TO: Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Committee on the Judiciary
Hawaiʻi State Senate

RE: SB3243, Relating to campaign finance

DATE: February 22, 2024

Dear Chair Rhoades and Vice Chair Gabbard,

On behalf of Free Speech For People, I write in strong support of the provisions of SB 3243 that would ban corporate political spending by foreign-influenced business entities.

Background

Free Speech For People is a national nonpartisan nonprofit 501(c)(3) organization that has helped develop and advocate for legislation like this around the country. Similar legislation was enacted in the City of Seattle, where it has been in effect since January 2020) and in Minnesota. A similar bill was passed by the New York State Senate last year, and is expected to pass both chambers this year; and similar bills are or will soon be pending in the U.S. Congress and in several other state legislatures.

We have developed the model legislation in consultation with the Center for American Progress and with noted legal experts including Prof. Laurence Tribe of Harvard Law School, one of the foremost constitutional law scholars in the country; Prof. John Coates of Harvard Law School, a corporate governance expert and former General Counsel of the U.S. Securities and Exchange Commission; Commissioner Ellen Weintraub of the Federal Election Commission, an expert on campaign finance law; Prof. Brian Quinn of Boston College Law School, an expert in corporate law and policy; and Professor Adam Winkler of the University of California Law School, an expert on corporations and the Constitution. They have each supported similar legislation in other states, and for your convenience I have attached some of their prior testimony submitted to other state legislatures considering similar bills.

This introduction is followed by a memorandum. Section I of the memorandum sets forth the general and legal background for the bill. Section II explains the foreign ownership thresholds. Section III answers certain frequently-asked questions that have emerged as we have developed this legislation in Seattle and in other states. Section IV provides some examples of how foreign-influenced corporations have injected money into Hawaii elections in recent years. After the memorandum, several expert letters in support of similar bills elsewhere are attached.

The bill is consistent with our current model legislation, which we have developed in partnership with the Center for American Progress, in various other states. If you have any questions about particular policy or drafting issues (some of which may be subtle) in the bill, we would be happy to discuss.

Sincerely,

Amira Mattar, Counsel
Free Speech For People

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.[1] 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.[2]

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.[3] 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."[4] On the topic of

[1] 52 U.S.C. § 30121.

[2] 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).

[3] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[4] *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.

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

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 such as Hawaii 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.

This threat is real. 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.[6] The company is currently preparing to spend millions on a similar ballot measure in Massachusetts. Although Uber started in California, the Saudi government made an enormous (and critical) early investment, and even now owns several percent of the company's stock, long after the company has gone public.[7] Fellow Proposition 22 major spenders, such as DoorDash and Lyft, are also substantially owned by foreign investors from countries including the United Kingdom, Japan, Malaysia, China, and elsewhere.

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[5] *Id.* at 362.

[6] 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; Glenn Blain, "Uber spent more than $1.2M on efforts to influence lawmakers in first half of 2017," N.Y. Daily News, Aug. 13, 2017, http://bit.ly/39HJLRf; Karen Weise, "This is How Uber Takes Over a City," Bloomberg, June 23, 2015, http://bloom.bg/1Ln2MaN.

[7] Eric Newcomer, "The Inside Story of How Uber Got Into Business with the Saudi Arabian Government," Nov. 3, 2018, https://bloom.bg/2SWWDgv. As of this writing, the Public Investment Fund of Saudi Arabia owns 3.9% of Uber stock. *See* Uber, https://www.cnbc.com/quotes/UBER?tab=ownership (last visited Mar. 8, 2021).

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.[8] Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-linked) DST Global.[9] Investment by foreign sovereign wealth funds, like Saudi Arabia's, is expected to increase exponentially as oil-rich Middle Eastern states seek to diversify their investment portfolios.[10]

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."[11]

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,[12] would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal ban on

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[8] 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] *See* Jon Swaine & Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian, Nov. 5, 2017, https://bit.ly/3ppmIF5; Dan Primack, *Yuri Milner adds $1.7 billion to his VC war chest,* FORTUNE, Aug. 3, 2015, https://bit.ly/3jnhNkb (DST Global is Moscow based); Scott Austin, *Airbnb: From Y Combinator to $112M Funding in Three Years*, The Wall Street Journal, July 25, 2011, https://on.wsj.com/2STNYvj. Reportedly, $40 million of the $112 million that Airbnb raised in its 2011 funding round came from DST Global. *See* Alexia Tsotsis, *Airbnb Bags $112 Million In Series B From Andreessen, DST And General Catalyst*, TechCrunch, July 24, 2011, http://tcrn.ch/2EF6IF2.

[10] According to one report, Saudi Arabia's Public Investment Fund is expected to deploy $170 billion in investments over the next few years. Sarah Algethami, *What's Next for Saudi Arabia's Sovereign Wealth Fund*, Bloomberg BusinessWeek, Oct. 21, 2018, https://bloom.bg/2sQNJGF.

[11] Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, http://nyti.ms/1SwK4gK.

[12] *Citizens United*, 558 U.S. at 349, 354, 356, 362.

foreign nationals spending their *own* money in U.S. elections.[13] In light of the Court's post-*Citizens United* decision in *Bluman*, a restriction on political spending by corporations with foreign ownership at levels potentially capable of influencing corporate governance can be upheld based on *Bluman* and as an exception to *Citizens United*.[14]

II. Foreign influence and ownership thresholds

How much foreign investment renders a corporation's political spending problematic for protection of democratic self-government? Arguably, *any* foreign ownership in companies that spend money to influence our elections is a threat to democratic self-government. In the most commonly accepted understanding, corporate shareholders are "the firm's residual claimants."[15] As the Hawaii Supreme Court has explained, after "all other creditors have been satisfied," shareholders lay claim to a company's "shares and the residual estate."[16] Put another way by the California Court of Appeal, "it is the shareholders who own a corporation, which is managed by the directors. In an economic sense,

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[13] 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.

[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] Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 449 (2001); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U.L. Rev. 547, 565 (2003) ("[M]ost theories of the firm agree, shareholders own the residual claim on the corporation's assets and earnings."); Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (1991) (arguing that shareholders are entitled to whatever assets remain after the company has met its obligations, and thus are the ultimate "residual claimant[s]" on a company's assets). While different theories are sometimes offered in academic literature, this is the standard economic model of shareholders of a firm, and it has been widely adopted in judicial decisions. *See, e.g.,* RTP LLC v. ORIX Real Est. Cap., Inc., 827 F.3d 689, 692 (7th Cir. 2016) ("Stockholders and owners of other equity interests have residual claims in a business; they get whatever is left after everyone else is paid."); In re Franchise Servs. of N. Am., Inc., 891 F.3d 198, 208 n.7 (5th Cir. 2018), as revised (June 14, 2018) ("Shareholders are the residual claimants of the estate," and are entitled to whatever remains after satisfying creditors); In re Cent. Ill. Energy Coop., 561 B.R. 699, 708 (Bankr. C.D. Ill. 2016) (noting that directors have fiduciary duty to shareholders rather than creditors precisely because "shareholders hav[e] the residual claim to the corporation's equity value").

[16] Ito v. Investors Equity Life Holding Co., 135 Haw. 49, 80 (2015).

when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets . . . ."[17]

In practice, shareholders rarely have the opportunity to actually assert these residual claims. Yet there is a sense in which investors and corporate managers alike understand that the corporation's assets "belong to" the shareholders.

That means that corporate political spending is drawn from shareholders' money. As Justice Stevens noted in the *Citizens United* decision, "When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill."[18] This point has often been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.[19] But here, we confront the mirror issue: corporate managers may spend money to influence U.S. elections out of funds that partly "belong to" foreign investors.

On this understanding, *any* amount of foreign investment in a corporation means that management's political expenditures come from a pool of partly foreign money. Seen that way, a corporation spending money in U.S. elections no longer qualifies as an "association of citizens" if *any* of the money in its coffers "belongs to" foreign investors—in other words, when it has any foreign shareholders at all.[20] Indeed, polling indicates that 73% of Americans—including majorities of both Democrats and Republicans—would support banning corporate political spending by corporations with *any* foreign ownership.[21]

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[17] Berg & Berg Enter., LLC v. Boyle, 100 Cal. Rptr. 3d 875, 892, 178 Cal. App. 4th 1020, 1039 (Cal. App. 2009); *accord* In re Bear Stearns Litig., 23 Misc. 3d 447, 474, 2008 WL 5220514 (N.Y. Sup. 2008) (noting that shareholders are the "residual beneficiaries of any increase in the company's value" when it is solvent) (cleaned up).

[18] Citizens United v. Federal Election Comm'n, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting).

[19] *See, e.g.,* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 85 (2010).

[20] By analogy, in the class-action context, some courts hold that a class cannot be certified if even a single member cannot bring the claim. *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III standing").

[21] Ctr. for Am. Progress Action Fund, *NEW POLL: Bipartisan Support for Banning Corporate Spending in Elections by Foreign-Influenced U.S. Companies*, https://bit.ly/3CrcWFV.

But we need not reach that far. At ownership thresholds well above zero, an investor may exert *influence*—explicit or implicit—over corporate decision-making. Even if a company was founded in the United States and keeps its main offices here, companies are responsive to their shareholders, and significant foreign ownership affects corporate decision-making. As the former CEO of U.S.-based ExxonMobil Corp. stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[22] There is no evidence that political spending is magically exempt from this general rule.

To someone not deeply versed in corporate governance, it may seem that the right threshold for the point at which a foreign investor (or any investor) can exert influence is just over 50%. That is, after all, the threshold for winning a race between two candidates, or controlling a two-party legislature. But corporations are not legislatures. A better analogy might be a chamber with many millions of uncoordinated potential voters, most of whom rarely vote and who may be, for one reason or another, effectively *prevented* from voting. In that type of environment, a disciplined owner (or ownership bloc) of 1% can be tremendously influential.

As explained in more detail in written testimony submitted by Professor John Coates of Harvard Law School in support of similar legislation elsewhere, and in a recent report by the Center for American Progress,[23] the thresholds in this bill—1% of stock owned by a single foreign investor, or 5% owned by multiple foreign investors—reflect levels of ownership that are widely agreed (including by entities such as the Business Roundtable) to be high enough to influence corporate governance. Corporate governance law gives substantial formal power to minority shareholders at these levels, and this spills out into even greater unofficial influence. For this reason, since the passage of Seattle's 2020 law, best-in-class bills—including those pending in states

[22] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT.
[23] *See* Michael Sozan, Ctr. for American Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), https://ampr.gs/2QIiNQT.

such as New York, Massachusetts, and Minnesota, and in the U.S. Congress—generally follow the Seattle model.[24]

Federal securities law provides powerful tools of corporate influence to investors at these levels. Seattle's 1% threshold was grounded in a rule of the U.S. Securities and Exchange Commission regarding eligibility of shareholders to submit proposals for a shareholder vote—a threshold that the SEC ultimately concluded was, if anything, *too high*.[25] For a large multinational corporation, an investor that owns 1% of shares might well be the largest single stockholder; it would generally land among the top ten. Conversely, as the SEC has acknowledged, many of the investors *most active* in influencing corporate governance own well below 1% of equity.[26]

Of course, this does not mean that *every* investor who owns 1% of shares will *always* influence corporate governance, but rather that the business community generally recognizes that this level of ownership presents that opportunity, and—for a foreign investor in the context of corporate political spending—that risk.

In other cases, no single foreign investor holds 1% or more of corporate equity, but multiple foreign investors own a substantial aggregate stake. To pick one example, at the moment of this writing (it may change later, of course, due to market trades), Amazon currently is owned 1% by the Norwegian government's oil fund (Norges Bank Investment Management), and at least 8.8% of its equity (and possibly

[24] The Minnesota bill was temporarily enjoined to preserve the status quo pending litigation. *See Minn. Chamber of Commerce v. Choi*, __ F. Supp. 3d. __, 2023 WL 8803357 (D. Minn. Dec. 20, 2023). The state is vigorously defending the bill and expects to prevail on a full record.

[25] Until November 4, 2020, owning one percent of a company's shares allows an owner to submit shareholder proposals, which creates substantial leverage. *See Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 70,240, 70,241 (Nov. 4, 2020). The SEC proposed to eliminate this threshold, and rely solely on absolute-dollar ownership thresholds that correspond to far *less* than 1% of stock value, because it is fairly uncommon for even a major, active institutional investor to own 1% of the stock of a publicly-traded company. *See* SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66,458 (Dec. 4, 2019) (proposed rule). In other words, recent advances in corporate governance law suggest that the 1% threshold may, if anything, be *higher* than appropriate to capture investor influence. That said, we believe that 1% remains defensible.

[26] *See id.* at 66,646 & n.58 (noting that "[t]he vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold," including major institutional investors such as California and New York public employee pension funds).

much more) is owned by foreign investors.[27] While presumably foreign investors as a class are not all perfectly aligned on all issues, they can be assumed to share certain common interests and positions that may, in some cases, differ from those of U.S. shareholders—certainly when it comes to matters of Hawaii public policy. As the Center for American Progress has noted:

> Foreign interests can easily diverge from U.S. interests, for example, in the areas of tax, trade, investment, and labor law. Corporate directors and managers view themselves as accountable to their shareholders, including foreign shareholders. As the former CEO of U.S.-based Exxon Mobil Corp. starkly stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[28]

Neither corporate law nor empirical research provide a bright-line threshold at which this type of aggregate foreign interest begins to affect corporate decision-making, but anecdotally it appears that CEOs do take note of this aggregate foreign ownership and that at a certain point it affects their decision-making. The Seattle model legislation selects a 5% aggregate foreign ownership threshold. Under federal securities law, 5% is the threshold that Congress has already chosen as the level at which a single investor *or group of investors working together* can have an influence so significant that the law requires disclosure not only of the stake, but also the residence and citizenship of the investors, the source of the funds, and even in some cases information about the investors' associates.[29] In this case, while it may not be appropriate to treat unrelated foreign investors as a single bloc for *all* purposes, it is appropriate to do so in the context of analyzing

[27] *See Amazon.com*, CNBC, https://www.cnbc.com/quotes/AMZN?tab=ownership (visited Feb. 5, 2024) (ownership tab). As of the date of writing, at least one foreign investor (Norges Bank) holds 1.0%. Aggregate ownership data, however, shows 8.8% held in Europe, Asia, and Australasia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 55.3% of shares owned in North America. CNBC obtains its geographic ownership concentration data from Thomson Reuters, which in turn obtains it from Refinitiv, a provider of financial markets data that has access to some non-public sources.

[28] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT.

[29] 15 U.S.C. §§ 78m(d)(1)-(3).

how corporate management conceive decision-making regarding political spending in U.S. elections.

Obviously, some companies do not have substantial foreign ownership. Even of those that do, many probably do not spend corporate money on Hawaii elections. Such companies either would not be covered at all (if they did not meet the threshold) or would not experience any practical impact (if they do not spend corporate money for political purposes).

The point here is *not* that FICs do not have connections to Hawaii, nor that foreign investment in Hawaii companies should be discouraged, nor that the foreign owners of these companies are necessarily known to be exerting influence over the companies' decisions about corporate political spending, nor that they would do so nefariously to undermine democratic elections. Rather, the point is simply that *Citizens United* accorded corporations the right to spend money in our elections on the theory that corporations are "associations of citizens." But for companies of this type, that theory does not apply. Enough shares are owned or controlled by a foreign owner that the corporation's spending is at least, in part, drawn from money that "belongs to" that foreign entity—and furthermore, the entity could exert influence over how the corporation spends money from the corporate treasury to influence candidate elections.

Finally, to reiterate, the bill does not limit in any way how employees, executives, or shareholders of these companies may spend their *own* money—just how the foreign-influenced business entities' potentially vast corporate treasuries may be deployed to influence Hawaii electoral democracy.

III. Frequently asked questions

Does this bill affect individual immigrants?
No. The bill regulates *corporate* political spending by business entities.

What types of companies are covered?
The bill defines the term "business entity" to include a for-profit corporation, company, limited liability company, limited partnership,

business trust, business association, or other similar for-profit business entity.

Has the bill been endorsed by leading scholars and experts? Similar bills in other parts of the country have been endorsed by Professor Laurence Tribe of Harvard Law School and Professor Adam Winkler of the University of California Law School, experts in constitutional law; Professor John C. Coates IV of Harvard Law School (also a former General Counsel and Director of the Division of Corporate Finance at the U.S. Securities Exchange Commission) and Professor Brian Quinn of Boston College School of Law, experts in corporate law and governance; and Federal Election Commissioner Ellen Weintraub, expert in election law.[30]

Does the bill have bipartisan support?
A 2019 national poll of 2,633 voters showed that 73%—including majorities of both Democrats and Republicans—would support banning corporate political spending by corporations with *any* foreign ownership.[31] Even after polled individuals were deliberately exposed to partisan framing and opposition messages, voters continued to support the policy 58-24 overall; Trump voters supported it 52-30 and Clinton voters supported it 68-20.

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 focuses on the latter.

As Judge Kavanaugh explained in *Bluman*, the public "has a compelling interest for purposes of First Amendment analysis in limiting the

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[30] *See* Letter from Prof. Laurence H. Tribe to Mass. Legis. Joint Comm. on Election Laws, Sept. 15, 2021, https://bit.ly/3E0CkTs; Letter from Fed. Election Comm'r Ellen L. Weintraub to Mass. Legis. Joint Comm. on Election Laws, Sept. 17, 2021, https://bit.ly/3EenbhN; Letter from Prof. John C. Coates IV to Seattle City Council, Jan. 3, 2020, https://bit.ly/3jjvfFP. Professors Winkler and Quinn have authorized us to convey their endorsement.
[31] Ctr. for Am. Progress Action Fund, NEW POLL: Bipartisan Support for Banning Corporate Spending in Elections by Foreign-Influenced U.S. Companies, https://bit.ly/3CrcWFV.

participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."[32] The U.S. Court of Appeals for the Ninth Circuit has confirmed that this interest applies to state elections as well.[33]

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 from investment in communications facilities to municipal public employment.[34] 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."[35] 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 prohibiting *printing flyers and posting them in a park* is narrowly tailored to that interest. Thus, 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.[36] The

[32] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), aff'd, 565 U.S. 1104 (2012).
[33] United States v. Singh, 924 F.3d 1030, 1042 (9th Cir. 2019).
[34] *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).
[35] *Id.* at 285.
[36] 52 U.S.C. § 30121, formerly codified as 2 U.S.C. § 441e.

proposed bill applies to companies where those same foreign entities own substantial investments.

Has any court decided how much foreign ownership of a corporation renders a corporation "foreign" for purposes of First Amendment analysis?

No. That issue was not before the Supreme Court in *Citizens United*, and the Court expressly decided *not* to decide that question.[37] The majority opinion did make a passing reference to corporations "funded predominately by foreign shareholders" as the type of issue that the decision was *not* addressing. This is what lawyers call "dictum"—something mentioned in a judicial opinion that is not part of its holding. Similarly, in *Bluman*, Judge Kavanaugh wrote that "[b]ecause this case concerns individuals, we have no occasion to analyze the circumstances under which a corporation may be considered a *foreign* corporation for purposes of First Amendment analysis."[38] For purposes of poltical spending, the question of how much foreign ownership is "too much" has not yet been decided by any court.

The analysis in the main part of the above memorandum shows how arguably *any* foreign ownership renders the entire pool of corporate funds foreign. However, the bill focuses more narrowly on corporations where foreign holdings exceed thresholds, established from empirical corporate governance research, where investors can exert influence on executives' decisions.

Notably, the Seattle Clean Campaigns Act (the model upon which this bill is based) has been in effect since February 2020, including the vigorously contested 2021 citywide election featuring an expensive mayoral race, yet none of the many multinational corporations in Seattle have been impelled to challenge it.

Do corporations know who their shareholders are?

Managers of privately-held corporations may know the identity of all shareholders at all times. Managers of publicly-traded corporations do not know moment to moment, but can obtain a complete list of

[37] *See Citizens United*, 558 U.S. at 362.

[38] *Bluman*, 800 F. Supp. 2d at 292 n.4.

shareholders and number of shares owned for any particular "record date," They do this on a regular basis for routine corporate purposes, such as the corporate annual meeting. For more detail, see the letter from Professor John C. Coates IV of Harvard Law School, a former General Counsel and Director of the Division of Corporate Finance at the U.S. Securities Exchange Commission.[39]

How many companies would be covered by the bill?

Foreign investment in U.S. companies has increased dramatically in recent years: "from about 5% of all U.S. corporate equity (public and private) in 1982 to more than 20% in 2015."[40] By 2019, that figure had increased to 40%.[41]

However, foreign ownership is not evenly distributed. Analysis by the Center for American Progress found that the thresholds in this bill would cover 98% of the companies listed on the S&P 500 index, but only 28% of the firms listed on the Russell Microcap Index—among the smallest companies that are publicly traded.[42]

It is much more difficult to obtain data regarding ownership of privately-held companies. Intuition suggests that the vast majority of small local businesses have zero foreign ownership.

Does the bill violate the rights of U.S. investors?

No. Obviously, individual U.S. investors may spend unlimited amounts of their *own* money on elections.

The question might be framed as whether the bill restricts the ability of U.S. investors to spend their money *through the vehicle of a corporation in which they share ownership with foreign investors*. At the outset, the

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[39] Letter from Prof. John C. Coates IV to Seattle City Council, Jan. 3, 2020, https://bit.ly/3jjvfFP.

[40] John C. Coates IV, Ronald A. Fein, Kevin Crenny, & L. Vivian Dong, *Quantifying foreign institutional block ownership at publicly traded U.S. corporations*, Harvard Law School John M. Olin Center Discussion Paper No. 888 (Dec. 20, 2016), Free Speech For People Issue Report No. 2016-01, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.

[41] *See* Steve Rosenthal and Theo Burke, *Who's Left to Tax? US Taxation of Corporations and Their Shareholders*, Urban-Brookings Tax Policy Ctr., paper presented at NYU School of Law (Oct. 27, 2020), https://bit.ly/3uLjVqE.

[42] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 42-45, https://ampr.gs/2QIiNQT.

assumption embedded in this framework is somewhat unrealistic; few if any U.S. investors buy stock in a for-profit business entity with the expectation that, the corporation will engage in regulated political campaign spending.[43] But even if so, any right to invest in a corporation with that expectation is limited by valid restrictions imposed on the *other* co-owners of the corporation, i.e., foreign investors. Any impact on *U.S. investors who have chosen to invest jointly with foreign investors* is incidental to the primary purpose of preventing foreign influence.

By analogy, in upholding a State Department order to shut down a foreign mission even though it had U.S. citizen and permanent resident employees, the U.S. Court of Appeals for the D.C. Circuit noted: "[The order] does not prevent [plaintiffs] from advocating the Palestinian cause, nor from expressing any thought or making any statement that they could have made before its issuance. The order prohibits [them] only from speaking *in the capacity of a foreign mission of the PLO*."[44]

Similarly, the U.S. investors can spend their money directly on political campaigns, or they can invest in a *different* corporation that is *not* foreign-influenced and which may spend treasury funds on political campaigns. If corporate political spending can be described as partly the speech of U.S. investors, then the bill prohibits them only from speaking *in the capacity of investors in a foreign-influenced business entity*.

Finally, the question could be framed as involving freedom of association for those U.S. investors who "associate" with foreign investors in a corporation. But a recent U.S. Supreme Court decision, written by Justice Kavanaugh, held that U.S. citizens cannot "export" or extend their own constitutional rights to foreign entities. In *Agency for International Development v. Alliance for Open Society Int'l, Inc*., the Court considered a statute that imposed speech-related conditions on funding. After first holding that the conditions violated the First Amendment rights of U.S. funding recipients, the Court then *rejected* a constitutional challenge on behalf of the foreign entities with which

[43] *See* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 Wis. L. Rev. 451, 451 (2019) (noting that for many American investors, corporate political spending "has no rational connection to their reason for investing").
[44] Palestine Information Office v. Shultz, 853 F.2d 932, 939 (D.C. Cir. 1988) (emphasis in original).

those U.S. entities associated. The Court explained that U.S. entities "cannot export their own First Amendment rights" to the foreign entities with which they associate.[45] The Court's reasoning leads to the same result when U.S. entities associate with foreign nationals in the corporate form: the mere fact that U.S. citizens have the independent right to contribute and make expenditures does not mean that those rights will flow to any association they form.

What if a U.S. investor holds a majority or controlling share? The danger of foreign participation remains. As corporate law expert Professor John Coates of Harvard Law School and his co-authors note:

> A stylized and largely uncontested fact is that institutional shareholders—the most likely to be blockholders of U.S. public companies—are increasingly influential in the governance of those companies. Various changes in markets and regulation have increased the ability of such institutions to encourage, pressure or force boards to adopt policies and positions that twenty years ago would have been beyond their reach. Board members are spending increased amounts of time responding to and directly "engaging" with blockholders. While in the past legal regimes tested "control" of foreign nationals at higher levels of ownership—majority voting power, or 25% blocks for example—those regimes may no longer catch the new forms of institutional influence.[46]

As it happens, federal communications law has been addressing a very similar issue for nearly 90 years. Since 1934, section 310 of the federal Communications Act has prohibited issuance of broadcast or common carrier licenses to companies with one-fifth foreign ownership.[47] Obviously, that raises a similar issue: a company with one-fifth foreign ownership has four-fifths U.S. ownership. Yet, as Congress determined, the risks were too great even with a four-fifths U.S. owner.

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[45] 140 S. Ct. 2082, 2088 (2020).

[46] Coates et al., *supra* note 40, at 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.

[47] *See* 47 U.S.C. § 310(b).

It makes little sense to say that a corporation with 75% U.S. ownership is too foreign-influenced to own a small local terrestrial radio station with limited reach, but not too foreign-influenced to spend tens of millions of dollars on statewide elections. Put another way, a U.S. investor that owns a very large percentage of a company but has foreign co-investors may be better suited choosing a different investment vehicle for buying radio stations *or* for spending money in elections.

We are only aware of one constitutional challenge to Section 310 in its nearly 90-year-history—the challenge concerned a slightly different point, but the court upheld the provision.[48] The same logic would apply to this bill.

What if the corporation takes proactive steps to ensure that foreign investors have no influence on corporate decision-making regarding political spending?

The issue is generally not that foreign investors are directly participating in corporate decision-making regarding political spending. In major corporations, most investors do not participate in day-to-day operational decisions.

Rather, the issue is that corporate executives are fully aware of their major investors, act with a fiduciary duty towards those investors, and tend to avoid taking action that they anticipate will displease those major investors. Among other considerations, major investors have multiple options for influencing corporate governance writ large: they can submit shareholder proxy resolutions; they can attempt to replace directors on the board, and demand a change in management; in publicly traded corporations, they can dump their shares, decreasing the value of executives' stock options; etc. Investors do not need to literally be in the conference room debating specific political expenditures to exert an influence, any more than voters need to be in

[48] *See* Moving Phones P'ship LP v. FCC, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (applying rational basis review because "[t]he opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community"). Other courts have upheld related provisions of the same act that are even *more* restrictive than section 310. *See, e.g.*, Campos v. FCC, 650 F.2d 890, 891 (7th Cir. 1981) (upholding against constitutional challenge a Communications Act provision barring even *permanent residents* from holding radio operator licenses).

the conference room during legislative debates to exert an influence on elected officials.

A similar question has repeatedly arisen in the context of the Communications Act, where partly-foreign-owned entities have sought broadcast or common carrier licenses, claiming that they had developed contractual or other internal measures to insulate decision-making from foreign partners or investors. Courts have consistently rejected such challenges.[49]

Does the bill apply to non-profits?

The bill does not impose any prohibitions on non-profits. To prevent circumvention, the bill does prohibit a foreign-influenced business entity from making a donation to a third party (including a non-profit) that is earmarked for political spending. For example, a foreign-influenced business entity cannot make a donation to a non-profit subject to an earmark that the non-profit will then spend the money on independent expenditures. This makes it harder for foreign-influenced business entities to "launder" political spending through non-profits or other intermediaries.

The bill does not apply to a non-profit that receives a contribution directly from a foreign national; that situation is already substantially addressed by federal law.[50] The gap that the bill aims to plug pertains to foreign *investors* in U.S. corporations; there is no directly analogous gap in the law for non-profits.

Does the bill affect immigrant-owned businesses?

No. The bill defines an individual foreign investor as "[a]n individual *outside the United States* who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence." That means that a naturalized U.S. citizen is not a "foreign investor"; an individual with lawful permanent residence

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[49] *See* Cellwave Tel. Servs. LP v. FCC., 30 F.3d 1533, 1535 (D.C. Cir. 1994) (rejecting argument that FCC should have granted license to partly-foreign-owned partnership because "the alien partners had insulated themselves by contract from any management role in the partnerships"); Moving Phones P'ship L.P. v. FCC, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993) (same).

[50] *See* 52 U.S.C. § 30121(a)(2).

(green card) is not a "foreign investor"; and even a foreign citizen in Hawaii or elsewhere within the United States who does *not* have lawful permanent status is not a "foreign investor." To be a foreign investor, they must be "outside the United States."

Does the bill apply to labor unions?
No. The noncitizen, non-permanent resident workers who may be members of U.S. labor unions are qualitatively different from the foreign entities that invest in U.S. corporations. Almost without exception, immigrant workers in U.S. labor unions are physically located *in the United States*, where they enjoy *most* rights under the U.S. Constitution; activities related to democratic self-government (including political spending) are the exception. By contrast, with rare exceptions, foreign investors in U.S. corporations are physically located abroad.[51] And indeed, the bill only applies to investment by foreign entities or by foreign individuals "outside the United States."

Under the Supreme Court's 2020 decision in *Agency for International Development v. Alliance for Open Society,* foreign entities located abroad have *no rights whatsoever* under the U.S. Constitution.[52] This weaker constitutional status of foreign entities and individuals located abroad makes the law more constitutionally defensible when limited to foreign-influenced business entities. Applying the bill to entities that may be partly funded foreign individuals located *within the United States* would raise more constitutional questions.

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[51] A major source of foreign national investors who actually reside in the United States is the EB-5 Immigrant Investors Visa Program. Under this program, approximately 10,000 visas per year are issued to foreign investors who invest at least $500,000 in American businesses. Notably, an EB-5 visa grants "conditional permanent residence." Since 52 U.S.C. § 3012(b)(2) defines a "foreign national" as someone "who is not lawfully admitted for permanent residence," an EB-5 investor might not be considered a "foreign national" under 52 U.S.C. § 30121. But, either way, a resident EB-5 investor would not be a foreign national "outside the United States."
[52] Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 140 S. Ct. 2082, 2086–87 (2020).

IV. Have foreign-influenced corporations spent money in recent Hawaii elections?

Yes. While it is not possible (due to the prevalence of "secret money" groups that do not disclose their donors) to produce a comprehensive report, in collaboration with Michael Sozan of the Center for American Progress, in early 2023 we examined publicly available data posted on the Campaign Spending Commission's web site and found several examples.

These examples are illustrative only, and not intended to be representative or comprehensive of the larger phenomenon. Nor is the analysis that follows intended to suggest that the entities named below are unusual "bad actors," or that (to our knowledge) they have violated any current law. The point of the following examples is only to provide examples of how foreign-influenced business entities as defined by this bill can and do inject money into Hawaii elections.[53]

A. Noncandidate committees

Purely as an example, consider the Hawaii Hotel Alliance (HHA). It filed a Statement of Information for Electioneering Communication on 8/4/2022. It states that it spent $31,378 in support of three candidates.[54]

[53] We differentiated and excluded spending by a corporation's PAC from the corporation itself, to the extent the Campaign Spending Commission's data provided that information. We were not able in every case to determine from the Commission's data which reported funds come from corporate treasuries as opposed to PACs. But the Charter Communications examples mentioned below are instructive. Note also that there is one noncandidate committee (NC20871) registered for "Charter Communications, Inc." (based in Stamford, CT) and a separate noncandidate committee (NC20839) for "Charter Communications, Inc., Hawaii Political Action Committee" (based in Sacramento, CA). From the names, we presume that NC20871 is corporate treasury money and NC20839 is an employee PAC.

Note also that corporate ownership changes (especially so for publicly-traded corporations), and so a corporation that may qualify as a foreign-influenced business entity now may not have been at the time the money was spent, or may no longer qualify between the submission and later reading of this memorandum. The bill requires the business entity to certify that it "was not a foreign-influenced business entity or foreign corporation *on the date the expenditure, independent expenditure, contribution, or expenditure for an electioneering communication was made*."

[54] https://ags.hawaii.gov/campaign/files/2022/08/HawaiiHotelAlliance-080422.pdf

The HHA is a trade association organized under section 501(c)(6) of the Internal Revenue Code.[55] No federal law requires entities organized under section 501(c)(4) or (c)(6) to disclose their donors; nor does Hawaii campaign finance law. This is known as "secret money" or sometimes "dark money." The true source of the funds is not publicly available.

However, in this case we can make some educated guesses about the source of the money. The Board of Directors of the Hawaii Hotel Alliance, as listed on its web site,[56] includes hotels owned by Marriott International and Disney, among other companies. These both easily meet the aggregate foreign ownership threshold and qualify as foreign-influenced business entities.[57] While the exact amount that the Hawaii Hotel Alliance receives from these corporations is undisclosed, it's likely a substantial percentage, given that they hold seats on the Alliance's board. That is one example of how foreign-influenced corporations (such as Marriott and Disney) use trade associations to inject "secret money" into Hawaii elections.

Many other entities that are registered as noncandidate committees are either themselves foreign-influenced corporations, or secret money groups that receive some of their funding from foreign-influenced corporations. One instructive example, if a bit out of date, is the Commission's web page entitled "NEXT REPORT DUE DECEMBER 8, 2016 FOR NONCANDIDATE COMMITTEES."[58] This page lists several dozen foreign-influenced corporations. Just looking at those beginning with the letter "A," we found several examples, including:

- Allstate Insurance Company [which the Commission distinguishes from "Allstate Insurance Company PAC," presumably an employee PAC]. Allstate is a foreign-influenced corporation, again easily meeting the aggregate foreign ownership threshold.[59] We searched the Commission's "Contributions Received By Hawaii

[55] https://apps.irs.gov/pub/epostcard/dl/FinalLetter_86-2146546_HAWAIIHOTELALLIANCE_03232021_00.tif (download link).
[56] https://www.hawaiihotelalliance.com/team-3.
[57] https://www.cnbc.com/quotes/MAR?tab=ownership; https://www.cnbc.com/quotes/DIS?tab=ownership.
[58] https://ags.hawaii.gov/campaign/nc-supplemental-report-due-january-31-2017/.
[59] https://www.cnbc.com/quotes/ALL?tab=ownership.

Noncandidate Committees From January 1, 2008 Through December 31, 2022" dataset[60] and the only information we found is that on 7/29/2022, "Allstate Insurance Company" contributed $55,700 to the "Allstate Insurance Company" noncandidate committee (NC20556). In other words, the noncandidate committee is simply a pass-through for the corporate funds.

- "Altria Client Services LLC & Its Affiliates-Philip Morris USA Inc, John Middleton Co, US Smokeless Tobacco Co & Nu Mark." Altria is a subsidiary of the Philip Morris tobacco and alcohol conglomerate. It is a foreign-influenced company (via the aggregate foreign ownership threshold).[61] Again, searching the "Contributions Received By Hawaii Noncandidate Committees From January 1, 2008 Through December 31, 2022" shows that this noncandidate committee (NC20569) is simply a pass-through for the corporate funds.
- American Chemistry Council. Like the Hawaii Hotel Alliance, this is a trade association registered under section 501(c)(6) of the Internal Revenue Code. It represents chemical manufacturing companies. The "Contributions Received By Hawaii Noncandidate Committees" dataset shows that the noncandidate committee "American Chemistry Council" (NC20576) received 100% of its funds from "American Chemistry Council." And because the American Chemistry Council is not legally required to report its donors to the IRS, examining its federal 990 form does not reveal its donors either.[62] In other words, major chemical manufacturers—many of which are foreign-influenced corporations—inject money into Hawaii elections through secret money groups, such as the American Chemistry Council.
- Other examples of secret money trade organizations with likely foreign-influenced corporations as members include the American Beverage Association (NC20586) (members include businesses owned by Coca-Cola, which is a foreign-influenced corporation[63]), and the Recording Industry Association of America (NC20865)

[60] https://hicscdata.hawaii.gov/dataset/Contributions-Received-By-Hawaii-Noncandidate-Comm/rajm-32md.
[61] https://www.cnbc.com/quotes/MO?tab=ownership.
[62] https://projects.propublica.org/nonprofits/organizations/530104410.
[63] https://www.cnbc.com/quotes/KO?tab=ownership.

(members include Universal Music Group, a foreign-owned (Dutch) corporation).[64]

Again, those were just a few examples beginning with the letter "A."

B. Direct contributions to candidates

We found numerous examples of foreign-influenced corporations contributing directly to candidates, by looking at the "Campaign Contributions Received by Hawaii State and County Candidates" dataset.[65] Again, the following examples are not remotely intended to be representative, nor is the intent to "name and shame," but rather simply to demonstrate that the phenomenon exists.

- Elevance Health, Inc. is a foreign-influenced corporation, with quite substantial aggregate foreign ownership and at least one foreign 1% investor (Baillie Gifford).[66] On 8/29/2022, it contributed $6,000 to a candidate for state office (CC10174).
- Charter Communications, Inc. is a foreign-influenced corporation, both due to aggregate foreign ownership and at least one foreign 1% investor (MFS Investment Management).[67] Just since 1/1/2020, it has made well over a hundred contributions to various candidates, typically $1000 each.[68]
- Other foreign-influenced corporations which have contributed directly to candidates include Allstate Insurance Company, with extensive aggregate foreign ownership;[69] and Altria Client Services (wholly owned by the tobacco company PhillipMorris, itself owned by Altria Group);[70] searching on these names in the contributions-received dataset shows many examples.

[64] https://en.wikipedia.org/wiki/Universal_Music_Group.
[65] https://hicscdata.hawaii.gov/dataset/Campaign-Contributions-Received-By-Hawaii-State-an/jexd-xbcg/data
[66] https://www.cnbc.com/quotes/ELV?tab=ownership.
[67] https://www.cnbc.com/quotes/CHTR?tab=ownership.
[68] Please note that for this purpose we just examined the contributions from "Charter Communications, Inc." (presumably, the company itself) and not at contributions from "Charter Communications PAC" (presumably, an employee PAC) nor "Charter Communications, Inc. Hawaii PAC" (also presumably an employee PAC), both of which made their own contributions.
[69] https://www.cnbc.com/quotes/ALL?tab=ownership.
[70] https://www.cnbc.com/quotes/MO?tab=ownership.