CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

April 3, 2013

The Honorable Lou Correa
State Capitol
Room 5061
Sacramento, CA 95814

The Honorable Tom Berryhill
State Capitol
Room 3076
Sacramento, CA 95814

Re: Constitutional Issues with Senate Bill 121

Dear Chairman Correa, Vice Chairman Berryhill, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments to demonstrate our opposition to Senate Bill 121, which is currently being considered by the Senate Banking and Financial Institutions Committee. Specifically, I write to note several significant legal concerns raised by the bill. In addition to raising public-policy concerns, these weaknesses could subject the state to costly litigation.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent a nonprofit, incorporated educational association in a challenge to Colorado's campaign finance laws. We are also involved in litigation currently before the U.S. Supreme Court.

I write to draw your attention to several significant constitutional concerns presented by Senate Bill 121, which seeks to require a California corporation (or seemingly a foreign corporation doing business in the state) to notify its shareholders 24 hours prior to making a political contribution or independent expenditure.

S.B. 121 imposes burdensome and impractical requirements on corporations. Under the auspices of shareholder protection, this bill will serve only to stifle speech, and will fail to meaningfully supplement existing shareholder safeguards. Moreover, the bill's constitutionality is suspect. For the above reasons, we oppose S.B. 121.

I. S.B. 121 imposes prohibitively costly burdens on protected speech.

Limitations on corporate independent expenditures are prohibited by the First Amendment to the United States Constitution.[1] This rule applies not only to federal laws, but to the states as well.[2] While this bill does not propose to limit corporate independent expenditures, it places such restrictive

[1] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[2] *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. ___ (2012) (citing U.S. Const., Art. VI, cl. 2).

barriers on free speech that it would effectively make such activities nearly impossible, and expose California to potential legal action if the bill becomes law.

S.B. 121 places an exorbitant burden on corporations engaging in political activity. While the government of California has broad discretion to regulate campaign finance and corporate activity within its borders, it cannot pile so many burdens upon corporate political activity as to effectively limit the First Amendment rights of incorporated entities.[3]

Faced with the burdensome costs of notifying all of a corporation's shareholders for every instance of speaking in this manner, many corporations will likely refrain from speaking entirely. As a result, in direct contravention of Supreme Court jurisprudence[4] and the United States Constitution, political speech may be regulated out of existence based exclusively on an entity's corporate identity.

II. The bill's broadness raises considerable concerns.

Internal corporate governance issues are typically left to state law. However, the broadness of S.B. 121's language appears to reach political activity even if it does not occur in California. These concerns caution against the broad language proposed in the legislation.

The bill purports to regulate both California corporations and seemingly foreign corporations doing business in California, but it also reaches all contributions and expenditures *no matter where they are made*. For example, if an Arizona-based bank has a branch in California, and that bank engages in political activity entirely internal to Arizona, S.B. 121 still requires that the Arizona bank first go through the onerous process of notifying all of its shareholders. The plain language of S.B. 121 only requires that the bank have *one* shareholder in California – and does not require that the bank engage in any political activity that actually affects California. While the state has authority over corporations doing business in California, we humbly suggest that this policy provides no protection to either California voters or California stockholders.[5] Rather, it makes California a more hostile environment for business, undermining the state's economic well-being.

III. S.B. 121 arbitrarily focuses on corporate political activity while failing to address the political activity of labor unions.

Since *Citizens United*, the conversation about campaign finance reform has focused on corporate political activity. The holding of *Citizens United*, however, applies to corporations and labor unions equally.[6] The Center supports the right of labor unions to engage in political speech.

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[3] *Citizens United* at 897 ("Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations...PACs, furthermore, must exist before they can speak. Given the onerous restrictions, *a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.*") {emphasis added}.

[4] *Id.*, at note 1.

[5] It is worth noting that even if the state amends S.B. 121 to try and protect California shareholders, this "shareholder protection" rationale was expressly foreclosed by *Citizens United* and would make the state vulnerable to a constitutional lawsuit. *See, Citizens United* at 911 (citing *First National Bank of Boston v. Bellotti,* 435 U. S. 765, 777 (1978)).

[6] Indeed, *Citizens United* was openly supported by at least one major labor union. *See, Citizens United v. Federal Election Commission*, Brief of Amicus Curiae AFL-CIO.

Indeed, encouraging broad political participation is central to our mission. However, the disparate treatment of corporations and unions under S.B. 121 suggests an Equal Protection problem.

While the constitutionality of this disparate treatment is questionable,[7] at the very least it must be based on *some* constitutionally acceptable justification. The Legislature imposes the *same* candidate contribution limits on corporations as it does on labor unions. This suggests that the citizens of California, through their elected representatives, appropriately treat corporations similarly to labor unions.

Despite this judgment by the Legislature, S.B. 121 subjects corporations to an exacting regulatory structure from which unions are exempt. Specifically, S.B. 121 requires a corporation to notify its shareholders before engaging in political activity. Conversely, pursuant to federal labor law, a labor union is presumed to have the consent of its members – its members must "opt-out" of the union's political activity.

This provision in particular raises additional Equal Protection concerns because similar requirements are not imposed on labor unions. Writing for the majority in *Citizens United*, Justice Kennedy stated: "The worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[8] The courts are unlikely to uphold a law imposing a major burden on only one type of incorporated entity – for-profit firms – while allowing lesser burdens on other entities and unincorporated associations. Of course, the answer is not to impose greater burdens on union activities; it is to avoid unnecessary and overbroad burdens on equivalent corporate activities.

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In its present form, Senate Bill 121 places significant burdens on political speech by corporate entities, may be functionally invalid (as it attempts to regulate corporate political activity that does not affect California), and raises serious Equal Protection concerns. If adopted it would threaten political speech rights in California and elsewhere, and could force the state into costly and unnecessary litigation. Thus, we oppose S.B. 121 and recommend that the Committee reject this bill.

Thank you for allowing me to submit comments on Senate Bill 121. I hope you find this information useful. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

Matt Nese

Matt Nese
Director of External Relations
Center for Competitive Politics

[7] *See, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (noting the differences between corporations and unions engaging in political activity), *but see*, *Citizens United* at 882 (overruling *Austin*).
[8] *First National Bank of Boston v. Bellotti,* 435 U. S. 765, 777 (1978) quoted in *Citizens United.*