

Chairman Barry Finegold, barry.finegold@masenate.gov
Chairman John Lawn, john.lawn@mahouse.gov
Joint Committee on Election Laws
Massachusetts State House

RE: Political spending by foreign-influenced corporations
S.418 (Montigny), H.640 (Cutler), H.703 (Naughton)

Limits on contributions to super PACs
S.394 (Comerford), H.642 (Day)

May 15, 2019

Dear Chairman Finegold and Chairman Lawn,

I am the Legal Director of Free Speech For People, a national non-partisan non-profit organization with over 30,000 supporters in Massachusetts and with offices in Amherst and Newton, that works to renew our democracy and to limit the influence of money in our elections. I write in support of two sets of bills now before the Joint Committee on Election Laws: S.418, H.640, and H.703, pertaining to political spending by foreign-influenced corporations, and S.394 and H.642, pertaining to contributions to independent expenditure PACs.

**1. Political spending by foreign-influenced corporations
(S.418, H.640, and H.703)**

The 2016 election showed that foreign interference in our elections is a serious problem. The recent news that at least one Russian company bought political ads on Facebook shows one way that foreign interests can use corporations to influence elections. But Facebook is not the only way that foreign interests can use American companies to influence U.S. elections. These (identical) bills would close a major loophole.

Under well-established federal law, upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend

money to influence federal, state, or local elections.¹ However, *no* law prevents a foreign interest from using a U.S.-based corporation to accomplish the same goal. Until recently, this was not a problem, either at the federal level or in states like Massachusetts, because they banned corporate political spending entirely. But the U.S. Supreme Court’s 2010 *Citizens United* decision invalidated laws, including in Massachusetts, that banned corporate political spending.²

That created a loophole for foreign interests to acquire stakes in U.S. corporations, such as a company incorporated in Delaware, and then use that leverage to influence or control the corporation’s political activity, including both direct spending and contributions to super PACs. The Supreme Court indicated in *Citizens United* that it was aware of this problem and its decision would not prevent a law that was designed to address this problem,³ yet it has been now nine years and neither Congress nor the beleaguered Federal Election Commission have done anything. However, as explained in more detail in written testimony submitted by Professor Laurence Tribe of Harvard Law School, Massachusetts does not need to wait for federal action to protect its state and local elections from foreign influence. The 2016 election showed us that the threat of foreign influence in elections is real. These bills would plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

1. Constitutionality of Banning Political Spending by Foreign-Influenced Entities

Commissioner (now Chair) Ellen Weintraub of the Federal Election Commission explained the issue in an op-ed in the New York Times: “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

¹ 52 U.S.C. § 30121; *Bluman v. Federal Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

² *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

³ *See id.* at 362.

American citizens—and enforce the ban on foreign political spending against those that are not.”⁴

The problem at issue in this loophole was identified by Justice Stevens in his dissent in *Citizens 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.”⁵ This threat is not merely hypothetical. Uber has shown an increasing appetite for political spending in a variety of contexts.⁶ Although Uber started in Silicon Valley, the Saudi government now owns more than 10 percent of the company.⁷ 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.⁸ Airbnb is a privately held company, so ownership data is not complete, but it is partly owned by Moscow-based (and Kremlin-linked) DST Global.⁹ 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

⁴ Ellen Weintraub, “Taking on Citizens United,” N.Y. Times, Mar. 30, 2016, <http://nyti.ms/1SwK4gK>.

⁵ *Citizens United*, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting).

⁶ Glenn Blain, “Uber spent more than \$1.2M on efforts to influence lawmakers in first half of 2017,” New York Daily News, Aug. 13, 2017, <http://www.nydailynews.com/news/national/uber-spent-1-2m-lobbying-efforts-2017-article-1.3408470>; Karen Weise, “This is How Uber Takes Over a City,” Bloomberg, June 23, 2015, <http://bloom.bg/1Ln2MaN>.

⁷ Eric Newcomer, “The Inside Story of How Uber Got Into Business with the Saudi Arabian Government,” Nov. 3, 2018, <https://www.bloomberg.com/news/articles/2018-11-03/the-inside-story-of-how-uber-got-into-business-with-the-saudi-arabian-government>.

⁸ 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>.

⁹ See Jon Swaine & Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian, Nov. 5, 2017, <https://www.theguardian.com/news/2017/nov/05/russia-funded-facebook-twitter-investments-kushner-investor>; 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/>. 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>. However, the calculation of DST Global’s ownership stake may be based on a valuation of \$1 billion or more; if so, DST Global’s \$40 million could represent 4%, not the 5% needed to qualify as a “foreign-influenced corporation.”

portfolios.¹⁰ Moreover, Massachusetts has already encountered an attempt to hide contributions from foreign actors through the use of shell corporations in the context of the ballot measure supporting gambling in 2016.¹¹

As Professor Laurence Tribe of Harvard Law School and I explained in our joint op-ed in the Boston Globe, “while the Supreme Court was careful to note that its decision would not foreclose limits that apply specifically to corporations with significant foreign influence, Congress hasn’t updated the law since the *Citizens United* decision. Meanwhile, the Federal Election Commission, the agency in charge of interpreting and applying the law, has been stuck in stalemate.”¹² And as Commissioner Weintraub noted in the New York Times, 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 case of *Bluman v. Federal Election Commission* specifically upheld a 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 corporate governance can be upheld on the authority of *Bluman* and as an exception to *Citizens United*.

¹⁰ According to one report, Saudi Arabia’s Public Investment Fund is expected to deploy \$170 billion in investments over the next three to four years. Sarah Algethami, “What’s Next for Saudi Arabia’s Sovereign Wealth Fund, Bloomberg BusinessWeek, Oct. 21, 2018, <https://www.bloomberg.com/news/articles/2018-10-22/what-s-next-for-saudi-arabia-s-sovereign-wealth-fund-quicktake>.

¹¹ Office of Campaign and Political Finance, “Ballot question committee agrees to \$125,000 civil forfeiture to resolve campaign finance issues,” (Jan. 26, 2017), <http://files.ocpf.us/pdf/releases/horsepr.pdf>; Shawn Musgrave, “Offshore Money Pours into Mass. Slot Machine Initiative,” New England Center for Investigative Reporting, November 3, 2016, <https://www.necir.org/2016/11/03/offshore-money-pours-slot-machine-initiative-massachusetts/>.

¹² Laurence Tribe & Ron Fein, “How Massachusetts can fight foreign influence in our elections,” Boston Globe, Sept. 26, 2017, <https://www.bostonglobe.com/opinion/2017/09/26/how-massachusetts-can-fight-foreign-influence-our-elections/CM8rjPu8NtmRJIYRVeUVJM/story.html>.

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).

2. *Mechanics of Proposed Ban*

The legislative proposal would amend chapter 55 to ban independent expenditures, electioneering communications, or contributions to independent expenditure PACs (super PACs) by a “foreign-influenced corporation.” It does *not* regulate other forms of corporate political activity, such as lobbying or spending in ballot measure elections, nor does it in any way regulate the personal political activities or spending of the individual employees or stockholders of the company. It simply bans a “foreign-influenced corporation” from using corporate treasury money to make independent expenditures, electioneering communications, or contributions to independent expenditure PACs.

The term “foreign-influenced corporation” is defined via a three-layer definition. First, the term “foreign investor” is defined to mean a foreign government, foreign company, or individual foreign national that owns stock in a company. Second, the term “foreign owner” is defined to mean either a foreign investor, *or* a company for which a foreign investor owns half or more of the shares. This latter part of the definition of “foreign owner” is intended to include a U.S.-registered company that is majority-owned or controlled by a foreign corporation or individual foreign investor, because many foreign entities invest in American companies through such subsidiaries. Finally, the term “foreign-influenced corporation” is defined to include a corporation, LLC, or similar business entity where either a single foreign owner owns 1% of shares, multiple foreign owners own 5% of shares in the aggregate, or a foreign owner participates directly or indirectly in the corporation’s decision-making process with respect to the corporation’s political activities in the United States.

The bill also requires corporations that do spend money in elections to certify that they are *not* foreign-influenced. Furthermore, the bill also expands an existing disclaimer requirement for political advertisements paid for by entities, such as independent expenditure PACs, that accept contributions from others. Under current law, these entities must list or

recite their top five contributors in the advertisement.¹⁵ The bill requires that the entity also either obtain certifications from the top five contributors that they are not foreign-influenced corporations, or else include an additional disclaimer.

3. Foreign ownership thresholds

The thresholds of 1% for a single foreign owner, or 5% for multiple foreign owners, may appear low at first. However, as explained in more detail in written testimony submitted by Professor John Coates of Harvard Law School, these thresholds reflect levels of ownership that are widely agreed (including by entities such as the Business Roundtable) to be high enough to influence corporate governance. For a large corporation, an investor that owns 1% of shares might well be the largest single stockholder. The proposed 1% threshold is also grounded in current Securities and Exchange Commission requirements and thresholds for shareholder proposals.¹⁶ 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 owner in the context of corporate political spending—that risk.

In order to evaluate the potential scope of the lower thresholds established in the proposed legislation, Free Speech For People has examined some of the largest companies in Massachusetts and the largest known political spenders. It is important to note that this analysis is based upon publicly reported levels of share ownership that are subject to change as shareholders buy and sell stocks. The fluidity of share ownership of publicly traded corporations is one of the reasons that the proposed legislation requires corporations to certify that they do not meet the definition of a foreign influenced corporation at the time that a contribution is made. This also means that although some of the entities we analyzed may meet the definition of foreign influence corporation on the date that we reviewed the ownership data, they may

¹⁵ 55 M.G.L. § 18G.

¹⁶ Owning one percent of a company's shares allows an owner to submit shareholder proposals, which creates substantial leverage. *See* 17 C.F.R. 240.14a-8(b).

or may not continue to meet that definition, while other corporations that may not have met the definition on the date of FSFP’s review, may meet the definition at a later date.

In order to develop a representative list of companies, we used the NASDAQ listing of companies by region, screened for Massachusetts companies, and sorted by largest market capital. We removed listings of index funds and ETFs, and focused only on the actual corporate entities. This resulted in 53 companies.

We also developed a separate list of companies that engaged in the most corporate political spending, whether publicly or privately held, based on reporting from recent Massachusetts campaign finance data at the Massachusetts Office of Campaign and Political Finance and the Center for Responsive Politics. This analysis included piercing through several layers. We examined not only corporations that spend money directly in elections, which is uncommon, but also those that make large contributions to the largest independent expenditure PACs (super PACs) or other outside spending groups active in Massachusetts elections.¹⁷ The purpose of this part of analysis was not to identify particular *spending* that would be affected by the bill, but rather some of the corporations with a demonstrated practice of spending money for political purposes in Massachusetts, purely for illustrative purposes.¹⁸

¹⁷ Given that funds from the Republican Governors Association and Democratic Governors Associations accounted for the vast majority of outside spending in state elections, we reviewed the top contributors to the Republican Governors Association (RGA) and the Democratic Governors Association (DGA) as reported by the Center for Responsive Politics’ Open Secrets database and added a number of companies to the list for evaluation as a result of their substantial contributions to these entities. Center for Responsive Politics, “Top Contributors to Republican Governors Assn 2014,” Open Secrets, accessed Feb. 5, 2019, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2014&ein=113655877; Center for Responsive Politics, “Top Contributors to Democratic Governors Assn 2018,” Open Secrets, accessed Feb. 5, 2019, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=521304889. Review of Open Secrets data from the Center for Responsive Politics also provided a list of the top contributors from Massachusetts from 2018. Center for Responsive Politics, “Top Contributors in 2018, Massachusetts,” Open Secrets, accessed Feb. 5, 2019, <https://www.opensecrets.org/states/donors.php?cycle=2018&state=MA>.

¹⁸ For example, we analyzed some companies that contributed to governors’ inaugural committees, even though the bill does not propose to restrict foreign-influenced corporations from this particular type of spending, because it demonstrates a more general propensity to use corporate treasury money for political purposes.

Many of the companies we analyzed did *not* have a foreign owner with 1% or more of shares, and of those that did, many did not appear to spend corporate money on state elections either directly or via contributions to outside-spending entities which then spend the money on state elections.¹⁹ 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).

But we found over forty U.S.-registered companies with substantial Massachusetts presences which appeared to meet or exceed the 1% threshold for foreign ownership based on publicly available shareholder data, and of that group, at least a dozen are known to spend money (directly or indirectly) in Massachusetts state elections. Many of them are well-known, and some residents might be surprised to know that they were owned in significant part by foreign investors. They included well-known companies in industries such as casinos (e.g., Wynn Resorts, of which 2.73% was owned by a British investor), waste management (e.g., Wheelabrator, which was owned by an Australian investor, or Waste Management Inc., of which 1.2% was owned by the Norwegian government's sovereign wealth fund); cable television (e.g., Comcast, of which 3.28% was owned by an investing company that is itself wholly owned by a Canadian financial company); and others.

The point here is not that these corporations do not have connections to Massachusetts, nor that foreign investment in Massachusetts 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 this:

Before 2010, *every* corporation was prohibited from spending money in Massachusetts elections, until *Citizens United* accorded corporations the right to spend money in our elections on the theory that

¹⁹ We can only say they *appear* not to have spent money on state elections because many times, corporations route their political spending through layers of 501(c)(4) "dark money" groups for which no disclosure is presently required.

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 it could exert influence over how the corporation spends money from the corporate treasury to influence candidate elections. And to reiterate, the bill does not limit in any way how U.S. employees, executives, or shareholders of these companies may spend their *own* money—just how the foreign-influenced corporations’ vast corporate treasuries may be deployed in our politics.

II. Limits on contributions to independent expenditure PACs (S.394, H.642)

Independent expenditure PACs, also known as super PACs, are political committees that make only independent expenditures. Under current law, there are absolutely no limits on contributions to these committees. This creates some unfortunate, illogical, and harmful effects. For example, it is illegal for a wealthy donor to contribute a penny more than \$1,000 to a candidate for governor, because the General Court has determined that contributions above that amount pose an unacceptable risk of corruption or the appearance of corruption.²⁰ Yet that same wealthy donor may contribute \$100,000, or \$1 million, or \$10 million, to the candidate’s super PAC.

This is a recent problem. Until 2010, Massachusetts limited contributions to all political committees except ballot question committees. In 2014, the first statewide election since contribution limits to independent expenditure PACs were eliminated, OCPF reported that super PACs and other independent groups spent \$20.4 million—twice the amount spent in 2010. Most of that came from just two super PACs.²¹

This problem was self-inflicted. Some believe that the Supreme Court’s decisions, including *Citizens United*, ban limits on contributions to independent expenditure PACs. But, as explained in more detail in

²⁰ 55 M.G.L. § 7A.

²¹ Office of Campaign & Political Finance, *Super PACs and independent groups spent \$20.4 million in 2014*, Mar. 27, 2015, <http://files.ocpf.us/pdf/releases/2015IEPACstudy.pdf>.

written testimony submitted to the committee by Professor Laurence Tribe of Harvard Law School, that is incorrect. It is true that some federal courts of appeals, in other parts of the country, have interpreted *Citizens United* to require this result, on the theory that contributions to independent expenditure committees cannot *possibly* cause corruption.²² But, as Professor Tribe explains, the reasoning of those decisions is incorrect and would likely not prevail at the U.S. Supreme Court. And since 2010, empirical evidence has mounted against the assumptions underlying that decision. For example, as explained in more detail in written testimony submitted to the committee by political scientist Stephen Weissman, the actual relationships between “independent” super PACs and their large donors provides ample opportunities for quid pro quo corruption.²³ Recent empirical research shows that, as one might expect, this also leads to the *appearance* of corruption.²⁴ In any event, no court with jurisdiction over Massachusetts—neither in the state court system nor any federal court—has ever adopted the reasoning of those courts or otherwise indicated that limits on contributions to super PACs would be unconstitutional.

This bill amends chapter 55 to impose a contribution limit of \$5,000 from any individual to a super PAC. This is identical to the limits on contributions to political party committees, and five times the limit on

²² See, e.g., *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (2010).

²³ Indeed, a federal grand jury indicted a sitting U.S. Senator for bribery for a contribution to a super PAC, and a federal judge upheld the indictment as consistent with *Citizens United*, although the jury later deadlocked and the judge dismissed some of the charges for insufficient evidence. See *United States v. Menendez*, No. CR 15-155, 2018 WL 526746, at *9 (D.N.J. Jan. 24, 2018). Relatedly, in 2011 the U.S. Court of Appeals for the Eleventh Circuit upheld a bribery conviction against Alabama Governor Don Siegelman where the bribe in question was given to a charitable organization that engaged only in issue advocacy. See *United States v. Siegelman*, 640 F.3d 1159, 1175 (11th Cir. 2011). The fact that a federal court found quid pro quo corruption from a contribution to a group that spent only on issue advocacy is striking because courts consider issue advocacy to pose no greater (and probably less) risk of corruption than “independent” expenditures in candidate races.

²⁴ See Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 *Journal of Legal Analysis* 375 (Winter 2016), available at <https://academic.oup.com/jla/article/8/2/375/2502553>.

contributions to candidate committees.²⁵ It is more than enough to enable contributors to support their favored candidates without posing an unacceptable risk of corruption.

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

Sincerely,

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²⁵ See 55 M.G.L. §§ 7A(a)(1)-(2).