



## HARVARD LAW SCHOOL

HAUSER HALL 420  
1575 MASSACHUSETTS AVENUE  
CAMBRIDGE, MASSACHUSETTS 02138

LAURENCE H. TRIBE  
*Carl M. Loeb University Professor Emeritus*

TEL: (617) 495-1767  
E-MAIL: [tribe@law.harvard.edu](mailto:tribe@law.harvard.edu)

The Honorable Alex Lee  
California State Assembly  
California State Capitol  
Sacramento, CA 95814

RE: AB 83, bill to ban political spending by foreign-influenced corporations

January 12, 2024

Dear Assembly Member Lee,

I write to you to express my opinion on an issue pertaining to the above-referenced bill currently before you. First, that U.S. Supreme Court constitutional precedent permits limits on political spending by foreign-influenced corporations in the form of “independent expenditures,” electioneering communications, spending on ballot measure campaigns, or contributions to super PACs. Second, that I consider such bills to be valuable tools for protecting and preserving the integrity of state and local elections, including in California, from the threat to the American ideal of self-government posed by foreign-influenced political spending.

### **Background**

I am the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University and Harvard Law School, where I have taught since 1968 and where my specialties include constitutional law and the U.S. Supreme Court.\* I have prevailed in three-fifths of the many appellate cases I have argued (including 35 in the U.S. Supreme Court).

### **Constitutionality of regulating political spending by foreign-influenced corporations**

Regulating political spending by corporations with significant foreign ownership is consistent with the Constitution and Supreme Court precedent. Indeed, concern about potential foreign influence over our democratic politics is written into the Constitution

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\* Title and university affiliation included for identification purposes only.

itself.<sup>1</sup> And while the Supreme Court has held that the First Amendment prohibits limits on independent expenditures *in general*, it has made an important exception for spending by foreign entities.

Federal law already prohibits foreign nationals—a category defined by federal law to include foreign governments, corporations incorporated or with their principal place of business in foreign countries, and individuals who are not U.S. citizens or lawful permanent residents—from spending money on federal, state, or local elections.<sup>2</sup> In the 2012 decision *Bluman v. Federal Election Commission*, the Supreme Court upheld this law against a post-*Citizens United* constitutional challenge, confirming the federal government’s ability to ban independent expenditures by foreign nationals.<sup>3</sup> As explained by the lower court opinion in that case, written by then-Circuit Judge Brett Kavanaugh and affirmed by the Supreme Court, the legal rationale for restricting political spending by foreign nationals is that “foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”<sup>4</sup>

The Supreme Court’s decision in *Citizens United* created a loophole through which foreign investors can circumvent this ban using the corporate form. Yet if foreign investors do not have a constitutional right to spend money to influence federal, state, or local elections, then they do not have a constitutional right to use the corporate form to do indirectly what they could not do directly.<sup>5</sup> This logic applies to a foreign investor that is located within the United States, but it is even stronger when applied to the types of foreign entities (sovereign wealth funds, banks, private equity funds, and insurance conglomerates) that tend to own large stakes in U.S. corporations, which are almost always located abroad. In the recent case *Agency for International Development v. Alliance for Open Society*, the Supreme Court held that foreign entities located abroad have *no* rights under the First Amendment to the U.S. Constitution.<sup>6</sup>

This is not only an issue of corporations that are majority-owned by foreign investors. As I told the federal House of Representatives Committee on the Judiciary shortly after the

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<sup>1</sup> See U.S. Const. art. I, § 9, cl. 8 (prohibiting federal officials from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

<sup>2</sup> 52 U.S.C. § 30121(a).

<sup>3</sup> *Bluman v. Fed. Election Comm’n*, 565 U.S. 1104 (2012) (mem.).

<sup>4</sup> *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court), *aff’d mem.*, 565 U.S. 1104 (2012). Despite this quotation’s reference to “foreign citizens,” the *Bluman* decision later noted that the federal statute specifically does *not* define lawful permanent residents as “foreign nationals” subject to the political spending prohibition. *See id.* at 292. Since the bills use the exact same definition of “foreign national” as does the federal law, lawful permanent residents would not be affected in the slightest.

<sup>5</sup> See Ellen Weintraub, “Taking on *Citizens United*,” Mar. 30, 2016, N.Y. TIMES, <https://nyti.ms/1qhmpKB>.

<sup>6</sup> *Agency for Int’l Development v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2087 (2020).

*Citizens United* decision, the same Supreme Court that decided *Citizens United* would probably have upheld a law limiting political advertising by corporations with a considerably smaller percent of equity held by foreign investors.<sup>7</sup> Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign investors.

Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* in 2017, the 2016 election and the federal government's failure to act shows why state and local governments should close the foreign corporate political spending loophole.<sup>8</sup> I believe California's interest in local self-government provides a comparable and constitutionally sufficient ground to support regulating independent expenditures, and contributions to super PACs, by such "foreign-influenced corporations." As such, I believe such a policy to be constitutional under the Court's *Citizens United*, *Bluman*, and *Agency for International Development* decisions, and a reasonable complement to existing federal law.

Similar logic applies to prohibitions on spending by foreign-influenced corporations in ballot measure elections. In most cases, current precedent bars limits on contributions, or corporate spending, in ballot measure elections.<sup>9</sup> The underlying principle is that, unlike candidate elections, ballot measure elections do not present the risk of *corruption* since there is no candidate to be corrupted. However, the courts have not considered the role of foreign influence in ballot measure elections,<sup>10</sup> and the general rule is likely to admit exceptions. It seems nearly unimaginable, for instance, that a court would invalidate a law banning foreign governments from spending money to influence ballot questions. The same would likely apply to foreign investors themselves. Proceeding by the same logic discussed earlier, if a foreign investor cannot spend its own money to influence a ballot measure election, then it ought not be able to do so through a corporation.

I am aware that a trial judge in Minnesota recently issued a preliminary injunction, accompanied by an unpublished opinion, that temporarily blocked a similar law in Minnesota.<sup>11</sup> The judge in that case correctly recognized that states can enact campaign finance laws to block foreign influence, and that these laws are not preempted by the Federal Election Campaign Act. He further recognized that states have "a compelling interest to limit the participation of foreign citizens and foreign corporations in activities

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<sup>7</sup> Laurence H. Tribe, "Citizens United v. Federal Election Commission: How Congress Should Respond," Testimony to U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties 7 (Feb. 3, 2010).

<sup>8</sup> See Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, <http://bit.ly/2fOULSH>.

<sup>9</sup> See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>10</sup> *Bluman* specifically noted that its holding "does not address such questions" because ballot measure campaigns were not at issue in that case. See 800 F. Supp. 2d at 292.

<sup>11</sup> *Minn. Chamber of Commerce v. Choi*, No. 23-cv-2015, 2023 WL 8803357 (D. Minn. 2023).

of American democratic self-government, including spending money to expressly advocate for or against a political candidate.” However, contrary to the expert analysis of my Harvard Law colleague John Coates, a corporate law expert who explained in a letter submitted for the legislative record how even minority (1% or less) investors can exert substantial influence on corporate decision-making, the judge in that case demanded a level of evidence of particular foreign investors influencing particular corporate decisions that far exceeds what federal courts ordinarily require for prophylactic legislation such as this. The Minnesota judge’s ruling is wrong on the merits and should not deter you from standing up to protect your own state’s elections.

### **Conclusion**

I applaud the California legislature for considering issues so critical to the health of our democracy, and I thank you for sparking an admirable effort to guard our political systems from the dangers posed by foreign corporate spending. I am confident that the U.S. Supreme Court would uphold a ban on foreign-influenced corporations’ independent expenditures, electioneering communications, expenditures on ballot measure campaigns, or contributions to super PACs or ballot question committees.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Laurence H. Tribe". The signature is written in a cursive, flowing style.

Laurence H. Tribe  
Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus  
Harvard Law School