UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Chamber of Commerce, a Minnesota nonprofit corporation, Plaintiff, v. John Choi, in his official capacity as County Attorney for Ramsey County, Minnesota; George Soule, in his official capacity as Chair of the Minnesota Campaign Finance and Public Disclosure Board; David Asp, in his official capacity as Vice Chair of the Minnesota Campaign Finance and Public Disclosure Board; Carol Flynn, in her official capacity as Member of the Minnesota Campaign Finance and Public Disclosure Board; Margaret Leppik, in her official capacity as Member of the Minnesota Campaign Finance and Public Disclosure Board; Stephen Swanson, in his official capacity as Member of the Minnesota Campaign Finance and Public Disclosure Board; and Faris Rashid, in his official capacity as Member of the Minnesota Campaign Finance and Public Disclosure Board, Defendants.	Civil No. 0:23-cv-02015 Hon. Eric C. Tostrud

<u>*AMICUS CURIAE* BY CLEAN ELECTIONS MINNESOTA, IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION</u>

INTEREST OF AMICUS

Clean Elections MN files this brief in support of Defendants' opposition to Plaintiff's motion for preliminary injunction (ECF 58).[1] Clean Elections MN is a non-partisan, non-profit organization that seeks a healthy democracy for Minnesota. It educates and advocates for expanded voter access, transparency, and reforms that limit the power of dark money and special interests in the state's political process, and to protect Minnesota's democratic self-government.

ARGUMENT

A. The law advances a compelling government interest.

1. Protecting democratic self-governance from foreign influence is a compelling government interest.

Minnesota Statutes § 211B.15 protects Minnesota's democratic self-governance. It is "narrowly tailored to advance a compelling government interest." *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281, 286 (D.D.C. 2011) (Kavanaugh, J.) (citing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007), *aff'd*, 565 U.S. 1104 (2012)). As then-Judge (now Justice) Kavanaugh wrote for the three-judge *Bluman* court and the Supreme Court affirmed, the government has a compelling interest 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." *Bluman*, 800 F. Supp. 2d at 288; *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 316

[1] No portion of this brief was prepared by counsel for a party, and no monetary contribution was received.

F. Supp. 3d 349, 356 (D.D.C. 2018) (in campaign finance case, confirming "the government's interest in preventing foreign influence over U.S. elections") (quoting *Bluman*, 800 F. Supp. 2d at 283 & 288 n.3) (cleaned up), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020).

Because political contributions and independent expenditures "are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices," they "are part of the overall process of democratic self-government." *Bluman*, 800 F. Supp. 2d at 288. To ensure that process promotes self-government by and for the American people, the government has a compelling interest in limiting foreign money entering U.S. elections. This interest justifies laws prohibiting *any* money from foreign nationals entering U.S. elections, even indirectly.

That question came before the Supreme Court in 2011, after it decided *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In *Bluman*, the plaintiffs challenged 52 U.S.C. § 30121(a), which prohibits foreign nationals from "directly or indirectly" spending money in U.S. elections. 800 F. Supp. 2d at 284. Benjamin Bluman was a Canadian citizen who had lived lawfully in the United States for five years when he sought to contribute $100 to three candidate campaigns, and to pay to print political flyers to distribute in New York City. *See Bluman*, 800 F. Supp. 2d at 285; Decl. of Benjamin Bluman, ECF 19-2, *Bluman v. Federal Election Comm'n*, No. 10-1766 (D.D.C. Jan. 10, 2011), *available at* https://www.courtlistener.com/docket/4904395/19/2/bluman-v-federal-election-commission/.

A three-judge district court, in an opinion authored by Judge Kavanaugh, found the total ban on foreign nationals' election spending was constitutional. *Bluman*, 800 F. Supp. at 286. The Supreme Court swiftly affirmed. *See* 565 U.S. at 1104.

Judge Kavanaugh noted a long line of Supreme Court cases holding that the government may exclude foreign citizens from activities "intimately related to the process of self-government." *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Bluman*, 800 F. Supp. 2d at 287 (collecting cases). As *Bluman* explained:

> We read these cases to set forth a straightforward principle: 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.

800 F. Supp. 2d at 288 (emphasis added).

To evade the clear government interest at stake here, plaintiff Minnesota Chamber of Commerce attempts to paint this law as one that merely seeks to "limit[] spending in elections." ECF 60, at 26. That is incorrect. Instead, the law protects Minnesota's democratic self-government from foreign influence. Political spending by foreign entities, either directly or indirectly, goes to the heart of our democratic self-government—and the government has an undisputed interest in prohibiting such spending. *Bluman*, 800 F. Supp. 2d at 288-89.

The government's interest in protecting Minnesota's democratic self-government does not vanish merely because foreign ownership has been commingled with that of U.S. citizens. Affiliation with U.S. investors does not "cure" foreign investors of the limited spate of rights afforded to them in the United States, nor render inapplicable the government's interest in preserving core functions of self-governance for U.S. citizens and permanent residents. In *Agency for International Development v. Alliance for Open Society Int'l, Inc.*, the Supreme Court explained that U.S. entities "cannot export their own First Amendment rights" to the foreign entities with which they associate. 140 S. Ct. 2082, 2088-89 (2020) (Kavanaugh, J.) (rejecting constitutional challenge to statute that imposed speech-related funding conditions on foreign entities that were affiliated with American organizations).[2] Notably, the United States has regulated foreign ownership in multiple sectors, including shipping and telecommunications. *See, e.g.*, 46 U.S.C. §§ 55102-03 (vessels transporting cargo between two points in the United States must be U.S.-built and owned and crewed by U.S. citizens); Communications Act of 1934 § 310(b)(3), codified as amended at 47 U.S.C. § 310(b)(3) (limiting foreign ownership of broadcast and telephone companies); Federal Communications Comm'n, *In the Matter of Review of International Section 214 Authorization to Assess Evolving National Security, Law Enforcement, Foreign Policy, and Trade Policy Risks*, IB Dkt. 23-119, FCC 23-28 (Apr.

[2] The Supreme Court in *Agency for International Development* did not reach the question of whether the government had a compelling interest in restricting the speech of foreign organizations operating abroad because it determined that, despite those organizations' close affiliation with U.S.-based institutions, they had no First Amendment rights to assert. 140 S. Ct. at 2089.

20, 2023) (seeking public comment on proposal to lower ownership reporting threshold from 10% to 5%). As for Section 310(b)'s foreign ownership limit, amicus is only aware of one constitutional challenge in its nearly 90-year history.[3]

This is not a case about limiting spending in elections, but rather Minnesota's compelling interest in protecting its democratic self-government from foreign influence.

Minnesota has a compelling interest to act because foreign-influenced corporations have the capacity to move rapidly to influence elections. For example, in 2016, Airbnb—then a privately-held company with significant investment from foreign sources—poured $10 million into a super PAC to influence New York state legislative races just weeks before the election.[4] Minnesota has every reason to prevent foreign-influenced corporations from similarly influencing its own elections. *See Brnovich v. Democratic National*

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[3] The challenge concerned a slightly different point, but the court upheld the provision. *See Moving Phones P'ship LP v. FCC*, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (applying rational basis review because "[t]he opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community"). Other courts have upheld related provisions of the same act that are even more restrictive than section 310. *See, e.g.*, *Campos v. FCC*, 650 F.2d 890, 891 (7th Cir. 1981) (upholding against constitutional challenge a Communications Act provision barring even permanent residents from holding radio operator licenses).

[4] Kenneth Lovett, "Airbnb to spend $10 million on Super PAC to fund pre-election day ads," N.Y. Daily News, Oct. 11, 2016, https://www.nydailynews.com/2016/10/11/airbnb-set-to-spend-10m-on-super-pac-created-to-fund-pre-election-day-ads/; *see also* 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). *See also* Ltr, from Professor John Coates to California Assembly Member Lee at 3-5 (Apr. 21, 2022), (hereinafter "Coates Ltr."), Ex. 1 to the Declaration of Rachel Kitze Collins, filed herewith. (citing this and other examples).

Committee, 141 S. Ct. 2321, 2348 (2021) (noting that when a state has evidence of fraud occurring in another state, it is "not obligated to wait for something similar to happen closer to home.").

2. The governmental interest in protecting democratic self-government from foreign influence is distinct from the corruption interest at issue in *Citizens United*.

As *Bluman* recognized, the Supreme Court's *Citizens United* decision "is entirely consistent with a ban on foreign contributions and expenditures." *Bluman*, 800 F. Supp. 2d at 289.[5] This is because the government has a compelling interest to preserve democratic self-government against encroachment of foreign interests and money—an interest at issue in *Bluman* and here, but not in *Citizens United*. And while the Supreme Court occasionally makes pronouncements like "[t]his Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption," *McCutcheon v. FEC*, 572 U.S. 185, 206 (2014), those statements have always been in the context of generally applicable restrictions—not restrictions targeted at foreign spending. The Supreme Court affirmed *Bluman*, which explicitly rested on the distinct

[5] Judge Kavanaugh also concluded that Justice Stevens' comments in his dissent in *Citizens United* on the subject of the law's ban on foreign contributions and expenditures is "a telling and accurate indicator of where the Supreme Court's jurisprudence stands." *Bluman*, 800 F. Supp. 2d at 289. Justice Stevens noted that the Court had "never cast doubt on laws that place special restrictions on campaign spending by foreign nationals…. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose 'obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.'" *Citizens United*, 558 U.S. at 424 n.51 (Stevens, J., dissenting in part and concurring in part) (citation omitted). Judge Kavanaugh was clearly correct in his assessment, as the Supreme Court affirmed the *Bluman* ruling.

interest 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." 800 F. Supp. 2d at 288.[6]

The corporations subject to Minnesota's law do not fall within the class protected by *Citizens United*. In three separate places, *Citizens United* defined that class of corporations as "associations of citizens." *Citizens United*, 558 U.S. at 349, 354, 356. Corporations with substantial foreign investment are not "associations of citizens." They are, at most, mixed associations of (1) citizens and (2) foreign entities organized or located abroad. Such a combination does not become an "association of citizens"; U.S. entities "cannot export their own First Amendment rights" to the foreign entities with which they associate. *Alliance for Open Soc'y Int'l*, 140 S. Ct. at 2088-89 (Kavanaugh, J.). In short, *Citizens United* defined (thrice) the class of corporations to which it applies as "associations of citizens," but the corporations prohibited by Minnesota's statute definitionally *are not* "associations of citizens." They are not protected by *Citizens United*.[7]

[6] *Bluman* cannot be explained as relying on the interest in preventing quid pro quo corruption. Bluman's prohibited expenditures included independent expenditures (printing flyers), which, per the Supreme Court, "do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357.

[7] Nor do "listener's rights" provide a basis to overcome the compelling government interest at stake here. Even if some listeners may be interested in hearing the paid-for political speech of the Chamber's members, that was also true of Benjamin Bluman.

B. The statute is narrowly tailored to corporations subject to influence by foreign investors.

1. One percent ownership exceeds the level at which investors may exercise significant influence over a corporation.

The statute is narrowly tailored to keep foreign money out of Minnesota elections. Far from being "de minimis," the thresholds reflect a reasonable understanding of how shareholders that hold 1%—or multiple shareholders holding an aggregate of 5%—can significantly influence corporate decision-making, including the decision to expend money on U.S. elections.[8]

One method of exerting influence is presenting a shareholder proposal. Until September 2020, the federal threshold for presenting a shareholder proposal at a publicly-traded company required holding either $2,000 or 1% of a company's shares.[9] Shareholders with this level of ownership can exert substantial leverage over boards of directors. In December 2019, the federal Securities and Exchange Commission (SEC) proposed to *eliminate* the 1% threshold requirement as *too high*—influential shareholders often did not hold such a *large* stake.[10] As the SEC explained:

> We also propose to eliminate the current 1 percent ownership threshold, which historically has not been utilized. *The vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold.* In addition, we understand that *the types of investors that hold 1 percent or*

[8] Coates Ltr., Ex. 1, at 9.

[9] 17 C.F.R. 240.14a-8(b) (2019), *available at* https://www.govinfo.gov/app/collection/cfr/2019/.

[10] *See* SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66,458 (Dec. 4, 2019). The rule was finalized in 2020 without change. *See* 85 Fed. Reg. 70,240, 70,241 (Nov. 4, 2020), codified at 17 C.F.R. § 240.14a-8.

> *more of a company's shares generally do not use Rule 14a-8 as a tool for communicating with boards and management.*[11]

Both the SEC's stated reasons for abandoning the 1% threshold for shareholder proposals demonstrate that the same is reasonable here.

First, shareholders that wield proposals to influence a corporation often do so with less than 1% ownership, including powerful investors like the California State Teachers' Retirement System and the New York City Comptroller.[12] Second, shareholders with 1% ownership need not exert influence via a formal proposal process. They have other avenues for exerting pressure on corporate management—including by simply picking up the phone.[13]

Shareholders can also exert influence through actual or threatened proxy fights to change a company's management. In 2021, the SEC amended its rules to eliminate minimum ownership requirements for shareholders to nominate directors to corporate boards.[14] Under the new rules, a shareholder with only a 2.3% stake in a therapeutics company orchestrated the election of nearly half the company's board—and could have

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[11] *Id.* at 66,646 (emphasis added).

[12] *Id.* at n.58; *see also* Coates Ltr., Ex. 1, at 6-7.

[13] SEC, *Transcript of the Roundtable on the Proxy Process* at 150 (Nov. 15, 2018), *available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf (comments of Brandon Rees, Deputy Director of Corporations & Capital Markets, AFL-CIO); *see also* Robert Jackson, Statement at the Federal Election Commission Forum, Second panel, June 23, 2016, *available at* https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Panel2-Complete.pdf; Coates Ltr. Ex. 1, at 9.

[14] *See* 17 C.F.R. 240.14a-19.

done so with a much smaller stake.[15] Disney, a behemoth corporation with 1.78 billion outstanding shares,[16] has twice in 2023 been embroiled in a proxy fight with a minority shareholder (holding less than 1% and then less than 2%). In January 2023, Nelson Peltz's Trian Fund Management sought to obtain a seat for Peltz on Disney's Board of Directors. At the time, Trian owned 9.4 million shares, *significantly less than* 1% of the total.[17] Trian withdrew its fight only after Disney announced a restructuring. In late 2023, Trian obtained 30 million shares and sought multiple seats on Disney's Board of Directors.[18] Trian's shares *still* amount to less than 2% ownership—more than enough to wage a proxy fight for multiple seats at the table or seek additional compromises from Disney's existing board.

Not every 1% owner will engage in active ownership, nor need to. Corporations are responsive to the stated and inferred goals of shareholders with an influential level of ownership—which may be much less than 1% but certainly is *no more than* 1%.

And as then-Judge Kavanaugh held in *Bluman*, the government has a compelling interest in excluding *all* foreign contributions or expenditures in U.S. elections, either direct or indirect. Bluman himself—a legal resident who as an attorney took an oath to uphold the U.S. Constitution—had significantly greater connection to the United States than

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[15] Michael R. Levin, *Activist Wins Another Vote Under Universal Proxy*, Harv. L. Sch. Forum on Corporate Governance (May 18, 2023), https://bit.ly/3obvM2h.

[16] The Walt Disney Company (DIS), Yahoo! Finance (Nov. 24, 2023).

[17] Lillian Rizzo & Alex Sherman, "Nelson Peltz Increases Disney Stake, Reignited Potential Proxy Battle," CNBC.com, Oct. 9, 2023, https://www.cnbc.com/2023/10/09/nelson-peltz-increases-disney-stake-reignites-potential-proxy-battle.html.

[18] *Id.*

foreign investors located abroad who own influential stakes in U.S. corporations. And the money he sought to spend is paltry compared to the vast sums that foreign-influenced corporations can afford to, and do, spend on U.S. elections. But neither the *Bluman* plaintiffs' close connection to the United States nor their limited spending plans could undermine the government's compelling interest in prohibiting *all* foreign spending in United States elections, both direct and indirect. If that is true, then it is at least equally true that Minnesota is justified in setting a threshold to exclude corporations with significant foreign ownership from contributing to Minnesota elections.

2. Five percent ownership exceeds the level at which an aggregate of foreign investors may influence a corporate entity.

Corporate executives take note of this aggregate foreign ownership, and at a certain point it affects their decision-making. As Lee Raymond, then CEO of U.S.-based ExxonMobil Corp., once stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S." *See* Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (Nov. 21, 2019), at 19, https://ampr.gs/2QIiNQT (quoting Steve Coll, *Private Empire: ExxonMobil and American Power* 71 (2012)). Plaintiff has provided no evidence that political spending is exempt from this general principle.

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 such significant influence that the law requires disclosure of the stake, the residence and citizenship of the investors, the source of the funds, and even in some cases information

about the investors' associates. *See* 15 U.S.C. §§ 78m(d)(1)-(3). The Securities Exchange Act of 1934 requires beneficial owners to file with the SEC their name, address, and numbers of shares if they own more than 5% of any class. *See* 15 U.S.C. § 78m(d); 17 C.F.R. §§ 240.13d-1, 240.13d-101 (filing must be done within 10 days of acquisition).

Furthermore, a corporation where one in 20 investors is a foreign entity is not an "association of citizens" within the meaning of *Citizens United*, any more than a congery of 95 chickens and five German shepherds constitutes a "flock of chickens." And just as the farmer presumptively manages his farm differently in light of its five canine members, corporate executives responsible to global investors presumptively think and act differently than those without such substantial foreign investment.

While it may not be appropriate to treat unrelated foreign investors together for *all* purposes, it is reasonable for Minnesota to insist that corporations with 5% aggregate foreign ownership refrain from interfering in its democratic self-government.

C. Implementation will not injure defendants or the rights of their members.

1. Ascertaining stock ownership is an essential function of corporate governance.

Corporations know or can easily learn their shareholders' identities. Privately-held corporations generally know this information at all times. Publicly-traded corporations (1) generally know their largest dozen or so shareholders, which would almost certainly include a 1% shareholder, (2) can use free, publicly available data to screen informally whether the corporation most likely qualifies as foreign-influenced, and (3) regularly (at

least annually; sometimes more) take "snapshots" of share ownership as of a particular record date to meet existing legal requirements.

2. Corporations regularly collect shareholder information in accordance with state law.

Minnesota law already requires corporations to keep a current list of shareholder information. Corporations must retain "a share register not more than one year old, containing the names and addresses of shareholders and the number and classes of shares held by each shareholder." Minn. Stat. § 302A.461. Corporations use this register to contact and invite shareholders to meetings. Minn. Stat. §§ 302A.431, 435. In Delaware, where many companies are incorporated, corporations must produce a similar list at least annually. Del. Code Ann. tit. 8, §§ 211, 219. Moreover, each shareholder has a right under Minnesota law to inspect and copy the corporation's share register (Minn. Stat. § 302A.461). Under federal law, corporations soliciting proxy votes must provide a shareholder list to any voting shareholder who requests it, or contact shareholders on behalf of the requesting shareholder. 17 C.F.R. § 240.14a-7. Thus, a directory of shareholder information is an integral prerequisite to conducting corporate affairs.[19]

a. Privately-held entities

Because privately-held corporations are owned by a smaller group of investors,[20] their managers can easily track owners and produce owner lists when required.[21] Indeed,

[19] As discussed *infra*, this list can be (and often is) generated on-demand on other occasions.

[20] Per SEC regulations, a company is privately-owned if it has less than 500 shareholders and $10 million in assets. 17 C.F.R. § 240.12g-1.

[21] *See also* Coates Ltr., Ex. 1, at 10.

each shareholder of a private company has the right to inspect the list "at any reasonable time." Minn. Stat. § 302A.461.

In support of its motion, the Chamber appends declarations of two managers from privately-held corporations. The declarants state the *exact* percentage of each company that is presently foreign-owned (*see* Decl. of Eric Nerland ¶¶ 7, 8; Decl. of Carlos Quinteiro, ¶¶ 7-9). Neither declarant mentions that such information was difficult to obtain. This is unsurprising; of course they could obtain this information readily, and so can the Chamber's other privately-held members.

b. Publicly-owned entities

The shares of publicly-owned corporations are traded on the market and can change hands moment-to-moment. But corporations can readily determine whether they qualify as foreign-influenced.

First, management at most publicly-traded corporations generally know the identities of their largest shareholders.[22] At most publicly-traded corporations, these are major institutional investors holding hundreds of millions of dollars' worth of shares.[23] And they do not typically buy or sell such large stakes on a day-to-day basis. In short, management already knows the identities of most (perhaps all) 1% investors.

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[22] Florian Ederer, *Common ownership in the U.S. Economy*, WASHINGTON CENTER FOR EQUITABLE GROWTH (May 25, 2022), https://equitablegrowth.org/common-ownership-in-the-u-s-economy/.

[23] Letter to The Hon. Maxine Waters, Ranking Member, Comm. on Financial Services from Jack Ehnes, Chief Executive Officer, CALSTRS, (June 5, 2017), at 1, *available at* https://democrats-financialservices.house.gov/uploadedfiles/letter_-_calstrs_wrong_choice_act.pdf.

Second, free publicly-available sources list both top shareholders and geographic concentration of shareholders. While this information may not be sufficiently reliable for purposes of *certification*, it enables a corporation to screen informally. For example, consider SPS Commerce, Inc. (NASDAQ: SPSC). As of the date of this brief, it appears that Dutch investment firm APG Asset Management N.V. holds 2.6% of SPS Commerce stock, totaling some $163 million. *See* CNBC, *SPS Commerce Inc*, https://www.cnbc.com/quotes/spsc?tab=ownership (visited Dec. 4, 2023). Further, it appears that at least 9.0% of SPS Commerce's shares are held abroad (at least 8.8% in Europe, and at least 0.2% in Asia). *See id.*[24] Similarly, an MSN Finance search reveals that SPS Commerce is *also* owned 1.38% by Macquarie Group, an Australian investment firm. *See* MSN, *SPS Commerce Inc.*, https://www.msn.com/en-us/money/stockdetails/fi-a23fxm?duration=1D&investorId=all (visited Dec. 4, 2023). Thus, SPS Commerce probably qualifies as a "foreign-influenced corporation" in two ways. Management might not like the answer, but it is easy (and free) to find.[25]

Finally, a corporation that does not obviously trigger the statute can swiftly obtain a snapshot of its shareholders on a given day. Indeed, publicly-owned corporations *can* and *do* compile this data by using intermediary services, like transfer agents, that compile

[24] These numbers are floors, not ceilings; the totals do not add to 100% as the third-party sites do not have complete information.

[25] These sites draw from a combination of public SEC filings and proprietary data. While the data is not as accurate as generating a record-date shareholder list (discussed *infra*), corporations may use this data to quickly ascertain whether they likely qualify under the statute.

shareholder data. The SEC acknowledges the ordinary use of transfer agents by public corporations.

> Companies that have **publicly traded securities typically use transfer agents to keep track of the individuals and entities that own their stocks and bonds**. . . Transfer agents keep records of who owns a company's stocks and bonds and how those stocks and bonds are held—whether by the owner in certificate form, by the company in book-entry form, or by the investor's brokerage firm in street name. They also keep records of how many shares or bonds each investor owns.[26]

As required by Minn. Stat. § 302A.426, before its annual shareholder meetings, a corporation must update its internal "share register." Corporations may also be required to generate complete shareholder lists at other times, such as off-cycle votes, merger proposals, or to solicit proxies.[27]

Companies typically employ transfer agents to compile these shareholder lists. Transfer agent companies such as EQ (formerly, American Stock Transfer and Trust Company) compile complete lists of all individual and institutional stockholders, including their addresses.[28] Most—if not all—publicly-traded corporations use such intermediary services to determine record shareholders[29]—including the Chamber's own declarant. The CEO of SPS, a publicly-traded corporation, averred that it would be impossible to "determine precisely at the time of an expenditure whether SPS meets the definition of

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[26] *Transfer Agents*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/edgar/search-and-access (last visited Dec. 4, 2023) (emphasis added).

[27] *See* Coates Ltr., Ex. 1 at 11.

[28] EQ, https://equiniti.com/us/ast-access/corporate-clients/ (last visited Dec. 4, 2023).

[29] *See* Coates Ltr., Ex. 1, at 11 ("Few if any publicly traded corporations engage in the process of determining their record shareholders for a given record date themselves.").

'foreign influenced.'" Black Decl. ¶ 11. As noted above, based on publicly available data, SPS likely meets this definition in multiple ways. And according to SPS's own website, it uses transfer agent EQ.[30] In other words, the company *already* uses an intermediary that furnishes it with shareholder information upon request.

3. Corporations need only make a "reasonable inquiry" into shareholders' status.

The Chamber and supporting *amici* argue that corporations cannot ascertain shareholder ownership levels with "accuracy" or "precision." But individual foreign shareholders only qualify as "foreign investors" if they are located "outside the United States." Minn. Stat. § 211B.15 subd. 1(e)(2)(iv). And the challenged law requires managers to make a "reasonable inquiry," a standard of care that in Minnesota calls an individual to not act frivolously or without evidentiary support.[31] The "reasonable inquiry" is also similar to the familiar "due inquiry" from securities law.[32] Here, managers are expected to make honest investigations based on information that they have or may reasonably obtain. To begin a "reasonable inquiry," corporations can use internal records to assess a last-updated status of shareholders. They may then search public databases to check whether the company is approaching the foreign-owned threshold line. If, based on these simple

[30] *Investor FAQs*, SPS COMMERCE, https://investors.spscommerce.com/investor-faqs (last visited Dec. 4, 2023).

[31] *See, e.g.*, *Stone v. Jetmar Properties, LLC*, 733 N.W.2d 480, 488 (Minn. Ct. App. 2007) (corporate and property law); *Claflin v. Com. State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. Ct. App. 1992) (real property); *Brown v. Ameriprise Fin. Servs., Inc.*, 276 F.R.D. 599, 602 (D. Minn. 2011) (Rule 11 attorney sanctions).

[32] *See* Coates Ltr., Ex. 1, at 13 (explaining familiarity of this standard to corporate managers).

and zero-cost inquiries, management believes that the company is likely *not* foreign-influenced, then it can engage its intermediary transfer agent to generate a shareholder list. The law's "reasonable inquiry" standard does not require corporations to carry out independent investigations of shareholders' domicile or citizenship beyond what the corporate manager knows or can determine from its shareholder list.

4. The certification requirement does not unreasonably burden corporations.

The certification requirement of Section 211B.15 does not unreasonably burden non-foreign-influenced corporations. Privately-held corporations generally know their shareholders, and can easily attest when they are not foreign-influenced. A publicly-traded corporation can engage a transfer agent to generate a shareholder list—the same list it regularly obtains for other purposes—and rely on that data for certification.

Despite the Chamber's claims that certification would be difficult and sometimes "virtually impossible," it provides no evidence of the time, cost, or resources required to conduct such an inquiry. Instead, its own declarants show that the required information is readily obtained through means already at their disposal. The Chamber has provided *no evidence* of the magnitude of any burden, let alone irreparable harm, for its *non-FIC* members (according to the Chamber, some 5,900 of 6,000). And its *foreign-influenced* members, lacking a constitutional right to spend to influence elections in the first place, experience no "irreparable harm." That "is alone sufficient grounds for vacating the preliminary injunction." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 n.9 (8th Cir. 1981).

Finally, foreign-influenced corporations retain multiple avenues for advocacy. Foreign-influenced corporations can establish "political funds" (*see* Minn. Stat. § 10A.12), to which their citizen or permanent resident shareholders, directors, and employees can contribute—establishing a distinct "association of citizens" for the purpose of making political contributions and expenditures. Foreign-influenced corporations may also lobby, post on social media, and produce other forms of non-prohibited speech.

5. The minimal burden of certification is inconsequential to Minnesota's compelling interest to protect democratic self-government.

Section 211B.15 requires corporations to certify that their contributions and expenditures are not foreign-influenced—information they already can easily obtain. Under *Bluman,* the government's interest in keeping foreign money out of U.S. elections justifies prohibiting a long-time legal U.S. resident who had sworn an oath to support the U.S. Constitution from purchasing a few fliers to express support for a presidential candidate. In the face of that precedent, it cannot be seriously disputed that the government's interest in protecting self-government is sufficiently compelling to justify imposing this minimal administrative responsibility on corporations as a condition of unleashing their vast corporate resources on electioneering. Whatever burden the Chamber may establish regarding certification falls well short of overcoming Minnesota's compelling interest to preserve democratic self-government.

CONCLUSION

The motion should be denied.

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