



## **“Defend Our Democracy” Ordinance** *Frequently Asked Questions*

### **1. What does the proposed ordinance do?**

The proposed ordinance, the first of its kind in the nation, will establish limits on contributions to “independent-expenditure only” political action committees, known as super PACs, effectively abolishing super PACs in St. Petersburg elections. It will also require corporations that spend \$5,000 or more on St. Petersburg elections to certify they are not owned or controlled in significant part by foreign entities.

### **2. Who is involved in this effort?**

Councilmember Darden Rice, Vice Chair of the St. Petersburg City Council, is championing the ordinance. Public support for the ordinance is led by **American Promise** (Tampa Bay Chapter) under the leadership of Rae Claire Johnson and Karen Lieberman, and the **St. Petersburg League of Women Voters**, under the leadership of Julie Kessel. The ordinance was developed with input from **Free Speech For People**, a national non-partisan non-profit organization, with the assistance and advice of Prof. Laurence Tribe, an expert in constitutional law at Harvard Law School; Prof. John Coates, an expert in corporate law at Harvard Law School; Prof. Dan Tokaji, an expert in election law at Ohio State University College of Law; and Prof. Ciara Torres-Spelliscy, an expert in election and constitutional law at Stetson University School of Law.

### **3. What are super PACs, and why are they a problem?**

In March 2010, a lower federal court, the U.S. Court of Appeals for the D.C. Circuit, created super PACs in the decision *SpeechNow.org v. FEC*,<sup>1</sup> by holding that the federal law limiting contributions to political action committees to \$5,000 per person per year did not apply to political committees that promised to make only “independent expenditures,” i.e., expenditures that are not coordinated with any candidate. As a result, super PACs have become vehicles for wealthy donors to evade campaign contribution limits designed to prevent corruption and the appearance of corruption.

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<sup>1</sup> 599 F.3d 686 (D.C. Cir. 2010).

#### **4. Has the U.S. Supreme Court ruled on this issue?**

No. While some courts have followed the *SpeechNow* decision, the U.S. Supreme Court, the Florida Supreme Court, and the U.S. Court of Appeals for the Eleventh Circuit (which has jurisdiction over federal cases in Florida) have yet to rule on the issue.

#### **5. Why limit contributions to super PACs in St. Petersburg?**

Super PAC spending is on the rise in Florida. According to the *Miami Herald*, donations to “groups [that] enjoy no limits on individual donations,” such as super PACs, “have skyrocketed” in recent years across the state.<sup>2</sup> For example, in Gainesville, big donors have worked around recently-adopted contribution limits by giving to super PACs that then spend big on races for the Gainesville City Commission and the Alachua County Commission.<sup>3</sup> In Brevard County, the mother of a congressional candidate in Melbourne Beach was able to bypass the federal contribution limit of \$5,200 by giving \$225,000 to a custom super PAC supporting her son.<sup>4</sup> A Cocoa Beach-based super PAC, the Space Coast Liberty Caucus, received contributions of hundreds of thousands of dollars to benefit a state senator in Rockledge.<sup>5</sup> And in Miami-Dade County, dueling super PACs raised and spent some \$300,000 on two judicial races.

This election cycle, the three leading candidates for Florida’s 19<sup>th</sup> congressional district, which includes parts of southwest Florida, all delayed announcing their candidacies in order to first raise money through outside groups such as super PACs.<sup>6</sup> And in the race for Florida’s 1<sup>st</sup> congressional district, a state representative-turned-congressional candidate is being supported by a super PAC funded by two organizations *he himself* used to run.<sup>7</sup> Just three days before announcing his intention to run, the state representative sent letters to Florida’s Division of Elections officially stepping down as the chairman of two leadership PACs. Three months later, the two PACs contributed all of their funds to the super PAC supporting his congressional bid.

Furthermore, Florida-based donors have become accustomed to making large, unregulated super PAC contributions. According to the National Institute on Money in State Politics, contributions from individuals residing in St. Petersburg to candidates and committees since 2012 totals nearly \$2.5 million.<sup>8</sup> During the 2016 election cycle, two Florida-based Republican

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<sup>2</sup> David Ovalle, “Auto insurance political committee flexes muscle in Miami judicial races,” MIAMI HERALD, Aug. 19, 2014, <http://hrl.d.us/29HWMiD>.

<sup>3</sup> Christopher Curry, “Local cap on campaign contributions is easy to bypass,” GAINESVILLE SUN, May 3, 2014, <http://bit.ly/29W3oqa>.

<sup>4</sup> This made the New York Times: “The Custom-Made ‘Super PAC,’” N.Y. TIMES, Aug. 3, 2014, <http://nyti.ms/1mdxFin>.

<sup>5</sup> The statewide campaign finance reform organization Come Clean Florida highlights this example on its web page. *See* Come Clean Florida, “2014 D16 Senate Race – Thad Altman,” <http://bit.ly/29s5f5b> (last visited July 16, 2016).

<sup>6</sup> Alexandra Glorioso, “Money keeps some wondering whether they should seek U.S. Rep. Curt Clawson’s seat,” NAPLES DAILY NEWS, June 1, 2016, <http://bit.ly/29u9Pos>.

<sup>7</sup> Paul Blumenthal, “This Super PAC Is Funded By Groups Once Run By The Candidate It Now Supports,” THE HUFFINGTON POST, Aug. 5, 2016, <http://huff.to/2azUqO2>.

<sup>8</sup> Nat’l Inst. on Money in State Politics, “Contributions from St. Petersburg, FL, to candidates and committees,” <http://bit.ly/29W3huX> (last visited July 16, 2016).

presidential candidates raised unprecedented amounts of money for their affiliated super PACs, while Florida-based donors have raised millions for the super PAC associated with Hillary Clinton.

Importantly, Florida is also linked to the first documented instance of quid pro quo corruption through super PAC contributions: In 2015, U.S. Senator Robert Menendez (D-NJ) and Dr. Salomon Melgen, who runs an ophthalmology clinic with four offices in St. Lucia and Palm Beach counties, were indicted on bribery charges stemming in part from alleged political favors provided by Sen. Menendez in exchange for earmarked contributions from Dr. Melgen to a super PAC supporting Sen. Menendez's reelection.<sup>9</sup> The indictment marked a turning point in the discussion about the corrupting potential of contributions to super PACs.<sup>10</sup>

Floridians are increasingly concerned about this emerging norm, and many Florida cities have actively sought constitutional change to push back: The Sarasota County Council, Gainesville City Commission, Orlando City Council, and South Miami City Council have passed resolutions calling for a constitutional amendment stating that money is not speech in elections, and city councils in Tampa Bay and Key West recently adopted resolutions condemning *Citizens United*. In 2014, *Florida Today* reported on outside spending and noted that "[a] locally based effort is seeking to reform campaign spending in Florida, at least for state legislative races. And even some of the beneficiaries agree change is needed."<sup>11</sup>

## **6. Why address foreign corporate spending?**

Federal law already prohibits foreign nationals—meaning foreign governments and their agents, foreign-based corporations, and individuals who are not citizens or lawful permanent residents of the United States—from spending “directly or indirectly” on federal, state, and local elections.<sup>12</sup> Yet as a result of the U.S. Supreme Court’s 2010 ruling in *Citizens United v. FEC*, and because the FEC has not clarified what “indirect” spending means, foreign entities are able to buy stakes in U.S.-based corporations, which can spend as much money as they want on American elections.

Commissioner Ellen Weintraub of the Federal Election Commission explained the issue in a recent op-ed in the *New York Times*: “Individual foreigners are barred [under federal law] from spending to sway elections,” she wrote.<sup>13</sup> Yet, under *Citizens United*, “groups of foreigners, or foreigners in combination with American citizens, [are allowed] to fund political spending through corporations.” This result, Weintraub concluded, “defies logic.”

The problem at issue in this loophole was identified by Justice Stevens in his dissent in *Citizens*

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<sup>9</sup> Matea Gold, “Menendez indictment marks first big corruption case involving a super PAC,” WASH. POST, Apr. 2, 2015, <http://wpo.st/PJDS1>.

<sup>10</sup> Nicholas Confessore & Matt Apuzzo, “Robert Menendez Indictment Points to Corrupting Potential of Super PACs,” N.Y. TIMES, Apr. 2, 2015, <http://nyti.ms/1DBslSe>.

<sup>11</sup> Dave Berman & Jim Waymer, “Outside groups play role in campaigns,” FLA. TODAY, Aug. 23, 2014, <http://on.flatoday.com/1ttHmP2>.

<sup>12</sup> See 52 U.S.C. § 30121(a).

<sup>13</sup> Ellen Weintraub, “Taking On Citizens United,” N.Y. TIMES, March 30, 2016, <http://nyti.ms/1SwK4gK>.

*United* when he wrote “Because [corporations] may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.”<sup>14</sup>

This threat is not merely hypothetical. For example, in May 2016, Uber teamed up with fellow ride-hailing service Lyft to drench Austin, Texas, in \$9 million worth of election spending—which crushed the previous record<sup>15</sup> for spending in Austin seven-fold, and which could have bought<sup>16</sup> five seats in the U.S. Congress in 2012—in the hope of overturning a city law requiring drivers to submit to fingerprint-based criminal background checks.<sup>17</sup> Then, just weeks later, Uber disclosed an unprecedented \$3.5 billion investment from the Saudi Arabian government, meaning that the Kingdom owns more than five percent of the company, along with a seat on its board of directors.<sup>18</sup>

Uber’s pummeling of Austin, Texas, was not Uber’s first fight and won’t be its last. The company recently spent roughly \$600,000 on a voter referendum in Seattle, and hundreds of thousands more on lobbying efforts, including nearly \$700,000 in California, \$300,000 in Washington, D.C., \$200,000 in Maryland, and \$70,000 in Oregon.<sup>19</sup> Uber has engaged fleets of lobbyists—250 by one count,<sup>20</sup> nearly one-third more than Walmart—in 45 of the nation’s 50 state houses,<sup>21</sup> and it has invested heavily on multiple fronts in major U.S. cities, from New York City<sup>22</sup> to Los Angeles,<sup>23</sup> to Chicago,<sup>24</sup> to Atlanta.<sup>25</sup>

This threat has surfaced in other cities and states across the country:

- A recent investigation by *The Intercept* revealed that APIC, a San Francisco-based “diversified international investment holding company,” which has been described as “controlled,” “owned,” and even “100 percent owned” by Gordon Tang and Huaidan

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<sup>14</sup> *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting).

<sup>15</sup> Nolan Hicks & Ben Wear, “Uber, Lyft spending now at \$8.1 million in Prop. 1 race,” AUSTIN-AMERICAN STATESMAN, Apr. 29, 2016, <http://atxne.ws/29u25yV>.

<sup>16</sup> Sarah Wheaton, “How Much Does a House Seat Cost?” N.Y. TIMES, July 9, 2013, <http://nyti.ms/29nlc0u>.

<sup>17</sup> Nolan Hicks, “Prop 1 campaign crosses \$9 million threshold,” AUSTIN-AMERICAN STATESMAN, May 9, 2016, <http://atxne.ws/29pbFBk>.

<sup>18</sup> See Elliot Hannon, “Saudi Arabia Makes Record \$3.5 Billion Investment in Uber,” SLATE, June 1, 2016, <http://slate.me/1UvvM3x>.

<sup>19</sup> Karen Weise, “This is How Uber Takes Over a City,” BLOOMBERG, June 23, 2015, <http://bloom.bg/1Ln2MaN>.

<sup>20</sup> *Id.*

<sup>21</sup> Dave Levinthal, “Capitol Hill’s Uber caucus,” CENTER FOR PUBLIC INTEGRITY, May 6, 2015, <http://bit.ly/1IL2HMO>.

<sup>22</sup> Kate Rogers, “In latest battle, Uber notches wins over New York City,” CNBC, Jan. 15 2016, <http://cnb.cx/1Vb9tPI>.

<sup>23</sup> Meghan McCarty, “City of LA wants fingerprinting for Uber and Lyft drivers,” 89.3 KPCC, March 17, 2016, <http://bit.ly/1UHohaB>.

<sup>24</sup> Micah Maidenberg, “Surprise: Uber, Lyft hate proposed ride-hailing regulations,” CRAIN’S CHICAGO BUSINESS, March 24, 2016, <http://bit.ly/29u3INg>.

<sup>25</sup> Associated Press, “Airport aims to use Uber drivers’ fingerprints to check past,” BOSTON HERALD, March 27, 2016, <http://bit.ly/29pfmXt>.

Chen—two Chinese citizens with permanent residence in Singapore—gave \$1.3 million to Right to Rise USA, a super PAC supporting Jeb Bush in 2016.<sup>26</sup>

- This past August, multinational corporations, including American Electric Power, Limited Brands, and Nationwide Insurance, spent a combined \$275,000 in defeating a ballot initiative in Columbus, Ohio, which would have increased the number of city councilmembers and established a ward-based election scheme.<sup>27</sup>
- In 2014, Chevron spent over \$3 million backing city council and mayoral candidates in Richmond, California, a city half the size of St. Petersburg.<sup>28</sup> Chevron was at the time facing a multimillion-dollar lawsuit from the city of Richmond over a refinery fire that caused more than 15,000 people to seek medical treatment.
- A New Jersey-based subsidiary of a Chinese-owned business contributed \$120,000 directly to Terry McAuliffe’s campaign during his successful 2013 gubernatorial bid in Virginia.<sup>29</sup>
- In 2012, a contentious ballot measure in Los Angeles County, the “Safer Sex in the Adult Film Industry Act,” attracted significant spending, including \$327,000 from two companies tied to “Manwin Licensing International,” a foreign corporation located in Luxembourg that runs adult webpages around the world.<sup>30</sup> The company’s then-CEO was a German national.<sup>31</sup>
- Also in 2012, a statewide ballot initiative in California, which would have required all foods that contain genetically modified organisms to be labeled as such, attracted \$45 million in spending from multinational corporations such as Monsanto and DuPont.<sup>32</sup> Opponents of the measure spent five times more than its supporters and defeated it by a 53-47 margin.<sup>33</sup>

These were no flashes in the pan: the Center for Responsive Politics, an organization devoted to tracking money in federal elections, has identified nearly \$10 million in spending from what it terms “foreign-connected PACs”—that is, American divisions of foreign companies that have formed political action committees in order to spend on American elections.<sup>34</sup>

As Professor Laurence Tribe of Harvard Law School explained in the *Boston Globe*, because the Federal Election Commission is “deadlocked into irrelevance” by its current 3-3 partisan makeup,

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<sup>26</sup> Jon Schwartz & Lee Fang, “The Citizens United Playbook,” THE INTERCEPT, Aug. 3, 2016, <http://bit.ly/2auW75p>.

<sup>27</sup> Lucas Sullivan, “Follow the money flowing toward initiative campaigns in Columbus,” THE COLUMBUS DISPATCH, July 22, 2016, <http://bit.ly/2ahlSpq>.

<sup>28</sup> Carolyn Jones, “Chevron’s \$3 million backfires in Richmond election,” SFGATE, Nov. 5, 2014, <http://bit.ly/1u4BBt7>.

<sup>29</sup> 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>.

<sup>30</sup> 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>.

<sup>31</sup> *Id.*

<sup>32</sup> Suzanne Goldenberg, “Prop 37: food companies spend \$45m to defeat California GM label bill,” THE GUARDIAN, Nov. 5, 2012, <http://bit.ly/29I3SE7>.

<sup>33</sup> *Id.*

<sup>34</sup> Ctr. for Responsive Politics, “Foreign-connected PACs,” <http://bit.ly/1puzjEv> (last visited July 16, 2016).

it is “in no position to lead the fight.” Instead, “local governments can raise the flag by passing laws that prohibit foreign-influenced corporations from spending money on their elections.”<sup>35</sup>

Political spending in local elections by foreign-influenced corporations appears to be growing. Of course, the full extent is not completely known, as state and local elections are now flooded with unprecedented millions in spending by secret sources through “dark money” organizations, which are not required to disclose their donors.<sup>36</sup> When corporations fund local election spending, it affects “officials who will regulate their industries, judges who will decide their cases, and ballot initiatives that will impact their bottom line.”<sup>37</sup>

St. Petersburg can lead the way by addressing the risk of foreign corporate political spending approaching the city’s doorstep.

## **7. How does the ordinance define a “foreign-influenced corporation”?**

Under the ordinance, as introduced, a foreign-influenced corporation is any corporation (1) wherein foreign nationals hold, own, control, or otherwise have directly or indirectly acquired beneficial ownership of equity or voting shares in an amount that is equal to or greater than five percent of the total equity or outstanding voting shares; (2) with a chief executive officer who is a foreign national; (3) with a board of directors comprised of one-third or more foreign nationals; or (4) wherein one or more foreign nationals participate in any way, directly or indirectly, in the corporation’s decision-making process with respect to the corporation’s political activities in the United States, including the corporation’s political activities in a municipal election.

These thresholds were inspired by other areas of the law, including corporate law, tax law, and communications law, and how they respond to the issue of foreign ownership and influence. The term “foreign national” is defined in existing federal law.

## **8. Is the ordinance constitutional?**

We believe it is. The ordinance has been carefully designed to comply with all precedent of the U.S. Supreme Court, the Florida Supreme Court, and the U.S. Court of Appeals for the Eleventh Circuit. If it is challenged in court, it might well provide the U.S. Supreme Court the opportunity to overrule the D.C. Circuit’s *SpeechNow* decision.

The justices of the U.S. Supreme Court are well aware of how super PACs have essentially taken over campaign financing in many elections, rendering direct contribution limits in the low

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<sup>35</sup> Laurence Tribe & Scott Greytak, “Get foreign money out of US elections,” BOSTON GLOBE, June 22, 2016, <http://bit.ly/292UENu>.

<sup>36</sup> See Chisun Lee et al., “Secret Spending in the States,” Brennan Center for Justice, June 26, 2016, <http://bit.ly/293KQ9A>.

<sup>37</sup> *Id.*

thousands almost irrelevant as donors circumvent them by giving tens of millions to affiliated super PACs.

When it comes to the ordinance's limit on foreign corporate spending, the current federal prohibition on foreign governments, foreign-based companies, and people who are not U.S. citizens or permanent residents contributing or spending money "directly or indirectly" in connection with any federal, state, or local election was upheld by the U.S. Supreme Court as recently as 2012 in the case *Bluman v. FEC*.<sup>38</sup>

### **9. Could this ordinance overturn *Citizens United*?**

The ordinance has been designed to comply with all precedent of the U.S. Supreme Court, including *Citizens United*. If the ordinance is challenged in court, it could lead to a legal ruling that overturns *Citizens United*, but both aspects of the ordinance could be upheld without requiring this.

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<sup>38</sup> *Bluman v. FEC*, 132 S. Ct. 1087 (2012).