CLC ACTION

To: Protect Maine Elections

From: Campaign Legal Center Action

Re: Whether Ballot Question 2's provisions barring campaign spending by foreign government-influenced entities and creating administrative requirements for broadcasters, news outlets, and internet platforms conflict with the First Amendment of the U.S. Constitution.

Date: October 17, 2023

Introduction

Maine's Ballot Question 2 ("the measure"), if enacted, would prohibit foreign governments and corporations with significant foreign government influence—referred to collectively as "foreign government-influenced entities"—from spending money to influence Maine elections. The measure also includes requirements for broadcasters, news outlets, and internet platforms that are designed to prevent foreign governments and corporations they own from circumventing the ban on foreign government spending in Maine elections. These requirements strengthen Maine residents' right to democratic self-government under the First Amendment of the U.S. Constitution.

We understand that Governor Mills, in vetoing L.D. 1610—a bill identical to the measure—questioned the constitutionality of laws that prohibit campaign spending by foreign government-influenced entities and that would require outlets to take administrative steps designed to prevent such entities from evading the law.[1] Protect Maine Elections has asked Campaign Legal Center Action to assess whether these provisions would conflict with the First Amendment. We provide this memo to explain why the answer is clearly *no*. Indeed, contrary to the Governor's veto message addressing L.D. 1610, the measure's provisions serve to strengthen and protect Maine citizens' First Amendment right to democratic self-government.

[1] Veto Message for L.D. 1610, Gov. Janet Mills (July 19, 2023) https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/7.19.23_LD%201610%20Letter.pdf (hereinafter, Governor's Veto Message).

Discussion

I. Ballot Measure 2 would fill gaps in the law that allow foreign governments and corporations they own to spend directly in Maine elections.

Currently, Maine elections are protected from foreign spending only by the federal ban on foreign interference.[2] Federal law has long barred foreign nationals—including foreign governments and foreign corporations—from contributing to campaigns and spending to influence federal, state, and local elections.[3] However, this broad prohibition has been construed to apply only to *candidate* elections, leaving state and local ballot measure elections vulnerable to significant foreign spending.[4] The measure addresses these gaps by implementing policy changes that would prevent foreign spending in Maine elections.

In questioning the constitutionality of the measure's provisions, the Governor took issue with three policies: 1) prohibiting foreign governments and corporations owned by those foreign governments from making contributions, expenditures, independent expenditures, and electioneering communications to influence Maine elections, including ballot measures elections; 2) providing clear standards for identifying foreign government-influenced corporations that would be prohibited from spending money in Maine elections; and 3) implementing due diligence requirements for broadcasters, news outlets, and internet platforms that will improve compliance with the law. This memo addresses each policy in turn.

II. Prohibiting foreign governments from spending to influence state and local ballot measure elections is plainly constitutional.

The measure bans foreign government-influenced entities from making contributions, expenditures, independent expenditures, and electioneering communications to influence a Maine ballot measure election. A ban on foreign interests spending money to influence ballot measure elections fits squarely within the broader exclusion of foreign nationals from having a say in the process of American self-government. In *Bluman v. FEC*, 565 U.S. 1104 (2012), the United States Supreme Court summarily affirmed a decision by a three-judge federal district court—authored by then-Judge Kavanaugh—upholding the constitutionality of the federal foreign interference ban.[5] In the district court opinion, then-Judge Kavanaugh explained that foreign nationals have no constitutional right to spend money to influence elections: "It is fundamental to the

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[2] *See* 52 U.S.C. § 30121.
[3] *Id.*
[4] Aaron McKean, *States Take the Lead to Stop Foreign Interference in Elections,* CAMPAIGN LEGAL CTR. (March 17, 2021) https://campaignlegal.org/update/states-take-lead-stop-foreign-interference-elections.
[5] *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court) (Kavanaugh, J.), *aff'd mem.*, 565 U.S. 1104 (2012).

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."[6]

The *Bluman* case rejected a challenge to the federal foreign interference ban by two foreign citizens living and working in New York on temporary work visas. These plaintiffs sought to spend money in state and federal elections, making expenditures and making contributions to candidates, parties, and outside groups making independent expenditures. The district court found that such activities "are an integral aspect of" the election process and that foreign nationals could therefore be excluded from the process.

While *Bluman* concerned—and upheld—the federal ban on foreign nationals spending in candidate elections, the reasoning of the underlying decision provides even stronger justification for preventing foreign nationals from spending in state and local ballot measures, in which voters participate in direct democracy to enact their own laws through the initiative process. Indeed, a state court of appeals in Washington concluded it was bound by U.S. Supreme Court precedent in *Bluman* and upheld that state's own law prohibiting foreign nationals from spending money in both candidate and ballot measure campaigns.[7] In addition to Washington, at least eight other states have enacted laws prohibiting foreign nationals from spending to influence their citizen-initiated ballot measure processes.[8]

In vetoing L.D. 1610, the Governor's veto message stated that "the First Amendment provides its broadest protections" to political speech and that the U.S. Supreme Court generally rejects "restrictions on speech in political campaigns other than to prevent *quid pro quo* style corruption.[9] The veto message misapplies the First Amendment to restrictions on campaign spending by foreign nationals under *Bluman* in two critical ways.

First, contrary to the veto message, *Bluman* explicitly noted the governmental interest at stake was *not* about preventing *quid pro quo* corruption, but rather the government's interest "in preventing foreign influence over U.S. elections."[10] More specifically, *Bluman* concluded the government 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

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[6] *Id.* at 288.
[7] *OneAmerica Votes v. State*, 518 P.3d 230 (Wash. Ct. App. 2022).
[8] Cal. Gov. Code § 85320(a); Colo. Rev. Stat. § 1-45-103.7(5.3); Fla. Stat. § 106.08(12)(b); Idaho Code Ann. § 67-6610d; Md. Code, Election Law § 13-236.1; Nev. Rev. Stat. § 294A.325; N.D. Cent. Code § 16.1-08.1-03.15; S.D. Codified Laws § 12-27-21.
[9] Governor's Veto Message, *supra* note 1, at 1.
[10] *Bluman*, 800 F. Supp. 2d at 288 n.3.

preventing foreign influence over the U.S. political process," including by "spending money to influence voters and finance campaigns."[11]

Second, the veto message is also mistaken that *Bluman* concerned only restrictions on *contributions* by foreign nationals. One of the plaintiffs in *Bluman* sought to "print flyers supporting President Obama's reelection and to distribute them in Central Park."[12] In other words, this would have been an "independent expenditure," and restrictions on expenditures are subject to the most skeptical or "strict" scrutiny under the First Amendment. In sum, the Supreme Court unequivocally upheld federal law's ban on both contributions *and* expenditures by foreign nationals.[13] And *Bluman* was decided after *Citizens United v. FEC*.[14] So while that case opened the door for domestic corporations to spend funds on independent expenditures to influence elections, the Supreme Court did not create the same opportunity for foreign nationals.

In short, *Bluman* rested on a "straightforward principle: 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."[15] Barring foreign governments and corporations owned by foreign governments from spending money to influence Maine elections, as the measure would do, is plainly both consistent with that principle and constitutional.

III. Regulating campaign spending by foreign government-influenced entities is in keeping with other laws that guard against foreign interference.

Under the measure, both foreign governments and entities that have significant foreign government influence are barred from spending money to influence Maine elections. The measure defines "foreign government-influenced entity" to include entities in which foreign governments or foreign government-owned entities either participate in the entity's political spending decisions or hold an ownership stake of 5% or more.

Setting standards for determining a corporation's foreign influence is in keeping with other laws that establish ownership thresholds to assess corporate influence. For example, the U.S. Securities and Exchange Commission (SEC) requires any person who acquires more than 5% ownership of a publicly traded corporation to disclose that person's ownership stake.[16] This requirement recognizes that owners acquiring 5% or more in a company have significant influence on the

[11] *Id.* at 288-89.
[12] *Id.* at 285.
[13] *Id.* at 288.
[14] 558 U.S. 310 (2010).
[15] 800 F. Supp. 2d at 288.
[16] 15 U.S.C. § 78m(d)(1).

corporation's management and policy, and it is crucial for shareholders and the public to be aware of owners acquiring this much influence in a company.[17] Another federal law, the Communications Act of 1934, restricts foreign individuals, governments, and corporations from owning more than 20% of the equity in broadcast companies.[18] Congress created these restrictions on foreign control to "safeguard the United States from foreign influence" and reduce security threats.[19]

Foreign influence through these mechanisms—ownership, funding, or direct involvement in political spending decisions—presents a significant risk that foreign nationals have a sufficiently large stake in a corporation to influence political spending or that domestic corporate managers will take into account the interests of their foreign owners when trying to influence elections.[20] In fact, the Federal Election Commission's regulations and advisory opinions also recognize that foreign actors may attempt to influence elections by spending money or directing political spending decisions through a foreign corporation's domestic subsidiary.[21] In turn, the measure establishes standards to determine foreign government influence, under which a corporation's managers may respond to foreign demands or may, even without overt foreign pressure, make political spending decisions based on the perceived preferences of foreign stakeholders. In either case, spending by such corporations undermines democratic self-governance and, thus, may be barred from attempting to influence elections.

Other jurisdictions have taken the same view by enacting similar standards as those in the measure, none of which have been found unconstitutional: In 2017, St. Petersburg, Florida enacted an ordinance that prohibited foreign-influenced corporations from spending in local elections and established ownership thresholds of 5% held by an individual foreign national or 20% held in the aggregate by multiple foreign nationals to determine whether an entity would be considered "foreign influenced."[22] The cities of Seattle, Washington and Portland, Maine passed their laws in 2020 and 2023, respectively, barring spending by corporations owned at thresholds of 1% by an individual foreign owner and 5% in aggregate by multiple

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[17] *See, e.g.*, *GAF Corp. v. Milstein,* 453 F.2d 709, 717 (2d Cir. 1971).
[18] 47 U.S.C. § 310(b)(3).
[19] *Moving Phones Partnership v. FCC*, 998 F.2d 1051, 1055-1056 (D.C. Cir. 1993).
[20] For an in-depth discussion of foreign influence through corporate ownership, *see generally* MICHAEL SOZAN, CTR. FOR AMERICAN PROGRESS, ENDING FOREIGN-INFLUENCED CORPORATE SPENDING IN US ELECTIONS (2019) https://www.americanprogress.org/wp-content/uploads/sites/2/2019/11/ForeignSpending-report.pdf.
[21] *See* 11 C.F.R. § 110.20(i) (prohibiting foreign nationals from participating in decisions involving election-related activities) *and* FEC Advisory Opinion 2005-10 (domestic subsidiary may spend to influence state and local elections, provided that no foreign nationals are involved in the decision-making process and any funds used for such purposes are domestically derived).
[22] The St. Petersburg ordinance was repealed after the State of Florida passed a law preempting it in 2021. Ki Hong & Sam Rothbloom, *States and localities take on foreign-influenced political spending*, Reuters (May 23, 2023) https://www.reuters.com/legal/legalindustry/states-localities-take-foreign-influenced-political-spending-2023-05-30/.

foreign owners.[23] Most recently, Minnesota passed its own state ban on electoral spending by foreign influenced corporations using the 1% and 5% thresholds.[24]

The Governor's veto message complains that determining a corporation's foreign government influence is an "in depth and difficult question to answer."[25] But the SEC has administered corporate disclosure laws that are connected to specific ownership thresholds for decades. For example, the SEC has enforced its disclosure requirements for investors who acquire above 5% ownership in a company since they took effect in 1970.[26] And the federal statute that bans corporations with over 20% foreign ownership from acquiring broadcasting licenses has been upheld against constitutional challenge.[27] To be sure, the overwhelming majority of corporations are privately held and their ownership can easily be ascertained by corporate leadership.[28]

IV. The measure's administrative requirements for paid political advertising are constitutional means to prevent circumvention of the law and ensure compliance.

To prevent circumvention of the law and foster compliance, the measure includes administrative requirements for political ads. Under the measure, broadcasters, news outlets, and internet platforms are required to establish due diligence policies "that are reasonably designed to ensure" they do not publish political ads by foreign government-influenced entities that are prohibited by the measure. An internet platform that "discovers" that it has distributed a prohibited political ad is required to "remove the communication and notify the" Maine Ethics Commission.

Due diligence requirements are a critical component for preventing circumvention of the law, particularly where the law serves to protect national security interests. For example, the federal foreign interference ban—which the *Bluman* court recognized "implicates . . . national security"[29]—prohibits a person from "knowingly" taking contributions from foreign nationals or providing

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[23] Seattle, Wash., Mun. Code §§ 2.04.010, 2.04.370, and 2.04.400; Portland, Me., Mun. Code §§ 9-91, 9-92, and 9-93.

[24] David Moore, *Minnesota Lawmakers Pass Sweeping Bill to Increase Voting Access*, SLUDGE (Apr. 27, 2023) https://readsludge.com/2023/04/27/minnesota-lawmakers-pass-sweeping-bill-to-increase-voting-access/. Minnesota's law is currently subject to litigation. *See* Dana Ferguson, *Minnesota Chamber sues over campaign disclosure law*, MPR NEWS (July 3, 2023) https://www.mprnews.org/story/2023/07/03/minnesota-chamber-sues-over-campaign-disclosure-law.

[25] Governor's Veto Message, *supra* note 1, at 2.

[26] Act of December 22, 1970, Pub.L. No. 91-567, § 1, 84 Stat. 1497, amending Securities Exchange Act § 13(d)(1), 15 U.S.C. § 78m(d)(1).

[27] *Moving Phones Partnership v. FCC*, *supra* note 19.

[28] *See, e.g.,* MICHAEL SOZAN, *supra* note 20, at 13 ("[T]here are more than 5 million corporations active enough to file tax returns with the Internal Revenue Service, and of those, less than 1 percent are publicly traded corporations.").

[29] 800 F. Supp. 2d at 285.

substantial assistance in the making or receipt of a contribution by foreign nationals in connection with federal, state, and local elections.[30] The FEC has established a safe harbor, however, for persons who "conduct a reasonable inquiry," such as seeking and obtaining copies of valid U.S. passport papers, regarding the source of the contribution.[31]

Similarly, the FCC's rules for sponsorship identification for paid advertising require broadcasters to "exercise reasonable diligence to ascertain whether foreign sponsorship disclosure requirements" apply to each advertising sponsor.[32] Reasonable diligence includes "inquiring" of the potential advertiser whether the advertiser "qualifies as a foreign governmental entity" and maintaining records "to track compliance" and "respond to any" FCC inquiries.[33] The USA Patriot Act requires an even higher standard—"enhanced due diligence"—for domestic financial institutions that maintain accounts for foreign financial institutions and other non-U.S. persons.[34]

Moreover, laws requiring broadcasters to implement procedures for the political advertisements they distribute have been specifically upheld by the U.S. Supreme Court. In *McConnell v. FEC*, the Court upheld a federal law that requires broadcasters to maintain a public file of requests for election-related advertising. Under federal law, broadcasters must keep and make public a "political file" containing records of all requests for time for advertising that "communicates a message related to any political matter of national importance," including candidates, elections to Federal office, and "national legislative issues of public importance."[35] The broadcaster must maintain certain information about the request for advertising time and the requestor, and keep the records for at least two years.[36] In upholding the law, the Court recognized that these administrative requirements, *inter alia*, support the verification of "compliance with the disclosure requirements and source limitations" of federal campaign finance law.[37]

The Governor's veto message, incorporating arguments by the Maine Press Association and Maine Association of Broadcasters, mistakenly characterizes these administrative requirements as a "prior restraint" on political speech that would be unduly burdensome.[38]

As an initial matter, the measure's ban on electoral spending by foreign government-influenced entities could only be an impermissible prior restraint if the

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[30] 11 C.F.R. §§ 110.20(b) and (h).
[31] 11 C.F.R. § 110.20(a)(7).
[32] 47 C.F.R. § 73.1212(j)(3).
[33] 47 C.F.R. § 73.1212(j)(3)(ii) and (vi).
[34] USA PATRIOT Act OF 2001, § 312(a)(i)(1), PL 107–56, 115 Stat. 272, (October 26, 2001).
[35] 47 U.S.C. § 315(e)(1).
[36] 47 U.S.C. § 315(e)(3).
[37] *McConnell v. FEC*, 540 U.S. 93, 237 (2003).
[38] Governor's Veto Message, *supra* note 1, at 3.

affected speech is constitutionally protected.[39] But as explained above, *Bluman* makes clear that foreign nationals have no constitutional right—under the First Amendment or any other part of the Constitution—to make political contributions or expenditures.[40] With no protected speech at issue, foreign governments cannot credibly claim that the measure's restrictions amount to a prior restraint. Given that foreign governments have no constitutional right to make contributions and expenditures, it naturally follows that any prohibited election-related advertising that is inadvertently published on an internet platform may be removed.

The Maine Press Association, however, argues that the administrative requirements in the measure amount to a prior restraint on media outlets by "telling them what they can and cannot publish."[41] The Association contends that it is also "unaware of precedents upholding laws imposing" due diligence requirements on media outlets.[42] As demonstrated above, the FEC and FCC have long implemented laws involving reasonable administrative requirements that apply to media outlets, and those have been upheld by federal courts.[43] In contrast to the hyperbolic—and false—assertions that the measure turns media outlets into "detective agencies" saddled with an "oppressive, time-consuming, and costly self-censorship regime," the measure simply requires that outlets implement due diligence policies that are cut from the same cloth as the requirements implemented by the FEC and FCC described above. The Supreme Court in *McConnell* faced similarly hyperbolic claims about the administrative requirements challenged in that case—described by plaintiffs as "intolerably burdensome and invasive"—yet upheld the requirements as constitutional.[44]

Additionally, the precedents the Association cites in support of its contention that the measure imposes a prior restraint on media outlets do not apply here. First, administrative requirements that prevent circumvention of the foreign government interference ban are not comparable to requirements for equal access, under which an outlet would be required to publish specific editorial content, for free, due to its own or a third party's speech, as was the case in *Miami Herald Pub. Co. v. Tornillo*.[45] And the Association does not even suggest that media outlets are

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[39] *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1980) ("The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment.")

[40] 800 F. Supp. 2d at 288. *See also OneAmerica Votes v. State*, 518 P.3d 230, 245 (Wash. Ct. App. 2022).

[41] Governor's Veto Message, *supra* note 1, at 5.

[42] *Id.*

[43] Notably, the FCC's recent amendments to its regulations on foreign sponsorship disclaimers were finalized this year. Although one of the five reasonable diligence steps the agency proposed was struck as beyond the FCC's statutory authority, *Nat'l Assoc. of Broadcasters v. FCC*, 39 F.4th 817 (D.C. Cir. 2022), the amendments providing four steps that constitute reasonable diligence are now in effect.

[44] *McConnell*, *supra* note 36, at 242 (cleaned up).

[45] 418 U.S. 241 (1974).

endorsing or commenting on a foreign government's speech if they accept its election-related advertising.

The Association also cites *Washington Post v. McManus*, which reviewed a Maryland disclosure law that required certain digital platforms to create an archive of all political ads purchased on the platform and to make these archives publicly available on their own websites. The measure, by contrast, only requires outlets to take steps to prevent a limited category of foreign actors from running prohibited political ads on their platform. Further, the court in *McManus* criticized the mismatch between the stated government interest—stopping "foreign meddling in the state's elections"—and the policy, which appeared instead to promote the public's interest in campaign finance information. But the measure's due diligence provisions are clearly focused on advancing Maine's compelling interest in preventing interference by foreign governments in its elections—by ensuring compliance with the state's ban on spending by foreign government-influenced entities. Finally, the court in *McManus* was concerned that the Maryland law was in effect "compelling" the speech of digital platforms by requiring platforms to maintain on their own websites a historical inventory of all political ads they hosted. There is no analogous data hosting requirement here.

Conclusion

The measure's provisions, which seek to bar foreign government-influenced entities from spending to influence Maine elections and prevent circumvention of the ban through reasonable administrative requirements, advance Maine citizens' rights to participate in democratic self-government under the First Amendment of the United States Constitution. The exclusion of foreign governments and corporations they own from spending in Maine elections is clearly supported by recent U.S. Supreme Court precedent. We would be happy to answer any further questions you have with respect to these issues.