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August 6, 2020

The Honorable Louis J. Luchini, Chair
The Honorable. John C. Schneck, Chair
Joint Standing Committee on Veterans and Legal Affairs
3 State House Station
Augusta, ME 04333-0003

Re: L.D. 2136 and proposed amendment

Greetings Senate Chair Luchini and House Chair Schneck and Members of the Committee:

You have asked whether L.D. 2136, *An Act to Prohibit Contributions, Expenditures and Participation by Foreign Nationals To Influence Referenda* (Emergency), presents any constitutional or other concerns. The bill, as written, prohibits a foreign national from 1) making a contribution or expenditure to influence a ballot question; 2) participating in the decision-making process of any person (including a ballot question committee or political action committee) regarding that person's activities to influence a referendum election. As originally drafted, L.D. 2136 defines a foreign national as 1) a foreign national as defined in 52 U.S.C. § 30121(b) (2020), and 2) an entity in which a foreign national holds, owns or controls, or otherwise has a direct or indirect beneficial ownership of 50% or more of equity, outstanding voting shares, membership units or other ownership interests. We understand that the sponsor of L.D. 2136 intends to amend the bill to narrow its application only to a "foreign government-owned entity," which is defined as an entity in which a foreign government holds, owns, controls or otherwise has a direct or indirect beneficial ownership of 50% or more of the total equity, outstanding voting shares, membership units or other ownership interests.

Background

Federal Regulation of Campaign Contributions to Candidates. Since 1966, federal law has prohibited agents of foreign governments and entities from making contributions to candidates. *See* Pub.L. No. 89-486, § 8, 80 Stat. 244, 248-49 (1966). In 1974, as part of an amendment to the Federal Election Campaign Act ("FECA"), Congress expanded the ban on contributions by agents of foreign governments to include *all* foreign nationals. In 2002, the federal prohibition on foreign financial involvement in American elections was further strengthened to expand the ban on foreign

nationals' financial influence on elections by banning foreign nationals both from making expenditures and from making contributions to political parties. *See* Bipartisan Campaign Reform Act of 2002, Pub.L. No. 107-155, § 303, 116 Stat. 81, 96. The federal law relating to campaign contributions by foreign nationals is currently codified at 52 U.S.C. § 30121(a).[1]

The Supreme Court has recognized that Congress's power to regulate contributions by foreign nationals stems from Congress's inherent authority to control and conduct relations with foreign nations. *Arizona v. United States,* 567 U.S. 387, 395 (2012); *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-589 (1952); U.S. Const., art I, § 8, cl.4, 18. In *Bluman v. Federal Election Commission,* 800 F. Supp.2d 281 (D. D.C. 2011), *sum. aff'd.,* 565 U.S. 1104 (2012) (mem.), the predecessor statute to § 30121 was upheld. In an opinion authored by current Supreme Court Justice Kavanaugh (who at that time was a Judge on the D.C. Court of Appeals sitting as a member of a three judge panel hearing the case at the district court level), the Court held that § 30121(a) served the compelling governmental interest of limiting the participation of *non-Americans* in the activities of a democratic self-government. *Id.,* 800 F.Supp.2d at 290. While the Court did not expressly specify what level of scrutiny applied, the Court found that the United States has a "compelling interest 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." *Id.* at 288.

In *Bluman,* the Court specifically reserved the question of whether Congress could prohibit foreign nationals from engaging in issue advocacy, such as a ballot question. *Id.* at 291-292. In addition, while *Bluman* involved individual foreign nationals who were temporarily residing in the United States, the Court explained that foreign corporations would likewise be barred from making contributions and expenditures prohibited by federal law. *Id.* at n. 4. The Court noted that it would not further analyze the circumstances under which a corporation could be considered a foreign corporation for purposes of First Amendment analysis. *Id.*

Bluman was decided not long after the landmark case of *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), which changed the legal landscape relating to campaign finance regulation. In *Citizens United,* the Supreme Court struck down longstanding campaign contribution prohibitions for corporations, holding that corporations have free speech rights protected by the First Amendment, and that the government cannot restrict political speech based on the speaker's corporate identity. *Id.* at 365. The Court reasoned that "independent political spending" by corporations (*i.e.,* corporate spending that is not coordinated with the candidate), does not give rise to corruption or the appearance of corruption in federal elections. *Id.* at 357-361.

While *Citizens United* did not involve the issue of foreign nationals, Justice Stevens, in his opinion (dissenting in part and concurring in part), noted that the majority opinion which foreclosed consideration of the speaker's corporate identity, would apply with equal force to multinational corporations controlled by foreign nationals. *Citizens United,* 558 U.S. at 424-425. If Justice Stevens's prediction is correct, the federal prohibition on contributions by foreign corporations would likely be struck down.

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[1] The law was previously codified at 2 U.S.C. § 441e(a).

Legal scholars have noted the tension between the Supreme Court's holding in *Citizens United* that corporate campaign spending cannot be limited and the holding in *Bluman* (summarily affirmed by the Supreme Court), that foreign nationals' campaign contributions can be prohibited. *See e.g.,* Letter from Laurence H. Tribe to Seattle City Council Re Proposed Ordinance to Limit Political Spending by Foreign-influenced Corporations, (January 3, 2020) (attached to testimony Maine Citizens for Clean Elections on L.D. 2136 on file with the Joint Standing Committee on Veterans and Legal Affairs); Brian Remler, *Foreign Threats, Local Solutions; Assessing St. Petersburg, Florida's "DEFENDOURDEMOCRACY" Ordinance as Potential Model Legislation to Curb Foreign Influence in U.S. Elections*, 49 Stetson L. Rev. 643 (Summer, 2020)*; Election Law—Limits on Political Spending By Foreign Entities—Alaska Prohibits Spending on Local Elections by Foreign-Influenced Corporations,--Alask. Stat. § 1513.068,* 132 Harv. L. Rev. 2402 (June 2019). The state of the law in this area is unsettled.

Regulation of Spending on Ballot Initiatives. As explained above, FECA does not regulate contributions or expenditures relating to referendum elections. In *Bluman,* the Court notes that spending money in order to advocate on an issue is very different than spending money to expressly advocate for a candidate for public office. *Bluman,* 800 F.Supp.2d at 290. The Supreme Court has generally struck down restrictions on spending in ballot question campaigns, while upholding laws that require disclosure of the source and amount of contributions. *See Citizens Against Rent Control v. City of Berkeley,* 454 U.S.290,299 (1981) (finding that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure" and "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed".); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978) (holding that state could not prohibit corporations from making contributions or expenditures advocating views on ballot measures, finding that "[t]he risk of corruption perceived in cases involving candidate elections (citations omitted) simply is not present in a popular vote on a public issue.").

Analysis

As explained, the law in the area of campaign finance regulation, and in particular, the interplay between the *Citizens United* and *Bluman* opinions is unsettled. This uncertainty makes it difficult to predict the outcome of a legal challenge to L.D. 2136 either as drafted or including the proposed amendment. We have identified the following questions that may assist the Legislature's consideration of the issues:

I. Does the State have the authority to regulate the campaign activity of foreign nationals involved in foreign commerce in the State of Maine, or is that type of regulation within the exclusive purview of Congress?

The United States Constitution gives Congress the power to regulate interstate commerce, commerce with Indian Tribes, and commerce with foreign nations. Art. 1, cl. 3. Inherent in this grant of power to Congress is a limitation on the power of the States to enact laws imposing substantial burdens on such commerce. This limitation is sometimes referred to as the dormant commerce clause. A foreign government owned entity may argue that L.D. 2136 interferes with

its ability to engage in foreign commerce in the State of Maine, and that regulation of foreign commerce is within the exclusive purview of Congress, not the State. In addition, it could be contended that federal election law preempts state regulation. That said, we are not aware of any case to have considered the foreign commerce clause issue in this context, so it is difficult to predict a likely outcome. Based upon the statutory framework of FECA, it unlikely that a court would find that FECA preempts state law in the context of referendum elections because it is an area not covered by FECA.

II. Does a foreign national or foreign government owned entity transacting business within the State of Maine have First Amendment rights under *Bluman v. Federal Election Commission,* 800 F. Supp.2d 281 (D. D.C. 2011), *sum. aff'd.,* 565 U.S. 1104 (2012 (mem.)?

In *Bluman,* the Court held that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. *Bluman* at 288. If foreign citizens do not have a constitutional right to participate, then neither do foreign corporations. *Bluman* at n.4. The *Bluman* opinion expressly reserves the question of whether Congress could prohibit contributions or expenditures for issue advocacy by foreign nationals stating, "[O]ur holding does not address such questions, and our holding should not be read to support such bans." *Id.* at 292. This raises uncertainty as to whether the *Bluman* rationale would be applied to ballot question campaigns.

There is also language in the *Bluman* opinion that suggests that foreign nationals with significant ties in the United States, such as permanent residents, might be viewed differently. *Bluman,* 800 F. Supp.2d at 292 (extension of the prohibition to lawful permanent residents would raise "substantial" questions). This language raises the possibility that a foreign national or foreign government owned entity doing business in the State of Maine would be viewed as having significant ties which could change the analysis. *See* e.g. California, CA GOVT § 85320; Colorado, C.R.S.A. § 1-45-107.5; Maryland, Md. Election Law Code. Ann. § 13-236.1; and South Dakota, S.D. codified Laws § 12-27-21. To our knowledge, none of these provisions have been challenged in court.

III. Does *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 321 (2010) bar governmental restriction of contributions to support or oppose a ballot question by a foreign government owned entity?

The *Bluman* opinion has language suggesting that *Citizens United* would not bar governmental restriction of contributions to a ballot initiative campaign by a foreign government owned entity *Bluman,* 800 F.Supp.2d at 289 ("Indeed in our view, the majority opinion in *Citizen's United* is entirely consistent with a ban on foreign contributions and expenditures."). However, as noted above, *Bluman* also has contradictory language suggesting that the result might not be the same in the case of a prohibition on contributions to ballot question campaigns. *See* Part II above.

IV. What level of scrutiny is applied to a governmental restriction prohibiting a foreign national or foreign government owned entity from contributing to a ballot question campaign?

The *Bluman* opinion does not decide this question but holds that the United States has a compelling interest 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. Because the Court found that the governmental interest was compelling, it did not need to reach the level of scrutiny to be applied, because the governmental interest was sufficient to satisfy any level of scrutiny.

Conclusion

In summary, because the law in this area is unsettled, it is difficult to predict the result of a legal challenge to L.D. 2136 either as drafted or amended. The foregoing summarizes what we have identified as the major legal issues to consider. Please let me know if I can be of further assistance.

Sincerely,

Aaron M. Frey
Attorney General