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Chair Kristin Roers
Vice-Chairman Jose Castaneda
North Dakota Senate State and Local Government Committee

RE: Senate Bills 2337 and 2361

Chair Roers and members of the Senate State and Local Government Committee:

My name is Blaine Johnson, and I am here today to express concern with Senate Bills 2337 and 2361, which seeks to prohibit the ownership of real property by foreign adversaries of the United States. While I understand the intent to protect national security, this bill raises serious constitutional and legal concerns that merit your careful consideration.

I. Violation of the Supremacy Clause and Foreign Affairs Powers

The regulation of foreign relations and national security is an exclusive power of the federal government under the U.S. Constitution. The Supremacy Clause (Article VI, Clause 2) establishes that federal law prevails over state or local laws that interfere with national policy. Additionally, the Foreign Commerce Clause (Article I, Section 8, Clause 3) grants Congress exclusive authority to regulate foreign commerce, including foreign investment. The Supreme Court has consistently held that states cannot intrude upon foreign affairs. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233, 62 S. Ct. 552, 86 L. Ed. 796 (1942). The legal implications of this federal exclusivity are straightforward. In the words of the Supreme Court, "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 85 L. Ed. 581 (1941). "[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 418, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). In *Zschoernig v. Miller*, 389 U.S. 429 (1968), the Court struck down an Oregon law restricting inheritance by foreign nationals, holding that such laws impermissibly interfered with federal foreign policy. This bill similarly seeks to regulate foreign property ownership in a manner that conflicts with federal jurisdiction.

II. Violation of the Equal Protection Clause

The bill's restrictions target property ownership based on national origin and citizenship status, raising significant Equal Protection concerns under the Fourteenth Amendment. In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court held that laws discriminating against non-citizens are subject to strict scrutiny, the highest level of judicial review. This bill does not appear to be narrowly tailored to achieve a compelling government interest and would likely fail constitutional scrutiny. Note that the federal regulations identified in both bills relies upon 15 CFR 791.4(a) which is not an outright prohibition but requires additional safeguards and caution.

III. Vagueness and Overbreadth

The bill relies on the designation of "foreign adversaries," a term that is subject to change at the discretion of federal agencies. The lack of clear and objective criteria creates a risk of arbitrary enforcement, violating the constitutional requirement that laws be clear and not overly broad. The Supreme Court has repeatedly ruled against vague laws, as seen in *Kolender v. Lawson*, 461 U.S. 352 (1983), where the Court struck down a statute that granted excessive discretion to law enforcement.

IV. Defined Terms

SB 2337 attempts to define foreign county of concern and foreign organization of concern. The prior use of foreign adversary was consistent with defined terms under federal regulations, the proposed language in SB 2337 deviates and results in the unnatural interpretation of commonly understood definitions and language. A "country" is not ever an individual on the OFAC list. This definition leads to an absurd result. SB 2337 further lowers the ownership threshold to 25% and disregards whether such ownership has control over the entity or not. Passive investors may not have voting rights or other managerial control.

V. Misunderstanding of CFIUS

SB 2337 provides for exceptions when "consent" is granted by the Committee on Foreign Investment in the United States. The CFIUS review is confidential, and if no threat is determined the review process is concluded. A decision not to exercise authority over the transaction results in a "safe harbor" for the proposed investment. Furthermore, the CFIUS review process is designed for covered transactions where a foreign government is acquiring a "substantial interest" in certain U.S. businesses and certain covered transactions that involve critical technologies. It does not apply to every minor circumstance in which foreign investment is involved.

Conclusion

While national security is a legitimate concern, SB 2337 and 2361 raise significant constitutional and legal issues that make it both overreaching and vulnerable to legal challenges. Instead of

enacting broad and constitutionally suspect prohibitions, I urge the legislature to consider alternative approaches that respect both national security interests and constitutional principles.

I appreciate your time and consideration and respectfully urge you to vote against this bill. I welcome any questions from the Committee.

Thank you.

Sincerely,

Blaine T. Johnson
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