SB 87: WRITTEN TESTIMONY—SUPPORT

Courtney Hostetler
Counsel, Free Speech For People
January 28, 2020

Maryland State Senate
Maryland State House
100 State Cir.
Annapolis, MD 21401

Dear Chair Pinsky, Vice Chair Kagan, and Members of the Education, Health, and Environmental Affairs Committee,

I am Counsel at Free Speech For People, a national non-partisan non-profit organization with approximately 18,000 supporters in Maryland, that works to renew our democracy and to limit the influence of money in our elections. I now write in support of Senate Bill 87: Campaign Finance—Contributions, Expenditures, or Donations by Foreign-Influenced Corporations or Foreign Principals (cross-filed as House Bill 34).

INTRODUCTION

Under well-established federal law, upheld by the Supreme Court, it is illegal for a foreign government, business, or individual to spend money directly or indirectly to influence federal, state, or local elections.[1] However, the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, which invalidated laws that banned corporate political spending, created a loophole in the law. Foreign interests can skirt the prohibition against political spending by foreign actors by acquiring stakes in U.S. corporations, and then using that leverage to influence or control the corporation's political activity, including campaign contributions, contributions to super PACs, and independent expenditures. And corporations can use infusions of foreign capital to fund their corporate political spending, with the goal of serving the interests of their shareholders and owners, including foreign owners.

[1] 52 U.S.C. § 30121; Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); United States v. Singh, 924 F. 3d 1030, 1042 (9th Cir. 2019).

The Supreme Court indicated in *Citizens United* that it was aware of the loophole that its decision created, and that its decision did not prohibit Congress from passing a law to address the problem.[2] Indeed, two years after *Citizens United*, the Supreme Court upheld an existing law prohibiting all direct and indirect spending by foreign actors on U.S. elections. While Congress has not taken steps to close this loophole, the state of Maryland need not wait for federal action to protect its elections from foreign influence. The proposed bill will allow lawmakers to protect democratic self-government in Maryland.

Professor Laurence Tribe, one of the nations most distinguished scholars of constitutional law, in writing about a substantially similar piece of legislation, has concluded that prohibiting political contributions by foreign-influenced corporations at the thresholds established in the proposed bill is both constitutional and "a valuable tool for protecting and preserving the integrity of elections . . . from the threat to the American ideal of self-government posed by foreign-influenced political spending."[3]

The bill does not limit how employees, executives, or shareholders may spend their *own* money in U.S. elections. For example, it does not prevent them from setting up a corporate PAC to make political contributions to Maryland elections. It does not prevent the corporation to participate in lobbying. It stands for the idea that where a foreign owner or owners owns or controls enough shares to exert influence over how a corporation spends money, Maryland may limit the foreign-influenced corporation's ability to deploy its potentially vast corporate treasury to influence Maryland's electoral democracy. Furthermore, compliance with the bill may be readily accomplished by standard corporate practices.[4]

A. Constitutionality of regulating political spending by foreign-influenced corporations

In his 2011 decision in *Bluman v. Federal Election Commission*, which was affirmed by the Supreme Court, then-Circuit Judge Brett Kavanaugh held that "the United States has a compelling interest for purpose 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."[5] He further concluded that political contributions and express-advocacy

[2] Citizens United, 558 U.S. at 362.
[3] Letter from Laurence Tribe to Seattle City Council (Jan. 3, 2020), *available at* http://bit.ly/2RWNhiq.
[4] Letter from John Coates to Seattle City Council (Jan. 3, 2020), *available* at http://bit.ly/2U2zoSS.
[5] Bluman, 800 F. Supp. 2d at 288.

expenditures are "part of the overall process of democratic self-government."[6] *Bluman* confirmed that it is constitutional to prohibit all political contributions and expenditures by foreign actors, whether made directly or indirectly, in order to protect the U.S. political process from foreign influence. The proposed bill does exactly this: it closes a loophole in the law and prevents foreign money, flowing through U.S.-based corporations, from directly or indirectly influencing the U.S. political process.

As Professor John Coates and Professor Laurence Tribe of Harvard Law School have explained in the testimony that they submitted in support of a substantially similar ordinance that recently passed into law in Seattle,[7] *Citizens United* created the loophole in the law by authorizing corporate political spending, but *Citizens United* does not pose a barrier to closing the loophole, as the proposed bill will do in Maryland. The holding in *Citizens United* built upon the idea that corporations are "associations of citizens."[8] But that theory does not apply here, because foreign-influenced corporations are associations of citizens and non-citizens, and its treasuries include money from U.S. and foreign owners, investors, and shareholders. The Supreme Court has held foreign citizens without permanent residency may be prohibited from making contributions to, or expenditures in, the U.S. political process, in order to protect democratic self-government from foreign interference. And states have a compelling interest in ensuring that foreign actors are not able to wield influence over U.S. elections through their participation in a corporation.

Citizens and permanent residents may still exercise their First Amendment rights and contribute to or independently expend funds on U.S. elections. They may even do so through the corporation, by setting up a separate corporate political action committee. And the corporation as a whole is free to continue to lobby and to express its political preferences. But foreign actors have no constitutional right to financially influence U.S. elections, and the state of Maryland has the right to protect its elections from foreign influence.

When U.S. corporations are held in part by foreign investors, those foreign investors are in a position to influence how the corporations spend money on elections. The problem at issue in this loophole was identified by Justice Stevens in his dissent in *Citizens United* when he wrote, "Because [corporations] may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters."[9] Corporate decisionmakers, who have a

---

[6] *Id.*
[7] Coates Letter, *supra* note 4; Tribe Letter, *supra* note 3.
[8] *See* Citizens United, 558 U.S. at 348, 354.
[9] Citizens United, 558 U.S. at 394 (Stevens, J., dissenting).

duty to act in the interest of their shareholders, need not wait for their shareholders to make specific request. These decisionmakers will make decisions about corporate political spending in order to maximize benefit to shareholders, who, as nonresidents, will have substantially different interests than residents and voters do in U.S. elections. And when they spend money, they will draw from treasuries infused with foreign capital.

B. Foreign ownership thresholds

Foreign investment often outweighs local considerations, no matter how iconic the company is to its "hometown." Even if a company was founded in the United States and keeps its main offices here, companies must be responsive to their shareholders, and significant foreign ownership affects corporate decision-making.

The bill's thresholds of 1% for a single foreign owner, or 5% for multiple foreign owners, may appear low at first. However, as explained in more detail by Professor John Coates of Harvard Law School,[10] and in a recent report by the Center for American Progress,[11] these thresholds reflect levels of ownership that are widely agreed (including by entities such as the Business Roundtable) to be high enough to influence corporate governance. The proposed 1% threshold is also grounded in a rule of the U.S. Securities and Exchange Commission regarding eligibility of shareholders to submit proposals for a shareholder vote,[12] a threshold that the Commission now believes is, if anything, too high because many of the investors most active in influencing corporate governance own well below 1% of equity.[13]

The 5% threshold for aggregate ownership is also reasonable. CEOs take note of this aggregate foreign ownership, and at a certain point it affects their decision-

[10] Letter from John Coates to Seattle City Council (Jan. 3, 2020), *available* at https://freespeechforpeople.org/wp-content/uploads/2020/01/signed-letter-1-3-20-Coates-Seattle-FIC-Jan-2020.pdf.
[11] *See* Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S Elections*, ctr. For American Progress, https://ampr.gs/2QIiNQT (Nov. 21, 2019).
[12] Under current rules, owning one percent of a company's shares allows an owner to submit shareholder proposals, which creates substantial leverage. See 17 C.F.R. 240.14a-8(b).
[13] The SEC has proposed to eliminate the 1% 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); see also *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).

making. 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.[14]

Of course, this does not mean that *every* foreign investor who owns 1% of shares, or is part of a 5% aggregate of foreign investors, will *always* influence corporate governance, but rather that the business community generally recognizes that this level of ownership presents that opportunity. And foreign investors need not exercise explicit influence in order to wield influence over a corporation, which has a duty to be responsive to its shareholders. Foreign-influenced corporations that make political contributions that are in the best interest of their shareholders will be giving their foreign shareholders direct and indirect influence over the U.S. political process.

CONCLUSION

The prospect of political spending by foreign-influenced corporations threatens to undermine Maryland's democratic self-government. The proposed law is constitutional, with reasonable thresholds that will protect Maryland elections. Therefore, I urge a favorable report on SB 87.

Sincerely,

Courtney Hostetler
Counsel
Free Speech For People
617-249-3015
chostetler@freespeechforpeople.org

[14] 15 U.S.C. §§ 78m(d)(1)-(3).