No. 24-1265

United States Court of Appeals
for the First Circuit

CENTRAL MAINE POWER COMPANY; VERSANT POWER; ENMAX CORPORATION; MAINE PRESS ASSOCIATION; MAINE ASSOCIATION OF BROADCASTERS; JANE P. PRINGLE; KENNETH FLETCHER; BONNIE S. GOULD; BRENDA GARRAND; LAWRENCE WOLD,

Appellees,

v.

MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES; WILLIAM J. SCHNEIDER; DAVID R. HASTINGS, III,; SARAH LECLAIRE; DENNIS MARBLE; STACEY D. NEUMANN; AARON M.FREY,

Appellants.

ON APPEAL OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF INSTITUTE FOR FREE SPEECH AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Institute for Free Speech is a 501(c)(3). It does not have a corporate parent or issue stock. No publicly traded company owns 10% or more of its stock.

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INTERESTS OF AMICUS CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties and advancing free speech.

The Institute files this brief to urge the Court to stand firm against Maine's attempt to claw away at the right of free speech by misleadingly labeling American entities as "foreign-government influenced." Maine's claimed compelling interest of preventing the *appearance* of foreign-government influence cannot withstand the dictates that First Amendment freedoms be given the "breathing space" they "need to survive." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

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[1] Counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or its counsel have made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to this filing.

SUMMARY OF THE ARGUMENT

Freedoms are often removed by sleight-of-hand. Here, the slight-of-hand occurs both in the text of Maine's misnomered "foreign money" speech prohibition, 21-A Me. Rev. Stat. § 1064 (the "Act"), and in the arguments the state offers to support it. The Act treats any American corporation with a small minority foreign-government equity holder as *being* the foreign government. Then, it labels political spending by the American corporation as prohibited foreign money. Not done, the Act seeks to further extend the ban to a second category of American companies: any American entity that might have a foreign-government owned entity indirectly participate in decisions regarding political expenditures. This spending is mistreated as "foreign money." As the state and its amicus admit, under their argument, "All that Maine need show is that … a foreign government shareholder has the *capacity* to influence a corporation's political spending." Br. of Amicus Protect Maine Elections at 17 (citing Appellants' Br. at 44-52). In other words, the State asserts that minor involvement with a corporation creates a "capacity to influence," which triggers an "influenced" designation, regardless of actual (or even apparent) influence.

Maine and its amicus wrongly equate the state's prohibition to a federal regulation banning foreign spending. But the federal law does not ban spending by

American companies, even those wholly foreign owned. The laws are not equivalents.

1. Maine's argument that a summarily-affirmed three-judge district court decision controls this case is unavailing, even without getting into whether such opinions can be controlling, *See* Joshua Douglas & Michael Solimine, "Precedent, Three-Judge District Courts, and the Law of Democracy," 107 Geo. L.J. 413 (2019). The opinion Maine invokes expressly *disclaimed* addressing the issue present here: what is a foreign corporation? "Because this case concerns individuals, we have no occasion to analyze the circumstances under which a corporation may be considered a foreign corporation for purposes of First Amendment analysis." *Bluman v. FEC*, 800 F. Supp. 2d 281, n.4 (D.D.C. 2011). It also noted that "American corporations . . . are all members of the American political community." *Id*. at 290.

Post the Judge Kavanaugh authored district court decision in *Bluman,* Justice Kavanaugh of Supreme Court authored an opinion which answered the First Amendment question. The Court held that corporate law draws a bright line between U.S. companies and their foreign affiliates; the former have First Amendment rights, the later do not. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430 (2020) ("*AID II*").

2. The Maine law prevents American companies from spending American dollars for political purposes. The Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of 'quid pro quo' corruption or its appearance." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 305 (2022).

Quid pro quo corruption cannot be a concern in referendum spending because, unlike an elected official, a law cannot be bribed. *Buckley*, 525 U.S. at 203 ("ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates."). The appearance of quid pro quo corruption of an individual cannot be equated with the more abstract appearance of *influence* on the election system.

The "appearance of influence" as a justification to bar political speech does not withstand First Amendment scrutiny. *Citizens United*, 558 U.S. at 359-360. Maine cannot trample First Amendment rights merely by smearing American corporations with a false "foreign-government influenced" label. Because the misnamed "foreign money" law actually targets American speech, the district court properly enjoined the law.

ARGUMENT

I. THE ACT VIOLATES THE FREE SPEECH RIGHTS OF AMERICAN CORPORATIONS

"Competition in ideas and government politics is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). As we know, "a major purpose of [the First Amendment] was to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "Discussion of public issues is integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Maine's ban on speech by companies allegedly tainted by foreign influence violates this right.

A. Maine Cannot Ban American Corporate Political Speech by Mislabeling it as Foreign-Government Influenced.

Maine begins its brief with an admission that the Act was passed to target American public utilities. *See* Appellant Br. 6-9. It is legally significant that public utilities possess government-like eminent domain powers and thus can have their business plans subject to public referenda. One Maine utility is engaged in efforts to expand its electric transmission network to supply hydroelectric power to parts of New England. Because its project was subjected to a referendum, that utility educated voters about its project when it appeared on the ballot. This is normal corporate behavior for a public utility motivated by business self-interest to explain

to the public why it should be allowed to expand its transmission grid. One would think this is beneficial information for voters to possess.

The state did not like what this American corporation had to say. Maine desired to silence it going forward. It could not do so directly, by say, banning political speech by public utilities. The only basis to limit American political speech is to prevent actual or apparent quid pro quo corruption. *Cruz*, 596 U.S. at 305. Thus, Maine attacked the speech rights of public utilities indirectly by labeling American speech "foreign-government influenced" and banning the offending American corporations from spending on ballot issues. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. This is transparently so here, as the State's brief admits it doesn't like public utilities engaging with voters. And it has not pointed to a single foreign interest these companies advanced that were separate from the economic interests of the business. More broadly, the law is an attempted end-run around *Citizens United*. Specifically, it is an effort to find means to deprive American corporations of First Amendment rights. Thus, this brief will focus on explaining why *Citizens United* controls this case.

1. The "foreign-government influenced" label is misleading.

The label the Maine law places on American companies is misleading. The law doesn't require any *actual* foreign influence to bar an American company from educating customers and voters about how referenda impact it and them. The theoretical possibility of influence triggers the "foreign-government influenced" label. The Act defines foreign influence, not by actual influence or control, but presumes influence if a foreign government has a small ownership interest in the American company, even indirectly. As Maine's amicus directly put it, if a "capacity to influence" exists, the Act concludes there is influence. This is a correct statement of what the Maine law does. It also means law is patently over inclusive.

Maine extends its ban even further to American companies in which a "foreign-government owned entity" has "indirect participation" in corporate decisions about referendum spending. No control, actual influence, or even agreement with the spending plan is required—mere "indirect participation" in the decision—including *opposition* to the decision—suffices. This is also over inclusive.

2. Appearance of influence is not cause to muzzle political speech.

The Supreme Court has recognized that the "appearance of influence" cannot justify First Amendment encroachments. "Reliance on a generic favoritism or influence theory is at odds with standard First Amendment analyses because it is

unbounded and susceptible to no limiting principle. The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." *Citizens United*, 558 U.S. at 359-360 (internal citations and quotations omitted). The lack of a limiting principle is evident here.

A corporation's core business interests can be on the ballot—in a utility's case, for example, the ability to connect a hydroelectric plant to a power grid. Foreign influence doesn't cause an American company to openly pursue its direct business interest. Maine admits that its "preventing the appearance of foreign influence" justification is "novel," and that it contradicts the "foreign control" standard discussed by both the *Citizens United* majority *and* dissent. Appellants' Br. at 50; *See Citizens United*, 558 U.S.at 362 and 465 (Stevens, J., dissenting)).

The *Citizens United* majority stated that a political speech ban that "is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders . . . would be overbroad even if we assumed, arguendo, that the Government has a compelling interest in limiting foreign influence over our political process." *Citizens United*, 558 U.S. at 362. While this statement was dictum, it is Supreme Court considered dictum, which is controlling in this court. *McCoy v. Mass. Ins. Of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("federal [ ] courts are bound by the Supreme Court's considered dicta

almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement."). The Supreme Court carefully considered, and stated where the line should be for foreign influence.

Under *Citizens United*, there are only two bases that *might* serve to regulate corporate speech based on foreign interests: either the corporation is foreign, or it is "funded predominately by foreign shareholders". This Court, like the district court, should follow this aspect of *Citizens United* and hold that a 5% foreign ownership stake is not predominate, and thus the law is overbroad.

Amicus Protect Maine Elections's argument that "*Citizens United* can be fairly read to permit restrictions on election activities of corporations with any equity held by foreign investors," Protect Maine Amicus Br. at 20, conflicts with Maine's admission of the conflict; and is plainly wrong. Maine's effort to distinguish *Citizens United* on the basis that the Maine law applies to a subset of foreign actors, falls flat. *Citizens United* drew the line at predominate funding or control—regardless of who the foreign investor is.

While the bright line between foreign and domestic corporations articulated in *Citizens United* is "considered dictum," this bright line is the holding of another, more recent, corporate free speech case. *See AID II*, 591 U.S. at 439 (restating "the

longstanding constitutional law principle that" unlike American corporations, "foreign organizations operating abroad do not possess constitutional rights," and noting this dichotomy results from "the elementary corporate law principle that each corporation is a separate legal unit.") *AID II,* decided in 2020, followed an earlier, nearly identical case between the same parties that held the federal government could not deny grant money to American entities that did not adopt policies opposing prostitution because the American entities possessed Free Speech rights to refuse compelled speech demands. *See Agency for Int'l Development v. Alliance for Open Society Int'l, Inc*., 570 U. S. 205 (2013)("*AID I*"). However, *AID II* held that foreign entities—even those affiliated with American entities—do not possess First Amendment rights and could not refuse to adopt anti-prostitution policies if they wished to receive the grants. This strict legal separation between foreign and domestic under the First Amendment articulated in *Citizens United,* and applied in *AID I* and *AID II,* starkly contrasts with Maine's line-blurring law.

On top of this bright ling, *Citizens United* also expressly stated that banning speech based on the "appearance of influence" lacks a limiting principle, *Citizens United*, 558 U.S. at 359, is "at odds with" the First Amendment, *id*., and that an "appearance of influence" will *not* cause a lack of faith in democracy, *id.* at 360. Putting together these two aspects of *Citizens United*, a purported appearance of

influence by a foreign entity is no grounds to curtail corporate political speech. Quite simply, *Citizens United* rejected Maine's professed purpose here.

B. The post-injunction draft regulation does not save the act

Maine implicitly acknowledges that its law has gone too far when it attempts to rely on its recently drafted pending regulation purporting to limit the Act. On May 29, 2024, the appellant Commission adopted a regulation purporting to limit the Act's definition of "participates." According to the state, the draft regulation "requires U.S. corporations to insulate their decision-making processes about election spending from foreign-government influence." Appellants' Br. at 56. A regulation cannot modify the term "participates" in a meaningful way to render it constitutional. *Citizens United*, 558 U.S., at 324 ("The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.").

As the draft regulation is not before the court, accordingly, amicus will reserve judgment on whether the regulation's supposed savings interpretation accomplishes its intended goal. Even if a regulation could and did create a saving definition of "participate," that change still wouldn't have fixed the statute. Under § 1064(1)(E)(2), the definition of "Foreign government-influenced entity" includes

two categories: 1) entities which are 5% foreign government owned, *or* 2) those with which the foreign government participates in the decision-making process.

Maine's attempt to limit the definition of "participate" only impacts the second category. This limitation does not impact the law banning speech from a company in which a foreign government has a triggering ownership interest, even if the foreign government does not participate in the decision-making process. *See* § 1064(1)(E)(2)(a). This is a problem the Appellant Commission has not fixed, as it does not claim to have redefined "or" to mean "and."

C. The Court can't modify the statutory language for Maine

Finally, Maine asks this Court to craft a constitutional statute for it. Maine suggests that the Act isn't facially unconstitutional because the Court could revise the statutory language to raise the 5% threshold to a permissible percentage, without suggesting what that level is. "[E]ven if the district court were correct that the 5% ownership threshold is too low, the Act would still have constitutional applications against FGIEs with higher foreign-government ownership." Appellants' Br. at 57-58. If the Court isn't interested in picking the correct ownership percentage, or thinks that there isn't one, Maine invites the Court to rewrite the law to require *actual* control by the foreign government to trigger the Act. "And, if nothing else, the Act could be constitutionally applied to U.S.

companies controlled—as opposed to just influenced—by foreign governments or FGOEs." *Id.* at 58. No prevision of the Act speaks to control.

It is Maine's duty to write constitutional laws. A federal court "will not rewrite a law to conform it to constitutional requirements." *Iancu v. Brunetti*, 588 U.S. 388, 397 (2019)(citation omitted). "So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language." *Id*. Maine's prohibition of election spending by what it falsely labels "foreign-government influenced" cannot be interpreted in a saving way. Five percent cannot be interpreted to mean 51% or 100%. "To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one." *Id*. at 398. No savings interpretation is available.

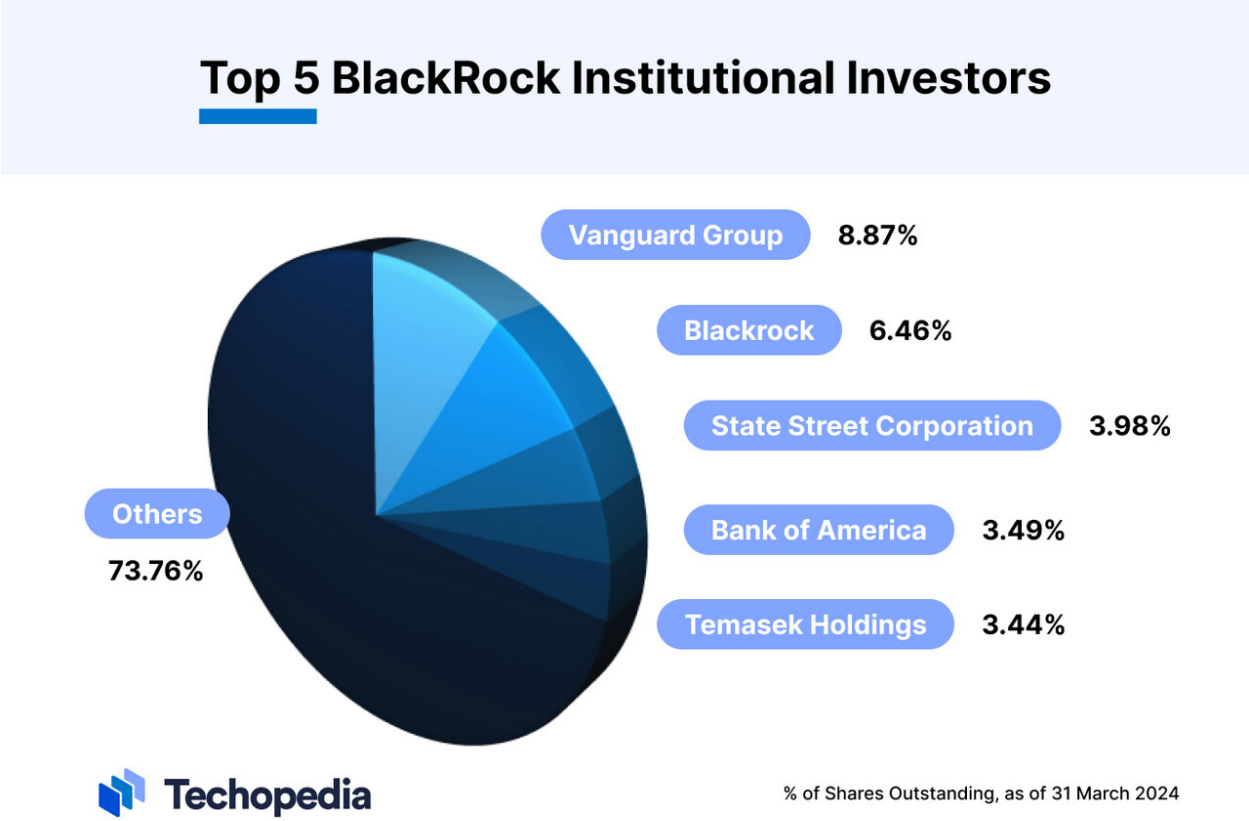
II. THE ACT IS NOT ADMINISTRABLE

A. The 5% indirect ownership rule is difficult to apply

The Act is not administrable in the vast swath of its potential applications, as there is no public filing available for a company to know whether an investor has *indirect* ownership of its publicly traded shares.

The difficulty of administering Maine's 5% "indirect ownership" threshold is evidenced by examining the theoretical application of the law to a corporation that

itself is a major holder of U.S. equites, Blackrock, Inc., based upon a June 2024 report of its largest equity holders, as the end of the First Quarter, March 31, 2024.[2]



According to this report, Blackrock's fifth largest shareholders is Temasek Holdings, a Singaporean sovereign wealth fund.[3] Per the above chart, Temasek's direct ownership of Blackrock is reportedly at 3.44%. This direct ownership by itself may not trigger the Act, but it is close. When indirect beneficial ownership is

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[2] https://www.techopedia.com/who-owns-the-most-blk-stock. The below chart appeared in the article.
[3] https://bit.ly/3WDMeGP

considered, the math gets tricky very quickly, and the 5% threshold may already be triggered largely because of the circular ownership structure of Blackrock.

Blackrock's second largest holder is Blackrock itself, at a reported 6.46%. These "treasury shares" or "repurchased shares" presumably are not counted as outstanding shares under this law. The Act would allocate a portion of the repurchased shares to Temasek as an indirect holding. This would increase Temasek's ownership percentage to 3.66%.[4]

The math doesn't end there. The first, third and fourth largest owners of Blackrock are Vanguard (8.87%), State Street (3.98%) and Bank of America (3.49%). Reciprocally, Blackrock is the largest owner of Vanguard at 7.6%.[5] Vanguard itself and State Street own another 7.8% of Vanguard.[6] Vanguard and Blackrock are the two largest shareholders of State Street, combining for a total 20.5% ownership.[7] Finally, Vanguard, Blackrock and State Street combine to own 18.2% of BOA.[8] And these numbers are in constant flux. If Temasek has additional indirect ownership of Blackrock through shares it owns outright of Vanguard, State

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[4] 0.0344 + (0.0344*0.0646) = 0.0366
[5] https://yhoo.it/4c2Zidc
[6] *Id*.
[7] https://yhoo.it/4dkgUme
[8] https://yhoo.it/4fnX4Ij

Street, or other Blackrock investors, those investments would also have to be calculated.

If and when the "beneficial ownership" math is complete, Temasek may be a 5% beneficially owner of Blackrock now. It likely would take an expert witness to do the math to determine the Temasek's total "indirect ownership" of Blackrock when these cross ownerships are considered. This amicus will not try.

Maine may quibble with this math. The exact percentages of Blackrock ownership are not material to this case. The difficulty of determining the level of indirect beneficial ownership is the point. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. The 5% *indirect* beneficial ownership standard is not easily administrable.

This highlights another problem with the statute: the ownership of publicly traded companies is fluid. High frequency trading can lead to investors entering and existing positions, even large ones, in very short periods. The number of outstanding shares is also dynamic. Companies cannot control, and often do not know in real time, who is purchasing their shares. Thus, companies may cross in and out of the ban multiple times within an election window without their

immediate knowledge of the exact composition of their direct ownership. And they may have no way of knowing who has triggering levels of indirect ownership or participation. This again demonstrates the difficult of administering the Act.

"First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal." *Id* at 336. When a law, such as Maine's, results in lack of clarity of whether a speaker has triggered a speech ban, the law has an impermissible chilling effect.

B. Equity ownership does not equate to participation in corporate governance

Even where ownership is easy to determine, the use of small equity holding as a proxy for "influence" doesn't make sense. Sovereign wealth funds tend to be passive investors, which do not seek to assert influence or control over their investments. Rose, Paul, *The Political and Governance Risks of Sovereign Wealth*. 4 Ann. Corp. Gov. 3, 147 (2019); Paul Rose, "Sovereign Wealth Funds: Active or Passive Investors?," 118 Yale L.J. Pocket Part 104 (2008). The SEC recognizes this distinction by requiring passive investors to file forms 13G rather than forms 13D. *See* 17 CFR 240.13d-1 *et seq.* Moreover, when acting as institutional investors, sovereign wealth funds file Form 13Gs on a much more relaxed timetable than 13D filers or even other 13G filers. *Id*. This SEC filing rule has been used to justify

this law. However, the SEC filing rule does not mean what the State and its amici claim, and doesn't justify the Act.

Also demonstrating that not all shareholders participate in corporate governance is the fact that some companies split equity from control. *See* Lund, Dorothy Nonvoting Shares and Efficient Corporate Governance, 71 Stan. L. Rev. 687 (2019). Famous examples include Google and Snap, both of which issue non-voting shares. *Id*. at 690 & 694. If a sovereign wealth fund holds a 5% non-voting stake in an American company, Maine cannot explain why that American company should be silenced.

In this way, the 5% rule is imprecise and could be both over- and under-inclusive depending on what voting rights (if any) a foreign owned entity has in the American corporation. *See Citizens United*, 558 U.S. at 362 (discussing "lack of fit").

C. The "Indirect Participation" Rule Is Even More Difficult to Apply

Of course, the Act doesn't even have a 5% minimum threshold to trigger its prohibition. Rather, all that is required is that a foreign-government controlled entity "directly or indirectly participates in the decision-making process . . . to influence" a referendum. 21-A Me. Rev. Stat.§1064(1)(E)(2)(b). A foreign-

government owned entity's "indirect participation" triggers the speech ban, even at ownership levels below 5%.

Thus, if a company holds a shareholder vote on whether to engage in campaign speech about a referendum and *any* shares are owned by a sovereign wealth fund, then that entity is prohibited, under Maine law, from engaging in that speech because the shareholder would have participated (probably "directly') in the process—even as the owner of a single share who voted *against* the spending.

Now assume the company didn't put the expenditure decision to a shareholder vote, but instead allowed the board of directors to decide. The shareholders, including the foreign government-owned entity, which held a single share, would have participated in the election of the board, and thus indirectly participated in the decision of the board to authorize the expenditure. This company, it seems, would also be barred by the Act from influencing a referendum.

The lesson here is that rather than prohibiting foreign interference in Maine elections, the law authorizes interference—or more precisely, causes it. The law allows foreign governments to *silence* American speech by purchasing a triggering quantity of shares of a publicly traded company. Even where the foreign-government did not make the purchase intentionally to interfere with a referendum,

Americans—up to and potentially exceeding 95% owners of the company—are silenced.

Blackrock is a useful example of the problem under this definition too. Blackrock Director Amin Nasser is also CEO of Aramco, the Saudi state-owned energy company.[9] Does his seat on the board trigger the "participation" block for Blackrock, and indirectly for companies Blackrock owns? By the text of the statute, it would seem so. Does Maine really believe Blackrock and entities Blackrock owns are Saudi instrumentalities by virtue of Nasser's directorship?

Blackrock holds significant ownership of dozens of U.S. companies and investment funds, according to 13D/G filings with the SEC.[10] The Maine law arguably bars every company owned by Blackrock from participating in referendum campaigns based on Saudi Arabia's "indirect participation" of its governance though Mr. Nasser's seat on Blackrock's board.

This law's vast sweep prohibits the exercise of First Amendment rights by American companies and their American shareholders, merely because of a sprinkling of inconsequential, and likely passive foreign government ownership. Upholding the Act would undermine the holding of *Citizens United.*

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[9] https://bit.ly/46CWliN
[10] https://fintel.io/i13d/blackrock

III. THE ACT FAILS STRICT SCRUTINY

"Laws that burden political speech ordinarily are subject to strict scrutiny, requiring the government to prove that any restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 11 (1st Cir. 2012) (*quoting Citizens United,* 558 U.S. at 340). *Fortuño* observed that *Citizens United* applied strict scrutiny in a corporate elections speech case, like this one. *Id*.

A. The Act is not narrowly tailored

To combat the alleged threat of "foreign influence," the Act would effectively silence as much as 95 percent, or even 99 percent, of shareholders who are American citizens or lawful permanent residents. This is not a "closely drawn" or "narrowly tailored" solution. Because equity and control can be separate, the Act is both under- and over-inclusive. This is evident by seeing that a narrowly tailored solution is used under federal law.

The best example of a more narrowly tailored solution is contained in the Federal Election Campaign Act ("FECA") and the regulations and interpretations of the FEC. For instance, 52 U.S.C. § 30121 prohibits foreign nationals from making contributions or expenditures, not only in connection with elections to federal office, but also to state and local office. The statute defines a foreign

national, in pertinent part, as including only a "corporation…organized under laws of or having its principal place of business in a foreign country." 52 U.S.C. § 30121(b) (incorporating definition from 22 U.S.C. 611(b)(3)). Thus, subsidiaries of foreign corporations, even wholly-owned subsidiaries, are not subject to the prohibition if they are incorporated and have their principal place of business in the U.S.

To prevent the type of indirect "foreign-influence" that is the target of the stated concern of Maine, the FEC has further given the statute an interpretation that, while broad, is much more "closely drawn" than the means chosen by Maine. FEC regulations expand on the statutory language to provide that not only may a foreign national not make expenditures, but further:

> [A] foreign national also may not direct, dictate, control, or directly or indirectly participate in the decision-making process of any...corporation, labor organization, political committee or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for Federal, State, or local office or decisions concerning the administration of a political committee [PAC].

11 C.F.R. § 110.20(i).

Maine's law appears to largely track this language. But because FECA's definition of "foreign national" excludes even wholly owned American

subsidiaries, while Maine's ban expressly extends to any American company with a mere 5% foreign government stake, the laws have entirely different scopes.

The FEC pronounced its application in a series of Advisory Opinions, culminating in AO 2006-15 (TransCanada). There, the Commission made clear that wholly-owned U.S. subsidiaries of a Canadian corporation that were incorporated and headquartered in the United States could make otherwise lawful expenditures and contributions, so long as "(1) the donations and disbursements derive entirely from funds generated by the Subsidiaries' U.S. operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts." Federal Election Commission, Advisory Opinion 2006-15, at 2 (TransCanada, May 19, 2006); *see also* Advisory Opinions 2004-42 (Pharmavite LLC); 2000-17 (Extendicare Health Services, Inc.); 1999-28 (Bacardi-Martini, USA, Inc.); 1995-15 (Allison Engine Company Political Action Committee); 1992-16 (Nansay Hawaii, Inc.); 1992-07 (H&R Block, Inc.); 1990-08 (The CIT Group Holdings, Inc.); 1989-29 (GEM of Hawaii, Inc.); 1981-36 (Japan Business Association of Southern California); and 1980-100 (Revere Sugar Corp.).

This more narrowly tailored approach prevents "foreign-influence" even as it allows corporate speech on behalf of American shareholders and their employees

in the United States. Unlike the Act, FECA is also easy for corporations to understand, administer, and comply with.

B. The Act lacks a legitimate sweep

The State claims that the Act has a legitimate sweep, but never articulates what that legitimate sweep is. The Maine law labels American corporations as "foreign influenced" when they are not. It bans American corporations from exercising their constitutional right of free speech. Maine says its goal is to ban political speech that isn't foreign influenced, but might appear to be. This approach fails the admonition that "First Amendment freedoms need breathing space to survive." *Citizens United*, 588 U.S. at 329. Maine passed the Act because of speech by specific American corporations that Maine did not like. *See* Appellants' Br. at 6-9. Maine cannot use the Act as a ruse to ban political speech that it dislikes. *Citizens United*, 588 U.S. at 339–41.

Political speech "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). When core political speech is at issue, "the importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Maine's professed interest of banning political speech that might *appear* to have been "influenced" by foreign governments cannot withstand scrutiny.

There is no reason to believe, and Maine has offered no evidence, that there is any legitimate sweep to this law. This is especially true because the restriction is not narrow tailored even though Maine had FECA, and its implementing regulations and advisory opinions available as guides on how to write a narrowly tailored law to ensure foreign money does not enter the political system. Instead, the Act prevents American money from being spent by American corporations. "The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." *Citizens United v. FCC*, 558 U.S. at 336. The preliminary injunction was proper and should be affirmed.

CONCLUSION

The District Court Order should be affirmed.

DATED: July 31, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29 AND 32

I hereby certify that this brief contains 5,057 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)(7)(B)(iii), which complies with the requirements in Fed R. App. P. 32(a)(7)(B)(i) and Fed R. App. P. 29(A)(5). I further certify that his brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point typeface and Times New Roman type style.

/s/ Charles Miller
Charles Miller (1129194)

CERTIFICATE OF SERVICE

I certify that this brief has been electronically filed with the Clerk of the Court on July 31, 2024. All attorneys in this matter are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing.

/s/ Charles Miller
Charles Miller (1129194)