

To: Councilmember M. Lorena González  
From: Ron Fein, Legal Director, Free Speech For People  
John Bonifaz, President, Free Speech For People  
Re: Proposed campaign finance ordinance to end super PACs in city elections and ban political spending by foreign-influenced corporations  
Date: April 30, 2019

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## **I. Introduction**

This memorandum explains and summarizes two proposed provisions for a potential Seattle campaign finance reform initiative: (1) abolishing super PACs in city elections, and (2) blocking foreign influence in city elections through the conduit of corporate political spending. These provisions complement each other well but are distinct (and would be legally severable). In addition, these provisions are complementary to the democracy vouchers program and would strengthen it by preventing wealthy individual and corporate donors from dampening its effectiveness by circumventing the new contribution limits.

As explained in this memorandum, and in some cases contrary to common misconception, these provisions are consistent with all applicable U.S. Supreme Court precedent, including *Citizens United*. Passage of this legislation would stop some of the most damaging recent trends in elections. Furthermore, if challenged in court, the legislation could lead to favorable judicial precedent with potential national effect.

Much of the work in developing the ordinance draws upon work done in preparation for an ordinance passed by the City Council of St. Petersburg, Florida, with the assistance of distinguished constitutional scholars and election experts such as Prof. Laurence Tribe, Federal Election Commissioner Ellen Weintraub, Prof. John Coates, and Prof. Charles Fried.<sup>1</sup>

## **II. Proposed Provisions**

### **A. Limit on Contributions to Super PACs**

Washington state law established an \$800 contribution limit for candidates in city elections.<sup>2</sup> The City of Seattle recently lowered its contribution limit for all city candidates to \$500 in aggregate

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<sup>1</sup> See <http://freespeechforpeople.org/st-petersburg-campaign>. For examples of the types of supportive analyses that could be provided in the legislative process in support of this provision, see the letters provided to the St. Petersburg City Council from Prof. Tribe, Commissioner Weintraub, Prof. Fried, Prof. John Coates, Prof. Albert Alschuler, Prof. Joseph Morrissey, and Stephen Weissman, Ph.D. Free Speech For People would be pleased to help prepare Seattle-oriented materials to help form a “legislative record” for Seattle voters.

<sup>2</sup> Wash. Rev. Code § 42.17A.405(2).

(that is, inclusive of the primary and general elections).<sup>3</sup> Although Seattle has been proactive in addressing the potential for corruption in its local elections, the dramatic rise in independent expenditures threatens the integrity of its elections and the effectiveness of its nation leading democracy vouchers program. Wealthy contributors may seek to circumvent the City’s limits through various mechanisms, one of which is the “independent expenditure committee”—a political action committee that promises to make only “independent” expenditures rather than contributing money directly to candidates. For example, soon after Gainesville, Florida (a city much smaller than Seattle) enacted contribution limits of \$250, wealthy donors began using these committees to circumvent these direct contribution limits.<sup>4</sup>

Until recently, federal law (and the law in many states) limited contributions to independent expenditure committees, like any other political committees. However, in some parts of the country—including the Ninth Circuit<sup>5</sup>—lower courts have struck down these limits, thus creating the modern phenomenon of the unregulated “super PAC.” If Seattle does not act to limit contributions to super PACs, then its contribution limits to candidates could be circumvented through super PACs, as they are in other places. Furthermore, if Seattle’s limits on contributions to super PACs are upheld by the U.S. Supreme Court, it would set national precedent allowing cities, states, and the United States to end super PACs nationwide.

### *1. Constitutionality of Limits on Contributions to Super PACs*

Contrary to a common misconception, super PACs were not created by the Supreme Court in *Citizens United v. FEC*.<sup>6</sup> As explained in a recent article by a group of pre-eminent constitutional law scholars, “In *Citizens United* the Supreme Court struck down limits on a [corporation’s] expenditures while the issue in *SpeechNow* was the validity of limiting contributions to a political group.”<sup>7</sup> That distinction between limits on expenditures versus limits on contributions is critical because since *Buckley v. Valeo*,<sup>8</sup> the Supreme Court has recognized different standards

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<sup>3</sup> Seattle Municipal Code Section 2.04.370.B.

<sup>4</sup> See Christopher Curry, *Local cap on campaign contributions is easy to bypass*, Gainesville Sun, May 3, 2014, <http://gainesville.com/news/20140503/local-cap-on-campaign-contributions-is-easy-to-bypass>.

<sup>5</sup> *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); see also *Farris v. Ranade*, 584 Fed. Appx. 887, 889 (9th Cir. 2014) (affirming order invalidating contribution limit to recall committees as applied to plaintiffs, but noting that ruling did not reach the plaintiff’s broader facial challenge to the statute and only precludes enforcement against plaintiffs where there is no evidence or appearance of corruption).

<sup>6</sup> *Citizens United v. FEC*, 558 U.S. 310, 349, 356, 362 (2010).

<sup>7</sup> 599 F.3d 686 (D.C. Cir. 2010); see Albert W. Alschuler, Laurence H. Tribe, Norman Eisen, & Richard W. Painter, *Why Limits on Contributions Should Survive Citizens United*, 86 *Fordham L. Rev.* 2299, 2303-04 (April 2018), <https://ir.lawnet.fordham.edu/flr/vol86/iss5/2/>.

<sup>8</sup> 424 U.S. 1 (1976) (per curiam).

of scrutiny for limits on contributions and limits on expenditures.<sup>9</sup> While limits on expenditures are subject to strict scrutiny, limits on contributions are not; they must merely be “closely drawn” to match a “sufficiently important interest.”

In *SpeechNow v. FEC*, the lower court improperly relied on dicta from *Citizens United* to conclude that the federal law limiting contributions to political action committees to \$5,000 per person per year did not apply to political committees that promised to make only “independent expenditures.”<sup>10</sup> The court’s theory was that since truly independent expenditures do not provide an opportunity for “quid pro quo” corruption (the only basis that the Supreme Court acknowledges for limiting money in politics), then contributions to such groups cannot possibly raise a risk of quid pro quo corruption or even the *appearance* of such corruption. But this is logically flawed: a major *contributor* to a super PAC has a perfect opportunity for quid pro quo corruption, even if the *super PAC itself* does not coordinate its political activities with the supported candidate.<sup>11</sup>

Unfortunately, then-Attorney General Eric Holder decided not to appeal *SpeechNow* to the Supreme Court, on the (clearly mistaken in retrospect) theory that the *SpeechNow* decision would “affect only a small subset of federally regulated contributions.”<sup>12</sup> As a result, super PACs have become one of the primary vehicles for wealthy donors to evade campaign contribution limits designed to prevent corruption and the appearance of corruption—yet the Supreme Court has never weighed in on this issue. Importantly, the Ninth Circuit has followed the *SpeechNow* ruling, and a challenge to the proposed ordinance would require reversal of the Ninth Circuit’s early rulings either as a result of an en banc review by the Ninth Circuit or an appeal to the Supreme Court. As set forth in an important recent law review article by Prof. Albert Alschuler of the University of Chicago Law School, Prof. Laurence Tribe of Harvard Law School, Ambassador (ret.) Norman Eisen (former chief ethics counsel to President Barack Obama), and

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<sup>9</sup> See Alschuler, et al., 86 Fordham L. Rev. at 2303-04.

<sup>10</sup> *Id.* at 2312.

<sup>11</sup> To put it concretely: suppose Mr. Moneybags donates \$1,000,000 to Seattleites for a Better Seattle Now, which then spends the \$1,000,000 in support of Candidate Jones. The rationale of the *SpeechNow* decision was that as long as the media buyer for Seattleites for a Better Seattle Now does not talk to Candidate Jones’ media buyer about ad strategy, then there will be no opportunity for *anyone* to engage in quid pro quo corruption. But nothing prevents *Mr. Moneybags* from talking to *Candidate Jones* and exchanging that contribution in exchange for a legislative favor. Indeed, a federal grand jury indicted a sitting U.S. Senator for bribery for exactly this type of transaction, and a federal judge upheld the indictment as consistent with *Citizens United*, although the jury later deadlocked and the judge dismissed some of the charges for insufficient evidence. See *United States v. Menendez*, No. CR 15-155, 2018 WL 526746, at \*9 (D.N.J. Jan. 24, 2018). Relatedly, in 2011 the U.S. Court of Appeals for the Eleventh Circuit upheld a bribery conviction against Alabama Governor Don Siegelman where the bribe in question was given to a charitable organization that engaged only in issue advocacy. See *United States v. Siegelman*, 640 F.3d 1159, 1175 (11th Cir. 2011). The fact that a court found quid pro quo corruption from a contribution to a group that spends only on issue advocacy is striking because courts consider issue advocacy to pose no greater (and probably less) risk of corruption than “independent” expenditures in candidate races.

<sup>12</sup> Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010, <http://1.usa.gov/298RWaP>.

Prof. Richard Painter (former chief ethics counsel to President George W. Bush), the *SpeechNow* decision was incorrectly decided at the time, and its flaws have only become more clear with time.<sup>13</sup> Our goal, in addition to effectively abolishing super PACs in Seattle, would be overturning the decisions that allowed for their creation.

Crucially, in several recent cases Chief Justice Roberts and Justice Alito have hinted dissatisfaction with the current state of campaign finance in ways that suggest they might be willing to sustain limits on contributions to super PACs even within the framework of *Citizens United*.<sup>14</sup> For example, both Roberts and Alito have rejected the proposition that independent expenditures cannot corrupt. In *FEC v. Wisconsin Right to Life*, Roberts and Alito recognized “[i]t may be that, in some circumstances, ‘large independent expenditures pose the same dangers of actual quid pro quo arrangements as do large contributions.’”<sup>15</sup>

There is reason to believe that at least five justices—the four *Citizens United* dissenters, plus Chief Justice Roberts and/or Justice Alito—may be prepared, doctrinally and in response to real world events, to reverse *SpeechNow* if given the opportunity to do so in a case that does not require reconsideration of *Citizens United*. (For this reason, the replacement of Justice Scalia with Justice Gorsuch and the replacement of Justice Kennedy with Justice Kavanaugh had no impact on a potential majority to overrule *SpeechNow* while adhering to *Citizens United*.) The proposed legislation would give Seattle an opportunity to limit the amount of contributions to independent expenditure committees, and, if challenged, could provide a vehicle to overturn *SpeechNow* and related decisions. By limiting contributions to independent expenditure committees, Seattle would effectively abolish the modern phenomenon of the super PAC.

## 2. Mechanics of Proposed Limit

There is no single category in Washington campaign finance law that maps neatly to a super PAC as commonly understood. Washington law and the Seattle Code distinguish between a “political committee,” which has the expectation of receiving contributions or making expenditures in support of, or in opposition to any candidate or any ballot proposition, and a “continuing political committee,” which is “an organization of continuing existence not established in anticipation of any particular election campaign.”<sup>16</sup>

Under this proposal, a new term would be created (e.g., “independent expenditure committee”) that means a political committee that makes only independent expenditures in Seattle city

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<sup>13</sup> Albert W. Alschuler, Laurence H. Tribe, Norman Eisen, & Richard W. Painter, *Why Limits on Contributions Should Survive Citizens United*, 86 Fordham L. Rev. 2299 (Apr. 2018), <https://ir.lawnet.fordham.edu/flr/vol86/iss5/2/>.

<sup>14</sup> For more background, see <https://freespeechforpeople.org/supreme-court-rejects-challenge-soft-money-rules/> and <https://freespeechforpeople.org/wp-content/uploads/2016/11/FSFP-Electionsummary-FINAL.pdf>.

<sup>15</sup> 551 U.S. 449, 478 (2007).

<sup>16</sup> Wash. Rev. Code § 42.17A.005.40 and 42.17A.005.15; Seattle Municipal Code, § 2.04.010.

elections.<sup>17</sup> We recommend limiting contributions to an independent expenditure committee to \$5,000 per contributor per year. This is the same as the federal limit on contributions to political committees,<sup>18</sup> although due to the *SpeechNow* decision, that limit is currently not enforced as to independent expenditure committees.

### 3. Rise of Super PAC Spending in Seattle Elections

Independent expenditures are on the rise in Seattle. Outside spending by super PACs in Seattle’s 2017 mayoral election was 5 times higher than 2009 spending, and almost double the amount spent in 2013.<sup>19</sup> Independent expenditures in council races hit a 15 year high in 2015; however, part of that may be attributed to the larger number of candidates up for election following a change to the number of council members elected by district. Nonetheless, the increase remains significant given that 2015 spending was almost 6 times higher as compared to 2009 while the number of candidates only increased by a factor of 3.<sup>20</sup> While total independent expenditures were down in City Council races in 2017, that is unsurprising given that there were 12 candidates up for election in 2015 and only four candidates running in 2017.<sup>21</sup>

As the chart below shows, the top spenders were single candidate committees for mayor and city council; however, the names of the committee tell us little about the contributors behind them.<sup>22</sup>

#### Top 5 Independent Expenditure Committees for 2017 Election<sup>23</sup>

<b>Committee</b>	<b>Amount</b>
People for Jenny Durkan (general)	\$763,476
People for Sara Nelson	\$121,880
People for Jenny Durkan (primary)	\$118,128
Working Families for Teresa (general)	\$108,106
Working Families for Teresa (primary)	\$98,130

<sup>17</sup> Regulating contributions to continuing associations (including 501(c)(4) nonprofits) would present additional legal hurdles and is not proposed here.

<sup>18</sup> See 52 U.S.C. § 30116(a)(1)(C).

<sup>19</sup> Seattle Ethics & Election Commission, 2017 Election Report, 15, Mar. 9, 2018, <http://www2.seattle.gov/ethics/elpub/2017Report.pdf>.

<sup>20</sup> Seattle Ethics & Election Commission, 2015 Election Report, 7, 14 Mar. 2, 2016, <http://www2.seattle.gov/ethics/elpub/2015Report.pdf>.

<sup>21</sup> 2017 Election Report, 16.

<sup>22</sup> Despite being named for specific candidates, these are not the candidates’ authorized committees.

<sup>23</sup> Seattle Ethics & Election Commission, 2017 Independent Expenditures Committee, <http://web6.seattle.gov/ethics/elections/campaigns.aspx?cycle=2017&type=contest&IDNum=167&leftmenu=collapsed>.

#### 4. Very Large Contributions to Super PACs in Seattle Elections

While direct contributions to candidates are limited to \$500 per cycle, there are currently no limits whatsoever on contributions to these committees and other independent expenditure-only committees. Large contributions to these single candidate independent expenditure committees are especially troubling with regard to creating the appearance of corruption or the potential for quid pro quo corruption. The largest contributor to these single candidate independent expenditure committees in the 2017 election was a group called the Civic Alliance for a Sound Economy (“CASE”), sponsored by the Seattle Chamber of Commerce. According to the Seattle Ethics & Election Commission, CASE contributed \$681,000 in 2017. That’s almost twice as much as the next 5 top contributors to super PACs added together.

##### Top 6 Contributors to Seattle Independent Expenditure Committees

<b>Contributor</b>	<b>Amount</b>
CASE	\$681,000
SEIU 775	\$121,104
UFCW 21 PAC	\$85,660
Seattle Firefighters Voluntary Political Action Fund	\$60,000
FUSE Washington	\$51,050
Seattle Hospitality for Progress	\$50,000

That means that one entity, CASE, paid for more than half of all independent expenditures in the 2017 elections in Seattle. Who are the contributors behind CASE? The largest single contributor to CASE for the 2017 election cycle was Amazon with contributions totaling \$350,000. CASE received 58% of its money from its top 5 donors, and over 80% of its total contributions came from contributions that exceeded \$5,000. Other top contributors to CASE included Vulcan Inc. (\$114,062), Washington Association of Realtors (\$50,000), R.C. Hedreen Company/Hedreen Holdings, LLC (\$50,000), and Premera Blue Cross (\$35,000).

As the above chart shows, labor and union groups also played a significant role in funding independent expenditures in Seattle, but each labor group’s spending amounts to a fraction of the total spending by CASE. Another important aspect of the contributions to the labor and union groups is that they tended to be from the local or national union political action committees themselves, which are limited by federal law to accept contributions of no more than \$5,000.<sup>24</sup> For example, SEIU 775 Quality Care Committee’s only contribution greater than \$5,000 came

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<sup>24</sup> See 52 U.S.C. § 30116(a)(1)(C).

from the national SEIU PAC.<sup>25</sup> UFCW Local 21 contributed \$258,428 to UFCW 21 PAC (98% of total contributions), and the only other cash contributions were for \$20 or less.<sup>26</sup> The Seattle Firefighters Voluntary Political Association received over 3,700 contributions, and only one (the \$25,000 contribution from the International Association of Firefighters) exceeded \$5,000. Thus, while the labor union contributions are quite large at the final stages, they ultimately represent an accumulation of smaller contributions which is not quite the same as the \$350,000 contributed directly to CASE by Amazon.

This data indicates that despite the success of the Democracy Vouchers program, a small number of wealthy donors are able to circumvent the existing candidate contribution limits by funneling hundreds of thousands of dollars to and through super PACs directly to single candidate independent expenditure committees. The potential for corruption, including quid pro quo corruption, is at a scale beyond anything previously known in city campaign funding.

A contribution limit of \$5,000 from any donor (corporation, union, individual, or committee) to independent expenditure committees would help protect against quid pro quo corruption or its appearance.<sup>27</sup> This is the same limit that applied to contributions to federal independent expenditure PACs until the *SpeechNow* decision. Furthermore, based on an analysis of recent campaign finance data, it would impede only a relatively small percentage of contributors. If there are concerns about protecting organizations that aggregate small donations, a policy option that is available but was not provided in this draft is an exception for a donor that is *itself* a committee that only accepts contributions that are limited to \$5,000 or less.<sup>28</sup> This type of exception for a donor that is itself a committee that accepts contributions that are limited to \$5,000 or less reflects the pass-through nature of much funding in Seattle city elections, but also would recognize the relevant difference between a single individual writing a check for \$100,000

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<sup>25</sup> According to federal data, SEIU COPE received over \$50 million in contributions in 2017-2018, but all of it came from contributions of \$700 or less. According to the SEIU 775 Quality Care Committee filings with the Seattle Ethics and Elections Commission for 2017, the national union contributed a total of \$253,193 or 98% of the total cash and in-kind contributions made during that cycle. The only other contributions received by SEIU 775 were reported as contributions of \$25.00 or less and in-kind contributions of \$1,400 or less.

<sup>26</sup> See PDC Open Data, Contributions to Candidates and Political Committees.

<sup>27</sup> Lower or higher contribution limits could be considered. However, there could be disadvantages to either. A higher limit might not be politically palatable to voters; even though it actually sets a limit where none currently exists, it could be painted as unnecessarily allowing large contributions. Conversely, a lower limit (e.g., \$1,000) might attract more opposition from “medium” donors and, perhaps be more legally vulnerable.

<sup>28</sup> If an exception were provided for donors that are themselves committees accepting only small or medium contributions, the threshold for the exception could be lowered if desired. For example, the law could limit contributors to independent expenditure committees to \$5,000 with an exception for a donor that is itself a committee that accepts contributions limited to \$1,000 (or \$500, or \$250) or less. Such an exception would allow organizations that receive large numbers of small contributions to funnel these into a single large contribution to an independent expenditure group. Again, this involves tradeoffs.

versus a political committee that accepts twenty different \$5,000 contributions and aggregates them into a \$100,000 contribution. The exception would prohibit the former but allow the latter.

## **B. Ban on Political Spending by Foreign-Influenced Corporations in City Elections**

*Citizens United* opened the door for massive corporate political spending, but the decision was premised on the conception of corporations as “associations of citizens.” That reliance upon this misconception that corporations are associations of American citizens provides an opportunity to limit corporate spending consistent with the decision. Existing federal law prohibits foreign nationals—meaning foreign governments and their agents, foreign-based corporations, and individuals who are not citizens or lawful permanent residents of the United States—from spending “directly or indirectly” on federal, state, and local elections.<sup>29</sup> This law was upheld by the Supreme Court just two years after *Citizens United* in *Bluman v. FEC*, based on the public’s interest in “democratic self-government.”<sup>30</sup> Yet, as a result of *Citizens United*, and because the FEC has not clarified what “indirect” spending means, U.S.-based corporations, even those with significant foreign ownership, can spend as much money as they want on American elections. This loophole enables foreign investors to do indirectly (spend money in U.S. elections, through influence over governance of a U.S. corporation) what they could not do directly. Closing this loophole would protect the integrity of local elections and the principle of democratic self-government by reducing the amount of corporate spending to a subset of corporations that are “associations of American citizens,” and since many major corporations cannot meet that test, it could have a significant impact on corporate political spending.

### *1. Constitutionality of Banning Political Spending by Foreign-Influenced Entities*

Commissioner Ellen Weintraub of the Federal Election Commission explained the issue in an op-ed in the *New York Times*: “Throughout *Citizens United*, the court described corporations as ‘associations of citizens,’ she wrote, “States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens—and enforce the ban on foreign political spending against those that are not.”<sup>31</sup>

The problem at issue in this loophole was identified by Justice Stevens in his dissent in *Citizens United* when he wrote, “Because [corporations] may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.”<sup>32</sup> This threat is not merely hypothetical. Uber has shown an increasing appetite for political spending in

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<sup>29</sup> See 52 U.S.C. § 30121(a). The proposed ordinance places no new limits on what foreign *individuals* may do—it only limits political spending by *corporations* with foreign investors.

<sup>30</sup> *Bluman v. FEC*, 565 U.S. 1104 (2012) (mem.), *aff’g* 800 F. Supp. 2d 281 (D.D.C. 2011) (3-judge court).

<sup>31</sup> Ellen Weintraub, “Taking on Citizens United,” *N.Y. Times*, Mar. 30, 2016, <http://nyti.ms/1SwK4gK>.

<sup>32</sup> *Citizens United v. FEC*, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting).



a variety of contexts.<sup>33</sup> Although Uber started in Silicon Valley, the Saudi government now owns more than 10 percent of the company.<sup>34</sup> In October 2016, Airbnb responded to the New York Legislature's growing interest in regulating the homestay industry by arming a super PAC with \$10 million to influence New York's legislative races.<sup>35</sup> Airbnb is a privately held company, so ownership data is not complete, but it is partly owned by Moscow-based (and Kremlin-linked) DST Global.<sup>36</sup> And investment by foreign sovereign wealth funds, like Saudi Arabia's, is expected to increase exponentially as oil-rich middle eastern states seek to diversify their investment portfolios.<sup>37</sup>

As Professor Laurence Tribe of Harvard Law School explained in the Boston Globe, because the Federal Election Commission is "deadlocked into irrelevance" by its current 3-3 partisan makeup, it is "in no position to lead the fight." Instead, "local governments can raise the flag by passing laws that prohibit foreign-influenced corporations from spending money on their elections."<sup>38</sup> And as Commissioner Weintraub noted in her New York Times op-ed, even partial foreign ownership of corporations calls into question whether *Citizens United*, which three times described corporations as "associations of citizens" and which expressly reserved questions

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<sup>33</sup> Glenn Blain, "Uber spent more than \$1.2M on efforts to influence lawmakers in first half of 2017," New York Daily News, Aug. 13, 2017, <http://www.nydailynews.com/news/national/uber-spent-1-2m-lobbying-efforts-2017-article-1.3408470>; Karen Weise, "This is How Uber Takes Over a City," Bloomberg, June 23, 2015, <http://bloom.bg/1Ln2MaN>.

<sup>34</sup> Eric Newcomer, "The Inside Story of How Uber Got Into Business with the Saudi Arabian Government," Nov. 3, 2018, <https://www.bloomberg.com/news/articles/2018-11-03/the-inside-story-of-how-uber-got-into-business-with-the-saudi-arabian-government>.

<sup>35</sup> Kenneth Lovett, *Airbnb to spend \$10M on Super PAC to fund pre-Election day ads*, N.Y. Daily News, Oct. 11, 2016, <http://nydn.us/2EF5Lgi>.

<sup>36</sup> See Jon Swaine & Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian, Nov. 5, 2017, <https://www.theguardian.com/news/2017/nov/05/russia-funded-facebook-twitter-investments-kushner-investor>; Dan Primack, *Yuri Milner adds \$1.7 billion to his VC war chest*, FORTUNE, Aug. 3, 2015, <http://fortune.com/2015/08/03/yuri-milner-adds-1-7-billion-to-his-vc-war-chest/> (DST Global is Moscow based); Scott Austin, *Airbnb: From Y Combinator to \$112M Funding in Three Years*, The Wall Street Journal, July 25, 2011, <http://blogs.wsj.com/venturecapital/2011/07/25/airbnb-from-y-combinatorto-112m-funding-in-three-years/>. Reportedly, \$40 million of the \$112 million that Airbnb raised in its 2011 funding round came from DST Global. See Alexia Tsotsis, *Airbnb Bags \$112 Million In Series B From Andreessen, DST And General Catalyst*, TechCrunch, July 24, 2011, <http://tcrn.ch/2EF6IF2>. However, the calculation of DST Global's ownership stake may be based on a valuation of \$1 billion or more; if so, DST Global's \$40 million could represent 4%, not the 5% needed to qualify as a "foreign-influenced corporation."

<sup>37</sup> According to one report, Saudi Arabia's Public Investment Fund is expected to deploy \$170 billion in investments over the next three to four years. Sarah Algethami, "What's Next for Saudi Arabia's Sovereign Wealth Fund," Bloomberg BusinessWeek, Oct. 21, 2018, <https://www.bloomberg.com/news/articles/2018-10-22/what-s-next-for-saudi-arabia-s-sovereign-wealth-fund-quicktake>.

<sup>38</sup> Laurence Tribe & Scott Greytak, "Get foreign money out of US elections," Boston Globe, June 22, 2016, <http://bit.ly/292UENu>.

related to foreign shareholders,<sup>39</sup> would apply. In light of the Court’s post-*Citizens United* decision in *Bluman*, a restriction on political spending by corporations with foreign ownership at levels potentially capable of influencing corporate governance can be upheld on the authority of *Bluman* and as an exception to *Citizens United*.

## 2. Mechanics of Proposed Ban

The proposed law would create a new term: “foreign-influenced corporation,” being defined principally as one with ownership of one percent by a single foreign investor, or five percent by a combination of foreign investors.<sup>40</sup> The proposal would also prohibit foreign-influenced corporations from spending in city elections directly (e.g., through direct candidate contributions or through independent expenditures), or through contributions to an independent expenditure committee. Corporations spending in city elections or contributing to independent expenditure committees would be required to certify that they do not qualify as a foreign-influenced corporation.

It is worth noting that the St. Petersburg ordinance used higher thresholds (five percent and 20 percent) for the definition of foreign-influenced entities. There is a trade-off between using these higher thresholds and the ones proposed in this draft. On the one hand, the five percent and 20 percent thresholds have the benefit of being used in other contexts as important levels of ownership for reporting or regulation. As noted above, ownership of five percent by one investor requires disclosure to the Securities and Exchange Commission, and in federal communications law, foreign ownership of a broadcast or common carrier license may not exceed twenty percent.<sup>41</sup> However, based upon a survey of the S&P 500, only one in eleven companies would meet the five percent threshold and only three companies would meet the twenty percent threshold.<sup>42</sup> That means that the lower thresholds would have a broader impact than the higher thresholds, but the lower thresholds might also be more vulnerable to a legal challenge.

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<sup>39</sup> *Citizens United v. FEC*, 558 U.S. 310, 349, 354, 356, 362 (2010).

<sup>40</sup> Owning one percent of a company’s shares allows an owner to present shareholder proposals which creates substantial leverage, *see* 17 C.F.R. 240.14a-8(b); Indeed, in recent proxy seasons, the New York City Pension Fund, despite owning less than one percent of outstanding shares in the target companies, led successful shareholder proposal campaigns regarding proxy access. *See* Paula Loop, “The Changing Face of Shareholder Activism,” Harvard Law School Forum on Corporate Governance and Financial Regulation, Feb. 1, 2018, <https://corpgov.law.harvard.edu/2018/02/01/the-changing-face-of-shareholder-activism/>; Five percent ownership by a single investor is a threshold generally used in corporate law and governance to assess the point at which the blockholder can influence corporate governance, whether by board votes, threat of exit, or any other means, and which for publicly traded corporations requires prompt disclosure of acquisition for this reason, *see* 15 U.S.C. § 78m.

<sup>41</sup> *See id.*; 47 U.S.C. § 310.

<sup>42</sup> John C. Coates IV, et al., Quantifying Foreign Institutional Block Ownership at Publicly Traded U.S. Corporations, Free Speech For People Issue Report 2016-01, Oct. 2016, <https://freespeechforpeople.org/wp-content/uploads/2016/10/FSFP-Coates-Fein-Crenny-Dong-report.pdf>.

### *3. Spending by Entities that Would Qualify as Foreign-Influenced*

Direct corporate political spending was limited in the last two election cycles with only Nucor, Vulcan and the Seattle Mariners appearing in the top 20 contributors to candidates.<sup>43</sup> As demonstrated above, and in the attached spreadsheet, corporate spending, foreign-influenced or otherwise, occurs primarily through contributions to political committees which then spend the money—or, more often, contribute it to another committee, and possibly another, before finally reaching the committee that spends the money on independent expenditures.

Amazon has been the most prominent corporation in terms of contributions to political committees in Seattle. Notably, under the proposed definition of “foreign-influenced entity,” Amazon would meet the 1% threshold for foreign ownership because current reporting shows that Baillie Gifford, a U.K. based investment fund, owns 1.4% of the outstanding shares. The second largest contributor in 2017 was Vulcan Inc., a privately held company whose ownership interests are currently undisclosed. Notably, Centurylink, which contributed \$30,000 to Civic Alliance for a Sound Economy, would also qualify as a foreign-influenced entity due to an 8.6% ownership interest by Singapore firm Singapore Tech Telemedia Pte, Ltd. Comcast Cable and Puget Sound Energy would also appear to qualify as foreign-influenced entities given significant ownership by Canadian and Dutch funds.

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<sup>43</sup> See 2017 Election Report, 17-19; 2015 Election Report 15-17.