Chairman Barry Finegold
Chairman Daniel Ryan
Joint Committee on Election Laws
Massachusetts State House

RE: Political spending by foreign-influenced corporations
S.454 (Comerford), S.482 (Montigny), H.839 (Uyterhoeven)

Limits on contributions to super PACs
S.455 (Comerford), H.772 (Day), H.840 (Uyterhoeven)

September 17, 2021

Dear Chairman Finegold and Chairman Ryan,

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.454, S.482, and H.839, banning political spending by foreign-influenced corporations, and S.455, H.840, and H.772, limiting contributions to independent expenditure PACs.

Please note that, with the permission of the authors, I have also attached to my own testimony the previous written testimony of Professor John Coates, currently on leave from Harvard Law School as the General Counsel of the Securities Exchange Commission, regarding similar bills in the previous session regarding political spending by foreign-influenced corporations; and Professor Albert Alschuler of the University of Chicago Law School, as well as political scientist Steven Weissman, retired from the Campaign Finance Institute, regarding the similar bills in the previous session regarding limits on contributions to independent expenditure PACs.

1340 Centre Street, Suite 209, Newton, MA 02459 O 617.244.0234 F 206.260.3031 www.freespeechforpeople.org

1. Political spending by foreign-influenced corporations (S.454, S.482, H.839)

The 2016 election showed that foreign interference in our elections is a serious problem. The 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 eleven 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

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[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.

bills would plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

1. General and legal 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.[4] 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.[5]

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.[6] 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."[7] With respect to

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[4] 52 U.S.C. § 30121.
[5] 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).
[6] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).
[7] *Citizens United*, 558 U.S. at 349, 354, 356.

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.[8] 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 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. In California, the company spent some $58 million on Proposition 22, the most expensive ballot initiative in the state's history, to help overturn a law that provided their drivers with worker protections.[9] The Saudi government made an enormous (and critical) early investment in Uber, and even now owns several percent of the company's stock, long after the company has gone public.[10] Fellow Proposition 22 major spenders, such as DoorDash and Lyft, are also substantially owned by foreign investors from countries including the United Kingdom, Japan,

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[8] *Id.* at 362.

[9] Ryan Menezes et al., "Billions have been spent on California's ballot measure battles. But this year is unlike any other," L.A. Times, Nov. 13, 2020, https://lat.ms/3gRct8d; 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.

[10] 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).

Malaysia, China, and elsewhere. As Michael Sozan of the Center for American Progress has noted, ordinary voters "know that their preferred candidates or policies cannot be accurately reflected when elections are heavily influenced by runaway corporate spending and foreign investors to whom CEOs owe a fiduciary duty."[11]

Uber, Lyft, and Doordash are now planning to bring a similar massive-spending campaign to Massachusetts. The companies have filed a proposed ballot initiative question, similar to the one in California, to block worker protections for their drivers.[12] Uber's major foreign investors include a British private equity fund (6.9%), the Saudi government (3.9%), and a Singapore financial company (3.4%). Lyft's major foreign investors include a Japanese e-commerce conglomerate (9.6%), a British financial firm (3.1%), a French bank (1.46%), and an Australian bank (1.26%).[13]

Similarly, 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.[14] Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-linked) DST

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[11] Michael Sozan, "Opinion: Stop political spending by foreign-influenced U.S. firms," Mercury News, Dec. 15, 2020, https://bayareane.ws/3e8HimY.

[12] *See* Nate Raymond & Tina Bellon, *Group backed by Uber, Lyft pushes Massachusetts gig worker ballot measure*, Reuters, Aug. 4, 2021, https://reut.rs/3Cnxwqx.

[13] *See* https://www.cnbc.com/quotes/UBER?tab=ownership; https://www.cnbc.com/quotes/LYFT?tab=ownership.

[14] 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.

Global.[15] 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.[16]

In the New York Times, Federal Election Commissioner Ellen Weintraub explained the problem, and pointed to a solution: "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."[17]

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,[18] would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal ban on

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[15] *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."
[16] 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.
[17] Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, http://nyti.ms/1SwK4gK.
[18] *Citizens United*, 558 U.S. at 349, 354, 356, 362.

foreign nationals spending their *own* money in U.S. elections.[19] 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*.[20]

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."[21] The time is ripe for Massachusetts to act.

2. *Foreign influence and ownership thresholds*

An important question is how much foreign investment renders a corporation's political spending problematic from the standpoint of preservation of democratic self-government 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

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[19] 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.

[20] 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.

[21] 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.

claimants."[22] As the California Court of Appeal put it, "it is the shareholders who own a corporation, which is managed by the directors. In an economic sense, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets . . . .").[23]

That means that, in at least some sense, money in the corporation's treasury is "their" money. In practice, shareholders only rarely can 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.[24] 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. Indeed, polling indicates that 73% of Americans—including majorities of both Democrats and Republicans—would

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[22] 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.
[23] Berg & Berg Enterprises, LLC v. Boyle, 100 Cal. Rptr. 3d 875, 892, 178 Cal. App. 4th 1020, 1039 (Cal. App. 2009).
[24] *See, e.g.,* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 85 (2010).

support banning corporate political spending by corporations with *any* foreign ownership.[25]

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."[26] Political spending is not magically exempt from this general rule.

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.

Since the passage of Seattle's 2020 law, which banned political spending by corporations owned 1% by one foreign investor, or 5% by multiple foreign investors, newer bills—currently pending in various states and in the U.S. Congress—generally follow the Seattle model.

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[25] Ctr. for Am. Progress Action Fund, *NEW POLL: Bipartisan Support for Banning Corporate Spending in Elections by Foreign-Influenced U.S. Companies*, https://bit.ly/3CrcWFV.

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

Federal securities law provides powerful tools of corporate influence to investors at these 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, and in a recent report by the Center for American Progress,[27] 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.

The 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*.[28] 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.[29]

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

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

[28] Until November 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.

[29] *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).

presents that opportunity, and—for a foreign investor in the context of corporate political spending—that risk.

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.[30] 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 Massachusetts 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."[31]

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

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[30] *See Amazon.com*, CNBC, https://cnb.cx/2JShvAt (visited Sept. 17, 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 0.9% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 57.5% 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.

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

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 cases information about the investors' associates.[32] 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, 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 Massachusetts 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 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 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. Furthermore, to reiterate, the bill does not limit in any way how employees, executives, or shareholders of these companies may

[32] 15 U.S.C. §§ 78m(d)(1)-(3).

spend their *own* money—just how the foreign-influenced business entities' potentially vast corporate treasuries may be deployed to influence Massachusetts electoral democracy. And finally, to eliminate any doubt, this bill does *not* impose any new restrictions on immigrants or other *individuals* seeking to get involved in elections. It only limits *corporate* political spending by corporations with significant foreign investment.

3. Mechanics of Proposed Ban

The legislative proposal would amend chapter 55 to ban independent expenditures, electioneering communications, contributions to independent expenditure PACs (super PACs), spending on ballot questions, or contributions to ballot question committees 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 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.[33] 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.

It is important to remember that, with respect to candidate elections, this is actually less restrictive than the pre-2010 status quo. 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 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.455, H.840, H.772)

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

[33] 55 M.G.L. § 18G.

determined that contributions above that amount pose an unacceptable risk of corruption or the appearance of corruption.[34] 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.[35]

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 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.[36] 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

[34] 55 M.G.L. § 7A.
[35] 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.
[36] *See, e.g.,* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686 (2010).

opportunities for quid pro quo corruption.[37] Recent empirical research shows that, as one might expect, this also leads to the *appearance* of corruption.[38] 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 contributions to candidate committees.[39] 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 further assistance, please do not hesitate to contact me.

Sincerely,

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

[37] 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.

[38] *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.

[39] *See* 55 M.G.L. §§ 7A(a)(1)-(2).

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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

May 14, 2019

Chairman Barry Finegold
Massachusetts State House
Room 507
Boston, MA 02133
barry.finegold@masenate.gov

Chairman John L. Lawn, Jr.
Massachusetts State House
Room 445
Boston, MA 02133
john.lawn@mahouse.gov

RE: An Act to limit political spending by foreign-influenced corporations
S.418 (Montigny), H.640 (Cutler), H.703 (Naughton)

Dear Chairman Finegold and Chairman Lawn,

I am writing to express my support for the proposed law regarding political spending by foreign-influenced corporations. The proposed law would be a critical tool for uncovering foreign influences in our elections. Unlike many commentators, my background is not in constitutional law – I gather my colleague Larry Tribe has endorsed the bill, and he knows far more about those topics than I do. 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 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 Vice Dean for Finance and Strategic Initiatives, 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, I teach 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 an 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

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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).

undermine the democracy or economy of the United States, although there is growing evidence that Russia sought to do just that in the last federal election. 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 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

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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).

$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 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] Last year, 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]

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[4] Nolan Hicks, "Prop 1 campaign crosses $9 million threshold," AUSTIN-AMERICAN STATESMAN, May 9, 2016, http://atxne.ws/29pbFBk.

[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.

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 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

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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.*

DuPont.[14] Opponents of the measure spent five times more than its supporters, and ultimately defeated it by a 53-47 margin.[15]

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 theoretically 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

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[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.*

[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.

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.

Under current federal law, 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 1% of voting shares should continue to qualify an investor for this method of influence. 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, even proposed a threshold *below* 1% for shareholder proposals:

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[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/.

[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.

> 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 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 decision making at ownership levels between 0.15% to 1%, or 3% for groups of investors.

Regulating foreign corporate spending

The Commonwealth can simultaneously welcome foreign investment without exposing itself to the risk of foreign money influencing their elections. The proposed law addresses this issue through a requirement that prohibits a corporation from spending certain types of money in state elections if it is a "foreign-influenced corporation" – a definition based, in part, on the extent of foreign ownership of corporate stock.[22] The proposed bill is a reasonable response to an increasingly localized problem, and is constitutional under the Court's decision 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

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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] The three types of prohibited spending for foreign-influenced corporations are independent expenditures, electioneering communication expenditures, or contributions to independent expenditure PACs (often called super PACs). The bill does not change the existing definitions of these terms in state law.

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. 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. 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).[23] 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

[23] *See* 15 U.S.C. § 78m(d); 17 C.F.R. §§ 240.13d-1, 240.13d-101.

identity of the purchaser's citizenship.[24] 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,[25] the information is not 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 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 . . . .[26]

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

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[24] *See* 17 C.F.R. § 240.13d-101 (item #6, requiring reporting of "Citizenship or place of organization").

[25] 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.

[26] Matt Krantz, USA TODAY, "U.S. online brokerage options are limited for foreigners," http://usat.ly/KXpDan (May 16, 2012).

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.

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,[27] as well as from other areas of law with which corporate executives are acquainted.[28] 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, electioneering communications, or make contributions to "super PACs" in candidate elections. The law imposes no obligations on corporations that do 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 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

[27] *See, e.g.,* 17 C.F.R. § 275.206(4)-2(a)(3).

[28] *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).

Cc: thomas.mahoney@masenate.gov
emily.izzo@mahouse.gov

THE UNIVERSITY OF CHICAGO

THE LAW SCHOOL

1111 EAST 60TH STREET

CHICAGO • ILLINOIS 60637-2786

Albert W. Alschuler
Julius Kreeger Professor, Emeritus
220 Tuttle Road
Cumberland, ME 04021

Telephone: 207 829 3963
email: a-alschuler@law.northwestern.edu

May 15, 2019

Senator Barry Feingold, Chair
Representative John Lawn, Chair
Joint Committee on Election Laws
The 191st General Court of the Commonwealth of Massachusetts

STATEMENT IN SUPPORT OF S.394 AND H.642

Dear Senator Feingold and Representative Lawn:

I write in support of S.394 and H.643. These bills would limit contributions to "independent expenditure groups" or "super PACs" to $5000 per calendar year. I focus particularly on concerns these bills might be unconstitutional.

The constitutional concern stems primarily from a decision of the United States Court of Appeals for the District of Columbia Circuit—*SpeechNow.org v. FEC*, 599 F.3d 686 (2010). In this decision, the D.C. Circuit did indeed hold that contributions to super PACs may not be limited. The Federal Election Commission acquiesced in the D.C. Circuit's decision, ceasing its enforcement of federal limits on contributions to super PACs. The Massachusetts Office of Campaign and Political Finance then followed the FEC's lead. In Interpretive Bulletin OCPF-IB-10-03 (Oct. 26, 2010), the Office wrote, "We agree with the FEC that . . . independent expenditure-only committees may raise unlimited contributions from individuals, political committees, and corporations."

The Massachusetts ruling and the D.C. Circuit decision that prompted it have created a strange system of campaign financing. Today, although a wealthy person may not donate $1001 dollars to a Massachusetts candidate, he may give $1 million to a super PAC whose only mission is to support this candidate. The state's limit on contributions to candidates no longer restricts how much people can give to electoral efforts; it simply requires them to send their contributions to less responsible and more destructive speakers. Super PACs have been called "the attack dogs and provocateurs of modern politics." The candidates they support need not take responsibility for what they say, and these groups usually disappear once an election is over. The attack ads they produce contribute to cynicism about politics, a cynicism that runs especially deep among young people. To be sure, the negative character of super PAC campaigning provides no reason to suppress it, but it's unfortunate that Massachusetts now has a system of campaign financing that actively channels funds toward less responsible speech.

Just how negative is super PAC campaigning? In the 2014 gubernatorial election in Massachusetts, super PACs favoring the Republican candidate Charlie Baker spent $3,861,749 urging voters to support him while they spent $7,140,466 (*1.8 times as much*) opposing the Democratic candidate, Martha Coakley. Super PACs favoring Coakley spent $122,907 urging voters to support her, while they spent $6,378,000 (*51 times as much*) opposing Baker. Massachusetts Office of Campaign and Political Finance, Super PACs and Independent Groups Spent $20.4 Million in 2014, Mar. 27, 2015, http://files.ocpf.us/pdf/releases/2015IEPACstudy.pdf.

The amount spent by these super PACs dwarfed the amounts spent by the candidates themselves. Coakley's campaign reported expenditures of $3.9 million and $2 million in in-kind contributions, while Baker's reported expenditures of $5.6 million and $1.2 million in in-kind contributions. *Id.*; *see also* Massachusetts Office of Campaign and Political Finance, *Most Independent Expenditure "Super" PAC Spending Supported the Incumbent Governor in 2018*, Feb. 27, 2019, https://www.ocpf.us/Home/PressRoom (noting that Governor Baker received $6,628,000 in super PAC support in 2018 while his Democratic opponent received none, but failing to indicate how much of Governor Baker's super PAC support was spent on negative campaigning).

No sane legislator would vote in favor of this regime of campaign financing, and no legislator ever has. Massachusetts has this regime because the United States Court of Appeals for the District of Columbia Circuit held that the First Amendment requires it. Yet the thought that the Constitution requires it looks strange too. The Supreme Court held 43 years ago that contributions to candidates can be limited to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the D.C. Circuit, however, legislatures may not forbid $10 million contributions to super PAC because these contributions do not create even an appearance of corruption.

SpeechNow was wrongly decided, and I believe that the Supreme Court is likely to say so if a way can be found to present the issue to the Court. The Court has never had an opportunity to address the question.

The Justice Department did not seek review of *SpeechNow*. In a statement that belongs on a historic list of wrong predictions, Attorney General Holder explained that the decision would "affect only a small subset of federally regulated contributions." Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf. Several federal courts of appeals have approved the *SpeechNow* decision, but these courts do not include the court whose jurisdiction includes Massachusetts, the U.S. Court of Appeals for the First Circuit. Like the First Circuit, the Supreme Judicial Court of Massachusetts has not addressed the issue.

In a law review article, some co-authors and I explain at length why *SpeechNow* was wrongly decided. My co-authors are Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at the Harvard Law School; Norman L. Eisen, a Senior Fellow at the Brookings Institution (formerly the ethics "czar" of the Obama White House); and Richard W. Painter, the S. Walter Richey Professor at the University of Minnesota Law School (formerly the ethics "czar" of the George W. Bush White House). *See* Alschuler et al., *Why Limits on Contributions to Super PACS Should Survive* Citizens United, 86 FORDHAM L. REV. 2299 (2018).

As noted in our article, not even the *SpeechNow* opinion maintained that the regime of campaign finance it created was desirable or defensible. Instead, the D.C. Circuit argued that a single sentence of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), compelled its result. The Court wrote in *Citizens United*, "[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption," and the D.C. Circuit declared, "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."

Our article shows that, contrary to the D.C. Circuit's reasoning, contributions to super PACs can corrupt even when expenditures by these groups do not. Moreover, the statement that the D.C. Circuit took as its premise was dictum, a nonbinding aside. We note several indications that the Supreme Court did not mean this statement to be taken in the way the D.C. Circuit took it.

For 43 years, the Supreme Court has distinguished between contribution limits, which it usually upholds, and expenditure limits, which it invariably strikes down. Reviewing the five distinctions drawn by the Court between contributions and expenditures, we show that contributions to super PACs cannot reasonably be distinguished from the contributions to candidates whose limitation the Court upheld.

The ultimate question posed by the Supreme Court's campaign-finance decisions is whether super PAC contributions create a sufficient appearance of corruption to justify their limitation. Our article describes opinion polls, the views of Washington insiders, and the statements of candidates of both parties in the 2016 Presidential election. It shows that *SpeechNow* has sharpened class divisions and helped to tear America apart.

I have attached a copy of our article to the email transmitting this letter.

Do not hesitate to contact me at 207-829-3963 or a-alschuler@law.northwestern.edu if I can be of further assistance. Enacting S.394 or H.642 could give the Supreme Court an opportunity to rule on an important, unsettled question of constitutional law. Resolving this question correctly would greatly improve our democracy.

Sincerely yours,

Albert W. Alschuler

cc: Thomas Mahoney, Legislative Aide to Senator Finegold

Emily Izzo, Chief of Staff

Testimony of Stephen R. Weissman on S.394 and H.642
Joint Committee on Election Laws
Massachusetts Legislature
May 15, 2019

Chairmen Finegold and Lawn, Jr., I am writing in support of two important bills, S.394 and H.642, that would limit contributions by individuals to independent expenditure committees to no more than $5,000 per year.

In particular, I would like to bring to your attention my research on donors to independent spending groups in federal elections. It challenges the core assumption of *SpeechNow.org v. Federal Election* Commission, the influential 2010 U.S. Appeals Court for the District of Columbia case that overturned federal law limiting individual contributions to independent political spenders to $5,000 per year. That Court *deduced* from the Supreme Court's opinion in *Citizens United* that since independent *spending* is, by definition, not coordinated with candidates, and therefore could not corrupt or appear to corrupt them, the same was logically true of *contributions* to independent spenders. The Court came to its conclusion without any real-world information about $5,000 plus donors to independent spenders because such contributions were then legally prohibited or undisclosed.

By the 2016 cycle, spending by independent political committees that collected contributions greater than $5,000 -- so-called Super PACs -- had reached $1.1 billion. More than three quarters of the funds were provided by just 1% of the groups' donors.

My study tests the Court's assumption that unlimited donations to such Super PACs cannot corrupt or appear to corrupt against political reality. I analyzed data on the top individual and organizational donors to Super PACs and other independent groups in the first two full federal election cycles following *SpeechNow*, 2011-12 and 2013-14. I learned that while independent spending groups maintain some distance from their preferred candidates -- in order not to illegally coordinate with them -- the largest donors to these groups have close ties with those candidates. *That is because they are directly financing the very same candidates they are simultaneously assisting indirectly through contributions to independent groups spending in their behalf*. These donors effectively circumvent the legal limits for contributions directly to candidates, which the Supreme Court has consistently upheld to prevent corruption or its appearance, by aiding them *both directly and indirectly*. This intensifies the danger of corruption and its appearance that the legal limit was supposed to address.

Before detailing my research, let me briefly introduce my qualifications on this subject. I am an independent political scientist specializing in American Government and U.S. Foreign Policy. I have taught at Fordham University, the University of Texas at Dallas and Howard University. From 1998-2002, I was Legislative Representative for Public Citizen – a nonpartisan national citizens group – where I concentrated on campaign finance reform legislation. From 2002-09 I was Associate Director for Policy at the Campaign Finance Institute, a nonpartisan research institution with a broad audience among federal, state and local policy makers, advocacy groups and scholars.

I have published many reports, articles and book chapters on campaign finance issues. One of my principal interests has been the explosion of independent group spending in elections, including Section 527, 501 (c) (4), 501 (c) (5) and 501 (c) (6) groups and, most recently, Super PACs. Among my publications on this subject are: "BCRA and the 527 Groups," in Michael Malbin ed., *The Election After Reform* (Lanham, MD: Rowman and Littlefield, 2006), 79-111 (with Ruth Hassan), "Nonprofit Interest Groups' Election Activities and Federal Campaign Policy," *The Exempt Organization Tax Review* (October 2006), 21-38 (with Kara Ryan), "Soft Money in the 2006 Election and the Outlook for 2008: The Changing Nonprofits Landscape," *Campaign Finance Institute* 2007, "Robert Menendez and the Dangers of Unlimited Campaign Contributions," *Los Angeles Times*, April 7, 2015, "Courting Corruption," *The American Interest*, August 25, 2017 and "Kavanaugh's Campaign Finance Record Shows an Atrocious Disregard for Precedent," *Slate*, September 5, 2018.

The attached two-part study, "The Speech Now Case and the Real World of Campaign Finance," published by Free Speech for People, was undertaken upon my initiative with FSFP cooperating by purchasing campaign finance data from the respected Center for Responsive Politics. It shows that the great majority of the top 100 individual and 50 organizational donors to Super PACs and other independent groups supporting candidates in the federal 2012 and 2014 election cycles simultaneously gave large campaign contributions directly to the same candidates. These donors were effectively pursuing a coordinated strategy that combined direct assistance to candidates within legal contribution limits and indirect support to them through unlimited donations to independent spenders. These federal findings are applicable to state elections where one also finds many of the same actors and issues.

Let me briefly convey to you my most striking findings:

- Of the 100 top individual donors to Super PACs and other independent spenders in each of the 2012 and 2014 cycles, 81 contributed both directly to candidates and to independent groups benefiting the same candidates. The average number of candidates receiving such assistance per donor was eight in 2014 and five in 2012. Donors' direct contributions to candidates averaged $30,970 ($3,999 per candidate) and $15,979 ($3,318 per candidate) in the respective cycles. Donors' contributions to independent spenders supporting the same candidates averaged $2.5 million in 2014 and $3 million in 2012.

- Of the top 50 organizational donors in each cycle, 31 contributed both directly and indirectly to the same candidates. The average number of candidates receiving such assistance in 2014 and 2012 was high: 33 and 37 per donor respectively. Direct contributions to preferred candidates averaged $265,827 ($8,071 per candidate) and

$293,057 ($7,914 per candidate). Contributions to independent spenders supporting the same candidates averaged $3.2 million per donor in 2014 and $3 million in 2012.

- Of these top individual and organizational donors, approximately 40-50% contributed to both political party committees and party-linked Super PACs active in the same elections. In the 2014 and 2012 cycles, 42 and 48 of the 100 top individual donors respectively contributed in this way to their party's fortunes. On average, each donor contributed to two party committees per cycle, donating an average of $84,808 and $69,522 respectively in 2014 and 2012, while giving $1 million and $2.2 million to party-linked Super PACs working in the same election as the party committees; and

- Of the top 50 organizational donors, 21 and 22 respectively contributed to both party and party-linked groups for the same elections in 2014 and 2012. On average, they gave $70,227 and $67,221 respectively to two party committees in the two cycles. At the same time, each contributed an average of $1.2 million and $1 million to party-linked Super PACs.

Is it possible that candidates and party committees were unaware of who is contributing both directly to them and to Super PACs supporting them? No, all these donations were publicly disclosed. Nor should we assume that large donors who are often close to candidates or parties and who also help them through donations to Super PACs never discuss the latter with them. Such "see no evil," "hear no evil" hypotheticals do not pass the smell test.

I very much hope that the Massachusetts legislature passes S. 394 and H.642, thereby assuming a leadership role in the fight to preserve American democracy.