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

Testimony Before the Hawaii Senate Committee on Judiciary

By Michael Sozan February 22, 2023

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

I submit this written testimony in strong support of S.B. 1179, legislation sponsored by Hawaii state Sen. Chris Lee (D), relating to campaign finance, which is aimed at prohibiting political spending by foreign nationals and U.S. corporations with appreciable foreign ownership. This pro-democracy legislation is the subject of a February 16 hearing by the Committee on Judiciary, where I hope to provide oral testimony. If enacted, this legislation would stop political spending by foreign entities, including foreign investors who own appreciable levels of stock in U.S. corporations, which would ultimately help protect Hawaii's right to self-government.

I am a senior fellow at the Center for American Progress, an independent, nonpartisan policy institute based in Washington, D.C., that is dedicated to improving the lives of all Americans through bold, progressive policies. My democracy reform work at CAP has involved research on preventing election-related spending by foreign-influenced U.S. corporations. My publications include reports and fact sheets analyzing this policy, with one 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. 1179, I conclude that it would provide an important tool to protect Hawaii's elections from foreign influence and reduce the outsize role that corporate money plays in the state's election outcomes. This commonsense bill would strengthen the right of Hawaii's residents and small businesses to determine the political and economic future of their state and help ensure that lawmakers are accountable to voters instead of corporations with considerable foreign ownership. This legislation is particularly timely given that foreign investors now own approximately 40 percent of U.S. corporate equity, compared with just 4 percent of U.S. equity in 1986.[2]

The committee's consideration of this legislation follows on the heels of a similar bill that Seattle passed in 2020 to protect its elections after a deluge of corporate political spending by at least one foreign-influenced U.S. corporation.[3] The city of San Jose, California, conditionally passed similar legislation last year.[4] In 2022, the New York State Senate passed a parallel bill on a bipartisan vote.[5] Moreover, 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).[6]

The bill being considered by this committee 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.[7]

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 11 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.[8] 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.[9] Even with the existence of this loophole, the subsequent *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.[10] This does not even count their separate corporate political action committees (PACs) that are 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 trade associations.

Much of this corporate election spending is done through secret, dark money channels, which makes it untraceable.[11] 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.

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 5 percent to 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 ballot initiative became the most expensive ballot measure in California history.[13]

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.[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 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."[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, 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.[17] 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.[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]

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.[20] Additionally, the Business Roundtable, an association representing corporate CEOs, 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 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.[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 that 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.[24] 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."[25] 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 nonpartisan organization Free Speech For People.[26]

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.[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, 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, "One cannot have a right collectively that one does 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]

How foreign-ownership thresholds would practically 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.

In searching the Hawaii Commission on Campaign Spending's public database,[30] it appears that American corporations with appreciable foreign ownership are spending political dollars in the state. Some examples come directly from the list of "noncandidate committees" that have filed reports and spent in prior elections in Hawaii. These corporations include Allstate Insurance Co., Altria Client Services LLC, and Anheuser-Busch Companies Inc.[31]

But corporations also secretly spend political dollars through dark money organizations, such as trade associations. A particularly instructive example involves the Hawaii Hotel Alliance, a noncandidate committee, which made expenditures for electioneering communications as recently as 2022.[32] The Hawaii Hotel Alliance lists itself as its sole donor, and the commission's website database does not appear to disclose any underlying donors.[33] That likely is because the Hawaii Hotel Alliance is a trade association organized under Section 501(c)(6) of the Internal Revenue Code.[34] Federal law does not require trade associations, or similar nonprofits organized under Subsection (c), to disclose their donors, which is why donors often remain secret and spend political dollars through dark money routes. Nonetheless, we know that the Hawaii Hotel Alliance includes hotels owned by Marriott International and Disney, which both have seats on the board of the Hawaii Hotel Alliance,[35] and both corporations surpass the aggregate foreign-ownership thresholds in S.B. 1179.[36] In sum, this is very likely an example of how American corporations with substantial foreign ownership secretly spend money in Hawaii's elections.

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. S.B. 1179 is a compelling legislative proposal that could 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 to pass this pending legislation. Please let me know if I can be of further assistance.

Sincerely,
Michael L. Sozan

Endnotes

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6 Anti-Corruption and Public Integrity Act, S. 5315, Section 721, 117th Cong., 2nd sess. (December 20, 2022), available at https://www.congress.gov/bill/117th-congress/senate-bill/5315?q=%7B%22search%22%3A%5B%22s5315%22%2C%22s5315%22%5D%7D&s=1&r=1; 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.

7 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 February 2023).

8 *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), aff'd, 132 S. Ct. 1087 (January 9, 2012), available at https://www.scotusblog.com/case-files/cases/bluman-v-federal-election-commission/.

9 *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/.

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11 See Ibid., p. 9.

12 See Bradley Hope and Justin Scheck, "How the crown prince of Saudi Arabia made his way into Silicon Valley circles with a $3.5 billion investment in Uber," Business Insider, September 2, 2020, available at https://www.businessinsider.com/how-investment-in-uber-brought-saudi-prince-to-silicon-valley-2020-9.

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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," 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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22 See John C. Coates IV, "Statement submitted to Massachusetts House of Representatives regarding an act to limit spending by foreign-influenced corporations" (Cambridge, MA: Harvard Law School, 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 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.

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