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None of Our Business? How Corporate Power Corrupts Local Economies and Democracies

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INTRODUCTION

In the last few years, corporate power has received a renewed focus at all levels of government, after some four decades of bipartisan neglect. At the state and local level, this has taken on many forms. New York, for example, passed a significant rewrite of its antitrust laws through the State Senate.[1] Lawmakers in several states introduced legislation to rein in the dominance Apple and Google have over app developers, with a bill advancing through the Arizona House.[2] In September 2020, Ohio made General Motors repay tens of millions of dollars to the state after it broke a promise to keep a plant open in Lordstown, and the same state levied a lawsuit attempting to impose common carrier rules onto Google.[3,4] State attorneys general joined a Department of Justice case against Google, while others launched an independent case, and they also filed their own multi-state effort against Facebook. Cities and states placed new regulations on predatory delivery app corporations. Communities all across the country, from Prince George's County, Maryland, to Grand Falls, New York, have said no to new Amazon facilities, citing the corporation's anti-labor and anti-environmental practices, and Washington, D.C., filed a groundbreaking antitrust case against the corporation.[6,7]

Much of this renewed interest in grappling with corporate power can be traced back to the controversy over Amazon's second headquarters, dubbed HQ2, and its ultimate defeat in New York by local activists and politicians.

In 2018, Amazon launched a continent-wide auction to place a division headquarters, which it called Amazon's second headquarters. Hundreds of cities attempted to convince the online retail giant to locate it within their borders, offering it billions of dollars in tax incentives and other monetary and regulatory favors, such as publicly funded helipads.[8,9] New York Gov. Andrew

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1 S933, approved on June 7, 2021 https://www.nysenate.gov/legislation/bills/2021/s933

2 Stoller, Matt and Pat Garofalo, "States Are Right to Rebel Against Big Tech," *The New York Times*, March 18, 2021 https://www.nytimes.com/2021/03/18/opinion/apple-google-app-monopoly.html

3 Hall, Kalea, "Ohio requires GM to refund tax credits, invest in Lordstown," *The Detroit News*, Sept. 28, 2020 https://www.detroitnews.com/story/business/autos/general-motors/2020/09/28/ohio-requires-gm-refund-tax-credits-and-invest-in-lordstown/3561524001/

4 State of Ohio v. Google, LLC https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-(Time-Stamped).aspx

5 Tkacik, Moe, "Rescuing Restaurants: How to Protect Restaurants, Workers, and Communities from Predatory Delivery App Corporations," American Economic Liberties Project, Sept. 18, 2020 https://www.economicliberties.us/our-work/rescuing-restaurants-how-to-protect-restaurants-workers-and-communities-from-predatory-delivery-app-corporations/

6 Garofalo, Pat, "Amazon's Grand Bribe Fails," Boondoggle, August 13, 2020 https://boondoggle.substack.com/p/amazons-grand-bribe

7 District of Columbia v. Amazon.com, Inc. https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf

8 Garofalo, Pat, "The Frenzy Over Amazon's HQ2 Should Be a National Embarrassment," TalkPoverty, Nov. 13, 2018 https://talkpoverty.org/2018/11/13/frenzy-amazons-hq2-national-embarrassment/

9 Capriel, Jonathan, "A helipad is likely out for HQ2. But there may be a workaround for Amazon," *Washington Business Journal*, April 8, 2020 https://www.bizjournals.com/washington/news/2020/04/08/a-helipad-is-likely-out-for-hq2-but-there-may-be-a.html

Cuomo, jokingly, said he would change his name to Amazon should the company locate in the Empire State.[10] He also, not jokingly, offered to rename a creek after the company.[11]

The winning bids—from Long Island City, New York, and Arlington, Virginia, a suburb of Washington, D.C., which were paired with a smaller outpost in Nashville, Tennessee—collectively pledged billions of public dollars to Amazon. Famously, activists and elected officials in New York were able to successfully organize against their state's share, with Amazon abandoning its plans there.

But even that victory revealed how far state and city governments need to go to fully confront the power of today's dominant corporations: Many cities refused to release details of their bids not only during negotiations with Amazon but even after the competition was over and the winners chosen.[12] More than two years later, some cities are still refusing to say what they offered. Only Amazon employees and those negotiating on behalf of city and state governments know what Amazon could have received in public resources.

This paper will look at several policies, like those that protect cities' Amazon bids, that enable corporations to collude with state and local governments to extract resources from local communities and undermine competition while shielding themselves and local elected officials from public accountability. It will show how these policies enable corporations to play elected leaders in different jurisdictions against each other in order to maximize resource extraction, without allowing the public to weigh in or activists to provide a counterweight and counternarrative. It will provide case studies for each and suggest changes that both city councils and state legislators can make to end these abuses, as well as offer model legislation upon which local and state officials can base their efforts.

Changing these practices will provide two important benefits to local communities: (1) enabling them to focus on economic efforts that pay wider dividends and that build more sustainable, inclusive, and equitable local economies, and (2) giving voters more say over when and how their local resources are used. It is imperative that these policy recommendations be adopted as part of the broader movement to rein in corporate power and check the growing economic and

10 Taylor, Kate, "New York's governor jokes he'll change his name to 'Amazon Cuomo' to win the HQ2 bid hours before a report that New York City will be home to one of the company's new headquarters," *Business Insider*, Nov. 5, 2018 https://www.businessinsider.com/new-york-governor-jokes-amazon-cuomo-name-change-hq2-2018-11

11 Lovett, Kenneth, "Cuomo ready to rename a Long Island City creek the Amazon River to woo Amazon into opening its second headquarters in NYC," *New York Daily News*, Oct. 30, 2018 https://www.nydailynews.com/news/politics/ny-pol-cuomo-amazon-20181030-story.html

12 Garofalo, Pat, "Open the Amazon files: A second scandal is that losing city and state bids across the country are still being kept from public scrutiny," *New York Daily News*, Feb. 22, 2019 https://www.nydailynews.com/opinion/ny-oped-open-the-amazon-files-20190222-story.html

political power of today's dominant corporations. They should be included as part of an overall policy framework aimed at reversing corporate consolidation and limiting corporate power.

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1. USE OF NON-DISCLOSURE AGREEMENTS IN ECONOMIC DEVELOPMENT

When the city council of Gallatin, Tennessee, approved nearly $20 million in tax breaks for the creation of a data center within the city in May of 2020, the official entity receiving the benefit was called "Project Woolhawk." It wasn't until months later that the actual beneficiary was revealed: Facebook.

Local officials who negotiated the deal were bound by a non-disclosure agreement that prevented them publicly acknowledging the true identity of the company behind Project Woolhawk. Members of the city council claimed they didn't even know the identity of the corporation they were voting to subsidize.[13] Local residents who may have wanted to protest public resources being spent on Facebook had no time to mount an effective, company-specific response, by design.

This is not an isolated incident involving just one city and one company: Such non-disclosure agreements are a common demand of corporations when negotiating with states and localities.

For example, a similar situation occurred in Onondanga County, New York, that same year, where Amazon was provided more than $70 million in subsidies without disclosing its identity to voters.[14] In Grand Falls, New York, local officials did not disclose that "Project Olive" was, in fact, a large Amazon warehouse. City councilors in Fort Wayne, Indiana, voted to approve subsidies for a new Amazon facility without knowing who the funds would benefit.[15] In Sherbourne County, Minnesota, Google was negotiating with local officials to build a data center for more than a year before residents knew those negotiations were occurring, with Google employing the name "Project Pine."[16] In Calvert County, Maryland, a non-disclosure agreement between officials and Dominion Cove Point LNG, a natural gas company, kept financial details secret that would have

13 Cross, Josh, "Rumored Facebook project could get tax breaks," *Gallatin News*, May 15, 2020 https://www.gallatinnews.com/news/rumored-facebook-project-could-get-tax-breaks/article_c4478a7c-96ba-11ea-b7ea-97ea5cce2faf.html

14 Moriarty, Rick, "Amazon's $350M center in Clay could bring big economic spinoff to Syracuse area," *Syracuse.com*, May 18, 2020 https://www.syracuse.com/business/2020/05/amazons-350m-center-in-clay-could-bring-big-economic-spinoff-to-syracuse-area.html

15 Garofalo, Pat, "State Secrets," Boondoggle, Mar. 16, 2021 https://boondoggle.substack.com/p/state-secrets

16 Kaszuba, Mike, "After obtaining a non-disclosure agreement, Google comes to Minnesota," Public Record Media, July 30, 2019 https://www.publicrecordmedia.org/after-obtaining-a-non-disclosure-agreement-google-comes-to-minnesota/

shown that property tax breaks granted to the company were far more lucrative than were being publicly disclosed.[17]

> **"It's customary now, when mega-Fortune 500 companies come, that they prefer that you not divulge what they're doing," said the manager of the Village of University Park, an Illinois community that gave large subsidies to Amazon. "It happens all the time."**

There is no national data on how pervasive these non-disclosure agreements are, but a casual survey of economic development agreements turns up many more examples than those above. And they cover more than just local economic development officials or city council members: Amazon's non-disclosure agreement for HQ2 was signed not just by people working directly on the incentive package in each respective city, but also by university researchers, urban planners, and even the waitstaff at a restaurant where the local chamber of commerce met to discuss their city's bid.[18]

"It's customary now, when mega-Fortune 500 companies come, that they prefer that you not divulge what they're doing," said the manager of the Village of University Park, an Illinois community that gave large subsidies to Amazon. "It happens all the time."[19]

As Economic Liberties noted in a previous report, the Partnership for Working Families used Freedom of Information Act requests to access eight non-disclosure agreements officials signed with Google. They prevent local officials from discussing "the terms of any agreement entered into between the two parties, and the discussions, negotiations and proposals related thereto." In correspondence with a local official in San Jose, Google confirmed that the point of the agreements was to prevent public relations problems in the community.[20]

Some local officials, particularly those employed by economic development councils or boards, which are either public or quasi-public agencies that negotiate directly with corporations seeking benefits, argue that the agreements are necessary to protect trade secrets or other proprietary information, as well as for preventing early judgment on negotiations that aren't

17 Meador, Anne, "Secret Non-Disclosure Agreement Raises Questions about Cove Point Tax Breaks," *DC Media Group*, Jan. 31, 2014 https://www.dcmediagroup.us/2014/01/31/secret-non-disclosure-agreement-raises-questions-cove-point-tax-breaks/

18 Calvert

19 Lippert, John and Natalie Moore, "Amazon's Massive Chicago-Area Expansion Was Fueled By $741 Million From Taxpayers," *WBEZ*, Oct. 26, 2020 https://www.wbez.org/stories/amazons-massive-chicago-area-expansion-was-fueled-by-741-million-from-taxpayers/300fa829-1b71-4d9e-a2f4-1776e88d4cb3

20 Garofalo, Pat, "Close to Home: How the Power of Facebook and Google Affects Local Communities," American Economic Liberties Project, August 30, 2020 https://www.economicliberties.us/our-work/close-to-home-how-the-power-of-facebook-and-google-affects-local-communities/

finished. For example, the president and CEO of the Business Development Board of Palm Beach County, Florida, wrote that the agreements help officials "to avoid miscommunication and to control information."[21]

Of course, actual proprietary information should not be disclosed by public officials after it has been turned over in good faith. However, the non-disclosure agreements often go beyond that narrow protection.

As detailed above, the agreements Google requested local officials sign not only covered the company's financial information, but any discussion, negotiations, or proposals and counterproposals in which the two parties engaged. Those aren't financial details pertaining to how a business is run, but details about how tax revenue is being disbursed.

Not only does this practice prevent local residents from knowing what officials offered in their name, but it may violate state public records law by preventing officials from disclosing information that such laws, where applicable, require be available to the public. As an attorney for the North Carolina Press Association explained regarding the use of NDAs in that state, "They essentially require public officials to break the public records law, in my opinion."[22]

Corporations are able to make demands that local officials sign non-disclosure agreements because of the power they hold and their ability to deliver promises regarding new jobs and economic investment into a particular community. Due to deindustrialization, lack of antitrust enforcement, and neoliberal tax and trade policies, many communities have been left with fewer local businesses to drive economic activity, and large manufacturers have decamped for foreign countries.

A large corporation promising jobs and investment is enticing, and the threat that it will go to some neighboring community, potentially depriving local residents of an economic lifeline and raining bad press down on local officials, ever-present. Studies have shown that elected officials who engage in more subsidization of corporations earn more votes for re-election due to the publicity they can accrue.[23] (Such deal making is also correlated with higher rates of officials being convicted of federal corruption charges.[24])

Plus, due to the collapse of the local journalism industry, many of the claims corporations and elected officials make regarding economic impact and job creation resulting from these deals go

21 Smallridge, Kelly, "Why Confidentiality is Important in the Economic Development Process," April 14, 2017 https://www.bdb.org/blog/2017/04/14/bdb-blog/why-confidentiality-is-important-in-the-economic-development-process/

22 Boyle, John, "Is public helped or harmed by closed economic deals?" *Asheville Citizen-Times*, May 2, 2015 https://www.citizen-times.com/story/news/local/2015/05/02/public-helped-harmed-closed-economic-deals/26796155/

23 Jensen, Nathan M. and Edmund J. Malesky, "Incentives to Pander: How Politicians Use Corporate Welfare for Political Gain," *Cambridge University Press*, 2018

24 Felix, Alison and James R. Hines Jr., "Who Offers Tax-Based Business Development Incentives," The Federal Reserve Bank of Kansas City Economic Research Department, Nov. 2011 https://www.kansascityfed.org/publicat/reswkpap/pdf/rwp11-05.pdf

unchecked by journalists steeped in the local political and economic scene. Local officials have less of a chance of being exposed as doing a corporation's bidding, and more that "news" framing the corporation's demands in friendly terms will be disseminated in the community.[25] Thus, local lawmakers feel they have no choice but to accede to corporate demands.

Non-disclosure agreements have the practical effect of giving local residents less information regarding how public resources are being used. In instances like Indianapolis' HQ2 bid, wherein the details are never released because the deal wasn't finalized, residents will simply never know what was being offered in their name.

In others, they don't know that their community is receiving different terms than others nearby, which also results in inequitable racial outcomes. For example, WBEZ and the Better Government Association found that predominantly Black communities in Illinois were giving Amazon hundreds of millions of dollars in subsidies for warehouses, while predominantly white communities were providing no monetary incentives for similar facilities.[26] This also means that local businesses are being treated asymmetrically, with some of them being forced to subsidize their large competitors while others aren't.

With more information and officials who keep the public clued into ongoing negotiations, voters, activists, and other local organizations can work to ensure a more equitable distribution of resources and that their communities are not being shortchanged or corrupted by dealing that is never made public.

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SOLUTION

States, cities, and counties should ban local officials from signing non-disclosure agreements with corporations for economic development purposes. State laws generally give state lawmakers the power to bar certain activities by city or county governments, including preventing local officials from entering into non-disclosure agreements with corporations. Sen. Michael Gianaris (D-NY) introduced such a measure in 2021, Bill S1196, which is a good

25 Garofalo, "Close to Home."

26 Lippert, John and Natalie Moore, "Amazon's Massive Chicago-Area Expansion Was Fueled By $741 Million From Taxpayers," *WBEZ*, Oct. 26, 2020 https://www.wbez.org/stories/amazons-massive-chicago-area-expansion-was-fueled-by-741-million-from-taxpayers/300fa829-1b71-4d9e-a2f4-1776e88d4cb3

model. If states refuse to take such a step, county and city governments can do it for their own jurisdictions. Bans should cover all public officials, as well as any private-sector officials, such as those working for chambers of commerce, trade associations, or quasi-private economic development offices, if taxpayer resources are part of the negotiations.

2. LACK OF CORPORATE GIVEAWAY TRANSPARENCY

In September 2020, Missouri State Auditor Nicole Galloway released a report on St. Louis' misuse of tax increment financing districts, which are aimed at promoting economic development in certain neighborhoods but often exacerbate already existing economic inequities. The report criticized the city for not disclosing how much revenue it loses annually to those agreements.[27]

Under what's known as Governmental Accounting Standards Board Statement (GASB) No. 77, local governments and school districts are supposed to detail annually how much revenue they lose thanks to agreements made with any entity that promises specific economic benefits. St. Louis, per the audit, wasn't including losses to TIFs in its statements. (They're in a gray area, neither specifically excluded or included by GASB.) Most cities and states say they comply with GASB standards as a way to obtain credit ratings to sell bonds.[28]

Galloway's criticism, though, was merely pointing to the tip of a much larger iceberg. Many state and local governments and school boards simply ignore the requirement to disclose revenue lost to arrangements with corporations. For instance, in Wyoming, no cities or counties report what they lose to corporate giveaways, and neither do any school boards. In California, just 11.9 percent of counties and cities report, while just one out of 1,089 school districts surveyed did.[29]

By comparison, in South Carolina, more than 91 percent of school districts report, as well as more than 77 percent of cities and counties. In New York, more than two-thirds of school districts report, while more than three-quarters of cities and counties do.[30]

27 "City of St. Louis: Tax Increment Financing," Missouri State Auditor, Report No. 2020-076, September 2020 https://app.auditor.mo.gov/Repository/Press/2020076701653.pdf

28 "GASB Primer and FAQs," Good Jobs First, accessed October 5, 2020 https://www.goodjobsfirst.org/gasb-primer-and-faqs

29 "Local Government GASB 77 Reporting Rate," Good Jobs First, accessed October 5, 2020 https://www.goodjobsfirst.org/local-government-gasb-77-reporting-rate

30 "Local Government GASB 77 Reporting Rate," Good Jobs First, accessed October 5, 2020

In the last 30 years, the use of corporate tax reductions, abatements, and other special dispensations have dramatically increased. They currently total, by some estimates, more than $40 billion annually. As the Urban Institute explained, "This proliferation makes it difficult for taxpayers, investors, and other stakeholders to determine the actual size of the tax base and to discern trends over time."[31] By refusing to disclose amounts in their annual financial statements, cities, states, and school districts add to the opacity.

Even outside official financial statements, transparency around corporate tax breaks is poor. Many cities, states, and counties don't disclose publicly which corporations receive which amount, from which governing entity, and for how long. And the various forms this public aid can take make transparency even more difficult. Just some of the types are: tax increment financing districts; payments-in-lieu-of-taxes (known as PILOTs); property tax abatements; or state corporate income tax reductions. And they also overlap: For instance, a corporation could receive a property tax abatement in the form of a PILOT, in which it makes a set tax payment every year instead of its usual property tax assessment.

This opacity disproportionately benefits large corporations, which take the lion's share of state and local development monies. A 2015 report by Good Jobs First looked at 4,200 economic development incentive awards in 14 states and found that large companies received dominant shares, ranging from between 80 and 96 percent of their dollar values.[32] For example, in North Carolina, 93 percent of deals and 95 percent of dollars go to firms with more than 100 employees.

A 2015 report by Good Jobs First looked at 4,200 economic development incentive awards in 14 states, and found that large companies received dominant shares, ranging from between 80 and 96 percent of their dollar values.

Further clouding transparency is that many corporations use "site selection consultants," who are lobbyists working on behalf of clients but generally don't have to register as such, as well as arrangements in which consultants receive a slice of the public money corporations receive.[33,34,35]

31 Francis, Norton, "GASB 77: Reporting Rules on Tax Abatements," The Urban Institute, October 2015 https://www.urban.org/sites/default/files/2015/10/09/2000474-gasb-77-reporting-rules-on-tax-abatements.pdf

32 LeRoy, Greg, Carolyn Fryberger, Kasia Tarczynska, Thomas Cafcas, Elizabeth Bird and Philip Mattera, "Shortchanging Small Business: How Big Businesses Dominate State Economic Development Incentives," Good Jobs First, October 2015 http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shortchanging.pdf

33 LeRoy, Greg, "The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation," Berrett-Koehler Publishers, 2005

34 Mahoney, Laura, "Lawyer Reaping Millions Over Decades as a Cut of Tax Incentives," *Bloomberg Tax*, May 8, 2019 https://news.bloombergtax.com/daily-tax-report-state/lawyer-reaping-millions-over-decades-as-a-cut-of-tax-incentives

35 Willingham, Zoe, "From Giveaways to Investments," Center for American Progress, Feb. 27, 2020 https://www.americanprogress.org/issues/economy/reports/2020/02/27/480909/from-giveaways-to-investments/

One California lawyer received millions annually as a cut of the sales tax revenue he helped redirect from government coffers to big corporations in several cities.[36] A 2019 study found that politically connected firms are more likely to receive incentives from a state, and that incentives provided to politically connected firms are less likely to lead to economic growth.[37]

This lack of disclosure has two major deleterious effects. First, small businesses not only don't receive similar help from government entities, putting them at a competitive disadvantage, but can't even find out the extent to which their competition has been subsidized. Second, local business owners, activists, and voters can't ascertain what their local officials are giving away in their name, making democratic accountability more difficult.

Some states have attempted to address their deficiencies in recent years by making their programs more transparent. But those measures are often met by opposition from big businesses and lawmakers. For example, in 2020, the California state legislature advanced SB 972, which would have forced the state to disclose to legislators which tax breaks were received by companies with more than $5 billion in annual gross receipts. Gov. Gavin Newsom vetoed it.[38]

Other jurisdictions, such as Louisiana and Philadelphia, have given local governmental bodies, including school boards, more of a role in deciding if and how corporate tax subsidies are handed out. In those places, even if the state authorizes a certain incentive, the school board can vote to veto the portion that would have come out of its budget.[39]

But overall, there has been little to no price to pay for political leaders who refuse to tell their residents who exactly is benefitting from public resources.

SOLUTIONS

- **States should mandate GASB 77 compliance.** Just as they have the power to bar non-disclosure agreements, states can also mandate compliance with GASB accounting standards for corporate tax transparency. Three-quarters of states legally mandate at least some compliance already with the overall standards of which GASB 77 is a part.[40] Such measures should be advanced in all 50 states, for all applicable levels of government. Iowa is a good example of a strong disclosure regime.[41] And states should specifically include TIFs under

36 Mahoney, "Lawyer Reaping Millions Over Decades as a Cut of Tax Incentives."

37 Aobdia, Daniel, Allison Koester, and Reining Petacchi, "Political Connections and Government-Awarded Economic Incentives: US State-level Evidence," Dec. 18, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127038

38 Mahoney, Laura, "Newsom Vetoes California Corporate Tax Payment Data Law," *Bloomberg Tax*, Sept. 29, 2020 https://news.bloombergtax.com/daily-tax-report-state/newsom-vetoes-california-corporate-tax-payment-data-law

39 Garofalo, Pat, "Louisiana Teachers Are Fighting Tax Breaks for Exxon. And They Might Win." TalkPoverty, Dec. 20, 2018 https://talkpoverty.org/2018/12/20/louisiana-teachers-fighting-tax-breaks-exxon-might-win/

40 Good Jobs First, "GASB Primer and FAQs." https://www.goodjobsfirst.org/gasb-primer-and-faqs

41 "GASB 77 Tax Abatement Disclosures," Iowa Auditor of State

their disclosure regimes, since GASB's statement leaves them in a gray area, not specifically excluded or included.

- **States should give local governments and school districts the ability to reject corporate tax breaks.** Both Louisiana, thanks to a 2016 executive order by Gov. John Bel Edwards, and the city of Philadelphia give local entities the ability to reject the portion of corporate tax subsidies that would come out of local school budgets (since local schools are usually funded by property taxes). In Louisiana, early data show that the policy had a measurable, positive effect on reducing the amount of money given to big corporations, saving the state $116 million through 2018, and saving millions of dollars for local school districts as well, including $10.4 million for Baton Rouge.[42] All 50 states can advance a similar policy, whether through executive action or legislation, depending on the state.

- **States should join an interstate compact to eliminate corporate tax subsidies.** (Or Congress can eliminate them.) Ultimately, abolition, not just transparency, of company-specific corporate tax incentives should be a public policy goal. But one of the key problems allowing for the proliferation of corporate subsidies is that states and cities are played against each other, and none wants to unilaterally disarm, for fear of a political backlash when purported jobs and investment wind up in other jurisdictions. To prevent this collective action problem, legislation introduced in 15 states in 2020 would create an interstate compact that disallows the use of tax incentives to poach businesses from other states; a bolstered version could disallow the use of any company-specific subsidy.[43] Congress could also use its power under the Commerce Clause to prevent states from using company-specific tax incentives or could tie an abolition of such incentives to other federal funding.[44,45] If states and cities choose to continue to use incentives, they should be targeted to local, smaller businesses or broad industry sectors.

3. NON-COMPLIANCE AND ABUSE OF PUBLIC RECORDS LAW

The Texas Enterprise Fund (TEF) is one of the nation's largest corporate subsidy programs. In 2017, University of Texas, Austin, professor Nathan Jensen submitted a public records request for "all Texas Enterprise Fund formal applications and agreements since the fund's inception."[46]

42 Riegel, Stephanie, "Report: ITEP changes net $10.4M for Baton Rouge, $116M for state," *Greater Baton Rouge Business Report*, March 10, 2020 https://www.businessreport.com/article/report-itep-changes-net-10-4m-for-baton-rouge-116m-for-state

43 The Coalition to Phase Out Corporate Tax Giveaways, https://endtaxgiveaways.org

44 Rolnick, Arthur J. and Melvin L. Burstein, "Congress Should End the Economic War Among the States," Federal Reserve Bank of Minneapolis, Jan. 1, 1995 https://www.minneapolisfed.org/article/1995/congress-should-end-the-economic-war-among-the-states

45 Farren, Michael D. and John Mozena, "Federal Pandemic Relief Could End the Interstate Economic Development Arms Race," Mercatus Center, May 2020 https://www.mercatus.org/system/files/farren-bailout-restrictions-mercatus-working-paper-v1.pdf

46 Letter from Paige Lay, Assistant Attorney General, Open Records Division, Texas Attorney General's office, ID# 713521, April 23, 2018.

The Texas attorney general's office responded with a lengthy document supplying all the objections raised by both the corporations whose applications would have been released and the Texas governor's office. The corporations made some reasonable objections to the release of personal or proprietary business information, but also objections—often rejected by the attorney general's office—that some of the material was subject to trade secrets exceptions or would help their competitors.[47]

The governor's office also weighed in and challenged the release of some of the material, asserting that doing so would enable other states would enable other states to entice the same companies.

"The governor's office states it has specific marketplace interests in Exhibit B because the governor's office is competing against other states attempting to recruit businesses to relocate or expand their businesses in their respective states. The governor's office states release of Exhibit B would seriously disadvantage Texas by permitting other states to directly approach these entities with competing incentives," the attorney general's office said.[48]

What is Exhibit B? Jensen doesn't know. And the law doesn't require an explanation. "If I want to challenge the request, I don't fully know what they are hiding," Jensen said.[49]

Texas' response is emblematic of weakness in state public records laws, which aid corporations in their effort to extract resources from communities.

Every state in the nation has some form of public records or Freedom of Information Act law, with the majority of them passed in the 1960s and 1970s, when the federal government was also advancing the federal FOIA law and creating a new framework for transparency following the Watergate scandal. But most state public records laws have wide exemptions, vague language, or other failings—including charging requesters excessive fees—that limit their usefulness to the public.[50] (A notable exception is Florida, whose laws have much narrower exemptions, though they do still exist.[51]) These shortcomings are exploited by corporations to prevent information from being released to the public, particularly when that information is part of incentive or other economic development arrangements with states, cities, and counties.

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47 Ibid.

48 Ibid.

49 Email to author, October 6, 2020

50 "Only Three States Score Higher Than D+ in State Integrity Investigation; 11 Flunk," Center for Public integrity, Nov. 9, 2015 https://publicintegrity.org/accountability/only-three-states-score-higher-than-d-in-state-integrity-investigation-11-flunk/

51 Winkler, Sophie, "Open Records Laws: A State by State Report," National Association of Counties, Dec. 2010. https://www.governmentecmsolutions.com/files/124482256.pdf

For example, many restrictions prevent public records requests from being used until after economic development deals with corporations have already been completed or announced publicly. For instance, South Carolina's guide to official compliance with its Freedom of Information Act law notes that such arrangements are exempt from FOIA requests until "(a) the offer to attract an industry or business to invest or locate in the offeror's jurisdiction is accepted by the industry or business to whom the offer was made; and (b) the public announcement of the project or finalization of any incentive agreement, whichever occurs later."[52]

Often, even if certain materials are not subject to public records exemptions, the corporations in question are given an opportunity to respond to or challenge the request before it is fulfilled.

This was also the case with Amazon's HQ2. In Indiana, for instance, a judge ruled that the state economic development agency doesn't ever have to disclose what it offered Amazon to build HQ2 in Indianapolis. The publication *Tax Analysts* sued for the details under the state's public records law, but since Indiana never got to the "final offer" stage, the judge said, that law doesn't apply.[53] The state Supreme Court confirmed that ruling in TK TK. Indianapolis isn't the only city in which this occurred. Chicago, Nashville, and Louisville all fought against disclosing the details of their bids, dragging journalists and good-government advocates into court in order to glean details.[54,55,56]

The organization MuckRock used public records requests in an attempt to ascertain every bid made for HQ2. More than 120 were never fulfilled.[57] Similarly, North Carolina's unsuccessful bid to win a new Apple campus has been kept under wraps by that state's Commerce Department for more than two years.[58]

Amazon and Apple, of course, like the situation to play out in this way: A blind auction increases the likelihood of higher bids, and ultimately more public money or lax regulatory regimes

52 "Public Official's Guide to Compliance with South Carolina's Freedom of Information Act," May 2017 https://pcsasc.memberclicks.net/assets/documents/2017foibook.pdf

53 Pak-Harvey, Amelia, "Indiana will not have to release Indianapolis' bid for Amazon's HQ2. Here's why." *Indianapolis Star*, May 5, 2020 https://www.indystar.com/story/news/local/indianapolis/2020/05/05/ruling-indiana-not-required-release-amazon-hq-2-bid-indianapolis/3079021001/

54 Koziarz, Jay, "Report sheds new light on Chicago's bid for Amazon HQ2," *Curbed Chicago*, Dec. 17, 2018 https://chicago.curbed.com/2018/12/17/18145150/chicago-amazon-hq2-bid-incentives-details

55 Sichko, Adam, "Nashville chamber releases part of Amazon HQ2 bid — but secrets remain," *Nashville Business Journal*, Nov. 19, 2018 https://www.bizjournals.com/nashville/news/2018/11/19/nashville-chamber-releases-part-of-amazon-hq2-bid.html

56 Mann, David A., "While Nashville's Amazon HQ2 bid remains secret, court rules Louisville must reveal details," *Nashville Business Journal*, Aug. 13, 2019 https://www.bizjournals.com/nashville/news/2019/08/13/while-nashvilles-amazon-hq2-bid-remains-secret.html

57 Merten, Paxtyn, Beryl Lipton, and Adanya Lustig, "America Bids on Amazon," MuckRock, https://www.muckrock.com/project/america-bids-on-amazon-175/

58 Dukes, Tyler, "NC nearly landed an Apple campus in 2018. Details of the incentive offer remain secret," *Raleigh News & Observer*, Dec. 16, 2020

accruing to the corporation. Amazon was also able to collect reams of data from cities all over, which it could use in future business endeavors, including when it decides where to locate new facilities, which are often subsidized by the public.[59]

States and cities engage in arrangements with private companies to build or run public infrastructure—popularly known as public-private partnerships, or P3s—as a way to leverage private money toward public goods and to extend the reach of local infrastructure dollars.

Often, even if certain materials are not subject to public records exemptions, the corporations in question are given an opportunity to respond to or challenge the request before it is fulfilled. For example, Amazon's economic development contract with Arlington County, Virginia, for HQ2 pledges that the county will "give Amazon not less than two (2) business days written notice of the request to allow Amazon to take such steps as it deems appropriate with regard to the requested disclosure of records."[60] Amazon's agreement with the Virginia state government also includes a clause to "give the Company prior written notice sufficient (in no event less than 2 business days) to allow the Company to seek a protective order or other appropriate remedy" to public records requests.[61]

Essentially, the company in question received a first pass at attempting to get a court to veto the disclosure. "The Amazon one was different [than previous Arlington County agreements] because it was unlimited and it also specifically mentioned giving the company time to seek some redress in court," said Megan Rhyne, executive director of the Virginia Coalition for Open Government.[62]

Finally, even if the law is on the side of public release of information, sometimes state agencies simply don't comply. A judge in South Carolina recently ruled that the state's Commerce Department was violating even the restrictive law outlined above, refusing to release basic information on how much the state was providing in financial support to corporations and what data it used to analyze whether or not that support would provide economic benefits.

59 Peterson, Hayley, "Amazon gained a huge perk from its HQ2 contest that's worth far more than any tax break," *Business Insider*, Dec. 14, 2018 https://www.businessinsider.com/amazon-hq2-search-data-2018-11

60 County Board Agenda Item Meeting of March 16, 2019, Item 29, Arlington County Board, Virginia https://arlington.granicus.com/MetaViewer.php?view_id=2&event_id=1355&meta_id=184432

61 "Memorandum of Understanding: Major Headquarters Program," Nov. 12, 2018 https://hqnova.com/assets/pdfs/NOVA_MOU_with_Amazon.pdf

62 Author interview, Oct. 23, 2020

"The question here is whether the public is entitled to disclosure of certain public information once these companies voluntarily seek and obtain public assistance. The economic incentive deals at issue here concern … public expenditures to the tune of tens of millions of public dollars," the judge wrote.[63] The suit was brought by state Sen. Dick Hartpoolian, who has subsequently called on South Carolina's governor to drop appeals to the ruling.[64]

Having access to these records is vitally important for accountability. For example, journalists in St. Louis were able to use a public records request to discover that the battery maker Energizer received $3 million in tax credits from a program meant to prevent companies from relocating to other states, but that it hadn't actually threatened to leave.[65] The disclosure would not have been made without adequate public records access.

"The concern that I have had over the years is both the lead-up and the amount of secrecy in the lead-up to an announcement and, subsequent to that, how laws are interpreted to try to hamper evaluation of how an agreement is going," said Rhyne. "Whatever is allowed to be withheld before or after is routinely interpreted as broadly as possible."[66] And due to the time or expense of continued litigation, organizations and individuals simply give up trying to obtain the information they seek.

But the end result is less information for the public and more opportunity for corporations to control what voters do and do not know about what their local officials are doing. Like the failure to disclose amounts corporations are receiving from taxpayers, these restrictions make it harder for small businesses to know the extent to which their dominant competitors are being granted favors by the state, as well as harder for local voters to decide if the actions local officials take in their name are a worthwhile use of public resources.

SOLUTION

- **States should mandate all materials pertaining to subsidy deals be subject to Freedom of Information Act/public records laws and be posted publicly.** States should also mandate that cities not give corporations more latitude to challenge requests than that provided by current law. Disclosures should cover all materials, including video and audio calls, and ongoing negotiations where applicable, and should also extend to nongovernmental entities—such as chambers of commerce or quasi-private entities that engage in economic development policy, such as Ohio's JobsOhio—and require prompt public posting. Penalties

63 Monk, John, "SC Commerce Department can't keep secret information about business deals, judge rules," *The State*, October 13, 2020 http://www.thestate.com/news/politics-government/article246404255.html

64 Ibid.

65 Kim, Jacob, "State quietly OK'd millions in subsidies for Energizer to keep, add jobs in St. Louis," *St. Louis Business Journal*, Sept. 9, 2020 https://www.ksdk.com/article/news/local/business-journal/energizer-millions-in-subsidies-keep-add-jobs-in-st-louis/63-31ff03ea-1d24-412e-8416-2bb997795db0

66 Author interview, Oct. 23, 2020

for noncompliance should be stiff and easily enforceable.[67] State fears that such a policy would amount to unilateral disarmament in subsidy negotiations can absolve them via interstate compacts as described above.

- **Eliminate fees and excessive wait times on FOIA requests.** Access to public records should not be a profit center for states and localities. Local officials sshould also face consequences, such as fines or censure, for refusing to provide materials in a prompt manner such as fines or censure. States should provide funds to localities that prove they can't respond to records requests in a timely manner without additional funding.

4. NON-COMPETES IN LOCAL DEVELOPMENT CONTRACTS

In 2014, the North Carolina Department of Transportation signed a contract with a private developer, I-77 Mobility Partners, to build new lanes on Interstate 77. Unbeknownst to local officials and residents, it included a non-compete clause requiring the state to compensate the developer if the state built new exits or added lanes to the highway. The non-compete is in effect for 50 years, effectively preventing local communities from taking steps to build new transportation infrastructure if they don't simultaneously want to compensate a private firm to the tune of millions of dollars.[68] (North Carolina actually bans its Turnpike Authority from entering into such agreements for tolled roads unless drivers can take an alternative, untolled route.[69])

Non-competes are a pervasive problem in local government contracting.[70] (These are not to be confused with non-competes for employees, which prevent them from taking certain jobs when they separate from an old employer, and which are also a significant public policy problem.) Perhaps the most well-known example of this kind of restriction in an infrastructure contract was Chicago's 2008 decision to grant exclusive rights over its parking meters to Chicago Parking Meters, LLC for 75 years. The city was restricted via a non-compete from taking several steps that would provide competition to the corporation's parking meter monopoly. The corporation now collects payments from the city when it takes parking spaces out of service for festivals and other civic events.[71] Those payments totaled $20 million in 2018.[72]

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68 Harrison, Steve, "Toll contract could hinder new free lanes on Interstate 77," *Charlotte Observer*, May 4, 2015 https://www.charlotteobserver.com/news/local/article20226147.html

69 Federal Highway Administration, State P3 Legislation, https://www.fhwa.dot.gov/ipd/p3/legislation/

70 DeGood, Kevin, "The Hazards of Noncompete Clauses in Public-Private Partnership Deals," Center for American Progress, July 27, 2016 https://www.americanprogress.org/issues/economy/reports/2016/07/27/141873/the-hazards-of-noncompete-clauses-in-public-private-partnership-deals/

71 Moser, Whet, "The Parking Meter Lease, And Non-Compete Clauses, Rear Their Heads Again," *Chicago Magazine*, May 4, 2012 https://www.chicagomag.com/Chicago-Magazine/The-312/May-2012/The-Parking-Meter-Lease-And-Non-Compete-Clauses-Rear-Their-Heads-Again/

72 Lentino, Chris, "Chicago to Pay $20 Million to Parking Meter Company in 2018," Illinois Policy, November 2, 2017 https://www.illinoispolicy.org/chicago-to-pay-20-million-to-parking-meter-company-in-2018/

States and cities engage in arrangements with private companies to build or run public infrastructure—popularly known as public-private partnerships, or P3s—as a way to leverage private money toward public goods and to extend the reach of local infrastructure dollars.[73] But by including non-competes in those contracts, they harm governments and residents in several ways.

As In the Public Interest explained, "These perverse contract clauses that limit the government's ability to make policy and planning decisions often last for decades due to the long length of P3 contracts, but guarantee corporate profits by insulating the company from many revenue risks."[74] Cities and states are unable to act when demographics or local economic trends change, requiring new or different forms of infrastructure or other public goods. Revenue that could go toward public services instead is funneled into corporate coffers. Officials find themselves in a position of having to tack millions onto the potential cost of a project if they decide they need to do it in violation of the non-compete.

Non-competes also undermine local democracy in at least two ways. First, they prevent officials from taking action that is in the public interest long after those who made the arrangement have left office, because the terms of non-competes often last decades, freezing locales in time despite changing demographics or other economic conditions. Second, they prevent local voters from using elections to call for their preferred policy choices, as either ballot referendums or the selection of candidates with a particular platform don't matter if the community is bound by a previous non-compete.

These problems have led least nine states, as well as the District of Columbia and Puerto Rico, to ban non-compete clauses in some public-private contracts.[75]

SOLUTION

Cities and states should ban non-competes in government infrastructure contracts. Currently, nine states, as well as the District of Columbia and Puerto Rico, ban these agreements in at least some forms of public-private contracts, usually those having to do with tolled roads or mass transit. Others should follow suit. If a blanket restriction proves too broad for political reasons, states can ban non-competes in certain classes of infrastructure project, as Maryland did in 2018 regarding mass transit projects.[76]

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73 DeGood,"The Hazards of Noncompete Clauses in Public-Private Partnership Deals,"

74 "The Perils of Public-Private Partnerships," In the Public Interest, June 2017

75 Pula, Kevin, "Public-Private Partnerships for Transportation Categorization and Analysis of State Statutes," National Conference of State Legislatures, Jan. 2016 https://www.ncsl.org/Portals/1/Documents/transportation/P3_State_Statutes.pdf

76 HB 816, 2018 legislative session http://mgaleg.maryland.gov/mgawebsite/legislation/details/hb0816?ys=2018rs

CONCLUSION

In every state, dominant corporations leverage their size and political power to extract resources from local communities—promising local lawmakers benefits such as job creation and investment that rarely materialize—while shielding that extraction from local residents, preventing them from articulating their opposition or holding local officials accountable. Their power enables them to demand that communities hide material facts from voters, for months, years, or even decades, as well as refrain from taking certain actions on public investments that are clearly in the public interest.

Forty years of corporate consolidation, spurred by the federal government's active disinterest in enforcing antitrust law, as well as neoliberal tax, labor, and trade policies that gutted manufacturing, undermined family farms, and allowed big retail firms to drive local merchants out of business, have put communities in a bind: Local firms can't thrive and grow, or even find investors, and the few corporations actively expanding are mega-firms that can dictate terms to local policymakers.

Reducing corporate power and breaking the stranglehold of monopolists is key to producing vibrant local economies. Research has shown that economies based on small, local businesses experience higher wage growth, lower rates of poverty, and more business formation.[77]

The policies outlined above, though not an exhaustive list of the ills regarding corporate transparency and accountability, combine to make it harder for local voters to understand what is being done with local resources while making it more likely that large corporations can extract resources in the name of economic development. They contribute to a policy environment in which small, independent businesses are at a consistent disadvantage, as their larger competitors receive subsidies and other benefits that smaller firms do not.

Changing these policies would constitute a significant first step toward building more resilient local economies based on smaller, local, independent firms, as well as a political system more accountable to local voters and business owners. They should be part of a larger push, like that underway in New York, to comprehensively rewrite antitrust law and increase enforcement, so that local economies and democracies can govern themselves, and so large corporations compete on a level playing field with everyone else.

77 For an overview of this research, see: Mitchell, Stacy, "Key Studies: Why Independent Matters," Institute for Local Self-Reliance, Jan. 8, 2016 https://ilsr.org/key-studies-why-local-matters/

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