September 9, 2016

Via fax and mail

The Honorable Governor Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Dear Governor Brown:

On behalf of the Center for Competitive Politics,[1] I urge you to veto Senate Bill 1107, which amends the Political Reform Act of 1974 to permit the State of California and its localities to subsidize candidate campaigns with Californians' tax dollars. Aside from concerns about the effectiveness of such programs, a more significant obstacle ought to stand in S.B. 1107's way: the Political Reform Act, as amended by voters in 1988, explicitly prohibits the creation of tax-financing programs in California without voter approval.

Article II, Section 10, of the California Constitution says the Legislature "may amend or repeal an initiative," but "only when approved" by the voters. The only exception to this requirement is if a voter-approved law "permits amendment or repeal," in which case the Legislature may skip voter approval. The Legislature's power to amend the Political Reform Act, originally passed by the voters in 1974, is strictly limited to amendments that "further [the] purposes" of the Act. All other amendments must be sent to the voters for approval.

In 1988, California voters approved the existing prohibition against tax-financing programs in their state. That law reads, in part, "No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office."

This provision is directly contradicted by Section 2(b) of S.B. 1107, which states, "A public officer or candidate may expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity establishes a dedicated fund for this purpose by statute, ordinance, resolution, or charter, and both of the following are true: (1) Public moneys held in the fund are available to all qualified, voluntarily participating candidates for the same office without regard to incumbency or political party preference. (2) The state or local governmental entity has established criteria for determining a candidate's qualification by statute, ordinance, resolution, or charter."

It defies all logic to find, as the Legislature does, that allowing the creation of tax-financing programs "furthers the purposes" of an Act which explicitly prohibits them. Under the California

[1] 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 state campaign finance laws in Colorado. We are also involved in litigation against the state of California.

Constitution, voters have a right to be heard before a key provision of the Act they approved is overturned.

S.B. 1107's supporters have argued that polling demonstrates that Californians now support tax-financed campaign programs, in contrast to the decision of voters 28 years ago. But often biased opinion polls are not a replacement for casting ballots. If the public truly supports tax-financing, S.B. 1107's proponents should have no opposition to putting the issue on the ballot and letting the voters decide.

Indeed, the Legislature initially appeared poised to do exactly that. The version of S.B. 1107 that originally passed the Senate on May 31, 2016 asked voters to approve the bill. After failing to meet a legislative deadline to qualify S.B. 1107 for the November 6, 2018 ballot, however, the bill's sponsor amended the measure to remove that requirement and insert language simply asserting that S.B. 1107 "furthers the purposes of the Political Reform Act." It is clear from the timing of this June 30 amendment that the Legislature understood it was supposed to send S.B. 1107 to the voters and is now attempting an end run around both the voters and the California Constitution.

Moreover, Californians who voted to prohibit tax-financed campaign programs in 1988 – and who have repeatedly rejected initiatives to create tax-financing programs in the years that have followed – had good reasons for doing so. Ample academic research suggests that these programs do not succeed in their goals of improving government or reducing corruption. Research by the Center for Competitive Politics has found that statewide tax-financing programs in Arizona and Maine failed to decrease the number of registered lobbyists in those states, failed to reduce the plurality of legislators from the traditional backgrounds of business and law, failed to increase the number of women elected to legislative office, and failed to stimulate increased voter turnout. Additional research by the Center finds that tax-financing did not change the frequency with which legislators aligned with organized interests (in Connecticut) and uncovered numerous cases of waste, fraud, and abuse in tax-financing programs (in Arizona, Maine, and New York City).[2]

Regardless of debates about the merits of public financing among experts and policymakers, we should all agree that the Legislature cannot reverse a key provision of a law approved by voters. Under the Political Reform Act and the California Constitution, if tax-financing is to come to The Golden State, it must be the voters who bring it. In failing to submit S.B. 1107 to the voters, the Legislature has brazenly overstepped its authority.

Senate Bill 1107 amends the Political Reform Act in a manner that does not "further [the] purposes" of the Act. For that reason, it should be vetoed. For more information, I have enclosed a more detailed constitutional analysis representative of the Enrolled version of S.B. 1107 that was prepared for the California Fair Political Practices Commission and dated July 20, 2016.

Sincerely,

David Keating
President

[2] More information can be found in "Taxpayer-Financed Campaigns: A Costly and Failed Policy," Center for Competitive Politics. Retrieved on September 8, 2016. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-07-16_Policy-Primer_Taxpayer-Financed-Campaigns.pdf (July 2014).

July 20, 2016

The Honorable Jodi Remke
Chair
California Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: The Proposed SB 1107 Amendment of the Political Reform Act's Public Financing Ban Does Not "Further [the] Purposes" of the Act and May Not Be Enacted by the Legislature Without Referral to the Voters under Article II, Section 10 of the California Constitution

Dear Chair Remke and Members of the Commission:

The Center for Competitive Politics ("CCP")[1] submits these comments in response to the submission of SB 1107 to the California Fair Political Practices Commission.

SB 1107 proposes to amend the Political Reform Act by enacting a change to the flat prohibition of Government Code section 85300 on the use of public moneys for election campaigns. As currently drafted, section 2 of the bill amends Government Code section 85300 to permit candidates for state and local offices to expend public moneys for election campaigns if the state or local government entity has established a dedicated fund for such purposes and conditions (1) the availability of the funds for use by all voluntarily-participating candidates without regard to incumbency or political party preference and (2) criteria for determining the candidates qualification (for such funds) by statute, resolution ordinance or charter.

On June 30, 2016, SB 1107 was amended in the Senate, and the amendment removed the provision that authorized the Secretary of State to place the measure on the 2018 ballot. Section 6 of the measure makes a legislative finding that the measure as drafted "furthers the purposes" of the Political Reform Act.

The two prerequisites of a legislative amendment of the Act without referral to the voters are (1) that the measure is adopted by two-thirds vote in each house of the Legislature and (2) the measure "furthers [the] purposes" of the Act. While the Legislature may place an amendment to section 85300 on the ballot by a two-thirds vote, it may not adopt any direct amendment to the

[1] 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, it presently represents nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Utah and recently won a case in the Nevada Supreme Court.

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Political Reform Act that does not "further its purposes" without such referral to the voters.[2] Gov. Code section 81012, subdiv. (b).[3] *Howard Jarvis Taxpayers Ass'n v. Bowen*, 192 Cal. App. 4th 110, 126-27 (2011).

The substantive amendment language of SB 1107 currently reads as follows:

> Section 85300 of the *Government Code* is amended to read:
>
> 85300. (a) Except as provided in subdivision (b), a ~~A~~ public officer shall not expend, and a candidate shall not accept, any public moneys for the purpose of seeking elective office.
>
> (b) A public officer or candidate may expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity establishes a dedicated fund for this purpose by statute, ordinance, resolution, or charter, and both of the following are true:
>
> (1) Public moneys held in the fund are available to all qualified, voluntarily participating candidates for the same office without regard to incumbency or political party preference.
>
> (2) The state or local governmental entity has established criteria for determining a candidate's qualification by statute, ordinance, resolution, or charter.
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> (New language appears in underlined text; deleted language in strikeout text.)

SB 1107 Amends the Political Reform Act.

There is no doubt that SB 1107 "amends" the Political Reform Act. It is not a separate statute, or even control language in a legislative resolution. As the Supreme Court said in *Franchise Tax Board v. Cory* (1976):

> "An amendment is ' . . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, . . .' (Sutherland, Statutory Construction (4th ed. 1972) § 22.01, p. 105.) A statute which adds to or takes away from an existing statute is

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[2] A number of attempts to impose public financing of state elections by initiative since 1990 have failed when presented to the state's voters. See the Senate Committee Analysis of SB 1107 dated June 19, 2016.

[3] 81012. This title may be amended or repealed by the procedures set forth in this section. If any portion of subdivision (a) is declared invalid, then subdivision (b) shall be the exclusive means of amending or repealing this title.
(a) This title may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 12 days prior to passage in each house the bill in its final form has been delivered to the commission for distribution to the news media and to every person who has requested the commission to send copies of such bills to him or her.
(b) This title may be amended or repealed by a statute that becomes effective only when approved by the electors.

considered an amendment." (*Robbins v. O. R. R. Co. (1867) 32 Cal. 472*.)" (80 Cal. App. 3d 766, 768.)

SB 1107 Does Not Further the Purposes of the Act. Instead It Undermines a Clear Purpose of the Act.

Section 6 of SB 1107 flatly concludes without any finding or analysis that its amendment of section 85300 would "further [the] purposes" of the Political Reform Act. This is not correct.

Proposition 73, which added chapter 5 to the Political Reform Act of 1974 (Gov.Code, §§ 81000–91015).2 Article 3 of chapter 5, entitled "Contribution Limitations," imposed various restrictions on contributions to and by candidates and political committees or parties (§§ 85301–85307), and also provided in section 85300: "No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office."

Under this voter-approved amendment, one of the purposes of the Act was to prohibit state and local governments from using public moneys for campaigns.[4] The prohibition of Section 85300 applies to state government (state constitutional, state legislative and judicial elections) and to local general law cities and districts, as well as to charter counties.

The proposed language of SB 1107 would allow the Legislature and any local government to effectively repeal this central provision of the Act.

In only one instance has the California Supreme Court allowed for any exception to that ban. In *Johnson v. Bradley*, 4 Cal. 4th 389, 392 (1992), the California Supreme Court held that the flat prohibition of section 85300 did not apply to charter cities under their constitutional "home rule" powers. The California Constitution generally grants charter cities a greater degree of autonomy over local affairs than charter counties have, particularly with respect to local elections. While the California Supreme Court ruled that the public financing ban does not apply to charter cities,[5] a state appellate court decision issued prior to *Johnson v. Bradley* held that the public financing ban <u>does</u> apply to charter counties (*County of Sacramento v. Fair Political Practices Commission* (1990) 222 Cal. App. 3d 687). The Supreme Court in *Johnson v. Bradle*y distinguished and criticized the latter decision but did not overrule it, and no decision subsequent to 1992 has done so.

Thus, the "purposes of the Act" includes a prohibition on public financing of campaigns at the state and local levels. For this analysis, it is not relevant or necessary to decide whether the "purposes" means the originally-enacted purpose of banning all state and local jurisdictions from adopting public financing of elections or the purpose of banning all jurisdictions except charter cities from doing so.

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[4] Such programs are also known, in this context, as "tax financing" or "public funding" regimes.

[5] Currently, California's charter cities may adopt or not adopt public financing of campaigns, subject to certain limits imposed by the U.S. Constitution. For example, *Arizona Free Enterprise v. Bennett* (2011) 564 U.S.721, struck down a public financing law because "Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment."

Only two appellate decisions have addressed the meaning of "furthers its purposes." While the two decisions are quite different, the Courts in both cases looked at the substance of the amendments to determine whether they furthered the purposes of the Act and thus the method of adoption (by legislation alone) was permissible. These decisions do not provide any basis for the type of change proposed by SB 1107.

In *Howard Jarvis Taxpayers Association*, 192 Cal. App. 4th 110 (2011), the Third District Court of Appeal found that a statute authorizing the Legislature to prepare a ballot label and title and summary of Proposition 1-A, the 2008 High Speed Rail Bond measure, did not further the purposes of the Political Reform Act that authorized the Attorney General to prepare such ballot materials for state ballot measures. The court concluded that the statute authorizing the Legislature to prepare a ballot title and summary and ballot label directly amended the Act for this particular measure by giving the Legislature the duties the Act had vested in the Attorney General. (*Id.* at p. 126.)

The Court stated,

> "Section 81012, subdivision (a) states the Political Reform Act of 1974 'may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 12 days prior to passage in each house the bill in its final form has been delivered to the commission [the Fair Political Practices Commission (§ 82012)] for distribution to the news media and to every person who has requested the commission to send copies of such bills to him or her.' As we have noted, the purposes of the Political Reform Act of 1974 are, among other things, to promote impartiality and to eliminate conflicts of interest in the performance of governmental duties. Consistent with these purposes, we have construed section 88002, subdivisions (a)(1) and (a)(2), provisions of the Political Reform Act, to require the Attorney General to prepare the ballot label, title and official summary for each state measure placed on the ballot for a vote of the electorate. And other statutes enacted consistent with, and in furtherance of the purposes of the Political Reform Act, require the Attorney General to prepare an impartial statement of the purpose of the measure, in language that is not an argument, and is not likely to create prejudice, for or against the measure (Elec.Code, § 9051), and preclude the Attorney General from preparing the ballot title and summary of a measure for which the Attorney General is a proponent (Elec.Code, § 9003). In this light, the Legislature's amendments of the statutory scheme by itself preparing the ballot label, title and summary of Proposition 1A, the High–Speed Train Bond Act, a measure that the Legislature placed on the ballot, cannot be said to 'further [the] purposes' of the Political Reform Act. Accordingly, the amendments do not comply with the limitation on the Legislature's authority set forth in section 81012, subdivision (a)." (*Id.*)

In the second case, *Santa Clarita Org. for Planning & the Env't (SCOPE) v. Abercrombie*, 240 Cal. App. 4th 300, 320 (2015), *as modified* (Sept. 22, 2015), *review denied* (Nov. 18, 2015) ("*Santa Clarita*"), the Second District Court of Appeal in an unusual legal and factual analysis upheld the Legislature's "harmonization" of Government Code 87100, a part of the Political Reform Act, with Section 15.2, subd. (d) of the Water Code's uncodified Act, the

Agency's enabling legislation,[6] which authorized a Water district employee to serve on the Agency's board of directors (and to participate in a district's contracting decision) once his status as an employee was disclosed.

The Court held that the Water Code amendment, section 15.2, "certainly amends or repeals section 87100 within the meaning of the provisions governing initiatives because it 'add[s] or take[s] from' section 87100. (*People v. Cooper* (2002) 27 Cal.4th 38, 443; *People v. Kelly* (2010) 47 Cal.4th 1008, 1026–1027.) More specifically, section 15.2, subdivision (d) 'takes away' from section 87100's reach by immunizing the conflict of interest that would otherwise be proscribed by section 87100 when an appointed director of the Agency's board of directors has a financial interest in a contract that is covered by section 1090 (because, as we conclude above, section 15.2, subdivision (d) excepts such conflicts from both section 1090 and section 87100)." (*Id.*) (See also, *Huening v. E*u (1991) 231 Cal.App. 3d 766.

After finding that section 15.2, subd. (d) was an implied exception to section 1090, the Court then concluded that giving effect to section 15.2, subd. (d) "harmonized" that statute with Government Code section 87100:

> "Because giving effect to one statute (section 87100) would nullify the other (section 15.2, subdivision (d)), the two are irreconcilable. In this situation, we are to 'where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions,' even if it requires us to impliedly repeal a portion of one of the statutes. (*State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956; *Consumers Union of the United States v. Calif. Milk Advisory Bd* (1978) 82 Cal.App.3d 433, 445.) In reconciling, we are to give effect to the more specific statute (*State Department,* at pp. 960–961), which in this case is section 15.2, subdivision (d). Even if we were to accept SCOPE's argument that we should assess specificity as between section 1090 and section 87100, it is well settled that section 1090's focus on conflicts involving contracts is more specific than section 87100's broader proscription of conflicts involving any governmental decision. (*People v. Honig,* (1996) 48 Cal.App.4th 289, 329 ['Sections 1090 and 1097 are more specific than the conflict-of-interest provisions of the PRA']; [*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074 & fn. 12].)
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> "More to the point, and as noted above, the conflict of interest provisions of the PRA are designed to ensure disclosure of the conflict (and, in some instances, recusal)—not to prohibit the participation of a regulated industry's constituents in the public agency charged with that regulation. (*Consumers Union, supra,* 82 Cal.App.3d at p. 448; § 87105; see also § 81002, subd. (c) [a purpose of the PRA is to assure that 'assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided'].) Because section 15.2, subdivision (d) applies only if the appointed director discloses his interest in the purveyor, an interpretation extending section 15.2, subdivision (d)'s exception from section 1090's provisions to contracts that would otherwise be barred by section 87100 is

[6] Stats. 1986, ch. 832, § 5, p. 2843, Deering's Ann. Wat.—Uncod. Acts (2008 ed.) Act 130, § 15.2, subd. (d).

the one that best harmonizes the Legislature's intent to ensure the disclosure of conflicts *and* permit regulated industry participation. It is accordingly the interpretation we will adopt.

"In light of this conclusion, we are empowered to construe section 15.2, subdivision (d) as creating an implied exception to section 87100. Courts may imply an exception when necessary to harmonize two irreconcilable statutes (*State Department, supra,* 60 Cal.4th at p. 956) or when necessary to ensure the Legislature does not enact a nullity (*People v. Pieters* (1991) 52 Cal.3d 894, 902). This case involves both scenarios."

With respect to the "furthering the purpose" requirement, the *Santa Clarita* Court held:

"However, the Legislature satisfied the procedural requirements for this partial repeal and/or amendment of section 87100. As we discuss above, excepting conflicts of interest that would be prohibited under section 1090 from section 87100 as well *furthers the PRA's purpose*s of ensuring the disclosure of conflicts of interest (and, on occasion, recusal from such conflicts) while at the same time permitting the continued participation of industry representatives in their own regulation by public agencies. (*Consumers Union, supra,* 82 Cal.App.3d at p. 448; §§ 87105, 81002, subd. (c).) (*Id.* at pp. 320-21)."

Conclusion

There is no question that substantively, the SB 1107 amendment "amends" the Act, section 85300, to permit public financing of campaigns at all levels of California government. This amendment does not "further [the] purposes" of the Political Reform Act, which prohibited precisely that result. Therefore, the measure cannot be enacted directly under Government Code section 82012 by the Legislature. Instead, SB 1107 may only be enacted by the voters, if submitted to them for approval under Article II, section 10 of the California Constitution.

Respectfully yours,

David Keating
President