FOREIGN THREATS, LOCAL SOLUTIONS: ASSESSING ST. PETERSBURG, FLORIDA'S "DEFEND OUR DEMOCRACY" ORDINANCE AS POTENTIAL MODEL LEGISLATION TO CURB FOREIGN INFLUENCE IN U.S. ELECTIONS

Brian Remler*

> "If taken seriously, our colleagues' assumption . . . would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans . . . ."
>
> —*Justice John Paul Stevens, dissenting in* Citizens United v. Federal Election Commission[1]
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> "Our holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures. . . . [W]e have no occasion to analyze the circumstances under which a corporation may be considered a foreign corporation for purposes of First Amendment analysis."
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> —*Judge Brett Kavanaugh,* Bluman v. Federal Election Commission[2]

I. INTRODUCTION

In October 2017, St. Petersburg, Florida made history by becoming the first American city to pass legislation ("the Ordinance") regulating campaign financing in its local elections by independent expenditure

 Executive Editor, *Stetson Law Review*, 2019–2020. Candidate for Juris Doctor, Stetson University College of Law, 2020. B.A., The University of North Carolina at Chapel Hill, 2012. Thank you to my Writing Advisor, Professor Lance Long, and my Notes & Comments Editor, Rachel King, for their feedback throughout the writing of this Article. Many thanks as well to Articles & Symposia Editor, Sean Mullen, and to all the Editors and Associates of *Stetson Law Review*, for their work in preparing this Article for publication.

1. 558 U.S. 310, 424 (2010).
2. 800 F. Supp. 2d 281, 292 n.4 (2011), *aff'd*, 565 U.S. 1104 (2012).

committees and foreign corporations.[3] At the time of the Ordinance's passage, the city was embroiled in the most expensive mayoral race in its history, with $1.9 million of the total $3 million raised between the top two candidates attributed to independent expenditure committees, or "Super PACs."[4] The Ordinance itself took over a year to pass from its introduction date and was the source of heated legal debate.[5] As it moved through the legislative process, the City of St. Petersburg ("the City") gained the attention and intervention of nationally recognized legal scholars and policymakers, including Professor Laurence Tribe of Harvard Law and Ellen Weintraub of the Federal Election Commission ("FEC").[6] Many predict the Ordinance will serve as a test-case that will eventually head to the Supreme Court, forcing the Court to rule on the validity of the D.C. Circuit's ruling in *SpeechNow.org v. Fed. Election Comm'n*,[7] which opened the door to unchecked Super PAC spending.[8]

Rather than wade into the debate surrounding the constitutionality of the Ordinance's limits on contributions to Super PACs[9]—which ultimately hinges on the validity of the D.C. Circuit's decision in *SpeechNow*—this Comment instead examines the constitutional questions raised by the Ordinance's foreign spending provisions and predicts arguments that will be made upon judicial review. The Supreme Court appears to have affirmed that the existing statutory ban on political contributions by foreign nationals[10] extends to "foreign corporations."[11] However, neither Congress, the FEC, nor the courts have provided any guidance on how to define such an entity.[12] The Ordinance

3. Charlie Frago, *St. Petersburg Council Acts to Limit Big Money in City Elections*, TAMPA BAY TIMES, Oct. 6, 2017, http://www.tampabay.com/news/localgovernment/council-will-look-at-limiting-big-money-in-st-pete-elections/2339908.

4. Mitch Perry, *Rick Kriseman 'Disappointed' by $3M Price Tag for St. Pete Mayor's Race*, FLORIDA POLITICS (Oct. 26, 2017), http://floridapolitics.com/archives/247904-rick-kriseman-disappointed-3m-price-tag-st-pete-mayors-race; *see also* Frago, *supra* note 3 ("[T]he current mayoral race between incumbent Rick Kriseman and former Mayor Rick Baker was offered as a prime exhibit of why the city needed to reign in campaign spending.").

5. Frago, *supra* note 3 (noting that "[f]or much of the debate, [Ordinance supporter John] Bonifaz and the city's top litigator, Joseph Patner, traded blistering legal arguments").

6. *Id.* (noting that "[n]ational constitutional scholars such as Harvard University's Laurence Tribe . . . sent testimony in support"). The letters and memoranda from Tribe & Weintraub, among others, are available at https://freespeechforpeople.org/st-petersburg-campaign/.

7. 599 F.3d 686, 698 (D.C. Cir. 2010).

8. Frago, *supra* note 3.

9. *See infra* pt. IV.

10. 52 U.S.C. § 30121 (2018); *see infra* pt. II.A & note 90.

11. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 292 n.4 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

12. *See infra* pt. III.B.

seeks to provide clarity in this realm, laying out various thresholds for defining corporations with different degrees of foreign ownership and accordingly restricting their abilities to contribute to local political campaigns.[13]

As it turns out, the timing of the Ordinance's passage could not have been more opportune, as the problem of foreign spending in U.S. elections attracted significant media attention in the wake of the 2016 presidential election.[14] Within the larger discussion of the role that social media advertisements played in influencing the election's outcome, some legislators have sought to resolve any ambiguity as to whether such ads fall within existing campaign finance regulations.[15] Further, Special Counsel Robert Mueller's investigation placed substantial focus on illegal foreign political spending, evidenced by indictments alleging violations of both the Bipartisan Campaign Reform Act's ("BCRA") ban on spending by foreign nationals and the Foreign Agent Registration Act.[16] With the 2020 election approaching, the time is ripe for legislators—at all levels—to act in order to promote clarity, and aid enforcement, of existing campaign finance regulations related to foreign political spending.

This Comment assesses the Ordinance as potential model legislation that other states and local entities can enact to protect their elections from foreign influence, focusing primarily on whether the Ordinance's foreign spending provisions are likely to survive constitutional scrutiny. Part II starts by exploring the history of campaign finance law in the U.S. generally and expounding on the current legal framework underlying federal election regulation, paying most attention to regulations regarding foreign spending. Part III

13. *See infra* pt. IV.

14. *See, e.g.*, Bob Bauer, *Why Russian Money Ends Up in U.S. Elections*, N.Y. TIMES, Aug. 6, 2018, https://www.nytimes.com/2018/08/06/opinion/russian-interference-campaign-finance-elections.html ("In 2016 . . . one of the larger political organizations active in the presidential election . . . was organized and run by a foreign government.").

15. Sarah Posner, *What Facebook Can Tell Us About Russian Sabotage of Our Election*, WASH. POST, Sept. 27, 2017, https://www.washingtonpost.com/blogs/plum-line/wp/2017/09/27/what-facebook-can-tell-us-about-russian-sabotage-of-our-election/?utm_term=.0d8e7c0d0f47 ("[Democratic co-chair of the Senate Intelligence Committee Mark] Warner . . . is working on legislation that would subject ads on Facebook to the same campaign finance disclosure requirements imposed on television and radio ads.").

16. *See, e.g.*, Indictment ¶¶ 25–26, 48–49, *United States v. Internet Research Agency LLC*, https://www.justice.gov/file/1035477/download (D.D.C. Feb. 16, 2018) (describing the FEC's ban on political spending by foreign nationals and the Internet Research Agency's fraudulent payments for social media advertisements). While the indictment does not explicitly charge the organization and associated individuals with violations of the above statutes, it references these violations within the larger charge of Conspiracy to Defraud the United States. *Id.*

surveys the current campaign finance landscape and the growing problem of unchecked and unknown political spending. Part IV examines the Ordinance's operative parts and how they interact with one another. Finally, Part V explores the constitutional issues the Ordinance's foreign spending provisions raise and predicts arguments that will be made if—or, more likely, when—the Ordinance is subjected to judicial review.

II. HISTORY OF UNITED STATES CAMPAIGN FINANCE LAW & LEGAL FRAMEWORK

This Part begins by examining the early emergent history of campaign finance law in the United States, from the early twentieth century to the passage of the Bipartisan Campaign Reform Act[17] ("BCRA") in 2002. It goes on to briefly examine the landmark decisions of *Citizens United*[18] and *SpeechNow*,[19] and the impacts they have had on the campaign finance landscape. It concludes with an in-depth examination of *Bluman v. Federal Election Comm'n*[20]—a seminal case on the constitutionality of restricting political speech by foreign nationals—and the questions the case explicitly left open.

A. From the 1907 Tillman Act to the 2002 BCRA & Its Judicial Construction

The twentieth century saw Congress take the first major actions to regulate campaign finance. In 1907, the Tillman Act was signed into law.[21] This legislation was the first to distinguish between spending by individuals and corporate entities, and it prohibited corporations and banks from making any financial contributions connected to elections.[22]

17. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.
18. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
19. SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686 (D.C. Cir. 2010).
20. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).
21. Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1998). The legislation was spurred by President Teddy Roosevelt's State of the Union Addresses in 1905 and 1906, in which he called for a complete ban on campaign contributions by corporations: "Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose directly or indirectly." P. Gordon Stafford, *The Federal Corrupt Practices Act, A Brief History with Comment*, 16 BUS. LAW 702, 702–03 (1961) (quoting 41 Cong. Rec. 22 (Dec. 4, 1906)).
22. Roy B. Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After* First National Bank of Boston v. Bellotti, 28 AM. U. L. REV. 149, 150 (1979). Birnbaum notes that this

The next campaign finance legislation, the Federal Corrupt Practices Act ("FCPA"), was enacted nearly twenty years later in 1925.[23] While the heart of the statute's language was nearly identical to the Tillman Act,[24] the FCPA nonetheless made a few significant modifications. It substituted the broad term "contribution" for "money contribution," imposed penalties on *recipients* of prohibited contributions in addition to contributors, and brought additional parties within the legislation's scope.[25] The FCPA thus subtly but significantly expanded the reach of federal campaign finance regulation.

The next major actions came in the 1940s, as Congress began to extend the existing restrictions on corporate institutions to encompass labor unions. In 1943, the passage of the War Labor Disputes Act ("WLDA") included a provision amending the FCPA to include labor unions.[26] Following the WLDA's expiration, Congress passed the Taft-Hartley Act in its place, bringing expenditures within the scope of regulation and extending prohibitions to cover primary elections for the first time.[27]

The 1960s brought the first significant campaign finance legislation related to foreign nationals. In 1966, Congress passed Pub. L. No. 89-486, which prohibited foreign government agents and entities from contributing to political candidates.[28] Spurred by the Committee on Foreign Relations' "aware[ness] of persistent efforts by numerous agents of foreign principals to influence the conduct of U.S. foreign and domestic policies,"[29] the legislation made a number of amendments to

legislation was passed at a time when the country faced similar challenges to today: "The Tillman Act was enacted in an era of industrial expansion and *the concentration of wealth in the hands of a few*." *Id.* (emphasis added). The statute itself made it "unlawful for any national bank, or any corporation . . . to make a money contribution in connection with any election to any political office." Tillman Act of 1907, Pub. L. No. 59-36, ch. 420, 34 Stat. 864, 864.

23. Philip E. Garber, *Taft-Hartley: Section 304—A Legislative History*, 7 INDUST. & LAB. REL. F. 59, 62 (1970).

24. The legislation maintained the prohibition on banks and corporations from "mak[ing] a contribution in connection with any election to any political office." *Id.* at 61.

25. Birnbaum, *supra* note 22, at 150.

26. Stafford, *supra* note 21, at 704. Interestingly, at this point, neither corporations, banks, nor unions were prohibited from making contributions in primary elections, as "[t]he act had no applicability to primaries." *Id.* at 705.

27. Garber, *supra* note 23, at 63.

28. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (describing the evolution of campaign finance restrictions on foreign nationals).

29. S. REP. NO. 143, at 2 (1965) [hereinafter Senate Committee Report].

the Foreign Agents Registration Act of 1938.[30] Besides prohibiting campaign financing by agents of foreign principals,[31] the comprehensive legislation also sought to broaden the scope of activities that would trigger disclosure.[32]

The passage of the Federal Election Campaign Act ("FECA") in 1971—and, more impactfully, its subsequent 1974 amendments—began the development of our country's modern campaign finance regulatory regime.[33] This legislation put in place contribution limits[34] and expenditure limits, imposed record-keeping requirements on Political Action Committees ("PACs"), and created the Federal Election Commission to enforce its provisions.[35] Most importantly for the purposes of this Comment, FECA expanded the existing ban on contributions by agents of foreign governments to encompass *all* foreign nationals.[36]

FECA's constitutionality was challenged in the landmark case of *Buckley v. Valeo*.[37] The Supreme Court noted that political expression was inherently protected by the First Amendment, and it accordingly applied strict scrutiny to the FECA provisions at issue, most notably the limitations placed on contributions and expenditures.[38] Ultimately, the majority simultaneously upheld FECA's contribution limits while striking down the Act's limitations on expenditures, noting a crucial distinction between the two. While contributions could be permissibly regulated because such regulation served the Government's compelling interest in preventing corruption or the appearance thereof, the Court

30. Pub. L. No. 75-583, ch. 327, 52 Stat. 631, 631. This Act, officially titled "An Act to Require the Registration of Certain Persons Employed by Agencies to Disseminate Propaganda in the United States and For Other Purposes," provided the first statutory definition of a "foreign principal" and required disclosure, in the form of a "registration statement," of certain employment contracts. *Id.*

31. Senate Committee Report, *supra* note 29, at 2. The definition of "agents of foreign principals" was intended to "cover[] persons who are either directly or indirectly subject to the direction or control of a foreign principal." *Id.* at 6. The Act also slightly modified the above definition of foreign principal by excluding certain domestic individuals. *Id.*

32. *See id.* at 5 (noting that "the present act's disclosure provisions have through the years been too narrowly enforced with the emphasis placed on subversive or potentially subversive agents").

33. Buckley v. Valeo, 424 U.S. 1, 6 (1976).

34. The Act limited contributions per election to $1,000 from individuals or groups and $5,000 for Political Action Committees, and it also imposed an aggregate limitation of $25,000 per individual donor. *Id.* at 7, 13–14 n.12.

35. *Id.* at 7.

36. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). Interestingly, this ban only applied to contributions to individual candidates; contributions by foreign nationals to political parties were still permitted. *Id.*

37. 424 U.S. 1, 15 (1976).

38. *Id.* at 16.

held that independent expenditures "d[id] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[39] Accordingly, FECA's independent expenditure limits did not survive strict scrutiny and were held unconstitutional.[40]

Two years after *Buckley*, the Supreme Court affirmed that the speech protections outlined in the decision applied to corporations.[41] In *First National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts law prohibiting corporate expenditures and contributions to campaigns involving referenda that did not implicate the corporation's business interests.[42] The Court framed the question at issue as whether the statute "abridge[d] expression that the First Amendment was meant to protect," and it accordingly applied a strict scrutiny standard to determine whether the statute was narrowly tailored to further a compelling state interest.[43] Finding the statute unconstitutional,[44] the Court "announced a novel doctrine that corporate speech is not unprotected by the [F]irst [A]mendment"[45]:

> We . . . find no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove . . . a material effect on its business or property.[46]

Thus, by the end of the 1970s, the foundations of our modern electoral landscape were starting to take shape. Contribution limits were in place and permitted, but expenditures—whether by individuals or corporations—were considered speech and thus could not be regulated.[47] Foreign nationals were prohibited from contributing to

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39. *Id.* at 46.
40. *Id.* at 51.
41. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).
42. Birnbaum, *supra* note 22, at 152.
43. *Bellotti*, 435 U.S. at 776, 786.
44. *Id.* at 794.
45. Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on* First National Bank of Boston v. Bellotti, 59 S. CAL. L. REV. 1227, 1227 (1986). Schneider notes that "the case has received less attention than it deserves. As the Court's leading consideration of the speech rights of corporations, it is a landmark in first amendment law." *Id.* at 1228.
46. *Bellotti*, 435 U.S. at 784. The Court's holding was not unanimous, as Justice White wrote a dissent criticizing the opinion: "The Court . . . holds that the First Amendment guarantees corporate managers the right to use not only their personal funds, but also those of the corporation, to circulate fact and opinion irrelevant to the business placed in their charge." *Id.* at 803 (White, J., dissenting).
47. Buckley v. Valeo, 424 U.S. 1, 58–59 (1976); *Bellotti*, 435 U.S. at 776.

political candidates, though contributions to political parties were still permitted.[48] And the nascent FEC was tasked with ensuring that everyone followed the applicable rules.[49]

While most campaign finance reform since the FCPA had focused on curtailing the influence of domestic organizations like corporations, banks, and labor unions, a scandal in the Clinton Administration and a subsequent Senate investigation shifted focus back to foreign electoral influence in the 1990s.[50] The incident was sparked by media interest in connections between a high-level Democratic National Committee ("DNC") official and the Asian business community.[51] This media interest triggered an in-depth Senate investigation that resulted in a nearly 10,000 page report released in 1998, which scrutinized evidence that China and other parties had made efforts to corrupt DNC officials through campaign donations.[52] While this controversy led some figures to call for impeachment,[53] its most lasting impact would be the renewed focus it brought to campaign finance reform.

Four years after the report's release, Congress passed the Bipartisan Campaign Reform Act ("BCRA") (commonly known as the McCain–Feingold Act), bringing the first major legislative changes to the United States' campaign finance regime since FECA.[54] While the BCRA made a number of small modifications to existing election law, it also added two novel prohibitions: one dealt with the problem of "soft money" donations to political parties, and the other implicated the use of treasury dollars by unions and corporations for the purpose of creating electioneering communications.[55] Arguably the most major change, however—and the one which appears to be a direct result of the

48. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

49. *Buckley*, 424 U.S. at 7.

50. *See* S. Comm. on Governmental Affairs, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. REP. NO. 105-167, at 3, 7 (1998) (expanding on controversy and recommending responses).

51. Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 505 (1997).

52. S. REP. NO. 105-167, at 4619–21.

53. *See, e.g.*, Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1 (1997) (laying out arguments for impeachment of then-President Clinton that include allegations of "illegal solicitations" and "illegal fund-raising"). Readers may note this article was published before President Clinton's 1998 affair with Monica Lewinsky, which eventually led to his impeachment and acquittal by the House of Representatives.

54. Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 253 (2003) (describing the BCRA as "the most sweeping reform of the federal campaign finance system in twenty-five years").

55. *Id.*

aforementioned Clinton-DNC scandal—was the Act's expansion of the existing ban on donations to *candidates* by foreign nationals to encompass donations to political *parties* as well.[56] This ban, currently codified at 52 U.S.C. § 30121 (2018), is the basis for the St. Petersburg Ordinance's novel efforts to regulate foreign money in its elections, which will be explored below.[57]

The BCRA's passage can be seen as a high-water mark for election regulation. Legislators worked across the aisle to make meaningful reform to safeguard our elections' integrity from both domestic and foreign actors who might attempt to undermine it.[58] However, this moment would not last long, as the water was soon to be drained in 2010 by two landmark decisions that would dramatically reshape our country's electoral landscape.

B. The *Citizens United* and *SpeechNow* Decisions & Their Impacts

In 2010, a major challenge to the BCRA came in the form of *Citizens United v. Fed. Election Comm'n*.[59] Petitioners challenged a number of the BCRA's provisions, including its limits on independent expenditures by corporations.[60] The Court overruled the BCRA's prohibitions on independent expenditures by corporations and its limits on the same by individuals, holding that "the Government cannot restrict political speech based on the speaker's corporate identity."[61] The Court did not throw the baby out with the bathwater, however, as it upheld the Act's disclaimer and disclosure provisions as applied to specific circumstances.[62] While *Citizens United*, coupled with the slogan "Corporations Are Not People," has become a rallying cry of sorts for

56. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). Contributions by foreign nationals to groups pursuing issue advocacy were still permitted under the new legislation. *Id.* (referencing *Wisconsin Right to Life v. Fed. Election Comm'n* as providing the judicial test to demarcate issue advocacy from electioneering).

57. *See infra* pt. IV.

58. *Bipartisan Campaign Reform Act of 2002: Roll Call Vote No. 54*, 148 CONG. REC. S2118 (2002) (showing that of the sixty "yes" votes for the BCRA, forty-nine were cast by Democrats and eleven by Republicans).

59. 558 U.S. 310, 321 (2010).

60. *Id.*

61. *Id.* at 346; Albert W. Alschuler, *Limiting Political Contributions after* McCutcheon*,* Citizens United*, and* SpeechNow, 67 FLA. L. REV 389, 412 (2016) [hereinafter Alschuler, *Limiting Contributions*] (quoting *Citizens United*, 558 U.S. at 346).

62. *Citizens United*, 558 U.S. at 367–68. The Court's upholding of these provisions likely bodes well for the Ordinance's disclosure requirements, described *infra* pt. IV.

many campaign-finance-reform advocates,[63] the most impactful changes to our country's election landscape were yet to occur.

The tsunami of money that has recently inundated our elections started with a small tremor, coming in the form of the D.C. Circuit's decision in *SpeechNow.org v. Fed. Election Comm'n*.[64] Appellants, a non-profit advocacy group, had brought a declaratory judgment action challenging the BCRA's limits on contributions by individuals to PACs.[65] Seizing on the *Citizens United* Court's holding that "as a matter of law . . . independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption," the D.C. Circuit dramatically extended that decision by striking down limits on *contributions* to groups that *make* independent expenditures.[66] One practical result of the decision was the birth of groups ubiquitous in our modern elections: independent expenditure committees, also known as Super PACs. As a consequence, spending in the 2012 federal elections nearly tripled the amount spent four years prior.[67]

C. *Bluman v. Fed. Election Comm'n*: The Constitutional Status of Campaign Finance Restrictions on Foreign Nationals and Unresolved Issues

Bluman v. Fed. Election Comm'n[68] involved a challenge to the constitutionality of 52 U.S.C. § 30121, as modified through the BCRA.[69] Plaintiffs, foreign citizens living and working in the United States as temporary residents, sought to contribute funds to candidates, parties, and issue-based advocacy groups, and they also sought to distribute flyers in support of candidates.[70] Thus, the challenge implicated a number of issues: both contributions and independent expenditures related to parties, candidates, and issue-based groups were at stake. Plaintiffs and the FEC argued at length over what level of scrutiny the

63. *See, e.g.*, *Overturn* Citizens United, THE STAMP STAMPEDE, https://www.stampstampede.org/money-out-voters-in/overturn-citizens-united/ (last visited Feb. 6, 2020) ("We need to amend the U.S. Constitution to declare that . . . [c]orporations are not people.").

64. 599 F.3d 686, 698 (D.C. Cir. 2010).

65. *Id.* at 689.

66. *Id.* at 694 (holding that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption").

67. Alschuler, *Limiting Contributions*, *supra* note 61, at 418. The ramifications of the *SpeechNow* decision are more fully explored *infra* pt. III.

68. 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

69. *Id.* at 283.

70. *Id.* at 282–83, 85.

Court should apply to the provisions.[71] However, then-Judge Kavanaugh would leave this question and others unresolved while providing a legal framework to analyze statutory limits on foreign nationals' speech in the context of the democratic process.

Judge Kavanaugh's opinion put forth four main points in this framework. First, it distinguished the issue of regulating foreign speech from other campaign finance related questions by noting that the Government has a different interest at stake: when foreign speech is at issue, the Government's interest is not in preventing corruption, but rather it "is in preventing foreign influence over U.S. elections."[72] Second, the court found that Supreme Court rulings have universally held that "the government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'"[73] Third, it noted that because foreign nationals are accordingly not afforded a right to participate in elections, the United States has a compelling interest in limiting their influence in the democratic process.[74] Finally, the court concluded that the statute at issue was narrowly tailored because the ban on foreign nationals achieves the compelling interest of excluding non-Americans from democratic participation and it does not include lawful permanent residents in its definition.[75]

Judge Kavanaugh's opinion nonetheless expressly limited the reach of the court's holding and left a number of questions unanswered. First, as to the limitations, the court noted that its holding did not address the question of whether Congress or other legislatures *could* prohibit foreign nationals from engaging in types of political speech other than those covered by the statute at issue.[76] Thus, the question of whether, say, a city could regulate foreign spending in local ballot initiatives was left unresolved by the court. The court also noted that any criminal violation of the statute would require a willful mens rea element.[77] Accordingly, a foreign resident without knowledge of the law would not be criminally liable for printing and distributing flyers for an election in good faith. Finally, although the court noted in its reasoning that the ban as written did not apply to lawful permanent residents, it did not

71. *Id.* at 285–86. Arguments made by both sides on this issue are examined *infra* pt. IV.B.
72. *Id.* at 288 n.3.
73. *Id.* at 287.
74. *Id.* at 288.
75. *Id.*
76. *Id.* at 292.
77. *Id.*

address whether Congress could lawfully extend it to encompass those individuals.[78]

For the purpose of this Comment's analysis of the Ordinance, two crucial questions were left unresolved by the court. First, what level of scrutiny applies to statutes regulating foreign spending in elections? The court assumes for argument that strict scrutiny applies, but it expressly avoids answering that question.[79] Second, what circumstances would permit a corporation to "be considered a *foreign* corporation for purposes of First Amendment analysis"?[80] The second question is one that the St. Petersburg Ordinance seeks to tackle, while resolution of the first will be crucial in determining whether the Ordinance's attempt to do so is within the bounds of the Constitution. Before addressing these issues, however, this Comment will assess another question: why is legislation like the Ordinance necessary in the first place?

III. CAMPAIGN FINANCE TODAY: THE WAVE OF MONEY OVERTAKING ELECTIONS

While the previous Part examined the historical background and recent legal developments of campaign finance regulation, this Part explores the practical changes that those developments have brought. First, it describes the development of Super PACs since the *SpeechNow* decision and shows how spending is moving from the federal to the local level. It goes on to elucidate how these developments have created difficulty in detecting campaign spending by foreign-owned or foreign-influenced corporations, a problem that the St. Petersburg Ordinance seeks to rectify.

A. The Rise of Super PACs: How Undisclosed Spending Happens & Its Impacts

As mentioned above, the *Citizens United* and *SpeechNow* decisions created a noticeable shift as early as 2012, and this trend of increased spending has continued unabated. The magnitude is staggering: while the top one hundred donors to federal candidates provided only $73

78. *Id.*

79. *Id.* at 285–86 ("[T]he debate over the level of scrutiny is ultimately not decisive here because we conclude that § 441e(a) passes muster even under strict scrutiny.").

80. *Id.* at 292 n.4.

million in 2010, a mere six years later that total increased over ten-fold to $900 million.[81]

This trend of increased outside spending has already trickled down to the state level. For example, in Georgia's 2017 Special Election to fill the congressional seat of Tom Price, President Trump's nominee for Secretary of Health and Human Services, total campaign spending in the race topped $25 million.[82] Further, thirty-seven of the forty-two groups that helped spend those funds were based outside of the state.[83] Another special election that same year, in the much less populous state of Utah, drew nearly $1 million in out-of-state Super PAC spending.[84]

The next—and final—destinations that Super PAC money is moving toward are county and municipal elections. In 2014, over $150,000 was spent to influence the outcome of a school board race in Elizabeth, New Jersey—a district with a student population numbering a mere 25,000.[85] In another example, the top three spending groups in Philadelphia's 2015 mayoral election were all Super PACs.[86] Municipalities throughout Orange County, California, saw independent expenditures nearly triple the money spent by candidates' official campaigns.[87] However, arguably the most egregious example came from Austin, Texas, in 2016, where the two major ride-sharing companies Uber and Lyft poured a staggering $9.1 million into Super PACs in an effort to pass a local ballot measure aiming to overhaul regulations on their industry.[88]

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81. Lawrence Norden et al., *How Citizens United Changed Politics and Shaped the Tax Bill*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCH. OF LAW. (Dec. 14, 2017), https://www.brennancenter.org/blog/how-citizens-united-changed-politics-and-shaped-tax-bill.

82. Lateshia Beachum, *Out-of-State Interests Spent $26.2 Million on Georgia Special Election*, NBC NEWS (June 20, 2017), https://www.nbcnews.com/politics/congress/out-state-interests-spent-26-2-million-georgia-special-election-n774366.

83. *Id.*

84. Courtney Tanner, *Super PACs Dump $853,000 into Utah Special Election to Replace Chaffetz*, THE SALT LAKE TRIBUNE, Aug. 10, 2017, https://www.sltrib.com/news/politics/2017/08/10/super-pacs-dump-853000-into-utah-special-election-to-replace-chaffetz/.

85. Fredreka Schouten, *Federal Super PACs Spend Big on Local Elections*, USA TODAY, Feb. 25, 2014, https://www.usatoday.com/story/news/politics/2014/02/25/super-pacs-spending-local-races/5617121/.

86. Alex Roarty, *Super PACs' Next Target: Local Elections*, THE ATLANTIC (May 18, 2015), https://www.theatlantic.com/politics/archive/2015/05/super-pacs-next-target-local-elections/435639/.

87. Tomoya Shimura & Joseph Pimentel, *PAC Money Overtaking City Elections, with $2.4 Million Spent in Irvine, Anaheim Alone*, ORANGE COUNTY REGISTER, Nov. 5, 2016, https://www.ocregister.com/2016/11/05/pac-money-overtaking-city-elections-with-24-million-spent-in-irvine-anaheim-alone/.

88. Nolan Hicks, *Prop 1 Campaign Crosses $9 Million Threshold*, AUSTIN-AMERICAN STATESMAN, May 9, 2016, http://cityhall.blog.statesman.com/2016/05/09/prop-1-campaign-crosses-9-million-threshold/.

While increased spending can be viewed as a predictable consequence of courts exempting independent expenditures from campaign finance regulation, the remainder of this Part examines a less predictable—yet arguably more impactful—result of the dual decisions of *Citizens United* and *SpeechNow*.

B. The Growing Problem of Foreign Spending and the Difficulties of Detecting It

Besides opening the floodgates for virtually unlimited and undisclosed campaign spending by individuals and corporations, the new election landscape has simultaneously cast a veil over the influence that foreign spending is having on our elections. Justice Stevens predicted this effect in 2010; dissenting in *Citizens United*, he expressed a strong concern that the ruling "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans."[89] While the Court's affirmation of *Bluman* dispelled that concern in the abstract, the Court has yet to provide any guidance on what constitutes a foreign corporation[90]—accordingly, any legislative efforts to define and regulate foreign corporate spending will be made in the realm of constitutional uncertainty. Neither has the FEC itself stepped in to fill the void; while Commissioner Ellen Weintraub has made multiple attempts to begin rulemaking on this issue—including one as recently as May 2018—the Commission has yet to proffer an official Notice of Proposed Rulemaking on the subject.[91]

This lack of clarity has created a situation where we simply do not, and cannot, know how large a role foreign money and influence are playing in our elections.[92] While foreign nationals continue to be statutorily barred from making candidate-related contributions or

89. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424–25 (2010) (Stevens, J., with Ginsburg, Breyer, and Sotomayor, JJ., concurring in part and dissenting in part).

90. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 292 n.4 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) ("Our holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures prohibited by [52 U.S.C. 30121]. Because this case concerns individuals, *we have no occasion to analyze the circumstances under which a corporation may be considered a foreign corporation for purposes of First Amendment analysis*." (emphasis added)).

91. Ellen L. Weintraub, *Rulemaking Proposal to Combat Foreign Influence in U.S. Elections*, FEC (May 17, 2018), https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-26-a.pdf.

92. Douglas M. Spencer, *Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals*, 47 STETSON L. REV. 225, 229–30 (2018).

expenditures,[93] the current state of campaign finance law allows groups to obfuscate the original source of contributions by funneling donations through "dark money" or "grey money" groups that are not required to fully disclose their donors.[94] For example, while independent expenditures of $250 or more are generally required to be disclosed, 501(c) organizations are exempted from this requirement.[95]

While the problem of foreign-controlled corporations unlawfully influencing elections prompted Congressional attempts to legislate on the subject every year from 2013 to 2017, not a single federal entity has yet provided guidance on what constitutes a "foreign-controlled" or "foreign-influenced" entity.[96] This lack of guidance has created a void that the St. Petersburg Ordinance, introduced below, seeks to fill.

IV. THE ST. PETERSBURG "DEFEND OUR DEMOCRACY" ORDINANCE

On October 5, 2017, St. Petersburg passed a historic ordinance regulating political spending in its municipal elections.[97] The legislation, backed by the St. Petersburg chapter of the League of Women Voters and the national advocacy group Free Speech for People, garnered most attention because of its provisions imposing limits on contributions to PACs.[98] Indeed, this view of the Ordinance as a "rebuke to *Citizens United*" consumed much of the debate and media coverage.[99] However, this perception oversimplifies the legislation and the potential benefits it can bring to campaign finance law.

Before introducing the Ordinance, it is important to note the source of the City's authority to enact legislation regulating its local elections. The power of localities to exercise such authority directly depends on what powers their parent state confers on them, and states differ greatly

93. 52 U.S.C. § 30121 (2018). This ban has been in place since the 2002 Bipartisan Campaign Reform Act, which itself was formulated in response to an investigation by the Senate Committee on Governmental Affairs into potential corrupting influence of foreign donations to the Democratic Party during the Clinton campaign. *Bluman*, 800 F. Supp. 2d at 283–84.

94. Spencer, *supra* note 92, at 235–36.

95. *Id.* at 234.

96. Daniel Murner et al., *Election Law Violations*, 55 AM. CRIM. L. REV. 1001, 1016 (2018).

97. Frago, *supra* note 3.

98. *Id.* ("The 6–2 vote by the City Council serves as a rebuke to *Citizens United*. . . . The council's vote . . . seeks to limit how much money individuals can give to PACs that seek to influence city elections."). Much attention in the debate leading up to the Ordinance's passage focused on whether it would survive a legal challenge, and many predict that the Ordinance could lead to a test case in front of the Supreme Court. *Id.* Indeed, John Bonifaz, the director of Free Speech for People, noted that one of the reasons St. Petersburg was selected was the Eleventh Circuit's silence on the issue decided in *SpeechNow*. *Id.*

99. *See, e.g.*, *id.*

in this regard.[100] Florida's Constitution provides broad authority to its municipalities for conducting their governmental affairs: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government . . . and may exercise any power for municipal purposes except as provided by law."[101] Statutory law further provides that with respect to conducting municipal elections, Florida municipalities are free to adopt provisions, so long as they do not "conflict[] with or exempt[] a municipality from any provision in the Florida Election Code that expressly applies to municipalities."[102] Thus, Florida cities like St. Petersburg are empowered to adopt provisions that supplement state election law, so long as such supplementary provisions do not conflict with existing state law.

St. Petersburg's Ordinance effectively has three operative parts: (1) Disclosure Requirements; (2) Contribution Limits; and (3) Foreign-Spending Regulation. Although this Comment will only assess the constitutional issues presented by the Foreign-Spending provisions, it details all three of these operative parts below.

A. Disclosure and Disclaimer Requirements

The Ordinance's disclosure and disclaimer requirements are arguably its least radical provisions, as evidenced by the lack of debate surrounding their passage in City Council's chambers.[103] Many of the disclosure requirements supplement pre-existing requirements in Florida's state election code, merely demanding that any reports required to be filed with the Secretary of State also be filed with St. Petersburg's city clerk.[104] The Ordinance also imposes two additional disclosure requirements: (1) whether any donor has a contract with the city, or expects to bid on such a contract, that is valued (or expected to

100. BRENNAN CTR. FOR JUSTICE, WRITING REFORM E-1 (Ciara Torres-Spelliscy ed.), *available at* http://ssrn.com/abstract=1729827.

101. FLA. CONST. art. VIII, § 2(b).

102. FLA. STAT. § 100.3605 (2019).

103. *St. Petersburg City Council Meeting*, at 6:12:35–6:13:10 (Oct. 5, 2017), http://www.stpete.org/boards_and_committees/recorded_city_meetings.php (Councilman Kennedy stating the St. Petersburg legal team's opinion that the disclosure provisions of the Ordinance do not pose any constitutional issues) [hereinafter October City Council Meeting].

104. ST. PETERSBURG, FL., CODE OF ORDINANCES §§ 10-71, 10-73, 10-74 (2017). It appears that one reason for the Ordinance's supplementation of existing state law was to avoid any potential arguments based on conflict preemption by state law. *See* October City Council Meeting, *supra* note 103, at 5:40:25–5:40:50 ("[W]e've structured this whole ordinance . . . to mirror the state requirements as much as possible to prevent any argument that you couldn't comply with [both].").

be valued) at $5,000[105] or more;[106] and (2) if the donor is a Foreign-Influenced Business Entity ("FIBE").[107]

The Ordinance's disclaimer requirements are similarly premised on existing Florida law,[108] although they go further than state law in terms of what they require. For any political advertisements displayed within the city limits, the following disclaimers are required: (1) if the name of any entity is required to be disclosed by existing statute, then the advertisement must also disclose the name of an individual who is an officer of that entity; and (2) advertisements paid for by an outside spending group must include the names of its top three donors, defined as the three largest contributors who "have each contributed an aggregate amount of $5,000 or more."[109]

B. Contribution Limits

While the Ordinance's contribution limits generated much debate on their constitutionality, their operation is relatively straightforward. The Ordinance effectively imposes a limit on contributions to PACs of $5,000 per person per year, although it does so by preventing such groups from *using* any portions of contributions that exceed that limit.[110] These limits only apply to those falling within the Ordinance's definition of "outside spending groups": organizations that (1) make or solicit candidate-related expenditures, (2) accept contributions that are designated for candidate-related expenditures, or (3) expressly or impliedly mention the City in a solicitation for contributions.[111] To avoid any problems of notice to potential donors, treasurers of groups covered by the above definition are required by the Ordinance to advise their donors of these limits.[112]

105. This number was originally set at $1,000 before being amended to this amount at the suggestion of Councilman Karl Nurse. *See* October City Council Meeting, *supra* note 103, at 5:35:00–5:36:00 (Councilman Nurse first suggesting raising the amount from $1,000 to $5,000); *Id.* at 6:23:00–6:26:30 (city council voting to approve the Ordinance with the amended amount).

106. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-72(d).

107. *Id.* § 10-72(e)(4). The contours defining such an entity are explored below, *infra* pt. IV.C.

108. *Id.* § 10-75(a) ("This section requires that additional information be incorporated into disclaimers already required by the Florida Election Code.").

109. *Id.* § 10-75(b)–(d).

110. *Id.* § 10-61(c).

111. *Id.* § 10-61(a).

112. *Id.* § 10-61(f).

C. Foreign Spending Provisions

The final operative piece of the Ordinance—and the primary subject of this Comment—consists of its provisions regulating campaign financing by foreign corporations. The Ordinance first sets forth two crucial definitions. First, it supplements the definition of "Foreign National" stipulated in 52 U.S.C. § 30121(b)[113] by adding "any entity for which a foreign national . . . has direct or indirect beneficial ownership of 50 percent or more of the equity . . . of the entity."[114] Accordingly, the Ordinance seems to bring such entities within the scope of § 30121(b)'s ban on candidate-related contributions. Second, it sets forth definitions for FIBEs, defining such entities as those in which (1) a single foreign national has 5% or more beneficial ownership,[115] (2) two or more foreign nationals collectively own 20% or more,[116] or (3) "[a] foreign national participates directly or indirectly in the entity's decision-making process with respect to the entity's political activities within the United States."[117]

After defining these entities, the Ordinance imposes various requirements to ensure that FIBEs are restricted from participating in local elections. First, the Ordinance requires *all* business entities that make any covered candidate-related expenditure or a contribution to an outside group to file a statement certifying that it is not a FIBE.[118] All such certification statements are made under penalty of perjury.[119] The Ordinance goes on to prohibit outside spending groups from utilizing any contributions from business entities that fail to file a certification

113. This definition in turn incorporates 22 U.S.C. § 611(b) (2018)'s definition of a "foreign principal," which encompasses corporations "organized under the laws of or having its principal place of business in a foreign country."

114. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(l).

115. Commissioner Weintraub suggested that this number stems from the Schedule 13D requirement in securities law for disclosure of beneficial purchases of 5% of more, stating "securities law considers the purchase of a 5% share of a corporation to be significant and worthy of disclosure." St. Petersburg Comm. of the Whole, *Campaign Finance Wastewater Sewer*, at 19:10–19:30 (Oct. 27, 2016), http://www.stpete.org/boards_and_committees/recorded_city_meetings.php [hereinafter Committee Mtg.].

116. Weintraub mentioned in a St. Petersburg Committee of the Whole meeting that this 20% figure is derived from federal communications law. *Id.* at 19:30–19:45. She appears to have been referring to 47 U.S.C. § 310(b) (2018), which implicitly defines a "foreign corporation" as including "any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or . . . a foreign government." This definition has been in place since the Communications Act's original passage in 1934. Communications Act of 1934, Pub. L. No. 73-416, § 310(a)(4), 48 Stat. 1064, 1086.

117. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(m).

118. *Id.* § 10-62(a)–(b).

119. *Id.* § 10-62(b)(3).

statement.[120] Thus, the Ordinance provides multiple sets of "teeth" to enforce its regulation of foreign spending: business entities themselves are regulated through the certification requirement, and spending groups are regulated by the prohibition on using funds from any businesses that fail to file a certification.

V. CONSTITUTIONAL ISSUES RAISED BY THE ORDINANCE

The Ordinance's three actionable provisions, discussed above, raise independent constitutional questions, and its severability clause[121] ensures that the fall of one provision will not doom the rest. Arguably the most controversial provisions, in terms of bucking existing precedent, are those dealing with contribution limits to independent expenditure committees.[122] These provisions expressly contradict the D.C. Circuit's holding in *SpeechNow* that such limits are unconstitutional in light of *Citizens United*.[123] Accordingly, the constitutionality of these provisions will turn on whether the Eleventh Circuit—and possibly the Supreme Court—agrees with the D.C. Circuit's 2010 decision.[124]

In contrast, the Ordinance's disclaimer and disclosure provisions are arguably the least controversial aspects of the novel legislation for multiple reasons. First, the *Citizens United* Court expressly upheld the federal disclosure provisions in the BCRA against a number of petitioners' challenges to them.[125] Thus, similar provisions in the local

120. *Id.* § 10-61(c).

121. *Id.* § 10-53.

122. *See id.* § 10-61(c) ("The following shall not be designated as eligible for use for covered candidate-related expenditures: (1) any portion of a contribution . . . exceed[ing] the aggregate of $5,000.00 per person per calendar year."). The provision goes on to prohibit use of contributions by entities failing to certify that they are foreign-influenced. *Id.*; *see also supra* pt. IV.C.

123. *See* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 694 (D.C. Cir. 2010) ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."). Indeed, the Ordinance's drafters were well aware of this contradiction in precedent: a key thrust of the Ordinance's supporters, like Professor Tribe, was that *SpeechNow* was incorrectly decided. Albert W. Alschuler, Laurence H. Tribe, et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 FORDHAM L. REV. 2299, 2308–14 (2018) [hereinafter Alschuler, *Why Limits Should Survive*].

124. This Comment will not weigh in on the robust debate as to the correctness of the *SpeechNow* holding. For arguments criticizing the decision, see, e.g., Alschuler, *Why Limits Should Survive*, *supra* note 123; Alschuler, *Limiting Contributions*, *supra* note 61. For arguments that the decision was a proper extension of the *Citizens United* Court's holding, see, e.g., Joel M. Gora, *In Defense of Super PACs and of the First Amendment*, 43 SETON HALL L. REV. 1185 (2013); Luke Wachob, SpeechNow.org v. Federal Election Commission*: Protecting the First Amendment Rights of Americans*, INSTITUTE FOR FREE SPEECH (Mar. 26, 2018), https://www.ifs.org/research/speechnow-org-v-federal-election-commission-protecting-the-first-amendment-rights-of-americans/.

125. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–71 (2010).

legislation are unlikely to cause unresolvable constitutional problems. Further, the disclosure provisions are written to supplement already-existing disclosure and disclaimer requirements at the state level.[126] The lack of successful constitutional challenges to these state-level requirements bodes well for the success of the Ordinance's similar restrictions at the municipal level.[127]

The Foreign Spending provisions of the Ordinance, however, are novel and will pose questions of first impression for any court tasked with ruling on their validity. Accordingly, the constitutionality of these provisions poses a pertinent subject that the remainder of this Comment undertakes to explore. First, it compares the Ordinance's foreign-spending provisions to existing federal law in order to parse out the novel issues they raise, and in doing so, it explores the sources from which the Ordinance creates its classifications and consequences. This Part goes on to predict the issues and arguments that will be raised if the Ordinance's constitutionality is litigated—arguments made by the parties in *Bluman* will be instructive in this regard. Specifically, this Part addresses: (1) arguments for whether strict scrutiny or rational basis review should apply; and (2) arguments regarding whether the Ordinance is sufficiently narrowly tailored to survive review under strict scrutiny.

A. Comparing the Ordinance to Federal Law

Because the only guidance from the Supreme Court on regulating foreign political speech relates to existing federal law, a comparative analysis between provisions in the Ordinance and those in other federal legislation will be beneficial. As shown above, while the Ordinance incorporates the language of 52 U.S.C. § 30121(b) to define "foreign national," it supplements this definition by bringing any entity that has

126. FLA. STAT. §§ 106.07, 106.0703, 106.071 (2019); ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(r).

127. One issue with disclosure that may be litigated concerns whether disclosure in certain instances is unconstitutional when it subjects donors to harassment comparable to that faced by the NAACP in the 1950s. Ciara Torres-Spelliscy, *Campaign Finance, Free Speech, and Boycotts*, 41 HARV. J.L. & PUB. POL'Y 153, 156 (2018) (referencing Buckley v. Valeo, 424 U.S. 1, 69 (1976) (discussing *NAACP v. Alabama* in reasoning that the absence of evidence of harassment was relevant in holding FECA's disclosure provisions constitutional)). However, any challenge to the Ordinance on this ground would deal with the Ordinance's application to specific facts, rendering such an analysis outside the scope of this Comment. Moreover, the potential of the Ordinance's slight additional disclosure requirements to cause this degree of harassment, when compared to existing state law, appears minimal to nonexistent.

a 50% ownership interest controlled by a foreign national within the scope of this definition.[128] Because this definition effectively precludes any entity falling within this definition from contributing to elections,[129] a crucial question to address is whether this definition of foreign national is within constitutional bounds. A similar question arises to the Ordinance's definitions of "Foreign-influenced business entity": are the Ordinance's lines, drawn at the ownership of 5% interest of an entity by a single foreign national or the ownership of 20% interest by two or more foreign nationals, constitutional?

The Ordinance also differs from existing federal law in terms of its requirements. 52 U.S.C. § 30121 simply makes it "unlawful" for foreign nationals to make contributions "to a committee of a political party" or "in connection with a . . . local election," and to make expenditures for "electioneering communication."[130] In contrast, the Ordinance requires any entity making a covered contribution or expenditure to certify that it does not fall within the above definitions of "foreign national" or "foreign-influenced."[131] At first glance, it might appear that this requirement falls short of a prohibition. However, since the required certification is taken under penalty of perjury,[132] this provision should be read as an effective ban on contributions or expenditures by these entities.

Another point of divergence between federal law regulating foreign campaign spending and the Ordinance is the scope of the contributions and expenditures that are regulated. Federal law prohibits contributions "in connection with . . . election[s]" or "to a committee of a political party," and it also proscribes expenditures "for an electioneering communication."[133] Electioneering communications in turn only capture those communications which "refer[] to a clearly identified candidate for . . . office" and expressly do not cover communications made more than sixty days before an election date.[134] In contrast, the Ordinance's foreign-spending provisions are triggered by "covered candidate-related expenditure[s]" or "contribution[s] to . . . outside-spending

128. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(1).

129. *See* 52 U.S.C. § 30121(a) (2018) (banning contributions from foreign nationals in local elections).

130. *Id.* § 30121(a)(1). The law also makes it unlawful for individuals to solicit or accept contributions prohibited by this provision. *Id.* § 30121(a)(2).

131. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-62(a)–(b).

132. *Id.* § 10-62(b)(3).

133. 52 U.S.C. § 30121(a)(1).

134. *Id.* § 30104(f)(3).

group[s]," which are defined as "independent expenditure[s] made with respect to a candidate or . . . an expenditure for an electioneering communication made with respect to a candidate."[135] Thus, it appears that the Ordinance casts a broader net than existing federal law: while federal law only covers expenditures within the time-bound definition of "electioneering communication,"[136] the Ordinance covers *any* "independent expenditure made with respect to a candidate,"[137] regardless of how far out from an election it is made.

One apparent commonality between the Ordinance and federal law is that neither appear to prohibit issue-based advocacy by foreigners.[138] Although the Ordinance's certification requirements are triggered by contributions to "outside-spending groups," and the Ordinance defines "outside-spending groups" broadly, all possible definitions of such groups relate to whether it accepts, solicits, or purports to either accept or solicit "*candidate-related* expenditures."[139] One could argue there is potential discord on this issue. For example, if a group solicits donations for both candidate-related expenditures *and* expenditures related to a ballot measure or other issue-based advocacy, then FIBEs might be locally barred from contributing to that group even though foreign nationals would be permitted to contribute to it under existing federal law.[140] However, since a FIBE would not in any way be prohibited from making its own expenditures on this type of issue, the Ordinance does not appear on its face to run afoul of *Bluman*'s guidance.

Thus, the Ordinance differs from existing federal law in a few crucial respects. First, instead of merely regulating conduct of *foreign nationals*, it regulates business entities with certain degrees of foreign ownership: (1) an entity owned 50% or more by a single foreign national is

135. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-62(a) (stating that the section applies to business entities that make covered candidate-related expenditures greater than or equal to $5,000); *id.* § 10-51(g) (defining these terms).

136. *See* 52 U.S.C. § 30104(f)(3).

137. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-62(a) (stating that the section applies to business entities that make covered candidate-related expenditures greater than or equal to $5,000); *id.* § 10-51(g) (defining these terms).

138. *See supra* text accompanying note 134 (showing that federal prohibitions on foreign campaign financing apply only in relation to political campaigns *for office*).

139. *See* ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-61(a)(1)–(5) (emphasis added).

140. This inference is premised on 52 U.S.C. § 30121 (2018)'s prohibition on contributions by foreign nationals "in connection with a Federal, State, or local election," and the statute's treatment of "election" as applying to elections *for office* (and thus not encompassing ballot measures & other referenda). However, this provision has a substantial lack of clarity regarding organizations that advocate for both issues & candidates—this uncertainty is another reason that additional federal legislation or rulemaking on the topic would be beneficial.

considered a 'foreign national' itself; and (2) an entity owned (a) 5% or more by a single foreign national or (b) 20% or more by 2 or more foreign nationals cumulatively is considered a FIBE subject to additional requirements. Second, while it purports to merely subject FIBEs to a reporting requirement, it effectively prohibits these entities from making any contributions or expenditures related to elections for office. Third, while the Ordinance appears to track federal law by allowing FIBEs to participate in issue-based advocacy, the Ordinance's language may nonetheless go further than federal law by proscribing contributions to groups that participate in both electioneering and issue-based advocacy.

As previously mentioned, these classifications will pose issues of first impression to a reviewing court. A threshold question such a court will face is what level of scrutiny it should subject these classifications to, as this question was explicitly left open by then-Judge Kavanaugh's opinion in *Bluman*.[141] Accordingly, the following Part will analyze the arguments made by both sides on this question, and it will predict how they might be reframed in the context of the Ordinance's classifications of foreign corporations.

B. Strict Scrutiny v. Rational Basis

The *Bluman* court not only left the question of level of scrutiny unanswered—it also acknowledged the question's complexity and difficulty to resolve:

> We think the question is somewhat more complex than either side suggests, not only because the statute implicates both the First Amendment and national security, but also because it includes both a limit on contributions and a limit on expenditures, which have traditionally been subject to different levels of First Amendment scrutiny.[142]

This interplay, between the degree of First Amendment protections afforded to citizens vis-à-vis non-citizens and the constitutional prerogative of the political branches to exert plenary power over alienage and national security issues, was central to arguments made by

141. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 285 (D.D.C. 2011) ("[T]he debate over the level of scrutiny is ultimately not decisive here because we conclude that § 441e(a) passes muster even under strict scrutiny.").

142. *Id.*

the FEC and the *Bluman* petitioners. This Part explores these arguments and how they might manifest differently in the context of the Ordinance.

1. FEC's Arguments for Rational Basis Review

The crux of the FEC's argument in *Bluman* was that restrictions on campaign financing by foreign nationals are an exercise of the federal government's power over alienage and national security issues and are thus subject to rational basis review.[143] The Commission pointed to a line of cases where the Supreme Court has applied rational basis review to statutes excluding foreign nationals from participation in other aspects of self-government.[144] However, the FEC appeared to recognize the limitations of this precedential support, as it noted that the Supreme Court has applied strict scrutiny to statutes excluding non-citizens from activities or benefits that "'if withheld, would directly cause economic dependence or physical harm.'"[145] After providing this framing, the FEC asserts that "[t]he opportunity to make monetary contributions to candidates . . . is 'hardly a prerequisite to existence in a community.'"[146] This wrinkle might take on more relevance in the Ordinance's context of restricting corporate campaign contributions: if a FIBE is excluded from contributing to candidates, while its non-foreign-influenced competitors are permitted to engage in this practice with an expectation of reciprocity, is the corporation being effectively excluded from a community or being subjected to economic dependence or harm?

The FEC thrusts another distinction to support rational basis review, namely whether the regulation at issue primarily affects economic interests or sovereign governmental functions—while courts typically apply strict scrutiny to the former, the latter is generally subjected to rational basis review.[147] Under this view, the aforementioned exclusions of foreign nationals from positions like

143. *See* Def.'s Mot. to Dismiss at 13–18, *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (2011) (10-1766) [hereinafter FEC Mot. to Dismiss]; Def.'s Opposition to Pls.' Mot. for Summ. J. and Reply in Supp. of the Comm'n's Mot. to Dismiss at 8–20, *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (2011) (10-1766) [hereinafter FEC Reply].

144. FEC Mot. to Dismiss, *supra* note 143, at 15–16 (citing Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973) (excluding aliens from voting and holding certain public offices); Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding statute excluding non-citizens from serving as police officers); Ambach v. Norwick, 441 U.S. 68, 80–81 (1979) (upholding statute excluding non-citizens from teaching in public schools)).

145. FEC Mot. to Dismiss, *supra* note 143, at 16 (quoting Moving Phones Partnership L.P. v. FCC, 988 F.2d 1051, 1056 (D.C. Cir. 1993)).

146. FEC Mot. to Dismiss, *supra* note 143, at 17.

147. FEC Reply, *supra* note 143, at 16.

police officers and teachers[148] would primarily affect sovereign functions, and the FEC seeks to place petitioners' political contributions and expenditures in this category as well.[149] However, the FEC implicitly acknowledges that authority to restrict foreign contributions rests with Congress[150]—in doing so, it begs the question as to whether state and local governments would have comparable authority.

2. Plaintiffs' Arguments for Strict Scrutiny

In contrast to the FEC, the *Bluman* plaintiffs hinge their argument on the premise that lawful residents of the United States are afforded the full force of the First Amendment's protections.[151] Plaintiffs first and foremost directed the court's attention to the Supreme Court's statement in *United States v. Verdugo-Urquidez*[152] that the Fourth Amendment's protections extend to "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[153] They also pointed to a number of circuit court decisions "hold[ing] that the First Amendment protects aliens while they lawfully reside in the United States."[154] This framing thus attempts to dilute the FEC's argument that foreign campaign financing implicates national security concerns that would subject such regulations to lesser scrutiny, and it also ignores the agency's distinction of whether such restrictions would serve primarily political or economic concerns.

After teeing up their argument on the aforementioned grounds, the *Bluman* plaintiffs argue that the law's effect of completely banning contributions and expenditures should accordingly subject it to strict

148. *See* FEC Mot. to Dismiss, *supra* note 143, at 15–16.

149. FEC Reply, *supra* note 143, at 8–9.

150. FEC Reply, *supra* note 143, at 31 ("Congress has the authority to prohibit even limited foreign contributions.").

151. Pls.' Mot. for Summ. J. at 15, *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (10-1766) [hereinafter Pls.' Mot. for Summ. J.].

152. 494 U.S. 259, 274–75 (1990) (rejecting the Fourth Amendment's application to a Mexican national involuntarily transported into the United States).

153. Pls.' Mot. for Summ. J., *supra* note 151, at 13 (quoting *Verdugo-Urquidez*, 494 U.S. at 265).

154. Pls.' Mot. for Summ. J., *supra* note 151, at 13–14 (citing American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063–64 (9th Cir. 1995) ("The Supreme Court has consistently . . . accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens."); Parcham v. INS, 769 F.2d 1001, 1004 (4th Cir. 1985) ("[A]liens residing in this country enjoy the protection of the First Amendment."); *In re* Weitzman, 426 F.2d 439, 449 (8th Cir. 1970) ("The Supreme Court has stated clearly that resident aliens are to be accorded the [F]irst [A]mendment guarantees of free speech and free press.")).

scrutiny.[155] First, the plaintiffs posit that "[a] complete ban on contributions is subject to strict scrutiny under the First Amendment."[156] While they acknowledge that limits on *amounts* of contributions have at times faced less-than-strict scrutiny, they point to the Court's reasoning in *Buckley* as support for their proposition that complete bans on contributions must be subjected to a strict scrutiny standard.[157]

3. Situating the Arguments in the Ordinance's Context

The above two Parts provide a glimpse into arguments that will likely be raised when, and if, the Ordinance faces a constitutional challenge. While the City's potential arguments for rational basis review will depend on placing the Ordinance's effects in the context of national security and alienage affairs, challengers will argue the full weight of the First Amendment must be afforded to foreign corporations, similarly to lawful foreign residents. This Comment will now situate these arguments in the context of the Ordinance by (1) examining the findings that the St. Petersburg City Council relied upon in promulgating the Ordinance, (2) exploring whether the recent decision of *Trump v. Hawaii* might support rational basis review, and (3) elucidating distinctions between the Ordinance and the law at issue in *Bluman* that may be relevant to a reviewing court.

The Ordinance's "*Findings Regarding Foreign Influence and Super-PAC Funding*" ("Findings") express the City's compelling need to legislate in order to fill gaps left by existing law.[158] The Findings first note a federal report finding "extensive foreign involvement" in the United States' 2016 elections.[159] They state that the existing ban on campaign financing by foreign nationals[160] demonstrates federal recognition of "the need to protect U.S. elections (including local elections) from foreign influence," but they assert that "[c]urrent law does not

155. Pls.' Mot. for Summ. J., *supra* note 151, at 17–19.

156. Pls.' Mot. for Summ. J., *supra* note 151, at 17.

157. Pls.' Mot. for Summ. J., *supra* note 151, at 18 (arguing that *Buckley*'s rationale that limited contributions still allow for individuals to show symbolic support through nominal contributions "does not apply to a total ban on contributions, which completely deprives an individual of [First Amendment political speech protections]").

158. *See* "Section 2—Findings Regarding Foreign Influence and Super-PAC Funding," St. Petersburg Ordinance (2017), http://www.defendourdemocracy.org/wp-content/uploads/2017/11/St-Pete-Final-ordinance-2017-11-09.pdf [hereinafter Ordinance Findings].

159. *Id.* § 2(a).

160. 52 U.S.C. § 30121(b) (2018).

adequately protect against foreign nationals . . . from influencing elections through corporate political spending by U.S. corporations with significant foreign ownership."[161] Besides briefly detailing the historical and legal support for the thresholds the Ordinance uses to classify FIBEs,[162] the Findings stress that failed rulemaking efforts to address this problem at the federal level, combined with evidence that corporations reaching FIBE levels of foreign ownership are actively participating in local elections, render "ensur[ing] that corporations that spend money in city elections are not foreign-influenced" necessary "[t]o protect the integrity of the democracy of St. Petersburg."[163] These detailed findings appear to indicate the City was anticipating judicial review under a strict scrutiny standard, evidenced by the detail with which they describe the City's compelling need for the Ordinance's classifications and restrictions.

Aside from the factual and situational context in which the Ordinance was passed, the temporal context—namely the six years that passed between the *Bluman* decision and the Ordinance's passing—may affect the arguments that are ultimately put forth on review. Specifically, the Court's decision in *Trump v. Hawaii*[164] may inform arguments as to whether rational basis or strict scrutiny should apply to the Ordinance. In that case, while plaintiffs argued that President Trump's travel ban should be subjected to strict scrutiny under the Establishment Clause, the Court distinguished typical Establishment Clause claims from the case at bar by noting that the case also implicated national security issues.[165] In deciding to apply a rational basis standard, the Court noted the following: "'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained."[166]

Whether the Court's application of rational basis review in *Hawaii* will have any bearing on the standard a reviewing court subjects the Ordinance to is less than clear. The City will likely point to the *Hawaii* holding to support a more deferential review of the Ordinance; this

161. Ordinance Findings, *supra* note 158, at § 2(b)–(c).

162. These thresholds and their bases are discussed *infra* pt. V.C.

163. Ordinance Findings, *supra* note 158, at § 2(d), (g)–(h).

164. 138 S. Ct. 2392, 2423 (2018).

165. *Id.* at 2418 ("Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive . . . rais[ing] a number of delicate issues regarding the scope of the constitutional right and the manner of proof.").

166. *Id.* at 2419–20 (internal quotations omitted).

argument would view the *Hawaii* holding as precedential support for the FEC's position in *Bluman* that restrictions on foreign political speech implicate national security concerns and are thus subject to rational basis review.[167] On the other hand, challengers of the Ordinance could highlight a few distinctions. First, while *Hawaii* concerned entry and national security of foreign *aliens*, i.e. foreign nationals not living in the United States, regulations of spending by foreign corporations would be more analogous to regulation of lawful permanent residents. Second, with regard to an objective of achieving national security, there appears to be a closer nexus between that objective and restrictions on entry than restrictions on campaign financing.[168] Finally, while the challenges in *Hawaii* and *Bluman* concerned regulation of foreigners' activity by the *federal* government, a challenge to the Ordinance would concern regulation by a local entity. Accordingly, arguments hinging on deference that courts typically apply to the federal executive and legislative branches in the realm of national security are likely to be less persuasive.

C. Strict Scrutiny Analysis of the Ordinance's Classifications for Foreign Corporations

Arguably one of the most impactful goals of the Ordinance is to clarify *Bluman*'s application to foreign corporations. While the Supreme Court's summary affirmation of the case[169] demonstrates that "foreign corporations" indeed fall within the bounds of 52 U.S.C. § 30121, and are thus properly subject to regulation, the case failed to provide any guidance on how to define such an entity.[170] The Ordinance's two classifications of corporations as either Foreign Nationals or FIBEs, and the thresholds upon which it premises these classifications, will accordingly present questions of first impression to a reviewing court. This Comment will assume that the classifications would survive review under a rational basis standard, and it accordingly limits its analysis to

167. *See supra* text accompanying note 143.

168. On the other hand, the findings noted by the St. Petersburg City Council regarding foreign involvement in U.S. elections might be sufficient to situate this means closer to the objective of national security. *See supra* text accompanying notes 159–163.

169. Bluman v. Fed. Election Comm'n, 565 U.S. 1104, 1104 (2012).

170. *Bluman*, 800 F. Supp. 2d at 292 n.4 ("Our holding means, of course, that foreign corporations are likewise barred . . . by [52 U.S.C. § 30121 (2018)]. Because this case concerns individuals, we have no occasion to analyze the circumstances under which a corporation may be considered a *foreign* corporation for purposes of First Amendment analysis." (emphasis in original)).

whether the classifications are sufficiently narrowly tailored to achieve a compelling governmental interest.

The Ordinance provides two separate levels of classification for foreign corporations. The first level equates any corporation that is owned 50% or more by a single foreign national with a foreign national itself, while the second level provides two separate thresholds to define FIBEs.[171] The first level appears to be straightforward and sound. It is fundamental that ownership interest greater than 50% allows control over a corporation. Thus, if a single foreign national controls the actions of a corporation, the corporation can be properly viewed as an extension of the foreign national. Accordingly, this definition seems narrowly tailored to achieve the compelling interest set forth in *Bluman* of "limiting the participation of *non-Americans* in the activities of democratic self-government."[172]

Further evidence that the 50% threshold would survive strict scrutiny review comes in the form of FEC Commissioner Ellen Weintraub's proposals to initiate rulemaking on this issue. Commissioner Weintraub put forth two such proposals in 2011, one in January and another in June.[173] While the first proposed two thresholds of beneficial ownership to define foreign corporations, one at 20% and another at 50%, the second eliminated the 20% threshold.[174] While this could be viewed as merely an attempt at political compromise, it could also be read as evidence of the Commissioner's certainty of the 50% threshold's constitutionality (and conversely, as evidence of her uncertainty of the same regarding the 20% threshold).

The Ordinance's second level of classification is less straightforward, as there is no obvious connection between a 5% or 20% ownership interest in a corporation and control of the corporation's actions. As mentioned above, these numbers appear to stem from statutes relating to securities law and telecommunications law.[175] Thus, viewing these other requirements and definitions in their respective

171. *See* ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(1)(m) (2017).

172. *Bluman*, 800 F. Supp. 2d at 290 (emphasis in original).

173. *See* Federal Election Comm'n, *Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Agenda Document No. 11-33*, FEC (June 9, 2011) [hereinafter FEC Doc. No. 11-33], https://www.fec.gov/resources/updates/agendas/2011/mtgdoc_1133.pdf; Federal Election Comm'n, *Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Agenda Document No. 11-02*, FEC (Jan. 18, 2011) [hereinafter FEC Doc. No. 11-02], https://www.fec.gov/resources/updates/agendas/2011/mtgdoc_1102.pdf.

174. FEC Doc. No. 11-33, *supra* note 173, at 79; FEC Doc. No. 11-02, *supra* note 173, at 87.

175. *See supra* notes 115–116.

contexts can shed light on whether their applications to the Ordinance will pass constitutional muster. We will first look at the context and history of the 20% ownership threshold in communications law, and then we will turn to the 5% threshold in securities law.

The St. Petersburg City Council's official findings regarding the Ordinance state that the 20% ownership threshold is based in telecommunications law codified at 47 U.S.C. § 310(b) (2018).[176] The Telecommunications Act does not permit any broadcast license to "be granted to or held by" foreign nationals, corporations organized under foreign governments' laws, corporate subsidiaries whose parent corporation is owned by foreign nationals to the tune of 25% or more, or "any corporation of which more than one-fifth of the capital stock is owned . . . by aliens or their representatives."[177] Although the interpretation of this restriction has been relaxed to a case-by-case determination within the past decade, it operated as a strict, categorical bar to ownership for the preceding seventy-plus years.[178]

Ultimately, the question of whether this 20% threshold will be found to be narrowly tailored on review remains unclear. On one hand, the fact that a 20% ownership interest is equated with a "foreign corporation" in this context suggests that it would be constitutionally sound in the context of the Ordinance. However, the fact that the 20% ownership threshold was never struck down is not dispositive of its constitutionality when applied to the context of campaign finance regulation. The regulation of telecommunications is viewed within the context of the Commerce Clause, and constitutional scrutiny in this area typically applies a "public interest" standard.[179]

Unlike the Ordinance's 20% aggregate-ownership threshold applicable to two or more foreign nationals, its 5% threshold applicable to a single foreign national stems from securities law, as noted by the St.

176. Ordinance Findings, *supra* note 158, at § 2(f) ("[A] corporation with a collection of foreign owners totaling 20% ownership would be unacceptably subject to foreign influence, as illustrated by 47 U.S.C. 310(b)'s 20% maximum of foreign ownership for broadcast licensees.").

177. 47 U.S.C. § 310(b) (2018).

178. David Oxenford, *FCC Allows More Than 25% Foreign Ownership of Broadcast Stations—Instructions for Investors Are to Be Developed*, BROADCAST LAW BLOG (Nov. 22, 2013), https://www.broadcastlawblog.com/2013/11/articles/fcc-allows-more-than-25-foreign-ownership-of-broadcast-stations-instructions-for-investors-are-to-be-developed/.

179. *See* Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/research/ revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/#judhistory.

Petersburg City Council's findings.[180] The 13D reporting requirement is triggered whenever a person gains ownership of more than 5% of an entity, and it requires such person to transmit a short statement to the S.E.C. detailing their newly acquired ownership.[181] While the constitutionality of disclosure requirements imposed by 15 U.S.C. § 78m have been challenged multiple times and upheld,[182] no challenges dealt with whether 5% was an appropriate threshold to trigger disclosure. Further, while the 5% threshold merely triggers reporting requirements in the securities context, such a threshold of foreign ownership in the context of the Ordinance would effectively preclude any and all candidate-related expenditures. Thus, while the 5% threshold is premised on existing legal requirements, the vastly different contexts of these requirements make this threshold's constitutionality uncertain when applied to campaign finance regulation.

Despite the fact that both the 5% and 20% beneficial ownership thresholds are premised on existing federal law, they may nonetheless be vulnerable to constitutional attacks as being over- or under-inclusive. Plaintiffs in *Bluman* put forth a number of such attacks against the foreign-spending provisions of the BCRA.[183] They argued that the statute was under-inclusive because it did not proscribe campaign financing by other residents who cannot vote, such as minors and permanent foreign residents, and because it did not prohibit foreign nationals from participating in issue-based advocacy.[184] Plaintiffs further argued that the statute was over-inclusive because it could deny non-citizen residents who had been granted the right to vote in some state and local elections the ability to contribute to the candidates they were voting for: "No system that permits such a bizarre result could be defended as 'narrowly tailored' or even 'closely drawn.'"[185]

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180. *See* Ordinance Findings, *supra* note 158, at § 2(e) ("Federal law and academic literature on corporate governance consider a single shareholder owning 5% or more to be in a position to influence corporate governance.").

181. 15 U.S.C. § 78m(d) (2018); Lloyd S. Harmetz, *Frequently Asked Questions About Section 13(D) and Section 13(G) Of The Securities Exchange Act of 1934*, MORRISON & FOERSTER LLP (2017), https://media2.mofo.com/documents/faqs-schedule-13d-g.pdf.

182. *See* United States v. Guterma, 281 F.2d 742, 746 (2d Cir. 1960) (finding disclosure requirements not unconstitutionally vague or indefinite); Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1110 (D.C. Cir. 2011) (finding that disclosure did not cause economic harm sufficient to constitute a taking).

183. Pls.' Mot. for Summ. J., *supra* note 151, at 24–27.

184. Pls.' Mot. for Summ. J., *supra* note 151, at 24–26.

185. Pls.' Mot. for Summ. J., *supra* note 151, at 26 (explaining that some cities had extended the right to vote in local elections to non-citizen residents—"[i]n Chicago, for example, non-citizen

While the *Bluman* court upheld the provisions at issue against these attacks, primarily on the grounds of long-standing historical distinctions between aliens and citizens,[186] the Ordinance's provisions defining 'foreign corporations' may be more vulnerable. As shown above, the historical lineage for the 5% and 20% bright-line, categorical restrictions are much less long-standing and also less clear.[187] Accordingly, the Ordinance's definitions could be more susceptible to being overturned if subjected to a narrowly-tailored analysis. Indeed, some scholars have already written on the problems of classifying corporations in binary fashions, such as the 'foreign-influenced'/'non-foreign-influenced' approach taken by the Ordinance.[188] However, the Ordinance's catch-all provision, defining a FIBE as one in which "[a] foreign national participates directly or indirectly in the entity's decision-making process with respect to the entity's political activities in the United States,"[189] may serve as its saving grace against any arguments for under-inclusivity. If the 5% and 20% thresholds fail to capture other entities that are foreign influenced, the City might argue, then this additional definition would effectively bring those entities within the Ordinance's scope, avoiding the type of anomalous result that the *Bluman* plaintiffs drew the court's attention to.

On the whole, it appears that if the Ordinance's foreign-spending provisions are subjected to strict scrutiny, the City will have a more difficult time arguing for the 5% threshold than the 20% threshold. If, on

parents are entitled to vote in school board elections"—and as a result, the BCRA's ban on political contributions by foreign nationals creates the anomalous result described above for such individuals).

186. *See* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 290–91 (2011).

187. *See supra* notes 176–78, 181–82, and accompanying text.

188. *See* Scott L. Friedman, Note, *First Amendment and "Foreign Controlled" U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries' Corporate Political-Speech Rights*, 46 VAND. J. TRANSNAT'L L. 613, 634 (2013) (arguing for a distinction between foreign corporations themselves and their domestic subsidiaries); *but see* Ryan Rott, *Fighting Foreign-Corporate Political Access: Applying Corporate Veil-Piercing Doctrine to Domestic-Subsidiary Contributions*, 114 MICH. L. REV. 481, 484 (2015) (arguing for the same distinction, but positing that domestic subsidiaries should be prevented from participating in the democratic process). *See also* Tim Bakken, *Constitutional Rights and Political Power of Corporations after* Citizens United*: The Decline of Citizens and the Rise of Foreign Corporations and Super PACs*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 119, 145 (2013) (noting that there may be circumstances "where a foreign individual or corporation may be so entrenched in American life and the government interest in prohibiting a political contribution so small or remote that a court might not be able to find a compelling [interest]"). Some scholars have advocated instead for a more fact-based, case-by-case inquiry to classify corporations in various legal contexts, including that of campaign finance. *See, e.g.*, Margaret M. Blair, *Corporations and Expressive Rights: How Lines Should Be Drawn*, 65 DEPAUL L. REV. 253, 264–72 (2016) (advocating for a four-question framework to assess the legal status of corporations).

189. ST. PETERSBURG, FL., CODE OF ORDINANCES § 10-51(m)(3).

the other hand, a reviewing court applies rational-basis review or intermediate scrutiny, the provisions will likely be upheld. Ultimately, the sheer novelty of what the Ordinance is undertaking by defining 'foreign corporations'—in the absence of any meaningful guidance—renders any predictive analysis inconclusive at best. While the issues raised in litigation can be ascertained to some degree, as shown above, the resolution of those issues cannot be resolved with any certainty until they are decided by reviewing courts.

VI. CONCLUSION

The City of St. Petersburg took a bold step forward in attempting to fill legislative gaps left open by the federal branches. While *Bluman* and its affirmance by the Supreme Court appeared to give a green light to the federal and state governments to regulate conduct of foreign corporations, neither the judicial, legislative, or executive branches have provided any guidance on how legislators can constitutionally define such entities. Accordingly, the City's aforementioned bold step was forced to be taken in relative blindness regarding the constitutionality of the Ordinance's provisions.

Despite (or perhaps because of) this difficulty, it is apparent the City took care to craft the Ordinance with an eye toward exacting judicial review. The City's Findings make a strong case that the Ordinance was drafted to achieve the compelling interest of safeguarding local elections from foreign influence. Further, the thresholds the Ordinance uses to classify corporations as either Foreign Nationals or FIBEs are based on classifications that have been found constitutional in other contexts. Thus, on one hand, the Ordinance's foreign spending provisions may be on strong constitutional footing when and if they are subjected to scrutiny by a reviewing court.

On the other hand, a number of questions cannot be predictably resolved until they face a decisionmaker. For one, the level of scrutiny that will apply is far from definitive due to the convergence of free speech issues, national security and alienage issues, and regulation of speech by corporations. Caselaw on these issues is highly disparate, and as demonstrated above, compelling arguments can be made for both rational basis and strict scrutiny review. Further, while the classification thresholds are premised on existing legal standards, those standards have yet to be litigated in context of the First Amendment's protection of political speech. Thus, while this Comment has been able to parse out

the issues that will be raised and predict arguments, it does not purport to make a blind prediction as to how any eventual litigation will play out.

While the Ordinance has yet to face a legal challenge, it has generated legislative responses both inside and outside of the State of Florida. On one hand, Florida state senator Jeff Brandes is attempting to put an end to St. Petersburg's bold experiment by legislatively preempting all Florida cities from placing any restrictions or limitations on political contributions or expenditures.[190] As of this writing, the bill has passed through multiple committees, and only time will tell whether it will ultimately become law.[191] On the other hand, the Ordinance has inspired similar legislation in other states and localities. In January 2020, Seattle, with the support of the same non-profit that helped develop the Ordinance, successfully adopted local legislation targeting foreign-influenced corporations.[192] Meanwhile, similar legislation has been introduced at the state level in Maryland[193] and the local level in New York City.[194]

While the future is uncertain for the St. Petersburg Ordinance and the similar legislation it continues to inspire, one thing is clear: the problem of foreign funds entering domestic elections is not a hypothetical one. While it is impossible to know the extent of foreign influence being exerted through corporate political spending, recent reports by Congress and research by academics demonstrates that such spending is happening. In the absence of rulemaking or legislation on the federal level, the City of St. Petersburg has performed a service for the entire nation by taking the lead. Even if some of its foreign spending provisions are limited or struck on review, the rest of the country will have the benefit of judicial precedent when they eventually decide to

190. Mary Ellen Klas, *St. Pete Tried to Abolish Super PACs. Jeff Brandes Wants to End That.*, TAMPA BAY TIMES, Feb. 4, 2020, https://www.tampabay.com/florida-politics/buzz/2020/02/04/st-pete-tried-to-abolish-super-pacs-jeff-brandes-wants-to-end-that/.

191. *See CS/CS/SB 1372: Elections*, THE FLORIDA SENATE, https://www.flsenate.gov/Session/Bill/2020/1372 (last visited Feb. 28, 2020) (tracking the progress of SB 1372).

192. *Seattle Legislation*, FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org/seattle-legislation/ (last visited Feb. 28, 2020) (describing the Seattle ordinance as "build[ing] on . . . similar legislation in St. Petersburg, Florida"); Office of the City Clerk, *Record No: CB 119731*, SEATTLE CITY COUNCIL, http://seattle.legistar.com/LegislationDetail.aspx?ID=4294877&GUID=6920B073-DF76-413B-AA7E-5731BF990F43&Options=ID%7CText%7C&Search=119731 (last visited Feb. 28, 2020) (providing a link to the Seattle ordinance itself).

193. *Maryland House Bill 34*, LEGISCAN, https://legiscan.com/MD/bill/HB34/20202 (last visited Feb. 28, 2020).

194. *File #: Int 1074-2018*, NEW YORK CITY COUNCIL, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3597747&GUID=04717F13-60D2-483F-B853-19CA3CF175D4&Options=Advanced&Search= (last visited Feb. 28, 2020).

craft regulations of their own to protect their local elections from foreign influence.