LEAGUE OF WOMEN VOTERS® OF SAN JOSE/SANTA CLARA

P.O. Box 5374
San Jose, CA 95150
www.lwvsjsc.org
November 15, 2021

To: Mayor Liccardo, Vice Mayor Jones, and Councilmembers Jimenez, Peralez, Cohen, Carrasco, Davis, Esparza, Arenas, Foley, and Mahan

cc: San Jose City Clerk

Subject: Options for Campaign Finance Regulations Related to Public Financing, Foreign Influence in Elections, and Other Limits on Corporations and Other Entities
Item: 3.6, November 16 Council Agenda

Dear Mayor Liccardo and City Councilmembers:

The League of Women Voters of San Jose/Santa Clara urges you to support the recommendations in the memo authored by Councilmembers Cohen, Jimenez, and Foley. We thank the City Attorney for a comprehensive review of options for local campaign finance reform.

We firmly believe that elections, and our political system overall, should prioritize ordinary voters, not big money or special interests. Representative democracy is damaged when there are secret donors, Super PACs, and an emphasis on raising large amounts of campaign cash. Our campaign finance system should maximize people's participation in the political process, promote transparency about the sources of money, combat corruption, and level the playing field so the competition is more equitable.

Foreign Influence in Elections

We support the definition of foreign-influenced corporations as stated in the Cohen, Jimenez, and Foley memorandum to help close a loophole which could allow citizens of other countries to influence elections by investing in US companies. We advocate for the lower threshold as an effective way to reduce the impact of large contributions to independent PACs and to accomplish the goal of political equality for all citizens. The Supreme Court ruling in Citizens United v. F.E.C. allowed corporations to spend freely in politics equating corporations to citizens with First Amendment rights. Seattle adopted an ordinance in reaction to a $1.5 million contribution by Amazon to a local PAC for use in Seattle Council elections in 2019. While we do not presume to offer legal advice, we note the zero standard alluded to by Justice Brett Kavanaugh while a judge on the DC Court of Appeals. He wrote in Bluman v. F.E.C., "Foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government…"

Public Financing Program

The League supports public financing of elections in which candidates must abide by reasonable spending limits and enhanced enforcement of campaign finance laws. The *We The People Act* (HR 1) was strongly supported by the League. If passed, it would have established public financing powered by small donations of $200 or less with a 6:1 match. Council should move expeditiously to bring forward a public campaign financing program. We look forward to reviewing the ordinance in depth and advocate in advance for extensive public outreach and for the new program to be fully funded.

The City of St. Petersburg, FL made history on October 6, 2017 by becoming the first municipality after the Citizens United decision to abolish Super PACs and limit foreign corporate spending in local

elections. The League of Women Voters of the St. Petersburg Area worked with a coalition for two years to encourage the City Council to pass the ordinance. Its president Dr. Julie Kessel stated, *"We believe that big money in politics is a root cause of a compromised democracy, every bit as corrosive as gerrymandering, governmental abuse of power and voter suppression. When money is as important to a candidate or an elected official as a citizen's vote, the sovereign power of the people to elect officials to represent their interests has been corrupted."*

We request that you vote YES to approve the recommendations in the Cohen, Jimenez and Foley memo, and continue to research options to limit the influence of money in politics.

Regards,

Carol M. Watts

Carol Watts
President, League of Women Voters of San Jose/Santa Clara
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FW: Item 3.6: Support Cohen, Foley, Jimenez Memo

City Clerk <city.clerk@sanjoseca.gov>
Tue 11/16/2021 1:33 PM
To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Jeffrey Buchanan <jeffrey@wpusa.org>
Sent: Tuesday, November 16, 2021 12:55 PM
To: City Clerk <city.clerk@sanjoseca.gov>
Subject: FW: Item 3.6: Support Cohen, Foley, Jimenez Memo

[External Email]

From: Jeffrey Buchanan [mailto:jeffrey@wpusa.org]
Sent: Tuesday, November 16, 2021 12:30 PM
To: 'mayoremail@sanjoseca.gov' <mayoremail@sanjoseca.gov>; 'Charles Chappie Jones' <chappie.jones@sanjoseca.gov>; 'Jimenez, Sergio' <sergio.jimenez@sanjoseca.gov>; 'raul.peralez@sanjoseca.gov' <raul.peralez@sanjoseca.gov>; 'david.cohen@sanjoseca.gov' <david.cohen@sanjoseca.gov>; 'Carrasco, Magdalena' <magdalena.carrasco@sanjoseca.gov>; 'Davis, Dev' <dev.davis@sanjoseca.gov>; 'Esparza, Maya' <maya.esparza@sanjoseca.gov>; 'Arenas, Sylvia' <sylvia.arenas@sanjoseca.gov>; 'Foley, Pam' <pam.foley@sanjoseca.gov>; 'Mahan, Matt' <matt.mahan@sanjoseca.gov>
Subject: Item 3.6: Support Cohen, Foley, Jimenez Memo

Dear Mayor Liccardo and Members of the City Council:

On behalf of Working Partnerships USA I would like to strongly encourage your support for the memo by Councilmember Cohen, Jimenez and Foley.

While San Jose residents would benefit from each of the policies examined by the City Attorney's Office, we believe the most important policy to implement is the ban foreign influenced business entities from engaging in our local elections. The City of San Jose welcomes immigrants, visitors, and investors from around the world. However, its elections should be decided by the people of San Jose and not by foreign investors or the business entities over which they exert influence. For this reason, and due to the importance of the public having faith in the 2022 elections, we believe the City Attorney's office should work to quickly bring back an ordinance for consideration as soon as possible, in addition to continuing work on public campaign financing and conflicts of interest.

In addition to moving this proposal quickly to ensure it is in place before electioneering begins in 2022, we would encourage the City Council and the City Attorney to look to the example of Seattle's ordinance in drafting our ordinance, and specifically utilize its definitions within their ordinance, which we believe answers questions raised previously by members of the Council on what types of entities to cover, namely that:

> *"Corporation" means a corporation, company, limited liability company, limited partnership, business trust, business association or other similar entity."*

As a City, we need to urgently address this policy loophole. Foreign nationals have used and may continue to use U.S. business entities to funnel funds into U.S. elections, in violation of federal laws prohibiting foreign spending in U.S. elections. Recent examples include in San Diego, where in 2017, a businessman was convicted in federal court of illegally funneling foreign dollars into local elections through shell corporations to support politicians who

might support his real estate development. Similarly, in New York in 2019, four individuals were indicted on charges of laundered foreign money into U.S. elections via shell corporations and straw donors.

The U.S. Court of Appeals for the Ninth Circuit has acknowledged the validity of legislation "to protect the country's political processes after recognizing the susceptibility of the elections process to foreign interference," including in municipal elections . (United States v. Singh)

The FBI has concluded that foreign influenced operations include "criminal efforts to suppress voting and provide illegal campaign financing," as set forth in FBI Director Christopher Wray's press briefing on election security on August 2, 2018.
The United States Congress and the U.S. Supreme Court have recognized the need to protect U.S. elections (including local elections) from foreign influence through the ban on contributions and expenditures by foreign nationals imposed by 52 U.S.C. 30121 and upheld by the Supreme Court in *Bluman v. Federal Election Commission*.

The Supreme Court in *Bluman v. Federal Election Commission* affirmed "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."

Current US law does not adequately protect against foreign interference through corporate political spending by U.S. corporations with significant foreign ownership.

The City of San Jose has an opportunity to adopt policy to prevent this kind of interference in our local democracy. We have a strong, well thought model to base our policy on: the City of Seattle's Clean Campaigns Ordinance.

There is no universally accepted, unambiguous definition of how much ownership is necessary to qualify as a "large" or "significant" shareholder in a corporation—sometimes known as a "blockholder." (Christopher Small, "Blockholders and Corporate Governance") But corporate governance experts, stakeholders, and even Republican members of Congress agree that a 1 percent stockholder can wield influence in the decision-making of corporate managers. According to corporate governance expert John Coates, "virtually no one questions that owning 1 percent of voting shares" gives such shareholder the ability to influence corporate decision-making. Robert Jackson, now a commissioner at the U.S. Securities and Exchange Commission (SEC) has agreed, stating, "in the case of a 1% shareholder of a very large public company … they will be given a fair amount of attention."

The City of Seattle utilizes this threshold for individual foreign investors, and it has been endorsed by leaders in the field of campaign finance, including FEC Commissioner Ellen Weintraub to constitutional scholars like Lawrence Tribe. Its notable, Commissioner Weintraub's support of the Clean Campaigns ordinance is more recent, and references more recent scholarship than the 2016 op-ed referenced in the City Attorney's Office memo, where she first suggested a higher threshold. Here August 2019 letter to the Seattle City Council argued that their ordinance's lower thresholds were supported by legal theory and policy examples.

Indeed, there is further support for this one percent threshold under current SEC regulations, where the threshold for presenting a shareholder proposal at a publicly traded corporation is that the shareholder must own at least 1 percent of voting shares or $2,000 of the corporation's market value. In November 2019, as the SEC proposed eliminating 1 percent threshold, finding that the vast majority of investors that submit shareholder proposals do not even have that level of equity ownership and that institutional investors below the 1 percent single owner threshold can, in fact, exercise substantial influence on a corporation's decisions. Moreover, the SEC found that investors who meet the 1 percent threshold are easily able to communicate with corporate managers.

In terms of aggregate foreign ownerships, although a dispersed class of foreign investors may not all be perfectly aligned on all issues, they do share common interests that deviate from the interests of American shareholders. John Coates has written, "corporations may have foreign ownership at substantial levels that would make unaffiliated foreign investors theoretically capable of exerting influence on the corporate political spending, even at levels below five percent of total stock."
One avenue for small foreign shareholders to exert this influence is during "proxy season," when they can threaten to—or can actually—band together to force votes on proposals that affect corporate managers.[1] Other experts agree with Coates that a 5 percent aggregate ownership threshold is appropriate. For example, Harvard Law School professor Laurence Tribe has concluded that "the same Supreme Court that decided Citizens United would probably have upheld a law limiting political advertising by corporations with five percent of equity held by

foreign nationals. Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with any equity held by foreign nationals."[2]
Corporations with foreign ownership have been increasingly politically active in recent years, including in local elections in San Jose and around the country.

In California, take for example companies like Uber, which approximately 10 percent of its shares are owned by the Saudi Arabian government. These shares lead to the Saudi government controlling one of Uber's nine board seats. As a company, Uber recently spent tens of millions of dollars on the 2020 elections, including supporting independent expenditures in the City of San Jose.

Major real estate investment trusts like Essex Property Trust and Equity Residential have invested millions of dollars opposing statewide ballot measures in addition to local spending on political races in places like San Jose. Reviewing their financial data shows foreign financial firms, including foreign government sovereign wealth funds, control significant parts of these funds.

Business entities have a fiduciary duty to their shareholders, including shareholders around the world, and generally prioritize the interests of such shareholders, which may diverge substantially from the interests of the citizens of San Jose and of citizens of the United States.

Political spending by foreign-influenced business entities, even when they are simply acting in the perceived interests of their investors rather than being purposefully used to funnel foreign money into local elections, can weaken, interfere with, or disrupt San Jose's democratic self-government and the faith that the electorate has in its elected officials.

To protect the integrity of San Jose's democratic self-government, it is necessary to prevent foreign-influenced business entities from influencing San Jose's elections by spending money in local candidate elections, contributing to independent expenditure committees or ballot measure committees.

We encourage the City Council to direct the City Attorney to move quickly on bringing back an ordinance to protect San Jose voters.

Best,
Jeffrey

Jeffrey Buchanan
Director of Public Policy
Working Partnership USA
[redacted]

[1] Ibid.

[2] Laurence H. Tribe, Statement in support of St. Petersburg, Florida legislation, October 25, 2016, p. 4, available at https://freespeechforpeople.org/wp-content/uploads/2016/10/7.Prof.-Laurence-Tribe-Letter-of-Support.pdf.

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Mayor Sam Liccardo
Vice Mayor Charles "Chappie" Jones
Members of the City Council
San Jose, California

RE: Proposed ordinance to ban political spending by foreign-influenced corporations

March 21, 2022

Dear Mayor Liccardo, Vice Mayor Jones, and Members of the City Council,

I write to you to express my opinion on an issue pertaining to the above-referenced bill currently before you. First, that U.S. Supreme Court constitutional precedent permits limits on political spending by foreign-influenced corporations in the form of "independent expenditures," electioneering communications, spending on ballot measure campaigns, or contributions to super PACs. Second, that I consider such bills to be valuable tools for protecting and preserving the integrity of state and local elections, including in San Jose, from the threat to the American ideal of self-government posed by foreign-influenced political spending.

Background

I am the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University and Harvard Law School, where I have taught since 1968 and where my specialties include constitutional law and the U.S. Supreme Court.* I have prevailed in three-fifths of the many appellate cases I have argued (including 35 in the U.S. Supreme Court).

Constitutionality of regulating political spending by foreign-influenced corporations

Regulating political spending by corporations with significant foreign ownership is consistent with the Constitution and Supreme Court precedent. Indeed, concern

* Title and university affiliation included for identification purposes only.

about potential foreign influence over our democratic politics is written into the Constitution itself.[1] And while the Supreme Court has held that the First Amendment prohibits limits on independent expenditures *in general*, it has made an important exception for spending by foreign entities.

Federal law already prohibits foreign nationals—a category defined by federal law to include foreign governments, corporations incorporated or with their principal place of business in foreign countries, and individuals who are not U.S. citizens or lawful permanent residents—from spending money on federal, state, or local elections.[2] In the 2012 decision *Bluman v. Federal Election Commission*, the Supreme Court upheld this law against a post-*Citizens United* constitutional challenge, confirming the federal government's ability to ban independent expenditures by foreign nationals.[3] As explained by the lower court opinion in that case, written by then-Circuit Judge Brett Kavanaugh and affirmed by the Supreme Court, the legal rationale for restricting political spending by foreign nationals is that "foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[4]

The Supreme Court's decision in *Citizens United* created a loophole through which foreign investors can circumvent this ban using the corporate form. Yet if foreign investors do not have a constitutional right to spend money to influence federal, state, or local elections, then they do not have a constitutional right to use the corporate form to do indirectly what they could not do directly.[5] This logic applies to a foreign investor that is located within the United States, but it is even stronger when applied to the types of foreign entities (sovereign wealth funds, banks, private equity funds, and insurance conglomerates) that tend to own large stakes in U.S. corporations, which are almost always located abroad. In the recent case *Agency for International*

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[1] *See* U.S. Const. art. I, § 9, cl. 8 (prohibiting federal officials from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State").

[2] 52 U.S.C. § 30121(a).

[3] Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012) (mem.).

[4] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court), *aff'd mem.*, 565 U.S. 1104 (2012). Despite this quotation's reference to "foreign citizens," the *Bluman* decision later noted that the federal statute specifically does *not* define lawful permanent residents as "foreign nationals" subject to the political spending prohibition. *See id.* at 292. Since the bills use the exact same definition of "foreign national" as does the federal law, lawful permanent residents would not be affected in the slightest.

[5] *See* Ellen Weintraub, "Taking on *Citizens United*," Mar. 30, 2016, N.Y. TIMES, https://nyti.ms/1qhmpKB.

Development v. Alliance for Open Society, the Supreme Court held that foreign entities located abroad have *no* rights under the First Amendment to the U.S. Constitution.[6]

This is not only an issue of corporations that are majority-owned by foreign investors. As I told the federal House of Representatives Committee on the Judiciary shortly after the *Citizens United* decision, the same Supreme Court that decided *Citizens United* would probably have upheld a law limiting political advertising by corporations with a considerably smaller percent of equity held by foreign investors.[7] Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign investors.

Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* in 2017, the 2016 election and the federal government's failure to act shows why state and local governments should close the foreign corporate political spending loophole.[8] I believe San Jose's interest in local self-government provides a comparable and constitutionally sufficient ground to support regulating independent expenditures, and contributions to super PACs, by such "foreign-influenced corporations." As such, I believe such a policy to be constitutional under the Court's *Citizens United, Bluman*, and *Agency for International Development* decisions, and a reasonable complement to existing federal law.

Similar logic applies to prohibitions on spending by foreign-influenced corporations in ballot measure elections. In most cases, current precedent bars limits on contributions, or corporate spending, in ballot measure elections.[9] The underlying principle is that, unlike candidate elections, ballot measure elections do not present the risk of *corruption* since there is no candidate to be corrupted. However, the courts have not considered the role of foreign influence in ballot measure elections,[10] and the general rule is likely to admit exceptions. It seems nearly unimaginable, for instance, that a court would invalidate a law banning foreign governments from spending

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[6] Agency for Int'l Development v. Alliance for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2087 (2020).

[7] Laurence H. Tribe, "Citizens United v. Federal Election Commission: How Congress Should Respond," Testimony to U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties 7 (Feb. 3, 2010).

[8] *See* Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, http://bit.ly/2fOULSH.

[9] *See* Citizens Against Rent Control. v. City of Berkeley, 454 U.S. 290 (1981); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[10] *Bluman* specifically noted that its holding "does not address such questions" because ballot measure campaigns were not at issue in that case. *See* 800 F. Supp. 2d at 292.

money to influence ballot questions. The same would likely apply to foreign investors themselves. Proceeding by the same logic discussed earlier, if a foreign investor cannot spend its own money to influence a ballot measure election, then it ought not be able to do so through a corporation.

Conclusion

I applaud the San Jose City Council for considering issues so critical to the health of our democracy, and I thank you for sparking an admirable effort to guard our political systems from the dangers posed by foreign corporate spending. I am confident that the U.S. Supreme Court would uphold a ban on foreign-influenced corporations' independent expenditures, electioneering communications, expenditures on ballot measure campaigns, or contributions to super PACs or ballot question committees.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

[redacted]

Laurence H. Tribe
Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus
Harvard Law School

City Council
San Jose, California

RE: Campaign finance reform memo re: campaign spending by foreign-influenced corporations (endorse)

March 21, 2022

Dear Mayor Liccardo, Vice Mayor Jones, and Councilmembers,

I write in support of the memo recommending that the Council direct staff to return to Council with a draft ordinance prohibiting political spending by foreign-influenced corporations.

I am the Legal Director of Free Speech For People, a national nonpartisan non-profit organization, that works to renew our democracy and to limit the influence of money in our elections. We have helped develop legislation to limit corporate political spending by partially-foreign-owned (foreign-influenced) corporations. Specifically, we helped develop a law passed by Seattle, Washington in 2020; a bill that this month passed the New York Senate; a bill introduced this month into the U.S. House of Representatives by Rep. Jamie Raskin; and similar legislation introduced into several state legislatures, including California (AB 1819).

We also share with you, and incorporate by reference, written testimony prepared by Professor John C. Coates IV, Harvard Law School (and former General Counsel of U.S. Securities and Exchange Commission), a leading national expert on corporate law and governance in support of the Seattle legislation, to which this policy would be very similar.[1] I have appended this letter to this testimony, along with a copy of California AB 1819, recently introduced in the Assembly.

If you have any questions, we would be happy to discuss.

Sincerely,

Ron Fein, Legal Director
Courtney Hostetler, Senior Counsel
John Bonifaz, President
Ben Clements, Board Chair and Senior Legal Advisor
Free Speech For People

[1] It is included only for informational purposes regarding the expert's support of the Seattle legislation.

I. General and legal background

Under well-established federal law, recently upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend any amount of money at all to influence federal, state, or local elections.[2] This existing provision does not turn on whether the foreign national comes from a country that is friend or foe, nor the amount of money involved. Rather, as then-Judge (now Justice) Brett Kavanaugh wrote in the seminal decision upholding this law:

> 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. It follows, therefore, 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.[3]

Federal law, however, leaves a gap that has been opened even further since the U.S. Supreme Court's 2010 *Citizens United* decision invalidated laws that banned corporate political spending.[4] While the existing federal statute prohibits a *foreign-registered corporation* from spending money on federal, state, or local elections, federal law does not address the issue of political spending by *U.S. corporations that are partially owned by foreign investors.* That is the topic here.

The *Citizens United* decision three times described the corporations to which its decision applied as "associations of citizens."[5] On the topic of corporations partly owned by foreign investors, the Supreme Court simply noted "[w]e need not reach the question" because the law before it applied to *all* corporations.[6] As a result, federal law currently does not prevent a corporation that is partly owned by foreign investors from making contributions to super PACs, independent expenditures, expenditures on ballot measure campaigns, or even (in states where it is otherwise legal) contributing directly to candidates.

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[2] 52 U.S.C. § 30121.

[3] Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd,* 132 S. Ct. 1087 (2012); *see also* United States v. Singh, 979 F.3d 697, 710-11 (9th Cir. 2020), cert. denied sub nom. Matsura v. United States, No. 20-1167, 2021 WL 2044557 (May 24, 2021).

[4] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[5] *Citizens United*, 558 U.S. at 349, 354, 356. Many scholars have criticized the Court's understanding of the corporate entity as an association. *See, e.g.,* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 Wis. L. Rev. 451 (2019). However misguided, this account reflects the reasoning that the Court has adopted in extending constitutional rights to corporations.

[6] *Id.* at 362.

Since 2010, neither Congress nor the beleaguered Federal Election Commission have done anything. However, as Professor Laurence Tribe of Harvard Law School and Federal Election Commissioner Ellen Weintraub have written, a city such as San Jose does not need to wait for federal action to protect its state and local elections from foreign influence. The goal of this bill is to plug the loophole allowing corporations partly or wholly owned by foreign interests to influence elections.

This threat is real. For example, Uber has shown an increasing appetite for political spending in a variety of contexts. In California, the company spent some $58 million on Proposition 22, which successfully overturned worker protections for Uber drivers.[7] The company is currently preparing to spend millions on a similar ballot measure in Massachusetts. Although Uber started in California, the Saudi government made an enormous (and critical) early investment, and even now owns several percent of the company's stock, long after the company has gone public.[8] Fellow Proposition 22 major spenders, such as DoorDash and Lyft, are also substantially owned by foreign investors from countries including the United Kingdom, Japan, Malaysia, China, and elsewhere.

Similarly, in October 2016, Airbnb responded to the New York Legislature's growing interest in regulating the homestay industry by arming a super PAC with $10 million to influence New York's legislative races.[9] Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-

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[7] Ryan Menezes et al., "Billions have been spent on California's ballot measure battles. But this year is unlike any other," L.A. Times, Nov. 13, 2020, https://lat.ms/3gRct8d; Glenn Blain, "Uber spent more than $1.2M on efforts to influence lawmakers in first half of 2017," N.Y. Daily News, Aug. 13, 2017, http://bit.ly/39HJLRf; Karen Weise, "This is How Uber Takes Over a City," Bloomberg, June 23, 2015, http://bloom.bg/1Ln2MaN.

[8] Eric Newcomer, "The Inside Story of How Uber Got Into Business with the Saudi Arabian Government," Nov. 3, 2018, https://bloom.bg/2SWWDgv. As of this writing, the Public Investment Fund of Saudi Arabia owns 3.9% of Uber stock. *See* Uber, https://www.cnbc.com/quotes/UBER?tab=ownership (last visited Mar. 8, 2021).

[9] Kenneth Lovett, *Airbnb to spend $10M on Super PAC to fund pre-Election day ads*, N.Y. Daily News, Oct. 11, 2016, http://nydn.us/2EF5Lgi.

linked) DST Global.[10] Investment by foreign sovereign wealth funds, like Saudi Arabia's, is expected to increase exponentially as oil-rich Middle Eastern states seek to diversify their investment portfolios.[11]

In the New York Times, Federal Election Commissioner Ellen Weintraub explained the problem, and pointed to a solution: "Throughout *Citizens United*, the court described corporations as 'associations of citizens," she wrote. "States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens—and enforce the ban on foreign political spending against those that are not."[12]

As Weintraub noted, even partial foreign ownership of corporations calls into question whether *Citizens United*, which three times described corporations as "associations of citizens" and which expressly reserved questions related to foreign shareholders,[13] would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal ban on foreign nationals spending their *own* money in U.S. elections.[14] In light of the Court's post-*Citizens United* decision in *Bluman*, a restriction on political spending by corporations with foreign ownership at levels potentially capable of influencing

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[10] *See* Jon Swaine & Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian, Nov. 5, 2017, https://bit.ly/3ppmIF5; Dan Primack, *Yuri Milner adds $1.7 billion to his VC war chest,* FORTUNE, Aug. 3, 2015, https://bit.ly/3jnhNkb (DST Global is Moscow based); Scott Austin, *Airbnb: From Y Combinator to $112M Funding in Three Years*, The Wall Street Journal, July 25, 2011, https://on.wsj.com/2STNYvj. Reportedly, $40 million of the $112 million that Airbnb raised in its 2011 funding round came from DST Global. *See* Alexia Tsotsis, *Airbnb Bags $112 Million In Series B From Andreessen, DST And General Catalyst*, TechCrunch, July 24, 2011, http://tcrn.ch/2EF6IF2.

[11] According to one report, Saudi Arabia's Public Investment Fund is expected to deploy $170 billion in investments over the next few years. Sarah Algethami, *What's Next for Saudi Arabia's Sovereign Wealth Fund*, Bloomberg BusinessWeek, Oct. 21, 2018, https://bloom.bg/2sQNJGF.

[12] Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, http://nyti.ms/1SwK4gK.

[13] *Citizens United*, 558 U.S. at 349, 354, 356, 362.

[14] Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd,* 132 S. Ct. 1087 (2012). In 2019, the U.S. Court of Appeals for the Ninth Circuit upheld federal statute's foreign national political spending ban as applied to local elections. *Singh*, 924 F.3d at 1042.

corporate governance can be upheld based on *Bluman* and as an exception to *Citizens United*.[15]

II. Foreign influence and ownership thresholds

How much foreign investment renders a corporation's political spending problematic for protection of democratic self-government? Arguably, *any* foreign ownership in companies that spend money to influence our elections is a threat to democratic self-government. In the most commonly accepted understanding, corporate shareholders are "the firm's residual claimants."[16] As explained Put by the California Court of Appeal, "it is the shareholders who own a corporation, which is managed by the directors. In an economic sense, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets . . . ."[17]

In practice, shareholders rarely have the opportunity to actually assert these residual claims. Yet there is a sense in which investors and corporate managers alike understand that the corporation's assets "belong to" the shareholders.

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[15] A similar analysis would also apply to *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which addressed limits on corporations spending in ballot question elections.

[16] Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 449 (2001); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U.L. Rev. 547, 565 (2003) ("[M]ost theories of the firm agree, shareholders own the residual claim on the corporation's assets and earnings."); Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (1991) (arguing that shareholders are entitled to whatever assets remain after the company has met its obligations, and thus are the ultimate "residual claimant[s]" on a company's assets). While different theories are sometimes offered in academic literature, this is the standard economic model of shareholders of a firm, and it has been widely adopted in judicial decisions. *See, e.g.,* RTP LLC v. ORIX Real Est. Cap., Inc., 827 F.3d 689, 692 (7th Cir. 2016) ("Stockholders and owners of other equity interests have residual claims in a business; they get whatever is left after everyone else is paid."); In re Franchise Servs. of N. Am., Inc., 891 F.3d 198, 208 n.7 (5th Cir. 2018), as revised (June 14, 2018) ("Shareholders are the residual claimants of the estate," and are entitled to whatever remains after satisfying creditors); In re Cent. Ill. Energy Coop., 561 B.R. 699, 708 (Bankr. C.D. Ill. 2016) (noting that directors have fiduciary duty to shareholders rather than creditors precisely because "shareholders hav[e] the residual claim to the corporation's equity value").

[17] Berg & Berg Enter., LLC v. Boyle, 100 Cal. Rptr. 3d 875, 892, 178 Cal. App. 4th 1020, 1039 (Cal. App. 2009); *accord* In re Bear Stearns Litig., 23 Misc. 3d 447, 474, 2008 WL 5220514 (N.Y. Sup. 2008) (shareholders are "residual beneficiaries of any increase in the company's value" when it is solvent) (cleaned up).

That means that corporate political spending is drawn from shareholders' money. As Justice Stevens noted in the *Citizens United* decision, "When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill."[18] This point has often been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.[19] But here, we confront the mirror issue: corporate managers may spend money to influence U.S. elections out of funds that partly "belong to" foreign investors.

On this understanding, *any* amount of foreign investment in a corporation means that management's political expenditures come from a pool of partly foreign money. Seen that way, a corporation spending money in U.S. elections no longer qualifies as an "association of citizens" if *any* of the money in its coffers "belongs to" foreign investors—in other words, when it has any foreign shareholders at all.[20] Indeed, polling indicates that 73% of Americans—including majorities of both Democrats and Republicans—would support banning corporate political spending by corporations with *any* foreign ownership.[21]

But we need not reach that far. At ownership thresholds well above zero, an investor may exert *influence*—explicit or implicit—over corporate decision-making. Even if a company was founded in the United States and keeps its main offices here, companies are responsive to their shareholders, and significant foreign ownership affects corporate decision-making. As the former CEO of U.S.-based ExxonMobil Corp. stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[22] There is no evidence that political spending is magically exempt from this general rule.

To someone not deeply versed in corporate governance, it may seem that the right threshold for the point at which a foreign investor (or any investor) can exert influence is just over 50%. That is, after all, the threshold for winning a race

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[18] Citizens United v. Federal Election Comm'n, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting).
[19] *See, e.g.,* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 85 (2010).
[20] By analogy, in the class-action context, some courts hold that a class cannot be certified if even a single member cannot bring the claim. *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III standing").
[21] Ctr. for Am. Progress Action Fund, *NEW POLL: Bipartisan Support for Banning Corporate Spending in Elections by Foreign-Influenced U.S. Companies*, https://bit.ly/3CrcWFV.
[22] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT.

between two candidates, or controlling a two-party legislature. But corporations are not legislatures. A better analogy might be a chamber with many millions of uncoordinated potential voters, most of whom rarely vote and who may be, for one reason or another, effectively *prevented* from voting. In that type of environment, a disciplined owner (or ownership bloc) of 1% can be tremendously influential.

As explained in more detail in written testimony submitted by Professor John Coates of Harvard Law School in support of similar legislation elsewhere, and in a recent report by the Center for American Progress,[23] the thresholds in this bill—1% of stock owned by a single foreign investor, or 5% owned by multiple foreign investors—reflect levels of ownership that are widely agreed (including by entities such as the Business Roundtable) to be high enough to influence corporate governance. Corporate governance law gives substantial formal power to minority shareholders at these levels, and this spills out into even greater unofficial influence. For this reason, since the passage of Seattle's 2020 law, newer bills—currently pending in states such as New York, Massachusetts, and Minnesota, and in the U.S. Congress—generally follow the Seattle model.

Federal securities law provides powerful tools of corporate influence to investors at these levels. Seattle's 1% threshold was grounded in a rule of the U.S. Securities and Exchange Commission regarding eligibility of shareholders to submit proposals for a shareholder vote—a threshold that the SEC ultimately concluded was, if anything, *too high*.[24] For a large multinational corporation, an investor that owns 1% of shares might well be the largest single stockholder; it would generally land

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[23] *See* Michael Sozan, Ctr. for American Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), https://ampr.gs/2QIiNQT.

[24] Until November 4, 2020, owning one percent of a company's shares allows an owner to submit shareholder proposals, which creates substantial leverage. *See Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 70,240, 70,241 (Nov. 4, 2020). The SEC proposed to eliminate this threshold, and rely solely on absolute-dollar ownership thresholds that correspond to far *less* than 1% of stock value, because it is fairly uncommon for even a major, active institutional investor to own 1% of the stock of a publicly-traded company. *See* SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66,458 (Dec. 4, 2019) (proposed rule). In other words, recent advances in corporate governance law suggest that the 1% threshold may, if anything, be *higher* than appropriate to capture investor influence. That said, 1% remains appropriate for this purpose.

among the top ten. Conversely, as the SEC has acknowledged, many of the investors *most active* in influencing corporate governance own well below 1% of equity.[25]

Of course, this does not mean that *every* investor who owns 1% of shares will *always* influence corporate governance, but rather that the business community generally recognizes that this level of ownership presents that opportunity, and—for a foreign investor in the context of corporate political spending—that risk.

In other cases, no single foreign investor holds 1% or more of corporate equity, but multiple foreign investors own a substantial aggregate stake. To pick one example, at the moment of this writing (it may change later, of course, due to market trades), Amazon does not have any 1% foreign investors, but at least 8.3% of its equity (and possibly much more) is owned by foreign investors.[26] While presumably foreign investors as a class are not all perfectly aligned on all issues, they can be assumed to share certain common interests and positions that may, in some cases, differ from those of U.S. shareholders—certainly when it comes to matters of San Jose public policy. As the Center for American Progress has noted:

> Foreign interests can easily diverge from U.S. interests, for example, in the areas of tax, trade, investment, and labor law. Corporate directors and managers view themselves as accountable to their shareholders, including foreign shareholders. As the former CEO of U.S.-based Exxon Mobil Corp. starkly stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[27]

Neither corporate law nor empirical research provide a bright-line threshold at which this type of aggregate foreign interest begins to affect corporate decision-making, but anecdotally it appears that CEOs do take note of this aggregate foreign

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[25] *See id.* at 66,646 & n.58 (noting that "[t]he vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold," including major institutional investors such as California and New York public employee pension funds).

[26] *See Amazon.com*, CNBC, https://cnb.cx/2JShvAt (visited Oct. 20, 2021) (ownership tab). As of the date of writing, at least one foreign investor (Norges Bank) holds 0.9% but no foreign investor is known to hold 1.0% or more. Aggregate ownership data, however, shows 7.4% in Europe (including Russia) and 0.9% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 57.4% of shares owned in North America. CNBC obtains its geographic ownership concentration data from Thomson Reuters, which in turn obtains it from Refinitiv, a provider of financial markets data that has access to some non-public sources.

[27] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT.

ownership and that at a certain point it affects their decision-making. The Seattle model legislation selects a 5% aggregate foreign ownership threshold. Under federal securities law, 5% is the threshold that Congress has already chosen as the level at which a single investor *or group of investors working together* can have an influence so significant that the law requires disclosure not only of the stake, but also the residence and citizenship of the investors, the source of the funds, and even in some cases information about the investors' associates.[28] In this case, while it may not be appropriate to treat unrelated foreign investors as a single bloc for *all* purposes, it is appropriate to do so in the context of analyzing how corporate management conceive decision-making regarding political spending in U.S. elections.

Obviously, some companies do not have substantial foreign ownership. Even of those that do, many probably do not spend corporate money on San Jose elections. Such companies either would not be covered at all (if they did not meet the threshold) or would not experience any practical impact (if they do not spend corporate money for political purposes).

The point here is *not* that FICs do not have connections to San Jose, nor that foreign investment in local companies should be discouraged, nor that the foreign owners of these companies are necessarily known to be exerting influence over the companies' decisions about corporate political spending, nor that they would do so nefariously to undermine democratic elections. Rather, the point is simply that *Citizens United* accorded corporations the right to spend money in our elections on the theory that corporations are "associations of citizens." But for companies of this type, that theory does not apply. Enough shares are owned or controlled by a foreign owner that the corporation's spending is at least, in part, drawn from money that "belongs to" that foreign entity—and furthermore, the entity could exert influence over how the corporation spends money from the corporate treasury to influence candidate elections.

Finally, to reiterate, the bill does not limit in any way how employees, executives, or shareholders of these companies may spend their *own* money—just how the foreign-influenced business entities' potentially vast corporate treasuries may be deployed to influence San Jose electoral democracy.

III. Frequently asked questions

Does this bill affect individual immigrants?
No. The bill regulates *corporate* political spending by business entities.

[28] 15 U.S.C. §§ 78m(d)(1)-(3).

What types of companies are covered?
The bill uses the term "corporation" for convenience, but defines it broadly to include a for-profit corporation, company, limited liability company, limited partnership, business trust, business association, or other similar for-profit business entity.

Has the policy been endorsed by leading scholars and experts?
The model legislation has been endorsed by Professor Laurence Tribe of Harvard Law School and Professor Adam Winkler of the University of California Law School, experts in constitutional law; Professor John C. Coates IV of Harvard Law School (also a former General Counsel and Director of the Division of Corporate Finance at the U.S. Securities Exchange Commission) and Professor Brian Quinn of Boston College School of Law, experts in corporate law and governance; and Federal Election Commissioner Ellen Weintraub, expert in election law.[29]

Does the bill have bipartisan support?
A 2019 national poll of 2,633 voters showed that 73%—including majorities of both Democrats and Republicans—would support banning corporate political spending by corporations with *any* foreign ownership.[30] Even after polled individuals were deliberately exposed to partisan framing and opposition messages, voters continued to support the policy 58-24 overall; Trump voters supported it 52-30 and Clinton voters supported it 68-20.

Does the bill prevent corruption?
The Supreme Court currently recognizes two distinct public interests in regulating the amounts and sources of money in politics: (1) preventing corruption or the appearance of corruption, and (2) protecting democratic self-government against foreign influence. This bill focuses on the latter.

As Judge Kavanaugh explained in *Bluman*, the public "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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[29] *See* Letter from Prof. Laurence H. Tribe to Mass. Legis. Joint Comm. on Election Laws, Sept. 15, 2021, https://bit.ly/3E0CkTs; Letter from Fed. Election Comm'r Ellen L. Weintraub to Mass. Legis. Joint Comm. on Election Laws, Sept. 17, 2021, https://bit.ly/3EenbhN; Letter from Prof. John C. Coates IV to Seattle City Council, Jan. 3, 2020, https://bit.ly/3jjvfFP. Professors Winkler and Quinn have authorized us to convey their endorsement for the policy but have not reviewed specific bill language in this jurisdiction.

[30] Ctr. for Am. Progress Action Fund, NEW POLL: Bipartisan Support for Banning Corporate Spending in Elections by Foreign-Influenced U.S. Companies, https://bit.ly/3CrcWFV.

preventing foreign influence over the U.S. political process."[31] The U.S. Court of Appeals for the Ninth Circuit has confirmed that this interest applies to state elections as well.[32]

Is the bill "narrowly tailored" to protecting democratic self-government?
Yes. The public interest in protecting democratic self-government from foreign influence is particularly strong, and supports a wide range of restrictions ranging from investment in communications facilities to municipal public employment.[33] In the specific context of political spending, the facts of the *Bluman* decision are worth noting. The lead plaintiff wanted to contribute to three candidates (subject to dollar limits that in theory minimize the risk of *corruption*) and "to print flyers . . . and to distribute them in Central Park."[34] All these were banned by the federal statute, and the court upheld the ban on all of them.

In other words, in a context where the risk of corruption was essentially nil, the court found that the interest in protecting democratic self-government from foreign influence is so strong that a law that prohibits *printing flyers and posting them in a park* is narrowly tailored to that interest. Given that, a ban on corporate political spending—with the potential for far greater influence on elections than one individual printing flyers—by corporations with substantial foreign ownership, at levels known from corporate governance literature to bring the potential for investor influence, is also narrowly tailored to the same interest.

Does this bill go further than the federal statute at issue in Bluman?
Yes; that is the point. The federal statute prevents foreign entities from spending money directly in federal, state, or local elections.[35] The proposed bill applies to companies where those same foreign entities own substantial investments.

Has any court decided how much foreign ownership of a corporation renders a corporation "foreign" for purposes of First Amendment analysis?
No. That issue was not before the Supreme Court in *Citizens United*, and the Court expressly decided *not* to decide that question.[36] The majority opinion did make a passing reference to corporations "funded predominately by foreign shareholders" as

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[31] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), aff'd, 565 U.S. 1104 (2012).
[32] United States v. Singh, 924 F.3d 1030, 1042 (9th Cir. 2019).
[33] *See Bluman*, 800 F. Supp. 2d at 287 (collecting Supreme Court cases upholding limits on noncitizen employment in a wide variety of local positions); 47 U.S.C. § 310(b) (banning issuance of broadcast or common carrier license to companies under minority foreign ownership).
[34] *Id.* at 285.
[35] 52 U.S.C. § 30121, formerly codified as 2 U.S.C. § 441e.
[36] *See Citizens United*, 558 U.S. at 362.

the type of issue that the decision was *not* addressing. This is what lawyers call "dictum"—something mentioned in a judicial opinion that is not part of its holding. Similarly, in *Bluman*, Judge Kavanaugh wrote that "[b]ecause 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."[37] For purposes of poltical spending, the question of how much foreign ownership is "too much" has not yet been decided by any court.

The analysis in the main part of the above memorandum shows how arguably *any* foreign ownership renders the entire pool of corporate funds foreign. However, the bill focuses more narrowly on corporations where foreign holdings exceed thresholds, established from empirical corporate governance research, where investors can exert influence on executives' decisions.

Notably, the Seattle Clean Campaigns Act (the model upon which this bill is based) has been in effect since February 2020, including the vigorously contested 2021 citywide election featuring an expensive mayoral race, yet none of the many multinational corporations in Seattle have been impelled to challenge it.

Do corporations know who their shareholders are?

Managers of privately-held corporations may know the identity of all shareholders at all times. Managers of publicly-traded corporations do not know moment to moment, but can obtain a complete list of shareholders and number of shares owned for any particular "record date," They do this on a regular basis for routine corporate purposes, such as the corporate annual meeting. For more detail, see the letter from Professor John C. Coates IV of Harvard Law School, a former General Counsel and Director of the Division of Corporate Finance at the U.S. Securities Exchange Commission.[38]

[37] *Bluman*, 800 F. Supp. 2d at 292 n.4.

[38] Letter from Prof. John C. Coates IV to Seattle City Council, Jan. 3, 2020, https://bit.ly/3jjvfFP.

How many companies would be covered by the bill?
Foreign investment in U.S. companies has increased dramatically in recent years: "from about 5% of all U.S. corporate equity (public and private) in 1982 to more than 20% in 2015."[39] By 2019, that figure had increased to 40%.[40]

However, foreign ownership is not evenly distributed. Analysis by the Center for American Progress found that the thresholds in this bill would cover 98% of the companies listed on the S&P 500 index, but only 28% of the firms listed on the Russell Microcap Index—among the smallest companies that are publicly traded.[41]

It is much more difficult to obtain data regarding ownership of privately-held companies. Intuition suggests that the vast majority of small local businesses have zero foreign ownership.

Does the bill violate the rights of U.S. investors?
No. Obviously, individual U.S. investors may spend unlimited amounts of their *own* money on elections.

The question might be framed as whether the bill restricts the ability of U.S. investors to spend their money *through the vehicle of a corporation in which they share ownership with foreign investors*. At the outset, the assumption embedded in this framework is somewhat unrealistic; few if any U.S. investors buy stock in a for-profit business entity with the expectation that, the corporation will engage in regulated political campaign spending.[42] But even if so, any right to invest in a corporation with that expectation is limited by valid restrictions imposed on the *other* co-owners of the corporation, namely, foreign investors. Any impact on *U.S. investors who have chosen to invest jointly with foreign investors* is incidental to the primary purpose of preventing foreign influence.

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[39] John C. Coates IV, Ronald A. Fein, Kevin Crenny, & L. Vivian Dong, *Quantifying foreign institutional block ownership at publicly traded U.S. corporations*, Harvard Law School John M. Olin Center Discussion Paper No. 888 (Dec. 20, 2016), Free Speech For People Issue Report No. 2016-01, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.
[40] *See* Steve Rosenthal and Theo Burke, *Who's Left to Tax? US Taxation of Corporations and Their Shareholders*, Urban-Brookings Tax Policy Ctr., paper presented at NYU School of Law (Oct. 27, 2020), https://bit.ly/3uLjVqE.
[41] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 42-45, https://ampr.gs/2QIiNQT.
[42] *See* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 Wis. L. Rev. 451, 451 (2019) (noting that for many American investors, corporate political spending "has no rational connection to their reason for investing").

By analogy, in upholding a State Department order to shut down a foreign mission even though it had U.S. citizen and permanent resident employees, the U.S. Court of Appeals for the D.C. Circuit noted: "[The order] does not prevent [plaintiffs] from advocating the Palestinian cause, nor from expressing any thought or making any statement that they could have made before its issuance. The order prohibits [them] only from speaking *in the capacity of a foreign mission of the PLO*."[43]

Similarly, the U.S. investors can spend their money directly on political campaigns, or they can invest in a *different* corporation that is *not* foreign-influenced and which may spend treasury funds on political campaigns. If corporate political spending can be described as partly the speech of U.S. investors, then the bill prohibits them only from speaking *in the capacity of investors in a foreign-influenced corporation.*

Finally, the question could be framed as involving freedom of association for those U.S. investors who "associate" with foreign investors in a corporation. But a recent U.S. Supreme Court decision, written by Justice Kavanaugh, held that U.S. citizens cannot "export" or extend their own constitutional rights to foreign entities. In *Agency for International Development v. Alliance for Open Society Int'l, Inc*., the Court considered a statute that imposed speech-related conditions on funding. After first holding that the conditions violated the First Amendment rights of U.S. funding recipients, the Court then *rejected* a constitutional challenge on behalf of the foreign entities with which those U.S. entities associated. The Court explained that U.S. entities "cannot export their own First Amendment rights" to the foreign entities with which they associate.[44] The Court's reasoning leads to the same result when U.S. entities associate with foreign nationals in the corporate form: the mere fact that U.S. citizens have the independent right to contribute and make expenditures does not mean that those rights will flow to any association they form.

What if a U.S. investor holds a majority or controlling share?
The danger of foreign participation remains. As corporate law expert Professor John Coates of Harvard Law School and his co-authors note:

> A stylized and largely uncontested fact is that institutional shareholders—the most likely to be blockholders of U.S. public companies—are increasingly influential in the governance of those companies. Various changes in markets and regulation have increased the ability of such institutions to encourage, pressure or force boards to adopt policies and positions that twenty years ago would have been beyond their reach. Board members are spending increased amounts of time responding to and directly "engaging" with blockholders. While in

[43] Palestine Information Office v. Shultz, 853 F.2d 932, 939 (D.C. Cir. 1988) (emphasis in original).
[44] 140 S. Ct. 2082, 2088 (2020).

> the past legal regimes tested "control" of foreign nationals at higher levels of ownership—majority voting power, or 25% blocks for example—those regimes may no longer catch the new forms of institutional influence.[45]

As it happens, federal communications law has been addressing a very similar issue for nearly 90 years. Since 1934, section 310 of the federal Communications Act has prohibited issuance of broadcast or common carrier licenses to companies with one-fifth foreign ownership.[46] Obviously, that raises a similar issue: a company with one-fifth foreign ownership has four-fifths U.S. ownership. Yet, as Congress determined, the risks were too great even with a four-fifths U.S. owner.

It makes little sense to say that a corporation with 75% U.S. ownership is too foreign-influenced to own a small local terrestrial radio station with limited reach, but not too foreign-influenced to spend tens of millions of dollars on statewide elections. Put another way, a U.S. investor that owns a very large percentage of a company but has foreign co-investors may be better suited choosing a different investment vehicle for buying radio stations *or* for spending money in elections.

We are only aware of one constitutional challenge to Section 310 in its nearly 90-year-history—the challenge concerned a slightly different point, but the court upheld the provision.[47] The same logic would apply to this bill.

What if the corporation takes proactive steps to ensure that foreign investors have no influence on corporate decision-making regarding political spending?

The issue is generally not that foreign investors are directly participating in corporate decision-making regarding political spending. In major corporations, most investors do not participate in day-to-day operational decisions.

Rather, the issue is that corporate executives are fully aware of their major investors, act with a fiduciary duty towards those investors, and tend to avoid taking action that they anticipate will displease those major investors. Among other

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[45] Coates et al., *supra* note 39, at 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.

[46] *See* 47 U.S.C. § 310(b).

[47] *See* Moving Phones P'ship LP v. FCC, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (applying rational basis review because "[t]he opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community"). Other courts have upheld related provisions of the same act that are even *more* restrictive than section 310. *See, e.g.*, Campos v. FCC, 650 F.2d 890, 891 (7th Cir. 1981) (upholding against constitutional challenge a Communications Act provision barring even *permanent residents* from holding radio operator licenses).

considerations, major investors have multiple options for influencing corporate governance writ large: they can submit shareholder proxy resolutions; they can attempt to replace directors on the board, and demand a change in management; in publicly traded corporations, they can dump their shares, decreasing the value of executives' stock options; etc. Investors do not need to literally be in the conference room debating specific political expenditures to exert an influence, any more than voters need to be in the conference room during legislative debates to exert an influence on elected officials.

A similar question has repeatedly arisen in the context of the Communications Act, where partly-foreign-owned entities have sought broadcast or common carrier licenses, claiming that they had developed contractual or other internal measures to insulate decision-making from foreign partners or investors. Courts have consistently rejected such challenges.[48]

Does the bill apply to non-profits?

The bill indirectly applies to non-profits that receive contributions from business entities. To prevent circumvention, the bill provides that any "person" (entity) that receives a contribution from a business entity can only spend those funds on political spending *if* the business entity also provided a certification that it is not foreign-influenced. In other words, if the business entity donor provides a certification that it is not foreign-influenced, then the recipient may spend the money on political spending to the extent otherwise permitted by law; if the business entity donor does *not* provide such a certification, then the recipient may only use the donation for other (non-political) spending. This makes it harder for foreign-influenced business entities to "launder" political spending through non-profits or other intermediaries.

The bill does not apply to a non-profit that receives a contribution directly from a foreign national; that situation is already substantially addressed by federal law.[49] The gap that the bill aims to plug pertains to foreign *investors* in U.S. corporations; there is no directly analogous gap in the law for non-profits.

Does the bill apply to labor unions?

No. The noncitizen, non-permanent resident workers who may be members of U.S. labor unions are qualitatively different from the foreign entities that invest in U.S. corporations. Almost without exception, immigrant workers in U.S. labor unions are

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[48] *See* Cellwave Tel. Servs. LP v. FCC., 30 F.3d 1533, 1535 (D.C. Cir. 1994) (rejecting argument that FCC should have granted license to partly-foreign-owned partnership because "the alien partners had insulated themselves by contract from any management role in the partnerships"); Moving Phones P'ship L.P. v. FCC, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993) (same).

[49] *See* 52 U.S.C. § 30121(a)(2).

physically located in the United States, where they enjoy *most* rights under the U.S. Constitution; activities related to democratic self-government (including political spending) are the exception. By contrast, with rare exceptions, foreign investors in U.S. corporations are physically located abroad.[50] Under the Supreme Court's 2020 decision in *Agency for International Development v. Alliance for Open Society,* foreign entities located abroad have *no rights whatsoever* under the U.S. Constitution.[51] This weaker constitutional status of foreign entities located abroad makes the law more constitutionally defensible when limited to foreign-influenced business entities.

[50] A major source of foreign national investors who actually reside in the United States is the EB-5 Immigrant Investors Visa Program. Under this program, approximately 10,000 visas per year are issued to foreign investors who invest at least $500,000 in American businesses. Notably, an EB-5 visa grants "conditional permanent residence." Since 52 U.S.C. § 3012(b)(2) defines a "foreign national" as someone "who is not lawfully admitted for permanent residence, an EB-5 investor might not be considered a "foreign national" under 52 U.S.C. § 30121.

[51] Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 140 S. Ct. 2082, 2086–87 (2020).

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January 3, 2020

City Council
Seattle, Washington

RE: Ordinance proposal re: political spending by foreign-influenced corporations

Dear Honorable Councilmembers,

I am writing to express my support for the proposed ordinance regarding political spending by foreign-influenced corporations. The proposal would be a critical tool for uncovering foreign influences in our elections. Unlike many commentators, my background is not in constitutional law. What I may add to this debate is corporate law knowledge – both from study as an academic and perhaps more importantly from extensive practical experience, sketched below. Drawing on that experience, below I explain how investors holding even just one percent of corporate equity can influence corporate governance, and how in corporations could – practically and at reasonable expense – obtain responsive information about the foreign national status of shareholders, as would be required by the law.

Background

I am the John F. Cogan Professor of Law and Economics at Harvard Law School, where I also serve as Special Advisor for Planning, Chair of the Committee on Executive Education and Online Learning, and Research Director of the Center on the Legal Profession. Before joining Harvard, I was a partner at Wachtell, Lipton, Rosen & Katz, specializing in financial institutions

and M&A. At HLS and at Harvard Business School, he teaches corporate governance, M&A, finance, and related topics, and I am a Fellow of the American College of Governance Counsel. I have testified before Congress and provided consulting services to the U.S. Department of Justice (DOJ), the U.S. Department of Treasury, the New York Stock Exchange, and participants in the financial markets, including hedge funds, investment banks, and private equity funds. I have served as independent consultant for the Securities and Exchange Commission (SEC), and as an independent representative of individual and institutional clients of institutional trustees and money managers, and I currently am serving as a DOJ-appointed independent monitor for one of the Global Systemically Important Financial Institutions. In June 2016, I testified by invitation at a forum on "Corporate Political Spending and Foreign Influence" at the Federal Election Commission.

Foreign corporate spending in American elections

Since the Supreme Court's 2010 *Citizens United* decision invalidated restrictions on corporate political spending,[1] the possibility that American elections could be influenced by foreign interests via corporations has attracted considerable public and policymaker interest. Foreign governments, foreign-based companies, and people who are neither U.S. citizens nor permanent residents are currently barred by federal law from contributing or spending money in connection with federal, state, or local elections.[2] Unfortunately, *Citizens United* created a loophole to this ban: these foreign entities can invest money through U.S.-based corporations that can – as a result of the decision – then spend unlimited amounts of money in American elections.

The policy interest in regulating foreign influence need not rest on the idea that foreign investors are tied to hostile governments that are actively trying to undermine the democracy or economy of the United States, although there is now evidence that Russia sought to do just that in the last presidential election, and is expected to try to do so again in future elections. In addition, it may separately rest on the observation that foreign nationals (even those in countries that are staunch U.S. allies) are simply not part of the U.S. polity. Democratic self-governance presumes a coherent and defined population to engage in that activity. Foreign nationals have a different set of interests than

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[1] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[2] 52 U.S.C. § 30121(a). This prohibition was upheld by a unanimous U.S. Supreme Court in 2012. *See Bluman v. FEC*, 132 S. Ct. 1087 (2012).

their U.S. counterparts, as regards a range of policies, such as defense, environmental regulation, and infrastructure. Few dispute the idea that a given government may properly seek to limit foreign influence over, in the words of the U.S. Supreme Court, "activities 'intimately related to the process of democratic self-government.'"[3] There is nothing particularly surprising or pernicious about this fact. Foreign and domestic interests predictably diverge.

Depending on the degree of their influence, foreign governments (or their agents, such as sovereign wealth funds), foreign corporations, or other foreign investors might be able to leverage ownership stakes in U.S. corporations to affect corporate governance. Through that channel, they could influence corporate political activity in a manner inconsistent with democratic self-government, or at least out of alignment with the interests of U.S. voters.

Every country regulates some types of foreign and domestic business activities differently. In many domains of the American economy, long-standing statutes, regulations, and legal traditions treat foreign companies or foreign-influenced companies differently than domestic companies. The United States has specific foreign restrictions across a number of different industries. In shipping, aircraft, telecom, and financial services, laws governing all of these industries limit or regulate foreign ownership or control. Some ban foreign ownership completely, and, for some, foreign ownership or control triggers special government approval procedures.

The same spirit of those bodies of law should inform regulation of election spending by foreign-influenced corporations. Since *Citizens United* opened the door for political activity by corporations, some corporations of which ownership or control is likely held in significant part by foreign entities have devoted considerable financial resources to influencing American elections.

In practice, the policy preferences of foreign-influenced corporations are sometimes clear from public sources. In May 2016, Uber and Lyft spent over $9 million on a ballot initiative in Austin, Texas that would have overturned an ordinance passed by the Austin City Council requiring the companies' drivers to submit to fingerprint-based criminal background checks.[4] Weeks later, Uber

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[3] *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011)(quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), *aff'd*, 132 S.Ct. 1087 (2012).

[4] Nolan Hicks, "Prop 1 campaign crosses $9 million threshold," AUSTIN-AMERICAN STATESMAN, May 9, 2016, http://atxne.ws/29pbFBk.

disclosed that the Saudi Arabian government had invested $3.5 billion in the company, giving the Kingdom over five percent ownership and a seat on its board of directors.[5] Also in 2016, the multinational "homestay" corporation Airbnb responded to the New York Legislature's growing interest in regulating the industry by arming a super PAC with $11 million to influence New York's legislative races.[6] Airbnb – a privately held company – is partly owned by Moscow-based DST Global.[7]

In another striking example, APIC, a San Francisco-based company described as "controlled" and "100 percent owned" by Gordon Tang and Huaidan Chen -- two Chinese citizens with permanent residence in Singapore -- gave $1.3 million to a super PAC that had supported Jeb Bush's run for president.[8] Though the story made headlines, it echoes similar, yet less publicized, efforts to influence high-profile state and national races. For example, in 2012, a Connecticut-based subsidiary of a Canadian insurance and investment corporation gave $1 million to the pro-Mitt Romney super PAC

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[5] *See* Elliot Hannon, "Saudi Arabia Makes Record $3.5 Billion Investment in Uber," SLATE, June 1, 2016, http://slate.me/1UvvM3x. Uber also spent roughly $600,000 on a 2015 voter referendum in Seattle. *See* Karen Weise, "This is How Uber Takes Over a City," BLOOMBERG, June 23, 2015, http://bloom.bg/1Ln2MaN.

[6] Kenneth Lovett, "Airbnb to spend $10 on Super PAC to fund pre-Election day ads," N.Y. DAILY NEWS, Oct. 11, 2016, http://www.nydailynews.com/news/politics/airbnb-spend-10m-super-pac-fund-pre-election-day-ads-article-1.2825469.

[7] *See* Dan Primack, "Yuri Milner adds $1.7 billion to his VC war chest," FORTUNE, Aug. 3, 2015, http://fortune.com/2015/08/03/yuri-milner-adds-1-7-billion-to-his-vc-warchest/ (DST Global is Moscow based); Scott Austin, "Airbnb: From Y Combinator to $112M Funding in Three Years, The Wall Street Journal, July 25, 2011, http://blogs.wsj.com/venturecapital/2011/07/25/airbnb-from-y-combinator-to-112m-funding-in-three-years/ (DST Global is a major investor in Airbnb).

[8] Jon Schwartz & Lee Fang, "The Citizens United Playbook," THE INTERCEPT, Aug. 3, 2016, http://bit.ly/2auW75p.

Restore Our Future.[9] In 2013, a New Jersey-based subsidiary of a Chinese-owned business contributed $120,000 directly to Terry McAuliffe's gubernatorial campaign in Virginia.[10]

Ballot initiatives have been particularly strong magnets for spending by multinational corporations. American Electric Power, Limited Brands, and Nationwide Insurance spent a combined $275,000 against a municipal initiative aimed at reconfiguring the Columbus City Council.[11] In 2012, a Los Angeles County ballot measure, the "Safer Sex in the Adult Film Industry Act," attracted over $325,000 from two companies tied to a Luxembourg corporation that ran adult webpages.[12] The company's then-CEO was a German national.[13] That same year, a statewide ballot initiative in California that would have required all foods containing genetically modified organisms to be labeled as such attracted $45 million in spending by multinationals such as Monsanto and DuPont.[14] Opponents of the measure spent five times more than its supporters, and ultimately defeated it by a 53-47 margin.[15]

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[9] Michael Beckel, "Foreign-Owned Firm Gives $1 Million to Romney Super-PAC," MOTHER JONES, Oct. 5, 2012, http://www.motherjones.com/politics/2012/10/canadian-foreign-donation-super-pac-restore-our-future.

[10] John Schwartz, "Va. Gov. Terry McAuliffe Took $120K from a Chinese Billionaire—but the Crime Is That It Was Legal," THE INTERCEPT, June 1, 2016, http://bit.ly/1XPvuXN.

[11] Lucas Sullivan, "Follow the money flowing to ward initiative campaigns in Columbus," THE COLUMBUS DISPATCH, July 22, 2016, http://bit.ly/2ahlSpq.

[12] *See* Ciara Torres-Spelliscy, "How a Foreign Pornographer Tried to Win a U.S. Election," THE BRENNAN CENTER FOR JUSTICE, Nov. 6, 2015, http://bit.ly/29pesu2.

[13] *Id.*

[14] Suzanne Goldenberg, "Prop 37: food companies spend $45m to defeat California GM label bill," THE GUARDIAN, Nov. 5, 2012, http://bit.ly/29I3SE7.

[15] *Id.*

Of course, not all politically active corporations are owned or controlled in significant part by foreign entities. Many privately held companies are owned directly by one or a small number of U.S. citizens. Among U.S. public companies, foreign ownership varies. I have carefully researched foreign ownership of large U.S. companies (see the short paper attached as an appendix to this letter) finding that, among publicly traded corporations in the Standard & Poor's (S&P) 500 index, one in eleven (~9 percent) has a foreign institutional investor with more than five percent of the company's voting shares. (Five percent was chosen for the study because it is the threshold at which federal securities law requires public disclosure of large stockholdings of US public companies.[16])

But other corporations may have foreign ownership at substantial levels that would make unaffiliated foreign investors capable of exerting influence on the corporate political spending, even at levels below five percent of total stock. One such method is by presenting proposals for a vote by the shareholders. Any investor who can present a shareholder proposal (either alone, or by working with a group of other investors) has substantial leverage. Indeed, in recent proxy seasons, the New York City Pension Fund, despite owning less than one percent of outstanding shares in the target companies, led successful shareholder proposal campaigns regarding proxy access.[17] Furthermore, this type of influence is not limited to actually presenting shareholder proposals; the ability to do so creates indirect means of influence, such as *threatening* a shareholder proposal, and it means that, in many cases, an investor at that level can get upper management, including the CEO, on the phone.

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[16] Under Section 13(d) of the Securities Exchange Act of 1934 (as amended by the Williams Act), any person or group of persons who acquire beneficial ownership of more than five percent of the voting class of the equity of a corporation that is listed or otherwise required to register as a "public" company under that law, must, within ten days, report that acquisition to the Securities and Exchange Commission (SEC) via Schedule 13D (or, in some cases, Schedule 13G). *See* 15 U.S.C. § 78m(d); 17 C.F.R. §§ 240.13d-1, 240.13d-101.

[17] See Paula Loop, "The Changing Face of Shareholder Activism," Harvard Law School Forum on Corporate Governance and Financial Regulation, Feb. 1, 2018, https://corpgov.law.harvard.edu/2018/02/01/the-changing-face-of-shareholder-activism/.

Under current federal law known as Rule 14a-8, the threshold for presenting a shareholder proposal at a publicly-traded company is owning either 1% of voting shares or $2,000 in market value.[18] Interestingly, while there is a political debate as to whether to raise or eliminate the $2,000 qualification, virtually *no one* questions that owning *at least* 1% of voting shares should continue to qualify an investor for this method of influence. Rather, the debate concerns whether that threshold is too *high*, and whether investors who own *less than 1%* should be able to present shareholder proposals.

For example, one of the first bills proposed in 2017 in the U.S. House of Representatives was the Financial CHOICE Act of 2017, which proposed to eliminate the $2,000 market value threshold, but retain the 1% ownership threshold.[19] In committee markup debate over the CHOICE Act, then-Rep. Jeb Hensarling (R-Tex.) explained that "we have something fairly reasonable and that is, you know, if you are going to put forward these proposals, have some real significant skin in the game. And what we say is 1 percent. One percent to put forward a shareholder proposal."[20]

Indeed, as part of those same political discussions, the Business Roundtable, a group of chief executive officers of major U.S. corporations formed to promote pro-business public policy, proposed a threshold *below* 1% for shareholder proposals:

> For proposals related to topics other than director elections, a truly reasonable standard could be to use a sliding scale based on the market capitalization of the company, with a required ownership percentage of **0.15 percent for proposals submitted to the largest companies and up to 1 percent for proposals submitted to smaller companies**. Additionally, if a proposal were submitted by a group or by a proponent

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[18] 17 C.F.R. 240.14a-8(b).

[19] *See* Financial CHOICE Act of 2017, H.R. 10 (115th Cong.), § 844. https://www.congress.gov/bill/115th-congress/house-bill/10/.

[20] House Financial Services Committee, remarks of Rep. Jeb Hensarling, May 3, 2017.

> acting by proxy, the ownership percentage sliding scale could be increased to up to 3 percent.[21]

In other words, the Business Roundtable recognizes that investors can *and should* have significant influence over corporate decisionmaking at ownership levels between 0.15% to 1%, or 3% for groups of investors.

In December 2019, the federal Securities and Exchange Commission formally proposed to revise Rule 14a-8 to not just lower but *eliminate* the 1% threshold for presenting shareholder proposals.[22] As the SEC explained:

> We also propose to eliminate the current 1 percent ownership threshold, which historically has not been utilized. *The vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold.* In addition, we understand that *the types of investors that hold 1 percent or more of a company's shares generally do not use Rule 14a-8 as a tool for communicating with boards and management.*[23]

In support of these points, the SEC cited statements from some of the world's largest and most influential pension fund investors, including the California State Teachers' Retirement System and the New York City Comptroller—both of which have led successful shareholder campaigns and are considered quite influential in corporate governance—that "[w]hile one percent may sound like a small amount, even a large investor like the $200 billion CalSTRS fund does not own one percent of publicly traded companies," and "[d]espite being among the largest pension investors in the world, [New York City funds] rarely hold more than 0.5% of any individual company, and most often hold less."[24] In other words, for a publicly-traded corporation, one percent is in fact a very large ownership stake, and some of the largest and most influential-in-governance investors rarely if ever hold that much.

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[21] Business Roundtable, "Responsible Shareholder Engagement & Long-Term Value Creation," https://www.businessroundtable.org/archive/resources/responsible-shareholder-engagement-long-term-value-creation (emphasis added).

[22] *See* SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66,458 (Dec. 4, 2019). The SEC's proposed rule would also modify the absolute-dollar-value thresholds, which are not relevant here.

[23] *Id.* at 66,646 (emphasis added).

[24] *Id.* n.58.

By the same token, the SEC cited an observation from its 2018 "Roundtable on the Proxy Process"[25] with which few of those with experience in corporate governance would disagree:

> Large institutional investors—the Blackrocks and State Streets and Vanguards of the world—do not need the shareholder proposal rule process to get the attention of management or the board of directors. There's not a corporate secretary or investor relations department in the country that would not return their call within 24 hours.[26]

The point here is not that foreign investors will use the shareholder proposal process to influence corporate political spending. Rather, the point is that the SEC itself recognizes that one percent ownership is so significant that investors with that level of ownership don't even need that process; they can easily get executive-suite management on the phone.

Whatever happens with the SEC rulemaking, Seattle can rely on the general agreement among major capital investors, corporate management, and governance experts that one percent ownership confers substantial influence over corporate governance.

Regulating foreign corporate spending

Seattle can simultaneously welcome foreign investment without exposing itself to the risk of foreign money influencing its elections. The proposed law addresses this issue through a requirement that prohibits a corporation from spending certain types of money in city elections if it is a "foreign-influenced corporation" – a definition based, in part, on the extent of foreign ownership of corporate stock.[27] The proposed bill is a reasonable response to an increasingly localized problem, and is constitutional under the Court's decision

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[25] I was a panelist at this roundtable.

[26] SEC, *Transcript of the Roundtable on the Proxy Process* (Nov. 15, 2018), available at https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf, at 150 (comments of Brandon Rees, Deputy Director of Corporations & Capital Markets, AFL-CIO).

[27] The types of prohibited spending for foreign-influenced corporations are independent expenditures or contributions to independent expenditure PACs (often called super PACs). Other forms of corporate political activity, such as lobbying or operating a corporate PAC, are not restricted.

in *Citizens United*. The remainder of this letter details how this certification requirement could operate.

The mechanics of the bill's foreign-influenced-corporation requirements

1. Ownership of corporate stock

To begin, as a general matter, corporate stock may be "owned" in three different forms. First, many companies that have one or a relatively small number of shareholders hold paper stock certificates. Among larger, stock exchange listed companies, with numerous owners, such direct ownership is rare, and increasingly so. At such companies, shares are more commonly held in "street name" through a broker (e.g., Fidelity or Charles Schwab). In these instances, the name on the stock certificate is actually the broker, but the broker keeps track in a database of how many shares belong to each client. Clients who hold shares in street name are "beneficial owners" under SEC rules, can direct brokers how to vote or sell shares, and can participate in corporate governance.

Most shares of large, listed companies, however, are now held by separate legal entities, such as mutual funds, pension funds, insurance companies, and hedge funds. As an economic matter, these entities hold stock on behalf of their clients or beneficiaries. However, as a legal matter, the investment entities themselves are the owners of the stock, and they do not pass through to beneficiaries either the right to vote or the right to sell the shares of the stock that the entity purchases. Individuals whose wealth is invested through these types of institutional investments cannot exercise voting rights associated with the shares. Instead, those rights are exercised by the management of the institutions.

2. Determining shareholders

Most corporate stock is not traded on public markets. As of 2012, more than five million corporations filed U.S. income tax returns. Only about 4,000 corporations were listed on a U.S. stock exchange – less than 0.1 percent of corporations that filed tax returns. Of the rest, many are owned by a single shareholder, or are beneficially owned by up to 500 individual owners. (SEC rules generally require public registration and disclosure for companies with more than 500 owners and $10 million in assets.) Companies without public markets are still large and have substantial numbers of shareholders. Examples include Cargill, with revenues exceeding $130 billion and over 200 shareholders, and Mars, with revenues exceeding $33 billion and over 45 shareholders. Because shares of such companies do not trade freely in the public markets, such companies generally can and do track the identity of their

shareholders directly.

For corporations listed on public markets, shares trade in significant volume—thousands of shares per day. Since public company shareholders change daily, even hourly, perfect real-time knowledge of the extent of foreign ownership or influence is not possible. However, publicly traded corporations have the ability to ascertain the exact ownership of their shares as of any arbitrary "record date." In fact, this happens at least annually, because companies are required by corporate law to have annual shareholder meetings, for which they must set a record date to determine which shareholders are eligible to attend and vote at the meeting. In fact, record dates are set and shareholder lists are created more frequently than that at many public companies, to allow for votes on off-cycle events, such as a merger proposal or charter amendments, which are brought to a vote at special meetings, or to determine recipients of dividends. Furthermore, at any point during the year, a qualifying shareholder can demand a shareholder list to solicit proxies, or a third party may demand a list to make a tender offer for shares.

Consequently, the ability to determine record stock ownership as of a given date is essential to the basic governance of corporations.

Few if any publicly traded corporations engage in the process of determining their record shareholders for a given record date themselves. They use an intermediary – most commonly, American Stock Transfer (AST) – that is dedicated to this function. Under state law, shareholders seeking to file a derivative suit or solicit shareholder support for a shareholder resolution or proxy contest can also obtain the list of shares using the same method. A corporation that needs the list of shareholders as of a specific date would engage AST to produce the list of shareholders as of that date. Under SEC rules, public companies also reach out beyond their record holders to the beneficial owners of broker- or bank-owned stock, and engage AST to contact banks, brokers or other intermediaries that are nominally record owners. Those firms, in turn, provide information about non-objecting beneficial owners to AST, which then compiles it and provides it to the corporation. Typically, banks, brokers and other intermediaries provide AST (and the corporation) with non-objecting client names, addresses, shares held, and purchase dates (which could be multiple blocks if a given shareholder bought multiple blocks of shares over time).

In addition to these basic corporate and securities law mechanisms, Section 13 of the federal Securities Exchange Act of 1934 requires any person or group of

persons who acquire beneficial ownership of more than five percent of the voting class of a listed corporation's equity to within ten days report that acquisition to the SEC on a Schedule 13D (or, in some cases, Schedule 13G).[28] These acquisitions are, in turn, made public by the SEC, and available through the SEC's EDGAR online database.

3. Determining whether shareholders are "foreign owners"

The bill requires a corporation that plans to engage in political spending to ascertain whether it meets the threshold of "foreign-influenced corporation." As just described above, acquisitions of five percent or more of the stock of public U.S. companies must already be disclosed under SEC rules, including the identity of the purchaser's citizenship.[29] Thus, the information is already publicly available (and readily available on commonly used search web sites such as Yahoo Finance or MSN Finance) for five percent blockholders of public companies. For ownership at lower thresholds,[30] the information is not always publicly available, but can be ascertained. Outside of the blockholder context, for most purposes, corporations typically do not inquire into the citizenship or permanent residency status of shareholders. Many brokerage firms impose restrictions on non-citizens, or specifically limit their customers to citizens or permanent residents. A 2012 sampling of major brokers by financial markets reporter Matt Krantz found divergence in practices:

> For instance, at Fidelity, the company says only U.S. citizens may open an account. . . . Over at TD Ameritrade, investors do not need to be a U.S. citizen to open an account. With that said, the stipulations and requirements vary dramatically based on the country the resident lives in and the potential customers' nationality, the company says. . . . Similarly at E-Trade, the brokerage has different rules based on the country. . . . The rules vary widely based on the nationality of the person

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[28] *See* 15 U.S.C. § 78m(d); 17 C.F.R. §§ 240.13d-1, 240.13d-101.

[29] *See* 17 C.F.R. § 240.13d-101 (item #6, requiring reporting of "Citizenship or place of organization").

[30] Obviously, if a corporation determines from publicly available information that it has a 5% foreign owner, then it already meets the definition of foreign-influenced corporation and the inquiry is over; there is no need to *further* ascertain whether it *also* has additional foreign owners at lower ownership levels.

> wanting the account . . . . TradeKing requires investors, including U.S. citizens, to be U.S. residents to establish the account. It makes an exception for customers who are living abroad and have a valid U.S. military or government address. Investors who are not U.S. citizens, yet reside legally in the U.S., may open an account if they have a Social Security number and aren't from 27 specific [prohibited] countries . . . .[31]

The process of ascertaining the foreign owner status of shareholders would be simple in many cases. If a publicly traded corporation asks American Stock Transfer to produce its list of shareholders (or just those shareholders who are foreign nationals), and AST in turn asks Fidelity, Fidelity's citizens-only customer policy would enable it to truthfully and simply answer that zero percent of the company's shares held through Fidelity are held by foreign nationals.

Similarly, where stock is held by a non-human shareholder, such as another corporation, the "foreign" status of that corporation can be ascertained readily by examining its place of incorporation and principal place of business.

The proposed law counts stock owned by domestic subsidiaries of foreign parent corporations the same as stock owned by foreign corporations. (In the terms of the law, either would be defined as a "foreign owner.") To the extent that a U.S. subsidiary of a foreign corporation has the potential to influence U.S. portfolio companies in which it invests, it has the potential to do so at the foreign parent's bidding or with the foreign parent's approval.

However, the law does *not* require "piercing" through the beneficial ownership of institutional entities such as mutual funds. For the ordinance's purpose, corporate stock owned by a mutual fund is not corporate stock held by a foreign national, even if many of the mutual fund's customers are themselves foreign nationals, as long as the advisor to the fund is a U.S. entity (a fact that can be readily determined with public information). This is a reasonable approach, because customers of mutual funds cannot themselves directly participate in governance of the corporation actually spending money in a city election. Instead, it is the management of the advisory firm that plays that role.

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[31] Matt Krantz, USA TODAY, "U.S. online brokerage options are limited for foreigners," http://usat.ly/KXpDan (May 16, 2012).

4. "Due inquiry"

Importantly, the law addresses any remaining possible difficulties that U.S. corporations might have in certifying as to whether they are foreign-influenced. As noted above, some brokerage firms allow foreign investors to buy stock of U.S. companies through them, and they may not report citizenship information about such customers to the corporations in which they invest. Thus, it may not be possible for every corporation to verify the U.S. or foreign national status of all of its shareholders with complete confidence. (Note, however, that the law does not actually require a corporation to verify *all* of its shareholders' statuses: Given the 5 percent, "aggregate" threshold, verifying that just over 95 percent of shareholders are not foreign owners would be sufficient.)

However, given this possibility, it is reasonable for the proposed law to impose a certification requirement that specifies that the chief executive officer of the corporation certify that the information is provided after "due inquiry." The "due inquiry" standard is familiar from securities law,[32] as well as from other areas of law with which corporate executives are acquainted.[33] It imposes only the customary obligation to make such reasonable inquiry as the corporation would do in any event. Thus, the law does not impose a meaningful additional information-gathering cost beyond what it would already be required to do under existing law.

Conclusion

The law is a reasonable solution to the risk of foreign influence in local elections through corporate political spending. The law is constitutional under *Citizens United*, and reasonable from a corporate and securities law perspective. The law would only apply to corporations that spend money on independent expenditures or make contributions to candidates or "super PACs" in candidate elections. The law imposes no obligations on corporations that do

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[32] *See, e.g.*, 17 C.F.R. § 275.206(4)-2(a)(3).

[33] *See, e.g., SRI Int'l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462, 1464–65 (Fed. Cir. 1997) (in patent law, standard for whether infringement was "willful" is "whether the infringer, acting in good faith and upon due inquiry, had sound reason to believe that it had the right to act in the manner that was found to be infringing"); *Black Diamond Sportswear, Inc. v. Black Diamond Equip., Ltd.*, No. 06-3508-CV, 2007 WL 2914452, at *3 (2d Cir. Oct. 5, 2007) ("A trademark owner is "'chargeable with such knowledge as he might have obtained upon [due] inquiry.'") (quoting *Polaroid Corp. v. Polarad Electronics Corp.*, 182 F. Supp. 350, 355 (E.D.N.Y. 1960)) (alteration in original).

not spend money on candidate elections. For those corporations that do engage in such spending, the requirement that corporations certify that they are not foreign-influenced is practicable and reasonable for both privately and publicly traded corporations, conditioned as it is on corporations engaging in "due inquiry," a standard that will not add material costs to the information-gathering and record-keeping in which corporations already engage.

If you have any further questions, please let me know.

Sincerely,

John C. Coates IV
John F. Cogan, Jr. Professor of Law and Economics
Harvard Law School

ASSEMBLY BILL No. 1819

Introduced by Assembly Member Lee
(Coauthor: Assembly Member Kalra)
(Coauthor: Senator Wieckowski)

February 7, 2022

An act to amend Section 85320 of, and to add Section 82007.5 to, the Government Code, relating to the Political Reform Act of 1974.

LEGISLATIVE COUNSEL'S DIGEST

AB 1819, as introduced, Lee. Political Reform Act of 1974: contributions and expenditures by foreign-influenced business entities.

The Political Reform Act of 1974 prohibits a foreign government or foreign principal from making any contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, a state or local ballot measure or an election for a state or local office. The act prohibits a person or committee from soliciting or accepting a contribution from a foreign government or foreign principal for the same purposes. The act makes a violation of these prohibitions a misdemeanor.

This bill would expand these prohibitions to include contributions, expenditures, or independent expenditures made by a foreign-influenced business entity, as defined, in connection with an election or ballot measure. The bill would require a business entity that makes a contribution, expenditure, or independent expenditure to file with the filing officer and the applicable candidate or committee a statement of certification, signed by the entity's chief executive officer under penalty of perjury, avowing that the entity was not a foreign-influenced business entity on the date the contribution, expenditure, or independent

expenditure was made. The bill would prohibit a person who receives funds from a business entity from using those funds for purposes of a contribution, expenditure, or independent expenditure in connection with a ballot measure or election unless the person receives a copy of the statement of certification from the business entity.

By creating a new crime and expanding the scope of an existing crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The Political Reform Act of 1974, an initiative measure, provides that the Legislature may amend the act to further the act's purposes upon a ⅔ vote of each house of the Legislature and compliance with specified procedural requirements.

This bill would declare that it furthers the purposes of the act.

Vote: ⅔. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. (a) This act shall be known, and may be cited, as the "Stop Foreign Influence in California Elections Act."

(b) The Legislature finds and declares all of the following:

(1) The State of California welcomes immigrants, visitors, and investors from around the world. However, its elections should be decided by the people of California and not by foreign investors or the business entities over which they exert influence.

(2) The United States Securities and Exchange Commission, major capital investors, corporate managers, and corporate governance experts broadly agree that ownership or control of one percent or more of shares can confer substantial influence on corporate decisionmaking. For similar reasons, ownership or control of five percent of shares by multiple foreign investors can affect corporate decisionmaking.

(3) Corporations with partial foreign ownership have been spending money to influence state and local elections in California and around the country.

(4) Investors are the ultimate beneficiaries of corporate interests. According to the California Court of Appeal, "it is the shareholders who own a corporation, which is managed by the directors" and "when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets." Berg & Berg Enter., LLC v. Boyle (2009) 178 Cal.App.4th 1020, 1039. Where part of the shareholders' equity is attributable to foreign investors, spending corporate treasury funds on California elections means spending the equity of foreign entities on California elections.

(5) Corporations and similar entities have a fiduciary responsibility to their shareholders, including investors around the world, and generally prioritize the interests of such shareholders, which may diverge substantially from the interests of the people of California and the United States.

(6) The United State government has concluded that Russia, China, Iran, and other foreign actors are engaged in ongoing campaigns to undermine democratic institutions, as set forth in the joint statement "Combating Foreign Influence in US Elections," issued by the Office of the Director of National Intelligence, United States Department of Justice, Federal Bureau of Investigation (FBI), and Department of Homeland Security on October 19, 2018.

(7) The FBI has concluded that foreign influence activities include "criminal efforts to suppress voting and provide illegal campaign financing," as set forth in FBI Director Christopher Wray's press briefing on election security on August 2, 2018.

(8) Aside from active measures by hostile intelligence services, the explicit or implicit influence of major foreign investors subjects corporate decisionmaking to foreign influence as executives consider interests of foreign investors. Domestic corporate political spending by such corporations threatens democratic self-government.

(9) The United States Congress and the United States Supreme Court have recognized the need to protect American elections from foreign influence through the ban on contributions and expenditures by foreign nationals imposed by 52 U.S.C. Sec. 30121 and upheld by the Supreme Court in Bluman v. Federal Election Commission (D.D.C. 2011) 800 F.Supp.2d 281, aff'd. (2012) 565 U.S. 1104.

(10) Current law does not adequately protect against foreign interference through corporate political spending by United States corporations with significant foreign ownership, as explained by

Federal Election Commissioner Ellen Weintraub in their May 22, 2019, written testimony to the United States House of Representatives Committee on Oversight and Reform's Subcommittee on National Security.

(11) Political spending by foreign-influenced corporations can weaken, interfere with, or disrupt California's democratic self-government and the trust that the electorate has in its elected representatives.

(12) To protect the integrity of California's democratic self-government, it is necessary to prevent foreign-influenced business entities from influencing California elections through political spending.

SEC. 2. Section 82007.5 is added to the Government Code, to read:

82007.5. "Chief executive officer" means the highest-ranking officer or decisionmaking individual with authority over a business entity's affairs.

SEC. 3. Section 85320 of the Government Code is amended to read:

85320. (a) ~~A foreign government or foreign principal shall~~ *A foreign government, foreign principal, or foreign-influenced business entity shall* not make, directly or through any other person, a contribution, *including a contribution to a committee,* 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.

(b) (1) Within 7 days after making a contribution, expenditure, or independent expenditure, a business entity shall file with the filing officer and the candidate or committee to which or for which the contribution or expenditure is made a statement of certification, signed by the chief executive officer of the business entity under penalty of perjury, avowing that, after due inquiry, the business entity was not a foreign-influenced business entity on the date the contribution or expenditure was made.

(2) (A) For purposes of the statement of certification, a business entity shall ascertain beneficial ownership in a manner consistent with the requirements of the Corporations Code or, if the business entity is registered on a national securities exchange, as set forth

in Sections 240.13d-3 and 240.13d-5 of Title 17 of the Code of Federal Regulations.

(B) Upon request of the recipient, a business entity shall also provide a copy of the statement of certification to any other candidate or committee to which the business entity provides a contribution.

~~(b)~~

(c) (1) A person or a committee shall not solicit or accept a contribution from a foreign ~~government or foreign principal~~ *government, foreign principal, or foreign-influenced business entity* 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.

(2) For purposes of paragraph (1), a person or committee may rely in good faith on a statement of certification pursuant to subdivision (e).

(d) (1) A person who receives a contribution or donation from a business entity shall not use that contribution or donation, directly or indirectly, to make a contribution, expenditure, or independent expenditure in connection with a ballot measure or election, or to contribute, donate, transfer, or convey funds to another person for purposes of making a contribution, expenditure, or independent expenditure in connection with a ballot measure or election, unless the person also receives from the business entity a copy of the statement of certification described in subdivision (b) and complies with the other requirements of this title.

(2) A person who uses a contribution or donation from a business entity for the purposes described in paragraph (1) shall separately designate, record, and account for the funds and ensure that disbursements for the purposes described in paragraph (1) are made only from funds that comply with the requirements of this section.

(e) For purposes of subdivisions (c) and (d), a person soliciting or receiving a contribution may rely in good faith on a statement of certification that meets the requirements of this section.

~~(c)~~

(f) For the purposes of this section, ~~a "foreign~~ *the following terms have the following meanings:*

(1) "Foreign principal" includes *all of* the following:

~~(1)~~

(A) A foreign political party.

~~(2)~~

(B) A person outside the United States, unless either of the following is established:

~~(A)~~

(i) The person is an individual and a citizen of the United States.

~~(B)~~

(ii) The person is not an individual and is organized under or created by the laws of the United States or of any state or other place subject to the jurisdiction of the United States and has its principal place of business within the United States.

~~(3)~~

(C) A partnership, association, corporation, organization, or other combination of persons organized under the laws ~~of~~ *of,* or having its principal place of business ~~in~~ *in,* a foreign country.

~~(4)~~

(D) A domestic subsidiary of a foreign corporation if the decision to contribute or expend funds is made by an officer, director, or management employee of the foreign corporation who is neither a citizen of the United States nor a lawfully admitted permanent resident of the United States.

(E) A business entity in which a foreign principal, as defined in subparagraph (A), (B), or (C), or a foreign government holds, owns, controls, or otherwise has directly or indirectly acquired beneficial ownership of equity or voting shares in an amount that is equal to or greater than 50 percent of the total equity or outstanding voting shares.

(2) "Foreign-influenced business entity" means a business entity in which any of the following occur:

(A) A single foreign principal holds, owns, controls, or otherwise has direct or indirect beneficial ownership of one percent or more of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the entity.

(B) Two or more foreign principals, in aggregate, hold, own, control, or otherwise have direct or indirect beneficial ownership of equity or voting shares in an amount that is equal to or greater than 5 percent of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the entity.

(C) One or more foreign principals participate in any way, directly or indirectly, in the business entity's decisionmaking process with respect to contributions or expenditures of funds in connection with a ballot measure or election.

~~(d)~~

(g) (1) This section ~~shall~~ *does* not prohibit a contribution, expenditure, or independent expenditure made by a lawfully admitted permanent resident.

(2) This section does not prohibit a business entity from sponsoring a sponsored committee, as defined in Section 82048.7, nor does it require a statement of certification from the sponsor solely due to the activities described in Section 82048.7.

~~(e)~~

(h) Any person who violates this section shall be guilty of a misdemeanor and shall be fined an amount equal to the amount contributed or expended.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 5. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

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Washington, DC 20005
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americanprogress.org

March 21, 2022

Honorable Mayor, Vice Mayor, and City Council
City of San Jose
200 E. Santa Clara St.
San Jose, CA 95113

Re: Support for Councilmembers' memorandum regarding campaign finance reform ordinance

Dear Mayor Liccardo, Vice Mayor Jones, and Members of the City Council:

I write in support of Councilmembers' memorandum directing staff to return to Council with a draft ordinance requiring that corporations certify that they are not foreign-influenced before making independent expenditures or contributing to campaigns and independent expenditure committees. If enacted, this people-powered ordinance would help stop political spending by foreign entities, including foreign investors who own appreciable levels of stock in U.S. corporations, thereby protecting the city's right to self-government. In recent weeks, this policy has taken on additional importance since Russia's invasion of Ukraine, given that Russian investors—including sanctioned Russian oligarchs—own appreciable amounts of American corporations.[1] Quite simply, the City should update its laws to prevent foreign entities from influencing elections and ballot measures, which should be the purview solely of the city's voters.

I am a senior fellow at the Center for American Progress (CAP). Based in Washington, D.C., CAP is an independent, nonpartisan policy institute dedicated to improving the lives of all Americans through bold, progressive policies. My democracy reform work at CAP has involved research in the area of preventing political spending by foreign-influenced U.S. corporations. I have submitted written and oral testimony on this policy in several state legislatures and have worked closely with lawmakers at the federal, state, and local levels to draft legislation to enact this structural reform. My publications include a report and fact sheet analyzing this policy, with the report republished in the Harvard Law School Forum on Corporate Governance.[2] These publications may be useful as you consider the recommended ordinance.

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[1] One high-profile example of a sanctioned Russian oligarch indirectly owning an appreciable portion of a politically-connected American company is discussed in my 2019 report, "Ending Foreign-Influenced Corporate Spending in U.S. Elections." Michael Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections" (Washington: Center for American Progress, 2019), available at https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/ (discussing Oleg Deripaska and Braidy Atlas, Inc.)

[2] Ibid; Michael Sozan, "Fact Sheet: Ending Foreign-Influenced Corporate Spending in U.S. Elections" (Washington: Center for American Progress, 2019), available at https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477468/ending-foreign-influenced-corporate-spending-u-s-elections-2/; Michael Sozan, "Ending Foreign-Influenced Corporate

Summary

After reviewing the Councilmembers' memorandum, I conclude that the recommended ordinance would provide an important tool to protect San Jose's elections and ballot initiatives from foreign influence and reduce the outsize role that corporate money can play in the results of elections and ballot initiatives. The common-sense recommended ordinance would strengthen the right of San Jose's residents to determine the political and economic future of their city and help ensure that lawmakers are accountable to voters instead of foreign-influenced corporations. This recommended ordinance is particularly important given that foreign investors now own approximately 40 percent of U.S. corporate equity, compared to just 4 percent in 1986, a stunning increase.[3]

The recommended ordinance would follow Seattle, Washington, which passed similar legislation in 2020 to protect its elections after a deluge of corporate political spending by at least one foreign-influenced U.S. corporation, Amazon.[4] Moreover, the New York State Senate recently passed similar legislation in a bipartisan vote, and that bill is now pending in the state Assembly.[5] Several similar bills have been filed at the federal level by leading members of Congress, including Sen. Elizabeth Warren (D-MA) and Rep. Jamie Raskin (D-MD).[6]

California certainly is no stranger to prodigious political spending by foreign-influenced U.S. corporations. As I discussed in an op-ed published in *The Mercury News* in 2020, multiple foreign-influenced companies, including Uber, Lyft, and DoorDash teamed up to spend over $200 million to get their desired result on Proposition 22, which invalidated a state law and allowed companies to classify their gig workers as contractors instead of employees.[7] This

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Spending in U.S. Elections" (Cambridge, MA: Harvard Law School Forum on Corporate Governance, 2019), available at https://corpgov.law harvard.edu/2019/12/06/ending-foreign-influenced-corporate-spending-in-u-s-elections/.

[3] Steven Rosenthal and Theo Burke, "Who's Left to Tax? US Taxation of Corporations and Their Shareholders" (Washington: Urban-Brookings Tax Policy Center, 2020), p. 2, available at https://www.law nyu.edu/sites/default/files/Who%E2%80%99s%20Left%20to%20Tax%3F%20US%20Taxation%20of%20Corporations%20and%20Their%20Shareholders-%20Rosenthal%20and%20Burke.pdf.

[4] Annie Palmer, "Blow to Amazon as Seattle passes new political spending restrictions," CNBC, January 13, 2020, available at https://www.cnbc.com/2020/01/13/blow-to-amazon-as-seattle-passes-new-political-spending-restrictions.html.

[5] Democracy Preservation Act, S.1126B, 2021-2022 legislative session (passed by N.Y. State Senate on January 10, 2022), available at https://www.nysenate.gov/legislation/bills/2021/s1126.

[6] Anti-Corruption and Public Integrity Act, S. 5070, Section 721, 116th Cong., 2nd sess. (December 19, 2020), available at https://www.congress.gov/bill/116th-congress/senate-bill/5070/text?q=%7B%22search%22%3A%5B%22warren%22%5D%7D&r=2&s=2; Get Foreign Money Out of U.S. Elections Act, H.R.6283, 117th Cong., 1st sess. (December 14, 2021), available at https://www.congress.gov/bill/117th-congress/house-bill/6283?q=%7B%22search%22%3A%5B%22raskin+get+foreign+money+out%22%2C%22raskin%22%2C%22get%22%2C%22foreign%22%2C%22money%22%2C%22out%22%5D%7D&s=1&r=1.

[7] Michael Sozan, "Opinion: Stop political spending by foreign-influenced U.S. firms," *The Mercury News*, December 15, 2020, available at https://www mercurynews.com/2020/12/15/opinion-stop-political-spending-by-foreign-influenced-u-s-firms/. As I wrote there, one of the corporations that spearheaded the ballot initiative—Uber—is partially owned and controlled by the government of Saudi

means that major foreign investors played a role—at least indirectly—in determining the fate of California policy.

Analysis

In the U.S. Supreme Court's misguided decision in *Citizens United*, the conservative majority gave American corporations the ability to spend money in elections based on the premise that corporations are "associations of citizens."[8] However, many of the largest American-based corporations are owned appreciably by *foreign* entities. This creates a loophole in the Supreme Court's ruling, as recognized in a dissenting opinion by Justice Stevens: foreign entities can invest in U.S. corporations, which then spend large amounts of money from their corporate treasuries to influence the results of elections and ballot initiatives.[9] This dangerous loophole allows foreign entities to circumvent the longstanding federal prohibition against their participating directly or indirectly in U.S. elections.[10]

The recommended ordinance proposes a cogent method to close this anti-democratic loophole by using bright-line thresholds to determine when a corporation has appreciable foreign ownership. The ordinance would amend the municipal code to define foreign-influenced corporations as any corporation—as defined by the California Political Reform Act—in which at least one of the following conditions is true:

- 1 percent or more of the total ownership interests of the corporation are held by a single foreign entity, or
- 5 percent or more of the total ownership interests of the corporation are held by two or more foreign entities in aggregate, or
- The corporation is owned by a foreign entity that directly or indirectly participates in decisions on the corporation's political activities in the United States.

I note that the recommended ordinance reasonably does not appear to limit foreign-influenced corporations from contributing money from their political action committees (where, by law, funds are derived from U.S. employees); nor does it limit either contributions from executives or employees in their personal capacities or a corporation's lobbying activities. Instead, the ordinance aims to limit spending directly from corporations' treasuries—spending that can be done via secret, dark money routes. It is also important that the recommended ordinance not apply to non-profit corporations nor should it have any impact on individual immigrants.

Arabia. Another corporation—Lyft—has seen appreciable ownership and control by a Chinese conglomerate and a Japanese conglomerate.

[8] *Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010), available at https://www.fec.gov/resources/legal-resources/litigation/cu_sc08_opinion.pdf.

[9] Ibid. (dissent by Justice Stevens).

[10] The Federal Election Campaign Act (FECA), 52 U.S.C. § 30121(a), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), Public Law 155, 116 Stat. 81, § 303 (2002), available at https://www.law.cornell.edu/uscode/text/52/30121.

Substantial Support for Foreign Ownership Thresholds

The foreign ownership thresholds used in this recommended ordinance are solidly grounded in corporate governance and related law, even though at first glance, they may appear to be relatively low. Moreover, the framework in the recommended ordinance is constitutional under federal jurisprudence,[11] as discussed at length by Harvard Law School professor Laurence Tribe in his letter filed in these proceedings.

Corporate managers, governance experts, and regulators recognize that a shareholder who owns at least 1 percent of corporate stock can influence corporate decision-making, including decisions about political spending.[12] Relatively few individual shareholders ever own as much as 1 percent of a major publicly traded corporation; and if they do, their stock likely is worth hundreds of millions of dollars, if not more.[13] These rare shareholders can almost always get the immediate attention of corporate executives and often have power over a corporation's strategic direction.

As discussed at length and cited in my 2019 report:

- The 1 percent ownership threshold is anchored in regulations of the U.S. Securities and Exchange Commission (SEC) governing thresholds for shareholder proposals.
- Former Republican Chairman of the U.S. House Committee on Financial Services Jeb Hensarling (R-TX) recognized—in the area of proxy contests—that shareholders who own 1 percent of corporate stock are important players who have the very real opportunity to influence corporate decision-making.
- The Business Roundtable, an association representing corporate CEOs, also acknowledged this dynamic. In fact, the Business Roundtable, suggested a sliding scale for considering shareholder proposals that would fall far below the 1 percent threshold for the largest U.S. corporations—to a 0.15 percent share of ownership.

The higher 5 percent aggregate foreign-ownership threshold also has strong merit. A significant number of smaller shareholders who band together may share a commonality—such as foreign domicile—which can influence corporate managers' decisions in the manner described above. Additionally, where several shareholders each own slightly less than 1

[11]The U.S. Supreme Court affirmed (without opinion) a decision authored by then-Judge Brett Kavanaugh, which recognized that the First Amendment allows the government to prohibit contributions from foreign entities, a ruling found to be consistent with *Citizens United*. *Bluman and Steiman v. Federal Election Commission*, memorandum opinion, U.S. District Court for the District of Columbia, No. 10-1766 (August 8, 2011), available at https://www.bloomberglaw.com/public/desktop/document/Bluman_v_Federal_Election_Commission_Civil_No_101766_BMK_RMURMC_2?1565223708; aff'd, 132 S. Ct. 1087 (2012) (Mem.), available at https://www.supremecourt.gov/orders/courtorders/010912zor.pdf.

[12] See Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections," pp. 32–34.

[13] According to internal research conducted by CAP in 2021, the *average* 1 percent shareholder of an S&P 500 corporation owns stock worth $864 million, while the *median* 1 percent shareholder of an S&P 500 corporation owns stock worth $335 million.

percent of a corporation but together own at least 5 percent of the corporation, the law cannot ignore the possibility that these smaller shareholders could join forces to do what a single 1 percent shareholder could do alone. Moreover, the Business Roundtable supported the right of a group of shareholders to submit a proposal for consideration if those shareholders owned only 3 percent of a corporation's shares.[14]

As Ellen Weintraub, longtime commissioner on the Federal Election Commission, has written, the United States is not working its way down from a 100 percent foreign-ownership standard; it is working its way up from the zero foreign-influence standard that a strict legal interpretation of federal law suggests.[15] When an American-based corporation is not an "association of citizens," any amount of foreign investment in a corporation should preclude management's political expenditures, a point argued compellingly by experts at the nonpartisan organization Free Speech For People.[16]

Practical Effect of Foreign Ownership Thresholds

In my 2019 report, I analyzed data on foreign ownership of 111 U.S.-based publicly traded corporations in the S&P 500 stock index. The results include the following:

- When applying the 1 percent *single* foreign shareholder threshold, 74 percent of the corporations studied exceeded the threshold.
- When applying the 5 percent *aggregate* foreign shareholder threshold, 98 percent of the corporations studied exceeded the threshold.

These 111 corporations voluntarily disclosed the very large sum of $443 million spent in federal and state elections from their corporate treasuries in the years 2015, 2016, and 2017.

Among smaller publicly traded corporations, 28 percent of the corporations that were randomly sampled exceeded the 5 percent aggregate foreign-ownership threshold. From this analysis, it appears that smaller publicly traded corporations may be less likely to have as much aggregate foreign ownership as their larger counterparts and therefore would likely be less affected by the recommended ordinance's ownership thresholds.

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[14] See Ning Chiu, "Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes," Davis Polk, November 16, 2016, available at https://www.davispolk.com/insights/client-update/business-roundtable-urges-improvements-rule-14a-8-and-related-processes; Business Roundtable, "Re: File Number 4-725" (Washington: 2018), p. 5, available at https://s3.amazonaws.com/brt.org/2018.11.09-BRT.SECProxyRoundtableCommentLetter.pdf.

[15] Ellen L. Weintraub, "Taking On Citizens United," *The New York Times*, March 30, 2016, available at https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united html.

[16] See Ron Fein, "RE: Political spending by foreign-influenced corporations S.454 (Comerford), S.482 (Montigny), H.839 (Uyterhoeven); Limits on contributions to super PACs S.455 (Comerford), H.772 (Day), H.840 (Uyterhoeven)," Free Speech For People, September 17, 2021, p. 8, available at https://freespeechforpeople.org/wp-content/uploads/2021/09/rfein-written-testimony-election-laws-20210917-combined.pdf.

Process for Corporations to Determine Foreign Ownership

Corporations can and do regularly ascertain foreign-ownership thresholds. Opponents' arguments that this process is impractical are not well founded.

According to testimony from former SEC counsel and Harvard Law School professor John Coates, the vast majority of corporations are owned by a single shareholder or a small, discernible group of shareholders, so it would be relatively simple to measure levels of appreciable foreign ownership.[17] Large publicly-traded corporations already collect this type of stockholder information for their annual shareholder meetings and sometimes more frequently to allow votes regarding off-cycle events.[18] Professor Coates' testimony explains how corporations can reasonably conduct the requisite inquiry to determine their levels of foreign ownership. Finally, multiple publicly available finance-related websites supply detailed information on corporations' largest shareholders, as well as approximate data regarding aggregate foreign ownership.[19] If corporations do *not* know who their owners are, then it only strengthens the case that those corporations should not be allowed to spend to influence elections or ballot measures.

Conclusion

At a time of rising foreign interference in U.S. elections, San Jose should be commended for helping to lead the way in legislative efforts across the nation to take proactive, commonsense steps to stop political spending by foreign-influenced American corporations. The recommended ordinance does not appear to be aimed at disincentivizing foreign investment in U.S. but rather setting guardrails on when foreign-influenced companies can spend political dollars to influence elections and ballot measures. The recommended ordinance would be a big step forward in reassuring the people of San Jose that their democratic right to self-government is protected.

I urge favorable consideration of the recommended ordinance. Please let me know if I can be of further assistance.

Sincerely,
Michael L. Sozan
Senior Fellow
[redacted]

[17] John C. Coates IV, Statement submitted to Massachusetts House of Representatives regarding an act to limit spending by foreign-influenced corporations, Harvard Law School, May 14, 2019, pp. 9-10, available at https://freespeechforpeople.org/wp-content/uploads/2019/05/2019-Coates-MA-FIC-20190514-PDF-final.pdf.
[18] Ibid.
[19] For example, see CNBC's finance website. Using Chevron as an example, a user can ascertain important foreign ownership data from the "Ownership" page. Ownership data for Chevron, CNBC, available at https://www.cnbc.com/quotes/CVX?tab=ownership (last visited March 2022).

COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mayor and City Council
City of San Jose

via e-mail only to
City Clerk Toni Taber
city.clerk@sanjoseca.gov

March 21, 2022

Mayor Liccardo, Vice Mayor Jones, and Councilmembers:

I write to you today in my individual capacity as a Commissioner on the U.S. Federal Election Commission in support of the proposal to draft an ordinance that would prohibit spending by foreign-influenced corporations in San Jose's elections. And I write to thank you for taking the lead on such an important topic.

If San Jose enacts such an ordinance, it will be the largest jurisdiction in the nation to do so. Helping ensure that San Jose's municipal elections belong to San Jose's voters would be commendable leadership on its own. But it would also set an exceptionally well-timed example for the California Assembly, which is considering similar protections to help ensure that your state's elections belong to California's voters.

The recommendation put forward by Councilmembers Cohen, Arenas, Jimenez, and Foley would, if enacted, strike a bold blow. But it would nonetheless fit comfortably within existing federal statutory law and Supreme Court precedent. It is fully in keeping with *Citizens United's* prescription for greater transparency in political spending; as the Supreme Court wrote, "[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The councilmembers' recommendation regarding foreign-influenced corporations is consistent with an approach I laid out in an op-ed for *The New York Times* (attached) that described a new way to read the *Citizens United* decision together with the foreign-national political-spending ban.

In a nutshell, I noted that since the *Citizens United* majority protected the First Amendment rights of corporations as "associations of citizens," and held that a corporation's right to

participate in elections flows from the collected rights of its individual shareholders to participate, it follows that the *limits* on the rights of a corporation's shareholders must *also* flow to the corporation.

And one of the most important campaign-finance limits we have is that foreign nationals are absolutely barred from spending directly or indirectly in U.S. elections at *any* political level – federal, state, county, or city. It thus defies logic to allow groups of foreign nationals, or foreign nationals in combination with American citizens, to fund political spending through corporations. One cannot have a right collectively that one does not have individually.

Accordingly, the ordinance recommended by Councilmembers Cohen, Arenas, Jimenez, and Foley seeks to ensure that only those corporations owned and influenced by people who have the right to participate in San Jose's elections are doing so.

The risks addressed by this measure are not theoretical. The largest aggregate penalty in a single matter in the post-*Citizens United* era stemmed from $1.3 million in illegal foreign donations to a super PAC routed through APIC, a California subsidiary of a foreign corporation. Had APIC's corporate officers been required to sign the statements of certification required by the ordinance recommended to you, the illegal behavior may well have been deterred.

Please do not hesitate to get in touch with me if I may be of any further assistance. I am available at commissionerweintraub@fec.gov and (202) 694-1035.

Sincerely,

Ellen L. Weintraub
Commissioner, Federal Election Commission

Attachment: "Taking On Citizens United" (March 30, 2016), NY TIMES, http://nyti.ms/230BOgq

The New York Times | http://nyti.ms/1qhmpKB

The Opinion Pages | OP-ED CONTRIBUTOR

Taking On Citizens United

By ELLEN L. WEINTRAUB MARCH 30, 2016

SOMETHING is very wrong with the way we fund our elections. This has become especially clear since Citizens United, the 2010 Supreme Court decision that struck down campaign spending limits on corporations, ruling they were intrusions on free speech.

The majority opinion in Citizens United v. Federal Election Commission was clear: The First Amendment rights of corporations may not be abridged simply because they are corporations. But while corporations may be deemed to have some of the legal rights of people, the court has never held that corporations have any of the political rights of citizens.

This key distinction, read in harmony with existing law, provides ways to blunt the impact of the decision that gave corporations the right to spend unlimited sums of money on federal elections.

The effect of that decision has been pronounced: The Washington Post reported this month that through the end of January, 680 corporations had given nearly $68 million to “super PACs” in this election cycle — 12 percent of the $549 million raised by such groups. This figure does not include the untold amounts of “dark money” contributions to other groups that are not disclosed by the donor or the recipient.

Throughout Citizens United, the court described corporations as “associations of citizens”: “If the First Amendment has any force,” Justice Anthony M. Kennedy wrote, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” In other words, when it comes to political speech, which the court equated with political contributions and expenditures, the rights that citizens hold are not lost when they gather in corporate form.

Foreign nationals are another matter. They are forbidden by law from directly or indirectly making political contributions or financing certain election-related advertising known as independent expenditures and electioneering communications. Government contractors are also barred from making contributions.

Thus, when the court spoke of “associations of citizens” that have the right to participate in American elections, it can only have meant associations of American citizens who are allowed to contribute.

But many American corporations have shareholders who are foreigners or government contractors. These corporations are not associations of citizens who are allowed to contribute. They are an inseparable mix of citizens and noncitizens, or of citizens and federal contractors.

Since the court held that a corporation’s right to participate in elections flows from the collected rights of its individual shareholders to participate, it follows that limits on those individuals’ rights must also flow to the corporation.

You cannot have a right collectively that you do not have individually. Individual foreigners are barred from spending to sway elections; it defies logic to allow groups of foreigners, or foreigners in combination with American citizens, to fund political spending through corporations. If that were true, foreigners could easily evade the restriction by simply setting up shell corporations through which to funnel their contributions.

Arguably, then, for a corporation to make political contributions or expenditures legally, it may not have any shareholders who are foreigners or federal contractors. Corporations with easily identifiable shareholders could meet this

standard, but most publicly traded corporations probably could not.

This may sound like an extreme result, but it underscores how urgently policy makers need to examine these issues with an eye toward drawing acceptable lines. Perhaps we could require corporations that spend in federal elections to verify that the share of their foreign ownership is less than 20 percent, or some other threshold. The Federal Communications Commission, for example, bars companies that are more than 20 percent owned by foreign nationals from owning a broadcast license. At the moment, without a clarifying rule, the only standard that follows the law is a zero-tolerance standard.

If one thing is clear this election season, it is that many voters feel that their voices are not being heard. We should make sure that the voices of citizens are not being drowned out by corporate money. American billionaires already have an outsize influence on our elections. Let's not cede yet more power to foreign elites.

To that end, at the next public meeting of the Federal Election Commission, I will move to direct the commission's lawyers to provide us with options on how best to instruct corporate political spenders of their obligations under both Citizens United and statutory law. The American people deserve assurances from American corporations that they are not using the money of foreign shareholders to influence our elections.

Regardless of whether the perpetually deadlocked F.E.C. takes action, lawyers may wish to think twice before signing off on corporate political giving or spending that they cannot guarantee comes entirely from legal sources.

States can also take action, since Citizens United and federal law barring foreign money apply with equal force at the state level. States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens — and enforce the ban on foreign political spending against those that are not.

Polls show that overwhelming majorities of Americans reject the conclusions of Citizens United and want to see it overturned. But in the meantime, federal and state policy makers and authorities can at least ensure that corporations are not being

used as a front to allow foreign money to seep into our elections.

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