UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Chamber of Commerce, *a Minnesota nonprofit corporation,*

Plaintiff,

vs.

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.

Case No.: 23-CV-02015 (ECT/JFD)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In December 2023, this Court preliminarily enjoined the "foreign influenced corporation" provisions of Minnesota Statute §211B.15 ("statute") because the record showed the statute is not narrowly tailored to fulfill a compelling government interest. The evidence has not changed since. Subsequent fact and expert discovery confirms that there is no evidence that could justify the statute under strict scrutiny. Instead, the evidence is even more compelling in showing that the statute is unconstitutional.

The statute is a direct and unsupportable assault on the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). Plaintiff Minnesota Chamber of Commerce (the "Chamber") thus respectfully moves for summary judgment because the statute is unconstitutional, and Defendants should be permanently enjoined from enforcing it. There are no genuine disputes of any material facts, and Defendants have failed to prove the statute is narrowly tailored to fulfill a compelling government interest. Rather, the statute is a misguided reaction to a made-up, imagined problem that, if enforced, will only strip American businesses of their rights to free speech.

Discovery has confirmed the Minnesota Legislature ("State") had no evidence of any situation that needed solving by such a statute. In an attempt to explain the absence of any actual factual evidence to prove alleged foreign influence through corporations in Minnesota elections, Defendants rely on their expert's assertion that "if [foreign influence] is going on…it would be secret"; and, therefore, there is no proof to show such foreign influence. (Declaration of Thomas H. Boyd dated July 19, 2024 ("Boyd Decl."), Ex. K at

194:11-18.) This falls alarmingly short of meeting Defendants' burden under strict scrutiny to justify the abridgment of thousands of businesses' First Amendment rights.

The State has also sought to rely on *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011), as a basis for restricting the free speech rights of domestic corporate entities. But *Bluman* does not establish that the State has a compelling interest to prohibit domestic companies from political spending on the basis of foreign shareholder ownership percentages—indeed, it expressly *declined* to address the issue. And even if there were a compelling interest, the statute—which restricts speech based on merely one or five percent foreign ownership—is not narrowly tailored to advance that interest. The statute is overinclusive because it restricts the speech of domestic companies that are not actually influenced by any foreign shareholders. And the statute is underinclusive because it does not restrict other entities, such as labor unions, which are theoretically just as vulnerable (if not more vulnerable) to alleged influence from foreign stakeholders.

Therefore, the statute must be held unconstitutional and permanently enjoined to protect the First Amendment rights of American businesses under *Citizens United*.

UNDISPUTED FACTS

I. THE PARTIES.

The Chamber represents over 6,300 businesses in Minnesota. (Declaration of Doug Loon dated July 18, 2024 ("Loon Decl.") ¶2.) As such, the Chamber regularly advocates for and advances pro-business legislation. (*Id.* at ¶3.)

The Chamber's membership includes privately-held and publicly-traded companies throughout Minnesota. (*Id.* ¶8.) At least 100 of the Chamber's members would be implicated by the statute because they are either publicly-traded and cannot ascertain whether they qualify as "foreign influenced corporations" under the statute, or they are privately-held and meet the statute's thresholds. (*Id.* at ¶¶8-12.)

Three of the Chamber's members—SPS Commerce, Extempore, and Lake of the Woods Cannabis Company—have submitted sworn declarations, responded to subpoenas, and testified that they want to be able to exercise their First Amendment rights to engage in political spending, and the statute threatens their future speech and restricts their participation in the Chamber's advocacy. *See infra* Facts, Part V. These members are generally representative of the Chamber's 6,300 members.

The Campaign Finance and Public Disclosure Board, comprised of five members who are Defendants, is a state agency empowered to enforce the statute (collectively, "CFPD Defendants"). *See* Minn. Stat. §211B.15, subds. 6, 7. The executive director of the CFPD Board and two staff members were deposed and, as discussed below, they have no knowledge of any facts or evidence to support the statute.

Defendant John Choi is the County Attorney for Ramsey County, and is therefore responsible for enforcement of the statute in Ramsey County, where the Chamber and many Chamber members reside. *See* Minn. Stat. §211B.15, subd. 3. As discussed below, Defendant Choi did not have any facts or evidence to support the statute.

II. MINNESOTA ATTEMPTED TO ABRIDGE CORPORATE POLITICAL SPEECH BY ENACTING THE STATUTE IN 2023.

The statute was enacted in the 2023 legislative session, and was to become effective on January 1, 2024. However, the Court properly issued a preliminary injunction prohibiting enforcement of the statute on December 20, 2023. (ECF 109.)

A. The Statute Restricts Domestic Corporations and LLCs From Making Independent Expenditures and Contributions.

The statute directly prohibits domestic for-profit corporations and LLCs from engaging in constitutionally-protected free speech to: (1) make expenditures related to candidacies; (2) make contributions or expenditures related to ballot questions; and (3) make contributions to political committees or political funds if they are "foreign influenced corporations." *See* Minn. Stat. §211B.15, subds. 1(d) & 4a (2023).

A "foreign influenced corporation" is defined by the statute as any for-profit corporation, limited liability company, or non-profit corporation "for which any 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 decisionmaking process with respect to the corporation's political activities in the United States.

Id. (emphasis added).

A "foreign investor" is an individual *residing* outside of the United States who is not a United States citizen or permanent resident. *See id.* at subd. 1(e). A "foreign investor" is also "a foreign country, a foreign political party, an entity organized under the laws of or having a principal place of business in a foreign country, or a corporation that is 50% or more owned by a foreign investor."[1] *Id.*

B. The Statute's Sworn Certification Requirement Places CEOs at Risk of Prosecution and Companies at Risk of Fines and Dissolution.

Any corporation or LLC that chooses to make an independent expenditure or contribution must satisfy a certification requirement under the statute.

The requirement mandates the CEO to certify under penalty of perjury that based on "reasonable inquiry" the company was "not a foreign-influenced corporation as of the date the contribution or expenditure was made." Minn. Stat. §211B.15, subd. 4b.

This certification must be made, signed, and filed with the CFPD Board *every time* the entity spends money for political purposes. *Id.*

Corporations and LLCs may be fined up to $40,000 and/or be dissolved for violations of the statute; and individuals who act on their behalf (i.e., officers) may be fined to $20,000 or be imprisoned up to five years, or both. *Id.* at subds. 6, 7.

[1] The statute's definition identifying a corporation as a "foreign investor" if it is 50% or more owned by a foreign investor is a telling recognition by the State that the level of ownership that matters is what amounts to control—not the *de minimis* 1 and 5 percent thresholds.

Law-abiding, risk-averse companies will understandably self-censor and avoid making expenditures and contributions due to the threat of these harsh penalties. (*See, e.g.*, ECF 62, Declaration of Archie Black dated October 24, 2023 ("Black Decl.") ¶¶25-26; Declaration of Eric Nerland dated July 19, 2024 ("Nerland Decl.") ¶11.)

III. DEFENDANTS HAVE NO EVIDENCE THAT MINORITY FOREIGN SHAREHOLDERS HAVE EVER SOUGHT TO EXERCISE INFLUENCE OR CONTROL OVER A CORPORATION'S ELECTION EXPENDITURES IN MINNESOTA OR ELSEWHERE.

Since the Court's injunction, the parties have engaged in discovery including written discovery, fact depositions, and expert discovery. All of this discovery yielded *no evidence* that could possibly justify the statute and its abridgment of First Amendment rights.

A. Defendants' Responses to Written Discovery Demonstrate the Statute Is Based on Speculation Regarding Foreign Influence.

Defendants answered interrogatories by repeating the same arguments they made at the preliminary injunction stage—citing speculation rather than facts and evidence.

For instance, when asked what "degree an owner's interest in a company provides the owner influence or control over the company's decisionmaking," Defendants recited a list of *potential* ways a shareholder *could* influence a company's decisionmaking. (Boyd Decl., Ex. A at 19-20, Ex. B at 6.) And CFPD Defendants blandly posited influence *might* occur through shareholder proposals. (*Id.*)

When asked to "describe in detail each instance in which a Foreign Influenced Corporation made contributions or independent expenditures in connection with an

election based in whole or in part on influence by a foreign owner," Defendants conceded "they do not have this information." (Boyd Decl., Ex. A at 20, Ex. B at 6.)

In responding to requests for admission, Defendants denied and deflected. For example, the Chamber variously requested Defendants to "admit you have no evidence that an owner's [1%, or 5%, or 10%, or 25%, or 50%] ownership interest in a company provides the owner influence or control over the company's decisionmaking." (Boyd Decl. Exs. C at 3-6, D at 2-4.) CFPD Defendants denied each of these requests, stating only "this is properly the scope of expert opinion and seeks a legal conclusion." (*Id.* at Ex. C at 3-6.) Defendant Choi answered: "Defendant is not currently in possession of any such evidence…." (*Id.* Ex. D at 2-4.) To date, Defendants have produced no evidence that any of these levels of ownership percentages have influence or control over a company's political spending decision making.

The Chamber also requested Defendants to "admit You have no evidence that a Foreign Influenced Corporation made contributions or independent expenditures in connection with the [2020, or 2022, or 2024] election based in whole or in part on influence by a foreign owner." (Boyd Decl. Exs. C at 6-9, D at 4-6.) Defendant Choi responded he "is not currently in possession of any such evidence." (*Id.* Ex. D at 4-6.) CFPD Defendants responded: "the information they know or can readily obtain is insufficient to enable them to admit or deny…." (*Id.* Ex. C at 6-9.)

Lastly, Defendants produced no documents evidencing any instance of a foreign investor influencing—or even seeking to influence—a company's political spending.

B. Defendants' Witnesses Testified They Are Not Aware of Any Instance in Which Foreign Shareholders Have Sought to Exercise Influence or Control Over a Corporation's Election Expenditures in Minnesota or Elsewhere.

Defendant Choi admits he has no evidence relevant to this case. (Boyd Decl., Ex. E.) CFPD Defendants identified three staff members who supplied information in response to the Chamber's written discovery requests. (*Id.* at Ex. F.) Accordingly, the Chamber deposed each of these three CFPD staff members, who testified as follows:

- CFPD witnesses are not aware of any evidence that foreign shareholders have ever sought to exercise influence or control over any domestic corporation's election expenditures. (Boyd Decl., Ex. G at 60:14-62:16, 111:15-18; Ex. H at 28:1-29:13, 64:7-22, 65:4-24; Ex. I at 30:9-17, 35:7-25, 36:20-37:7, 53:5-23.)

- CFPD witnesses have no reason to believe there is any past or current threat of foreign shareholders seeking to exercise influence or control over a domestic corporation's election expenditures. (*Id.* Ex. H at 63:1-64:1; Ex. I at 38:10-19, 52:13-17.)

- The Legislature never asked the Board or its staff for any information on these topics. (*Id.* Ex. G at 67:2-10; Ex. H at 64:2-6; Ex. I at 34:9-12.)

- The Board and its staff felt the proposed legislation was problematic with regard to the thresholds and the certification and compliance components. (*Id.* Ex. G at 50:4-52:13; Ex. H at 21:20-22:2, 23:5-25:7, 33:7-34:4, 34:5-35:16, 37:10-17, 39:8-42:25, 47:1-48:7; Ex. I at 25:2-23, 27:2-33:16, 30:18-31:8, 45:24-47:9.)

    - "1 percent seemed very small" (*Id.* Ex. H at 23:5-9.)

    - "I have to admit I think I said I'm glad that's not me doing that certification." (*Id.* Ex. H at 37:10-14.)

    - "I suspected that once corporations figured out they had to fill out this form, a good majority would say, 'This is not worth it' and would not do it." (*Id.* Ex. H at 41:8-11.)

- "I think there are aspects of the law that make it subject to constitutional attack. One would be that it is an outright prohibition on certain types of speech as opposed to a disclosure requirement. Another element is the certification requirement and the potential number of certifications an entity regulated by the board could be required to file and whether that would be potentially overly burdensome, and then also the scope, I suppose, the number of corporations that it could potentially apply to." (*Id.* Ex. I at 27:10-20.)

- "[T]here's certainly a question, in my mind at least, as to whether there are alternative ways to target that same type of foreign influence." (*Id.* Ex. I at 29:20-22.)

C. Defendants' Expert Provides No Admissible Evidence to Justify the Statute's Infringement on Free Speech.

Defendants disclosed an expert, Professor Sarah Haan, to provide opinions on campaign finance, the First Amendment, and corporate governance. (Boyd Decl., Ex. J.) Professor Haan is a law professor who acknowledges that she has provided purely legal opinions. (*Id.* Ex. K at 66:13-67:4.) As such, Professor Haan's opinions are inadmissible in their entirety and may not be considered at summary judgment.[2] Fed. R. Evid. 702; Fed. R. Civ. P. 56(c)(1)(B). Moreover, Professor Haan's opinions are speculative assertions that are not supported by evidence—and are, indeed, contrary to the factual record.

1. Professor Hann Provides No Admissible Evidence That Foreign Shareholders Have Sought to Exercise Influence or Control Over a Corporation's Election Expenditures.

Professor Haan disclosed and described five opinions in her written report. She asserts, "Minnesota has an urgent…interest in excluding foreign influenced corporations

[2] In conjunction with this Motion, the Chamber has also filed a motion to exclude the expert opinions of Professor Haan in their entirety under Federal Rule of Evidence 702.

from participation in democratic self-government", and "it would be constitutionally permissible for Minnesota to prohibit a corporation with a single foreign shareholder from making independent expenditures." (Boyd Decl., Ex. J at 7.) These are non sequiturs based on two points of data: the number of domestic companies that have foreign shareholders; and the amount of companies engaged in making political contributions. (*See id.*) Professor Haan simply assumes there is a causal relationship between these two facts—but she does not identify a single instance where a foreign shareholder has influenced a domestic company to spend money in American elections. (*See id.*)

Furthermore, Professor Haan opines about the *potential* influence of a shareholder. (*Id.* Ex. J at 7-8.) She opines that shareholders are in a position to *potentially* influence a company through a shareholder proposal and that "it is widely accepted" that "a group of shareholders holding, in aggregate, 5% of the corporation's stock *can* influence the corporation decisionmaking *if* those shareholders coordinate or act in concert." (*Id.* (emphasis added).) However, Professor Haan's opinions never go beyond the point of speculation and conjecture; and she does not provide (and concedes she does not have) any evidence that any foreign shareholders have ever engaged in any of these actions to influence corporate political spending decisionmaking.

Instead, Professor Haan testified there is *no evidence*, but then claims this is *proof* that such influence is actually occurring:

> Q. Are you aware of any instance in which a foreign shareholder sought to exercise influence over the company's political spending for any purpose other than to increase

> shareholder value and obtain a financial return on their investment?
>
> A. I don't have a specific example in mind, no. If this kind of thing is happening, you know, we would not be -- I wouldn't expect to be aware of it. It would basically be a secret.

(Boyd Decl., Ex. K at 156:15-24.)

> Q. Do you have any evidence that foreign-influenced corporations are currently interfering in any elections in Minnesota?
>
> A. I don't have any evidence nor would I expect to have any evidence because if this is going on, and it probably is, it would be completely not transparent. It would be secret. We would not know about it.

(*Id.* at 194:11-18.)

2. Professor Haan Provides Nothing More Than Speculation and Conjecture to Support the Statute's Ownership Thresholds.

Professor Haan asserts, "*any level of foreign ownership* [is] sufficient to *render the corporation foreign-influenced*," but provides no evidence to support her position.[3] (Boyd Decl., Ex. J. at 16 (emphasis added).) Professor Haan instead points to the facts that (1) shareholders with at least 2,000 shares of stock are *eligible* to make shareholder proposals, and (2) shareholders *can* aggregate their ownership and in concert so as to exert potential influence on a company. (*Id.* at 18-25; ECF 88 at 30-31.)

[3] Professor Haan's view conflicts with the fact that *de minimis* ownership of 1% or 5% by foreign investors has been recognized as a basis to presume a lack of influence on the part of the minority owner. *See, e.g.*, *In re Marriage of Brinkman*, No. A20-0597, 2021 WL 668087, at *5 (Minn. Ct. App. Feb. 22, 2021), *review denied* (May 18, 2021) (20% lack-of-control discount applied to share value); Swope v. Siegel-Robert, Inc.: Why Both Minority and Marketability Discounts…, 69 UMKC L. Rev. 455, 461 (2000).

First, Professor Haan neither cites to nor testified to a single example of a shareholder proposal regarding a company's political spending. (Boyd Decl., Exs. J, K.) In fact, Professor Haan testified, "I'm not sure I've ever seen a shareholder proposal that directs the company to make a campaign finance expenditure." (*Id.* Ex. K at 114:13-16.) And Professor Haan conceded it is questionable whether a shareholder proposal requesting a company spend money to effect politics would even qualify as a shareholder proposal under SEC Rule 14a-8. (*Id.* at 112:19-113:9.)

Second, and likewise, Professor Haan simply speculates that "[i]t doesn't strike me as particularly far fetched that examples of [foreign shareholders holding more than 5% or more in the aggregate acting in concert] would exist." (*Id.* at 116:21-117:4.) But, again, neither Professor Haan nor any of the Defendants have provided any such examples.

As the Court has held, merely "explaining how foreign minority shareholders could exercise influence over corporations is not enough." (ECF 109 at 17.)

D. The Chamber's Rebuttal Experts Demonstrate the Fallacies of Professor Haan's Opinions.

Plaintiff rebutted Professor Haan's opinions with opinions rendered by two esteemed experts, who supported their opinions with actual facts, data, and experience.

1. Brad Smith Conclusively Rebutted Professor Hann's Opinions as to the Alleged Purpose and Need for the Statute.

Brad Smith is a recognized campaign finance and election law scholar and former member of the Federal Election Commission ("FEC"). (Boyd Decl., Ex. L at 1-2.) He is also is a professor at Capital University Law School and has taught courses in election law

or campaign finance every year since 1994 (except three years when he wasn't teaching). (*Id.* at 2.) Professor Smith is also a prolific author. He wrote *Unfree Speech: The Folly of Campaign Finance Reform* and is co-author/editor of leading casebooks and hornbooks in election law. (*Id.*)

In response to Professor Haan's Report, Professor Smith provided rebuttal opinions based on his over 30 years of specialized knowledge and actual experience from, *inter alia*, serving on the FEC, that (1) there is no established compelling governmental interest to prohibit domestic corporate speech due to concerns regarding actual or the appearance of foreign influence or control; (2) there is no evidence that foreign shareholders have attempted to exercise influence or control over a domestic corporation's election expenditures in Minnesota or elsewhere; (3) the statute is underinclusive because it excludes labor unions and other entities; and (4) there are far less restrictive means to accomplish the State's professed objective (*e.g.*, FEC's Advisory Opinion 2006-15 (TransCanada)). (Boyd Decl., Exs. L, M.)

2. Richard Grubaugh Rebutted Professor Haan's Speculative Assertions Regarding the Statute's Ownership Thresholds.

Richard Grubaugh is a Senior Managing Director at D.F. King & Co., a globally recognized leader in proxy solicitation and a subsidiary of Equiniti ("EQ"), one of the world's leading shareholder transfer agents. (Boyd Decl., Ex. N at 2.) Mr. Grubaugh has provided professional services related to shareholder proposals, proxy contexts, and other complex corporate control situations for the past four decades. (*Id.*)

In response to Professor Haan's Report, Mr. Grubaugh provided rebuttal expert opinions based on his four decades of specialized knowledge and actual experience in providing public companies with advice and counsel regarding shareholder proposals and proxy voting, that (1) he has never seen foreign shareholders of public companies attempt to exercise influence or control over a domestic corporation's election expenditures in Minnesota or elsewhere; and (2) public companies cannot ascertain the information needed for a CEO to certify the company is not a "foreign influenced corporation" at any given point in time. (*Id.* at 4-5.)

Mr. Grubaugh explained that the ability to make a shareholder proposal is very different from actually influencing action. (*Id.* at 6.) He has worked on countless shareholder proposals over the last 40 years and has never seen a shareholder proposal directing a company to make a contribution or expenditure. (*Id.*)

Mr. Grubaugh further explained that parties purchase stocks to obtain a return on their investment. (*Id.* at 8-9; Ex. O at 120:22-122:1.) As a result, most passive investors focus on the return on investment rather than corporate political expenditures. (*Id.*) Similarly, activist shareholders, such as those acting in concert as "wolf packs" as Professor Haan describes, focus on increased value rather than corporate political expenditures. (*Id.*)

In addition, the dynamic between directors/officers and shareholders is governed by numerous state, federal, and common law. While directors and officers owe duties to their investors to manage lawfully and maximize shareholder value, they do not take orders from shareholders. As Archie Black of SPS Commerce testified, directors and officers of public

companies are professional businesspeople and managers who operate the corporation to maximize success and return on investment—not to sacrifice these primary objectives merely to curry favor with a particular shareholder. (Boyd Decl., Ex. P at 113:2-20.)

In sum, there is no—and never has been any—evidence of the purported harmful "influence" that the statute allegedly seeks to prevent.

IV. THE CHAMBER'S POLITICAL SPEECH WOULD BE CHILLED BY THE STATUTE.

A. The Chamber Has Historically Contributed Towards Independent Expenditures.

The Chamber contributes some membership dues to independent expenditure political action committees. Historically, the Chamber has budgeted for "grassroots and political expenditures" of substantial sums per year. (Boyd Decl., Ex. Q at 41:11-42:18.) This includes contributions to Pro Jobs Majority fund ("Pro Jobs"), as permitted by Minnesota Statute §10A.12. (Loon Decl. ¶17.) In the 2022 election, the Chamber made independent expenditures of over $1.3 million to Pro Jobs. (*Id.* ¶20.)

B. The Statute's Bans on Political Spending Apply to the Chamber Through Minnesota Statutes Chapter 10A.

Although the statute purports to exempt non-profit corporations from the definition of "foreign influenced corporations," that exemption only applies to the extent "that the funds [at issue] *qualify as general treasury money*." Minn. Stat. §211B.15, subd. 4a(b) (emphasis added). However, the statutory definition of "general treasury money" states that it "***does not include*** money collected to influence the nomination or election of

candidates or local candidates or to promote or defeat a ballot question." Minn. Stat. §10A.01, subd. 17c (emphasis added). The statute also specifically states:

> 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.*

Minn. Stat. §211B.15, subd. 4a(b) (emphasis added).[4]

As stated, the Chamber has historically made, and regularly makes, contributions to political action committees like Pro Jobs. (Boyd Decl., Ex. Q at 41:11-42:18.) This is part of the Chamber's mission, and member organizations pay dues to support those efforts. (Loon Decl. ¶¶15-16.) But under the statute, non-profits like the Chamber are prohibited from using membership dues received from a "foreign influenced corporation" to influence the nomination or election of candidates or local candidates or to promote or defeat a ballot question. As such, the Chamber's ability to continue its historic political spending in the future is threatened by the restrictions imposed by the statute. (*Id.* at ¶¶41-43.)

As a practical matter, the Chamber cannot use dues money paid by any member that meets the definition of a "foreign influenced corporation"—or that the Chamber cannot certify is not a "foreign influenced corporation"—for any political expenditures and contributions.

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[4] A payment to the Chamber, including membership dues, could potentially qualify as an implied contribution for political purposes. The Chamber's President and CEO Doug Loon testified the Chamber's mission is clear that it involves grassroots and political advocacy; the Chamber keeps their members apprised of its actions in this regard; and the records of these contributions are publicly available. (Boyd Decl., Ex. Q at 96:14-99:9.)

The CFPD's own executive director confirmed that the statute prohibits non-profits from using money from a "foreign-influenced corporation" for election-related purposes. (Boyd Decl., Ex. G at 105:21-106:6.) He also testified none of the CFPD Defendants disagreed with his interpretation. (*Id.* at 106:7-12.) The other CFPD staff witnesses also agreed. (*Id.* Ex. I at 49:25-50:16; *id.* Ex. H at 55:3-11.) Thus, the Chamber's political spending is curtailed because it receives funds from members that are defined as "foreign-influenced corporations" or who cannot certify they are not "foreign-influenced corporations" under the statute.

The extent of the restriction on the Chamber's speech is not merely a matter of degree. Because of practical realities, the statute effectively restricts the Chamber's political spending overall. To comply with the statute, the Chamber must either: (a) refrain from making any contributions to Pro Jobs because some of these funds may have come from members who meet the statute's definition of "foreign-influenced corporations" or (b) segregate membership revenue and utilize only those dues it can confirm with certainty have been made by members who do not meet the statute's definition of "foreign-influenced corporations" *on the day the membership revenue was received*. But the Chamber cannot practically separate membership revenue in this way. The Chamber would need to be able to verify which of its over 6,300 members are "foreign influenced" as of the date each paid membership dues and segregate those funds in a separate account. (Loon Decl. ¶23.) But the Chamber does not have the resources to be able to determine with reasonable accuracy which of its members do or do not qualify as "foreign influenced" at

any given time. (*Id.* ¶¶26-28.) Moreover, as discussed below, *infra* Facts, Part V, many of the Chamber's members themselves are unable to determine whether they meet the definition of a "foreign influenced corporation." (*Id.* ¶29; Black Decl. ¶9.) Thus, it is practically impossible for the Chamber to continue making political contributions and comply with the statute.

Accordingly, given the restrictions imposed by the statute—which the CFPD's witnesses have confirmed—there can be no dispute that the Chamber would be adversely affected if the statute is enforced.

C. The Chamber Has Already Been Harmed by the Statute's Threatened Ban on Political Spending.

In 2023, following enactment of the statute, the Chamber accelerated the contribution of $440,000 to Pro Jobs, which had not been budgeted but the Chamber felt it had to do in advance of the statute's January 1, 2024 effective date so as to avoid potential penalties, prosecution, and dissolution. (Loon Decl. ¶¶32-36.) The need to accelerate the timing of this contribution due to the threats posed by the statute resulted in tax liability the Chamber could have otherwise avoided. (*Id.* ¶37.)

The Court has since entered its preliminary injunction. This has enabled the Chamber to resume its contributions, which it did on June 25, 2024, in the amount of $500,000 to Pro Jobs. (*Id.* ¶¶38-39.) The Chamber plans to make these kinds of contributions in the future so long as the statute is not enforced. (*Id.* ¶¶40-41.)

V. THE STATUTE RESTRICTS THE POLITICAL SPEECH OF CHAMBER MEMBERS.

The Chamber estimates at least 100 of its members would be affected by the statute because they either know with reasonable certainty, or they lack sufficient information to ascertain with reasonable certainty, the nationality of each of their shareholders at any given time. (Boyd Decl., Ex. R at 4-5; *see, e.g.*, ECF 62 at ¶9.) Moreover, in the case of public companies, the ownership of their publicly traded stock is subject to ongoing changes. (Black Decl. ¶7; Boyd Decl., Ex. N at 9-13.)

Three Chamber members illustrate the manner in which the statute threatens and adversely affects Minnesota businesses. Those members previously submitted sworn declarations in support of the Chamber's Motion for Preliminary Injunction and have since responded to subpoenas by producing documents, provided deposition testimony; and/or submitted supplemental declarations in support of summary judgment. (*See* ECF 62-64.)

A. Lake of the Woods Cannabis Company

Lake of the Woods Cannabis Company ("LW") is a Minnesota privately-held C-corporation based in Warroad, Minnesota. (Nerland Decl. ¶2.) LW manufactures and sells cannabis products. (*Id.* at ¶3.) Under the statute, LW is a "foreign influenced corporation" because one its shareholders is a Canadian national who, as of July 19, 2024, owns 19.5% of LW stock. (*Id.* at ¶7.)

LW was formed in 2021 following Minnesota's historic legislation legalizing recreational cannabis. (Boyd Decl., Ex. S at 28:20-29:16.) Currently, LW seeks to expand its business to own dispensaries. (*Id.* at 32:4-22.) LW is actively researching candidates

and campaigns that are pro-cannabis and support future dispensary businesses in the following Minnesota counties: Olmstead, Koochiching, Goodhue, Wabasha, and Roseau. (Nerland Decl. at ¶16.) LW intends to make independent expenditures yet this year and has taken steps to do so. (*Id.* at ¶18.) In fact, LW has been politically active in "speaking with lobbyists, representatives, interested political parties." (Boyd Decl., Ex. S at 105:13-25.)

In addition, LW pays membership dues in part to advance the Chamber's mission, including pro-business initiatives and political spending. (Nerland Decl. ¶21.) If the statute is upheld and allowed to become effective, the Chamber would not be permitted to use LW's dues for political expenditures and contributions. (*Id.* at ¶23.)

B. Deeloh Technologies d/b/a Extempore

Extempore is a Delaware privately-held C-corporation incorporated based in Minneapolis. (Declaration of Carlos Seone dated July 19, 2024 ("Quinteiro Decl.") ¶2.) Extempore provides learning platforms to aid language learning. (*Id.* at ¶3.) Under the statute, Extempore is a "foreign influenced corporation" because one of its shareholders is a foreign national: a United Kingdom national who owns 1.656% stock (as of July 19, 2024). (*Id.* at ¶9.)

While Extempore has not yet made a contribution or expenditure, its CEO testified that Extempore intends to exercise the right to do so in the future:

> Q: Why did Extempore decide to get involved in this litigation?
>
> [Objection]
>
> A. Yeah. Because we do believe that, given the fact that most of our customers are public school districts, we anticipate that

> at some point in the future, as we continue to grow, we might want to exercise political speech via contributions, via continuing paying dues to the Chamber, via ballot questions. There's -- we anticipate there's going to be a lot of situations as we continue to grow where we might want to get involved in the political discourse, and we don't want that right to be taken away from us.

(Boyd Decl., Ex. T at 141:13-142:2.)

Extempore also seeks to have the membership dues it pays to the Chamber available for the Chamber to advance is mission, including for use as political expenditures and contributions. (Quinteiro Decl. ¶¶16-17.) But Extempore's CEO is concerned that if the statute is upheld, Extempore's membership would undermine the Chamber's ability to make independent expenditures to advance the policies Extempore supports. (Boyd Decl., Ex. T at 165:11-21.) Consequently, Extempore would likely have to discontinue its membership in the Chamber if the statute is upheld because "we don't want to run the risk of our dues being considered political speech" in violation of the statute with its statutory penalties ad punishments. (*Id.* at 151:2-9.)

C. SPS Commerce

SPS Commerce ("SPS") is a Delaware corporation based in Minneapolis and is publicly traded on the NASDAQ, ticker "SPSC." (Black Decl. ¶¶3-4.) While SPS has not made independent political expenditures or contributions in 2024, it wants to be able to do so in the near future. (Boyd Decl., Ex. P at 111:12-25.) For example, SPS is very active in supporting education initiatives that benefit the community and enhance the quality of the workforce; and SPS would likely want to make contributions to support the Page

Amendment when it becomes a ballot question. (*Id.* at 94:3-24.) SPS also supports the Chamber's mission, and supports using member dues for political expenditures and contributions. (*Id.* at 90:8-16; 139:2-140:18.)

The publicly-traded nature of SPS's ownership prevents SPS from certifying whether it is a "foreign influenced corporation" because SPS does not have visibility into the nationality or citizenship of all of its shareholders. Archie Black, SPS's former Chairman and CEO, explained SPS lacks visibility into the nationality or citizenship of its shareholders due to the existence of intermediary holders and shareholders who object to the disclosure of their identities. (*Id.* at 44:10-20; 46:1-48:23) Expert Richard Grubaugh confirmed Mr. Black's experience at SPS is the norm for all publicly-traded companies. (Boyd Decl., Ex. N at 10-15.)

First, there are shareholders whose ownership is reflected in physical records, which is usually a very small percentage of shareholders. (*See, e.g.*, Boyd Decl., Ex. U; Ex. P at 44:10-45:13.) These are the persons who are listed in the "share register" (Boyd Decl., Ex. N at 11) required by law. *See* Minn. Stat. §302A.461, subd. 1.

Second, there are shareholders who hold their stock indirectly, such as through a bank or broker. This category of shareholders is further divided into either "non-objecting" or "objecting" shareholders. *Non-objecting* shareholders *have not* opted to withhold their individual ownership information. *See* CFR §240.14b-1. In contrast, *objecting shareholders* have opted to direct that their bank or broker not to share their information. *See id.* As a result, SPS can only obtain a list of non-objecting beneficial shareholders.

(Boyd Decl., Ex. N at 12-13.) This list can be requested for a certain record date, but is not immediately available and may cost thousands of dollars. (*Id.*) This contains shareholder names and addresses, but not residence or nationality. (*Id.*; *id.* Ex. P at 46:1-49:4.) There is no list for objecting shareholders that shows street holders and their addresses. (Boyd Decl., Ex. N at 13.)

Third, there are shareholders who hold their stocks indirectly through nominees. Companies can only get a list of these shareholders that state the nominee, but not the street name holder. (*Id.* Ex. N at 12.)

Fourth, SPS and other publicly traded companies have access to limited public filings. Shareholders are required to file 13D and 13G disclosures within five days of obtaining 5% of a company's stock. *See* 17 C.F.R. §240.13d-1. These disclosures include the nationality of the shareholder, but given the five day filing period, they cannot be used to confirm ownership on any given day. (*Id.* Ex. N at 15.) Additionally, institutional investors are required to file 13F disclosures, which report quarter-end holdings 45 days thereafter. *See* 17 C.F.R. §240.13f-1. This data also cannot be relied upon to confirm ownership on any given day. (Boyd Decl., Ex. N at 15; *id.* Ex. P at 118:25-119:17.)

Due to the dynamic and ongoing nature in which stock is traded and the limited information regarding the identity and nationality of their shareholders, publicly-traded companies cannot certify whether they are "foreign influenced corporations" at any given time. As Mr. Black put it with respect to SPS:

> So, no, I can't tell you who my shareholders are. I can speculate, but once somebody says I'm going to jail if I'm

> wrong, I don't speculate anymore. I shut down and don't do things. Right? I mean, I'm not going to jail. I'm not CEO anymore, but man, going to jail? That's pretty harsh. That scares every CEO on the planet.

(*Id.* Ex. P at 120:6-12.) The statute's certification requirements accompanied by the onerous penalties equate to absolute prohibitions:

> this is a way to disallow any publicly traded company to ever make a contribution to those things. That's what it did, because I could never, ever, as a CEO of a public company, assert that we don't have 1 percent ownership from an individual or 5 percent. I could never do that**.** No public company would ever be able to give; and that was the intent of it, is to stop us from giving, stop us from participating.

(*Id.* at 116:12-21.) Therefore, the statute would silence all domestic public companies simply because they cannot certify—and their officers cannot personally afford to certify—they are not "foreign influenced corporations."

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "To show a genuine dispute of material fact, a party must provide more than conjecture and speculation." *Zayed v. Associated Bank, N.A.*, 913 F.3d 709, 720 (8th Cir. 2019).

ARGUMENT

The Chamber and its members, along with numerous other domestic companies and associations are entitled to exercise and assert their First Amendments rights and protections, including the right of free speech under *Citizens United*. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the

dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (quotation omitted). The statute unlawfully strips these rights and withholds important political discourse.

I. THE CHALLENGED PROVISIONS OF THE STATUTE RESTRICTING POLITICAL SPEECH VIOLATE THE FIRST AMENDMENT.

The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office," *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation omitted), and the realm of political speech is where the First Amendment's "protection of robust discussion is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (citation omitted).

Laws that restrict political speech "are subject to strict scrutiny, which ***requires the Government to prove*** that the restriction [1] furthers a ***compelling interest*** and [2] is ***narrowly tailored*** to achieve that interest."[5] *Citizens United*, 558 U.S. at 310 (emphasis added). Defendants have failed to prove the State has a compelling interest; and, even if it did, the statute is not narrowly tailored to achieve any such interest.

A. The State *Does Not* Have a Compelling Interest to Justify the Prohibitions Imposed by the Statute.

"In general, strict scrutiny is best described as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has

[5] The Chamber recognizes that exacting scrutiny is often applied to cases involving political contributions; however, as the Court did in its Order, the Chamber assumes that strict scrutiny applies, and that even if exacting scrutiny applied, the statute fails under both standards. (ECF 109 at 11-12.)

placed on the speech in question in pursuit of that interest." *Republican Party of Minnesota v. White*, 416 F.3d 738, 750 (8th Cir. 2005). As a result, a statute undergoing this scrutiny must "substantially protect that interest from similarly significant threats." *Id.*

1. The State *Does Not* Have a Compelling Interest to Prohibit All Political Expenditures by Domestic Corporations and LLCs Based Solely on the Existence of Foreign Shareholders.

Defendants have asserted that *Bluman* supports the statute. However, *Bluman* only addressed restrictions imposed on the activities by foreign citizens and companies directly—not on the persons or entities who foreign nationals may seek to influence. 800 F. Supp. 2d at 289–90. As a result, *Bluman* does not provide support for the statute.

Moreover, there is evidence that the statute's prohibitions were not motivated by any actual interest related to foreign influence. At most, Defendants have retained an expert who opines shareholders *could potentially attempt* to influence a company's political speech. (Boyd Decl., Ex. J at 15-17.) But that expert cannot identify any evidence that this *possibility* has ever occurred. (*Id.* Ex. K at 194:11-18.)

2. At Most, *Bluman* Provides the State May Have a Compelling Interest in Limiting the Participation of Foreign Citizens and Foreign Businesses in Activities Involving American Democratic Self-Government, but This Interest Is Limited.

As stated, *Bluman* focused on the legitimacy of restrictions on the *activities* of foreign nationals to prevent *foreign influence by those foreign nationals*—not restrictions on the activities of American businesses who may be influenced by foreign nationals.

Specifically, *Bluman* narrowly addressed the constitutionality of federal law that prohibits foreign individuals from themselves making political expenditures in United

States' politics. 800 F. Supp. 2d at 283. As such, the court only held the government has an interest "in limiting the participation of foreign citizens in *activities* of American democratic self-government." *Id.* at 288 (emphasis added).

Bluman declined to "analyze the circumstances under which a corporation may be considered a foreign corporation for purposes of the First Amendment analysis." *Id.* at 292 n.4. This express limitation underscores the court focused solely on direct contributions and expenditures by foreign citizens and foreign companies. (Boyd Decl., Ex. L at 13.)

3. The State Does Not Have a Compelling Interest to Prohibit All Political Expenditures by Domestic Corporations and LLCs that Have Foreign Shareholders.

For the above reasons, Defendants cannot legally or factually establish the State has a compelling interest to prohibit domestic companies from exercising their First Amendment rights simply because the companies may have foreign shareholders.

Professor Haan disagrees, but she supports her opinion that "foreign actors seeking to influence our political system routinely use corporations to disguise their role and to channel funds" on (1) the amount of foreign holdings of U.S. stocks and (2) the amount of political spending done by companies. (Boyd Decl., Ex. J at 14.) Professor Haan is unable to draw any evidentiary connection between these two statistics. Rather, Professor Haan can only speculate that these are related, and that there must be "secret" foreign influence being perpetrated by foreign shareholders. (*Id.* Ex. K at 156:15-24, 194:11-18.) This kind of rank speculation and conjecture does not support the silencing of all American corporations and LLCs simply because they have minor foreign ownership.

Defendants and Professor Haan also assume that foreign citizens wishing to influence American politics would consider a domestic entity to be an ideal vehicle. But this is also not supported by evidence. Nor is it logical. Professor Haan suggests these foreign actors would want to tie up their assets in order to obtain a minority stake in the company, then make a shareholder proposal, and hope to negotiate some type of settlement that would involve making a political contribution. (*Id.* Ex. J at 18-19.) It is undisputed, however, that there is no evidence of this ever happening either. (*Id.* at 189:17-190:18.)

The more likely path of foreign interference has been cyber efforts by Russian, Iranian, and Chinese actors. (*Id.* Ex. J at 13.) But these activities have nothing to do with foreign influence allegedly exerted through stock ownership.

Furthermore, Professor Haan attempts to justify the State's speculation by opining "even the appearance of foreign influence in our elections poses a threat to self-government." (*Id.* at 9.) However, the State does not have a compelling interest to prevent "the appearance of foreign government influence." *Cent. Maine Power Co. v. Maine Comm'n on Govern-mental Ethics & Election Pracs.*, --- F. Supp. 3d. ----, No. 1:23-CV-00450-NT, 2024 WL 866367, at *12 (D. Me. Feb. 29, 2024); *see also Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 308 (2022) (holding "the Government may not seek to limit the appearance of mere influence or access" (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 208 (2014))).

Nor is there any evidence to support such a purported interest. To the contrary, the most comprehensive study of public opinion found "no statistically or substantively

significant positive effects of campaign finance reforms on trust in government." (Boyd Decl., Ex. L at 23-24 (citing David M. Primo & Jeffrey D. Milyo).) There is no legal or factual support for the State's stated interest based on "appearances."

a) There is no legal authority to support a compelling interest to deprive citizens or companies of their First Amendment rights because they might be subjected to foreign influence.

Despite State's apparent disdain for *Citizens United*, the fact is the Supreme Court definitively "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United*, 558 U.S. at 343. *Bluman* recognized this holding, stating "American corporations...[are] members of the American political community." 800 F. Supp. 2d at 290.

Therefore, it cannot be disputed that the entities silenced by the statute are indeed entitled to First Amendment protection. And yet, the statute seeks to restrict their rights based merely on a professed fear of "foreign influence." The Eighth Circuit has held that "a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *281 Care Comm. v. Arneson*, 766 F.3d 774, 786 (8th Cir. 2014). The fear of potential "foreign influenced" speech likewise "must be viewed with some skepticism."

b) There is no "loophole" in Citizens United—the State can impose restrictions and prohibitions on foreign investors who are the source of the alleged foreign influence.

Contrary to the empty rhetoric used to attempt to support the statute, there is no "loophole" that enables foreign influence. Federal law already fully addresses the government's interest in restricting foreign actors from spending in American politics. *See infra*, Part B.5; FEC Advisory Opinion No. 2006-15 (May 19, 2006). These laws apply to the very shareholders the State believes to be the source of the potential foreign influence. The focus must be on the *influencer*—not on those who are allegedly "influenced."

As the Court held in its Order, "preventing the exercise of First Amendment-protected political speech by a corporation with foreign shareholders, ***without more, does not alone represent a compelling interest***." (ECF 109 at 15 (emphasis added).) Defendants are still "without" the "more" that is necessary to prove a compelling interest.

B. The Challenged Provisions of the Statute Cannot Survive Strict Scrutiny Because They Are Not Narrowly Tailored.

Even assuming the State's objective to "protect self-governance in Minnesota from foreign influence" is compelling, the statute still fails because it is not narrowly tailored. (*See* ECF No. 88 at 23.) "A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)." (ECF 109 at 15-16 (citing *Republican Party of Minnesota*, 416 F.3d at 751).)

1. Minority Foreign Shareholder Ownership at One and Five Percent Thresholds Does Not Render a Company "Foreign."

In *Citizens United*, the Supreme Court declined to decide whether the government has an interest in preventing foreign individuals or associations from influencing the political process. *Citizens United*, 558 U.S. 362. Justice Kennedy's concurrence observed that the federal statute at issue would be overbroad (even if the interest was compelling) because it was "not limited to corporations or associations created in foreign countries or *funded predominately by foreign shareholders*." *Id.* at 884 (emphasis added).

Even under this test, the statute cannot be sustained. "Predominantly" means more than 50 percent. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Fed. Highway Admin* 151 F. Supp. 3d 76, 88 (D.D.C. 2015) ("Predominately surely means more than 50 percent"); *see also* PREDOMINANT, Black's Law Dictionary (12th ed. 2024) ("More powerful, more common, or more noticeable than others; having superior strength, influence, and pervasiveness"); *supra* note 1.

Domestic companies with a single foreign shareholder that owns one or more percent, or even several foreign shareholders that own five or more percent, cannot be defined as "funded predominately by foreign shareholders." *Cent. Maine Power Co.*, 2024 WL 866367 at *14 ("I do not see how [the 5 percent ownership requirement] can survive [this] observation in *Citizens United*."). Therefore, the Minnesota Legislature's attempt to render a company "foreign" based on such ownership cannot be upheld.

2. There Is No Evidence that the Challenged Provisions of the Statute Advance Minnesota's Stated Compelling Interest of Preventing Foreign Influence in Its Elections.

When evaluating strict scrutiny "courts consider evidence of the harm the government seeks to prevent." (ECF 109 at 16 (citing *McCutcheon*, 572 U.S. at 219-21).) Defendants have presented *no evidence* to demonstrate that the one-percent and five-percent foreign ownership levels used to strip these domestic companies of their free speech rights is justified by a very real and actual harm posed by these foreign shareholders' influence over political spending decisionmaking.

The legislative history is void of any findings of fact regarding minority foreign shareholders exercising influence over a company's election expenditures in Minnesota or elsewhere. Instead, the legislative history reflects a (1) a disdain for *Citizens United*, (2) a negative view of corporate spending, and (3) a disregard for the impracticality of compliance. (*See* ECF 60 at 8-15.) But no evidence of any foreign influence.

Defendants likewise admit they have no evidence of even a *single* company that has been influenced by a minority foreign investor to make a political expenditure or contribution. (*Supra* Facts, Part III.) Indeed, Professor Haan testified that she is unaware of any such example. (Boyd Decl., Ex. K at 194:11-18.)

Plaintiff has also been unable to find any such evidence. Expert Brad Smith who served on the FEC, has confirmed that he is not aware of any either. (*Id.* Ex. L at 15.)

Thus, Defendants are left to defend their position with speculation and conjecture as to *potential* influence. However, the Supreme Court has made clear that the purported

threat must be real—not based on conjecture. *See Colorado Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 618 (1994) (holding it is not sufficient to "simply posit the existence of the disease"); *McCutcheon*, 572 U.S. at 210 (stating "we have never accepted mere conjecture as adequate to carry a First Amendment burden").

3. The Statute Is Overinclusive.

Apart from the lack of a compelling interest and lack of evidence of an actual threat to justify the prohibition on free speech, the statute is also not narrowly tailored because it is overinclusive. A law is overinclusive if it "necessarily circumscribes protected expression." *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 633 (4th Cir. 2016) (quoting *Republican Party of Minnesota v. White*, 536 U.S. at 775 (2002)).

De minimis ownership of 1% or 5% by foreign investors is a basis to presume a *lack of influence*—as opposed to a presumption of actual influence. *See supra* note 3. Defendants have presented no evidence to establish foreign investors with *de minimis* ownership stakes exert actual influence—or that there is any justification for there to be a presumption of actual influence—over corporate political spending decisionmaking. Yet the statute would categorically and indiscriminately apply to all of these corporations and LLCs, even where there is absolutely no evidence or suggestion of foreign influence as to their political spending decisionmaking—and even where they have implemented controls that ensure no foreign influence as to their political spending decisionmaking.

In *Citizens United*, the Supreme Court recognized the state's "categorical ban[ ] on speech [is] asymmetrical to" its stated compelling interest. 558 U.S. at 361. Here, the

statute's focus on these ownership percentages, as opposed to actual influence, is a categorical ban that asymmetrically restricts the rights of domestic businesses that are not actually influenced by foreign owners. (*See* Quinteiro Decl. ¶¶5-13; Nerland Decl. ¶¶5-11; Black Decl. ¶22.) As a result, the statute "sweeps far too broadly." (ECF 109 at 19.)

First, the statute is clearly overinclusive because it applies indiscriminately to all domestic corporations with a foreign shareholder holding one percent of its shares, or several foreign shareholders holding five percent, even where those foreign shareholders are: (1) passive investors, (2) non-voting shareholders, (3) shareholders who recuse themselves from participating in decisions, or (4) shareholders without any actual influence or control of the corporations election expenditures.

Second, as a practical matter, the statute effectively prohibits all publicly traded companies from engaging in political speech. The officers of publicly traded companies can never satisfy the "reasonable inquiry" standard to certify the company is not a "foreign influenced corporation" due the constant trading of their stock and the practical limitations on their ability to access information regarding the nationality of their shareholders. (*See supra* Facts, Part V.C; Boyd Decl., Ex. N at 9-16; Black Decl. ¶9.) These companies are prohibited from exercising their speech rights regardless of the absence of any evidence of actual threat by foreign shareholders to influence political expenditures.

Third, closely-held companies that meet the statute's definition of a "foreign influence corporation" are prohibited from engaging in any independent expenditure

activities even if they have ensured the foreign shareholders have not participated in the company's decisionmaking regarding independent expenditures.

4. The Statute Is Underinclusive.

The statute is also unconstitutionally underinclusive because it "leaves appreciable damage to that supposedly vital interest unprohibited." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015).

Here, the statute omits from its restrictive scope numerous other kinds of business organizations, such as partnerships, non-profits, cooperatives, associations and—most notably—labor unions, which foreign citizens might just as readily "use" as vehicles to participate in Minnesota elections. (Boyd Decl., Ex. L at 19-21.) Moreover, the legislative history demonstrates that the exclusion of labor unions was intentional.[6] If the State was truly interested in decreasing foreign influence in elections, it would have also restricted labor unions as well. This exclusion, in particular, "flushes" out the State's lack of a compelling interest. *Republican Party of Minnesota*, 416 F.3d at 750.

Furthermore, the statute's prohibitions apply when the foreign shareholders are located outside of the country, but not when those foreign shareholders are in the United States. *See* Minn. Stat. §211B.15 subd. 1(e)(2)(iv). This, too, "flushes" out the State's lack of a compelling interest. *Republican Party of Minnesota*, 416 F.3d at 750.

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[6] *See* Minn. H., Floor Debate, 93rd Minn. Leg., Reg. Sess. (April 13, 2023), available at https://www.lrl.mn.gov/media/file?mtgid=1048024. Recordings are also available on YouTube: https://www.youtube.com/channel/UCfR6kiQaeJLkxUyPaeouZTw

And in final example, the determination of whether the company seeking to make an expenditure is a "foreign influenced corporation" is made *as of the date of the expenditure*. *Id.* §211B.15 subd. 4b. But as the Court recognized, this results in numerous opportunities for absurd results, such as a foreign shareholder being able to exercise influence or control over a corporation's election expenditures so long as he sells his shares before the expenditures are actually made. (ECF 109 at 21-22.)

5. The Statute Is Not the Least Restrictive Means to Achieve the Stated Interest—Preventing Foreign Influence in Elections.

As discussed *infra*, federal law already addresses the State's professed interest to prevent foreign influence in domestic elections because it already targets the threat of such foreign influence by restricting and prohibiting foreign nationals, *i.e.*, the source of the alleged foreign influence—and does so without infringing on the free speech rights of citizens or domestic companies who may be the potential subject or target of that influence. *See*, e.g., FEC's Advisory Opinion 2006-15 (TransCanada) (Boyd Decl., Ex. M).

Defendants do not and cannot explain why the federal law is deficient. Defendants' expert, Professor Haan, recognizes federal laws have been passed to effectuate the State's interest. (Boyd Decl., Ex. J at 10-11, 13.) But Professor Haan nonetheless testified that "the federal regulation doesn't capture all of the forms of foreign influence that we understand in 2024 can be going on in corporate practice." (*Id.* Ex. K at 117:12-118:5.) When pressed on her answer, she failed to explain how or why the restrictions under the federal law are insufficient. (*Id.* at 118:6-20.) Again, there is no evidence in support of the statute.

In sum, the statute is not the least restrictive means to address the State's stated interest because it is not tied to the alleged harm, it is overinclusive and underinclusive, and there are other less restrictive means to achieving the alleged government interest.

II. THE STATUTE IS EXPRESSLY AND IMPLIEDLY PREEMPTED.

In addition, the Court should hold that the statute is preempted.

First, to the extent the statute seeks to regulate with respect to federal elections, it is expressly preempted by FECA.

Second, to the extent that it attempts to regulate with respect to state and local elections, it is impliedly preempted by Congress's decision to occupy the field of regulation of foreign nationals' involvement in *all* elections, as shown by Congress's unique expression of its intent in FECA to regulate restrictions on foreign nationals' involvement in every "Federal, State, and local election." 52 U.S.C. §30121(a)(1). This expression of intent is unique and found nowhere else in campaign finance law, and it demonstrates Congress's intent to occupy the field as to this subject through a uniform national standard. Indeed, "[t]he primary purpose of FECA was to limit quid pro quo corruption and its appearance"—which is the only recognizable government interests in limiting political speech in the form of spending. *WinRed, Inc. v. Ellison*, 59 F.4th 934, 944–45 (8th Cir. 2023) (quoting *McCutcheon*, 572 U.S. at 197); *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 308 (2022). There is no room for more state regulation in pursuit of this interest.

The Chamber recognizes that the Court declined to hold the statute is preempted in its preliminary injunction order. However, at that time, the Court was applying a more

rigorous standard of proof, whereas at this stage the standard is preponderance of the evidence—is it more likely than not that, based on undisputed facts, the statute is preempted. For the reasons stated below, the Chamber has met this standard of proof.

A. The Statute's Attempt To Regulate Spending With Respect To Federal Elections Is Expressly Preempted.

Congress expressly decided that FECA and the "rules prescribed under" it "supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C.§30143(a). The FEC has promulgated regulations defining the scope of this express preemption to include "[l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. §108.7(b)(3).

Chapter 211B, which includes the statute, in plain and unambiguous terms attempts to place limits on contributions and expenditures with respect to federal elections. The statute prohibits foreign-influenced corporations from, among other things, making "a contribution to a ***candidate*** for nomination, election, or appointment to a public office or to a ***candidate's*** principal campaign committee." Minn. Stat. §211B.15, subd. 4a (emphasis added). Although the statute does not itself define "candidate," the Minnesota Legislature has provided definitions elsewhere that govern the scope of the statute.

First, Minnesota Statute §211B.01, subdivision 1 provides "[t]he definitions in chapter 200 and this section *apply to this chapter*." (emphasis added). Nowhere in Chapter 211B is there any carve-out regarding the applicability of the definitions in §211B.01 to sections in Chapter 211B. Second, Minnesota Statute §211B.15, subdivision 1 provides: "For purposes of this section, the terms defined in this subdivision have the meanings

given. *Unless otherwise provided*, the definitions in section 10A.01 also apply to this section." (emphasis added). Thus, to determine the meaning of certain words and phrases in the statute, the Court must first look to §211B.15, subdivision 1 and §211B.01, *and then* to §10A.01 if §211B.15, subdivision 1 and §211B.01 do not contain a definition.

Section 211B.15, subdivision 1 does not define "candidate," but §211B.01 does and defines it to mean "an individual who seeks nomination or election to a ***federal***, statewide, legislative, judicial, or local office…except candidates for president and vice-president of the United States." Minn. Stat. §211B.01, subd. 3 (emphasis added). Because §211B.01 provides a definition that applies to the statute, the "*unless* otherwise provided" proviso that would otherwise incorporate definitions found in §10A.01 does not apply. Thus, by its plain terms, the statute seeks to regulate with respect to federal elections.

The Court previously expressed that the Chamber did not explain why §211B.01's definition of "candidate" should control instead of §10A.01's definition. The Court also previously expressed it was "not plausible that the Minnesota Legislature incorporated all of those terms [in §10A.01] expressly limited to state elections and state-election entities, but intended 'candidate' to be defined by Minn. Stat. §211B.01." (ECF No. 109 at 26 (internal citation omitted).) But as explained above, the Minnesota Legislature specifically decided that the definitions in §10A.01 *do not* apply if a definition has already been provided—and §211B.01 already provides a definition of "***candidate***." Although the statute uses some terms that are defined by §10A.01 ("political committee," "political

fund," "political party unit," "ballot question," "contribution," "expenditure"), this is simply because §211B.01 does not otherwise provide definitions.

Moreover, restricting the scope of the statute to only state and local elections, and not federal elections, would conflict with the stated purpose of Chapter 211B as a whole—which is to regulate all campaign practices—and §211B.15 in particular—which is intended to regulate corporate political contributions in several respects. Indeed, the Minnesota Attorney General has historically enforced Chapter 211B provisions against candidates for federal office. *See, e.g.*, *State v. Jude*, 554 N.W.2d 750, 752 (Minn. Ct. App. 1996) (Sixth District Congressional seat). It seems quite implausible that the Minnesota Legislature intended to change the entire scope of §211B.15—which for over 35 years has applied to both state and federal elections—when it enacted the Democracy for People Act, but did not explicitly state such an intention that dramatically altered §211B.15's reach.

At the very least, there is a statutory conflict if both §211B.01 and §10A.01 apply to the statute's use of "candidate." In cases of statutory ambiguity, the better course is to conclude that the statute is preempted. *See Cent. Maine Power Co.*, 2024 WL 866367 at *6 (holding Maine's analogous statute was likely preempted because the chapter in which the analogous statute is found governs state and federal elections).

B. The Statute Is Impliedly Preempted By Congress's Intent To Occupy The Field Regarding Involvement of Foreign Nationals In Elections.

The statute is also impliedly preempted because Congress specifically chose to occupy the field of regulation of foreign nationals' involvement in every "Federal, State, and local election." 52 U.S.C. §30121(a)(1). Field preemption occurs when Congress

"take[s] unto itself all regulatory authority" by legislating in a "field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Supreme Court has explained that field preemption applies if any *one* of the following three situations is met:

> [1] if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [2] if "the Act of Congress…touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," *or* [3] if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority.

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (emphasis added); *accord Arizona v. United States*, 567 U.S. 387, 399 (2012).

This case involves the second situation—when "the Act of Congress…touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." For example, "in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Court inferred an intent to pre-empt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs…is made clear by the Constitution,' and the regulation of that field is 'intimately blended and intertwined with responsibilities of the national government." *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985) (internal citations omitted).

Since the seminal *Hines* case, courts have found that state law is preempted because of the dominant federal interest in regulating foreign affairs. For example, this Court recently held (at the motion to dismiss phase) that it was plausible a Minnesota law

requiring persons who provide veterans benefits to make certain disclosures was preempted by the dominant federal interest in regulating the provision of veterans benefits. *See Jewell v. Herke*, 526 F. Supp. 3d 459, 466 & n.2 (D. Minn. 2021) (relying on *Sperry v. State of Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), which this Court described as "applying a type of field preemption in an area of dominant federal concern").

The Supreme Court has also consistently held state statutes that attempt to govern matters bearing on foreign affairs are preempted due to dominant federal concerns and interests related to foreign affairs. *See, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S. Ct. 664, 666, 19 L. Ed. 2d 683 (1968) (holding state statute attempting to provide for escheat in cases where a nonresident alien claims real or personal property was preempted due to "the field of foreign affairs which the Constitution entrusts to the President and the Congress"). Indeed, "federal power in the field affecting foreign relations [must] be left entirely free from local interference." *Hines*, 312 U.S. at 63.

Congress's dominant interest in federal foreign affairs and national security interests include the involvement of foreign nationals in domestic elections. Moreover, the federal government has a special responsibility to regulate such involvement. Considering these very propositions, the District of Maine recently held (at the preliminary injunction phase) that the issue of whether the analogous Maine statute was preempted presented a "close question." *Cent. Maine Power Co.*, 2024 WL 866367 at *10. In making this determination, the court explained (in reference to conflict preemption, incorporated in its field preemption analysis): "The history of the foreign prohibition on spending shows that

Congress has been active in this area over the last fifty years." *Id.* at *9. Indeed, Congress enacted FECA in 1974, and for the past 50 years, Congress has regulated foreign nationals' ability to contribute to *all* elections. *See* 52 U.S.C. §30121; 2 U.S.C. §441e (1974). The Maine court held that the plaintiffs had not met their high burden at the preliminary injunction phase to show field preemption. *Id.* at *10-11 But the court did *not* specifically analyze the "dominant interest" test, even though its analysis suggests that, if it had, the court would have held the Maine statute is field preempted. *See id.*

Congress uniquely and specifically decided to regulate contributions by foreign nationals with respect to "Federal, *State, or local* election." 52 U.S.C. §30121 (emphasis added). This unique expression of congressional intent to legislate in the sphere in which it concerns are dominant—foreign affairs and national security—demonstrates that Congress intended to vindicate establish a uniform standard applicable to all elections. As the Ninth Circuit recently observed, it is "necessary and proper" for Congress to regulate contributions and involvement in elections by foreign nationals due to the dominant federal concerns. *See United States v. Singh*, 979 F.3d 697, 710 (9th Cir. 2020).

This intent is buttressed by the fact that, while Congress has decided to only sparingly regulate state and local elections, when it has done so it has made a concerted effort to ban pernicious evils on a national basis, leaving no room for supplemental state regulation—such as by banning poll tests in any "Federal, State, or local election," 52 U.S.C. §§10303(a)(1), 10501(a); outlawing extortion of contributions to candidates or parties for any "Federal, State, or local election," 18 U.S.C. §601(a), (b)(1); prohibiting

solicitation or receipt of donations in federal buildings in connection with a "Federal, State, or local election," 18 U.S.C. §607(a)(1); and criminalizing false claims of citizenship to register to vote in any "Federal, State, or local election," 18 U.S.C. §1015(f).

Similarly, the FEC has only issued *one* regulation that applies to any "Federal, State, or local" elections, and that regulation further vindicates the dominant federal interest. *See* 11 C.F.R. §110.20(b) ("A foreign national shall not, directly or indirectly, make a contribution or a donation of money or other thing of value, or expressly or impliedly promise to make a contribution or a donation, in connection with any *Federal, State, or local* election." (emphasis added)); *see also* §110.20(f) ("Federal, State, or local election."), (i) ("elections for any Federal, State, or local office.").

It is a well-established principle that "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous [federal] policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (emphasis added). The State's statute attempts to disrupt regulation within the same sphere—where the federal government has a dominant and overriding interest—and is therefore preempted.

CONCLUSION

For the foregoing reasons, the Chamber requests that the Court grant its motion for summary judgment in its entirety, including the declaratory and permanent injunctive relief sought by Plaintiff in its Complaint, and the related relief requested therein.

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