Committee on State, Veterans, & Military Affairs
Colorado Senate

RE: SB21-177 (Bridges/Woodrow)
Concerning restrictions on foreign-influenced money in political campaigns in the state

March 17, 2021

Dear Chair Gonzales, Vice Chair Coleman, Senator Lewis, Senator Simpson, and Senator Sonnenberg,

I am the Legal Director of Free Speech For People, a national non-partisan non-profit organization, that works to renew our democracy and to limit the influence of money in our elections. In particular, we played a critical role in helping draft, provide legal support, and advocate for the nation's first two enacted laws (in Seattle, Washington and St. Petersburg, Florida) that limit political spending by partially-foreign-owned (foreign-influenced) corporations.

I write now to provide our recommendations on SB21-177. A brief list of our recommendations is below, followed by a more detailed explanation of some of them.

I. Recommendations

1) Upgrade the thresholds for a "foreign-influenced corporation" to 1% ownership by any foreign owner (not just a foreign government) or 5% (not 20%) aggregate ownership by multiple foreign owners.
2) Expand the definition of "foreign owner" to also include a corporation or similar entity that is owned at least 50% by a foreign government, foreign political party, foreign business entity, or foreign national.
3) Clarify that actual foreign participation in corporate decision-making regarding political activity will also trigger "foreign-influenced" status regardless of ownership levels.

4) Expand the definition of "foreign-influenced corporation" to also include other legal structures for business entities such as LLCs, partnerships, and so forth.

We have also attached, for your convenience, two letters of testimony that were prepared in support of similar legislation that was enacted by the Seattle City Council in 2020. These letters are from:

- Professor Laurence Tribe, Harvard Law School (addressing constitutional law)
- Professor John Coates, Harvard Law School (addressing mechanisms of corporate governance and implementation), now Acting Director of the Division of Corporate Finance at the U.S. Securities and Exchange Commission

II. General 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.[1] 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.[2]

[1] 52 U.S.C. § 30121.
[2] 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, 924 F.3d 1030, 1042 (9th Cir. 2019).

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.[3] 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."[4] With respect to 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.[5] 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.

Eleven years have passed, and 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 state such as Colorado does not need to wait for federal action to protect its state and local elections from foreign influence. The goal of this type of legislation is to plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

This threat is not merely hypothetical. For example, Uber has shown an increasing appetite for political spending in a variety of contexts.[6] Although Uber started in Silicon Valley, the Saudi government made an enormous (and critical) early investment, and even now owns several

[3] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).
[4] *Citizens United*, 558 U.S. at 349, 354, 356.
[5] *Id.* at 362.
[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.

percent of the company's stock, long after the company has gone public.[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 received crucial early funding from, and was at that time 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 portfolios.[10]

As Professor Laurence Tribe of Harvard Law School and I explained in a 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."[11]

In the New York Times, Federal Election Commissioner Ellen Weintraub explained the problem, and pointed to a solution:

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[7] 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).

[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, 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. 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."

[10] 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.

[11] 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.

"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 corporate governance can be upheld on the authority of *Bluman* and as an exception to *Citizens United*.[15]

III. Foreign influence and ownership thresholds

How much foreign investment renders a corporation's political spending problematic? Arguably, *any* amount of political spending by partly-foreign-owned corporations is a threat to democratic self-government. In the most commonly accepted understanding, shareholders in a corporation are "the firm's residual claimants."[16] That means that, in at

[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 the part of the federal statute that applies the foreign national political spending ban to local elections. *Singh*, 924 F.3d at 1042.
[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, e.g.,* 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 theoretical angles are sometimes offered in academic literature, this is the standard economic model of shareholders of a firm.

least some sense, money in the corporation's treasury is "their" money. In practice, shareholders only 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.

As to corporate political spending, since *Citizens United* this issue has been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.[17] But here, we confront the mirror issue: corporate managers may use funds that partly "belong to" foreign investors to influence U.S. elections. On this understanding, *any* amount of foreign investment in a corporation means that management's political expenditures are coming from a pool of partly foreign money. Seen that way, the threshold for when a corporation spending money in U.S. elections is no longer an "association of citizens" is when *any* of the money in its coffers "belongs to" foreign investors—in other words, when it has any foreign shareholders at all.

We need not, however, reach that far. As a practical matter, an alternative way to look at the issue is to consider at what threshold an investor may exert *influence*—explicit or implicit—over corporate decision-making. When U.S. corporations are held in part by foreign investors, then U.S. corporate managers consider the interests of those foreign investors when they make decisions. Political spending budgets are no exception. 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 Exxon Mobil Corp. stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[18] Political spending is not magically exempt from this general rule.

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[17] *See, e.g.,* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 85 (2010).
[18] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, https://ampr.gs/30soG9S (Nov. 21, 2019).

1. The state of the art for this category of legislation is 1%/5% thresholds for foreign ownership.

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 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 bloc of 1% can be tremendously influential. As set forth in more detail below, corporate governance law gives substantial formal power to minority shareholders, and this spills out into even greater unofficial influence.

When we began working on this type of legislation in St. Petersburg in 2016, we used thresholds of 5% for a single foreign investor, and 20% for aggregate foreign investment. However, these levels are no longer considered state of the art. 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 to limit political spending by corporations owned 1% by one foreign investor, or 5% by multiple foreign investors.

The origins of the older thresholds illustrate why they have been superseded in newer legislation. In 2016, we faced limits on data availability. For example, the 5% threshold for a single foreign investor, used in the legislation that we developed that year for St. Petersburg, Florida, was driven in large part by the fact that federal law requires any investor who acquires 5% of the stock of a publicly traded corporation to disclose that stake to the Securities and Exchange Commission.[19] Yet this threshold does not correspond to any particular mechanism of influence over corporate governance; while no one doubts that a 5% stake in a publicly traded corporation is quite significant, there is no particular mechanism of influence that applies at 5% but which would not apply at 4.9%, or a lower level.

[19] 15 U.S.C. § 78m(d).

To the contrary, federal securities law provides powerful tools of corporate influence to investors at much lower levels. The 2020 Seattle ordinance's 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 in support of similar legislation elsewhere, and in a recent report by the Center for American Progress,[20] 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.

Seattle's 1% threshold was also 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 Commission ultimately concluded was, if anything, *too high*.[21] For a large multinational corporation, an investor that owns 1% of shares might well be the largest single stockholder; it would generally land among the top ten. Conversely, as the Commission has acknowledged, many of the investors most active in influencing corporate governance own *well below* 1% of equity.[22]

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.

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

[21] 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, we believe that 1% remains defensible.

[22] *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).

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.[23] 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 Colorado 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."[24]

Neither corporate and securities 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 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

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[23] *See Amazon.com*, CNBC, https://cnb.cx/2JShvAt (visited Mar. 8, 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 7.5% in Europe (including Russia) and 0.8% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 57.6% 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.

[24] Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, https://ampr.gs/30soG9S (Nov. 21, 2019).

cases information about the investors' associates.[25] 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.

Of course, as discussed in more detail in the next section, some companies do not have a foreign owner with 1% or more of shares. Even of those that do, many probably do not spend corporate money on Colorado 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 these corporations do not have connections to Colorado, nor that foreign investment in Colorado 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 partly 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 corporations' potentially vast corporate treasuries may be deployed to influence Colorado electoral democracy.

[25] 15 U.S.C. §§ 78m(d)(1)-(3).

2. The 1%/5%/20% thresholds provide limited coverage.

SB21-177 currently defines a foreign-influenced corporation as one owned 1% by a foreign *government*, 5% by a foreign non-governmental owner, or 20% by multiple foreign investors.

The 5%/20% thresholds that the bill would apply to non-governmental foreign owners have long been known to provide fairly narrow coverage. Research that we conducted with Professor John Coates of Harvard Law School in 2016 found that:[26]

- Only one in eleven (9%) companies in the S&P 500 had one or more foreign institutions each owning 5% or more blocks of stock.
- Only three had foreign institutions with more than 20% blocks.

Over three years later—in between the final passage of the St. Petersburg legislation in 2017 and the Seattle legislation (which uses 1%/5% thresholds) in 2020—we were able to make use of broader sets of empirical data. A November 2019 report from our partners at the Center for American Progress was able to use proprietary data that is made partially public by companies such as Refinitiv. Of 111 corporations studied among the S&P 500 stock index, 74 percent exceeded the 1 percent threshold for a single foreign owner and 98 percent exceeded the 5 percent aggregate foreign ownership threshold.[27]

In short, the 1%/5% thresholds cover nearly all of the S&P 500. But they have far less impact on smaller corporations, even those publicly traded. Among smaller publicly traded corporations on the Russell Microcap Index, only 28 percent exceeded the 5 percent aggregate foreign ownership threshold.[28] And of course many smaller corporations that are *not* publicly traded have little or no foreign ownership.

The additional triggering for 1% ownership by a foreign government does expand the scope somewhat. Sovereign wealth funds from oil-rich nations sometimes invest at this level in companies such as Uber (Saudi

[26] *See* John C. Coates IV, Ronald Fein, Kevin Crenny, & Li Wei Vivian Dong, *Quantifying Institutional Block Ownership, Domestic and Foreign, at Publicly Traded U.S. Corporations*, Harvard Law School John M. Olin Center Discussion Paper No. 888 (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2857957.

[27] *See* Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, 42-44, 48-50, https://ampr.gs/30soG9S (Nov. 21, 2019).

[28] *Id.* at 44.

Arabia, 3.9%) and Apple (Norway, 1.0%). But it would still fail to cover many corporations with foreign ownership at levels that makes the corporate decision-making about political activity susceptible to influence.

The point is *not* that passing a law limiting political spending by corporations with the proposed thresholds would be actively harmful. It would provide some very modest benefits for Colorado's democracy. But it is inadequate to the task. Political spending by foreign-influenced corporations threatens democratic self-government, and the thresholds used by a small city in Florida in 2017 are not adequate for the challenges that Colorado will face now or in the years to come.

IV. Other recommended amendments

In addition to revising the thresholds, we recommend the following additional amendments:

1. Revise the definition of "foreign owner" in section 10.9 (a) to *also* include an entity where a foreign owner, as described in section 10.9(a)(I)-(II), owns a majority interest. In other words, if A (a foreign government, party, corporation, or individual) owns 50% or more of B, and B owns the specified thresholds of stock (as defined in section 10.7) of C, then C should also qualify as a foreign-influenced corporation.[29]

This issue may be illustrated with a concrete example from another state, Maine. There, a U.S. company called Central Maine Power is owned 100% by another U.S. company, Avangrid. But Avangrid is 100% owned by Iberdrola, a Spanish corporation. Under the proposed bill 21-177, Iberdrola would qualify as a "foreign owner," but Avangrid would apparently not; consequently, Central Maine Power would not qualify as a "foreign-influenced corporation," even though it is wholly owned by a foreign corporate "grandparent" and the public in Maine correctly understands it to be owned by Iberdrola.

[29] The Seattle model legislation addresses this issue by using two separate terms: a "foreign owner" and a "foreign investor." Since the drafters of the Colorado bill have decided to use a single term, we propose our revisions within that framework.

This situation is not unique to Maine, nor to wholly-owned subsidiaries. For example, a major stockholder in many U.S. corporations is "MFS Investment," which maintains its offices in Boston but is in fact wholly-owned by a Canadian financial conglomerate. Under the proposed legislation, MFS Investment would not qualify as a "foreign owner" and therefore corporations in which it invests would not be considered as "foreign-influenced corporations" by virtue of this investment.

2. Revise the definition of "foreign-influenced corporation" in section 10.7(a) (page 2, line 7) to not just include "a corporation" but also similar business entities such as limited liability companies, partnerships, limited partnerships, or other similar business entities that meet the foreign ownership thresholds.

3. Revise the definition of "foreign-influenced corporation" in section 10.7(a) to add a new section IV: "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."

V. Conclusion

We believe that SB21-177 provides a productive starting point. However, further work is needed. Colorado has a golden opportunity to take a principled stand for the benefit of its residents. We urge the committee to make these amendments, and look forward to advocating vigorously for the amended bill.

If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

Ron Fein
Legal Director, Free Speech For People
617-244-0234
rfein@freespeechforpeople.org

HARVARD UNIVERSITY
Hauser Hall 420
Cambridge, Massachusetts 02138
tribe@law.harvard.edu

Laurence H. Tribe
Carl M. Loeb University Professor

Tel.: 617-495-1767

Seattle City Council
Seattle, Washington 98124

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

January 3, 2020

Dear Councilmembers,

I write to you to express my opinions on an ordinance that has been proposed for consideration by the Seattle City Council. First, that U.S. Supreme Court constitutional precedent permits limits on political spending by foreign-influenced corporations in the form of campaign contributions, "independent expenditures," or contributions to super PACs, as provided in the proposed ordinance. Second, that I consider this bill to be a valuable tool for protecting and preserving the integrity of elections, including Seattle's, 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 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 about potential foreign influence over our democratic politics is written into the

* Title and university affiliation included for identification purposes only.

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 nationals.

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 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

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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.

considerably smaller percent of equity held by foreign investors.[6] 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 need to close the foreign corporate political spending loophole.[7] I believe Seattle's interest in self-government provides a comparable and constitutionally sufficient ground to support regulating campaign contributions, independent expenditures, and contributions to super PACs, by what the bill terms "foreign-influenced corporations." As such, I believe it to be constitutional under the Court's *Citizens United* and *Bluman* decisions and a reasonable complement to existing federal law.

Conclusion

I applaud Seattle for its leadership on issues so critical to the health of our democracy, and I thank you for considering this admirable effort to guard our political systems from the dangers posed by foreign-influenced corporate spending. I am confident that the U.S. Supreme Court would uphold a ban on foreign-influenced corporations' political spending as provided in the proposed ordinance.

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

Sincerely,

Laurence H. Tribe

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

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[6] 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), *available at* http://bit.ly/2ueI4KT.

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

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

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

Phone: 617-496-4420
Fax: 617-495-5156
jcoates@law.harvard.edu

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

[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