

This proposal would revise the Political Reform Act of 1974 to ban political spending by “foreign-influenced business entities,” a term defined within the bill. Similar legislation was enacted in Seattle in January 2020, and is currently pending in the U.S. Congress, in New York state, and elsewhere.

Under present *federal* law, a foreign government, foreign political party, foreign-incorporated corporation, or individual foreign national who is *not* lawfully admitted for permanent residence is prohibited from spending money on federal, state, or local elections.¹ This prohibition was upheld as constitutional by the U.S. Supreme Court in 2012, affirming a lower court opinion written by then-Judge, now-Justice Brett Kavanaugh.² As Kavanaugh explained, the law is justified by the public interest in protecting “American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”³ Present state law extends this prohibition to ballot measures.⁴

This bill expands those protections substantially. It prohibits a “foreign-influenced business entity” (defined as a company in which either 1% of shares are owned by a single foreign investor, 5% of shares are owned by multiple foreign investors, or a foreign entity participates in decision-making with respect to state or local political spending) from making contributions, expenditures, independent expenditures, or contributions to committees. It also includes safeguards to prevent FIBEs from using contributions to third parties (such as 501(c)(4) nonprofits) to channel political spending, while allowing FIBEs to continue making contributions for such entities for other purposes. It does *not* prohibit FIBEs from sponsoring a sponsored committee in the form of an employee or shareholder PAC, to which its U.S. employees and non-foreign investors may contribute their own money.

General and legal background

Under well-established federal law, recently upheld by the U.S. Supreme Court, it is illegal for a foreign government, business, or individual to spend any amount of money at all to influence federal, state, or local elections.⁵ This existing provision does not turn on whether the foreign national comes from a country that is friend or foe, nor the amount of money involved. Rather, as then-Judge (now Justice) Brett Kavanaugh wrote in the seminal decision upholding this law:

It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation

¹ See 52 U.S.C. § 30121. The Federal Election Commission has opted to interpret this as only applying to *candidate* elections, not ballot question elections.

² See *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).

³ *Bluman*, 800 F. Supp. 2d at 288.

⁴ See Cal. Gov’t Code § 85320.

⁵ 52 U.S.C. § 30121.

of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.⁶

Federal law, however, leaves a gap that has been opened even further since the U.S. Supreme Court's 2010 *Citizens United* decision invalidated laws that banned corporate political spending.⁷ While the existing federal statute prohibits a *foreign-registered corporation* from spending money on federal, state, or local elections, federal law does not address the issue of political spending by *U.S. corporations that are partially owned by foreign investors*. That is the topic here.

The *Citizens United* decision three times described the corporations to which its decision applied as “associations of citizens.”⁸ With respect to the topic of corporations partly owned by foreign investors, the Supreme Court simply noted “[w]e need not reach the question” because the law before it applied to *all* corporations.⁹ As a result, federal law currently does not prevent a corporation that is partly owned by foreign investors from making contributions to super PACs, independent expenditures, expenditures on ballot measure campaigns, or even (in states where it is otherwise legal) contributing directly to candidates.

Eleven years have passed, and neither Congress nor the beleaguered Federal Election Commission have done anything. However, as Professor Laurence Tribe of Harvard Law School and Federal Election Commissioner Ellen Weintraub have written, a state such as California does not need to wait for federal action to protect its state and local elections from foreign influence. The goal of this type of legislation is to plug the loophole that *Citizens United* created for corporations partly or wholly owned by foreign interests.

This threat is not merely hypothetical. For example, Uber has shown an increasing appetite for political spending in a variety of contexts, including in California, where the company spent some \$58 million on Proposition 22.¹⁰ Although Uber started in Silicon Valley, the Saudi government made an enormous (and critical) early investment, and even now owns several percent of the company's stock, long after the company has gone public.¹¹ Fellow Proposition 22 major spenders, such as DoorDash and Lyft, are also substantially owned by foreign investors from countries including the United Kingdom, Japan, Malaysia, China, and elsewhere. As Michael Sozan of the Center for American Progress noted in the Mercury News, “Californians — especially those in marginalized communities — know that their preferred candidates or policies cannot be accurately

⁶ 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, 1042 (9th Cir. 2019).

⁷ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁸ *Citizens United*, 558 U.S. at 349, 354, 356.

⁹ *Id.* at 362.

¹⁰ Ryan Menezes et al., “Billions have been spent on California's ballot measure battles. But this year is unlike any other,” L.A. Times, Nov. 13, 2020, <https://lat.ms/3gRet8d>; 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>.

¹¹ Eric Newcomer, “The Inside Story of How Uber Got Into Business with the Saudi Arabian Government,” Nov. 3, 2018, <https://bloom.bg/2SWWDgy>. As of this writing, the Public Investment Fund of Saudi Arabia owns 3.9% of Uber stock. *See* Uber, <https://www.cnbc.com/quotes/UBER?tab=ownership> (last visited Mar. 8, 2021).

reflected when elections are heavily influenced by runaway corporate spending and foreign investors to whom CEOs owe a fiduciary duty.”¹²

Similarly, 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.¹³ Airbnb received crucial early funding from, and was at that time partly owned by, Moscow-based (and Kremlin-linked) DST Global.¹⁴ 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.¹⁵

In the New York Times, Federal Election Commissioner Ellen Weintraub explained the problem, and pointed to a solution: “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.”¹⁶

As Weintraub noted, 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,¹⁷ 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.¹⁸ 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*.¹⁹

¹² Michael Sozan, “Opinion: Stop political spending by foreign-influenced U.S. firms,” Mercury News, Dec. 15, 2020, <https://bayareane.ws/3e8HimY>.

¹³ 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>.

¹⁴ 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.”

¹⁵ 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>.

¹⁶ Ellen Weintraub, *Taking on Citizens United*, N.Y. Times, Mar. 30, 2016, <http://nyti.ms/1SwK4gK>.

¹⁷ *Citizens United*, 558 U.S. at 349, 354, 356, 362.

¹⁸ *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.

¹⁹ A similar analysis would also apply to *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which addressed limits on corporations spending in ballot question elections.

Foreign influence and ownership thresholds

An important question is how much foreign investment renders a corporation's political spending problematic from the standpoint of preservation of democratic self-government. Arguably, *any* amount of political spending by partly-foreign-owned corporations is a threat to democratic self-government. In the most commonly accepted understanding, shareholders in a corporation are "the firm's residual claimants."²⁰ As the California Court of Appeal put it, "it is the shareholders who own a corporation, which is managed by the directors. In an economic sense, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets . . .".²¹

That means that, in at least some sense, money in the corporation's treasury is "their" money. In practice, shareholders only rarely have the opportunity to actually assert these residual claims. Yet there is a sense in which investors and corporate managers alike understand that the corporation's assets "belong to" the shareholders.

As to corporate political spending, since *Citizens United*, this issue has been raised from the perspective of shareholders who may not *want* corporate managers spending "their" money on various political causes.²² But here, we confront the mirror issue: corporate managers may use funds that partly "belong to" foreign investors to influence U.S. elections. On this understanding, *any* amount of foreign investment in a corporation means that management's political expenditures are coming from a pool of partly foreign money. Seen that way, the threshold for when a corporation spending money in U.S. elections is no longer an "association of citizens" is when *any* of the money in its coffers "belongs to" foreign investors—in other words, when it has any foreign shareholders at all.

We need not, however, reach that far. As a practical matter, an alternative way to look at the issue is to consider at what threshold an investor may exert *influence*—explicit or implicit—over corporate decision-making. When U.S. corporations are held in part by foreign investors, then U.S. corporate managers consider the interests of those foreign investors when they make decisions. Political spending budgets are no exception. 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. As the former CEO of U.S.-based Exxon

²⁰ Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 449 (2001); see also, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U.L. Rev. 547, 565 (2003) ("[M]ost theories of the firm agree, shareholders own the residual claim on the corporation's assets and earnings."); Frank H. Easterbrook & Daniel R. Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36-39 (1991) (arguing that shareholders are entitled to whatever assets remain after the company has met its obligations, and thus are the ultimate "residual claimant[s]" on a company's assets). While different theoretical angles are sometimes offered in academic literature, this is the standard economic model of shareholders of a firm.

²¹ *Berg & Berg Enterprises, LLC v. Boyle*, 100 Cal. Rptr. 3d 875, 892, 178 Cal. App. 4th 1020, 1039 (Cal. App. 2009).

²² See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 85 (2010).

Mobil Corp. stated, “I’m not a U.S. company and I don’t make decisions based on what’s good for the U.S.”²³ Political spending is not magically exempt from this general rule.

To someone not deeply versed in corporate governance, it may seem that the right threshold for the point at which a foreign investor (or any investor) can exert influence is just over 50%. That is, after all, the threshold for winning a race between two candidates, or controlling a two-party legislature. But corporations are not legislatures. A better analogy might be a chamber with many millions of uncoordinated potential voters, most of whom rarely vote and who may be, for one reason or another, effectively *prevented* from voting. In that type of environment, a disciplined bloc of 1% can be tremendously influential. As set forth in more detail below, corporate governance law gives substantial formal power to minority shareholders, and this spills out into even greater unofficial influence.

Since the passage of Seattle’s 2020 law, newer bills—currently pending in states such as New York, Massachusetts, and Minnesota, and in the U.S. Congress—generally follow the Seattle model to limit political spending by corporations owned 1% by one foreign investor, or 5% by multiple foreign investors.

Federal securities law provides powerful tools of corporate influence to investors at these levels. The 2020 Seattle ordinance’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 in support of similar legislation elsewhere, and in a recent report by the Center for American Progress,²⁴ 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.

Seattle’s 1% threshold was 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 ultimately concluded was, if anything, *too high*.²⁵ For a large multinational corporation, an investor that owns 1% of shares might well be the largest single stockholder; it would generally land among the top ten. Conversely, as the Commission has

²³ Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, <https://ampr.gs/30soG9S> (Nov. 21, 2019).

²⁴ See Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, Ctr. for American Progress, <https://ampr.gs/2QliNQT> (Nov. 21, 2019).

²⁵ Until November 4, 2020, owning one percent of a company’s shares allows an owner to submit shareholder proposals, which creates substantial leverage. See *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 70,240, 70,241 (Nov. 4, 2020). The SEC 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) (proposed rule). In other words, recent advances in corporate governance law suggest that the 1% threshold may, if anything, be *higher* than appropriate to capture investor influence. That said, we believe that 1% remains defensible.

acknowledged, many of the investors *most active* in influencing corporate governance own well below 1% of equity.²⁶

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 8.3% of its equity (and possibly much more) is owned by foreign investors.²⁷ 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 California public policy. As the Center for American Progress has noted:

Foreign interests can easily diverge from U.S. interests, for example, in the areas of tax, trade, investment, and labor law. Corporate directors and managers view themselves as accountable to their shareholders, including foreign shareholders. As the former CEO of U.S.-based Exxon Mobil Corp. starkly stated, “I’m not a U.S. company and I don’t make decisions based on what’s good for the U.S.”²⁸

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 Seattle model legislation 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.²⁹ 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 corporate management conceive decision-making regarding political spending in U.S. elections.

²⁶ 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).

²⁷ See *Amazon.com*, CNBC, <https://cnb.cx/2JShvAt> (visited Apr. 28, 2021) (ownership tab). As of the date of writing, at least one foreign investor (Norges Bank) holds 0.9% but no foreign investor is known to hold 1.0% or more. Aggregate ownership data, however, shows 7.5% 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 57.6% 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.

²⁸ Michael Sozan, Ctr. for Am. Progress, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, <https://ampr.gs/30soG9S> (Nov. 21, 2019).

²⁹ 15 U.S.C. §§ 78m(d)(1)-(3).

As discussed in more detail in the next section, some companies do not have a foreign owner with 1% or more of shares. Even of those that do, many probably do not spend corporate money on California elections. 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 California, nor that foreign investment in California 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 the corporation's spending is at least, in part, drawn from money that "belongs to" that foreign entity—and furthermore, the entity could exert influence over how the corporation spends money from the corporate treasury to influence candidate elections. Finally, 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 business entities' potentially vast corporate treasuries may be deployed to influence California electoral democracy.

The enclosed bill does not yet contain findings; however, we would be pleased to provide them for you. Similarly, if you have any questions about particular policy or drafting choices (some of which may be subtle) made in the development of the draft, we would be happy to discuss.

Sincerely,

Ron Fein, Legal Director
Courtney Hostetler, Senior Counsel
John Bonifaz, President
Ben Clements, Board Chair and Senior Legal Advisor
Free Speech For People