CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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February 17, 2015

The Honorable Thomas M. Bakk
75 Rev. Dr. Martin Luther King Jr. Boulevard
232 Capitol
Saint Paul, MN 55155

The Honorable David W. Hann
100 Rev. Dr. Martin Luther King Jr. Boulevard
147 State Office Building
Saint Paul, MN 55155

Re: Constitutional and Practical Issues with Senate File 92

Dear Majority Leader Bakk, Minority Leader Hann, and members of the Senate:

On behalf of the Center for Competitive Politics, I am writing you today to respectfully submit the following comments regarding serious constitutional and practical issues within the provisions of Senate File 92, which requires that all political contributions and independent expenditures of funds derived from revenues of a corporation or LLC be made with funds that have been reported as income on individual income tax returns. This requirement would violate the First and Fourteenth Amendments as interpreted by the Supreme Court.

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 nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

If Senate File 92 becomes law as written, there is a high likelihood that it will be found unconstitutional if challenged in court. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to award legal fees to successful plaintiffs. Legal fee awards are frequently costly – often well over one hundred thousand dollars.

Depending on one's reading of this hopelessly vague bill, it goes as far as to outright ban corporate funding of independent expenditures – in direct contradiction to the Supreme Court's holding in *Citizens United*. It surely discriminates against certain speakers, depending on the manner in which they make their living and the size of their income. In any event, the bill runs

afoul of Supreme Court precedent, imposes onerous burdens on affected corporate entities and individuals, and infringes on the speech rights of the aforementioned entities.

I. Senate File 92 explicitly bans political giving by the poor, while leaving it unchanged for the sufficiently wealthy.

This bill may be one of the worst infringements on First Amendment political rights that the Center has seen proposed. The statutory trigger in S.F. 92 only permits those funds which have been reported on a personal income tax form (or which would be required to be so reported) to be contributed to political entities. But not every American is required to file a federal income tax return.[1] For example, single individuals under the age of 65 do not need to file a federal income tax return for 2014 if they make less than $10,150.[2]

Consequently, if this bill becomes law, an entire class of America's working poor will have their constitutional rights extinguished. Those with sufficient means to trigger income taxes will be able to be more fully engage in the political process. In essence, this bill actually brings back one of America's oldest forms of political discrimination: a property qualification on participation in our democracy.

While an obvious result of the bill's language, it seems doubtful that this outcome was intended. But it illustrates the poor drafting and insufficient vetting underlying this effort. For that reason alone, this bill ought to be tabled.

II. As written, Senate File 92 is impermissibly vague, leaving potential speakers to guess at its meaning, and is accordingly ripe for constitutional challenge.

At best, this bill leaves those wishing to speak guessing at the meaning of its provisions; at worst, this bill intentionally bans corporations from making independent expenditures. Based on either reading, S.F. 92 is highly vulnerable to a legal challenge.

If this bill functions to prohibit spending from "corporate revenue," unless such revenue is converted to individual income via payment in the form of a salary or a dividend, then the bill violates the Court's holding in *Citizens United* by acting as a restraint on corporate spending on independent expenditures. In *Citizens United*, the Court held that corporations, along with trade associations and labor organizations, could not be prevented from making independent expenditures.[3] As independent expenditures are disseminated independently of any candidate, the Court reasoned that they pose no danger of corruption or the appearance of corruption – and, therefore, no sufficient governmental interest exists for banning them.[4]

Indeed, 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,

[1] "Do You Need to File a Federal Income Tax Return?," Internal Revenue Service. Retrieved on February 17, 2015. Available at: http://www.irs.gov/Individuals/Do-You-Need-to-File-a-Federal-Income-Tax-Return%3F- (January 15, 2015).
[2] "Do I need to file a 2014 tax return with the IRS?," TurboTax AnswerXchange. Retrieved on February 17, 2015. Available at: https://ttlc.intuit.com/questions/1901490-do-i-need-to-file-a-2014-tax-return-with-the-irs (January 28, 2015).
[3] *Citizens United v. Federal Election Commission*, 558 U.S.310, 372 (2010).
[4] *Id*. at 360-61.

union, or individual.'"[5] He continued: "prohibited… are restrictions distinguishing among different speakers, allowing speech by some but not others… restrictions based on the identity of the speaker are all too often simply a means to control content."[6] Following *Citizens United*, there can be no serious question that the courts will uphold a law that imposes a ban on spending by entities on independent expenditures simply because a portion of that spending has been derived from corporate revenue.

However, even if this bill is read only to limit spending by individuals on independent expenditures (or political contributions) using pretax corporate revenue, the bill is fatally flawed from a vagueness standpoint. How is an individual to know – in advance – how his or her income will be reported for tax purposes? The bill only permits spending "from funds that have been reported, or will be required to be reported..."[7] Does this provision mean that individuals have to guess at future tax policy? Does this provision only apply to money that has already been reported in the past year? If so, does that mean that an individual must set aside money for political spending in a bank account for a year before it can be used to make independent expenditures or political contributions? What if an individual places these segregated funds into bonds or a money-market account that holds securities? Does that decision remake the individual's money into "corporate revenue," effectively restarting the clock?

Even if these vagueness concerns were clarified, the law would likely remain unconstitutional. As Minnesota undoubtedly knows, *Citizens United* also prohibited states from forcing corporations to speak through other entities, such as PACs.[8] The Court explicitly held that the federal ban on corporate speech remained "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."[9] The Eighth Circuit reaffirmed this holding just two-and-a-half years ago.[10] Although this bill attempts to evade this clear constitutional command by naming these separate entities "individuals subject to income tax reporting," it does nothing to change the fact that the bill plainly seeks to ban direct corporate speech.

Given these important questions, would-be speakers will not know how and in what manner they may speak, and S.F. 92 will chill otherwise lawful activity. There is nothing in the text of the bill itself or any direction in the bill for future guidance to be promulgated on these questions. This is a significant weakness because the Supreme Court has made clear that such confusing requirements chill speech: "Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[11]

Again, as currently written, the provisions in Senate File 92 are unlikely to survive a legal challenge.

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[5] *Id.* at 349 (citing and quoting *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 777 (1978)).
[6] *Id.* at 340.
[7] Section 1, Subd. 14a.
[8] *Citizens United*, 558 U.S. at 337-338.
[9] *Id.* at 337.
[10] *Minnesota Citizens Concerned for Life, Inc.*, 692 F.3d 864, 872 (8th Cir. 2012).
[11] *Citizens United*, 558 U.S. at 324.

III. As noted above, the bill's vagueness further suffers from a lack of clarity as to what constitutes "corporate revenue."

In an extension of the discussion above, S.F. 92 is vulnerable to constitutional challenge as a result of its vague terms. To take another example, Subdivision 14a references "corporate revenue" without defining the term. Take the enumerated example of capital gains: "political contributions and independent expenditures of funds derived from revenues of a corporation or limited liability company may be made only from funds that have been reported, or will be required to be reported, as income on individual income tax returns, such as…capital gains."[12]

In theory, if Jane Doe purchases a corporate bond on the open market and holds it to maturity, then the resulting funds would be paid from the "revenues of a corporation." How does the change in value of a stock, for instance, implicate corporate revenue? What happens in the event of a capital loss? If Ms. Doe purchases a stock at $10, and sells it at $5 (or any amount lower than the purchase price, for that matter), and the purchaser is a corporation, does this purchase, which resulted in a net loss to Ms. Doe, count as "corporate revenue?" Can Ms. Doe use these funds for political speech, even though it would qualify as a loss, and thus potentially not as income, for tax purposes? More broadly, is Ms. Doe supposed to know how to report every cent of her income before she is able to make decisions about how to legally spend her finances on political speech?

Regardless of the answers to these questions, it's clear that Senate File 92 is riddled with vagueness issues that will affect any would-be speakers. As noted above, the Supreme Court has found vague laws impermissible when such confusing requirements chill speech. As the Court explained in *Citizens United*, "[t]he First Amendment does not permit laws that force speakers to retain a campaign attorney…before discussing the most salient issues of our day."[13]

IV. As written, S.F. 92 arbitrarily discriminates based on the nature of the speaker.

As written, if Tom makes his money entirely from legal fees, and his firm isn't incorporated, nothing in S.F. 92 would appear to restrict his political spending. However, if Dick works for McDonald's, he must worry about what he can spend on independent expenditures and political contributions, since many of his funds are derived from the corporate revenue of McDonald's. (Of course, if he's single, younger than 65, and makes less than $10,150 per year, the bill would ban his participation). By contrast, if Harry happens to be independently wealthy, and keeps all of his money in gold, nothing in this bill could be construed to limit his political spending – at least so long as candidates accept bullion. But if Harry chooses to liquidate his gold into currency, he will presumably do so through a corporation, raising the question as to whether that money could be considered funds obtained from corporate revenues.

The above scenarios state the problem: what possible state interest is being helped by this state of affairs? Unless S.F. 92 is targeted at restricting or inhibiting corporate spending – which is flatly prohibited by *Citizens United* as it pertains to the funding of independent

[12] Section 1, Subd. 14a.
[13] *Citizens United*, 558 U.S. at 324.

expenditures – it is clear that this bill will arbitrarily curtail the speech of some individuals while appropriately leaving the speech of others unfettered.

V. S.F. 92 invokes equal protection concerns, as it 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.[14] The Center supports the right of labor unions to engage in political speech. Indeed, encouraging broad political participation is central to our mission. However, the disparate treatment of corporations and unions under S.F. 92 suggests a constitutional infirmity under the Equal Protection Clause of the Fourteenth Amendment.

While the constitutionality of this disparate treatment is questionable,[15] at the very least it must be based on *some* constitutionally acceptable justification. S.F. 92 subjects entities, which receive corporate funding and choose to make political contributions or independent expenditures, to a spending prohibition from which unions are exempt. Specifically, S.F. 92 requires an organization or individual receiving corporate revenue to account for the nature of its current funding before engaging in political activity, as contributions and independent expenditures are prohibited if the money used to fund them is derived from pretax revenue.

This provision in particular raises additional Equal Protection concerns because similar requirements are not imposed on labor unions. The courts are unlikely to uphold a law imposing a major burden on entities receiving corporate funding while allowing lesser burdens on entities that receive no corporate funding. Of course, the answer is not to impose greater burdens on entities funded with contributions from labor unions – it is to avoid unnecessary and overbroad burdens on equivalent organizations receiving funding from corporate entities.

It's worth noting that additional Equal Protection problems exist given the irreparable harm the bill does to those poor enough to avoid income taxes (by prohibiting this class from making contributions or funding independent expenditures), while allowing those who must file income taxes to more fully participate in the political process. This problem also exists as it pertains to how individuals choose to make a living. As discussed above, if this bill becomes law, our lawyer who makes his money entirely thorough legal fees obtained by his unincorporated firm may engage in the political process uninhibited while the McDonald's worker would be forced to comply with this vague law, since much of his earnings are derived from the corporate revenue of McDonald's. Both issues would deprive individuals of the equal protection of the laws.

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[14] The law at issue in *Citizens United*, 2 U.S.C. § 441b, banned independent expenditures from both corporations and unions. *Citizens United*, 558 U.S. at 318-319 (citing and discussing 2 U.S.C. § 441b). 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.

[15] *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*, 558 U.S. at 365 (overruling *Austin*).

Writing for the majority in *Citizens United*, Justice Kennedy held: "We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[16]

If Senate File 92 is intended to limit corporate speech on independent expenditures, given the clear statement of the Court on this issue, it should be obvious that the bill would not survive if challenged in court, all while wasting precious taxpayer dollars in a futile effort to limit political speech that enjoys full protection from the prohibition proposed in this bill. If Senate File 92 is intended to limit the speech of individuals who derive funding from corporate revenue, it still suffers from serious vagueness concerns and a lack of equal protection that is no less vulnerable to legal challenge.

Although we understand that many of the above issues inherent in this legislation may have been unintended, members of the Senate must realize the serious constitutional and practical issues contained in this legislation as they contemplate this bill.

Thank you for considering this analysis of Senate File 92. Should you have any further questions regarding these issues 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
Director of External Relations
Center for Competitive Politics

[16] *Citizens United*, 558 U.S. at 365.