UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Minnesota Chamber of Commerce, a Minnesota nonprofit corporation,

Plaintiff,

vs.

John Choi, et al.,

Defendants.

Court File No. 23-cv-02015 (ECT/JFD)

STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION[1]

The Chamber[2] has brought this motion on its own behalf based on a misreading of Democracy for the People Act—non-profits like the Chamber are not foreign-influenced corporations. It has also brought this motion on behalf of its members, of which only three have been named at any point in this litigation as being potentially impacted by the Democracy for the People Act. The outcome of this case is controlled by *Bluman*, a case in which then-Judge Kavanaugh upheld the federal government's ability to ban independent expenditures by foreign nationals in federal, state, or local elections. *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.C. Cir. 2011), *aff'd mem.*, 565 U.S. 1104 (2012). In so doing, Judge Kavanaugh explained that "foreign citizens do not have a constitutional

[1] This brief is filed on behalf of the State Defendants: the members of the Minnesota Campaign Finance Board, who are sued in their official capacities.

[2] As used herein, "the Chamber" refers to Plaintiff, the Minnesota Chamber of Commerce.

right to participate in, and thus may be excluded from, activities of democratic self-government." *Id.* at 288.

The law challenged here is fully consistent with *Bluman* and was enacted to pursue the non-controversial purpose of protecting democratic self-governance in Minnesota from foreign influence. *Dataphase* requires that the Chamber show, most importantly, that it is likely to succeed on the merits. Here, the Chamber is not likely to succeed on its facial challenge because the Democracy for the People Act is narrowly tailored to meet a legitimate government interest.[3] It sets reasonable thresholds of 1% and aggregate 5%, based on corporate influence. The Chamber argues the Democracy for the People Act is overbroad, but it has identified only 100 out of its more than 6,000 members to which the law applies. And only three are referenced whatsoever in its motion.

State Defendants respectfully request the Court deny the Chamber's motion for a preliminary injunction because it is not likely to succeed on the merits and the remaining *Dataphase* factors have not been satisfied.

STATEMENT OF FACTS

I. THE DEMOCRACY FOR THE PEOPLE ACT

On May 5, 2023, and May 24, 2023, the Governor signed a law limiting the participation of foreign-influenced corporations in Minnesota elections. The Democracy for the People Act defines foreign-influenced corporations, restricts them from certain

[3] In its memorandum, the Chamber raises its facial challenge only.

campaign activities, requires certification, and specifies that existing penalties apply. Each of these aspects is set forth below.

Definitions

Sec. 3. Minnesota Statutes 2022, section 211B.15, subdivision 1, is amended to read:

(d) "Foreign-influenced corporation" means a corporation as defined in **paragraph (c), clause (1) or (3),** for which at least one of the following conditions is met:

(1) a single foreign investor holds, owns, controls, or otherwise has direct or indirect beneficial ownership of **one percent or more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation;
(2) two or more foreign investors in aggregate hold, own, control, or otherwise have direct or indirect beneficial ownership of **five percent or more** of the total equity, outstanding voting shares, membership units, or other applicable ownership interests of the corporation; or
(3) a foreign investor participates directly or indirectly in the corporation's decision-making process with respect to the corporation's political activities in the United States.

The calculation of a person's or entity's ownership interest for purposes of clauses (1) and (2) must exclude any portion of the person's or entity's direct or indirect beneficial ownership of equity, outstanding voting shares, membership units, or otherwise applicable ownership interests of a corporation that are held or owned in a mutual fund based in the United States.

(e) "Foreign investor" means a person or entity that:

(1) holds, owns, controls, or otherwise has direct or indirect beneficial ownership of equity, outstanding voting shares, membership units, or otherwise applicable ownership interests of a corporation; and
(2) is any of the following:
(i) a government of a foreign country;
(ii) a political party organized in a foreign country;
(iii) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country;

> (iv) **an individual outside of the United States** who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence in the United States; or
> (v) **a corporation in which a foreign investor** as defined in items (i) to (iv) holds, owns, controls, or otherwise has directly or indirectly acquired beneficial ownership of equity or voting shares in an amount that is **equal to or greater than 50 percent** of the total equity or outstanding voting shares.

2023 Minnesota Laws Chapter 34, art. 3, secs. 3-6 (emphasis added). It is effective January 1, 2024. *Id.* Corporation, in turn, means (1) a corporation organized for profit that does business in this state; (2) a nonprofit corporation that carries out activities in this state; or (3) a limited liability company formed under chapter 322C, or under similar laws of another state, that does business in this state. Minn. Stat. § 211B.15, subd. 1(c). Because the definition of foreign-influenced corporation is limited to a corporation as defined in paragraph (c) clause (1) or (3), a nonprofit corporation is not a foreign-influenced corporation.

Restrictions

Foreign-influenced corporations are prohibited from making several campaign-related expenditures and contributions:

> Sec. 4. Minnesota Statutes 2022, section 211B.15, is amended by adding a subdivision to read:
>
> Subd. 4a. Foreign-influenced corporations.
>
> (a) Notwithstanding subdivisions 3 and 4, a foreign-influenced corporation must not:
>
> > (1) make an expenditure, or offer or agree to make an expenditure, to promote or defeat the candidacy of an individual for nomination, election, or appointment to a public office;

> (2) make contributions or expenditures to promote or defeat a ballot question, or to qualify a question for placement on the ballot;
> (3) make a contribution to a candidate for nomination, election, or appointment to a public office or to a candidate's principal campaign committee; or
> (4) make a contribution to a political committee, political fund, or political party unit.
>
> (b) A foreign-influenced corporation must not make a contribution or donation to any other person or entity with the express or implied condition that the contribution or donation or any part of it be used for any of the purposes prohibited by this subdivision. This section does not prohibit donations to any association for its general purposes such that the funds qualify as general treasury money pursuant to section 10A.01, subdivision 17c, nor does it impose any additional limitations on the use of such funds.

2023 Minnesota Laws Chapter 34, art. 3, secs. 3-6; 2023 Minnesota Laws Chapter 62, art. 5, sec. 43. It is effective January 1, 2024, and applies to contributions, expenditures, and other applicable activities occurring on or after that date. *Id.*

Certification

The Democracy for the People Act also has a certification requirement.

> Sec. 5. Minnesota Statutes 2022, section 211B.15, is amended by adding a subdivision to read:
>
> Subd. 4b. Certification of compliance with subdivision 4a. A corporation as defined in subdivision 1, paragraph (c), clause (1) or (3), that makes a contribution or expenditure authorized by subdivision 3 or 4 must submit a **certification to the Campaign Finance and Public Disclosure Board that it was not a foreign-influenced corporation as of the date the contribution or expenditure was made**. The certification must be submitted **within seven business days after the contribution or expenditure is made and must be signed by the corporation's chief executive officer after reasonable inquiry, under penalty of perjury**. If the activity requiring certification was a contribution to an independent expenditure committee, the corporation must additionally provide a copy of the certification to that committee. For purposes of this certification, the corporation shall ascertain beneficial ownership in a manner consistent with chapter 302A or, if it is registered on a national securities exchange, as set

> forth in Code of Federal Regulations, title 17, sections 240.13d-3 and 240.13d-5. The corporation shall provide a copy of the statement of certification to any candidate or committee to which it contributes, and upon request of the recipient, to any other person to which it contributes.

2023 Minnesota Laws Chapter 34, art. 3, secs. 3-6. Again, this provision goes into effect on January 1, 2024, and applies to contributions, expenditures, and other applicable activities occurring on or after that date. *Id.*

Knowing Violation & Penalties

An individual or corporation knowingly violates Section 211B.15 if, at the time of the transaction, the individual or corporation knew that the transaction was a contribution, and that the contributor was a corporation subject to the prohibitions of subdivision 2 or 4a. Minn. Stat. § 211B.15, subd. 7b. The knowing violations provision was modified only to be inclusive of the new prohibition regarding foreign-influenced corporations, and the penalty provisions were not amended in 2023. A corporation that violates Section 211B.15 is subject to a civil penalty that cannot exceed $10,000, imposed by the Board under Chapter 10A, or imposed by the Office of Administrative Hearings under Chapter 211B. Minn. Stat. § 211B.15, subd. 7(a). A corporation that knowingly violates the section commits a crime and is subject to a fine not exceeding $40,000; a convicted domestic corporation may be dissolved. *Id.*, subd. 7(b). A convicted foreign or nonresident corporation may have its right to do business in Minnesota declared forfeited. *Id.* An individual who aids, abets, or advises a violation of this section is guilty of a gross misdemeanor. *Id.*, subd. 13; *see also* Minn. Stat. § 21B.15, subd. 6 (penalties for individuals).

II. THE LEGISLATIVE HISTORY DEMONSTRATES THAT THE PURPOSE OF THE DEMOCRACY FOR THE PEOPLE ACT IS TO PROTECT DEMOCRATIC SELF-GOVERNANCE IN MINNESOTA FROM FOREIGN INFLUENCE.

Before the Democracy for the People Act passed, the legislature took testimony on the proposal and had floor debates. At least one person who testified in support of the proposed law also supplied written materials related to the proposal. The legislative history is clear that the purpose of the Democracy for the People Act is to protect democratic self-governance in Minnesota from foreign influence.

A. Submissions to the Legislature

1. Testimony

Ron Fein, Legal Director of Free Speech for People, testified in support of S.F. 3 in the Elections Committee on February 2, 2023. (Audio, at 56:00.)[4] He testified that this legislation is about democratic self-governance. Regarding the 1% threshold, he testified that 1% of a publicly held corporation can amount to millions of dollars and is tremendously influential: "If you own 1% of an S&P 500 corporation, you can get the CEO on the phone within 24 hours."[5] (*Id.*, 59:29.)

2. Coates Letter

One of the documents submitted to the Legislature in connection with the proposed law was an April 2022 letter by John C. Coates IV, John F. Cogan, Jr. Professor of Law

[4] Audio files of the Feb. 2, 2023 Senate Elections Committee hearing can be found at https://mnsenate.granicus.com/player/clip/10119.

[5] Mr. Fein's written legislative testimony regarding H.F. 117 and S.F. 3, along with supporting materials, can be found here: https://freespeechforpeople.org/minnesota-legislation/.

and Economics from Harvard Law School (the "Coates Letter").[6] Professor Coates is a professor of law and economics at Harvard Law School. He teaches corporate governance, M&A, and related topics. He has testified before Congress and has provided consulting services to the U.S. Department of Justice, the U.S. Department of Treasury, and the New York Stock Exchange, among others. He has also served as an independent consultant for the SEC.

Professor Coates wrote the Coates Letter to California Assembly Member Lee regarding proposed legislation that is very similar to the law at issue in this case. His letter focuses on corporate law and governance, and it explains "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." (Coates Ltr. at 1.)

In several American sectors long-standing statutes, regulations, and legal traditions treat foreign companies or foreign-influenced companies differently than domestic companies. (Coates Ltr. at 3.) For example, in "shipping, aircraft, telecom, and financial services, laws governing all of these industries limit or regulate foreign ownership or control." (*Id.*) Professor Coates suggests that the same spirit should inform regulation of election spending by foreign-influenced corporations.

[6] The Coates Letter begins on page 28 of the submissions of Mr. Fein to the Minnesota Senate. *See* https://freespeechforpeople.org/wp-content/uploads/2023/02/fsfp-mn-fic-sf3-testimony-with-attachments-feb-2023-1.pdf, *archived at* https://perma.cc/2YN8-XGCP.

Professor Coates provides numerous examples of foreign-influenced companies who have attempted to influence American elections following *Citizens United v. FEC*, 558 U.S. 310 (2010):

- In 2016, Uber and Lyft spent over $9 million on a ballot initiative in Austin. Weeks later, Uber disclosed that the Saudi Arabian government had invested $3.5 billion in the company, which gave the Kingdom over 5% ownership and a seat on the company's board of directors. (Coates Ltr. at 3.)
- In 2016, Airbnb gave $11 million to a super PAC to influence New York legislative races. Airbnb is partly owned by Moscow-based DST Global. (*Id.* at 3-4.)
- In 2016, APIC, a company controlled by two Chinese citizens, gave $3 million to a super PAC that supported Jeb Bush's run for president. (*Id.*)
- In 2012, a Connecticut-based subsidiary of a Canadian company gave $1 million to a pro-Mitt Romney super PAC. (*Id.* at 4.); and
- In 2013, a New Jersey-based subsidiary of a Chinese-owned business contributed $120,000 to Terry McAuliffe's gubernatorial campaign in Virginia. (*Id.*)

Coates also identifies contributions to ballot initiatives by foreign-influenced corporations. (*Id.*at 5.)

Regarding investor influence, Professor Coates states that "[a]ny investor who can present a shareholder proposal (either alone, or by working with a group of other investors)

has substantial leverage." (*Id.* at 6.) Indeed, in recent proxy sessions, a fund that owns less than one percent of outstanding shares, has led successful shareholder proposals. (*Id.*)

Professor Coates explains that until September 2020, the threshold for submitting a shareholder proposal at a publicly-traded company was either 1% of voting shares or $2,000 in market value. (*Id.* at 6.) Professor Coates stated that before the amendment, although there was political debate about changing the $2,000 threshold, virtually no one questioned that owning 1% of voting shares "should continue to qualify an investor for this method of influence." (*Id.*) In 2017, there was a proposal in the U.S. House of Representatives to eliminate the $2,000 market value threshold but retain the 1% ownership threshold. (*Id.* at 7.) Then-Rep. Jeb Hensarling (R-Tex.), stated: "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." (*Id.*) The Business Roundtable, CEOs of major U.S. corporations formed to promote pro-business public policy, proposed a threshold *lower than* 1% for shareholder proposals. (*Id.*) For the largest companies, ownership would be 0.15%; for the smaller companies it would be up to 1%. (*Id.*)

Before discussing whether compliance was feasible, Coates explained the nature of stock ownership. Stock can be owned in one of three primary ways: (a) paper stock (rare for larger, stock-exchange listed companies); (b) shares held in "street name" through a broker (e.g., Fidelity or Charles Schwab); or (c) holdings by separate legal entities. (*Id.* at 9-10.) Paper stockholders and the clients/beneficiaries who own stocks through brokers can participate in corporate governance. (*Id.* at 10.) "Most shares of large, listed

companies, [] are held by separate legal entities, such as mutual funds, pension funds, insurance companies, and hedge funds." (*Id.* at 10.) These entities hold stocks on behalf of their clients or beneficiaries, but individuals whose wealth is invested through these types of institutional investments cannot exercise voting rights. (*Id.*)

After providing that background regarding stock ownership, Professor Coates discusses in detail why compliance is not difficult. For example, most entities are private and already can and do track shareholder information. (*Id*.) Public entities have the ability (and are required to at least annually, as well as for events like mergers, charter amendments, special meeting items, etc.) to ascertain ownership on any arbitrary record date and the ability to make this determination is essential for basic corporate governance, and how most public entities use an intermediary to make this determination). (*Id.* at 11-12.) Regarding determinations of whether a shareholder is a foreign owner, most public shares are owned or held through a broker, which may have citizenship requirements, and it is easy to check the foreign status of non-individuals by looking at place of incorporation or principal place of business. (*Id.* at 12-13.)

Further, Professor Coates discusses a "due inquiry" standard, comparable to the law's "reasonable inquiry" standard, and explains how entities are already familiar with such a standard from federal securities laws. (Coates Ltr. 13-14.) Professor Coates explains how this imposes "only the customary obligation to make such reasonable inquiry as the corporation would do in any event" and, as a result, the law "does not impose a meaningful additional information-gathering cost beyond what it would already be required to do under existing law." (Coates Ltr. 12–13.)

3. City of Seattle Ordinance

In 2020, the City of Seattle adopted an ordinance similar to the Democracy for the People Act.[7] The Seattle Ordinance was cited by Minnesota legislators as a template for the proposed Minnesota law. Seattle made several findings of fact:

- The City's "elections should be decided by the people of Seattle and not by foreign investors or the business entities over which they exert influence."
- "Foreign nationals have used and may continue to use U.S. business entities to funnel funds into U.S. elections, which is in violation of federal laws prohibiting foreign spending in U.S. elections. There are recent instances of intentional and targeted foreign interference in domestic local elections, including in San Diego, where in 2017, a businessman was convicted in federal court of unlawfully funneling foreign funding into local elections through third parties and shell corporations in order to support politicians who might support his real estate development plans; and in New York, where, in 2019, four individuals have been indicted on charges stemming from a scheme in which they laundered foreign money into U.S. elections via shell corporations and straw donors."
- The United States government has concluded the 2016 presidential election was subject to extensive foreign involvement.

[7] Ordinance 126035, City of Seattle, available at http://clerk.seattle.gov/~archives/Ordinances/Ord_126035.pdf, *archived at* https://perma.cc/G8BD-ZYG2.

- The United States government has concluded that Russia, China, Iran, and other foreign actors are engaged in ongoing campaigns to undermine democratic institutions.
- The FBI has concluded that foreign influenced operations include "criminal efforts to suppress voting and provide illegal campaign financing."
- Current law does not adequately protect against foreign influence through corporate political spending by U.S. corporations with significant foreign ownership.

The findings cite several bases for using the one-percent threshold and state that foreign money can weaken, interfere with, or disrupt Seattle's self-governance and the faith that the electorate has in its elected officials. (*Id.* ¶¶ J-N.) The findings cite multiple cases as well: *U.S. v. Singh*, 979 F.3d 697, 710-11 (9th Cir. 2020); *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.C. Cir. 2011), *aff'd mem.*, 565 U.S. 1104 (2012).

B. Legislator Testimony and Statements[8]

The Democracy for the People Act was proposed initially as H.F. 3, S.F. 3, and H.F. 117. Time and time again, Minnesota legislators made it clear that the purpose of the Democracy for the People Act was to protect democratic self-governance in Minnesota from foreign influence.

[8] The Chamber relies heavily on statements by Rep. Niska and others who voted against the legislation. Statements by legislators who vote against legislation is not evidence of legislative intent. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) (statements by opponents are usually accorded little weight).

The House Elections Finance and Policy Committee first discussed H.F. 117 on January 18, 2023.[9] That bill was introduced by Rep. Stephenson and related to political activities by foreign-influenced corporations. Rep. Stephenson explained that the law already restricts spending by foreign nationals but does not restrict spending by foreign corporations. (Audio, 7:11-8:03.) Rep. Stephenson explained that H.F. 117 is relatively straightforward and extends the existing prohibition on foreign nationals contributing to Minnesota campaigns and elections to foreign-influenced corporations. (*Id.*, 8:03-8:12.)

In the House Elections Finance and Policy Committee on February 8, 2023, H.F. 3 was described as containing transparency and disclosure provisions to ensure voters know who is spending money to influence their vote.[10] It extends to foreign-influenced corporations the existing prohibitions on foreign nationals contributing to our elections. (Audio, at 7:48-7:58.)

The House Judiciary Finance and Civil Law Committee discussed H.F. 3 on March 2, 2023.[11] The committee discussed the source of the thresholds and the policies behind the Democracy for the People Act. Rep. Niska asked about the source of the thresholds

[9] The audio file from the House Elections Finance and Policy Committee, Jan. 18, 2023, can be found at https://www.house.mn.gov/Committees/archives/93007/Page/3; https://www.lrl.mn.gov/audio/house/2023/elect011823.mp3.

[10] The audio for the House Elections Finance and Policy Committee meeting, Feb. 8, 2023, can be found at https://www.house.mn.gov/Committees/archives/93007/Page/3; https://www.lrl.mn.gov/audio/house/2023/elect020823.mp3

[11] The audio for the House Judiciary Finance and Civil Law Committee meeting, March 2, 2023, can be found at https://www.house.mn.gov/Committees/archives/93015/Page/2; https://www.lrl.mn.gov/audio/house/2023/jud030223.mp3.

and Rep. Greenman said the SEC has determined the thresholds at which investors have influence. (Audio, at 55:00-56:29.) 1% was the threshold for shareholders to submit a proposal for vote, which is indicative of influence. (*Id.*, 56:30-56:42.) Further, the legislators looked to the Business Roundtable for guidance, which provided that 1% for an individual or 5% for a group is enough to have influence. (*Id.*, 56:56-57:25.)

As for the reason behind the proposal more generally, Rep. Greenman said foreign nationals are prohibited because the animating principle is self-governance. A corporation is an association of citizens and 1% is the level at which shareholders have influence and there is no reason they should have any influence in American elections. (*Id.*, 58:45-59:46.)

Regarding S.F. 3, considered by Judiciary and Public Safety Committee on March 10, 2023,[12] Sen. Kreun asked whether the intent was to ban all participation from publicly traded companies. Sen. Bolden answered "[t]hat is not the intent of this bill. The intent of this bill is to eliminate influence of foreign dollars in our [] elections. . . . The record date process to know who their shareholders are, is a process that exists, that they are already using. We are not asking them to do something they cannot do. They can do this and they should do it if they are wanting to spend money in our elections." (Audio, 1:01:29-1:02:27.) Sen. Bolden further explained that federal law is silent regarding political spending by U.S.-based companies that are partially owned by foreign investors. (*Id.*, 1:04:13-1:04:51.) She also stated, we are talking about foreign influence in our

[12] The audio for the the Senate Judiciary and Public Safety Committee meeting, March 10, 2023, can be found at https://mnsenate.granicus.com/player/clip/10804.

elections. (*Id.*, 1:05:01-1:05:07.) Foreign companies do not have constitutional free speech rights related to our elections. (*Id.*, 1:05:12-1:05:16.)

S.F. 3 was further discussed at the Senate Finance Committee meeting on April 4, 2023.[13] Sen. Bolden answered a question by Sen. Draheim by stating, "the intention of this provision is because we do not want foreign influences in our elections. Minnesotans do not want that, it is not good—it is not healthy for our elections, it is not healthy for our democracy. We don't want foreign influence in out elections and that is the purpose of that provision. (*Id.*, 20:20-20:35.)[14]

On April 13, 2023, Rep. Greeman explained during the floor vote on H.F. 3 that the purpose of the Democracy for the People Act is to protect democratic self-governance from foreign influence.[15] When asked by Rep. Niska why the legislature should pass a law in this area when federal law already prohibits foreign nationals from contributing in any elections, Rep. Greenman explained that the bill is "narrowly tailored to say if you are—we—what we don't want is corporations that are foreign influenced that folks who couldn't

[13] The audio for the Senate Finance Committee meeting, April 4, 2023, can be found at https://mnsenate.granicus.com/player/clip/11268.

[14] The Chamber quotes Senator Bolden: "the stated goal of the bill is to get political spending out of elections, out of influencing votes of Minnesotans." (*See* Doc. 60, at 26.) This is clearly a misstatement, as Senator Bolden stated multiple times that the object was about protecting democratic self-governance in Minnesota from foreign influence. The Democracy for the People Act plainly does not "get political spending out of elections." It does not stop political spending writ large; instead, it targets spending by foreign-influenced corporations, which represent no more than 100 of the Chamber's more than 6,000 members.

[15] A video of the House floor discussion on H.F. 3, on April 13, 2023, can be found here: https://www.house.mn.gov/hjvid/93/896806.

directly contribute under that law can now contribute and be involved in our elections." (Audio, 2:24:47-2:26:45.) Rep. Niska explained he agreed we should not allow a foreign national who controls a corporation to hide behind that corporation, but he disagreed with the thresholds. (*Id.*, 2:27:40-2:28:25.)

LEGAL STANDARD

"[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

Because it seeks to enjoin legislation, the Chamber bears the heavy burden of establishing as a threshold matter that it is likely to succeed on the merits. The Eighth Circuit reasoned in *Planned Parenthood of Minn., N.D., S.D. v. Rounds* as follows:

> [A] more rigorous standard 'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.' If the party with the burden of proof makes a threshold showing that *it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors*.

530 F.3d 724, 732 (8th Cir. 2008) (emphasis added) (internal citation omitted). The Chamber has not met and cannot meet its burden.

ARGUMENT

I. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Democracy for the People Act Is Not Pre-empted.

The Chamber argues the Democracy for the People Act is pre-empted by federal law. Pursuant to the Supremacy Clause, federal law is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. State laws "'must yield' when Congress intends to preempt it." *WinRed, Inc. v. Ellison*, 59 F.4th 934, 941 (8th Cir. 2023) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). There is a strong presumption against pre-emption. *See Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993). And the Court should presume that Congress did not intend to preempt the States' power to regulate matters of local concern. *Holtzman v. Oliensis*, 695 N.E.2d 1104, 1107 (N.Y. 1998) (citing several cases).

Congress can pre-empt state laws in one of three ways: (a) expressly through statutory language; (b) implicitly where a state law conflicts with or stands as an obstacle to federal law; or (c) implicitly when it occupies a legislative field and leaves no room for state law. *WinRed*, 59 F.4th at 941 (quoting *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993)).

None of those has occurred here. The Federal Elections Campaign Act ("FECA") does not expressly preempt the Democracy for the People Act because the challenged provisions not apply to federal candidates for office. Conflict preemption does not apply here because federal law already prohibits foreign nationals from "indirectly" contributing

to state and local elections. The Democracy for the People Act likewise prohibits foreign nationals from "indirectly" contributing to state and local elections. Therefore, there is no conflict with federal law. Finally, the Democracy for the People Act is not preempted as a matter of field preemption because Congress has not fully occupied the field of campaign finance regulations and there are relatively few federal laws applicable to state and local campaigns. Instead, state and local governments are free to regulate elections for state and local officials.[16]

1. FECA does not expressly pre-empt the Democracy for the People Act.

To interpret an express preemption provision, the court first looks to the plain wording of the clause, which is the best evidence of legislative intent. *WinRed*, 59 F.4th at 942. FECA expressly pre-empts state law with respect to federal elections: "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a).[17] "Federal law supersedes state law concerning ... [l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 1.08.7(b)(3).

The challenged provisions of the Democracy for the People Act, however, do not apply to candidates for federal office because nothing in the legislative history suggests or

[16] For the same reasons, the Chamber is wrong that "federal law fully and directly addresses" the interests identified by the sponsors of the Democracy for the People Act. (*See* Doc. 60, at 32.)

[17] Of course, the FECA does not preempt time, place, and manner restrictions. *See WinRed*, 59 F.4th at 944. State Defendants do not argue the challenged provisions of the Democracy for the People Act are a time, place, or manner restriction.

implies that the provisions will apply to federal candidates. The Court can and should look beyond the statutory text when the interpretation would be at odds with the drafters' intent. *See United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013) (affirming that this court "look[s] beyond" statutory text when application of the plain language "will produce a result demonstrably at odds with the intentions of its drafters") (*citing United States v. Ron Pair Enters*., 489 U.S. 235, 242 (1989)).

If a literal reading suggests the challenged provisions of the Democracy for the People Act applies to federal candidates, the Court should construe the provisions as applying only to non-federal candidates. As an example, in *Reeder v. Kansas City Board of Police Commissioners*, the Eighth Circuit held that FECA does not preempt a statute prohibiting Missouri police officers from donating to federal campaigns even though the state prohibition fell within a literal reading of the preemption clause. 733 F.2d 543, 545 (8th Cir. 1984). The Eighth Circuit was explicit that "some state laws that could be characterized as coming within the preemption provision, if read literally and broadly, remain valid." *Id.* Because the law does not apply to federal candidates, there is no argument that federal law expressly pre-empts it. *See Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (spending limit/public financing scheme was preempted only to the extent that it applied to Minnesota Congressional candidates).

2. There is no conflict pre-emption.

When FECA does not expressly pre-empt a state law, the Court should infer that FECA likewise does not impliedly pre-empt it. *WinRed*, 59 F.4th at 944. Nevertheless, the Court must still address the Chamber's implied pre-emption argument. *See id.* Conflict

pre-emption voids state laws when (1) "compliance with both federal and state regulations is a physical impossibility," or (2) "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quotation omitted).

The Chamber points to no physical impossibility. There is no argument that it is impossible for the Chamber or any of its members to comply with both FECA and the Democracy for the People Act. Federal law does not address spending by domestic corporations that are partially owned by foreign investors. The Chamber argues pre-emption applies because the Democracy for the People Act prohibits conduct that is allegedly permitted under federal law. (Doc. 60, at 35.) As a preliminary matter, federal law is silent on the issue of spending by foreign-influenced corporations, or what qualifies as a foreign-influenced corporation. Additionally, this argument proves the Board's point that compliance with both is possible. Because foreign-influenced corporations are not required under federal law to make contributions and expenditures in state and local elections, it is not impossible to comply with federal law and the Democracy for the People Act at issue in this case. *See WinRed*, 59 F.4th at 944 ("FECA does not require WinRed to mislead or deceive consumers.").

Likewise, the Chamber puts forth no argument that "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. at 399. Federal law prohibits foreign nationals from spending money on federal, state, or local elections. *See* 52 U.S.C. § 30121(a). Prohibiting foreign money from being channeled through corporations in state

and local elections serves that same purpose, for if foreign investors do not have a constitutional right to spend money to influence elections, then they do not have a constitutional right to do so indirectly through the corporate form. *See Bluman*, 800 F. Supp. 2d at 288 ("[F]oreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."). To the extent the Chamber argues federal law seeks uniformity in election law, the national uniformity is *limited* to the "areas where it pre-empts state law." *WinRed*, 59 F.4th at 945. In short, the Democracy for the People Act is not at odds with FECA.

3. There is no field pre-emption.

Here, FECA does not occupy the field of campaign contributions or expenditures by foreign-influenced corporations. "Field preemption occurs when federal law occupies a 'field' of regulation so comprehensively that it has left no room for supplementary state legislation." *Murphy v. NCAA*, 584 U.S. ——, 138 S. Ct. 1461, 1480 (2018) (quotation omitted). There is *no* federal law that defines the term "foreign-influenced corporations" or regulates such spending. Instead, the Chamber appears to argue that there can be no differentiation between foreign-influenced corporations and non-foreign-influenced corporations. No federal law supports that position. Indeed, an FEC Commissioner has expressly acknowledged that this is a gap in the federal scheme. FEC Commissioner Weintraub, "How Our Broken Campaign Finance System Could Allow Foreign Governments to Buy Influence in Our Elections and What We Can Do About It." (July 19, 2017), available at https://www.fec.gov/resources/cms-content/documents/DPCC-19-July-2017_Final.pdf, *archived at* https://perma.cc/D4BU-WDJG.

In summary, the Chamber is unlikely to succeed on the merits of its pre-emption claim.

B. The Democracy for the People Act Survives First Amendment Scrutiny.

The Chamber is likewise unlikely to succeed on the merits of its First Amendment claim. Although challenges to laws that limit contributions and expenditures have been subject to different levels of scrutiny, the level of scrutiny does not matter here, because the law survives strict scrutiny. *See Bluman*, 800 F. Supp. 2d at 285-86. Therefore, the Board assumes for purposes of this motion that strict scrutiny applies. In order to pass muster under strict scrutiny, a statute must be narrowly tailored to advance a compelling government interest. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (controlling opinion of Roberts, C.J.).

1. The Government has a compelling interest in protecting democratic self-governance from foreign influence.

Minnesota has a compelling interest in protecting democratic self-governance in Minnesota from foreign influence. Foreign investors may be able to leverage ownership stakes in U.S. entities to impact corporate governance, and through that channel they could influence corporate political activity inconsistent with principles of democratic self-governance.

Bluman is the persuasive authority on this issue. In *Bluman*, foreign nationals who *resided* and worked in the United States brought a lawsuit against the Federal Election Commission challenging a federal law that prohibited them from making political contributions. *Bluman*, 800 F. Supp. 2d at 282-83. The FEC moved to dismiss, and

plaintiffs moved for summary judgment. Writing for a three-judge panel of the District Court, Justice Kavanaugh, then-Circuit Judge, held that statute did not violate First Amendment. *Id.* at 292. The United States Supreme Court affirmed the decision without opinion. 565 U.S. 1104 (2012). By affirming the decision, the United States Supreme Court made *Bluman* binding precedent, until the Supreme Court declares otherwise. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (votes of summary affirmance are votes on the merits of the case and lower courts are bound by the decisions).

In *Bluman*, then-Judge Kavanaugh began by acknowledging the national debate spurred by the First Amendment implications of campaign finance laws. *See Bluman*, 800 F. Supp. 2d at 286 (citing *Citizens United*, 558 U.S. at 310; *Bukley v. Valeo*, 424 U.S. 1 (1976)). He then stated, "[t]his case does not implicate those debates. Rather, this case raises a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process." *Id.* He noted that the Supreme Court has long upheld laws (at the local, state, and federal level) that exclude foreigners from "activities that are part of democratic self-government." *Id.* at 283, 286-87. In short, "the government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'" *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)). Indeed, "'exclusion of aliens from basis governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition.'" *Id.* (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982)). The court then declared what it called 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.

Bluman, 800 F. Supp. 2d at 288; *see also U.S. v. Singh*, 979 F.3d 697, 710-11 (9th Cir. 2020) (the compelling interest applies to state and local elections); *OneAmerica Votes v. State*, 518 P.3d 230 (Wash Ct. App. 2022) (citing *Bluman*, applying First Amendment precedent, and concluding state law that banned political contributions by foreign nationals was constitutional).

Bluman is consistent with *Citizens United*, which itself rested in large part on the premise that U.S. entities are "associations of citizens." *Citizens United*, 558 U.S. at 349; *see also Bluman*, 800 F. Supp. 2d at 289 (noting that the only four justices in *Citizens United* who spoke to the issue indicated that "the government obviously has the power to bar foreign nationals from making campaign contributions and expenditures") (citing *Citizens United*, 558 U.S. at 420-21). The Democracy for the People Act simply makes sure entities contributing to our political process are, indeed, associations of U.S. citizens. And as a practical matter, it makes no sense to ban direct spending by foreign nationals but not indirect spending by the exact same foreign nationals through domestic entities. In *United States v. Singh*, for example, the Ninth Circuit concluded that a foreign national could not use his United States-based company to funnel money into United States elections. 979 F.3d at 720-21. It was akin to a straw donation. *Id.*

Despite the Chamber's protestations, the Democracy for the People Act is not an end-run around *Citizens United*, because it does not ban corporate money in elections. Indeed, out of the Chamber's 6,000 plus members, only 100 or so may be impacted by the legislation. And to date, the Chamber has identified only three such members that may in fact be impacted by the Democracy for the People Act once it goes into effect. (Kimble Dec. Ex. 1, at Ans. Int. 7.) Of course, if the legislature wanted to ban corporate speech in elections, implementing legislation that captures only roughly 1% or less of entities would not be a very effective way of doing so. The only rational interpretation is that the intended effect of the Democracy for the People Act is what the sponsors said: protect democratic self-governance in Minnesota from foreign influence.

2. On its face, the Democracy for the People Act is narrowly tailored to protect democratic self-governance from foreign influence.

As pleaded in the Complaint and as demonstrated in the Chamber's initial discovery responses, the Democracy for the People Act affects few companies—just about 1% of the Chamber's members. (Compl. ¶ 41; *see also supra* at Kimble Dec. Ex. 1, at Ans. Int. 7.) The Democracy for the People Act sweeps precisely as broad as it must. It affects very few companies overall, and only those that have foreign investors who can exert influence over the corporation. The information from SPS Commerce bears this out. Although 1% may seem like a small percentage of ownership in the abstract – but it undoubtedly means influence pursuant to corporate law – it in fact is a lot of ownership. A single shareholder who owns 1% of SPS Commerce stock is likely one of the top 40 shareholders and owns shares worth several millions of dollars.

The Democracy for the People Act considers that the core interest in political speech, as discussed in *Citizens United*, is about decision making in democracy. Political speech is "'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Citizens United*, 558 U.S. at 349 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

a. The Democracy for the People Act is not underinclusive.

The Chamber argues that the law is underinclusive because it does not affect spending by unions. (Doc. 60, at 31.) But unions and other non-profits generally do not have investors so there is nothing analogous to investors in for-profit corporations. There is no common governance structure that suggests or implies influence by persons that provide funding to the union or non-profit. The fiduciary duties of non-profit board members also differ greatly from private company boards that seek to ensure shareholder return on investment. *See Buckley v. Valeo*, 424 U.S. 1, 105 (1976), *superseded by statute on other grounds* (noting that "a statute is not invalid under the Constitution because it might have gone farther than it did"), *cited in Bluman*, 800 F. Supp. 2d at 292; *see also Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 (8th Cir. 2012) (affirming denial of preliminary injunction regarding law that subjected corporations to more stringent regulations than unions).

b. The Democracy for the People Act is not overbroad: The 1% and 5% thresholds are reasonable because 1% allows for a substantial amount of influence vis a vis other investors.

The Chamber also argues the Democracy for the People Act is overbroad, pointing to the 1% and 5% thresholds. The Chamber is wrong, because the 1% and 5% thresholds are reasonably based on corporate influence and because it is not impossible for companies to comply with the Democracy for the People Act.

The Chamber argues the 1% threshold means the law is overbroad because it 1% is *de minimis*. (Doc. 60, at 29.) To the contrary. Although *Bluman* could be read to permit restrictions on election activities of corporations with *any* equity held by foreign investors, the Democracy for the People Act is limited to ownership that denotes influence. For decades, the ability to present a shareholder proposal occurred at 1% ownership. In September 2020, the threshold became even lower–$2,000. Financial CHOICE Act of 2017, H.R. 10 (115th Cong.), § 844; *see also SEC, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8,* 84 Fed. Reg. 66,458 (Dec. 4, 2019); 17 C.F.R. 240.14a-8(b). The rationale for the SEC to eliminate the 1% threshold was in part because ownership levels *much lower* than 1% exerted a great deal of influence. The SEC explained:

> We also propose to eliminate the current 1 percent ownership threshold, which historically has not been utilized. The vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold. In addition, we understand that the types of investors that hold 1 percent or more of a company's shares generally do not use Rule 14a-8 as a tool for communicating with boards and management.

Id. at 66,464.[18] The following chart reflects relative ownership:

The following table compares the proposed dollar thresholds as a percentage of market value as of December 2018 for the S&P 500 Index constituents and May 2019 for the Russell 3000 Index constituents: [60]

Registrant	$2,000 Threshold as a percentage of market value	$15,000 Threshold as a percentage of market value	$25,000 Threshold as a percentage of market value
Largest Registrant in the S&P 500 Index	0.0000003	0.0000019	0.0000032
500th Registrant in the S&P 500 Index	0.0001	0.0005	0.0009
3,000th Registrant in the Russell Index	0.0013	0.0098	0.0164

Id.

The SEC also cited statements from some of the largest pension fund investors, including the influential California State Teachers' Retirement System and the New York City Comptroller. "While one percent may sound like a small amount, even a large investor like the $200 billion CalSTRS fund does not own one percent of publicly traded companies," and "[d]espite being among the largest pension investors in the world, [New York City funds] rarely hold more than 0.5% of any individual company, and most often

[18] The reason 1% shareholders don't use the shareholder proposal process to connect with the board is because 1% is such a high amount of power; investors with that amount of ownership can easily get executive-suite management on the phone. (*See* Coates Ltr. at 7-8.)

hold less." *Id.* n.58. In other words, 1% is unquestionably a big percentage in terms of influence at large publicly traded companies.

As an example, for SPS Commerce, a company with a market cap of $6.253 billion, $2,000 is likely substantially less than 1%. *See* SPS Commerce, Inc. (SPSC), https://finance.yahoo.com/quote/SPSC?p=SPSC&.tsrc=fin-srch (last visited Nov. 21, 2023). Indeed, the tenth largest investor in SPS owns 2.23% of the stock, at a value of nearly $140 million. SPS Commerce Major Holders, https://finance.yahoo.com/quote/SPSC/holders/ (last visited Nov. 21, 2023). An individual stockholder in SPS who owns 1% of the stock, owns shares worth about $68 million. *Id.* (regarding Delaware Group Equity Fds V-Small Cap Core Fund). According to Morningstar, owning 1% of the stock of SPS Commerce would put the investor in the top 15 of all fund investors. SPS Commerce, Inc., Ownership, Funds, https://www.morningstar.com/stocks/xnas/spsc/ownership (last visited Nov. 21, 2023) (number 15 is Fidelity Small Cap Index, which owns .92%). It would put the investor just outside the top 20 of all institutional investors. SPS Commerce, Inc., Ownership, Institutions, https://www.morningstar.com/stocks/xnas/spsc/ownership (last visited Nov. 21, 2023) (number 20 is T. Rowe Price Assocs., Inc., which owns 1.25%).

The ability to present a shareholder proposal can create substantial leverage. (*See* Coates Ltr. at 6.) Even the ability to threaten a proposal can get C-suite attention and exert indirect influence. (*Id.*) The Business Roundtable proposed threshold below 1% for shareholders to be able to present proposals to the board. (*Id.* at 7.) For larger public entities, a 1% holder may be the largest single shareholder. (*Id.* at 8.)

Many of the most active investors own less than 1% (e.g., NY and CA public employee pension funds). (*Id.*) In other words, the business community recognizes that a 1% level of ownership presents the opportunity for corporate influence. And the 5% threshold is reasonable because it is the threshold that requires disclosure. The 1% and 5% thresholds are reasonable because they are tied to a high level of influence.

C. The Democracy for the People Act Does Not Even Apply to the Chamber and Does Not Apply to the Proposed Activity of the Three Members It Identifies.

Perhaps unintentionally, the Chamber misreads a relevant part of the Democracy for the People Act. The Chamber argues that a nonprofit, such as the Chamber, can be a foreign-influenced corporation. *See* Doc. 60, at 5 & n.1. But the definition of foreign-influenced corporation is a corporation defined by Section 211B.15, subd. 1(c)(1) and (3) only. Minn. Stat. § 211B.15, subd. 1(d). A non-profit is defined as a corporation under 1(c)(2). Therefore, the Democracy for the People Act does not restrict the Chamber from using its money in a manner that a foreign-influenced corporation cannot, and has no certification requirements. In short, the law prohibits contributions and expenditures by foreign-influenced corporations—not contributions and expenditures by non-profits like the Chamber—and does not prohibit recipient expenditures.

Regarding SPS Commerce, there is nothing in the record to indicate that SPS Commerce or Extempore have taken actions previously or will take action in the future that is prohibited by the Democracy for the People Act. Mr. Black states, "I have led, and will continue to lead, efforts to pass legislation in the Minnesota Legislature to place the Page Amendment on the ballot during a general election." (Doc. 62 ¶ 18.) But those efforts do

not qualify as ballot question expenditures because under § 10A.01, subd. 7, "lobbying activities" are specifically excluded from the definition of the phrase "[p]romoting or defeating a ballot question." Therefore, SPS Commerce may continue to engage in lobbying efforts in support of a bill that will result in the Page Amendment being placed on the ballot. However, if the legislature approves a bill placing the question on the ballot, and if SPS Commerce is a foreign-influenced corporation, it may be prohibited from spending money on certain types of political expenditures. There is nothing in the record to indicate that will occur imminently, or that SPS Commerce is a foreign-influenced corporation. The declaration says that "SPS has exercised its free speech rights to support our communities in the past," but doesn't cite a single example aside from the Page Amendment. (Doc. 62 ¶ 14.) With respect to the Page Amendment, the declaration says that "SPS has made expenditures to support the recent ballot question initiative known as the 'Page Amendment'" but the declaration does not explain what those expenditures were.[19] (*Id.* ¶ 15.) Extempore likewise is not prohibited from engaging in lobbying related to the Page Amendment.

LW argues that is a foreign-influenced corporation, and that it would like to spend money in the area of cannabis policy. (Doc. 64 ¶ 12.) But the declaration does not specify what speech or through what means, so it is impossible to determine if the proposed speech is covered by the Democracy for the People Act. The record is also empty regarding how

[19] Mr. Black also states, "I have led, and will continue to lead, efforts to pass legislation in the Minnesota Legislature to place the Page Amendment on the ballot during the general election." (Doc. 62 para. 18.)

decisions will be made about contributions or expenditures, if any. Although LW disclaims that any foreign investors have ever been involved in political speech in the past, the declaration does not even state that there *has* been any political speech. It doesn't explain any process that governs how money may or may not be spent regarding elections. A self-serving statement that the declarant does not believe the foreign investor will play a role in the money spent in elections is insufficient.

II. CONSIDERATION OF IRREPARABLE INJURY, RELATIVE HARMS, AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING A PRELIMINARY INJUNCTION.

The Chamber has not shown a likelihood of success on the merits and therefore the motion for preliminary injunction should be denied. Plaintiff has also not satisfied any of the remaining *Dataphase* factors.

First, Plaintiff's need for immediate relief is undercut by its own delay in bringing a motion for injunctive relief. The Democracy for the People Act passed in May 2023. The Chamber did not bring its motion for preliminary injunction until September 28, 2023. The Chamber's delay in bringing its motion weighs heavily against granting its requested injunctive relief. *See, e.g.*, *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (holding that plaintiff's delay in seeking preliminary injunction "belies any claim of irreparable injury pending trial," and recognizing that delay in seeking injunction, standing alone, may justify denying request); *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, Civ. No. 09-1091, 2010 WL 2131007, at *1 (D. Minn. May 25, 2010) (Ericksen, J.) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no

irreparable injury." (internal quotation marks and citations omitted)). Moreover, the harm it alleges is speculative at best. It is based on its hypothetical theory about how the Democracy for the People Act will be applied, and in some cases relies on a flat incorrect reading of the Act. As such, the Chamber's alleged injury is speculative at best.

In the context of alleged irreparable harm, the Chamber implies it is nearly impossible for affected members to comply with the Democracy for the People Act because they lack the ability to know all of their shareholders, their ownership percentages, and their citizenship status. (Doc. 60, at 7, 18-20, 22.) This argument is at odds with normal corporate governance. Investors are already required to file disclosures in certain circumstances. 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 public under law must, within 10 days, report the acquisition to SEC on Schedule D.[20] 15 U.S.C. § 78m(d). This includes the identity of the buyer's citizenship, which is publicly available information. *See* 17 C.F.R. § 240.13d-101 (item number six, requires reporting of "Citizenship or place of organization"); *see also* SEC, EDGAR Search & Access, https://www.sec.gov/edgar/search-and-access (last accessed Nov. 24, 2023). Of course, if any company has a single foreign investor who owns more than 5%, then the

[20] The timeline will be shorter in about one year. "SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting," (Oct. 10, 2023), https://www.sec.gov/news/press-release/2023-219 ("Among other things, today's amendments: shorten the deadline for initial Schedule 13D filings from 10 days to five business days and require that Schedule 13D amendments be filed within two business days.").

inquiry under the challenged provisions of the Democracy for the People Act is over—the company is a foreign-influenced company.[21]

Professor Coates' letter explains in detail why it is not impractical for foreign-influenced corporations to comply with the Democracy for the People Act. Corporations can identify who its shareholders are. Most corporations are private (less than .1% are public). These entities generally can and do track their shareholders identities directly. (Coates Ltr. at 10 & Compl. ¶¶ 50, 63.) Most shares of large, listed companies are held by separate legal entities (e.g., mutual funds). The Democracy for the People Act excludes beneficiaries who own shares through U.S.-based mutual funds. Minn. Stat. 211B.15, subd. 1(d)(3). Relatedly, the top four index funds – State Street, Vanguard, BlackRock, and Fidelity—owned about 25% of all stock of every public company. "Are Index Funds Getting Too Powerful?", *WBUR* (Aug. 7, 2023). In other words, regarding publicly traded companies, the shares held by some of the largest shareholders in the market are unaffected by the Democracy for the People Act. As for shares held through a broker, the broker keeps track of how many shares belong to each client.

[21] It is unclear, and the Chamber does not explain, whether any of the 100 or so members will actually have difficulty determining if they are foreign-influenced. For example, if 85 of them know that at least 5% is owned by a single foreign investor, then they are a foreign-influenced corporation. In that hypothetical, the Chamber's argument is about just 15 members. Which 15 are they? And do they believe it will be too hard for them to assess whether they are foreign-influenced and why? The preliminary injunction record is conspicuously silent on this front. The Chamber served discovery responses on November 22, 2023, and still can identify only three affected members. (Kimble Dec. Ex. 1, at Ans. Int. 7.)

Professor Coates further explains that public corporations have the ability to ascertain exact ownership on any arbitrary record date. At least annually, publicly-traded companies are required by law to have shareholder meetings. The company must set a record date to determine what shareholders are eligible to attend and vote. Something similar must also occur for actions such as mergers, charter amendments, and other things of that nature brought up at special meetings. The ability to make a determination about ownership is essential to basic governance. (Coates Tr. at 10-11.) Most entities use and intermediary (e.g., American Stock Transfer) for this function. (*Id.* at 11.)

Most companies will be able to identify non-citizen shareholders. Many brokerage firms impose restrictions on non-citizens (e.g., Fidelity, you must be a U.S. citizen). And there is already publicly available data for shareholders who hold 5% of a company's stock. (Coates Ltr. at 12-13.) A company could ask American Stock Transfer (AST) to produce a list of all shareholders that are foreign nationals and AST in turn could ask Fidelity, and Fidelity's U.S.-only policy would enable it to answer. For non-individuals, the foreign status of an entity investor is easily ascertained by examining place of incorporation and principal place of business.

In short, the Chamber is wrong that it is impossible for its members to comply with the Democracy for the People Act. Its argument also ignores that the Democracy for the People Act requires only a reasonable inquiry. Reasonable inquiry is a standard that is already familiar to securities law. *See, e.g.*, 17 C.F.R. § 275.206(4)-2(a)(3) (due inquiry). And the law expressly states that the method for determining ownership is the same as what the company is already doing. Minn. Stat. § 211B.15, subd. 4b. In other words, the

determination of ownership is already a familiar practice in securities law and other areas of corporate law. There is no meaningful additional information-gathering cost beyond what it is already required to do under existing law. (Coates Ltr. at 14.)

Second, the injunction the Chamber seeks is not in the public interest and the harm it would cause outweighs the harms alleged by Chamber. Minnesotans deserve to have their duly enacted laws enforced, especially in the arena of foreign influence in elections. Allowing foreign money to play a role in elections undercuts public confidence in elections and undermines self-government. Those are harms that cannot be undone. Especially in light of the speculative nature of the alleged harm and the fact that the Chamber cannot show that it is likely to succeed on the merits, a preliminary injunction is not warranted.[22]

CONCLUSION

State Defendants respectfully request that the Court deny the Chamber's motion for preliminary injunction.

[22] In response to the amicus briefs, notably as non-profits, neither amicus itself is a foreign-influenced corporation. Moreover, the brief by the Minnesota Broadcasters Association and Minnesota Newspaper Association relies on speculation and does not discuss foreign money in politics, which is what this case is about. Finally, *Citizens United* did not hold that prohibitions on protected corporate political speech are unconstitutionally "overbroad" when they are "not limited to corporations or associations that were created in foreign countries or funded predominantly [*sic*] by foreign shareholders." (Doc. 86, at 4.) Instead, the Court was explaining that it was *not* reaching a particular question, because it did not apply to the challenged law. "We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *Citizens United*, 558 U.S. at 362.

Dated: November 27, 2023

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