

Senator Craig Hickman, Senate Chair
Representative Laura Supica, House Chair
Committee on Veterans and Legal Affairs
Maine State Legislature

RE: LD 1610's provision to ban corporate political spending by foreign government-influenced entities

May 3, 2023

Dear Senator Hickman, Representative Supica, and Members of the Veterans and Legal Affairs Committee,

I am the Counsel for Free Speech For People, a national non-partisan non-profit organization, that has played a critical role in helping draft, provide legal support, and advocate for the nation's first laws that limit corporate political spending by partially-foreign-owned (foreign-influenced) corporations.¹ I write today to provide legal analysis on LD 1610, which would prohibit corporate political spending by foreign government-influenced entities. This bill is grounded in constitutional principles that generally restrict foreign entities from spending money on U.S. elections and is a productive starting point towards securing democratic elections from all means of foreign influence.²

¹ Legislation prohibiting corporate political spending by foreign-influenced corporations has been in effect in the city of Seattle since January 2020. Last week, both chambers of the Minnesota Senate passed a landmark bill, which the Governor has pledged to sign into law, prohibiting such spending. Free Speech For People, *Minnesota becomes first state in the nation to pass legislation prohibiting foreign-influenced corporations from spending money in elections*, <https://bit.ly/4411KcB>. This year, similar bills passed one chamber each of the New York, Washington, and Hawaii legislatures, and are also pending in California and Massachusetts.

² While LD 1610 seeks to restrict corporate political spending by entities with some connection to foreign *governments*, we recommend that the Committee revise the bill to trigger foreign-influenced status based on *any* foreign investor outside the United States, not just governments. A foreign investor may exert influence over corporate decision-making in a manner inconsistent with democratic self-government even if the foreign investor is not a government. Furthermore, LD 1610's foreign investment threshold (5%) should be lowered to either 1% for a single foreign investor or 5% for aggregate foreign investment. These thresholds—used in the Seattle and Minnesota laws, and the bills in New York, Hawaii, Washington, California, and Massachusetts—reflect corporate governance experts' analysis of investor influence.

I. General and legal background

Under well-established federal law, recently upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend any amount of money at all to influence federal, state, or local elections.³ This existing provision does not turn on whether the foreign national comes from a country that is friend or foe, nor the amount of money involved. Rather, as then-Judge (now Justice) Brett Kavanaugh wrote in the seminal decision upholding this law:

It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.⁴

Federal law, however, leaves a gap that has been opened even further since the U.S. Supreme Court's 2010 *Citizens United* decision invalidated laws that banned corporate political spending.⁵ While the existing federal statute prohibits a foreign-registered corporation from spending money on federal, state, or local elections, federal law does not address the issue of political spending by U.S. corporations that are partially owned by foreign investors. That is the topic here.

The *Citizens United* decision three times described the corporations to which its decision applied as “associations of citizens.”⁶ On the topic of corporations partly owned by foreign investors, the Supreme Court simply noted “[w]e need not reach the question” because the law before it applied to all corporations.⁷ As a result, federal law currently does not prevent a corporation that is partly owned by foreign investors from making contributions to super PACs, independent expenditures,

³ 52 U.S.C. § 30121.

⁴ *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); *see also* *United States v. Singh*, 979 F.3d 697, 710-11 (9th Cir. 2020), cert. denied sub nom. *Matsura v. United States*, No. 20-1167, 2021 WL 2044557 (May 24, 2021).

⁵ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁶ *Citizens United*, 558 U.S. at 349, 354, 356. Many scholars have criticized the Court's understanding of the corporate entity as an association. *See, e.g.*, Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 Wis. L. Rev. 451 (2019). However misguided, this account reflects the reasoning that the Court has adopted in extending constitutional rights to corporations.

⁷ *Id.* at 362.

expenditures on ballot measure campaigns, or even (in states where it is otherwise legal) contributing directly to candidates.⁸

Since 2010, neither Congress nor the beleaguered Federal Election Commission have done anything. However, as Professor Laurence Tribe of Harvard Law School and Federal Election Commissioner Ellen Weintraub have written, a state does not need to wait for federal action to protect its state and local elections from foreign influence. The goal of this bill is to plug the loophole allowing corporations partly or wholly owned by foreign interests to influence elections.

In the New York Times, Federal Election Commissioner Ellen Weintraub explained the problem, and pointed to a solution: “Throughout *Citizens United*, the court described corporations as ‘associations of citizens,’ she wrote. “States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens—and enforce the ban on foreign political spending against those that are not.”⁹

As Weintraub noted, even partial foreign ownership of corporations calls into question whether *Citizens United*, which three times described corporations as “associations of citizens” and which expressly reserved questions related to foreign shareholders,¹⁰ would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal

⁸ For example, Uber has shown an increasing appetite for political spending in a variety of contexts. In California, the company spent some \$58 million on Proposition 22, which successfully overturned worker protections for Uber drivers. *See* Ryan Menezes et al., “Billions have been spent on California’s ballot measure battles. But this year is unlike any other,” L.A. Times, Nov. 13, 2020, <https://lat.ms/3gRct8d>. Uber is, as of this writing, 3.8% owned by the Public Investment Fund of Saudi Arabia—a foreign government entity, but at a level that would not trigger LD 1610. *See* CNBC, *Uber Technologies Inc.*, <https://www.cnbc.com/quotes/UBER?tab=ownership> (visited May 3, 2023). Similarly, in October 2016, Airbnb responded to the New York Legislature’s growing interest in regulating the homestay industry by arming a super PAC with \$10 million to influence New York’s legislative races. Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-linked) DST Global. *See* Kenneth Lovett, *Airbnb to spend \$10M on Super PAC to fund pre-Election day ads*, N.Y. Daily News, Oct. 11, 2016, <http://nydn.us/2EF5Lgi>.

⁹ Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, <http://nyti.ms/1SwK4gK>.

¹⁰ *Citizens United*, 558 U.S. at 349, 354, 356, 362.

ban on foreign nationals spending their own money in U.S. elections.¹¹ The Supreme Court went even further in *Agency for International Development v. Alliance for Open Society Int’l, Inc.* when Justice Kavanaugh (writing for the Court) held that foreign entities located abroad have no constitutional rights.¹² Furthermore, the Court explained that U.S. entities “cannot export their own First Amendment rights” to the foreign entities with which they associate.¹³

In light of the Court’s post-*Citizens United* decisions in *Bluman* and *Agency for International Development*, a restriction on political spending by corporations with foreign ownership at levels potentially capable of influencing corporate governance can be upheld based on those cases and as an exception to *Citizens United*.¹⁴

II. Frequently asked questions

Does the bill prevent corruption?

The Supreme Court currently recognizes two distinct public interests in regulating the amounts and sources of money in politics: (1) preventing corruption or the appearance of corruption, and (2) protecting democratic self-government against foreign influence. This bill is defensible under both interests.

As Judge Kavanaugh explained in *Bluman*, the public “has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”¹⁵ The U.S. Court of Appeals for the Ninth Circuit has confirmed that this interest applies to state elections as well.¹⁶

Is the bill “narrowly tailored” to protecting democratic self-government?

Yes. The public interest in protecting democratic self-government from foreign influence is particularly strong and supports a wide range of restrictions ranging

¹¹ *Bluman v. Federal Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012). In 2019, the U.S. Court of Appeals for the Ninth Circuit upheld federal statute’s foreign national political spending ban as applied to local elections. *Singh*, 924 F.3d at 1042.

¹² 140 S. Ct. 2082, 2086 (2020).

¹³ *Id.* at 2088.

¹⁴ A similar analysis would also apply to *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which addressed limits on corporations spending in ballot question elections.

¹⁵ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

¹⁶ *United States v. Singh*, 924 F.3d 1030, 1042 (9th Cir. 2019).

from investment in communications facilities to municipal public employment.¹⁷ In the specific context of political spending, the facts of the *Bluman* decision are worth noting. The lead plaintiff wanted to contribute to three candidates (subject to dollar limits that in theory minimize the risk of corruption) and “to print flyers . . . and to distribute them in Central Park.”¹⁸ All these were banned by the federal statute, and the court upheld the ban on all of them.

In other words, in a context where the risk of corruption was essentially nil, the court found that the interest in protecting democratic self-government from foreign influence is so strong that a law that prohibits printing flyers and posting them in a park is narrowly tailored to that interest. Given that, a ban on corporate political spending—with the potential for far greater influence on elections than one individual printing flyers—by corporations with substantial foreign ownership, at levels known from corporate governance literature to bring the potential for investor influence, is also narrowly tailored to the same interest.

Does this bill go further than the federal statute at issue in Bluman?

Yes; that is the point. The federal statute prevents foreign entities from spending money directly in federal, state, or local elections.¹⁹ The proposed bill also applies to non-foreign entities that may be in part based or incorporated within the U.S. but that are owned, controlled, or otherwise influenced by foreign interests—in this case, a foreign government—according to the proposed definition.

If you have any questions about legal, policy, or technical aspects of the bill, I would be happy to discuss.

Sincerely,

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Free Speech For People

¹⁷ See *Bluman*, 800 F. Supp. 2d at 287 (collecting Supreme Court cases upholding limits on noncitizen employment in a wide variety of local positions); 47 U.S.C. § 310(b) (banning issuance of broadcast or common carrier license to companies under minority foreign ownership).

¹⁸ *Id.* at 285.

¹⁹ 52 U.S.C. § 30121, formerly codified as 2 U.S.C. § 441e.