

Hawaii Bill, With Amendments, Would Limit Political Spending by Foreign-Influenced U.S. Corporations

Testimony Before the Hawaii Senate Committee on Judiciary

By Michael Sozan February 9, 2022

Michael Sozan, a senior fellow at the Center for American Progress, submitted written testimony before the Hawaii Senate Committee on Judiciary in support of S.B. 166, with amendments, to limit political spending by foreign-influenced U.S. corporations.

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

I hereby submit this written testimony to support the intent of S.B. 166, legislation sponsored by Sen. Chris Lee (D-HI) 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. 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.¹ These publications may be useful as the committee considers the pending legislation.

After reviewing S.B. 166, 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 passed similar legislation in 2020 to protect its elections after a deluge of corporate political spending by at least one foreign-influenced U.S. corporation.² 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.³ 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).⁴ 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.⁵

The pending bill, when amended, would reduce foreign influence in Hawaii elections by preventing political spending by 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.⁶

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.⁷ 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 special panel's *Bluman* decision—without writing a decision itself.

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.⁸ 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.⁹ This does not even account for 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.¹⁰ Whether traceable or not, multiple avenues now exist for foreign entities to exert influence on the 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 1982.¹¹

Many foreign-influenced U.S. corporations that spend political dollars are wholly owned subsidiaries of foreign corporations, such as BP and Shell Oil Co. 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.¹²

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 initiative became the most expensive ballot measure in California history.¹³ 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.

S.B. 166 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.¹⁴ 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.¹⁵

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 will almost inevitably 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.”¹⁶

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, government officials, and, ultimately, 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.

S.B. 166’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.¹⁷ Relatively few individual shareholders 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.¹⁸ 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.¹⁹

Former Chairman of the U.S. House Committee on Financial Services Jeb Hensarling (R-TX) 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.²⁰ The Business Roundtable, an association representing corporate CEOs, also acknowledged this dynamic.²¹ 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 the 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 do band—together to force votes on proposals that affect corporate decision-making.²² 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.²³

Finally, as Ellen Weintraub, longtime commissioner on the Federal Election Commission, has written, the United States is not working its way down from a 100 percent foreign-ownership standard; the nation is working its way up from the zero foreign-influence standard that a strict legal interpretation of federal law suggests.²⁴ Weintraub’s argument is rooted in *Citizens United*, in which the Supreme Court held that corporations could spend freely in politics, calling them “associations of citizens,” and that corporations’ rights to spend in politics flow 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.”²⁵ Under these circumstances in which 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 nonpartisan organization Free Speech For People.²⁶

S.B. 166 is constitutional

As detailed in a 2019 CAP report, the foreign-ownership thresholds in this legislation would survive constitutional challenge, a conclusion supported by several noted experts in constitutional, election, and corporate law.²⁷ 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 as “associations of citizens,” and that corporations’ right to spend in politics therefore flows from their shareholders’ collective First Amendment rights. By this logic, boundaries on the shareholders’ rights must also apply to the corporation. She also wrote, “You cannot have a right collectively that you do not have individually.”²⁸ 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.”²⁹

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 S.B. 166’s foreign-ownership thresholds would affect corporations practically

The vast majority of U.S. businesses have no foreign owners. But in the CAP report referenced above,³⁰ 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 shareholder 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 S.B. 166’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 the 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 U.S. 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 and 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 the 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 in 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, and they may not 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 of the 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 should 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. S.B. 166 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,
Michael L. Sozan

Endnotes

- 1 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/>.
- 2 See Greg Scruggs, "Seattle passes campaign finance curbs on 'foreign-influenced' firms," Reuters, January 13, 2020, available at <https://www.reuters.com/article/us-usa-politics-seattle/seattle-passes-campaign-finance-curbs-on-foreign-influenced-firms-idUSKBN1ZD04T>.
- 3 Democracy Preservation Act, S. 1126B, 2021-2022 legislative session (passed by New York State Senate on January 10, 2022), available at <https://www.nysenate.gov/legislation/bills/2021/s1126>.
- 4 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, 117th Cong., 1st 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>.
- 5 Steph Solis, "Uber, Lyft-backed gig worker ballot initiative certified by AG Healey," *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>.
- 6 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).
- 7 *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/>.
- 8 *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/>.
- 9 See Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections" (discussing this issue in several sections).
- 10 See *Ibid.*, p. 9.
- 11 See Steven M. Rosenthal and Theo Burke, "Who Owns US Stock? Foreigners and Rich Americans," Tax Policy Center TaxVox, October 20, 2020, available at <https://www.taxpolicycenter.org/taxvox/who-owns-us-stock-foreigners-and-rich-americans>.
- 12 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>.
- 13 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/>.
- 14 See Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections," p. 37.
- 15 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>.
- 16 Steve Coll, *Private Empire: ExxonMobil and American Power* (New York: Penguin Books, 2012), p. 71 (quoting Lee Raymond).
- 17 See Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections," pp. 32–34.
- 18 Legal Information Institute, "17 CFR. § 240.14a-8 - Shareholder proposals," available at <https://www.law.cornell.edu/cfr/text/17/240.14a-8> (last accessed September 2021).
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- 21 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.SECProxy-RoundtableCommentLetter.pdf>.
- 22 See John C. Coates IV, "Re: An Act to limit political spending by foreign-influenced corporations S.418 (Montigny), H.640 (Cutler), H.703 (Naughton)," 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>.
- 23 See Chiu, "Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes"; Business Roundtable, "Re: File Number 4-725."
- 24 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>.
- 25 *Ibid.*
- 26 See Ron Fein, "RE: Political spending by foreign-influenced corporations S.454 (Comerford), S.482 (Montigny), H.839 (Uyterhoeven); Limits on contributions to super PACs S.455 (Comerford), H.772 (Day), H.840 (Uyterhoeven)," 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>.

27 See Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections," p. 38.

28 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).

29 Weintraub, "Taking On Citizens United."

30 Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections."