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Seattle City Council
Seattle, Washington 98124

RE: Proposed ordinance to limit political spending by foreign-influenced corporations

January 3, 2020

Dear Councilmembers,

I write to you to express my opinions on an ordinance that has been proposed for consideration by the Seattle City Council. First, that U.S. Supreme Court constitutional precedent permits limits on political spending by foreign-influenced corporations in the form of campaign contributions, “independent expenditures,” or contributions to super PACs, as provided in the proposed ordinance. Second, that I consider this bill to be a valuable tool for protecting and preserving the integrity of elections, including Seattle’s, from the threat to the American ideal of self-government posed by foreign-influenced political spending.

Background

I am the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard University and Harvard Law School, where I have taught since 1968 and where my specialties include constitutional law and the U.S. Supreme Court.* I have prevailed in three-fifths of the many appellate cases I have argued (including 35 in the U.S. Supreme Court).

Constitutionality of regulating political spending by foreign-influenced corporations

Regulating political spending by corporations with significant foreign ownership is consistent with the Constitution and Supreme Court precedent. Indeed, concern about potential foreign influence over our democratic politics is written into the

* Title and university affiliation included for identification purposes only.

Constitution itself.¹ And while the Supreme Court has held that the First Amendment prohibits limits on independent expenditures *in general*, it has made an important exception for spending by foreign nationals.

Federal law already prohibits foreign nationals—a category defined by federal law to include foreign governments, corporations incorporated or with their principal place of business in foreign countries, and individuals who are not U.S. citizens or lawful permanent residents—from spending money on federal, state, or local elections.² In the 2012 decision *Bluman v. Federal Election Commission*, the Supreme Court upheld this law against a post-*Citizens United* constitutional challenge, confirming the federal government’s ability to ban independent expenditures by foreign nationals.³ As explained by the lower court opinion in that case, written by then-Circuit Judge Brett Kavanaugh and affirmed by the Supreme Court, the legal rationale for restricting political spending by foreign nationals is that “foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”⁴

The Supreme Court’s decision in *Citizens United* created a loophole through which foreign investors can circumvent this ban using the corporate form. Yet if foreign investors do not have a constitutional right to spend money to influence federal, state, or local elections, then they do not have a constitutional right to use the corporate form to do indirectly what they could not do directly.⁵

This is not only an issue of corporations that are majority-owned by foreign investors. As I told the federal House of Representatives Committee on the Judiciary shortly after the *Citizens United* decision, the same Supreme Court that decided *Citizens United* would probably have upheld a law limiting political advertising by corporations with a

¹ See U.S. Const. art. I, § 9, cl. 8 (prohibiting federal officials from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

² 52 U.S.C. § 30121(a).

³ *Bluman v. Fed. Election Comm’n*, 565 U.S. 1104 (2012) (mem.).

⁴ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court), *aff’d mem.*, 565 U.S. 1104 (2012). Despite this quotation’s reference to “foreign citizens,” the *Bluman* decision later noted that the federal statute specifically does *not* define lawful permanent residents as “foreign nationals” subject to the political spending prohibition. See *id.* at 292. Since the bills use the exact same definition of “foreign national” as does the federal law, lawful permanent residents would not be affected in the slightest.

⁵ See Ellen Weintraub, “Taking on *Citizens United*,” Mar. 30, 2016, N.Y. TIMES, <https://nyti.ms/1qhmpKB>.

considerably smaller percent of equity held by foreign investors.⁶ Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign investors.

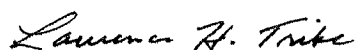
Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* in 2017, the 2016 election and the federal government's failure to act shows why state and local governments need to close the foreign corporate political spending loophole.⁷ I believe Seattle's interest in self-government provides a comparable and constitutionally sufficient ground to support regulating campaign contributions, independent expenditures, and contributions to super PACs, by what the bill terms "foreign-influenced corporations." As such, I believe it to be constitutional under the Court's *Citizens United* and *Bluman* decisions and a reasonable complement to existing federal law.

Conclusion

I applaud Seattle for its leadership on issues so critical to the health of our democracy, and I thank you for considering this admirable effort to guard our political systems from the dangers posed by foreign-influenced corporate spending. I am confident that the U.S. Supreme Court would uphold a ban on foreign-influenced corporations' political spending as provided in the proposed ordinance.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,



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⁶ Laurence H. Tribe, "Citizens United v. Federal Election Commission: How Congress Should Respond," Testimony to U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties 7 (Feb. 3, 2010), *available at* <http://bit.ly/2ueI4KT>.

⁷ *See* Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, <http://bit.ly/2fOULSH>.