KRISTIN E. IZUMI-NITAO
EXECUTIVE DIRECTOR

PHONE: (808) 586-0285
FAX: (808) 586-0288
WWW.HAWAII.GOV/CAMPAIGN

STATE OF HAWAI'I
CAMPAIGN SPENDING COMMISSION
235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

March 28, 2022

TO: The Honorable Mark M. Nakashima, Chair
House Committee on Judiciary & Hawaiian Affairs

The Honorable Scot Z. Matayoshi, Vice Chair
House Committee on Judiciary & Hawaiian Affairs

Members of the House Committee on Judiciary & Hawaiian Affairs

FROM: Kristin Izumi-Nitao, Executive Director
Campaign Spending Commission KEI

SUBJECT: **Testimony on S.B. No. 166, SD 1, Relating to Campaign Finance**

Wednesday, March 30, 2022
2:00 p.m., Conference Room 325 & Via Videoconference

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission ("Commission") appreciates the intent of this bill and offers the following comments.

This purpose of the bill is to prohibit foreign influence on state governance by (1) prohibiting foreign nationals and foreign-influenced corporations from making independent expenditures, electioneering communications, or contributions to candidates or committees,[1] (2) requiring corporations that contribute or expend funds in a State election to file a statement of certification with the Commission regarding their status as a foreign-influenced corporation, (3) requiring every entity that expends funds in a state election and receives contributions or donations from a corporation to ensure that funds derived from foreign-influenced corporations are not used for political spending, and (4) requiring noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement that none of the funds used by the top contributor were derived from a foreign-influenced corporation.

[1] Foreign nationals and foreign corporations are already prohibited from making contributions and expenditures in Hawaii. Hawaii Revised Statutes ("HRS") §11-356(a). This bill extends the prohibition to foreign-influenced corporations.

Section 2 of the bill incorporates the commonly understood definition of "foreign corporation" into the definition of "foreign-influenced corporation."

In addition to broadening the ban on contributions and including a ban on expenditures, from foreign-influenced corporations, Section 3 of the bill amends HRS §11-356[2] (beginning at page 6) by (1) adding a new subsection (b) that prohibits a foreign national or foreign-influenced corporation from making independent expenditures or expenditures for electioneering communications, (2) adding a requirement in a new subsection (c) that a corporation that makes a contribution or expenditure of more than $1,000 to a committee must, within seven business days, file a certification with the Commission that the corporation was not a foreign-influenced corporation when the contribution or expenditure was made, and (3) adding a requirement in a new subsection (d) that a person who receives a contribution or donation from a corporation may not use that contribution or donation to make an expenditure unless (A) the person receives from the corporation a copy of the statement of certification described above, (B) the person does not have actual knowledge that the statement of certification is false, (C) the person separately designates, records, and accounts for these funds, and (D) the person's use of the funds is otherwise lawful.

Finally, Section 4 of the bill amends HRS §11-393 by adding a new subsection (d)[3] that requires a noncandidate committee that is required to disclose top contributors, to obtain from each top contributor a statement of certification that none of the funds contributed by the top contributor were derived from a foreign-influenced corporation. If the noncandidate committee does not receive the statement of certification, the contribution must be returned to the top contributor.

The Commission respectfully requests that this Committee makes this bill effective beginning with the **2024** elections to give the Commission time to make the necessary changes to its forms and its electronic filing systems (and, thus, work closely with ETS) as well as to create, prepare, and publish/disseminate educational materials to inform committees and other corporations about the new certification requirements. Notably, in an election year, we average about 80 new noncandidate committees – many of whom did not know that they had to register and file reports with the Commission. Further, it would also permit the Commission, and other interested persons, time to properly consider other complimentary (and possibly, necessary) legislation, such as making a false certification a felony and providing for the escheat of contributions from foreign-influenced corporations.

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[2] The Commission is concerned that this bill, in amending HRS §11-356, is a departure from the federal law prohibiting contributions from foreign nationals and foreign corporations. To the extent this bill goes farther than what is prohibited by current federal law, the Commission will not have the benefit of Federal Election Commission advisory opinions or other guidance.

[3] Beginning at page 11 of the bill.

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MAILING ADDRESS
P.O. Box 23404
Honolulu
Hawaii 96823

March 25, 2022

TO: Chair Nakashima and Members of the JHA Committee

RE: SB 166 SD1 Relating to Campaign Finance

Support for a Hearing on March 30

Americans for Democratic Action is an organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

Americans for Democratic Action Hawaii supports this bill as it prohibits foreign nationals and foreign corporations from making independent expenditures and requires every corporation that contributes or expends funds in a state election to file a statement of certification regarding its limited foreign influence. Independent expenditures and corporate contributions should not be a loophole for foreign entities to funnel money into our campaigns. This bill helps keep them clean.

Thank you for your consideration.

Sincerely,

John Bickel, President

LEAGUE OF WOMEN VOTERS® OF HAWAII

Committee on Judiciary and Hawaiian Affairs
Chair Nakashima, Vice Chair Matayoshi

March 30, 2022, 2 PM Videoconference
SB166 SD1 — RELATING TO CAMPAIGN FINANCE

TESTIMONY
Beppie Shapiro, Legislative Committee, League of Women Voters of Hawaii

Chair Nakashima, Vice Chair Matayoshi, and Committee Members:

The League of Women Voters of Hawaii supports SB166 SD1, which (1) prohibits foreign nationals and foreign corporations from making independent expenditures, (2) requires every corporation that contributes or expends funds in a state election to file a statement of certification regarding its limited foreign influence, and (3) requires noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

We also strongly support an amendment proposed by other testifiers at the hearing by JDC on 2/17/22.

The League of Women Voters has supported Congressional efforts in 2016 and 2019 to prevent foreign interference in elections, improve online political ad disclosures and increase IRS oversight of non-profit organizations' activities.

Our democratic system is built on the assumption and requirement that political leaders are chosen by the people to whom they are responsible – the electorate in their districts. When foreigners influence or attempt to influence our elections, they subvert this bedrock principle of our democratic system. Political leaders elected with the assistance of foreigners may be tempted to respond to those foreigners' interests, which may not coincide with the benefit of our own citizens. Thus we strongly support the intent and most of the practices described in SB166 SD1.

League of Women Voters of Hawaii
P.O. Box 235026 ♦ Honolulu, HI 96823
Voicemail 808.377.6727 ♦ my.lwv.org/hawaii ♦ voters@lwvhi.org

We are however persuaded to ask this committee to amend SB166 SD1, by the testimony from the Center for American Progress (CAP), submitted on 2/16/22 to JDC, regarding the foreign ownership thresholds which trigger the need for certifications. Their testimony states “The legislation’s original foreign ownership thresholds are solidly grounded in corporate governance and related law. Without these thresholds, the legislation risks capturing very little spending by foreign-influenced American corporations, which in turn could weaken Hawaii’s self-government “ (p. 2 of testimony as downloaded from capitol.hawaii.gov). The paragraphs following this statement describe the reasoning behind it. We find CAP’s evidence and reasoning sound; we therefore ask this committee to re-instate the foreign ownership thresholds in the original SB166.

Thank you for the opportunity to submit testimony.

League of Women Voters of Hawaii
P.O. Box 235026 ♦ Honolulu, HI 96823
Voicemail 808.377.6727 ♦ my.lwv.org/hawaii ♦ voters@lwvhi.org

Common Cause
Hawaii
Holding Power Accountable

P.O. Box 2240
Honolulu, Hawaii 96804
808.275.6275
www.commoncause.org/hi

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Monday, March 21, 2022
2:00 PM
Via Videoconference and Conference Room 309

in consideration of
SB 166, SD1
RELATING TO CAMPAIGN FINANCE.

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the House Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii appreciates the intent of SB 166, SD1, which (1) prohibits foreign nationals and foreign-influenced corporations from making independent expenditures, electioneering communications, or contributions to candidates or committees, (2) requires every corporation that contributes or expends funds of more than $1,000 in an election cycle in a state election to file a statement of certification regarding foreign influence, (3) requires recipients of corporate donations from expending funds for certain purposes unless the contributing corporation has certified that the corporation is not foreign-influenced, and (4) requires noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening our representative democracy through improving our campaign finance system with laws that amplify the voices of everyday people by requiring strong disclosures and making sure everyone plays by the same commonsense rules.

Common Cause Hawaii understands the need for a bill similar to SB 166, SD1 to protect Hawaii's elections from foreign interference, which is foundational to our representative democracy. Our democracy cannot function properly if our elections have been subverted by foreign influence. SB 166, SD1 is an excellent start to protecting our elections from foreign intervention. While SB 166, SD1 is a good start to protecting our State's democratic self-governance, Common Cause Hawaii suggests additional refinement is necessary to the foreign ownership thresholds, certification provisions, and more.

The integrity of our elections is important to us all, and we must protect it from undue foreign influence. Therefore, Common Cause Hawaii appreciates the intent of SB 166, SD1. If you have questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

Committee on Judiciary and Hawaiian Affairs
Hawaii State House
Honolulu, Hawaii

RE: SB166-SD1 (relating to campaign finance)
Endorse subject to amendment

March 29, 2022

Dear Chair Nakashima, Vice Chair Matayoshi, and members of the committee:

We write in qualified support of SB166-SD1, conditioned on one critical amendment.

Free Speech For People is a national nonpartisan non-profit organization, that works to renew our democracy and limit the influence of money in elections. We have helped develop legislation to limit corporate political spending by foreign-influenced corporations. We helped develop a law passed by Seattle, Washington in January 2020; a measure just approved this month by San Jose, California; a bill that this year passed the New York Senate; a bill recently introduced into the U.S. House of Representatives by Rep. Jamie Raskin; and similar legislation introduced into several state legislatures. The bill as we propose to modify it would be consistent with our current model legislation, which we have developed in partnership with the Center for American Progress, in New York and elsewhere.

With one change, we would be pleased to endorse the bill. It comports with U.S. Supreme Court precedent, including the *Citizens United*, *Bluman*, and *Alliance for Open Society* decisions, because it targets foreign influence (via influence on corporate spending) to protect democratic self-government. It has no impact on individual immigrants, or on businesses owned by green card holders.

However, in the definition of "foreign-influenced corporation" (p. 3, lines 7-1), we recommend splitting paragraph (1) into two and re-inserting the following language from the original draft of SB166 (i.e., before SD1), to expand the definition of a foreign-influenced corporation:

> (1) A **single foreign owner** holds, owns, controls, or otherwise has direct or indirect beneficial ownership of **one per cent or more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation;
>
> (2) **Two or more foreign owners**, in aggregate, hold, own, control, or otherwise have direct or indirect beneficial ownership of **five per cent or**

> **more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation . . .

In February, we submitted testimony to the Senate Judiciary Committee recommending this change. Our testimony to that committee explaining the reasons for this recommendation, as well as an earlier round of testimony on the original SB166 (which may answer other questions you may have), are attached.

I am planning to testify remotely at the upcoming hearing, and would be happy to answer any questions you may have.

Sincerely,

John Bonifaz, President
Free Speech For People

Committee on Judiciary
Hawaii State Senate
415 South Beretania Street
Honolulu, Hawaii 96813

RE: SB166 – Proposed SD1 (relating to campaign finance)
Endorse subject to amendment

February 16, 2022

Dear Chair Rhoads, Vice Chair Keohokalole, and members of the committee:

We write in qualified support of SB166, conditioned on one critical amendment.

Free Speech For People is a national nonpartisan non-profit organization, that works to renew our democracy and limit the influence of money in elections. We have helped develop legislation to limit corporate political spending by foreign-influenced corporations. Specifically, we helped develop a law passed by Seattle, Washington in January 2020; a bill that this year passed the New York Senate; a bill recently introduced into the U.S. House of Representatives by Rep. Jamie Raskin; and similar legislation introduced into several state legislatures. The bill as we propose to modify it would be consistent with our current model legislation, which we have developed in partnership with the Center for American Progress, in New York and elsewhere. With these changes, we would be pleased to endorse it.

Most of the amendments to SB166 in proposed SD1 are positive and beneficial. However, we recommend re-inserting the following language from the original draft of SB166, to expand the definition of a foreign-influenced corporation:

> (1) A **single foreign owner** holds, owns, controls, or otherwise has direct or indirect beneficial ownership of **one per cent or more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation;
>
> (2) **Two or more foreign owners**, in aggregate, hold, own, control, or otherwise have direct or indirect beneficial ownership of **five per cent or more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation . . .

A short explanation for this change follows.

I. Foreign influence and ownership thresholds

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,[1] **the thresholds in the original SB166—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. Thus, since the passage of Seattle's 2020 law, newer bills—pending in states such as New York, Massachusetts, and Minnesota, and in the U.S. Congress—generally follow the Seattle model.

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*.**[2] 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.[3]

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

[2] 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.

[3] *See* 84 Fed. Reg. 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).

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 does not have any 1% foreign investors, but at least 8.3% of its equity (and possibly much more) is owned by foreign investors.[4] 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."[5]

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

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[4] *See Amazon.com*, CNBC, https://cnb.cx/3HVuWvg (visited Feb. 15, 2022) (ownership tab). As of the date of writing, at least one foreign investor (Norges Bank) holds 0.9% but no foreign investor is known to hold 1.0% or more. Aggregate ownership data, however, shows 7.6% in Europe (including Russia) and 1.1% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 55.6% 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.

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

cases information about the investors' associates.[6] 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 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).

II. Frequently asked questions

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.[7] 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."[8] For purposes of poltical spending, the question of how much foreign ownership is "too much" has not yet been decided by any court.

Our January 28, 2022 testimony shows how arguably *any* foreign ownership renders the entire pool of corporate funds foreign. However, the bill focuses 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 city election with an expensive mayoral race, yet none of the many multinational corporations in Seattle were impelled to challenge it.

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[6] 15 U.S.C. §§ 78m(d)(1)-(3).
[7] *See Citizens United*, 558 U.S. at 362.
[8] *Bluman*, 800 F. Supp. 2d at 292 n.4.

How many companies would be covered by the bill at 1%/5% thresholds?
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."[9] By 2019, that figure had increased to 40%.[10]

However, foreign ownership is not evenly distributed. The Center for American Progress found that the original 1%/5% thresholds in SB166 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.[11] By contrast, the threshold in proposed SD1 would cover only 9% of the S&P 500.[12]

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.

III. Other information

We also share with you, and incorporate by reference, written testimony prepared by leading national experts in support of the Massachusetts legislation, to which SB166 would be extremely similar if amended as discussed above:[13]

Commissioner Ellen Weintraub, Federal Election Commission
http://bit.ly/WeintraubMALtr

Professor Laurence Tribe, Harvard Law School
http://bit.ly/TribeMALtr

Professor John C. Coates IV, Harvard Law School; former General Counsel of U.S. Securities and Exchange Commission
http://bit.ly/CoatesMALtr

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[9] 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.
[10] *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.
[11] 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.
[12] *See* Coates et al., *supra* note 9.
[13] These links are included only for informational purposes regarding the experts' support of the Massachusetts legislation.

If you have any questions about particular policy or drafting choices (some of which may be subtle) made in the development of the draft, we would be happy to discuss. (And please see our January 28, 2022 written testimony for discussion of other issues.)

Sincerely,

Ron Fein, Legal Director
Courtney Hostetler, Senior Counsel
John Bonifaz, President
Ben Clements, Board Chair and Senior Legal Advisor
Free Speech For People

Committee on Judiciary
Hawaii State Senate
415 South Beretania Street
Honolulu, Hawaii 96813

RE: SB166 (relating to campaign finance)
Endorse subject to amendments

January 28, 2022

Dear Chair Rhoads, Vice Chair Keohokalole, and members of the committee:

I write in qualified support of SB166, subject to critical amendments. These are summarized below and described in detail in the following memorandum.

I am the Legal Director of Free Speech For People, a national nonpartisan non-profit organization, that works to renew our democracy and to limit the influence of money in our elections. We have helped develop legislation to limit corporate political spending by partially-foreign-owned (foreign-influenced) corporations. Specifically, we helped develop a law passed by Seattle, Washington in January 2020; a bill that this month passed the New York Senate; a bill introduced this month into the U.S. House of Representatives by Rep. Jamie Raskin; and similar legislation introduced into several state legislatures.

Major changes
Remove language, currently found in HRS §§ 11-356(a) and (c), that (if left in place) would nullify any impact of SB166 via exceptions that swallowed the rule.

- In § 11-356(a), strike "and in the same manner prohibited under title 52 United States Code section 30121 and title 11 Code of Federal Regulations section 110.20, as amended."[1]
- Strike § 11-356(c) in its entirety.

Without these changes, the bill has minimal effect; the language that we urge to be struck ensures that the bill goes no further than existing federal law. *With* these changes, the bill achieves its intended purpose.

Other changes
- Separate the term "foreign corporation" (FC) from (newly defined) "foreign-influenced corporation" (FIC) to avoid confusion.
- Add "electioneering communications" to prohibited activities for FCs/FICs.

[1] The current version of HRS § 11-356(a) cites the federal statute as 2 U.S.C. § 441e; it was recodified to 52 U.S.C. § 30121 in 2014. This is not material.

- Add a new anticircumvention provision (§ 11-356(d)), described in detail below, to prevent FC or FIC money from entering elections, despite the restriction, via "secret money" groups such as 501(c)(4)s.
- Clarify "beneficial ownership" in § 11-356(c).
- Update section 1 (findings/summary).

This introduction is followed by proposed bill text and a memorandum. Section I of the attached 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, New York, Congress, and elsewhere. (At the end of the memo, for your convenience, is an image of the proposed bill redlined against SB166.)

The bill as modified would be consistent with our current model legislation, which we have developed in partnership with the Center for American Progress, in New York and elsewhere. With these changes, we would be pleased to endorse it. We also share with you, and incorporate by reference, written testimony prepared by leading national experts in support of the Massachusetts legislation, to which SB166 would be extremely similar if amended as discussed above:[2]

Commissioner Ellen Weintraub, Federal Election Commission
http://bit.ly/WeintraubMALtr

Professor Laurence Tribe, Harvard Law School
http://bit.ly/TribeMALtr

Professor John C. Coates IV, Harvard Law School; former General Counsel of U.S. Securities and Exchange Commission
http://bit.ly/CoatesMALtr

If you have any questions about particular policy or drafting choices (some of which may be subtle) made in the development of the draft, we would be happy to discuss.

Sincerely,

Ron Fein, Legal Director
Courtney Hostetler, Senior Counsel
John Bonifaz, President
Ben Clements, Board Chair and Senior Legal Advisor
Free Speech For People

[2] These links are included only for informational purposes regarding the experts' support of the Massachusetts legislation.

THE SENATE S.B. NO. 166
THIRTY-FIRST LEGISLATURE, 2021
STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO CAMPAIGN FINANCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the State has a compelling interest in securing its democratic self-governance from foreign influence.

The legislature further finds that former President Barack Obama warned of foreign corporate spending in state elections and that Ellen Weintraub, commissioner of the Federal Election Commission, and Ann Ravel, former commissioner of the Federal Election Commission, specifically called on states to enact legislation to limit the influence of foreign-influenced corporate spending on American elections.

The legislature recognizes that Seattle, Washington has enacted legislation, and the U.S. Congress and several states and municipalities, including Colorado, Maine, Massachusetts, Minnesota, New York State, and New York City are considering enacting legislation, to limit foreign-influenced corporate political spending and to protect the integrity of their

elections from foreign influence through corporate political spending.

The purpose of this Act is to protect the State's democratic self-governance by:

(1) Prohibiting foreign entities and foreign-influenced corporations from making independent expenditures, electioneering communications, or contributions to candidates or committees;

(2) Requiring every corporation that contributes or expends funds in a state election to file a statement of certification regarding its status as a foreign-influenced or foreign corporation;

(3) Requiring every entity that expends funds in a state election and receives contributions or donations from corporations to ensure that funds derived from foreign or foreign-influenced corporations are not used for political spending; and

(3) Requiring noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

SECTION 2. Section 11-302, Hawaii Revised Statutes, is amended by adding five new definitions to be appropriately inserted and to read as follows:

""Chief executive officer" means the highest-ranking officer or individual having authority to make decisions regarding a corporation's affairs.

"Foreign-influenced corporation" means a corporation that meets at least one of the following conditions:

(1) A single foreign owner holds, owns, controls, or otherwise has direct or indirect beneficial ownership of one per cent or more of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation;

(2) Two or more foreign owners, in aggregate, hold, own, control, or otherwise have direct or indirect beneficial ownership of five per cent or more of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation; or

(3) A foreign owner participates directly or indirectly in the corporation's decision-making process with respect to the corporation's political activities in the United States.

"Foreign investor" means a person or entity that:

(1) Holds, owns, controls, or otherwise has direct or indirect beneficial ownership of equity, outstanding

voting shares, membership units, or other applicable ownership interests of a corporation; and

(2) Is:

(A) A government of a foreign country, a foreign political party, or a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country; or

(B) A foreign national.

"Foreign national" means an individual 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.

"Foreign owner" means:

(1) A foreign investor; or

(2) A corporation wherein a foreign investor holds, owns, controls, or otherwise has directly or indirectly acquired a beneficial ownership of equity or voting shares in an amount that is equal to or greater than fifty per cent of the total equity or outstanding voting shares."

SECTION 3. Section 11-356, Hawaii Revised Statutes, is amended to read as follows:

"[~~[~~]§11-356[~~]~~] Contributions and expenditures by a foreign national or foreign corporation; prohibited. (a) ~~Except as provided in subsection [(b),] (c), n~~No contributions or expenditures shall be made to or on behalf of a candidate, candidate committee, or noncandidate committee, by a foreign national, foreign-influenced corporation, or foreign corporation, including a domestic subsidiary of a foreign corporation, a domestic corporation that is owned by a foreign national, or a local subsidiary where administrative control is retained by the foreign corporation~~, and in the same manner prohibited under [2] title 52 United States Code section [441e] 30121 and title 11 Code of Federal Regulations section 110.20, as amended~~.

(b) No independent expenditures or electioneering communications shall be made by a foreign national, foreign-influenced corporation, or foreign corporation.

[~~(b)~~] ~~(c) A foreign-owned domestic corporation may make contributions if:~~

~~(1) Foreign national individuals do not participate in election-related activities, including decisions concerning contributions or the administration of a candidate committee or noncandidate committee; or~~

~~(2) The contributions are domestically-derived.~~

(c) Every corporation that contributes to or makes an expenditure on behalf of a candidate, candidate committee, or noncandidate committee, including an independent expenditure or electioneering communication, shall, within seven business days after making the contribution or expenditure, file with the campaign spending commission a statement of certification signed by the corporation's chief executive officer avowing under penalty of perjury that, after due inquiry, the corporation was not a foreign-influenced or foreign corporation on the date the expenditure, independent expenditure, contribution, or expenditure for an electioneering communication was made. For purposes of this certification, the corporation shall ascertain beneficial ownership in a manner consistent with the Hawaii Business Corporation Act or, if it is registered on a national securities exchange, as set forth in title 17 Code of Federal Regulations sections 240.13d-3 and 240.13d-5. The corporation shall provide a copy of the statement of certification to any candidate or committee to which it contributes, and upon request of the recipient, to any other person to which it contributes.

(d) A person that receives a contribution or donation from a corporation may not use that contribution or donation, directly or indirectly, to make an expenditure for any purpose listed in subsection (c), or contribute, donate, transfer, or

convey funds from such a contribution or donation to another person to use for such purpose, unless:

(1) The person received from the corporation a copy of the statement of certification described in subsection (c);

(2) The person does not have actual knowledge that the statement of certification is false;

(3) The person separately designates, records, and accounts for such funds, and ensures that disbursements for the purposes described in subsection (c) are only made from funds that comply with the requirements of this section; and

(4) The person's use of such funds is otherwise lawful.

(e) For the purposes of this section, "corporation" means a for-profit corporation, company, limited liability company, limited partnership, business trust, business association, or other similar for-profit entity.

(f) For the purposes of this section, "electioneering communication" has the meaning defined by section 11-341."

SECTION 4. Section 11-393, Hawaii Revised Statutes, is amended to read as follows:

"[~~]§11-393[~~] Identification of certain top contributors to noncandidate committees making only independent expenditures. (a) An advertisement shall contain an additional notice in a prominent location immediately after or below the notices

required by section 11-391, if the advertisement is broadcast, televised, circulated, or published, including by electronic means, and is paid for by a noncandidate committee that certifies to the commission that it makes only independent expenditures. This additional notice shall start with the words, "The three top contributors for this advertisement are", followed by the names of the three top contributors, as defined in subsection [~~(c),~~] (f), who made the highest aggregate contributions to the noncandidate committee for the purpose of funding the advertisement; provided that:

(1) If a noncandidate committee is only able to identify two top contributors who made contributions for the purpose of funding the advertisement, the additional notice shall start with the words, "The two top contributors for this advertisement are", followed by the names of the two top contributors;

(2) If a noncandidate committee is able to identify only one top contributor who made contributions for the purpose of funding the advertisement, the additional notice shall start with the words, "The top contributor for this advertisement is", followed by the name of the top contributor;

(3) If a noncandidate committee is unable to identify any top contributors who made contributions for the

purpose of funding the advertisement, the additional notice shall start with the words, "The three top contributors for this noncandidate committee are", followed by the names of the three top contributors who made the highest aggregate contributions to the noncandidate committee; and

(4) If there are no top contributors to the noncandidate committee, the noncandidate committee shall not be subject to this section.

In no case shall a noncandidate committee be required to identify more than three top contributors pursuant to this section.

(b) If a noncandidate committee has more than three top contributors who contributed in equal amounts, the noncandidate committee may select which of the top contributors to identify in the advertisement; provided that the top contributors not identified in the advertisement did not make a higher aggregate contribution than those top contributors who are identified in the advertisement. The additional notice required for noncandidate committees described under this subsection shall start with the words "Three of the top contributors for this advertisement are" or "Three of the top contributors to this noncandidate committee are", as appropriate, followed by the names of the three top contributors.

(c) This section shall not apply to advertisements broadcast by radio or television of such short duration that including a list of top contributors in the advertisement would constitute a hardship to the noncandidate committee paying for the advertisement. A noncandidate committee shall be subject to all other requirements under this part regardless of whether a hardship exists pursuant to this subsection. The commission shall adopt rules pursuant to chapter 91 to establish criteria to determine when including a list of top contributors in an advertisement of short duration constitutes a hardship to a noncandidate committee under this subsection.

(d) A noncandidate committee shall obtain a statement of certification from each top contributor required to be listed in an advertisement pursuant to this section avowing under penalty of perjury that, after due inquiry, none of the funds contributed by the top contributor were derived from a foreign or foreign-influenced corporation. If a noncandidate committee does not receive a statement of certification from a top contributor, the advertisement shall include the following statement: "Some of the funds used to pay for this message may have been provided by foreign or foreign-influenced corporations." A noncandidate committee shall be entitled to rely on a statement of certification provided by a top

contributor unless the noncandidate committee has actual knowledge that the statement of certification is false.

[~~(d)~~] (e) Any noncandidate committee that violates this section shall be subject to a fine under section 11-410.

[~~(e)~~] (f) For purposes of this part, "top contributor" means a contributor who has contributed an aggregate amount of $10,000 or more to a noncandidate committee within a twelve-month period prior to the purchase of an advertisement."

SECTION 5. Nothing in this Act shall be construed to diminish or infringe upon any right protected under the First Amendment of the Constitution of the United States or conflict with any federal statute or regulation.

SECTION 6. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 7. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

INTRODUCED BY: _____

Report Title:
Campaign Finance; Foreign Corporations; Foreign Nationals

Description:
Prohibits foreign nationals, foreign-influenced corporations, and foreign corporations from making independent expenditures. Requires every corporation that contributes or expends funds in a state election to file a statement of certification regarding its limited foreign influence. Requires recipients of corporate donations from expending funds derived from corporations that have failed to certify that they are not foreign-influenced. Requires noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

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,

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[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.

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.[8] 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.[9] 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.

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.[10] Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-

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[8] 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.

[9] 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).

[10] 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.

linked) DST Global.[11] 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.[12]

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."[13]

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,[14] would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal ban on foreign nationals spending their *own* money in U.S. elections.[15] 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

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[11] *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.

[12] 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.

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

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

[15] 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.

corporate governance can be upheld based on *Bluman* and as an exception to *Citizens United*.[16]

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."[17] 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."[18] 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, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets . . . ."[19]

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[16] 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.

[17] 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").

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

[19] 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).

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."[20] This point has often been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.[21] 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.[22] 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.[23]

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

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

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

[22] 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").

[23] 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.

on what's good for the U.S."[24] 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,[25] 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, newer bills—currently pending in states such as New York, Massachusetts, and Minnesota, and in the U.S. Congress—generally follow the Seattle model.

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

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

anything, *too high*.[26] 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.[27]

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 does not have any 1% foreign investors, but at least 8.3% of its equity (and possibly much more) is owned by foreign investors.[28] 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

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[26] 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.

[27] *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).

[28] *See Amazon.com*, CNBC, https://cnb.cx/2JShvAt (visited Oct. 20, 2021) (ownership tab). As of the date of writing, at least one foreign investor (Norges Bank) holds 0.9% but no foreign investor is known to hold 1.0% or more. Aggregate ownership data, however, shows 7.4% in Europe (including Russia) and 0.9% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 57.4% 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.

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."[29]

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.[30] 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 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

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[29] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT.
[30] 15 U.S.C. §§ 78m(d)(1)-(3).

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 uses the term "corporation" for convenience, but defines it broadly 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?

The model legislation has 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.[31]

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.[32] 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.

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[31] *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.

[32] 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.

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 participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."[33] The U.S. Court of Appeals for the Ninth Circuit has confirmed that this interest applies to state elections as well.[34]

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.[35] 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."[36] 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.

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

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.[37] The 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.[38] 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."[39] 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 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.[40]

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[37] 52 U.S.C. § 30121, formerly codified as 2 U.S.C. § 441e.
[38] *See Citizens United*, 558 U.S. at 362.
[39] *Bluman*, 800 F. Supp. 2d at 292 n.4.
[40] Letter from Prof. John C. Coates IV to Seattle City Council, Jan. 3, 2020, https://bit.ly/3jjvfFP.

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."[41] By 2019, that figure had increased to 40%.[42]

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.[43]

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 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.[44] 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, namely, foreign investors. Any impact on *U.S.*

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[41] 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.
[42] *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.
[43] 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.
[44] *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").

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*."[45]

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 corporation.*

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 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.[46] 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

[45] Palestine Information Office v. Shultz, 853 F.2d 932, 939 (D.C. Cir. 1988) (emphasis in original).
[46] 140 S. Ct. 2082, 2088 (2020).

> 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.[47]

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.[48] 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.

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.[49] 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.

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[47] Coates et al., *supra* note 41, at 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.

[48] *See* 47 U.S.C. § 310(b).

[49] *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).

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 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.[50]

Does the bill apply to non-profits?

The bill indirectly applies to non-profits that receive contributions from business entities. To prevent circumvention, the bill provides that any "person" (entity) that receives a contribution from a business entity can only spend those funds on political spending *if* the business entity also provided a certification that it is not foreign-influenced. In other words, if the business entity donor provides a certification that it is not foreign-influenced, then the recipient may spend the money on political spending to the extent otherwise permitted by law; if the business entity donor does *not* provide such a certification, then the recipient may only use the donation for other (non-political) spending. 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.[51] 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.

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[50] *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).

[51] *See* 52 U.S.C. § 30121(a)(2).

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.[52] 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.[53] This weaker constitutional status of foreign entities located abroad makes the law more constitutionally defensible when limited to foreign-influenced business entities.

Appendix: Redlined version of proposed bill as compared to SB166

[52] 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.
[53] Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 140 S. Ct. 2082, 2086–87 (2020).

THE SENATE
THIRTY-FIRST LEGISLATURE, 2021
STATE OF HAWAII

S.B. NO. 166

A BILL FOR AN ACT

RELATING TO CAMPAIGN FINANCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the State has a compelling interest in securing its democratic self-governance from foreign influence.

The legislature further finds that former President Barack Obama warned of foreign corporate spending in state elections and that Ellen Weintraub, commissioner of the Federal Election Commission, and Ann Ravel, former commissioner of the Federal Election Commission, specifically called on states to enact legislation to limit the influence of foreign-influenced corporate spending on American elections.

The legislature recognizes that Seattle, Washington has enacted legislation, and the U.S. Congress and several states and municipalities, including Colorado, Maine, Massachusetts, Minnesota, New York State, and New York City, are considering enacting legislation, to limit foreign-influenced corporate political spending and to protect the integrity of their

Deleted: Alaska; Connecticut; Massachusetts; New York City; and St. Petersburg, Florida, have enacted or

Commented [RF1]: We thought it was helpful to distinguish Seattle, which actually passed a law, from the other legislatures, which are currently considering bills.These are the better examples to cite. Also, we removed reference to the Alaska legislation (it contained an exception that swallowed the rule entirely), Connecticut (although one house of the legislature passed it, the effort is moribund now); and St. Petersburg (it did pass an ordinance, but it was later preempted by state law prohibiting all Florida cities from enacting campaign finance limits).

elections from foreign influence through corporate political spending.

The purpose of this Act is to protect the State's democratic self-governance by:

(1) Prohibiting foreign entities and foreign-influenced corporations from making independent expenditures, electioneering communications, or contributions to candidates or committees;

(2) Requiring every corporation that contributes or expends funds in a state election to file a statement of certification regarding its status as a foreign-influenced or foreign corporation;

(3) Requiring every entity that expends funds in a state election and receives contributions or donations from corporations to ensure that funds derived from foreign or foreign-influenced corporations are not used for political spending; and

(3) Requiring noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

SECTION 2. Section 11-302, Hawaii Revised Statutes, is amended by adding five new definitions to be appropriately inserted and to read as follows:

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Commented [RF2]: We recommend this nomenclature change to avoid distracting readers with the misconception that the bill is focused on immigrants.

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""Chief executive officer" means the highest-ranking officer or individual having authority to make decisions regarding a corporation's affairs.

"Foreign-influenced corporation" means a corporation that meets at least one of the following conditions:

(1) A single foreign owner holds, owns, controls, or otherwise has direct or indirect beneficial ownership of one per cent or more of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation;

(2) Two or more foreign owners, in aggregate, hold, own, control, or otherwise have direct or indirect beneficial ownership of five per cent or more of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation; or

(3) A foreign owner participates directly or indirectly in the corporation's decision-making process with respect to the corporation's political activities in the United States.

"Foreign investor" means a person or entity that:

(1) Holds, owns, controls, or otherwise has direct or indirect beneficial ownership of equity, outstanding

Commented [RF3]: We recommend this nomenclature change because the term "foreign corporation" more typically refers to a corporation incorporated or headquartered abroad.

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voting shares, membership units, or other applicable ownership interests of a corporation; and

(2) Is:

(A) A government of a foreign country, a foreign political party, or a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country; or

(B) A foreign national.

"Foreign national" means an individual 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.

"Foreign owner" means:

(1) A foreign investor; or

(2) A corporation wherein a foreign investor holds, owns, controls, or otherwise has directly or indirectly acquired a beneficial ownership of equity or voting shares in an amount that is equal to or greater than fifty per cent of the total equity or outstanding voting shares."

SECTION 3. Section 11-356, Hawaii Revised Statutes, is amended to read as follows:

"[~~[~~]§11-356[~~]~~] Contributions and expenditures by a foreign national or foreign corporation; prohibited. (a) ~~Except as provided in subsection [(b),] (c), n~~No contributions or expenditures shall be made to or on behalf of a candidate, candidate committee, or noncandidate committee, by a foreign national, foreign-influenced corporation, or foreign corporation, including a domestic subsidiary of a foreign corporation, a domestic corporation that is owned by a foreign national, or a local subsidiary where administrative control is retained by the foreign corporation~~, and in the same manner prohibited under [2] title 52 United States Code section [441e] 30121 and title 11 Code of Federal Regulations section 110.20, as amended~~.

(b) No independent expenditures or electioneering communications shall be made by a foreign national, foreign-influenced corporation, or foreign corporation.

~~[(b)] (c) A foreign-owned domestic corporation may make contributions if:~~

~~(1) Foreign national individuals do not participate in election-related activities, including decisions concerning contributions or the administration of a candidate committee or noncandidate committee; or~~

~~(2) The contributions are domestically-derived.~~

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Commented [RF4]: This exception swallows the entire rule. Since the federal statute and regulation would *not* prohibit spending by a corporation owned 1% by a single foreign investor or 5% by multiple foreign investors, tying the state statute to the federal statute would mean that the bill would not achieve anything with respect to those corporations.

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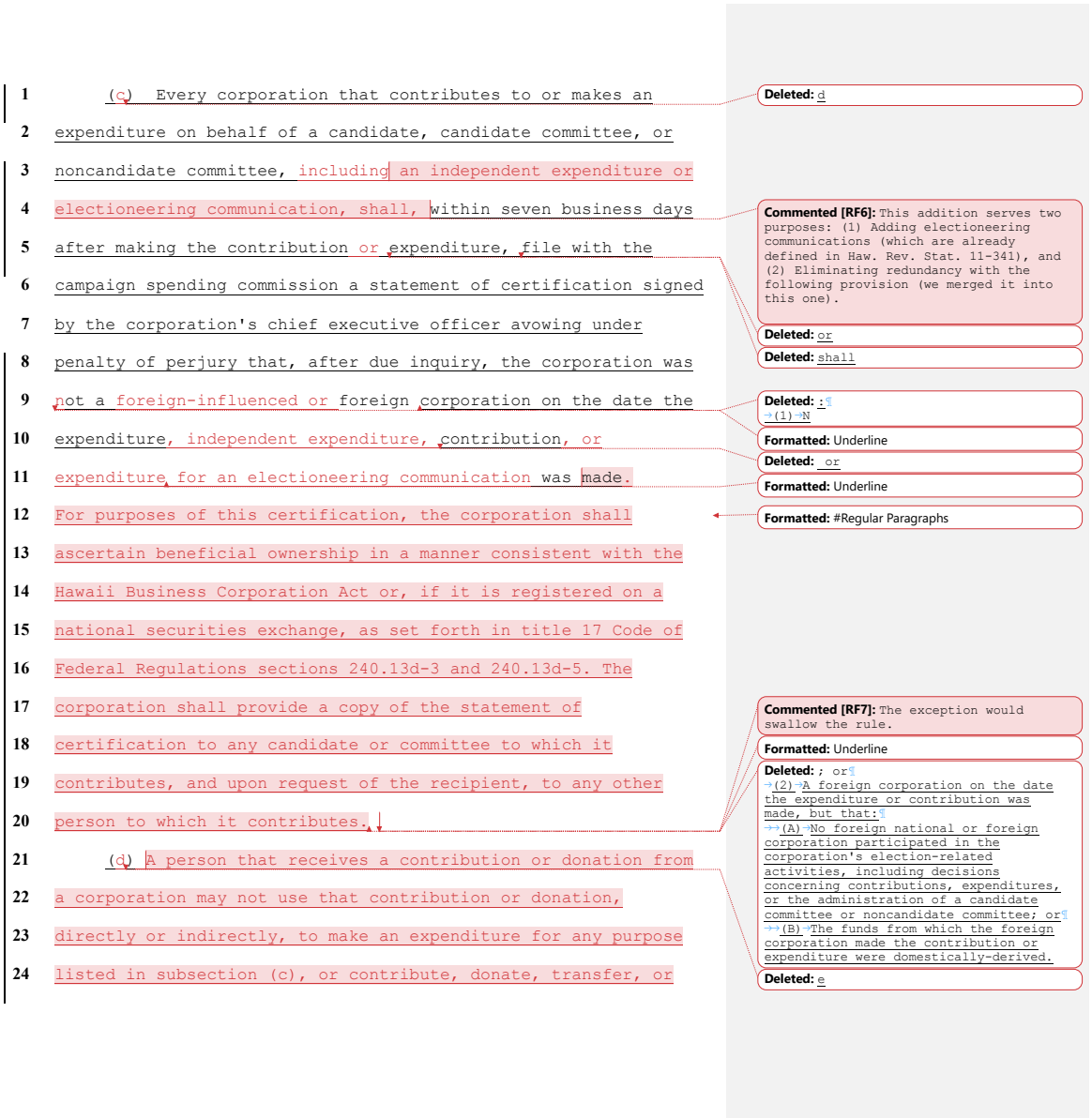

(c) Every corporation that contributes to or makes an expenditure on behalf of a candidate, candidate committee, or noncandidate committee, including an independent expenditure or electioneering communication, shall, within seven business days after making the contribution or expenditure, file with the campaign spending commission a statement of certification signed by the corporation's chief executive officer avowing under penalty of perjury that, after due inquiry, the corporation was not a foreign-influenced or foreign corporation on the date the expenditure, independent expenditure, contribution, or expenditure for an electioneering communication was made. For purposes of this certification, the corporation shall ascertain beneficial ownership in a manner consistent with the Hawaii Business Corporation Act or, if it is registered on a national securities exchange, as set forth in title 17 Code of Federal Regulations sections 240.13d-3 and 240.13d-5. The corporation shall provide a copy of the statement of certification to any candidate or committee to which it contributes, and upon request of the recipient, to any other person to which it contributes.

(d) A person that receives a contribution or donation from a corporation may not use that contribution or donation, directly or indirectly, to make an expenditure for any purpose listed in subsection (c), or contribute, donate, transfer, or

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Commented [RF6]: This addition serves two purposes: (1) Adding electioneering communications (which are already defined in Haw. Rev. Stat. 11-341), and (2) Eliminating redundancy with the following provision (we merged it into this one).

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Deleted: ; or¶ →(2)→A foreign corporation on the date the expenditure or contribution was made, but that:¶ →→(A)→No foreign national or foreign corporation participated in the corporation's election-related activities, including decisions concerning contributions, expenditures, or the administration of a candidate committee or noncandidate committee; or¶ →→(B)→The funds from which the foreign corporation made the contribution or expenditure were domestically-derived.

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convey funds from such a contribution or donation to another person to use for such purpose, unless:

(1) The person received from the corporation a copy of the statement of certification described in subsection (c);

(2) The person does not have actual knowledge that the statement of certification is false;

(3) The person separately designates, records, and accounts for such funds, and ensures that disbursements for the purposes described in subsection (c) are only made from funds that comply with the requirements of this section; and

(4) The person's use of such funds is otherwise lawful.

(e) For the purposes of this section, "corporation" means a for-profit corporation, company, limited liability company, limited partnership, business trust, business association, or other similar for-profit entity.

(f) For the purposes of this section, "electioneering communication" has the meaning defined by section 11-341."

SECTION 4. Section 11-393, Hawaii Revised Statutes, is amended to read as follows:

"**[~~]§11-393[~~] Identification of certain top contributors to noncandidate committees making only independent expenditures.** (a) An advertisement shall contain an additional notice in a prominent location immediately after or below the notices

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Commented [RF10]: The term is defined in 11-341 but only for the purpose of that section. We are unsure whether Hawaii legislative drafting style requires this cross-reference but it may be necessary.

required by section 11-391, if the advertisement is broadcast, televised, circulated, or published, including by electronic means, and is paid for by a noncandidate committee that certifies to the commission that it makes only independent expenditures. This additional notice shall start with the words, "The three top contributors for this advertisement are", followed by the names of the three top contributors, as defined in subsection [~~(c),~~] (f), who made the highest aggregate contributions to the noncandidate committee for the purpose of funding the advertisement; provided that:

(1) If a noncandidate committee is only able to identify two top contributors who made contributions for the purpose of funding the advertisement, the additional notice shall start with the words, "The two top contributors for this advertisement are", followed by the names of the two top contributors;

(2) If a noncandidate committee is able to identify only one top contributor who made contributions for the purpose of funding the advertisement, the additional notice shall start with the words, "The top contributor for this advertisement is", followed by the name of the top contributor;

(3) If a noncandidate committee is unable to identify any top contributors who made contributions for the

purpose of funding the advertisement, the additional notice shall start with the words, "The three top contributors for this noncandidate committee are", followed by the names of the three top contributors who made the highest aggregate contributions to the noncandidate committee; and

(4) If there are no top contributors to the noncandidate committee, the noncandidate committee shall not be subject to this section.

In no case shall a noncandidate committee be required to identify more than three top contributors pursuant to this section.

(b) If a noncandidate committee has more than three top contributors who contributed in equal amounts, the noncandidate committee may select which of the top contributors to identify in the advertisement; provided that the top contributors not identified in the advertisement did not make a higher aggregate contribution than those top contributors who are identified in the advertisement. The additional notice required for noncandidate committees described under this subsection shall start with the words "Three of the top contributors for this advertisement are" or "Three of the top contributors to this noncandidate committee are", as appropriate, followed by the names of the three top contributors.

(c) This section shall not apply to advertisements broadcast by radio or television of such short duration that including a list of top contributors in the advertisement would constitute a hardship to the noncandidate committee paying for the advertisement. A noncandidate committee shall be subject to all other requirements under this part regardless of whether a hardship exists pursuant to this subsection. The commission shall adopt rules pursuant to chapter 91 to establish criteria to determine when including a list of top contributors in an advertisement of short duration constitutes a hardship to a noncandidate committee under this subsection.

(d) A noncandidate committee shall obtain a statement of certification from each top contributor required to be listed in an advertisement pursuant to this section avowing under penalty of perjury that, after due inquiry, none of the funds contributed by the top contributor were derived from a foreign or foreign-influenced corporation. If a noncandidate committee does not receive a statement of certification from a top contributor, the advertisement shall include the following statement: "Some of the funds used to pay for this message may have been provided by foreign or foreign-influenced corporations." A noncandidate committee shall be entitled to rely on a statement of certification provided by a top

contributor unless the noncandidate committee has actual knowledge that the statement of certification is false.

[~~(d)~~] (e) Any noncandidate committee that violates this section shall be subject to a fine under section 11-410.

[~~(e)~~] (f) For purposes of this part, "top contributor" means a contributor who has contributed an aggregate amount of $10,000 or more to a noncandidate committee within a twelve-month period prior to the purchase of an advertisement."

SECTION 5. Nothing in this Act shall be construed to diminish or infringe upon any right protected under the First Amendment of the Constitution of the United States or conflict with any federal statute or regulation.

SECTION 6. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 7. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

INTRODUCED BY: _____

Report Title:
Campaign Finance; Foreign Corporations; Foreign Nationals

Description:
Prohibits foreign nationals, foreign-influenced corporations, and foreign corporations from making independent expenditures. Requires every corporation that contributes or expends funds in a state election to file a statement of certification regarding its limited foreign influence. Requires recipients of corporate donations from expending funds derived from corporations that have failed to certify that they are not foreign-influenced. Requires noncandidate committees making only independent expenditures to obtain a statement of certification from each top contributor required to be listed in an advertisement.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

SB-166-SD-1
Submitted on: 3/27/2022 6:55:27 PM
Testimony for JHA on 3/30/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

Support

SB-166-SD-1
Submitted on: 3/29/2022 6:58:59 AM
Testimony for JHA on 3/30/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jason E. Korta	Individual	Support	Written Testimony Only

Comments:

I strongly support this important legislation. Foreign-influenced corporations should not be allowed to participate in our elections. We should know who is spending in our elections, and our candidates for public office should never have to run against an opponent with foreign support.

Let us decide our elections free of foreign interference. Please pass this bill out of your committee.

Thank you.