

Seattle City Council
Seattle City Hall
Seattle, WA

RE: Political spending by foreign-influenced corporations
Council Bill # 119731

January 6, 2020

Dear Councilmembers,

I am the Legal Director of Free Speech For People, a national non-partisan non-profit organization with approximately 15,000 supporters in Seattle, that works to renew our democracy and to limit the influence of money in our elections. We were proud to help defend the Honest Elections Seattle Initiative by submitting an amicus brief in its support at the Washington Supreme Court in the recent case *Elster v. City of Seattle*.¹ I now write in support of a proposed ordinance that addresses political spending by foreign-influenced corporations.

The 2016 election showed that foreign interference in our elections is a serious problem. The news that at least one Russian company bought political ads on Facebook shows one way that foreign interests can use corporations to influence elections.² But Facebook is not the only way that foreign interests can use American companies to influence U.S. elections. This proposal would close a major loophole.

Under well-established federal law, upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend money to influence federal, state, or local elections.³ However, *no* law prevents a foreign interest from using a U.S.-based corporation to accomplish the same goal, particularly since the U.S. Supreme Court's

¹ See <https://freespeechforpeople.org/elster-v-city-of-seattle/>.

² See Jessica Guynn *et al.*, *Thousands of Facebook ads bought by Russians to fool U.S. voters released by Congress*, USA Today, May 10, 2018, <http://bit.ly/37GKYX4>.

³ 52 U.S.C. § 30121; *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1042 (9th Cir. 2019).

2010 *Citizens United* decision invalidated laws that banned corporate political spending.⁴

Citizens United created a loophole for foreign interests to acquire stakes in U.S. corporations and then use that leverage to influence or control the corporation's political activity, including campaign contributions, contributions to super PACs, and independent expenditures. The Supreme Court indicated in *Citizens United* that it was aware of this problem and its decision would not prevent a law that was designed to address this problem,⁵ yet it has been now nine years and neither Congress nor the beleaguered Federal Election Commission have done anything. However, as Professor Laurence Tribe of Harvard Law School has written, a city such as Seattle does not need to wait for federal action to protect its state and local elections from foreign influence. The 2016 election showed us that the threat of foreign influence in elections is real. These bills would plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

A. Constitutionality of Regulating Political Spending by Foreign-Influenced Corporate Entities

As background, it is important to understand that longstanding federal law already prohibits foreign nationals (defined to include foreign governments, foreign corporations, and individuals who are neither U.S. citizens nor permanent residents) from spending money to influence federal, state, or local elections, and that this federal law was recently upheld by the U.S. Supreme Court in the case of *Bluman v. Federal Election Commission*.⁶

People seeking to violate this federal law prohibiting foreign spending in U.S. elections have repeatedly used U.S. business entities to funnel funds into U.S. elections, including in San Diego, where, in 2017, a foreign businessman was convicted in federal court of unlawfully

⁴ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁵ *See id.* at 362.

⁶ 52 U.S.C. § 30121; *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); *see also* *United States v. Singh*, 924 F.3d 1030 (9th Cir. 2019) (specifically upholding ban on foreign national spending in *local* elections).

funneling foreign funding into local elections through third parties and shell corporations in order to support politicians who might support his real estate development plans,⁷ and in New York, where, in 2019, four foreign nationals have been indicted on charges stemming from a scheme in which they laundered foreign money into U.S. elections via shell corporations and straw donors.⁸

There are also subtler forms of foreign influence through corporate political activity. When U.S. corporations are held in part by foreign investors, those foreign investors are in a position to influence how the corporations spends money on elections. 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.”⁹ But, as Commissioner (now Chair) Ellen Weintraub of the Federal Election Commission testified in July 2017, current federal law does not adequately protect against foreign interference through corporate political spending by U.S. business entities with significant foreign ownership.¹⁰

Weintraub explained the issue and a potential solution 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.”¹¹

⁷ *Singh*, 924 F.3d at 1040-41.

⁸ *United States v. Parnas*, No. 19-CR-725, available at <https://www.justice.gov/usao-sdny/press-release/file/1208281/download>.

⁹ *Citizens United*, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting).

¹⁰ Ellen Weintraub, *How Our Broken Campaign Finance System Could Allow Foreign Governments to Buy Influence in Our Elections and What We Can Do About It*, Testimony Before the Senate Democratic Policy & Communications Committee, July 19, 2017, https://www.fec.gov/resources/cms-content/documents/DPCC-19-July-2017_Final.pdf.

¹¹ Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, <http://nyti.ms/1SwK4gK>.

This threat is not merely hypothetical. For example, Uber has shown an increasing appetite for political spending in a variety of contexts.¹² Although Uber started in Silicon Valley, the Saudi government now owns more than 10 percent of the company.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

As Professor Tribe and I explained in a joint op-ed in the Boston Globe, “while the Supreme Court was careful to note that its decision would not foreclose limits that apply specifically to corporations with significant foreign influence, Congress hasn’t updated the law since the *Citizens United* decision. Meanwhile, the Federal Election Commission,

¹² 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>.

¹³ Eric Newcomer, “The Inside Story of How Uber Got Into Business with the Saudi Arabian Government,” Nov. 3, 2018, <https://bloom.bg/2SWWDgv>.

¹⁴ 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>.

¹⁵ 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-warchest/> (DST Global is Moscow based); Scott Austin, *Airbnb: From Y Combinator to \$112M Funding in Three Years*, The Wall Street Journal, July 25, 2011, <https://on.wsj.com/2STNYvj>. 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.”

¹⁶ According to one report, Saudi Arabia’s Public Investment Fund is expected to deploy \$170 billion in investments over the next few years. Sarah Algethami, *What’s Next for Saudi Arabia’s Sovereign Wealth Fund*, Bloomberg BusinessWeek, Oct. 21, 2018, <https://bloom.bg/2sQNJGF>.

the agency in charge of interpreting and applying the law, has been stuck in stalemate.”¹⁷

As Weintraub noted in the *New York Times*, 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 related to foreign shareholders,¹⁸ would apply. Indeed, after deciding *Citizens United*, the Supreme Court in *Bluman v. Federal Election Commission* specifically upheld the federal ban on foreign nationals spending their *own* money in U.S. elections.¹⁹ 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*.

B. Mechanics of Proposed Ordinance

The proposal would prohibit a foreign-influenced corporation from making a contribution to a candidate’s campaign, a contribution to an independent expenditure committee (often called a “super PAC”), or an independent expenditure. It would also require any corporation engaging in such spending to promptly file a statement of certification, signed by its chief executive officer under penalty of perjury, avowing that, after due inquiry, the corporation was not a foreign-influenced corporation when the expenditure or contribution was made.

The proposal does *not* regulate other forms of corporate political activity, such as lobbying or spending in ballot measure elections, nor does it in any way regulate the personal political activities or spending of the individual employees or stockholders of the company. Nor does it have any effect whatsoever on opportunities for political expression by

¹⁷ Laurence Tribe & Ron Fein, “How Massachusetts can fight foreign influence in our elections,” *Boston Globe*, Sept. 26, 2017, <https://www.bostonglobe.com/opinion/2017/09/26/how-massachusetts-can-fight-foreign-influence-our-elections/CM8rjPu8NtmRJIYRVeUVJM/story.html>.

¹⁸ *Citizens United*, 558 U.S. at 349, 354, 356, 362.

¹⁹ *Bluman v. Federal Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012). In 2019, the U.S. Court of Appeals for the Ninth Circuit upheld the part of the federal statute that applies the foreign national political spending ban to local elections. *Singh*, 924 F.3d at 1042.

individual foreign nationals. It simply and narrowly prohibits use of *corporate treasury money* by foreign-influenced corporations for these particular forms of electoral spending.

The term “foreign-influenced corporation” is defined via a three-layer definition. First, the term “foreign investor” is defined to mean a foreign government, foreign company, or individual foreign national that owns stock in a company. Second, the term “foreign owner” is defined to mean either a foreign investor, *or* a company for which a foreign investor owns half or more of the shares. This latter part of the definition of “foreign owner” is intended to include a U.S.-registered company that is majority-owned or controlled by a foreign corporation or individual foreign investor, because many foreign entities invest in American companies through such subsidiaries. Finally, the term “foreign-influenced corporation” is defined to include a corporation, LLC, or similar business entity where either a single foreign owner owns 1% of shares, or multiple foreign owners own 5% of shares in the aggregate, or a foreign owner participates directly or indirectly in the corporation’s decision-making process with respect to the corporation’s political activities in the United States.

C. Foreign ownership thresholds

Foreign investment often outweighs local considerations, no matter how iconic the company is to its “hometown.” Even if a company was founded in the United States and keeps its main offices here, companies are responsive to their shareholders, and significant foreign ownership affects corporate decision-making.

The proposal’s thresholds of 1% for a single foreign owner, or 5% for multiple foreign owners, may appear low at first. However, as explained in more detail in written testimony submitted by Professor John Coates of Harvard Law School, and in a recent report by the Center for American Progress,²⁰ these thresholds reflect levels of ownership that are widely agreed (including by entities such as the Business Roundtable) to be high enough to influence corporate governance. The

²⁰ See Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, Ctr. for American Progress, <https://ampr.gs/2QliNQT> (Nov. 21, 2019).

proposed 1% threshold is also grounded in a rule of the U.S. Securities and Exchange Commission regarding eligibility of shareholders to submit proposals for a shareholder vote—a threshold that the Commission believes is, if anything, *too high*.²¹ For a large multinational corporation, an investor that owns 1% of shares might well be the largest single stockholder. Conversely, as the Commission has acknowledged, many of the investors most active in influencing corporate governance own well below 1% of equity.²²

Of course, this does not mean that *every* investor who owns 1% of shares will *always* influence corporate governance, but rather that the business community generally recognizes that this level of ownership presents that opportunity, and—for a foreign investor in the context of corporate political spending—that risk.

In other cases, no single foreign investor holds 1% or more of corporate equity, but multiple foreign investors own a substantial aggregate stake. To pick one example, at the moment of this writing (it may change later, of course, due to market trades), Amazon does not have any 1% foreign investors, but at least 7.9% of its equity (and possibly much more) is owned by foreign investors.²³ While presumably foreign investors as a class are not all perfectly aligned on all issues, they can be assumed to share certain common interests and positions that may, in some cases, differ from those of U.S. shareholders—certainly when it comes to matters of local Seattle public policy.

²¹ Under current rules, owning one percent of a company's shares allows an owner to submit shareholder proposals, which creates substantial leverage. See 17 C.F.R. 240.14a-8(b). The SEC has proposed to eliminate this threshold, and rely solely on absolute-dollar ownership thresholds that correspond to far less than 1% of stock value, because it is fairly uncommon for even a major, active institutional investor to own 1% of the stock of a publicly-traded company. See SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66,458 (Dec. 4, 2019).

²² See *id.* at 66,646 & n.58 (noting that “[t]he vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold,” including major institutional investors such as California and New York public employee pension funds).

²³ See *Amazon.com*, CNBC, <https://cnb.cx/2JShvAt> (visited Jan. 6, 2020) (ownership tab). As of the date of writing, two foreign investors (Baillie Gifford and Norges Bank) each hold 0.9% but no foreign investor holds 1.0% or more. Aggregate ownership data, however, shows 7.1% in Europe (including Russia) and 0.8% in Asia. In fact, the total aggregate foreign ownership could be much higher, as the summary data show only 56.3% of shares owned in North America. CNBC obtains its geographic ownership concentration data from Thomson Reuters, which in turn obtains it from Refinitiv, a provider of financial markets data that has access to some non-public sources.

Neither corporate and securities law nor empirical research provide a bright-line threshold at which this type of aggregate foreign interest begins to affect corporate decision-making, but anecdotally it appears that CEOs do take note of this aggregate foreign ownership and that at a certain point it affects their decision-making. The proposed ordinance selects a 5% aggregate foreign ownership threshold. Under federal securities law, 5% is the threshold that Congress has already chosen as the level at which a single investor *or group of investors working together* can have an influence so significant that the law requires disclosure not only of the stake, but also the residence and citizenship of the investors, the source of the funds, and even in some cases information about the investors' associates.²⁴ In this case, while it may not be appropriate to treat unrelated foreign investors as a single bloc for *all* purposes, it is appropriate to do so in the context of analyzing how they may influence decision-making regarding political spending in U.S. elections.

In Seattle, a number of companies would qualify as a “foreign-influenced corporations.” As noted above, this includes companies with local origins that keep their main offices here; it is important to be clear-eyed about the fact that corporate decision-making is responsive to the company’s actual current shareholders, wherever they are.

Of 63 Washington-headquartered, NASDAQ-listed companies, 14 have foreign investors of more than 1 percent, and 10 of those companies are headquartered in the Seattle metropolitan area.²⁵ These include well-known companies like T-Mobile,²⁶ Zillow,²⁷ and Redfin.²⁸ And of course others, such as Amazon (discussed above), exceed the 5% aggregate

²⁴ 15 U.S.C. §§ 78m(d)(1)-(3).

²⁵ This information comes from Marketscreener.com.

²⁶ *T-Mobile US Inc*, CNN Business, <https://cnn.it/2ZSDIVA> (visited Jan. 6, 2020). As of this writing, Norway-based Norges Bank holds 1.14 percent.

²⁷ *Zillow Group Inc*, Market Screener, <https://www.marketscreener.com/ZILLOW-GROUP-INC-20814107/company/> (visited Jan. 6, 2020). As of this writing, Australian-based Caledonia Private Investments owns 26.5 percent. Several other foreign investors (including Australia-based Cavalane Holdings Pty. Ltd. and U.K.-based Baillie Gifford & Co.) hold 1% or more.

²⁸ *Redfin Corp*, Market Screener, <https://www.marketscreener.com/REDFIN-CORP-37247408/company/> (visited Jan. 6, 2020). As of this writing, U.K.-based Baillie Gifford & Co. holds 6.39 percent, and Capital Research and Management holds 17.6% on behalf of various “international,” “global,” and “world” investors.

ownership thresholds. The point is not to criticize these particular corporations (there is nothing unlawful or improper *per se* with foreign investment), nor to state definitively that they would be subject to the proposed ordinance, but simply to note that their corporate decision-making, including around Seattle politics and elections, may be influenced by their increasingly international investors.

Some of these companies have made considerable political expenditures in recent area elections. A well-known recent example, of course, was Amazon's \$1.5 million contribution to Civic Alliance for a Sound Economy (CASE), a super PAC active in Seattle's 2019 city council election.²⁹

Of course, some companies do not have a foreign owner with 1% or more of shares, and even of those that do, many appear not to spend corporate money on Seattle elections.³⁰ Such companies either would not be covered at all (if they did not meet the threshold) or would not experience any practical impact (if they do not spend corporate money for political purposes).

The point here is *not* that these corporations do not have connections to Seattle, nor that foreign investment in Seattle companies should be discouraged, nor that the foreign owners of these companies are necessarily known to be exerting influence over the companies' decisions about corporate political spending, nor that they would do so nefariously to undermine democratic elections. Rather, the point is simply that *Citizens United* accorded corporations the right to spend money in our elections on the theory that corporations are "associations of citizens." But for companies of this type, that theory does not apply. Enough shares are owned or controlled by a foreign owner that it could

²⁹ Of course, Amazon was not the only company with partial foreign ownership that contributed to super PACs in the 2019 election. For example, Expedia contributed \$50,000 to CASE. See *Civic Alliance for a Sound Economy Sponsored by Seattle Chamber, 2019*, PDC, https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer_id=CIVIAS%20101&election_year=2019 (visited Jan. 6, 2020). As of this writing, some 10.8% of Expedia stock is owned by international investors in Europe, Asia, and Australasia. *Expedia*, CNBC, <https://cnb.cx/2QIUkly> (visited Jan. 6, 2020).

³⁰ We can only say they *appear* not to have spent money on state or local elections because corporations often route their political spending through layers of 501(c)(4) "dark money" groups for which no disclosure is presently required.

exert influence over how the corporation spends money from the corporate treasury to influence candidate elections. And to reiterate, the bill does not limit in any way how employees, executives, or shareholders of these companies may spend their *own* money—just how the foreign-influenced corporations’ potentially vast corporate treasuries may be deployed to influence Seattle electoral democracy.

II. Conclusion

In recent years, Seattle has taken important steps towards preventing corruption and enhancing democratic self-government by limiting contributions to candidates and providing for citizen-funded elections through the Democracy Voucher Program. However, the prospect of political spending by foreign-influenced corporations threatens to undermine the city’s democratic self-government. Seattle has a golden opportunity to take a principled stand for the benefit of its residents.

If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

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