IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OPAWL – BUILDING AAPI FEMINIST LEADERSHIP *et al.*,

***Plaintiffs*,**

v.

DAVE YOST, in his official capacity as Ohio Attorney General *et al.*,

***Defendants*.**

Case No.: 2:24-cv-3495

Judge Michael H. Watson

Magistrate Judge Kimberly A. Jolson

BRIEF OF AMERICANS FOR PUBLIC TRUST AND HONEST ELECTIONS PROJECT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Americans for Public Trust ("APT") is a nonprofit, nonpartisan organization committed to exercising vigilant oversight and restoring trust in government by exposing corruption and holding politicians and political groups accountable for corrupt and unethical behavior. To further this mission, APT uses in-depth investigations and legal action to help promote open and transparent government and ensure that those who disregard the rule of law are held accountable. It also seeks to raise public awareness of this work through reporting and disseminating information about the powerful being held accountable for their misconduct to help rebuild public trust. APT has a significant interest in this case because it is concerned about the potential for foreign contributions to affect the decision-making of state elected officials, and it supports Ohio's efforts to combat such influence.

The Honest Elections Project (the "Project") is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that state legislatures put in place to protect the integrity of state voting processes. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case as this challenge implicates the constitutional power of all state legislatures to craft rules that limit foreign influence in elections and could potentially call into question the legality of similar state laws across the nation.[1]

[1] Amici affirm that no counsel for either party authored this brief in whole or in part. Additionally, no counsel for any party made a monetary contribution to the preparation or submission of this brief. No person other than *Amici* made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

Faced with a decision about where best to assign authority over election regulations, the Framers of the U.S. Constitution "settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho v. Common Cause*, 588 U.S. 684, 699 (2019). Alexander Hamilton succinctly explained the rationale: because "a discretionary power over elections ought to exist somewhere," the Framers were left with three possible dispensations. *Id.* (quoting The Federalist No. 59, p. 362 (C. Rossiter ed. 1961)). Power over elections could "either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." *Id.* The Framers adopted the third option.

States have historically wielded this constitutional authority to restrict foreign participation in their elections. An unbroken chain of Supreme Court precedent has held that "foreign citizens may be denied certain rights and privileges that U.S. citizens possess," including by such measures as "bar[ring] foreign citizens from voting." *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (citing *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973)). "The Court has further indicated that aliens' First Amendment rights might be less robust than those of citizens in certain discrete areas," and "has drawn a fairly clear line" permitting the government to "exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'" *Id.* (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)). For that reason, the Supreme Court in 2012 summarily affirmed a lower court opinion written by then-Judge Kavanaugh holding 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." *Id.* at 288.

Pursuant to its constitutional authority over election regulation and in furtherance of that compelling interest, the Ohio General Assembly recently passed, and the Governor subsequently signed, Amended Substitute House Bill 1 ("H.B. 1").[2] This bill prohibits persons who are not United States citizens (including lawful permanent residents) from funding contributions, expenditures, or independent expenditures that support or oppose Ohio candidates or statewide ballot issues. Although these changes are meaningful, they are neither unprecedented nor beyond the power of Ohio to enact. If states are to retain the necessary flexibility to respond to legitimate emerging threats of foreign influence in American elections,[3] then this challenge must fail and the preliminary injunction should be denied.

I. Ohio Is Not the Only State that Restricts Foreign Participation in Elections.

The Complaint portrays H.B. 1 as a radical outlier, but it is not. In fact, eight other States—including several States that are currently governed by Democrats—similarly restrict foreign participation in state elections. Some of these laws apply to fewer categories of people than H.B. 1, and others apply to fewer types of elections. However, there is no challenged provision of H.B. 1 that was not already reflected in another state's laws at the time that H.B. 1 was enacted.

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[2] H.B. 1 was passed during the special session of the Ohio General Assembly that Governor Mike DeWine convened pursuant to his authority under Article III, Section 8 of the Ohio Constitution. Governor DeWine convened the special session, in part, to "strengthen the State of Ohio's prohibition against foreign influence with and in Ohio's elections…" See Senate Journal, dated May 28, 2024, pp. S1 – S3 (https://www.legislature.ohio.gov/files/special-session/journal_s_20242805.pdf, last accessed July 30, 2024).

[3] In 2018, FBI Director Christopher Wray announced that foreign governments often "provide illegal campaign financing" as part of a broader effort to "target[] our democratic institutions and our values." Fed. Bureau of Investigation, *FBI Director Christopher Wray's Statement at Press Briefing on Election Security* (Aug. 2, 2018), https://www.fbi.gov/news/press-releases/fbi-director-christopher-wrays-statement-at-press-briefing-on-election-security.

Colorado's prohibition, which was adopted in a 2002 statewide constitutional referendum, is most similar to Ohio's because it applies to precisely the same categories of people. The relevant constitutional provision prohibits any "candidate committee, political committee, small donor committee, or political party" from "knowingly accept[ing] contributions from . . . any natural person who is not a citizen of the United States." Colo. Const. Art. XVIII, Sec. 3(12). Hence, Ohio is not the first State to bar political contributions from lawful permanent residents residing within the State; Colorado has prohibited political contributions from both foreign nationals *and* lawful permanent residents for more than two decades. The Colorado law is narrower than H.B. 1 in one respect: it applies to every type of Colorado political committee with the sole exception of "issue committees," which are committees that have the "major purpose of supporting or opposing any ballot issue or ballot question." Colo. Const. Art. XVIII, Sec. 2(10). Therefore, foreign nationals and lawful permanent residents in Colorado can continue to spend in state ballot issue elections, but are totally prohibited from using their contributions to influence candidate elections.

Other States have expressly extended their foreign contribution bans to the ballot measure context, while opting to permit contributions from lawful permanent residents. For example, the North Dakota Constitution bans "foreign nationals not lawfully admitted for permanent residence in the United States . . . from making contributions or expenditures in connection with any statewide election, election for the legislative assembly, or statewide ballot-issue election." N.D. Const. Art. XIV, § 2(6). Nevada bars foreign nationals from "directly or indirectly" contributing to candidates, political committees, or independent expenditures, and defines "foreign national" to encompass "an individual who is not a citizen of the United States . . . and who is not lawfully admitted for permanent residence." Nev. Rev. Stat. Ann. §§ 294A.325(1), (6)(a) (citing 52 U.S.C. § 30121(b)(2)). To avoid liability under that statute, the recipient of a contribution must "request[]

and obtain[] from the source of the contribution a copy of current and valid United States passport papers" if they are "aware of facts that would lead a reasonable person to inquire whether the source . . . is a foreign national." *Id.* § 294A.325(3).

Moreover, while Colorado is the only State whose foreign contribution ban applies to lawful permanent residents residing *within* the State, other States have enacted bans that are applicable to any person residing outside of the United States who is not a U.S. citizen (i.e., including lawful permanent residents who are temporarily living overseas). Maryland falls within this category, prohibiting any non-U.S. citizen outside of the United States from making contributions to ballot issue committees or even "independent expenditures or electioneering communications relating to a ballot issue." Md. Election Law Code Ann. § 13-236.1(b). And while Maryland's ban was enacted in 2017, other States have enforced identical bans for much longer. Since 1997, California has prohibited any "foreign government or foreign principal" from making "a contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, any state or local ballot measure or in connection with the election of a candidate to state or local office." Cal. Gov't Code § 85320(a). "Foreign principal" means any person "outside the United States," unless the person is a U.S. citizen. *Id.* at § 85320(c). That means that, like H.B. 1, California and Maryland both prohibit political spending related to state ballot measures by any person who is not a U.S. citizen if they are outside of the country.

One state ban on foreign contributions even survived a recent legal challenge that bears a remarkable resemblance to the claims brought by Plaintiffs here. In 2020, Washington enacted a statute prohibiting foreign nationals (defined to include individuals who are neither U.S. citizens nor lawful permanent residents, wherever they reside) from contributing to candidates or political committees, and from making expenditures supporting or opposing candidates or ballot measures.

Rev. Code Wash. § 42.17A.005(24)(a). The statute casts a broad net, barring even U.S. citizens and lawful permanent residents from making political contributions or expenditures if the contribution/expenditure "is financed *in any part* by a foreign national" or if "[f]oreign nationals are involved in making decisions regarding the contribution, expenditure, political advertising, or electioneering communication *in any way*." Rev. Code Wash. § 42.17A.417 (emphases added). In short, like H.B. 1, the Washington statute is intended to prevent foreign nationals from indirectly laundering their political contributions through otherwise legal sources.

A group of noncitizen plaintiffs and advocacy organizations challenged the statute under the Washington Constitution, arguing that the law violated their free speech and associational rights and discriminated against them on the basis of alienage—the very same arguments that Plaintiffs here advance under federal law. *See OneAmerica Votes v. State*, 23 Wn. App. 2d 951, 955 (Wash. Ct. App. 2022). The Washington plaintiffs lost, with a state appellate court holding that "individuals who are neither United States citizens nor permanent resident aliens do not have a constitutional right to make political contributions in state and local elections, or to participate in any decision-making regarding the financing of political contributions by the organizations with which they affiliate." *Id.* Moreover, the court affirmed that a State has a compelling interest in "prohibiting foreign nationals from making political contributions" and "in prohibiting citizens or domestic organizations from using money from foreign nationals to make such contributions," and determined that the statute was sufficiently narrowly tailored to advance the permissible goal of "exclud[ing] those who are not citizens from participating in the State's political processes." *Id.* at 979. Specifically, the court found it meaningful that the statute "focuses on express advocacy and does not prohibit political speech other than the financing of specific candidates or ballot measures." *Id.* at 985. The same can be said of H.B. 1.

Therefore, multiple States—including States governed by Democrats and States governed by Republicans—have adopted laws that prohibit political contributions from lawful permanent residents and that restrict the ability of noncitizen sources to funnel contributions through domestic entities. H.B. 1 is not unique in either regard.

II. Even If Ohio Legislated to the Limits of Its Authority, It Did Not Exceed It.

As demonstrated, H.B. 1 aggregates various provisions that have existed for years in other States to comprehensively attack the problem of foreign influence in state elections. Ohio has undeniably gone farther than any other individual State in pursuit of this goal. H.B. 1 applies to every type of noncitizen contributor (including lawful permanent residents) and to every type of Ohio election (including ballot issue elections). Other States that have regulated in this area have chosen either the former or the latter, but not both. But the fact that Ohio has legislated up to the limits of its authority does not mean that it has overstepped constitutional bounds. This "'use it or lose it' view of legislative authority" which assumes that other "legislatures maximally exercised their power to regulate" is "flawed." *See United States v. Rahimi*, 219 L. Ed. 2d 351, 395 (2024) (Barrett, J., concurring). Just because no State has previously deemed it necessary to enact a statute as broad as H.B. 1 does not imply that Ohio is prohibited from doing so now.

It is an elementary principle of statutory interpretation that "a statute is not invalid under the Constitution because it might have gone farther than it did." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)). But the inverse of that proposition is also true: a statute is not invalid under the Constitution simply because it went as far as it could lawfully go. While a State is "not bound . . . to strike at all evils at the same time or in the same way," there is no constitutional provision that prevents a State from legislating to the limits of its constitutional authority if it has an expansive appetite for reform or when it faces a multifaceted

problem that demands a broader approach. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). "[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," or it may proceed in a comprehensive manner as Ohio did here. *Buckley*, 424 U.S. at 105 (quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955)). The Constitution does not mandate a single legislative approach to issues of public concern.

In this case, Ohio canvassed various approaches that have proven successful at limiting foreign influence in the elections of other states and combined different elements of those approaches to craft H.B. 1. But the amalgamation of various elements from different state laws does not render Ohio's comprehensive approach unconstitutional. It cannot be the case that Colorado's longstanding ban on political contributions from lawful permanent residents is constitutional, but Ohio's is not because it extends to ballot measures. It cannot be the case that California's longstanding ban on direct or indirect political contributions in all elections from non-citizens residing overseas is constitutional, but Ohio's coextensive ban on contributions from the same categories of persons in the same types of elections residing within the state is not. Either States can permissibly restrict foreign national contributions consistent with their Elections Clause power, or they have somehow been stripped of an essential aspect of state sovereignty without any court explicitly saying so.

The Constitution does not purport to mandate a particular approach to the regulation of political spending by foreign nationals. The Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Lochner v. New York*, 198 U.S. 45, 76

(1905) (Holmes, J., dissenting). Here, Ohio's approach is hardly "novel" or "shocking"; rather, it combines familiar aspects of various laws that have been enacted and enforced in Republican- and Democrat-governed States alike. While some may argue that foreign national participation in American elections is not a serious problem and others may claim the problem, even if real, will not be fully eliminated by H.B. 1, neither of those differing perspectives impinge on Ohio's constitutional authority to choose to enact the law that it did.

CONCLUSION

Although Ohio may have legislated to the limits of its constitutional authority in enacting H.B. 1, it has not unconstitutionally exceeded that authority. Nor is Ohio the first State to act in this area. Other States have enacted laws banning political contributions from lawful permanent residents; restricting the ability of foreign nationals to spend in support of ballot measures as well as candidates; and even penalizing U.S. citizens and domestic entities that make prohibited contributions using funds contributed by foreign nationals or lawful permanent residents.

The fact that Ohio has combined elements from all these laws in the comprehensive package that became H.B. 1 does not make Ohio's law different in kind than those that preceded it. This Court should reject the instant challenge and deny the preliminary injunction, or risk forever impairing the ability of States to legislate against foreign influence in their elections.

Dated: July 30, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2024, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Southern District of Ohio by using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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