



**STATE OF HAWAII**  
**CAMPAIGN SPENDING COMMISSION**

235 SOUTH BERETANIA STREET, ROOM 300  
HONOLULU, HAWAII 96813

January 26, 2022

TO: The Honorable Karl Rhoads, Chair  
Senate Committee on Judiciary

The Honorable Jarrett Keohokalole, Vice Chair  
Senate Committee on Judiciary

Members of the Senate Committee on Judiciary

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

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

Friday, January 28, 2022  
9:30 a.m., 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 corporations from making independent expenditures,<sup>1</sup> (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 corporation, and (3) requiring noncandidate committees to obtain a statement of certification from top contributors that the funds used by the top contributors were not derived from a foreign corporation.

Section 2 of the bill adopts definitions of "foreign corporation" and "foreign national" that are not commonly understood. This makes the enforcement of and adherence to the requirements of the bill difficult. Without knowing the situation addressed by the bill, the Commission believes that adopting the more commonly understood definitions "foreign corporation" and "foreign national" makes the bill easier to understand and enforce. A foreign corporation is one that was created or organized outside of the United States or not under the laws of the United States, any of its states, or the District of Columbia. Foreign national means all persons who are not (1) a U.S. citizen, (2) a legal immigrant with a "Green Card," and (3) a

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<sup>1</sup> Foreign nationals and foreign corporations are **already** prohibited from making contributions and expenditures in Hawaii. Hawaii Revised Statutes ("HRS") §11-356(a).

protected individual granted asylum or refugee status. Then, the definitions of “foreign investor” and “foreign owner” would not be needed.

Section 3 of the bill amends HRS §11-356 (beginning at page 6) by adding a requirement in a new subsection (d) that a corporation that makes a contribution or expenditure to a committee must, within seven business days, file a certification with the Commission that the corporation is either (1) not a foreign corporation or (2) is a foreign corporation, but that “(A) No foreign national or foreign corporation participated in the in the corporation’s election-related activities, . . . or (B) That funds from which the foreign corporation made the contribution or expenditure were domestically derived.” If the definition of foreign corporation is modified as suggested, the Commission recommends that this Committee delete “foreign corporation” on page 6, line 6, and replace it with a “foreign-owned domestic corporation” to read as follows:

“(2) A ~~[foreign corporation]~~ foreign-owned domestic corporation on the date the expenditure or contribution was made, but that;”

That is, a domestic corporation that is foreign owned, may make contributions or expenditures so long as (A) no foreign national or foreign corporation participated in election-related activities or (B) the funds used for the contributions or expenditures are domestically derived. This would make the proposed subsection (d) consistent with what is subsection (c) in the bill.

The Commission notes that organizations like corporations do not have to register with the Commission and file reports unless the organization has spent more than \$1,000 in a two-year election period. HRS §11-321(g). This measure, beginning on page 3 at line 17, appears to require corporations to file a statement of certification within seven business days of making an independent expenditure without regard to the amount spent.

Finally, Section 5 of the bill amends HRS §11-393 by adding a new subsection (d)<sup>2</sup> 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 corporation. If the noncandidate committee does not receive the statement of certification, the advertisement must contain the following statement: “Some of the funds to pay for this message may have been provided by foreign corporations.” Instead of requiring this statement on the advertisement, which will no doubt cause an investigation to be launched, the Commission suggests that the bill require the return of the contribution if the statement of certification is not provided by the top contributor.

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<sup>2</sup> Beginning at page 10 of the bill.

Statement Before The  
**SENATE COMMITTEE ON JUDICIARY**

Friday, January 28, 2022

9:30 AM

Via Videoconference

in consideration of

**SB 166****RELATING TO CAMPAIGN FINANCE.**

Chair RHOADS, Vice Chair KEOHOKALOLE, and Members of the Senate Judiciary Committee

Common Cause Hawaii supports with suggested amendments SB 166, 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.

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 Americans by requiring strong disclosures and making sure everyone plays by the same commonsense rules.

Common Cause Hawaii supports SB 166 as necessary to protecting 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 is an excellent start to protecting our elections from foreign intervention. While SB 166 is a good start to protecting our State's democratic self-governance, Common Cause Hawaii suggests the following amendments to SB 166:

- 1) Delete lines 11-16 at page 5. Common Cause Hawaii is concerned that the exception -- to allow foreign-owned domestic corporations to make contributions, if they claim that foreign national individuals did not participate in election-related activities or contributions are domestically-derived -- would be difficult to ascertain and verify. Ultimately, the exception may become meaningless and swallow the rule prohibiting a foreign national or foreign corporation from making contributions or expenditures to or on behalf of a candidate, candidate committee, or noncandidate committee. This change would correspond to deleting lines 19-20 at page 4.
- 2) Delete lines 6-16 at page 6. Common Cause Hawaii is concerned that any statement that the foreign corporation on the date of the expenditure or contribution did not participate in the corporation's election-related activities or the funds were domestically-derived would be difficult to ascertain and verify. Again, the exception may become meaningless and swallow the rule rendering the requirement that every corporation that contributes or expends funds in a Hawaii election file a statement of certification hollow.

- 3) Expand the current ban on foreign interference to include electioneering communications. SB 166, at page 5, lines 9-10, prohibits foreign national and foreign corporation from making independent expenditures. Electioneering communications should be added to this ban as well.
- 4) Define foreign corporations at pages 2-3 to include 501(c)(4) organizations that receive 5% or more of their funds from foreign nationals or other foreign corporations. Including 501(c)(4) groups in the coverage will prevent foreign nationals and foreign corporations from channeling large amounts of money through non-profit organizations that typically do not have to disclose their donors.
- 5) Require foreign nationals and foreign corporations that run issue ads to include a “paid for by a foreign national” disclaimer on the ads. When foreign nationals or foreign corporations run advertisements to influence government action or policy, such issue ads should clearly and conspicuously identify the foreign individual or entity responsible for the ad, including a disclaimer that the person is a foreign national.

The integrity of our elections is important to us all, and we must protect it from undue foreign influence. Therefore, Common Cause Hawaii supports SB 166 with the above suggested amendments.

Thank you for the opportunity to testify in support of SB 166 with suggested amendments. If you have questions of me, please contact me at [sma@commoncause.org](mailto:sma@commoncause.org).

Very respectfully yours,

Sandy Ma  
Executive Director, Common Cause Hawaii





AMERICANS FOR DEMOCRATIC ACTION

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OFFICERS		DIRECTORS		MAILING ADDRESS
John Bickel, President	Melodie Aduja	Jan Lubin	Bill South	P.O. Box 23404
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Dave Nagajji, Treasurer	Juliet Begley	Jenny Nomura		Hawaii 96823
Doug Pyle, Secretary	Stephanie Fitzpatrick	Stephen O'Harrow		

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January 25, 2022

TO: Chair Rhoads and Members of the Judiciary Committee

RE: SB 166 Relating to Campaign Finance

Support for a Hearing on January 28

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



January 28, 2022

The Honorable Karl Rhoads  
Chair, Senate Committee on Judiciary  
Hawaii State Legislature

The Honorable Jarrett Keohokaloe  
Vice Chair, Senate Committee on Judiciary  
Hawaii State Legislature

**Re: Statement in Support of S.B. 166**

Dear Chair Rhoads, Vice Chair Keohokaloe, and Members of the Committee on Judiciary,

The Campaign Legal Center (CLC) respectfully submits this statement to the Committee in support of S.B. 166. CLC also provides three recommendations for strengthening S.B. 166. CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy across all levels of government. Since the organization's founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, as well as in numerous other federal and state court cases. Our work promotes every American's right to participate in the democratic process.

Senate Bill 166 takes important steps to safeguard the right of Americans to democratic self-governance by prohibiting foreign nationals from making independent expenditures and expanding the definition of foreign national to include corporations with significant foreign influence. Despite a federal ban on foreign interference, foreign interests have spent substantial sums to influence recent U.S. elections. Following *Citizens United v. FEC*, 558 U.S. 310 (2010), federal law has failed to address campaign spending by corporations with significant foreign influence. In light of federal inaction, several jurisdictions have passed reforms similar to S.B. 166 to ban campaign spending by foreign-influenced corporations.<sup>1</sup>

In addition to supporting the bill's provisions regarding foreign corporations and independent expenditures, CLC recommends the following amendments:

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<sup>1</sup> See Alaska Stat. § 15.13.068(a); St. Petersburg, Florida Municipal Code § 10-51(m); Seattle, Washington Municipal Code § 2.04.400. The Alaska and St. Petersburg laws apply to corporations owned 5% or more by a single foreign owner and 20% or more by multiple foreign owners, and the Seattle law applies to corporations owned 1% or more by a single foreign owner and 5% or more by multiple foreign owners.

**Expand the prohibition to include electioneering communications.** The bill expands Hawaii's ban on foreign spending in elections to include independent expenditures. To ensure that the ban applies to all election-related advertisements, CLC recommends including electioneering communications in the ban. Other states, including Alaska, Colorado, Maryland, Montana, and Washington, as well as federal law, also prohibit foreign nationals from making electioneering communications.<sup>2</sup>

**Ban 501(c)(4) organizations that receive 20% or more of their funds from foreign sources from spending in elections.** The bill expands Hawaii's ban to corporations with certain amounts of foreign ownership or that are formed under the laws of a foreign jurisdiction. CLC recommends including 501(c)(4) organizations that receive 20% or more of their funds from foreign nationals or other foreign corporations. Including these groups in the ban will prevent foreign interests from laundering large amounts of money through non-profit organizations to influence Hawaii elections.<sup>3</sup>

**Require foreign nationals who run issue ads to include a "paid for by a foreign national" disclaimer on the ads.** When foreign nationals run ads that attempt to influence government action or policy, like the approval of an environmental permit or the passage of a bill, those ads should clearly and conspicuously identify the foreign national responsible for the ad, including a disclaimer that the person is a foreign national. Requiring this kind of disclosure is similar to the disclaimer requirements under the federal Foreign Agents Registration Act.<sup>4</sup>

CLC respectfully urges the Committee to support updating Hawaii's ban on foreign interference in elections with our recommendations and taking favorable action on S.B. 166. Thank you for the opportunity to submit this statement in support of this important legislation. If you have further questions, please do not hesitate to contact us.

Respectfully submitted,

/s/

Aaron McKean  
Legal Counsel

Campaign Legal Center  
1101 14th St. NW, Suite 400  
Washington, DC 20005

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<sup>2</sup> Alaska Stat. § 15.13.068(a); Colo. Rev. Stat. § 1-45-103.7(5.5); Md. Code, Elections § 13-236.1(b)(2); Mont. Code Ann. § 13-37-502(1); Wash. Rev. Code § 42.17A.417; 52 U.S.C. § 30121(a)(1)(c).

<sup>3</sup> See, e.g., Investigations team & Ruth Sherlock, *Exclusive: Pro-Trump campaign group should face inquiry over 'foreign donor', leading election lawyer states*, THE TELEGRAPH (Oct. 25, 2016), <http://www.telegraph.co.uk/news/2016/10/25/exclusive-pro-trump-campaign-group-should-face-inquiry-over-fore/>.

<sup>4</sup> 22 U.S.C. § 611, *et seq.*

**SB-166**

Submitted on: 1/25/2022 3:47:25 PM

Testimony for JDC on 1/28/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in support.



January 27, 2022

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

**LATE**

**RE: Committee hearing on SB166, a bill relating to campaign finance**

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

I hereby submit this written testimony to support the intent of SB166, legislation sponsored by Sen. Chris Lee, relating to campaign finance, which is aimed at prohibiting political spending by foreign nationals and foreign-influenced corporations. This pro-democracy legislation is the subject of today's hearing by the Committee on Judiciary. My testimony includes suggestions for amendments that would strengthen this pending legislation and help it achieve its public policy objectives.

I am a senior fellow at the Center for American Progress (CAP). Based in Washington, D.C., CAP is an independent, nonpartisan policy institute dedicated to improving the lives of all Americans through bold, progressive policies. My democracy reform work at CAP has involved research in the area of preventing election-related spending by foreign-influenced U.S. corporations. My publications include a report and fact sheet analyzing this policy, with the report republished in the Harvard Law School Forum on Corporate Governance.<sup>1</sup> These publications may be useful as the committee considers the pending legislation.

After reviewing SB166, I conclude that, if amended, it would provide an important tool to protect Hawaii's elections from foreign influence and reduce the outsized role that corporate money plays in election outcomes. This bold bill would strengthen the right of Hawaii's residents to determine the political and economic future of their state and help ensure that lawmakers are accountable to voters instead of foreign-influenced corporations.

This legislative effort in Hawaii follows on the heels of Seattle, Washington, which in 2020, passed similar legislation to protect its elections after a deluge of corporate political spending by at least one foreign-influenced U.S. corporation. Moreover, the New York State Senate recently passed a similar bill, on a bipartisan vote, and the bill is now pending in the state Assembly.<sup>2</sup> Several similar bills have been filed at the federal level by members of Congress, including Sen. Elizabeth Warren (D-MA) and Rep.

Jamie Raskin (D-MD).<sup>3</sup> This legislative effort is also timely, given that foreign-influenced corporations Uber and Lyft are expanding their ballot initiative efforts in states across the nation; for example, they are now working in Massachusetts after their recent success in California to overturn a pro-worker state law.<sup>4</sup>

The pending bill, when amended, would reduce foreign influence in Hawaii elections by preventing political spending from U.S. corporations that meet one of the following criteria:

- A single foreign shareholder owns or controls 1 percent or more of the corporation's equity.
- Multiple foreign shareholders own or control—in the aggregate—5 percent or more of the corporation's equity.
- Any foreign entity participates directly or indirectly in the corporation's decision-making process about political activities in the United States.

These bright-line thresholds would not bar political spending in Hawaii by *all* U.S. corporations but rather U.S. corporations that have levels of foreign ownership appreciable enough to influence the decision-making of corporate managers.

## The current legal framework

Current law and U.S. Supreme Court precedent are clear when it comes to foreign influence: It is illegal for foreign governments, foreign corporations, or foreign individuals to directly or indirectly spend money to influence U.S. elections.<sup>5</sup>

The statutory prohibition against foreign involvement is foundational to U.S. self-government and exists primarily because foreign entities are likely to have policy and political interests that do not align with America's best interests. This bedrock principle was discussed at length and developed by the nation's founders and enshrined in the U.S. Constitution. It was reaffirmed just nine years ago in the case of *Bluman v. Federal Election Commission*, written by now-U.S. Supreme Court Justice Brett Kavanaugh, who was part of a special panel deciding the case.<sup>6</sup> In that case, the court stated 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." The Supreme Court affirmed the *Bluman* decision (without writing a decision).

Yet a loophole in current law makes the United States vulnerable to foreign influence because foreign entities can invest in an American-based corporation—and then that corporation can spend unlimited amounts of money on elections, often secretly. This loophole was opened in the Supreme Court's misguided 2010 decision in *Citizens United v. Federal Election Commission*, which, for the first time, gave corporations the right to spend unlimited amounts of money from their corporate treasuries on advertising for the election or defeat of candidates.<sup>7</sup> The Supreme Court indicated it was aware of this foreign-influence loophole and that its decision would not preclude a law to close it. Even with the existence of this loophole, the *Bluman* decision concluded that nothing in *Citizens United* was inconsistent with the law that bans foreign contributions and expenditures in U.S. elections.

## Torrent of spending by U.S. corporations that have appreciable foreign ownership

In the years since *Citizens United*, America's largest corporations—most of which appear to have appreciable levels of foreign ownership—have spent hundreds of millions of dollars directly from their corporate treasuries to influence elections and ballot measures.<sup>8</sup> This does not even count their separate corporate political action committees (PACs), funded by money from U.S. managers and employees; contributions by a corporation's managers or employees in their personal capacities; or the hundreds of millions of dollars that corporations spend on lobbying, other advocacy, or memberships in like-minded associations.

Much of this corporate election spending is done through secret, dark money channels, which makes it untraceable.<sup>9</sup> Whether traceable or not, multiple avenues now exist for foreign entities to exert influence on our nation's domestic political process via corporate political spending. This is an especially noteworthy point in light of the fact that foreign investors, as of 2019, owned a whopping 40 percent of all U.S. stock, compared with just 5 percent in 1982.<sup>10</sup>

Many foreign-influenced U.S. corporations that spend political dollars are wholly owned subsidiaries of foreign corporations, such as BP and Shell Oil. Other U.S. corporations are partially foreign owned. For example, approximately 10 percent of U.S.-based Uber is reportedly owned by Saudi Arabia, which controls one of Uber's board seats.<sup>11</sup>

Uber has spent tens of millions of dollars in recent years to influence elections and ballot measures that would help the company's bottom line. For example, in 2020, Uber joined forces with foreign-influenced Lyft and other companies to spend a staggering \$203 million on a ballot initiative that overturned a pro-worker state law in California. This ballot initiative became the most expensive ballot measure in California history.<sup>12</sup> These same foreign-influenced corporations are now leading similar ballot initiatives in other states, where they likely will spend tens of millions of dollars attempting to weaken labor laws.

## This legislation is rooted in well-accepted principles of corporate governance law and practice

Ownership thresholds are not new or untested in U.S. law. Rather, they are common regulatory tools used in many contexts—such as telecommunications, defense, and financial services—to help prevent undue foreign influence over U.S. sovereignty or national security and the divergent policy interests that flow therefrom.<sup>13</sup> Foreign-ownership thresholds, in fact, were passed by the U.S. House of Representatives in the DISCLOSE Act of 2010 and garnered 59 votes in the U.S. Senate, one vote short of breaking a filibuster.<sup>14</sup>

Hawaii's interest in regulating foreign influence need not rest on the idea that foreign investors may be linked to hostile entities that are actively trying to weaken democracy. Rather, because current federal law does not explicitly prevent U.S.-based corporations with foreign owners from spending money in elections, foreign interests are almost inevitably going to influence the political system. That is because,

pursuant to long-standing corporate governance principles, corporate managers are obliged to spend resources in ways that serve all 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.”<sup>15</sup>

In the policy areas of workers’ rights, taxation, the environment, and commerce—just to name a few—there are many ways that foreign interests predictably diverge from the interests of people living in Hawaii. At the very least, this dynamic creates a harmful appearance of impropriety that can weaken people’s trust in the state’s elections, in government officials, and, ultimately, in the policies that lawmakers produce.

Barring political spending by corporations with appreciable levels of foreign ownership does not mean that such companies necessarily lack sufficient ties to Hawaii. Nor is this policy meant to signify that such companies are trying to deliberately influence Hawaii’s elections, that these companies are bad actors, or that these companies should reject investments from foreign entities. Rather, this legislation would close a loophole opened by *Citizens United* and prevent the possibility that a company with appreciable foreign ownership would allow such ownership to influence the company’s political spending in Hawaii.

## The legislation’s foreign-ownership thresholds are carefully crafted

At first glance, the recommended thresholds—1 percent for a single foreign shareholder and 5 percent for aggregate foreign ownership—may appear to be relatively low. However, both thresholds are solidly grounded in corporate governance and related law.

Corporate managers, capital investors, regulators, and governance experts recognize that a shareholder who owns at least 1 percent of stock in a corporation can influence corporate decision-making, including decisions about political spending.<sup>16</sup> There are relatively few individual shareholders who ever own as much as 1 percent of a major publicly traded corporation, and if they do, their stock likely is worth tens of millions of dollars, if not more. Shareholders who own 1 percent of corporate stock are rare and powerful; they are able to get their calls returned by executive suite managers and have sway over the strategic direction of a corporation.

The legislation’s 1 percent threshold is rooted in regulations of the U.S. Securities and Exchange Commission’s (SEC) governing thresholds for shareholder proposals. These regulations state that if a shareholder owns at least 1 percent of a corporation’s shares, that shareholder has the unique right to submit shareholder proposals to dictate a corporation’s course of action.<sup>17</sup> In November 2019, the SEC even proposed eliminating the 1 percent threshold, finding that the vast majority of investors who submit shareholder proposals do not even have that level of equity ownership and that institutional investors below the 1 percent single owner threshold can, in fact, exercise substantial influence on a corporation’s decisions.<sup>18</sup>

The former Republican chairman of the U.S. House Committee on Financial Services recognized—in the area of proxy contests—that shareholders who own 1 percent of corporate stock are important players

who have the very real opportunity to influence corporate decision-making.<sup>19</sup> And the Business Roundtable, an association representing corporate CEOs, acknowledged this dynamic.<sup>20</sup> In fact, the Business Roundtable suggested a sliding scale for shareholder proposals that would dip far below the 1 percent threshold for the largest U.S. corporations—to a 0.15 percent share of ownership.

A 5 percent aggregate foreign-ownership threshold is also well supported. When a significant number of smaller shareholders together have a commonality—such as foreign domicile—it can influence corporate managers’ decisions, in the manner described above. Moreover, if several shareholders each own slightly less than 1 percent of a corporation, but together own at least 5 percent of a corporation, it makes little sense to ignore the possibility that they could join forces to do what a single 1 percent shareholder could do alone.

One avenue for smaller shareholders to exert their collective influence is during “proxy season,” when they can threaten to band—or actually have banded—together to force votes on proposals that affect corporate decision-making.<sup>21</sup> The Business Roundtable stated that it supported the right of a group of shareholders to submit a proposal for consideration if those shareholders owned only 3 percent of a corporation’s shares.<sup>22</sup>

Finally, as Ellen Weintraub, longtime commissioner on the Federal Election Commission, has written, we are not working our way down from a 100 percent foreign-ownership standard, we are working our way up from the zero foreign-influence standard that a strict legal interpretation of federal law suggests.<sup>23</sup> Weintraub’s argument is rooted in *Citizens United*, where the Supreme Court held that corporations could spend freely in politics, calling them “associations of citizens,” and that corporations’ rights to spend in politics flows from the collective First Amendment rights of their individual shareholders. Weintraub concluded that it “logically follows, then, that *restrictions* on the rights of shareholders must also apply to the corporation.” Under these circumstances where a corporation is not an “association of citizens,” *any* amount of foreign investment in a corporation should preclude management’s political expenditures, a point argued compellingly by experts at the non-partisan Free Speech For People.<sup>24</sup>

## This legislation is constitutional

The foreign-ownership thresholds in this legislation would survive constitutional challenge, a conclusion supported by several noted experts in constitutional, election, and corporate law.<sup>25</sup> At root, this legislation is consistent with the *Bluman* decision—which the Supreme Court affirmed—declaring that foreign entities have no constitutional right to participate in U.S. elections.

Moreover, this legislation follows the approach laid out by Commissioner Weintraub, which provided a new, cogent way to read *Citizens United* in conjunction with the ban on foreign spending in U.S. elections. As discussed in the section above, Weintraub pointed out that *Citizens United* allows corporations to spend freely in politics, calling them “associations of citizens,” and that corporations’ rights to spend in politics flows from the collective First Amendment rights of their individual shareholders. Weintraub stated that it “logically follows, then, that *restrictions* on the rights of shareholders must also apply to the corporation.” She also wrote, “You cannot have a right collectively that you do not have individually.”<sup>26</sup> Therefore, according to Weintraub, “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.”<sup>27</sup>

It is worth noting that foreign-influenced U.S. corporations—and their managers and employees—would have multiple other avenues to exercise their legitimate First Amendment rights to spend money to influence elections or policymaking, as discussed above. These avenues include contributions from a corporation’s PAC, contributions by a corporation’s managers or employees in their personal capacities, lobbying activities, advocacy campaigns, or memberships in associations.

## How the foreign-ownership thresholds practically would affect corporations

The vast majority of U.S. businesses have no foreign owners. But in the CAP report referenced above, I analyzed data on foreign ownership of 111 U.S.-based publicly traded corporations in the S&P 500 stock index. The results include the following:

- When applying the 1 percent single foreign shareholder threshold, 74 percent of the corporations studied exceeded the threshold.
- When applying the 5 percent aggregate foreign threshold, 98 percent of the corporations studied exceeded the threshold.

These 111 corporations voluntarily disclosed \$443 million spent in federal and state elections from their corporate treasuries in the years 2015, 2016, and 2017.

Among smaller publicly traded corporations, 28 percent of the corporations that were randomly sampled exceeded the 5 percent aggregate foreign-ownership threshold. From this analysis, it appears that smaller publicly traded corporations may be less likely to have as much aggregate foreign ownership as their larger counterparts and therefore would likely be less affected by this legislation’s ownership thresholds.

## Necessary amendments

In order for this legislation to meet its objective of effectively prohibiting political spending by foreign-influenced U.S. corporations, I recommend amendments designed to accomplish the following:

- Most importantly, in Section 3, strike portions of the language related to Hawaii Revised Statutes sections 11-356(a) and (c). If left in place, this language would effectively nullify any impact of this bill via exceptions that swallow the intended policy. Specifically, the language should not refer to the United States Code and related sections of the Code of Federal Regulations, and the bill should prohibit foreign-influenced corporations from making contributions even where foreign nationals do not participate in a corporation’s election-related activities or even where the corporation’s contributions are domestically derived.

- In Section 2, provide a separate definition for the term “foreign-influenced corporation,” to avoid confusion with the term “foreign corporation.” The latter term usually refers to a corporation incorporated or headquartered abroad.
- In Section 3(c), add “electioneering communications” (which is already defined in Hawaii Revised Statutes) to the list of prohibited activities for foreign corporations and foreign-influenced corporations.
- In Section 3, add a specific anti-circumvention provision as subsection (d), to explicitly prevent money from foreign corporations or foreign-influenced corporations from entering elections via “secret money” groups such as 501(c)(4)s. Amended language should make clear that a person receiving a contribution or donation from a corporation may not use that contribution or donation, directly or indirectly, to make an expenditure for any purpose defined earlier in the section, or contribute, donate, transfer, or convey funds from such 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 earlier; (2) the person does not have actual knowledge that the statement of certification is false; (3) the person separately designates, records, or accounts for such funds, and ensures that disbursements for the purposes described earlier are only made from funds that comply with the requirements of this section; and (4) the person’s use of the funds is otherwise lawful.
- In Section 3(c), clarify that for purposes of certification, the corporation must 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.

## Conclusion

At a time of rising foreign interference in U.S. elections, Hawaii is to be commended for positioning itself at the forefront of legislative efforts across the nation to take proactive, commonsense steps to stop political spending by foreign-influenced U.S. corporations. SB166 is a people-powered proposal that would go a long way in reassuring the people of Hawaii that their democratic right to self-government is protected.

For the reasons stated above, I urge the committee’s adoption of amended language and passage of the pending legislation. Please let me know if I can be of further assistance.

Sincerely,

/s/ Michael L. Sozan



## Endnotes

- <sup>1</sup> Michael Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections” (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/>; Michael Sozan, “Fact Sheet: Ending Foreign-Influenced Corporate Spending in U.S. Elections” (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477468/ending-foreign-influenced-corporate-spending-u-s-elections-2/>; Michael Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections” (Cambridge, MA: Harvard Law School Forum on Corporate Governance, 2019), available at <https://corpgov.law.harvard.edu/2019/12/06/ending-foreign-influenced-corporate-spending-in-u-s-elections/>.
- <sup>2</sup> Democracy Preservation Act, S.1126B, 2021-2022 legislative session (passed by N.Y. State Senate on January 10, 2022), available at <https://www.nysenate.gov/legislation/bills/2021/s1126>.
- <sup>3</sup> Anti-Corruption and Public Integrity Act, S. 5070, Section 721, 116th Cong., 2nd sess. (December 19, 2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/5070/text?q=%7B%22search%22%3A%5B%22warren%22%5D%7D&r=2&s=2>; Get Foreign Money Out of U.S. Elections Act, H.R.6283, 117<sup>th</sup> Cong., 1<sup>st</sup> sess. (December 14, 2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/6283?q=%7B%22search%22%3A%5B%22raskin+get+foreign+money+out%22%2C%22raskin%22%2C%22get%22%2C%22foreign%22%2C%22money%22%2C%22out%22%5D%7D&s=1&r=1>.
- <sup>4</sup> Steph Solis, “Uber, Lyft-backed gig worker ballot initiative certified by AG,” Boston Business Journal, September 1, 2021, available at <https://www.bizjournals.com/boston/news/2021/09/01/maura-healey-certifies-gig-worker-ballot-petition.html>.
- <sup>5</sup> See Legal Information Institute, “52 U.S. Code § 30121 – Contributions and donations by foreign nationals,” available at <https://www.law.cornell.edu/uscode/text/52/30121> (last accessed September 2021).
- <sup>6</sup> *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), aff’d, 132 S. Ct. 1087 (January 9, 2012) (Mem.), available at <https://www.scotusblog.com/case-files/cases/bluman-v-federal-election-commission/>.
- <sup>7</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (January 21, 2010), available at <https://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/>.
- <sup>8</sup> See Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections” (discussing this issue in several sections).
- <sup>9</sup> See *Ibid*, p. 9.
- <sup>10</sup> See Steven M. Rosenthal and Theo Burke, “Who Owns US Stock? Foreigners and Rich Americans,” (Washington: Tax Policy Center, 2020), available at <https://www.taxpolicycenter.org/taxvox/who-owns-us-stock-foreigners-and-rich-americans>.
- <sup>11</sup> See Eric Newcomer, “The Inside Story of How Uber Got Into Business With the Saudi Arabian Government,” Bloomberg, November 3, 2018, available at <https://www.bloomberg.com/news/articles/2018-11-03/the-inside-story-of-how-uber-got-into-business-with-the-saudi-arabian-government>.
- <sup>12</sup> I wrote about Proposition 22 and the need for California to pass legislation to ban political spending by foreign-influenced U.S. corporations. See Michael Sozan, “Opinion: Stop political spending by foreign-influenced U.S. firms,” *The Mercury News*, December 15, 2020, available at <https://www.mercurynews.com/2020/12/15/opinion-stop-political-spending-by-foreign-influenced-u-s-firms/>.
- <sup>13</sup> See Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections,” p. 37.
- <sup>14</sup> See Michael Beckel, “Senate Republicans Again Block DISCLOSE Act, Designed to Reveal Special Interest Spending,” Center for Study of Responsive Politics OpenSecrets, September 23, 2010, available at <https://www.opensecrets.org/news/2010/09/senate-republicans-again-block/>; DISCLOSE Act, H.R. 5175, 111th Cong., 2nd sess. (April 29, 2010), available at <https://www.congress.gov/bill/111th-congress/house-bill/5175>; DISCLOSE Act, S. 3628, 111th Cong., 2nd sess. (July 21, 2010), available at <https://www.congress.gov/bill/111th-congress/senate-bill/3628>.



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- <sup>15</sup> Steve Coll, *Private Empire: ExxonMobil and American Power* (New York: Penguin Books, 2012), p. 71 (quoting Lee Raymond).
- <sup>16</sup> See Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections,” pp. 32–34.
- <sup>17</sup> Legal Information Institute, “17 CFR. § 240.14a-8 - Shareholder proposals, (b),” available at <https://www.law.cornell.edu/cfr/text/17/240.14a-8> (last accessed September 2021).
- <sup>18</sup> U.S. Securities and Exchange Commission, “Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8” (Washington: 2019), pp. 22–23, 154, available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.
- <sup>19</sup> U.S. House of Representatives Committee on Financial Services, transcript of committee debate and markup of Financial CHOICE Act, H.R. 10, § 844(b), 115th Cong., 1st sess. (May 3, 2017), available at <https://plus.cq.com/doc/congressionaltranscripts-5096442?9>, on file with author
- <sup>20</sup> See Ning Chiu, “Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes,” Davis Polk, November 16, 2016, available at <https://www.davispolk.com/insights/client-update/business-roundtable-urges-improvements-rule-14a-8-and-related-processes>; Business Roundtable, “Re. File Number 4-725” (Washington: 2018), p. 5, available at <https://s3.amazonaws.com/brt.org/2018.11.09-BRT.SECProxyRoundtableCommentLetter.pdf>.
- <sup>21</sup> See John C. Coates IV, Statement submitted to Massachusetts House of Representatives regarding an act to limit spending by foreign-influenced corporations, Harvard Law School (May 14, 2019), pp. 6–7, available at <https://freespeechforpeople.org/wp-content/uploads/2019/05/2019-Coates-MA-FIC-20190514-PDF-final.pdf>.
- <sup>22</sup> See Chiu, “Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes”; Business Roundtable, “Re. File Number 4-725.”
- <sup>23</sup> Ellen L. Weintraub, “Taking On Citizens United,” *The New York Times*, March 30, 2016, available at <https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.
- <sup>24</sup> See Ron Fein, Statement submitted to Massachusetts Legislature Joint Committee on Election Laws regarding bills to limit political spending by foreign-influenced corporations, Free Speech For People (September 17, 2021), p. 8, available at <https://freespeechforpeople.org/wp-content/uploads/2021/09/rfein-written-testimony-election-laws-20210917-combined.pdf>.
- <sup>25</sup> See Sozan, “Ending Foreign-Influenced Corporate Spending in U.S. Elections,” p. 38.
- <sup>26</sup> Ellen L. Weintraub, “Seattle Takes On Citizens United,” *The New York Times*, January 14, 2020, available at <https://www.nytimes.com/2020/01/14/opinion/seattle-citizens-united.html> (emphasis in original).
- <sup>27</sup> Weintraub, “Taking On Citizens United.”

**LATE**

**SB-166**

Submitted on: 1/28/2022 6:59:08 AM

Testimony for JDC on 1/28/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Jason E. Korta	Individual	Support	No

Comments:

Our elections should be free of foreign influence. I strongly support this legislation.

**LATE**

**SB-166**

Submitted on: 1/28/2022 8:21:32 AM

Testimony for JDC on 1/28/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Melissa Korta	Individual	Support	No

Comments:

If this does not pass, it will be concerning. It is imperative that we pass this bill to prevent outside foreign influences from corrupting our elected officials. This bill will ensure some checks regarding where/from whom funds are being received.

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.”<sup>1</sup>
- 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.

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<sup>1</sup> 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:<sup>2</sup>

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

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<sup>2</sup> These links are included only for informational purposes regarding the experts’ support of the Massachusetts legislation.

THE SENATE  
THIRTY-FIRST LEGISLATURE, 2021  
STATE OF HAWAII

S.B. NO. 166

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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 ~~[(e),]~~ (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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup> 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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<sup>3</sup> 52 U.S.C. § 30121.

<sup>4</sup> *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).

<sup>5</sup> *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

<sup>6</sup> *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.

<sup>7</sup> *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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-

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<sup>8</sup> 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>.

<sup>9</sup> 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).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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."<sup>13</sup>

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,<sup>14</sup> 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.<sup>15</sup> 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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<sup>11</sup> 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>.

<sup>12</sup> 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>.

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

<sup>14</sup> *Citizens United*, 558 U.S. at 349, 354, 356, 362.

<sup>15</sup> *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*.<sup>16</sup>

## 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."<sup>17</sup> 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."<sup>18</sup> 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 . . . ."<sup>19</sup>

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<sup>16</sup> 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.

<sup>17</sup> 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").

<sup>18</sup> *Ito v. Investors Equity Life Holding Co.*, 135 Haw. 49, 80 (2015).

<sup>19</sup> *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."<sup>20</sup> This point has often been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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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<sup>20</sup> *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting).

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

<sup>22</sup> 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").

<sup>23</sup> 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.”<sup>24</sup> 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,<sup>25</sup> 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

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<sup>24</sup> Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, <https://ampr.gs/2QliNQT>.

<sup>25</sup> See Michael Sozan, Ctr. for American Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), <https://ampr.gs/2QliNQT>.



anything, *too high*.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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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<sup>26</sup> 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.

<sup>27</sup> 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).

<sup>28</sup> 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.”<sup>29</sup>

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.<sup>30</sup> 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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<sup>29</sup> Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, <https://ampr.gs/2QliNQT>.

<sup>30</sup> 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.<sup>31</sup>

#### ***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.<sup>32</sup> 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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<sup>31</sup> 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.

<sup>32</sup> 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.”<sup>33</sup> The U.S. Court of Appeals for the Ninth Circuit has confirmed that this interest applies to state elections as well.<sup>34</sup>

***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.<sup>35</sup> 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.”<sup>36</sup> 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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<sup>33</sup> *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

<sup>34</sup> *United States v. Singh*, 924 F.3d 1030, 1042 (9th Cir. 2019).

<sup>35</sup> *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).

<sup>36</sup> *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.<sup>37</sup> 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.<sup>38</sup> 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.”<sup>39</sup> For purposes of political 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.<sup>40</sup>

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<sup>37</sup> 52 U.S.C. § 30121, formerly codified as 2 U.S.C. § 441e.

<sup>38</sup> See *Citizens United*, 558 U.S. at 362.

<sup>39</sup> *Bluman*, 800 F. Supp. 2d at 292 n.4.

<sup>40</sup> 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.”<sup>41</sup> By 2019, that figure had increased to 40%.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup> 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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<sup>41</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957).

<sup>42</sup> 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>.

<sup>43</sup> 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>.

<sup>44</sup> 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*.”<sup>45</sup>

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.<sup>46</sup> 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

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<sup>45</sup> *Palestine Information Office v. Shultz*, 853 F.2d 932, 939 (D.C. Cir. 1988) (emphasis in original).

<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup> 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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<sup>47</sup> Coates et al., *supra* note 41, at 5,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2857957](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957).

<sup>48</sup> See 47 U.S.C. § 310(b).

<sup>49</sup> 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.<sup>50</sup>

***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.<sup>51</sup> 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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<sup>50</sup> 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).

<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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*

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<sup>52</sup> 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.

<sup>53</sup> *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:

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

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

11 The legislature recognizes that Seattle, Washington has  
12 enacted legislation, and the U.S. Congress and several states  
13 and municipalities, including Colorado, Maine, Massachusetts,  
14 Minnesota, New York State, and New York City, are considering  
15 enacting legislation, to limit foreign-influenced corporate  
16 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).

1 elections from foreign influence through corporate political  
2 spending.  
3 The purpose of this Act is to protect the State's  
4 democratic self-governance by:  
5 (1) Prohibiting foreign entities and foreign-influenced  
6 corporations from making independent expenditures,  
7 electioneering communications, or contributions to  
8 candidates or committees;  
9 (2) Requiring every corporation that contributes or  
10 expends funds in a state election to file a statement  
11 of certification regarding its status as a foreign-  
12 influenced or foreign corporation;  
13 (3) Requiring every entity that expends funds in a state  
14 election and receives contributions or donations from  
15 corporations to ensure that funds derived from foreign  
16 or foreign-influenced corporations are not used for  
17 political spending; and  
18 (3) Requiring noncandidate committees making only  
19 independent expenditures to obtain a statement of  
20 certification from each top contributor required to be  
21 listed in an advertisement.  
22 SECTION 2. Section 11-302, Hawaii Revised Statutes, is  
23 amended by adding five new definitions to be appropriately  
24 inserted and to read as follows:

Deleted: corporate

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

Deleted: nationals

1       "Chief executive officer" means the highest-ranking  
2       officer or individual having authority to make decisions  
3       regarding a corporation's affairs.  
4       "Foreign-influenced corporation" means a corporation that  
5       meets at least one of the following conditions:  
6       (1) A single foreign owner holds, owns, controls, or  
7       otherwise has direct or indirect beneficial ownership  
8       of one per cent or more of the total equity,  
9       outstanding voting shares, membership units, or other  
10      applicable ownership interests of the corporation;  
11      (2) Two or more foreign owners, in aggregate, hold, own,  
12      control, or otherwise have direct or indirect  
13      beneficial ownership of five per cent or more of the  
14      total equity, outstanding voting shares, membership  
15      units, or other applicable ownership interests of the  
16      corporation; or  
17      (3) A foreign owner participates directly or indirectly in  
18      the corporation's decision-making process with respect  
19      to the corporation's political activities in the  
20      United States.  
21      "Foreign investor" means a person or entity that:  
22      (1) Holds, owns, controls, or otherwise has direct or  
23      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.

**Deleted:** 1

1           voting shares, membership units, or other applicable  
2           ownership interests of a corporation; and  
3       (2) Is:  
4           (A) A government of a foreign country, a foreign  
5               political party, or a partnership, association,  
6               corporation, organization, or other combination  
7               of persons organized under the laws of or having  
8               its principal place of business in a foreign  
9               country; or  
10          (B) A foreign national.  
11       "Foreign national" means an individual who is not a citizen  
12 of the United States or a national of the United States and who  
13 is not lawfully admitted for permanent residence.  
14       "Foreign owner" means:  
15       (1) A foreign investor; or  
16       (2) A corporation wherein a foreign investor holds, owns,  
17           controls, or otherwise has directly or indirectly  
18           acquired a beneficial ownership of equity or voting  
19           shares in an amount that is equal to or greater than  
20           fifty per cent of the total equity or outstanding  
21           voting shares."  
22       SECTION 3. Section 11-356, Hawaii Revised Statutes, is  
23 amended to read as follows:

1 "[f]\$11-356[+] Contributions and expenditures by a foreign

2 national or foreign corporation, prohibited. (a) ~~Except as~~

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3 ~~provided in subsection [(b)], (c), or~~ No contributions or

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4 expenditures shall be made to or on behalf of a candidate,

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5 candidate committee, or noncandidate committee, by a foreign

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6 national, foreign-influenced corporation, or foreign

7 corporation, including a domestic subsidiary of a foreign

8 corporation, a domestic corporation that is owned by a foreign

9 national, or a local subsidiary where administrative control is

10 retained by the foreign corporation, ~~and in the same manner~~

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11 ~~prohibited under [2] title 52 United States Code section [441e]~~

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12 ~~30121 and title 11 Code of Federal Regulations section 110.20,~~

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13 ~~as amended.~~

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.

14 (b) No independent expenditures or electioneering

15 communications shall be made by a foreign national, foreign-

16 influenced corporation, or foreign corporation.

17 ~~[(b)] (c) A foreign-owned domestic corporation may make~~

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18 ~~contributions if:~~

19 (1) Foreign national individuals do not participate in

20 ~~election-related activities, including decisions~~

21 ~~concerning contributions or the administration of a~~

22 ~~candidate committee or noncandidate committee, or~~

23 (2) The contributions are domestically derived.

Commented [RF5]: This exception would also swallow the rule.

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1	(c) Every corporation that contributes to or makes an	Deleted: d
2	expenditure on behalf of a candidate, candidate committee, or	
3	noncandidate committee, including an independent expenditure or	
4	electioneering communication, shall, within seven business days	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).
5	after making the contribution or expenditure, file with the	Deleted: or
6	campaign spending commission a statement of certification signed	Deleted: shall
7	by the corporation's chief executive officer avowing under	
8	penalty of perjury that, after due inquiry, the corporation was	
9	not a foreign-influenced or foreign corporation on the date the	Deleted: ; →(1)-N
10	expenditure, independent expenditure, contribution, or	Formatted: Underline
11	expenditure, for an electioneering communication was made.	Deleted: or
12	For purposes of this certification, the corporation shall	Formatted: Underline
13	ascertain beneficial ownership in a manner consistent with the	Formatted: #Regular Paragraphs
14	Hawaii Business Corporation Act or, if it is registered on a	
15	national securities exchange, as set forth in title 17 Code of	
16	Federal Regulations sections 240.13d-3 and 240.13d-5. The	
17	corporation shall provide a copy of the statement of	
18	certification to any candidate or committee to which it	Commented [RF7]: The exception would swallow the rule.
19	contributes, and upon request of the recipient, to any other	Formatted: Underline
20	person to which it contributes.	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.
21	(d) A person that receives a contribution or donation from	Deleted: e
22	a corporation may not use that contribution or donation,	
23	directly or indirectly, to make an expenditure for any purpose	
24	listed in subsection (c), or contribute, donate, transfer, or	

1 convey funds from such a contribution or donation to another  
2 person to use for such purpose, unless:  
3 (1) The person received from the corporation a copy of  
4 the statement of certification described in subsection (c);  
5 (2) The person does not have actual knowledge that the  
6 statement of certification is false;  
7 (3) The person separately designates, records, and  
8 accounts for such funds, and ensures that disbursements for the  
9 purposes described in subsection (c) are only made from funds  
10 that comply with the requirements of this section; and  
11 (4) The person's use of such funds is otherwise  
12 lawful.  
13 (e) For the purposes of this section, "corporation" means  
14 a for-profit corporation, company, limited liability company,  
15 limited partnership, business trust, business association, or  
16 other similar for-profit entity.  
17 (f) For the purposes of this section, "electioneering  
18 communication" has the meaning defined by section 11-341."  
19 SECTION 4. Section 11-393, Hawaii Revised Statutes, is  
20 amended to read as follows:  
21 "[§]11-393[+] Identification of certain top contributors  
22 to noncandidate committees making only independent expenditures.  
23 (a) An advertisement shall contain an additional notice in a  
24 prominent location immediately after or below the notices

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Commented [RF8]: We recommend this anti-circumvention provision, which we developed for the NY bill.

Deleted: Every corporation that makes an independent expenditure, within seven business days after making the independent expenditure, shall 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 corporation on the date the independent expenditure was made.

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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.



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

- 11       (1) If a noncandidate committee is only able to identify  
12           two top contributors who made contributions for the  
13           purpose of funding the advertisement, the additional  
14           notice shall start with the words, "The two top  
15           contributors for this advertisement are", followed by  
16           the names of the two top contributors;
- 17       (2) If a noncandidate committee is able to identify only  
18           one top contributor who made contributions for the  
19           purpose of funding the advertisement, the additional  
20           notice shall start with the words, "The top  
21           contributor for this advertisement is", followed by  
22           the name of the top contributor;
- 23       (3) If a noncandidate committee is unable to identify any  
24           top contributors who made contributions for the

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

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

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

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

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

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

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

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

5 ~~[(e)]~~ (f) For purposes of this part, "top contributor"  
6 means a contributor who has contributed an aggregate amount of  
7 \$10,000 or more to a noncandidate committee within a twelve-  
8 month period prior to the purchase of an advertisement."

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

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

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

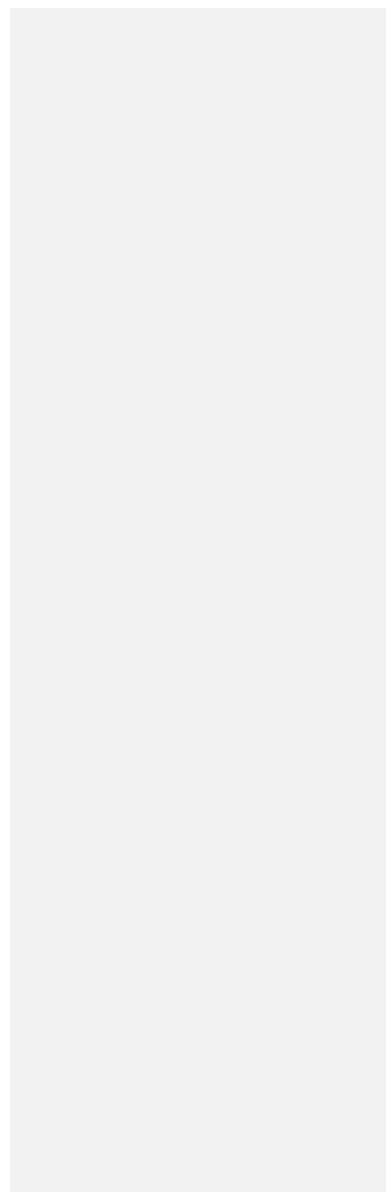
22 SECTION 8. Statutory material to be repealed is bracketed  
23 and stricken. New statutory material is underscored.

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

**1**

INTRODUCED BY: \_\_\_\_\_

**2**



**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.*