FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ELLEN L. WEINTRAUB
COMMISSIONER

October 25, 2016

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Members of the St. Petersburg City Council:

Thank you for this opportunity to comment on the "Defend Our Democracy Ordinance" you are considering. I congratulate and thank Vice Chair Rice for taking on this issue and bringing this ordinance before you. This ordinance will make St. Petersburg a leader in the United States' so-far halting efforts to respond to the corporate and foreign money flowing into our elections since the 2010 *Citizens United* decision.

In this tumultuous political year, foreign influence on American elections has emerged as an area of great concern to the American people. Our intelligence agencies indicate that a foreign government has stolen and disclosed emails from a national party committee and persons associated with a Presidential campaign in an attempt to disrupt our election. We have seen similar reports of foreign hacks of state voter-registration data. And we may have spotted the tip of the iceberg in foreign political spending, the true size of which is obscured by a sea of dark money.

The proliferation of dark-money groups in the wake of *Citizens United* has made it impossible to know the sources of all the funds flooding into our political system. It would be best to have more complete transparency for political spending. This proposal to require political spenders to verify and certify that they are not spending foreign money is a relatively modest but extremely welcome first step toward that goal.

Your proposed ordinance is well-drafted, on-target, legally sound, and very important. I am sorry to report that it is the sort of reform that may only succeed at the local and state levels at the moment, as ideological opposition to campaign-finance law enforcement has effectively paralyzed both the Federal Election Commission and Congress.

I well understand the concern about the increasingly influential role of super PACs in our elections. At the federal level, we are awash in super PAC funds. The Associated Press reported earlier this week that of the $1.7 billion raised for the Presidential race this year, fully one-third

of it came from unlimited donations to super PACs or dark-money groups that disclose even less than super PACs do.

The Wall Street Journal did a deep dive into the reports filed at the FEC last week. They found that 23 billionaires have spent $88 million on the presidential campaign. That's more than 700 times as much as they could have given if they could only contribute directly to candidate committees.

While most people think about outside-spending groups like super PACs in relation to congressional and presidential races, we are increasingly seeing these types of groups active at the state and local levels as well, where smaller sums can have much bigger impacts. A new study by the Brennan Center finds that in 2014 in the state races they examined, only 29 percent of outside spending was fully transparent, way down from 76 percent in 2006. This is a very troubling trend.

But I particularly want to address your proposed legislation's provisions concerning foreign-influenced corporations. I am gratified to note that it tracks the arguments I laid out in a *New York Times* op-ed in March (attached), where I highlighted the risk of foreign actors influencing our politics through corporate political contributions.

In a nutshell, my op-ed pointed out that the *Citizens United* majority protected the First Amendment rights of corporations as "associations of citizens." But the people behind corporate political spenders are not always U.S. citizens, and the resources they use may well be owned by foreigners. And under longstanding federal law, foreign nationals are absolutely barred from spending directly or indirectly in U.S. elections at any political level, including the municipal level. 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.

Foreign ownership of U.S. corporate assets is not an abstract concern. As Harvard Law professor John Coates, an expert on corporate law, said at the FEC in June, we have seen an "astonishing increase" in foreign ownership of U.S. corporate stock: "Back to 1982, about 5 percent of all U.S. corporate stock was held or controlled by foreigners," Prof. Coates said. "Now, it's now up to 25. Twenty-five."

And as I read Supreme Court precedent, ownership matters. When a U.S.-based company is owned by foreigners, the U.S. managers, even if they are U.S. citizens, would be breaching their fiduciary duties if they spent company resources other than in the best interest of their foreign owners. In the 2014 *Hobby Lobby* case, the Supreme Court wrote, "An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people." It matters whose rights are being protected and whether the people who own or control corporations have the right to participate in our elections at all. Foreign nationals do not.

By focusing on disclosure, the City of St. Petersburg is on strong legal footing. The proposed disclosure does not bar any spending. It merely requires corporations that seek to spend in St. Petersburg elections to certify that they are following pre-existing federal law barring political spending by foreign nationals in municipal elections.

This is fully in keeping with *Citizens United's* prescription for greater transparency in political spending; as the 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 measure before you requires a certification by corporations that seek to spend more than $5,000 in municipal elections that they are not "foreign-influenced corporations." The 5% and 20% thresholds strike me as defensible levels at which to draw a distinction among corporations. The notion that ownership can indicate control is not a novel idea in the law. Other areas of law specify various ownership levels that may be deemed a controlling interest. For example, federal securities law considers the purchase of a 5% share of a corporation to be significant and worthy of disclosure. Communications law limits foreign ownership of entities seeking broadcast licenses to a 20% share.

First Amendment concerns are not implicated by a bar on foreign political spending. In *Bluman v. FEC,* a 2011 decision affirmed by the Supreme Court, a special three-judge D.C. district court held 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." The Court noted that the "government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections."

I applaud St. Petersburg's taking a leadership role on this important question in American political life. By adopting these disclosure requirements, you will set an example that can be followed by others at the local, state, and federal levels. By passing this ordinance, you will be doing not just your City but also your country a great service.

Sincerely,

Ellen L. Weintraub

Ellen L. Weintraub
Commissioner
Federal Election Commission

cc: Mayor Rick Kriseman
Deputy Mayor Kanika Tomalin
City Attorney Jacqueline Kovilaritch

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.

Ellen L. Weintraub is a member of the Federal Election Commission.

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