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Brendan W. Donckers, Chair
Hardeep Singh Rekhi, Vice Chair
Seattle Ethics & Elections Commission
PO Box 94729
Seattle, Washington 98124-4729

RE: Proposed ordinance to limit contributions to super PACs and political spending by foreign-influenced corporations

August 1, 2019

Dear Chairman Donckers and Vice Chairman Rekhi,

I write to you to express my opinion on two issues pertaining to an ordinance that has been proposed for consideration by the Seattle City Council. First, that U.S. Supreme Court constitutional precedent permits limits on contributions to "independent expenditure" PACs (super PACs), and the limits on political spending by foreign-influenced corporations in the form of "independent expenditures," electioneering communications, or contributions to super PACs, as provided in the proposed ordinance. Second, that I consider these bills to be valuable tools for protecting and preserving the integrity of elections, including Seattle's, from the pervasive growth and corrosive influence of super PACs, and 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).

* Title and university affiliation included for identification purposes only.

Constitutionality of limiting contributions to super PACs

Super PACs, a relatively recent development in campaign financing, are political committees that can accept unlimited contributions and make unlimited expenditures. With no limit on how much money they can accept or spend, super PACs have come to haunt not only our national elections,[1] but our state and local elections as well.[2]

As described below, I believe a $5,000 limit on contributions to super PACs active in state and local elections is not only a common-sense solution, but is also consistent with U.S. Supreme Court precedent on the matter—including *Citizens United.*

Supreme Court precedent distinguishes legal limits on *contributions to* political campaigns and committees from limits on *expenditures* (spending by candidates, individuals, or outside entities). Broadly speaking, limits on contributions (including contributions to political committees) are subject to less scrutiny under the First Amendment than limits on expenditures.[3] As the Supreme Court explained in *Buckley v. Valeo*, writing a check to someone else to spend does not merit the full protection of "speech," and poses heightened risks of corruption. Thus, the Supreme Court has upheld limits on contributions to political committees in general.[4]

These principles were not altered by *Citizens United v. Federal Election Commission*,[5] which concerned limits on *expenditures*, or by any subsequent Court cases. In fact, to be clear, I believe that the decision reached by the Supreme Court in *Citizens United* was correct—*for the specific facts of that case* (involving the release of a movie through video-on-demand). However, as I have written, the opinion in *Citizens United* did contain some very loose and misguided language (what lawyers call "dictum," i.e., statements not necessary to the court's decision) about independent expenditures and corruption—language that could easily mislead a lower court.[6]

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[1] *See* Fredreka Schouten & Christopher Schnaars, "USA Today analysis: Rich Democrats surge past GOP in political giving," USA TODAY, Aug. 30, 2016, http://usat.ly/2cc0npZ.
[2] *See* Matt Rocheleau, "Super PACs spent heavily during first statewide election," BOSTON GLOBE, Mar. 27, 2015, http://bit.ly/2xvjXrm; *see also* Alex Roarty, "Super PACs' Next Target: Local Elections," THE ATLANTIC, May 18, 2015, http://theatln.tc/2cge7A1; Theodore Schleifer, "Super PACs coming to a city near you," CNN, May 19, 2015, http://cnn.it/2bEtUHf.
[3] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).
[4] *See* California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182 (1981).
[5] 558 U.S. 310 (2010).
[6] *See* Laurence H. Tribe, *Dividing* Citizens United: *The Case v. the Controversy*, 30 Const. Comm. 463 (2015).

And in fact, very shortly after the *Citizens United* decision was issued, a lower federal court in Washington, D.C., fell into this trap: In *SpeechNow.org v. Federal Election Commission*,[7] which was argued just days after the *Citizens United* decision, the U.S. Court of Appeals improperly extended *Citizens United* from the context of *expenditures* to the legally distinct context of *contributions.*

This decision was incorrect. In *SpeechNow*, the D.C. Circuit reasoned that contributions made to a political committee could not possibly create the actuality or appearance of corruption, so long as the political committee only used its funds for independent expenditures.[8] As set forth in a recent law review article that I co-authored with my colleagues Prof. Albert Alschuler of the University of Chicago Law School, Ambassador (ret.) Norman Eisen (former chief ethics counsel to President Barack Obama), and 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 since then.[9] *SpeechNow* departed from both *Buckley* and *Citizens United*, and improperly subjected contribution limits to the higher level of constitutional scrutiny that the Court currently applies to independent expenditures. In fact, the Supreme Court has specifically rejected the idea of judging the corrupting potential of a *contribution* based on how the money might ultimately be *used.*[10] And moreover, since *SpeechNow*, the D.C. Circuit's pronouncement that contributions to

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[7] 599 F.3d 686 (D.C. Cir. 2010) (en banc).

[8] *Id.* at 694.

[9] 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/; *see also* Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon, Citizens United, *and* SpeechNow, 67 Fla. L. Rev. 389, 474-76 (2015).

[10] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 155 (2003) (noting that "large soft-money contributions to national parties" had corrupting potential "*regardless of how those funds are ultimately used*") (emphasis added). A different part of the *McConnell* decision was overruled by *Citizens United.*

independent expenditure groups cannot corrupt or create the appearance of corruption has proven empirically wrong.[11]

Limiting contributions to independent expenditure PACs (super PACs) is entirely consistent with Supreme Court precedent. These contributions have no greater speech value, and hardly any less risk of corruption, than direct contributions to candidates. This is true even if the super PAC does not "coordinate" its advertising or other spending with the candidate, as a very large check to a super PAC is unquestionable of value to the supported candidate, and the contributor is free to discuss with the candidate exactly what s/he expects for the money.

Unfortunately, the U.S. Department of Justice decided not to appeal the *SpeechNow* decision to the Supreme Court, in large part on the theory that "the particularly limited nature of SpeechNow's contribution and expenditure practices means that the court of appeals' decision will affect only a small subset of federally regulated contributions."[12] The Supreme Court has never considered the question. Consequently, *SpeechNow* remains law in the D.C. Circuit for now. And just four weeks after *SpeechNow*, the Ninth Circuit adopted the D.C. Circuit's decision in the case *Long Beach Area Chamber of Commerce v. City of Long Beach*.[13] However, that hastily-

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[11] For example, 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*, *see* United States v. Menendez, 132 F. Supp. 3d 635 (D.N.J. 2015), *appeal dismissed in part*, 3d Cir. (Dec. 12, 2015), 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). And just recently, individuals in North Carolina were indicted in a bribery scheme involving contributions "through an independent expenditure committee, [given] in exchange for specific official action favorable to" the contributor. United States v. Lindberg, No. 5:19-CR-00022, ECF No. 3 (indictment) (W.D.N.C. May 18, 2019). 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 federal 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 much less) risk of corruption than "independent" expenditures in candidate races.

[12] Letter from Att'y Gen. Eric H. Holder, Jr., to Sen. Harry Reid (June 16, 2010), http://1.usa.gov/298RWaP.

[13] 603 F.3d 684 (9th Cir. 2010); *see also* Thalheimer v. City of San Diego, 645 F.3d 1109, 1117–21 (9th Cir. 2011).

reached decision remains available for reconsideration by a larger (en banc) panel of the Ninth Circuit, or of course by the U.S. Supreme Court.[14]

In sum, dollar limits on contributions to super PACs are constitutional under Supreme Court precedent. Furthermore, I believe that such limits, including those established by the proposed bills, could have been upheld even by the Court that issued the *Citizens United* decision, and the replacement of Justices Scalia and Kennedy by Justices Gorsuch and Kavanaugh respectively does not alter this. The U.S. Supreme Court has upheld limits on contributions to political action committees in the past, did not address such limits in *Citizens United*, and has never created a special loophole or exception for super PACs.

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 Constitution itself.[15] 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.[16] 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.[17] 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

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[14] Several other federal courts of appeals, considering challenges to pre-*SpeechNow* laws, have also followed the D.C. Circuit's lead.

[15] *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").

[16] 52 U.S.C. § 30121(a).

[17] *Bluman v. Fed. Election Comm'n*, 565 U.S. 1104 (2012) (mem.).

constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[18]

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.[19]

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 considerably smaller percent of equity held by foreign investors.[20] 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.[21] I believe Seattle's interest in self-government provides a comparable and constitutionally sufficient ground to support regulating 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.

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[18] *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.

[19] *See* Ellen Weintraub, "Taking on *Citizens United*," Mar. 30, 2016, N.Y. TIMES, https://nyti.ms/1qhmpKB.

[20] 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), https://judiciary.house.gov/_files/hearings/pdf/Tribe100203.pdf.

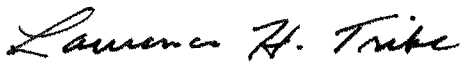
[21] *See* Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, http://bit.ly/2fOULSH.

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 super PACs and foreign corporate spending. I am confident that the U.S. Supreme Court would uphold both a limit on contributions to super PACs, and a ban on foreign-influenced corporations' independent expenditures, electioneering communications, or contributions to super PACs.

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

Sincerely,



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