IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MINNESOTA CHAMBER OF COMMERCE,

Plaintiff,

v.

JOHN CHOI, et al.,

Defendants.

Case No. 23-cv-02015 (ECT/JFD)

BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF AMICUS CURIAE

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan nonprofit organization committed to the design, defense, and implementation of effective campaign finance and political disclosure laws, including those limiting the impact of foreign spending in American elections.

SUMMARY OF ARGUMENT

Money is flowing through foreign-owned domestic corporations into state and local elections following *Citizens United v. FEC*, 558 U.S. 310 (2010), streaming through loopholes opened by the 2010 Supreme Court decision in existing prohibitions on foreign campaign spending. Minnesota attempted to close these gaps by enacting the Democracy for the People Act (the "Act"), Minn. Stat. § 211B.15, subd. 1(d)-(e), 4a-4b, to bar contributions and expenditures from foreign-influenced corporations in both its candidate and ballot measure elections. The law vindicates Minnesota's compelling interest in "limiting the participation of foreign citizens in activities of American democratic self-government" and preserving local self-governance. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *summ. aff'd*, 565 U.S. 1104 (2012).

This Court preliminarily enjoined the Act on the grounds that its 1%-5% foreign ownership thresholds were not sufficiently tailored to meet the standards of either strict or exacting scrutiny. (Opinion, Dec. 12, 2023, ECF No. 109 ("Op.").) Plaintiff Minnesota Chamber of Commerce now urges the Court to issue a permanent injunction, asserting that the record supporting the Act is inadequate, and that discovery following the preliminary

injunction proceedings only "confirms that there is no evidence that could justify the statute under strict scrutiny." (Chamber Br. at 2.)[1]

But the Act is fully consistent with the First Amendment. First, although the Chamber "assumes" that strict scrutiny applies to the Act (Op. at 12), *Bluman* declined to decide the level of scrutiny applicable to a foreign money ban. Restrictions on the participation of foreign nationals in U.S. democratic institutions have been held only to rational basis review in the past, and even under the standard framework for reviewing restrictions on campaign contributions, only "closely drawn" scrutiny is applied. (Op. at 11.)

Second, even under strict scrutiny, the Act is sufficiently tailored because it targets the expenditures and contributions of those corporations in which foreign investors are able to "control[] or exercise[e] influence over . . . election-expenditures." (Op. at 15.) The Chamber asserts that the state must produce *actual* examples of "foreign shareholders exercising influence over a company's election expenditures in Minnesota." (Chamber Br. at 33.) But because the interests advanced by the Act are "neither novel nor implausible," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378-79 (2000), "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny" is light, *id*. at 378. As researchers are beginning to document, millions of dollars from foreign investors have

[1] The Chamber also repeats its argument, rejected previously by this Court (Op. at 23-30), that the Federal Election Campaign Act preempts the Act in its entirety. CLC addressed this question of law in the brief it previously filed in this case (ECF No. 98). It does not repeat these arguments here as there has been no change in the relevant statutory or judicial authorities warranting reconsideration of this question.

made their way into state elections through domestic corporations. (*See infra* 4-7.) But Minnesota has little access to information about foreign investors' influence over these corporations' internal decisions regarding campaign spending. And where election-related problems are "neither easily detected nor practical to criminalize," legislatures are entitled to take a proactive approach. *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

BACKGROUND

A. Federal law provides only limited checks on foreign campaign spending.

Until passage of the Act, Minnesota elections were protected from foreign spending only by the Federal Election Campaign Act ("FECA"), which bars "foreign national[s]" from "directly or indirectly" making contributions or expenditures "in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)(1). Section 30121 defines "foreign nationals" to include, inter alia: (1) "an individual who is not a citizen of the United States," *id*. § 30121(b)(2); and (2) a "foreign principal," including a "corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b)(3).

As CLC's first amicus brief detailed (*see supra* n.1), the federal ban has two significant limitations. First, Section 30121 has been construed to apply only to candidate elections, leaving state referenda vulnerable to foreign spending. In the last decade, the Federal Election Commission ("FEC") has twice declined to find that FECA governed spending in state ballot measure elections, explaining that it was "sensitive to the unique balance of power between the federal government and the states" and therefore would not

extend the statute beyond its explicit terms.[2] Notably, however, the FEC based these decisions on its interpretation of FECA, not on any constitutional concerns. Indeed, the FEC has frequently urged Congress to amend Section 30121 to explicitly cover ballot measure elections, confirming that the FEC believes such an extension would be constitutional. *See, e.g.*, FEC, *Draft Legislative Recommendations 2023*, at 9, https://www.documentcloud.org/documents/24233992-2023-legislative-recommendations?responsive=1&title=1.

Second, the federal foreign money ban does not apply to corporations incorporated in the United States, even those wholly owned by foreign nationals. This limitation only became evident after *Citizens United*, because before that decision, no corporation—regardless of its foreign ownership—could lawfully make contributions or expenditures from its treasury funds to influence federal elections. *See* 52 U.S.C. § 30118(a). Instead, federal law required corporations to make any contributions or expenditures through "separate segregated funds," i.e., highly regulated political committees (or "PACs"). *See* 11 C.F.R. § 114.5(b). These PACs could not spend a corporation's treasury funds on campaign advocacy and instead were limited to soliciting funds for this purpose from a restricted class of employees and officers, none of whom could be foreign nationals. *Id.* Thus, prior to *Citizens United*, federal elections did not face the specter of foreign-owned

[2] *See* Stmt. of Reasons of Chair Broussard, MURs 7523 & 7512 (Nov. 2, 2021), at 3, https://www.fec.gov/files/legal/murs/7523/7523_28.pdf. *See also* Stmt. of Reasons of Vice Chairman Petersen, et al., MUR 6678 (Apr. 20, 2015), https://www.fec.gov/files/legal/murs/6678/15044372963.pdf.

corporations directly spending their treasury funds without the significant limitations of the PAC structure.

B. State elections nationwide have seen an influx of foreign money routed through corporations and other entities.

Following *Citizens United*, the limitations of FECA have allowed millions of dollars of foreign spending, including expenditures by foreign-owned or -influenced corporations, to enter federal, state, and local elections.

Given the opaque nature of internal corporate decision-making, there has been little empirical analysis of spending by foreign-influenced corporations in state elections. But in January 2024, watchdog group OpenSecrets.org analyzed the data on foreign-influenced spending in six states, including Minnesota, estimating conservatively that corporations with more than 1% individual foreign ownership or 5% aggregate foreign ownership made more than $163 million in political contributions between 2017 and 2022 in those states alone. Jimmy Cloutier, Brendan Glavin, Taylor Giorno, Ciara O'Neill, Anna Massoglia, Pete Quist, Inci Sayki, Rachel Timmons and Harshawn Ratanpal, *A Case Study of State-Level Corporate Political Contributions in Colorado, Michigan, Minnesota, Montana, New York, & Washington*, OpenSecrets.org (Jan. 2024), https://www.opensecrets.org/news/reports/foreign-influenced-corporate-money ("OpenSecrets Rpt.").

While the degree to which big corporate spenders are influenced by foreign investors is not always apparent to voters, several states have experienced more well-publicized foreign involvement in their state and local elections. In 2023, for example, 86

percent of Maine voters enacted a ballot referendum to prohibit foreign government-influenced entities from spending in state elections. Kaitlyn Budion, *Question 2 passes, banning foreign electioneering in Maine*, Maine Public, (Nov. 8, 2023), https://www.wshu.org/2023-11-08/question-2-passes-banning-foreign-electioneering-in-maine. The referendum was in response to multiple election cycles wherein foreign *government*-owned utility companies had made tens of millions of dollars in expenditures, often to defeat ballot measures designed to increase Maine's energy independence. In 2023, for instance, ENMAX, a corporation owned by the City of Calgary, contributed over $15 million through a political committee to spend against Question 3, a measure that would have created an electric utility governed by an elected board to acquire and operate Maine's utilities. Avangrid Management Company, owned by Spain-based company Iberdrola, contributed an additional $24 million to defeat the measure. These foreign-owned companies outspent Maine-based groups supporting Question 3 by around $40 million to $1 million. Ballotpedia.com, *Maine Question 3, Pine Tree Power Company Initiative (2023), Campaign Finance*, https://ballotpedia.org/Maine_Question_3,_Pine_Tree_Power_Company_Initiative_(2023)#cite_note-oppfinance-10.

Foreign-influenced corporations have spent heavily in state referenda in Montana and Colorado as well. In 2018, Altria Group, a tobacco product corporation with between 5 to 10 percent foreign ownership, provided 98 percent of the $17 million in funding to defeat a proposed Medicaid Expansion initiative in Montana that would have been funded by a cigarette tax. *See* OpenSecrets Rpt.; Ballotpedia.com, Montana I-185, Extend

Medicaid Expansion and Increase Tobacco Taxes Initiative, https://ballotpedia.org/Montana_I-185,_Extend_Medicaid_Expansion_and_Increase_Tobacco_Taxes_Initiative_(2018). The same year, Noble Energy, a foreign-influenced corporation now owned by Chevron, made significant contributions to defeat Proposition 112, a Colorado ballot measure which would have mandated that new oil and gas developments be a minimum of 2500 feet from occupied buildings including schools and hospitals. Ballotpedia.com, Colorado Proposition 112, Minimum Distance Requirements for New Oil, Gas, and Fracking Projects Initiative (2018), https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_(2018). Opponents of Proposition 112 spent a combined total of over $31 million to defeat the measure, compared to the $1.87 million spent in support. *Id.*

In Minnesota, foreign-influenced corporations spent at least $250,000 in state-level elections from 2017 to 2022. OpenSecrets attributes the relatively low measurable amount of spending to the existing state ban on corporate contributions to state-level candidates and party committees, as well the absence of ballot measures in the 2021 or 2022 elections. OpenSecrets Rpt.

This influx of foreign money—often making its way through gaps in federal and state laws—has caused concern among citizens and their lawmakers across the country. At least twenty-three states have enacted laws limiting campaign contributions or expenditures by foreign nationals in state elections, the majority of which apply to spending

by foreign corporations. *See* Nat'l Conf. for State Legislatures ("NCSL"), *Campaign Finance Regulation: State Comparisons*, at "Contribution Limits to Candidates" (last updated Oct. 24, 2022), https://www.ncsl.org/elections-and-campaigns/campaign-finance-regulation-state-comparisons.[3] In addition to Minnesota, the laws of ten other states also prohibit foreign nationals from spending to influence ballot measure elections specifically.[4] Finally, a number of jurisdictions have also attempted to address the campaign spending of foreign-owned and -influenced domestic corporations, including Maine, 21-A Me. Rev. Stat. § 1064, and Connecticut, 2024 Public Act 24-28 (approved May 21, 2024), https://www.cga.ct.gov/2024/ACT/PA/PDF/2024PA-00028-R00SB-00253-PA.PDF, as well as three municipalities.[5]

[3] Alaska Stat. § 15.13.068; Cal. Gov. Code § 85320(a); Colo. Rev. Stat. § 1-45-103.7(5.3); Fla. Stat. § 106.08(12)(b); Haw. Rev. Stat. § 11-356; Idaho Code Ann. § 67-6610d; Ind. Code § 3-9-2-11; Iowa Code § 68A.404(2)(c); La. Stat. Ann. § 18:1505.2(M); 21-A Me. Rev. Stat. § 1064; Md. Code, Election Law § 13-236.1; Mo. Const. Art. XIII, § 23(3)(16); Miss. Code Ann. § 23-15-819; Mont. Code Ann. § 13-37-502; Neb. Rev. Stat. § 49-1479.03; Nev. Rev. Stat. § 294A.325; N.H. Rev. Stat. Ann. § 664:5(VI); N.J. Stat. Ann. § 19:44A-8.1(e); N.Y. Elec. Law § 14-107(3); N.D. Cent. Code § 16.1-08.1-03.15; Ohio Rev. Code § 3517.13; S.D. Codified Laws § 12-27-21; Wash. Rev. Code § 42.17A.417; W. Va. Code § 3-8-5g.

[4] The ten additional states are California, Colorado, Florida, Idaho, Maine, Maryland, Nebraska, Nevada, North Dakota, South Dakota, and Washington. *See supra* n.3.

[5] Portland Charter Art. IV, s.13, https://content.civicplus.com/api/assets/5c09aff5-1c73-4caa-84f9-d1f2c6cecd70?cache=1800; Seattle Charter, 2.04.370(E), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT2EL_CH2.04ELCACO_SUBCHAPTER_IVCACOLI_2.04.370MALICOCA; San Jose Mun. Code §§ 12.06.114, 12.06.270.

ARGUMENT

I. The Foreign Money Ban Is Constitutional.

Whether reviewed under intermediate or strict scrutiny, the Act passes muster because it focuses on those corporations that can be substantially influenced by foreign investors and is thus narrowly tailored to ensure that Minnesota elections are protected from foreign money routed through corporate entities.

A. Strict scrutiny should not be assumed.

In this court's earlier opinion, it accepted the apparent assumption of some of the parties that strict scrutiny applied to the Act. (Op. at 12.) *Bluman*, however, notably declined to decide the level of scrutiny applicable to the federal foreign money ban; therefore, this presumption was unwarranted.

Instead, *Bluman* acknowledged the argument that restrictions on the participation of foreign nationals in American democratic institutions have typically been held only to rational basis review. 800 F. Supp. 2d at 285. The three-judge court recognized that the Supreme Court had considered—and upheld—the exclusion of foreign nationals from a range of "activities of democratic self-government." *Id*. at 288. *See also Cabell v. Chavez–Salido*, 454 U.S. 432, 439-40 (1982) (upholding state requirement that peace officers be U.S. citizens); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state provision that prohibited noncitizens from being certified as public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) *(*upholding state statute requiring police officers to be U.S. citizens). In these cases, the Supreme Court applied rational basis review in recognition of the "'[s]tate's historical power to exclude aliens from participation in its democratic political

institutions' as part of the sovereign's obligation 'to preserve the basic conception of a political community.'" *Foley*, 435 U.S. at 295-96; *Cabell*, 454 U.S. at 438 ("[C]itizenship . . . is a relevant ground for determining membership in the political community.").

Ultimately, the *Bluman* Court avoided the "complex" question of the level of review because it held that the federal ban could survive even strict scrutiny. 800 F. Supp. 2d at 285. But this ruling hardly suggests that strict scrutiny is a foregone conclusion. At most, it highlights that it remains in open question whether and the degree to which restrictions on foreign nationals' spending in U.S. elections warrant heightened scrutiny.

Even if this Court turns from the *Cabell-Foley* line of cases to the typical doctrinal framework for reviewing campaign finance laws, strict scrutiny cannot be justified with respect to the review of the contribution-related provisions of the Act. As this Court recognized, restrictions on independent expenditures may draw stringent scrutiny, but "courts apply a different standard of review when political contributions are regulated" (Op. at 11). *See also McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.")). It is well-settled that measures restricting campaign contributions draw only intermediate, "closely drawn" scrutiny, even when the law entirely prohibits certain contributions. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) (ruling that "the time to consider" the difference

between a contribution ban and a limit "is when applying scrutiny at the level selected, not in selecting the standard of review itself").

Like the federal foreign money ban, the Act restricts both foreign-influenced corporate expenditures and contributions. Acknowledging this feature, this Court held that the Act nevertheless "would fail even under the 'closely drawn' test" applicable to contribution limits. (Op. at 12.) But the tailoring standard imposed by the Court—and certainly the stringent evidentiary requirements urged by the Chamber—resemble the least restrictive means test reserved for strict scrutiny review. The questions left open by *Bluman* as to the appropriate level of review instead counsel in favor of adopting a more flexible approach and granting the legislature the deference it typically receives in drafting contribution regulations.

B. The governmental interests Minnesota seeks to realize are compelling.

When *Bluman* rejected a challenge to FECA's foreign money ban, it held that the government has "a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." 800 F. Supp. 2d at 288.

Although *Bluman* upheld the federal foreign money ban, its reasoning applies equally to efforts by *states* to prevent foreign nationals from spending in local elections, and especially in referenda, where voters participate in direct democracy to enact their own laws. So concluded a Washington state court of appeals that held that it was bound by *Bluman* to uphold Washington state's law prohibiting foreign spending in both candidate

and ballot measure campaigns. *See OneAmerica Votes v. State*, 518 P.3d 230, 247 (Wash. Ct. App. 2022) ("[Washington] State's interest in prohibiting foreign nationals from making political contributions and the corresponding interest in prohibiting citizens or domestic organizations from using money from foreign nationals to make such contributions is a compelling one.").

This Court recognized the compelling interests identified in *Bluman* are relevant here, holding that "Minnesota's compelling interest to prevent foreign nationals from participating in our national political process extends to preventing foreign nationals . . . from controlling or exercising influence over a corporation's election-expenditures." (Op. at 15.) The Act aims to achieve precisely this goal, targeting the expenditures of those corporations that are most likely to be influenced by one or more foreign investors holding substantial equity. (*See infra* Part C.1.)

But this Court gave little consideration to the state's broader interest in shielding state elections from any indirect foreign expenditures, questioning whether a state could restrict the "election activities of corporations with any equity held by foreign investors." (Op. at 14.) *Bluman*, however, recognized that the courts had not yet answered the question of when "a corporation may be considered a foreign corporation for purposes of First Amendment analysis." 800 F. Supp. 2d at 292 n.4. And the reasoning of *Citizens United* would seem to allow for restrictions on election activities of corporations with *any* foreign owners.

Citizens United understood that U.S. corporations derive their First Amendment rights from the fact that they are "associations of *citizens*." 558 U.S. at 349 (emphasis

added). Because a corporation's right to participate in elections is premised on the rights of its individual shareholders to participate in elections, the corporation cannot assert any derivative First Amendment rights based on its *non*-citizen shareholders. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 437-38 (2020) (holding that domestic organization could not assert First Amendment rights of their foreign affiliates—because the latter possessed no such rights—nor "export their own First Amendment rights" to affiliates). As FEC Commissioner Weintraub has reasoned, "[i]ndividual foreigners are barred from spending to sway elections" so it would "def[y] logic to allow groups of foreigners, or foreigners in combination with American citizens, to fund political spending through corporations." Ellen Weintraub, *Taking On Citizens United*, N.Y. Times, Mar. 30, 2016, https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html. If foreign nationals cannot spend *directly* in U.S. elections, then it follows that they cannot spend *indirectly* by associating with a domestic entity. Thus, *Citizens United* supports the proposition that a corporation with *any* foreign shareholders may be barred from making expenditures of their treasury funds in U.S. elections, or at the least, must do so through a PAC funded and controlled entirely by U.S. citizens. *See also* Letter from Prof. Laurence H. Tribe to St. Petersburg City Council at 4, (Oct. 25, 2016), https://freespeechforpeople.org/wp-content/uploads/2016/10/7.-Prof.-Laurence-Tribe-Letter-of-Support.pdf (noting that *Bluman* "suggests [foreign spending] limit could apply to corporations with *any* equity held by foreign nationals").

C. The Act is narrowly tailored.

Although *Citizens United* and *Bluman* can be fairly read to permit restrictions on election activities of corporations with any foreign investors, the Act took a more targeted approach to the problem of foreign influence, relying on 1% individual ownership and 5% collective ownership thresholds that are well-recognized benchmarks for investor influence. This Court ruled in its earlier opinion that the Act's thresholds were likely not narrowly tailored, but this analysis—and the Chamber's arguments on summary judgment—rely on an overly restrictive test for which entities constitute "foreign nationals" and impose undue evidentiary obligations on the state.

1. The 1%-5% ownership thresholds are reasonable.

The Act's thresholds reflect a federal rule that for decades set the ability to present a shareholder proposal at a 1% ownership percentage (or alternatively, a $2,000 monetary threshold). 17 C.F.R. § 240.14a–8 (2018). In 2019, the 1% threshold was reconsidered, but not because it was too low, but rather unrealistically high. *See* SEC, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, 84 Fed. Reg. 66,458 (Dec. 4, 2019). The SEC explained that proposals in the past were typically submitted by shareholders that did not meet the 1% threshold, and cited authority indicating that 1%+ shareholders instead often communicated with corporate leadership directly to influence decisions. *Id.* at 66,464. *See also* Coates Ltr. 8-9.[6]

[6] As defendants highlighted (ECF No. 88 at 7-8), the letter by Professor Coates was submitted to the Minnesota Senate in its deliberations on the Act, *see* https://freespeechforpeople.org/wp-content/uploads/2023/02/fsfp-mn-fic-sf3-testimony-with-attachments-feb-2023-1.pdf.

As Minnesota describes in detail, it is not just the formal power of a 1%+ investor, but its informal influence that is critical to corporate governance. (ECF No. 147 at 7-9.) Thus, contrary to the Chamber's suggestion (Chamber Br. at 13), Defendants are not arguing that shareholder proposals represent the main mechanism by which a 1%+ foreign investor will attempt to control a corporation's political spending, but rather that this power demonstrates their inherent ability to wield substantial influence over corporate decision-making. (Haan Rpt. at 20, ECF No. 130-10.) As Professor John Coates has also explained, "the SEC itself recognizes that [even] one percent ownership is so significant that investors with that level of ownership don't even need [the proposal] process; they can easily get executive-suite management on the phone." Coates Ltr. at 9.

It is thus reasonable to incorporate a 1% threshold in a statute that seeks to set a bright line for when a foreign investor is capable of significantly influencing a corporation's decisions regarding political spending.

2. The evidentiary burden imposed on Minnesota is unduly heavy and contrary to governing precedent.

The Act's concerns are "neither novel nor implausible," *Shrink Mo.*, 528 U.S. at 379, and consequently the "empirical evidence needed to satisfy heightened judicial scrutiny" is light, *id*. at 378.

In its earlier order, the Court stated that it was "not enough" for Minnesota to "explain[] how foreign minority shareholders *could* exercise influence over corporations" to "justify § 211B.15's ban." (Op. at 17 (emphasis added).) Although it noted the absence of "evidence that minority foreign shareholders have even once exercised influence or

control over a corporation's election expenditures," it is unclear whether this Court perceived this as an evidentiary prerequisite to meeting either strict or exacting scrutiny. But the Chamber has construed this discussion to require the state to produce both *actual* examples of "compan[ies] that [have] been influenced by a minority foreign investor to make a political expenditure or contribution," and to do so with respect to their "election expenditures in *Minnesota*." (Chamber Br. at 33 (emphasis added).)

There is little authority for onerous evidentiary burden the Chamber urges. Minnesota is not establishing the constitutional basis for a foreign corporate money ban in the first instance here—the compelling interests supporting such a ban are not in dispute—but only that its thresholds for determining significant foreign shareholder influence are reasonable. *Shrink Mo.*, 528 U.S. at 393 (explaining that governmental may rely on "evidence and findings accepted in [earlier precedent]" to defend well-established types of campaign finance laws).

First, the Chamber errs because there is no geographical limitation on the evidence a jurisdiction may present to substantiate its interest in a campaign finance law. States may defend their laws by relying on the "experience of states with and without similar laws." *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc). "The First Amendment does not require . . . conduct[ing] new studies or produc[ing] evidence independent of that already generated by other [jurisdictions]." *Shrink Mo.*, 528 U.S. at 393 n.6 (citation omitted). Many states have experienced large-scale campaign spending by foreign-influenced or -owned entities in their elections. (*See supra* at 4-7.) And defendants have highlighted studies and testimony submitted to other state and local legislatures that have considered

foreign money restrictions upon which this Court may rely. (ECF No. 88 at 7-13; ECF No. 147 at 7 n.10, 10 n.11.) There is no reason to think that foreign-influenced corporate spending will stop upon reaching Minnesota's borders.

Second, the Chamber demands that Minnesota produce evidence of *actual* foreign influence over corporations' political expenditures, but such a standard is both impracticable and unsupported by judicial authority. Minnesota has little access to information about whether corporations' internal decisions about election spending are in fact "influenced" or "controlled" by their foreign investors. This is uniquely within the knowledge of the entity itself: the typical organization is neither required to, nor typically inclined to, publicize the details of its political decision-making. It is thus virtually impossible to produce the information that the Chamber requires—absent a state investigation or discovery from the corporation making the political expenditure in question. It is precisely in circumstances when election-related problems are not "easily detected" that the Supreme Court has approved of preventative campaign finance laws. *McConnell*, 540 U.S. at 153. Minnesota thus acted reasonably in incorporating a bright-line threshold into its law, and "no smoking gun is needed" in terms of evidence, "where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995).

Third, even when reviewing for narrow tailoring, courts grant legislatures substantial discretion in setting the level of monetary limits and thresholds, and other structural features of campaign finance laws. For example, almost every political disclosure law relies on a monetary threshold to trigger its reporting requirements, which, if the

disclosure law is otherwise permissible, need only to be "reasonable" and not "without rationality." *Buckley v. Valeo*, 424 U.S. 1, 83 (1976) (this "line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"). *See also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (noting courts pay "judicial deference to plausible legislative judgments as to the appropriate location of a reporting threshold"); *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012).

Likewise, contribution restrictions often include varying monetary limits that reflect the legislature's judgment about the relative risks posed by various types of contributors. *See, e.g.*, *Buckley*, 424 U.S. at 30 ("'[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'"). To defend the monetary amounts at which contribution limits are set, the government is not required to show actual corrupt intent—that, for instance, contributors of $1,000 intend to corrupt a candidate or that contributors of exactly this amount have done so in the past. *Citizens United*, 558 U.S. at 357 (noting that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements"). Instead, the Supreme Court has consistently counseled deference to legislative judgments regarding the corruptive potential of contributions and allowed legislators significant discretion in setting appropriate limits and thresholds. *See, e.g. McConnell*, 540 U.S. at 137; *Shrink Missouri*, 528 U.S. at 395-97; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30.

In reviewing the 1% and 5% thresholds, this Court is similarly considering a structural aspect of an otherwise valid and well-established type of campaign finance law.

Federal law has for decades barred foreign corporations from making contributions or expenditures in federal and state candidate elections, 52 U.S.C. § 30121. And, as *Bluman* observed, there is no precedent answering when "a corporation may be considered a foreign corporation for purposes of First Amendment analysis." 800 F. Supp. 2d at 292 n.4. Thus, here, because it is difficult to "isolate suspect contributions [and expenditures]," *Buckley*, 424 U.S. at 29-30, or ascertain actual foreign influence on a case-by-case basis, it was "reasonable" for Minnesota to adopt a bright line for shareholder influence drawn from longstanding federal laws.

D. Facial invalidation is unwarranted.

In considering a challenge to the facial validity of a law, courts should "vigorously enforce[] the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). Thus, even if this Court questions certain applications of the ownership thresholds, the Act would not be facially invalid because any potentially unconstitutional applications do not outweigh its "plainly legitimate sweep." *Id.*

As the Court's earlier ruling appears to acknowledge, at the least, the Act can be applied to: (1) foreign corporations, as defined by federal campaign finance law, *see* 22 U.S.C. § 611(b)(3); and (2) corporations that are majority or "predominantly" owned by foreign nationals. (Op. at 14-15 (citing *Citizens United*, 558 U.S. at 362).) Indeed, were the Act permanently enjoined in the manner that the Chamber urges, it would appear that even corporations *wholly* owned by foreign investors—or corporations incorporated abroad—would be permitted to make unlimited expenditures in Minnesota ballot measure elections.

Further, the Chamber has not offered *any* argument for why the third prong of the definition of "foreign-influenced corporation," which relies on a foreign investor's actual participation in corporate decision-making, is unconstitutional. Minn. Stat. § 211B.15, subd. 1(d)(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"). This definition resembles a long-standing FEC regulation,[7] which has governed foreign campaign activity in candidate elections for over twenty years without legal challenge. *See* Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928-01, 69946 (Nov. 19, 2002).

The Chamber has thus failed to demonstrate that "[the Act's] unconstitutional applications [are] realistic, not fanciful, and their number . . . substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023) (citations omitted).

CONCLUSION

For these reasons, the Act should be declared constitutional and summary judgment granted in favor of defendants.

[7] 11 C.F.R. §110.20(i) ("A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, . . . with regard to such person's Federal or non-Federal election-related activities.").

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Respectfully submitted,

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