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Symposium Remarks

Corporations, Foreign Investments, and U.S. Elections

Courtney Hostetler*

Hostetler: I am honored to be here. As Megan mentioned, I am Senior Counsel at Free Speech for People. We are a nonpartisan, nonprofit organization, founded with the mission of overturning *Citizens United*, the Supreme Court case that struck down limits on independent political expenditures by corporations.[1] In the meantime, we as an organization are working on measures that are designed to restrain unchecked corporate power within the context of the law and the world, as we currently find it.

Which is what I'd like to talk a little bit about today. And specifically, how we can shore up our campaign finance laws to better withstand the pressures that our increasingly globalized economy can place upon our government. I'll be touching on a few points.

First, I'll start with the proposition that is probably familiar to you: that if left unchecked and under-regulated, the outsized financial power of multinational corporations can undermine the political power of people within their host countries. That, in turn, can lead to serious human rights violations and environmental abuses.

Second, the difficult lessons we've learned about multinational corporations can and should inform the way that we approach political spending in the United States by a different kind of corporation: what I'm going to call the foreign-influenced corporation that benefits from substantial foreign investment.

Third, that providing powerful foreign entities with access to our elections *via* the political spending decisions of the companies in which they are invested runs the real risk of undermining the political voices of people who live in this country.

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1. Citizens United v. FEC, 558 U.S. 310, 341 (2010).

Finally, I want to draw your attention to a solution: to prohibit political spending by foreign-influenced for-profit corporations, in order to better protect our "democratic self-government."[2]

I'll start with multinational corporations. Multinational corporations are corporations that are headquartered in one country but also operate in other countries. There are complicated narratives around them, but this basic definition is sufficient for our purposes. As mentioned, these corporations often have enormous financial powers in the countries in which they operate. They therefore are typically driven to increase profits for owners and investors who live in different countries and have few or no ties to the host communities. We have seen far too many examples of multinational corporations that commit human rights abuses, harm the environment, and undermine the rule of law in their host countries in pursuit of profit.

Nestlé, for example, has used child and slave labor in its supply chains in Thailand and in a number of West African countries.[3] Siemens has been embroiled in corruption scandals that include paying bribes and kickbacks to secure government contracts in Argentina, Venezuela, Bangladesh, and even a United Nations Oil for Food program in Iraq.[4]

Closer to home, in 2010, an explosion of the BP Oil rig off the Gulf of Mexico dumped the equivalent of approximately four million barrels of oil into the Gulf.[5] Eleven people died, it took nearly three months to stop the spill,[6] and the disaster caused billions of dollars in damage to the Gulf of

2. Bluman v. FEC, 800 F. Supp. 2d 281, 287 (2011), *aff'd*, 565 U.S. 1104 (2012) (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

3. Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), https://wapo.st/3BfPAFp; Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, GUARDIAN (Feb. 1, 2016), https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast. Several individuals who asserted that they had been trafficked from Mali to Cote d'Ivoire as child slaves to produce cocoa sued Nestlé and Cargill in 2005 in US federal court for aiding and abetting child slavery. The lawsuit ended in 2021, when the Supreme Court ruled that the plaintiffs/respondents could not seek extraterritorial application of the Alien Tort Statute because the "mere corporate presence" of the corporations in the United States was not sufficient to establish a connection to the slave labor employed by Nestlé in Cote d'Ivoire. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

4. *See* Off. of Pub. Affs., *Former Siemens Executive Pleads Guilty to Role in $100 Million Foreign Bribery Scheme*, U.S. DEP'T OF JUST. (Mar. 15, 2018), https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme; Alexandra Wrage & Anne Richardson, *Siemens AG—Violations of the Foreign Corrupt Practices Act*, 48 INT'L LEGAL MATERIALS 232 (2009); Jens Hack, *Germany's Siemens in Iraq Oil-for-Food Investigation*, REUTERS (Jan. 21, 2007, 1:22 AM), https://www.reuters.com/article/sppage023-l03225472-oisbi-idUKL0322547220070103.

5. BUREAU OF OCEAN ENERGY MGMT., REGUL. AND ENF'T, REPORT REGARDING THE CAUSES OF THE APRIL 20, 2010 MACONDO WELL BLOWOUT (2011); *see also In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 21 F. Supp. 3d 657 (E.D. La. 2014) [hereinafter *In re Oil Spill*]; Findings of Fact and Conclusions of Law Phase Two Trial at 39–44, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, No. 2:10-md-02179, 2015 WL 10793974 (E.D. La. 2015).

6. *In re Oil Spill*, 21 F. Supp. 3d at 667.

Mexico, with ongoing losses to fishing communities that live along the coast.[7] BP and its contractors were found to have violated federal safety regulations, leading to and exacerbating the damage caused by the explosion.[8]

These examples unfortunately barely scratch the surface, but they demonstrate that these sorts of violations can and have happened everywhere across the world. The *why* so often comes down to money and this drive for profit. Which begs the question of what might constrain a company's drive for profit; what does it take to have a company prioritize human rights, workers' rights; the right to democratic self-governance, or the environment over pure profit. As we have seen with multinational corporations, they are more likely to cause damage where their profit-maximizing goal is not tempered either by the corporation's own interest in adhering to the rule of law or its legal obligation to adhere to the rule of law, or to protect the environment, or to protect human rights.

In other words, when they are neither constrained by their own interest in a community's wellbeing nor by regulations and laws (like minimum wage or labor laws), problems can emerge in the corporations' areas of operation, which might explain why some companies with decent reputations in their home countries perform so badly abroad. And why, sometimes, companies that follow and may even support strong regulations in their home countries do not necessarily adhere to those same principles when they are operating abroad.

How does this tie into what I want to speak about today? What about corporations that operate in their home country, which is the country in which they're incorporated, but are answerable to foreign investors who live thousands of miles away? What happens when the home country is one that doesn't have strong protections against the encroachment of corporations into the political sphere? For example, the United States, where two things have happened in the last decade. First, corporations have been given

7. *Grim Outlook for Oil Spill; Fishing Ban in Effect*, NPR (May 2, 2010, 11:41 AM), https://www.npr.org/2010/05/02/126455225/grim-outlook-for-oil-spill-fishing-ban-in-effect; *Deepwater Horizon Oil Spill Settlements: Where the Money Went*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/explainers/deepwater-horizon-oil-spill-settlements-where-money-went (last updated Apr. 20, 2017); Joan Meiners, *Ten Years Later, BP Oil Spill Continues to Harm Wildlife—Especially Dolphins*, NAT'L GEOGRAPHIC (Apr. 17, 2020), https://www.nationalgeographic.com/animals/article/how-is-wildlife-doing-now--ten-years-after-the-deepwater-horizon; Nina Lakhani, *'We've Been Abandoned': A Decade Later, Deepwater Horizon Still Haunts Mexico*, GUARDIAN (Apr. 19, 2020), https://www.theguardian.com/us-news/2020/apr/19/deepwater-horizon-mexico-10-years-on; Michael R. Cope, Tim Slack, Troy C. Blanchard & Matthew R. Lee, *Does Time Heal All Wounds? Community Attachment, Natural Resource Employment, and Health Impacts in the Wake of the BP Deepwater Horizon Disaster*, 42 SOC. SCI. RSCH. 872 (2013).

8. *See In re Oil Spill*, 21 F. Supp. 3d at 738–45 (finding that BP committed gross negligence and willful misconduct under the Clean Water Act); *see also* Proposed Guilty Plea Agreement, United States v. BP Exploration & Production, Inc., Crim. No. 12-292 (E.D. La. Jan. 29, 2013); Order, United States v. BP Exploration & Production, Inc., Crim. No. 12-292 (E.D. La. Jan. 29, 2013).

enormous power to spend unlimited amounts of money on US elections.[9] Second, corporations are becoming increasingly reliant on foreign investments.[10]

First, we have the case I mentioned a little bit earlier, *Citizens United v. Federal Election Commission*.[11] It's a 2010 Supreme Court case that changed the rules for corporate political spending in the United States.[12]

Corporations already had been granted the right to spend on ballot measures by a previous Supreme Court decision,[13] but with *Citizens United*, the Court broke with decades of jurisprudence in deciding that the free speech clause of the First Amendment prohibits the government from restricting corporations from making independent political expenditures.[14] Those are expenditures that are related to a candidate, so either supporting a candidate or opposing a candidate, but are made without direct coordination with a candidate for elected office or with that candidate's campaigns.[15]

It is still constitutional to prohibit corporations from directly contributing to candidate campaigns and political parties in elections for federal office.[16] But in part thanks to *Citizens United* and *SpeechNow.org v. Federal Election Commission*, a case in the Court of Appeals for the D.C. Circuit that essentially opened the floodgates to Super PACs,[17] over the last decade independent expenditures have come to be enormously influential in elec-

9. Citizens United v. FEC, 558 U.S. 310, 341 (2010); *see generally* Letter from John Coates, Professor of L. and Econ., Harv. L. Sch., to Alex Lee, Assemb., Cal. St. Assemb., In Support of Proposed Bill AB 1819 re: Political Spending by Foreign-Influenced Corporations (Apr. 21, 2022), https://freespeechforpeople.org/wp-content/uploads/2022/04/coates-california-ab1819-written-testimony-20220419.pdf [hereinafter Coates Letter].

10. *See, e.g.*, Steve Rosenthal & Theo Burke, *Who's Left to Tax? US Taxation of Corporations and Their Shareholders*, (Oct. 27, 2020) (preliminary draft presented at NYU School of Law: Tax Policy and Public Finance colloquium) (on file with NYU School of Law), https://bit.ly/3RIe9je; MICHAEL SOZAN, CTR. FOR AM. PROGRESS, ENDING FOREIGN-INFLUENCED CORPORATE SPENDING IN U.S. ELECTIONS (2019).

11. *Citizens United*, 558 U.S. at 341.

12. *Id.*

13. First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790, 794 (1978).

14. *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).

15. 52 U.S.C. § 30101(17) ("The term 'independent expenditure' means an expenditure by a person— (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."); 11 C.F.R. § 100.16 (2022).

16. *Citizens United*, 558 U.S. at 359 (noting that the Court did not address direct corporate contributions to candidates); 52 U.S.C. § 30118.

17. SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.C. Cir. 2010) (concluding that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group"). Super PACs are political action committees in which corporations, other entities, and individuals can pool their money for the purposes of independent expenditures to influence an election. *See Registering as a Super PAC*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/ (last visited Sept. 8, 2022).

tions—in the range of billions of dollars. It is often very difficult to find out where that money is coming from.[18]

This means that corporations can wield influence over ballot measures, over elected officials who control the passage of laws that relate to the environment, corporate regulation, wages, and labor, and over individuals who are chosen to enforce those laws in agencies or in our courts. That's the first change.

The second change involved the investor market in the United States, and essentially happened separately but in lockstep with the aftermath of the *Citizens United* and *SpeechNow* decisions. In 1982, about forty years ago, only about five percent of all corporate equity in this country came from foreign investments.[19] That number quadrupled to twenty percent by 2015.[20] Then in less than four years, it doubled again, so that by 2019 that number hovered around forty percent.[21]

In other words, US-based corporations are increasingly relying on foreign investment in two ways. First, corporations that have not yet gone public and are seeking to grow will actively seek out investment, often from foreign sources. Second, publicly traded corporations are reliant on stock prices, which in turn means being reliant on a stock market that also is increasingly influenced by global investment. There is real benefit for corporations in having this globalized international stock market: more people and entities that are trading in the stock market means that there are more people and entities to chase limited shares, which in turn means prices go up.

What we have now, because of these two trends, the Supreme Court's description of a corporation in the *Citizens United* decision as being an "association[ ] of citizens,"[22] is even less accurate now than it was twelve years ago.

So, what does this mean for US elections? The United States has long prohibited any spending either directly or indirectly by foreign nationals,

18. Super PACs must disclose their donors but can accept contributions from certain nonprofits that are not required to publicly disclose their donors. Therefore, super PACs can expend significant resources on US elections using funds obtained from nonprofit organizations without knowing or disclosing who provided those funds initially to the nonprofit group. Michael Beckel, *What is Political 'Dark Money'—And Is It Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 20, 2016), https://publicintegrity.org/politics/what-is-political-dark-money-and-is-it-bad/. More than $1 billion in dark money was spent in federal elections in 2020. Anna Massoglia & Karl Evers-Hillstrom, *'Dark Money' Topped $1 Billion in 2020, Largely Boosting Democrats*, OPEN SECRETS (Mar. 17, 2021), https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/.

19. John C. Coates IV, Ronald A. Fein, Kevin Crenny & L. Vivian Dong, *Quantifying Foreign Institutional Block Ownership at Publicly Traded U.S. Corporations*, 1, 14 (Harv. L. Sch. John M. Olin Ctr. Discussion Paper No. 888, 2016).

20. *Id.*

21. *See* Rosenthal & Burke, *supra* note 10.

22. Citizens United v. FEC, 558 U.S. 310, 356 (2010).

governments, or corporations in US elections.[23] But with the changing shape of global investment, we are starting to see a new and widening avenue for political spending in US elections by entities that might be subject to foreign influence.

It could be direct influence. A powerful investor could pick up a phone, make a call, just as the powerful donor might be able to get their senator on the phone. But the larger concern is more about the indirect influence that investors wield. Executives are very aware of who their corporation's investors are, where those investors come from, and what their goals might be.

To a substantial extent, corporate executives care about their investors, who increasingly are located abroad. This means that similarly and increasingly, executives see their jobs as looking out for the interests of those foreign investments.

This dynamic is not new and it once led the then-chief executive officer of Exxon Mobil to proclaim, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."[24] This was an acknowledgement of where his interests lie, what his focus was. The statement wasn't made in response to election spending, but it certainly is applicable. When it comes to political spending, it means that executives have the ability to spend literally millions of dollars with an increasingly global pool of investors in mind.

As a stark example, we can look to what happened in California during the Proposition 22 campaign. Proposition 22 was a successful 2020 ballot measure that enabled companies like Uber, Lyft, and DoorDash to treat their drivers as independent contractors instead of employees.[25] This is an important distinction because, if app-based delivery service drivers are treated as employees, they are entitled to benefits like healthcare, paid family leave, and unemployment insurance, and they would be better protected by California labor laws that govern wages, hours, and working conditions.[26] But if these drivers are instead classified as independent contrac-

23. 52 U.S.C. § 30121.

24. Bernard Vaughan, *Global Power of ExxonMobil Spotlighted in New Coll Book*, REUTERS (Apr. 27, 2012, 3:36 PM), https://www.reuters.com/article/books-exxonmobil-idUSL2E8FQP6B20120427.

25. *See Proposition 22, Exempts App-Based Transportation and Delivery Companies from Providing Employee Benefits to Certain Drivers, November 3, 2020 Ballot*, LEGIS. ANALYST'S OFFICE, https://lao.ca.gov/ballot/2020/Prop22-110320.pdf (last visited Oct. 10, 2022).

26. Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 5 (2018), *superseded by statute*, Cal. Lab. Code § 2775 (enumerating the benefits that employers must afford workers classified as employees in California as well as the taxes for which employers are responsible pertaining to their employees); Idrian Mollaneda, *The Aftermath of California's Proposition 22*, CAL. L. REV. ONLINE (May 2021), https://www.californialawreview.org/the-aftermath-of-californias-proposition-22/. Prior to Proposition 22, rideshare and delivery drivers were treated as employees, pursuant to 2019 legislation Assembly Bill 5, that codified a 2018 California Supreme Court decision, *Dynamex Operations West, Inc. v. Superior Court*, which established a test to

tors, their employers—app-based delivery companies like Uber, Lyft, and DoorDash—do not need to provide the same benefits and the workers have fewer protections under California law.[27] The stakes were high, and the Proposition 22 campaign was hugely expensive. More than $220 million were spent, with proponents of Proposition 22 spending more than $200 million.[28]

Several of the biggest spenders were foreign-influenced corporations.[29] For example, Uber is a US corporation, but the sovereign wealth fund of Saudi Arabia actually own about five to ten percent of its corporate stock and has a seat on its board of directors.[30] Uber spent $59 million on the Proposition 22 campaign.[31] DoorDash had not yet had its IPO, but at the time, its major investors included a London-based investment firm and a Singapore-based investment firm.[32] It spent $52 million on the campaign.[33]

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determine whether the workers should be classified as employees or independent contractors. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019). Under that test, rideshare and delivery drivers were classified as employees.

27. *Dynamex*, 416 P.3d at 5; *see also* Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly $200 Million to Knock Down an Employment Law They Don't Like—And It Might Work*, WASH. POST (Oct. 26, 2020, 2:19 PM), wapo.st—hash>/3QBbV4x.

28. *California PROPOSITION 022: Changes Employment Classification Rules for App-Based Transportation and Delivery Drivers*, OPEN SECRETS, https://www.opensecrets.org/ballot-measures/CA/2020/50168797/summary (last visited Oct. 10, 2022).

29. *See California Proposition 22, App-Based Drivers As Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#cite_note-finance-25 (last visited Aug. 27, 2022) [hereinafter *Ballotpedia Proposition 22 Summary*]; *see also Campaign Finance: Yes on 22—Save-App-Based Jobs and Services: A Coalition of On-Demand Drivers and Platforms, Small Businesses, Public Safety and Community Organizations*, CAL-ACCESS, https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422181&session=2019 (last visited Oct. 10, 2022) (campaign finance directory) [hereinafter *Cal-Access Campaign Finance*].

30. When Uber was a start-up, Saudi Arabia provided the company a $3.5 billion dollar investment and in 2018 held approximately ten percent ownership in the company; by 2019, it still held more than five percent direct ownership in the company. *See* Eric Newcomer, *The Inside Story of How Uber Got Into Business With the Saudi Arabian Government*, BLOOMBERG (Nov. 3, 2018, 2:52 PM), https://www.bloomberg.com/news/articles/2018-11-03/the-inside-story-of-how-uber-got-into-business-with-the-saudi-arabian-government; Alexei Oreskovic, *The Uber IPO Exposes How Saudi Cash Drives Silicon Valley Innovation, and Even the Biggest Tech Companies Can't Stop It*, BUS. INSIDER (Apr. 13, 2019, 7:00 AM), https://www.businessinsider.com/uber-ipo-saudi-tied-2019-4?op=1. Yasir Al-Rumayyan, Managing Director of the Saudi Arabia Public Investment Fund, still has a seat on the company's Board of Directors. *See Leadership*, UBER, https://www.uber.com/newsroom/leadership/ (last visited Sept. 13, 2022).

31. *Ballotpedia Proposition 22 Summary*, *supra* note 29; *Cal-Access Campaign Finance*, *supra* note 29.

32. Theodore Schleifer, *DoorDash Is Raising $535 Million From SoftBank and Others at a $1.4 Billion Valuation*, VOX (Mar. 1, 2018, 9:00 AM), https://www.vox.com/2018/3/1/17065928/doordash-softbank-gic-funding; Aditi Roy, *Food-Delivery Company DoorDash Valued at $7.1 Billion in New Fund-raising Round, Nearly Double From Six Months Ago*, CNBC (Feb. 21, 2019, 5:14 PM), https://cnb.cx/3xl0R4T.

33. *Ballotpedia Proposition 22 Summary*, *supra* note 29; *Cal-Access Campaign Finance*, *supra* note 29.

We can also look at Amazon, which in 2019 poured more than a million dollars into Seattle city elections, an enormous amount of money for city council elections,[34] to get people elected to the city council who would support Amazon's business interests in the city. Amazon, also, is a company with substantial investment from foreign owners.[35]

The company's efforts failed, and Seattle soon thereafter passed legislation that I will discuss more in just a minute, to prevent foreign-influenced corporations from spending on Seattle city elections in the future.

Before turning to this type of legislation, I'll note that I've given you a couple headline-grabbing examples of the way in which foreign-influenced corporations can gain traction in US elections. But while all our eyes are turning on these big players, like Uber and Amazon, other foreign-influenced corporations also can play big roles in campaign financing and in independent expenditures, particularly at the local and state level. Often, corporate contributors don't have to spend millions of dollars to change the shape of local elections. Ten thousand, twenty-five thousand, fifty thousand dollars may be a drop in the bucket compared to the campaigns I just told you about, but this is money that the average donor just can't compete with but can seriously influence a city or state election. In turn, contributors gain real influence over things like environmental legislation, labor laws, corporate oversight, taxes, mining rights, land development, construction, and manufacturing. These are all hotly contested issues that are often decided by city councils, state legislatures, or by agencies chosen by elected officials. Foreign-influenced corporations can play a big role without necessarily attracting big headlines.

The issue is not just about the influence itself; it's also about how it's perceived. It can absolutely jeopardize the trust that voters have in our democratic process, undermine the "process of democratic self-government,"[36] and create "the appearance of corruption."[37] It can make voters reasonably

34. Jason Del Rey, *Amazon Tried to Buy a New Seattle City Council. It Doesn't Look Like It Worked*, Vox (Nov. 6, 2019, 6:00 PM), https://www.vox.com/recode/2019/11/6/20951648/seattle-city-council-results-amazon-kshama-sawant-egan-orion.

35. *See* Daniel Beekman, *Seattle City Council Bans 'Foreign-Influenced' Companies From Most Political Spending*, Seattle Times (Jan. 13, 2020, 6:59 PM), https://www.seattletimes.com/seattle-news/politics/seattle-city-council-bans-foreign-influenced-companies-from-most-political-spending/; *see also Amazon.com Inc. Ownership*, CNBC, https://www.cnbc.com/quotes/AMZN?tab=ownership (last visited Sept. 14, 2022) (estimating that approximately 7.9% of Amazon shares are held by European and Asian owners); Letter from Ron Fein, Legal Dir., Free Speech For People, to Seattle City Councilmembers, Political Spending By Foreign-Influenced Corporations Council Bill # 119731 1, 8 (Jan. 6, 2020), https://freespeechforpeople.org/wp-content/uploads/2020/01/fein-seattle-testimony-fic-spending-20200106.pdf (summarizing Amazon ownership approximately at time of Amazon's expenditures on Seattle city council elections).

36. Bluman v. FEC, 800 F. Supp. 2d 281, 287 (2011), *aff'd*, 565 U.S. 1104 (2012) (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

37. Citizens United v. FEC, 558 U.S. 310, 356 (2010) (recognizing a "'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.'" (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

question the ability of legislators to be faithful to the interests of their constituents when their campaigns rely heavily on independent expenditures by corporations that, in turn, act with the interest of powerful foreign stakeholders in mind.

So, where do we go from here? One possibility is legislation that would close off this avenue for potential foreign influence in our elections. In early 2020, Free Speech For People and our local partner Fix Democracy First helped pass an ordinance in Seattle that prohibits foreign-influenced corporations from contributing funds to Seattle elections.[38] The law created a bright-line foreign-ownership threshold. If a single foreign entity holds one percent or more of a US company, that company is prohibited from spending political dollars from its corporate treasury on Seattle elections.[39] The prohibition also applied to US companies in which more than one foreign entity owns an aggregate of five percent or more stake in the company.[40]

We have helped introduce and support similar bills in other cities and states, as well as in Congress.[41] The law works within our existing legal framework. I previously mentioned that under federal law, foreign entities and nationals—for example, the Norwegian State Pension Fund and the Public Investment Fund of Saudi Arabia—are prohibited from spending, either "directly or indirectly," in US elections.[42] This law was upheld in *Bluman v. Federal Election Commission*, a D.C. three-judge district court opinion written by then-Judge Kavanaugh and later affirmed by the Supreme Court.[43] The court in *Bluman* concluded that even two individuals who lived and worked or studied in the United States on visas could be prohibited from contributing to candidate campaigns or spending even *de minimis* amounts on independent expenditures.[44] The court reasoned that the law prohibiting foreign spending on US elections was constitutional because elections and election spending go to the heart of our "process of democratic self-government."[45]

38. Seattle, Wash., Ordinance 126035 (Jan. 17, 2020) (amending Seattle Municipal Code §§ 2.04.010, 2.04.260, 2.04.270, 2.04.360, 2.04.370, and adding § 2.04.400).

39. *Id.*

40. *Id.*

41. In 2020, Senator Warren and Congresswoman Jayapal introduced a similar provision in the Anti-corruption and Public Integrity Act of 2020, a bill originally introduced in 2018. S. 5070, 116th Cong. § 712 (2020). In 2021, Congressman Raskin then introduced a bill that would also prohibit foreign-influenced corporations from spending on US elections. H.R. 6283 117th Cong. (2021). Information on other bills pending in other cities and states can be found at *Challenging Foreign Influence in Elections*, FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org/foreign-influence/ (last visited Oct. 10, 2022).

42. 52 U.S.C. § 30121.

43. Bluman v. FEC, 800 F. Supp. 2d 281 (2011), *aff'd*, 565 U.S. 1104 (2012); *see also* United States v. Singh, 924 F.3d 1030, 1042 (9th Cir. 2019), *vacated sub nom.* Azano Matsura v. United States, 140 S.Ct. 991 (2020) (upholding statute's applicability to state elections).

44. *See generally Bluman*, 800 F. Supp. 2d 281.

45. *Id.* at 288; *see also id.* at 287 (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

What we're proposing is a law that would apply the same principles to companies in which these entities hold a level of ownership sufficient for management to take notice. The one percent threshold might not sound like a lot, but for many publicly traded companies, it is the point of real investor influence. Professor John Coates, a corporate and governance expert at Harvard Law School and who provided testimony in support of the ordinance in Seattle and other proposed laws, explained that one percent voting shares give shareholders the ability to influence corporate decision making.[46] It's the place where boards of companies are going to listen and engage with them.

Professor Robert Jackson, who served as commissioner with the US Securities and Exchange Commission (SEC) from 2018 to 2020, has agreed that one percent shareholders wield influence over large public companies.[47] The SEC's own rules also support this conclusion that the one percent threshold of ownership is *at least* sufficient to give a shareholder influence over corporate decision making: prior to 2020, one threshold for presenting a shareholder proposal, which can have enormous sway over corporate policies, was one percent ownership; in part because this threshold was deemed too high to accurately gauge the ownership level at which a shareholder gained influence, the SEC modified this rule to eliminate the percentage threshold.[48]

These investors often don't need to exercise this sway directly. Once this threshold is met, executives become aware of who their big investors are and begin to make decisions with that in mind.

The law that we have proposed could go a long way to insuring that, even as our economy globalizes and companies benefit from foreign investment, our elections retain the ability to focus on the voice of the people who live here.

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46. Coates Letter, *supra* note 9, at 7; Coates et al., *supra* note 19, at 6 n.17.

47. Robert Jackson, Remarks at the Corporate Political Spending and Foreign Influence Forum (June 23, 2016) (transcript on file with the Federal Election Committee), https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Panel2-Complete.pdf ("[W]hat we're more interested in . . . is control of the corporate resources and for the reasons Professor Coates gave, 1% ownership in a public corporation could yield a significant amount of control and the way to think about this, I think, is that the corporation in this box with enormous resources and the interesting question is not whose money is it? . . . But the issue, the question is, who decides what happens with those resources? And the answer, in the case of a 1% shareholder of a very large public company is that, they'll be given a fair amount of attention.").

48. 17 C.F.R. § 240.14a-8(b) (2022); *SEC Adopts Amendments to Modernize Shareholder Proposal Rule*, U.S. SEC. & EXCH. COMM'N (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-220; SOZAN, *supra* note 10, at 32–33.