Yet at the same time, its impact should not be overstated. LD 479, if enacted with our requested changes, would not limit foreign investment, foreign commerce, or friendly relations between nations. But companies with substantial foreign ownership should not spend money to influence Maine’s democratic self-government.

Thank you for considering this supplemental testimony.

Sincerely,

Ron Fein
Legal Director

⁴ See Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, Ctr. for Am. Progress, <https://ampr.gs/2QLiNQT> (Nov. 21, 2019).