



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Councilmember David Cohen
Councilmember Sergio Jimenez
Councilmember Pam Foley

SUBJECT: SEE BELOW

DATE: November 16, 2021

Approved

David Cohen *Sergio Jimenez* *Pam Foley*

Date: 11/16/2021

SUBJECT: CAMPAIGN FINANCE REFORM

RECOMMENDATION

1. Direct 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.
 - a. Amend the municipal code to define foreign-influenced corporations as any corporation in which at least one of the following conditions is true:
 - i. 1% or more of the total ownership interests of the corporation are held by a single foreign entity
 - ii. 5% or more of the total ownership interests of the corporation are held by two or more foreign entities in aggregate
 - iii. 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.
2. Return to Council with a model for a public campaign financing program administered by the Board of Fair Campaign and Political Practices:
 - a. Consider the reimbursement model used in Oakland and the matching model used in San Francisco and Los Angeles, referenced in the staff memo, as examples when making recommendations for the San José program, with analysis of anticipated costs, challenges, and benefits.
 - b. Require that eligible candidates:
 - i. Receive a certain number of small donations from San José residents before qualifying to apply for public financing
 - ii. Agree to accept no loans from third parties
 - iii. Agree to loan or donate no more than \$5,000 of their own funds to their campaign

- iv. Be opposed in their race by a candidate who has also met the criteria for public financing
 - v. Other requirements for eligibility that staff may recommend
 - c. Identify, or make recommendations for the establishment of, a reliable ongoing funding source for the program, subject to voter approval if necessary.
3. Amend Section 12.06.290 of the Municipal Code to extend the campaign contribution period for primary and general council and mayoral elections to sixty days after the primary and general election dates, respectively. Specify that funds raised during this period must be used to retire campaign debts and liabilities and may not be used for any other purpose, and that solicitation of funds during this period must indicate clearly that they will be used for this purpose.

BACKGROUND

Our electoral system is the bedrock of our democracy, and elected representatives, from city councils to the halls of Congress, have a responsibility to ensure our elections are conducted with the highest standard of integrity and transparency. Today's discussion on campaign finance reform, in conjunction with the comprehensive report from staff, provides us with an opportunity to live up to that responsibility by addressing certain flaws and oversights in our electoral system. These issues, left unresolved, have the potential to erode public trust in our elections and elected officials, provide openings for foreign-influenced corporations to exert undue influence, and disengage members of the community from taking part in the political process.

As the memo from the City Attorney points out, current federal and state campaign finance regulations leave loopholes through which foreign money continues to flow into our elections—sometimes in massive amounts. This is particularly worrisome at the local level, where such contributions can have an exponentially greater impact than in high-profile, high-spending federal elections. Thus, it is incumbent on local governments to set up policies that close those loopholes and ensure the public has faith that the elections they vote in are free of foreign influence.

Both the constitutionality and the need for such policies have been recognized by the courts and by our country's most trusted campaign finance authorities. The legitimacy of legislation at the local level to protect our elections was affirmed just two years ago by the U.S. Court of Appeals for the Ninth Circuit, which has appellate jurisdiction over California's district courts, in its decision in *United States v. Singh*.¹ The U.S. District Court for the District of Columbia's decision in *Bluman v. Federal Elections Commission*, upheld upon review by the Supreme Court, recognized that prohibiting contributions from foreign-owned corporations is consistent with the First Amendment and with the Supreme Court's landmark ruling in *Citizens United v. Federal Elections Commission*.² These decisions have laid a sound foundation for the validity of laws along the lines we are proposing. Moreover, there is a substantial body of evidence testifying to the necessity of such laws, not merely their constitutionality. Former Federal Elections

¹ *United States v. Singh*, 924 F. 3d (2019)

² *Bluman v. Federal Elections Commission*, 800 F. Supp. 2d (2011)

Commission Chair Ellen Weintraub has testified before state legislatures and Congress, as well as in correspondence with city councils considering such legislation, that there is a clear and present need for policies to stem the influx of foreign money into local elections.^{3 4} So too has leading constitutional law scholar Laurence Tribe, who has endorsed measures of the kind we are recommending here as “valuable tool[s] for protecting and preserving the integrity of local elections.”⁵

Our recommendation is that the threshold for foreign-owned corporations be set at 1% of interests held by a single foreign investor or entity. This number derives from the Securities and Exchange Commission’s long-standing requirement that a shareholder own at least 1% of stock in a corporation to be eligible to make proposals to the board. While 1% may seem narrow, Professor John C. Coates, a widely recognized corporate law authority and former consultant for the SEC, points out that “virtually no one questions that owning 1% of voting shares” would “qualify an investor for this method of influence”—that is, a say in corporate political spending.⁶ If we want to ensure foreign entities are not influencing the flow of political spending in San José, 1% is a reasonable threshold to set.

Public financing for council and mayoral campaigns would also serve to bolster public confidence in our electoral system and boost community engagement with local elections. The Supreme Court has repeatedly affirmed not only the constitutionality of public financing of campaigns, but also its value as a means of preventing electoral corruption.⁷ Assessments of public financing programs in Washington, DC, New York City, and Los Angeles have unanimously found that those programs stimulated citizen engagement with the electoral process, increased the number of small donors in local elections, and opened the doors for a larger, more diverse field of candidates.^{8 9 10}

With successful public financing programs already operational in other major Bay Area cities like Oakland and San Francisco, it would be prudent for the City of San José to consider following suit. Thus, we ask that staff come back to Council with recommendations for a public financing program, looking at the reimbursement and matching models referenced in the staff memo as examples, with a comprehensive analysis of anticipated implementation costs, challenges, and benefits of each approach in San José.

³ HB 34: Hearings before the Ways and Means Committee of the Maryland House of Delegates. 2020. (Testimony of Ellen Weintraub)

⁴ Ellen Weintraub. Letter to the St. Petersburg City Council on the proposed “Defend our Democracy Ordinance.” October 25, 2016

⁵ Laurence Tribe. Letter to the St. Petersburg City Council on the proposed “Defend our Democracy Ordinance.” October 25, 2016

⁶ John C. Coates. Statement submitted to the Massachusetts House of Representatives regarding an act to limit spending by foreign-influenced corporations, p. 7. 2019.

⁷ Opinion of the court in *Buckley v. Valeo* (1970) and *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (2011)

⁸ Fors Marsh Group. “Report: District of Columbia Fair Elections Program.” August 2, 2021.

⁹ New York City Campaign Finance Board. “New Yorkers Make Their Voices Heard: A Report on the 2009 Elections.” 2010.

¹⁰ Center for Governmental Studies. “Public Campaign Financing in California.” 2014.

Slightly extending the campaign contribution period for both primary and general elections would also serve to encourage a broader and more diverse pool of candidates to run for office. Current FEC regulations permit campaigns to accept contributions following an election in order to pay down outstanding campaign debts¹¹—but the City of San José’s municipal code implicitly rules this out by prohibiting the solicitation or acceptance of contributions after midnight the day before the primary and general election dates, other than for the purpose of paying costs associated with an election contest or recount. This has the effect of discouraging candidates who would otherwise be interested in running for office but lack the personal funds to pay off any debts they may accrue during the campaign. Allowing a brief period of sixty days after the conclusion of the election during which candidates may accept contributions for the sole purpose of retiring campaign debt is a commonsense fix that would remove this barrier and bring us in line with standard FEC practices.

Addressing these issues gives us an opportunity to bolster the public’s faith in their democracy and their elected representatives, boost civic engagement, and draw a more diverse pool of candidates and participants into our electoral process. We would be remiss if we did not take that opportunity now.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member’s staff, concerning any action discussed in the memorandum, and that each signer’s staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member’s staff.

¹¹ <https://www.fec.gov/help-candidates-and-committees/handling-loans-debts-and-advances/retiring-debts-candidate/>