



COMMISSIONER ELLEN L. WEINTRAUB  
FEDERAL ELECTION COMMISSION  
WASHINGTON, D. C. 20463

Mayor and City Council  
City of San Jose

*via e-mail only to*  
City Clerk Toni Taber  
[city.clerk@sanjoseca.gov](mailto:city.clerk@sanjoseca.gov)

March 21, 2022

Mayor Liccardo, Vice Mayor Jones, and Councilmembers:

I write to you today in my individual capacity as a Commissioner on the U.S. Federal Election Commission in support of the proposal to draft an ordinance that would prohibit spending by foreign-influenced corporations in San Jose's elections. And I write to thank you for taking the lead on such an important topic.

If San Jose enacts such an ordinance, it will be the largest jurisdiction in the nation to do so. Helping ensure that San Jose's municipal elections belong to San Jose's voters would be commendable leadership on its own. But it would also set an exceptionally well-timed example for the California Assembly, which is considering similar protections to help ensure that your state's elections belong to California's voters.

The recommendation put forward by Councilmembers Cohen, Arenas, Jimenez, and Foley would, if enacted, strike a bold blow. But it would nonetheless fit comfortably within existing federal statutory law and Supreme Court precedent. It is fully in keeping with *Citizens United's* prescription for greater transparency in political spending; as the Supreme Court wrote, "[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The councilmembers' recommendation regarding foreign-influenced corporations is consistent with an approach I laid out in an op-ed for *The New York Times* (attached) that described a new way to read the *Citizens United* decision together with the foreign-national political-spending ban.

In a nutshell, I noted that since the *Citizens United* majority protected the First Amendment rights of corporations as "associations of citizens," and held that a corporation's right to

participate in elections flows from the collected rights of its individual shareholders to participate, it follows that the *limits* on the rights of a corporation's shareholders must *also* flow to the corporation.

And one of the most important campaign-finance limits we have is that foreign nationals are absolutely barred from spending directly or indirectly in U.S. elections at *any* political level – federal, state, county, or city. It thus defies logic to allow groups of foreign nationals, or foreign nationals in combination with American citizens, to fund political spending through corporations. One cannot have a right collectively that one does not have individually.

Accordingly, the ordinance recommended by Councilmembers Cohen, Arenas, Jimenez, and Foley seeks to ensure that only those corporations owned and influenced by people who have the right to participate in San Jose's elections are doing so.

The risks addressed by this measure are not theoretical. The largest aggregate penalty in a single matter in the post-*Citizens United* era stemmed from \$1.3 million in illegal foreign donations to a super PAC routed through APIC, a California subsidiary of a foreign corporation. Had APIC's corporate officers been required to sign the statements of certification required by the ordinance recommended to you, the illegal behavior may well have been deterred.

Please do not hesitate to get in touch with me if I may be of any further assistance. I am available at [commissionerweintraub@fec.gov](mailto:commissionerweintraub@fec.gov) and (202) 694-1035.

Sincerely,



Ellen L. Weintraub  
Commissioner, Federal Election Commission

Attachment: "Taking On Citizens United" (March 30, 2016), NY TIMES, <http://nyti.ms/230BOgg>

**The New York Times** | <http://nyti.ms/1qhmpKB>

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The Opinion Pages | OP-ED CONTRIBUTOR

# Taking On Citizens United

By ELLEN L. WEINTRAUB MARCH 30, 2016

**SOMETHING** is very wrong with the way we fund our elections. This has become especially clear since Citizens United, the 2010 Supreme Court decision that struck down campaign spending limits on corporations, ruling they were intrusions on free speech.

The majority opinion in *Citizens United v. Federal Election Commission* was clear: The First Amendment rights of corporations may not be abridged simply because they are corporations. But while corporations may be deemed to have some of the legal rights of people, the court has never held that corporations have any of the political rights of citizens.

This key distinction, read in harmony with existing law, provides ways to blunt the impact of the decision that gave corporations the right to spend unlimited sums of money on federal elections.

The effect of that decision has been pronounced: The Washington Post reported this month that through the end of January, 680 corporations had given nearly \$68 million to “super PACs” in this election cycle — 12 percent of the \$549 million raised by such groups. This figure does not include the untold amounts of “dark money” contributions to other groups that are not disclosed by the donor or the recipient.

Throughout *Citizens United*, the court described corporations as “associations of citizens”: “If the First Amendment has any force,” Justice Anthony M. Kennedy wrote, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” In other words, when it comes to political speech, which the court equated with political contributions and expenditures, the rights that citizens hold are not lost when they gather in corporate form.

Foreign nationals are another matter. They are forbidden by law from directly or indirectly making political contributions or financing certain election-related advertising known as independent expenditures and electioneering communications. Government contractors are also barred from making contributions.

Thus, when the court spoke of “associations of citizens” that have the right to participate in American elections, it can only have meant associations of American citizens who are allowed to contribute.

But many American corporations have shareholders who are foreigners or government contractors. These corporations are not associations of citizens who are allowed to contribute. They are an inseparable mix of citizens and noncitizens, or of citizens and federal contractors.

Since the court held that a corporation’s right to participate in elections flows from the collected rights of its individual shareholders to participate, it follows that limits on those individuals’ rights must also flow to the corporation.

You cannot have a right collectively that you do not have individually. Individual foreigners are barred from spending to sway elections; it defies logic to allow groups of foreigners, or foreigners in combination with American citizens, to fund political spending through corporations. If that were true, foreigners could easily evade the restriction by simply setting up shell corporations through which to funnel their contributions.

Arguably, then, for a corporation to make political contributions or expenditures legally, it may not have any shareholders who are foreigners or federal contractors. Corporations with easily identifiable shareholders could meet this

standard, but most publicly traded corporations probably could not.

This may sound like an extreme result, but it underscores how urgently policy makers need to examine these issues with an eye toward drawing acceptable lines. Perhaps we could require corporations that spend in federal elections to verify that the share of their foreign ownership is less than 20 percent, or some other threshold. The Federal Communications Commission, for example, bars companies that are more than 20 percent owned by foreign nationals from owning a broadcast license. At the moment, without a clarifying rule, the only standard that follows the law is a zero-tolerance standard.

If one thing is clear this election season, it is that many voters feel that their voices are not being heard. We should make sure that the voices of citizens are not being drowned out by corporate money. American billionaires already have an outsize influence on our elections. Let's not cede yet more power to foreign elites.

To that end, at the next public meeting of the Federal Election Commission, I will move to direct the commission's lawyers to provide us with options on how best to instruct corporate political spenders of their obligations under both Citizens United and statutory law. The American people deserve assurances from American corporations that they are not using the money of foreign shareholders to influence our elections.

Regardless of whether the perpetually deadlocked F.E.C. takes action, lawyers may wish to think twice before signing off on corporate political giving or spending that they cannot guarantee comes entirely from legal sources.

States can also take action, since Citizens United and federal law barring foreign money apply with equal force at the state level. States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens — and enforce the ban on foreign political spending against those that are not.

Polls show that overwhelming majorities of Americans reject the conclusions of Citizens United and want to see it overturned. But in the meantime, federal and state policy makers and authorities can at least ensure that corporations are not being

used as a front to allow foreign money to seep into our elections.

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

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