



1-1-2016

AB 1200: Procuring Lobbyist Reform

Charles Wiseman

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AB 1200: Procuring Lobbyist Reform

Charles Wiseman

Code Sections Affected

Government Code §§ 82002, 82039 (amended).

AB 1200 (Gordon); awaiting Assembly concurrence in Senate amendments.

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I. INTRODUCTION

The government's concern over paid actors who push private agendas dates back to at least 1843.¹ In *Clippinger v. Hepbaugh*, the Supreme Court of Pennsylvania cautioned of the dangers of allowing a practice that “may lead to secret, improper and corrupt tampering with legislative action.”² The apprehension towards lobbyists continues today, with many Americans viewing

1. *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315, 320 (Pa. 1843).

2. *Id.*

lobbyists as unethical, dishonest, and wielding too much power.³ This view is somewhat short-sighted and ignores that lobbyists are responsible for a lot of good.⁴ In large numbers, lobbyists can help legislators and agencies by reducing ambiguity in policy choices.⁵ Through lobbyists, legislators have access to a large polling sample regarding where they should align ideologically based on who is lobbying about an issue, and how large the group is.⁶ Regardless of how the general public views lobbyists, they are entrenched in both the state and federal governments.⁷ Lobbyist behavior is widely regulated as a response to wariness of their prevalence and power.⁸

In 2014, California spent eleven billion dollars on state government procurement contracts.⁹ Government procurement is the means through which California purchases the services and goods it requires.¹⁰ A government procurement contract is an agreement between the state entity that has purchased the good or service, and the provider of the good or service.¹¹ These contracts can cover a wide variety of items, from traffic cones, waffle mix, and anti-virus software, to helicopters, iPads, law enforcement vehicles, and loaded ammunition.¹² However, under current law, a prospective contractor can pay an

3. See Art Swift, *Honesty and Ethics Rating of Clergy Slides to New Low*, GALLUP (Dec. 16, 2013), http://www.gallup.com/poll/166298/honesty-ethics-rating-clergy-slides-new-low.aspx?utm_source=honesty_and_ethics_list&utm_medium=search&utm_campaign=tiles (on file with *The University of the Pacific Law Review*) (only six percent of Americans polled believe that lobbyists have high or very high honesty and ethical standards); see also Lydia Saad, *Americans Decry Power of Lobbyists, Corporations, Banks, Feds*, GALLUP (Apr. 11, 2011), http://www.gallup.com/poll/147026/Americans-Decry-Power-Lobbyists-Corporations-Banks-Feds.aspx?utm_source=too_much_power&utm_medium=search&utm_campaign=tiles (on file with *The University of the Pacific Law Review*) (showing seventy-one percent of Americans polled believe that lobbyists have too much power).

4. DONALD E. DEKIEFFER, *THE CITIZEN'S GUIDE TO LOBBYING CONGRESS* 5 (2007); see Newsweek Staff, *Good Lobbying vs. Bad Lobbying*, NEWSWEEK (Apr. 17, 2009), <http://www.newsweek.com/good-lobbying-vs-bad-lobbying-77199> (on file with *The University of the Pacific Law Review*) (describing a lobbyist's work for the Human Rights Watch advocating for victims of oppression).

5. David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227, 228 (1995).

6. *Id.*

7. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATL. (Apr. 20, 2015), <http://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> (on file with *The University of the Pacific Law Review*).

8. See *Inst. of Gov't Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001) (holding that lobbyist reform is a result of strong policy concerns regarding accountability and transparency).

9. *Video: Lobbying Transparency Would Protect Taxpayers Funds*, at 00:54–55, CAL. ASSEMB. DEMOCRATIC CAUCUS (June 15, 2015), available at <http://asmcd.org/news-room/video-gallery/lobbying-transparency-would-protect-taxpayer-funds> (on file with *The University of the Pacific Law Review*) [hereinafter *Lobbying Transparency Would Protect Taxpayers Funds*].

10. *Our Key Services*, DEP'T OF GEN. SERVS., <http://www.dgs.ca.gov/pd/Home.aspx> (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

11. *Id.*

12. See *State Contracts Index Listing*, DEP'T OF GEN. SERVS., PROCUREMENT DIV., <http://www.documents.dgs.ca.gov/pd/contracts/contractindexlisting.htm> (last visited Sept. 24, 2015) (on file with *The*

individual to influence a government official regarding a procurement contract without the individual registering as a lobbyist.¹³ AB 1200 would have created more transparency by requiring these individuals to register as lobbyists.¹⁴

II. LEGAL BACKGROUND

Section A gives the background of the Political Reform Act of 1974 (PRA), and how AB 1200 attempted to amend it.¹⁵ Section B discusses why three McGeorge students pushed for the creation of the bill.¹⁶ Section C explains how the PRA regulates lobbyists.¹⁷ Section D addresses previous attempts to alter the PRA and their results.¹⁸ Finally, Section E discusses the constitutionality of regulating lobbyists.¹⁹

A. *The Political Reform Act of 1974*

California passed the PRA as Proposition 9 in 1974.²⁰ Jerry Brown, California's Governor, helped write and campaign for the PRA while he was California's Secretary of State and a candidate for Governor.²¹ The Act's goal is to create a more transparent and responsible state government.²² The PRA covers a wide range of political reforms, including regulation of campaigns, elections, ethical practices, and the behavior of public officials and lobbyists.²³ The PRA also created the Fair Political Practices Commission, which has the power to

University of the Pacific Law Review) (listing current Leveraged Procurement Agreements); see also *State Contract & Procurement Registration System (SCPRS) Data*, DEP'T OF GEN. SERVS., <http://www.dgs.ca.gov/pd/Programs/eprocure/SCPRSData.aspx> (last visited Sept. 25, 2015) (on file with *The University of the Pacific Law Review*) (disclosing the subject of state procurement contracts and the amount of money the state spent).

13. *California Lobbying Disclosure*, BOLDER ADVOCACY (Feb. 28, 2014), <http://bolderadvocacy.org/wp-content/uploads/2012/02/california.lobbying.pdf> (on file with *The University of the Pacific Law Review*) [hereinafter *California Lobbying Disclosure*].

14. Melanie Mason, *Law Students Propose Bill to Close Lucrative Capitol Lobbying Loophole*, L.A. TIMES (June 2, 2015), <http://www.latimes.com/local/politics/la-me-pol-lobbying-20150603-story.html> (on file with *The University of the Pacific Law Review*).

15. *Infra* Part II.A.

16. *Infra* Part II.B.

17. *Infra* Part II.C.

18. *Infra* Part II.D.

19. *Infra* Part II.E.

20. *About the Political Reform Act*, CAL. FAIR POLITICAL PRACTICES COMM'N, <http://www.fppc.ca.gov/index.php?id=221> (last visited July 20, 2015) (on file with *The University of the Pacific Law Review*) [hereinafter *About the Political Reform Act*].

21. Robert Cruickshank, *Who Was Jerry Brown*, CALIFORNIA NORTHERN: A NEW REGIONALISM (2012), available at <http://calnorthern.net/who-was-jerry-brown/> (on file with *The University of the Pacific Law Review*).

22. *About the Political Reform Act*, *supra* note 20.

23. *Id.*

implement and enforce these reforms, as well as the ability to create new regulations, as needed, in line with the PRA's goals.²⁴

B. Three McGeorge Law Students, Their Professor, and a Democratic Assembly Member Walk into a Bar

While working as law clerks for the Fair Political Practices Commission, two McGeorge School of Law students, Robert Nash and Robert Binning, discovered behavior that seemed like lobbying in regards to procurement contracts was not actually considered lobbying under the PRA.²⁵ Nash and Binning began researching the topic and talking with lobbyists and other capitol community members, because they felt there was a "much closer connection between the lobbying activity and the benefits received" in procurement contracts.²⁶ Nash and Binning found that the federal government and twenty-five out of fifty state legislatures had already created some kind of labeling and disclosure requirement for lobbying activities related to procurement contracts.²⁷

Fellow McGeorge student Alexander Khan joined Nash and Binning, and with the help of Gary Winuk, former Fair Political Practices Commission enforcement chief, and through their participation in the McGeorge Legislative and Public Policy Clinic, the three students were able to develop their research.²⁸ Eventually, the group sought Assembly Member Richard Gordon's support, as he is a respected reformer and sits on the Assembly Committee on Elections and Redistricting—the committee the bill would have to pass through.²⁹ Nash, Binning, and Khan continued to stay involved with their bill as it made its way through the legislature, even as they studied for the July 2015 bar exam.³⁰

C. Lobbyists and the PRA

The PRA requires an individual to register with the Secretary of State as a lobbyist if his or her principal employee obligations include communicating, whether directly or through another party, with any elected state, agency, or legislative official "for the purpose of influencing legislative or administrative action."³¹ Registration requires lobbyists and lobbyist employers to pay a nominal

24. CAL. GOV'T CODE §§ 83100–83112 (West 2015).

25. E-mail from Robert Binning, former McGeorge student, to Charles Wiseman, author (Aug. 11, 2015, 1:16 PM) (on file with *The University of the Pacific Law Review*).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. CAL. GOV'T CODE § 82039 (West 2015).

fee of \$100 for both years of the legislative session.³² Lobbyist registration also places restrictions on the amount of money lobbyists can expend on gifts, travel, and entertainment for public officials.³³ Lobbyists and lobbying firms are prohibited from entering into contingency arrangements based upon “the defeat, enactment, or outcome of any proposed legislative or administrative action.”³⁴ Additionally, registration prohibits former officials from influencing state government administrative actions for a one-year period.³⁵ Currently, the PRA defines administrative action as “[t]he proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding.”³⁶ However, this definition does not include any reference to state-granted government procurement contracts.³⁷ This allows individuals to lobby the legislature for procurement contracts without being labeled as lobbyists.³⁸

D. Changing the PRA

The California legislature has made many attempts to reform the PRA with mixed success.³⁹ Surprisingly, one of the biggest obstacles to amending the PRA comes from its coauthor and one of its proponents, Governor Jerry Brown.⁴⁰ During the 2013–2014 legislative session, Governor Brown vetoed SB 831, SB 1442, and SB 1443.⁴¹ These bills would have amended the PRA in line with its goals of transparency and accountability.⁴² Had it not been vetoed, SB 831 would have “changed campaign finance rules regarding gifts and travel, behested

32. *California Lobbying Disclosure*, *supra* note 13, at 6.

33. *Id.* at 10–11.

34. GOV'T § 86205(f) (prohibiting contingency fees for lobbyists and lobbyist employers).

35. *California Lobbying Disclosure*, *supra* note 13, at 11.

36. GOV'T § 82002(a)(1).

37. See *Delegated Purchasing Authority*, DEP'T OF GEN. SERVS. (June 26, 2015), <http://www.dgs.ca.gov/Pd/Programs/Delegated.aspx> (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*) (making no reference to state-granted government procurement contracts).

38. Mason, *supra* note 14.

39. See generally AB 12, 2001 Leg., 2001–2002 Sess. (Cal. 2001); AB 707, 2005 Leg., 2005–2006 Sess. (Cal. 2005) (an act to amend the PRA that the legislature did not pass); Elizabeth Kim, *The CAPS Act: Enacting New Barriers Between Elected Officials and Interest Groups*, 46 MCGEORGE L. REV. 355 (2014) (detailing three reform bills passed by the legislature, two of which were vetoed); Ryan Matthews, *SB 831: Bringing Political Reform into the Twenty First Century*, 46 MCGEORGE L. REV. 368 (2014) (explaining the failure of SB 831); Patrick Ford, *Chapter 16: Combating Dark Money in California Politics*, 46 MCGEORGE L. REV. 335 (2014) (highlighting legislation designed to sprinkle sunshine on dark money).

40. Robert M. Stern, *What Happened to Jerry Brown, The Reformer We Once Knew?*, S.F. CHRONICLE (Oct. 9, 2014), <http://www.sfgate.com/opinion/openforum/article/What-happened-to-Jerry-Brown-the-reformer-we-5810178.php> (on file with *The University of the Pacific Law Review*).

41. Kim, *supra* note 39, at 358; Matthews, *supra* note 39, at 384.

42. See Kim, *supra* note 39, at 360 (quoting the praise of Robert Stern, coauthor of the PRA, for the CAPS act); Matthews, *supra* note 39, at 376 (stating SB 831's goal was to prevent undue influence by special interests).

donations to nonprofit organizations, and expenditures of campaign funds.”⁴³ SB 1442 and SB 1443 comprised two-thirds of a larger bill package that would have made up the California Accountability in Public Service (CAPS) Act.⁴⁴ Had the three bills been enacted, the package would have “barred lobbyists from paying for public officials’ fundraising events, increased the frequency of committee reporting, expanded online reporting and disclosure, and prohibited lobbyists from giving public officials gifts.”⁴⁵ Although Governor Brown only signed one bill from the package into law, the legislature was still able to expand the PRA by changing the definition of “contribution” to include lobbyists hosting fundraising events in their home or office.⁴⁶

The legislature has previously attempted to amend the PRA to include influencing procurement contracts as behavior requiring registration as a lobbyist.⁴⁷ The first was AB 13 from the 2001–2002 session.⁴⁸ If enacted, AB 13 would have had a similar effect as AB 1200: it would have expanded the definition of “administrative action” to include procurement contracts.⁴⁹ Although the Assembly passed the bill 76–0, neither the Senate, nor any Senate committee ever voted on it.⁵⁰ AB 707, from the 2005–2006 session, began as a bill that would require every “contractor, agent of a contractor, or consultant acting on behalf of a contractor” to publically disclose “any communication the contractor, agent, or consultant had with the state agency during the one-year period preceding the award of the contract” within thirty days of signing a contract with a state agency.⁵¹ However, AB 707 was gutted and amended into a bill about vote-by-mail ballots.⁵² All language regarding procurement contracts was struck from the bill.⁵³

43. Matthews, *supra* note 39, at 374.

44. Kim, *supra* note 39, at 360.

45. *Id.*, at 359.

46. CAL. GOV'T CODE § 82015(f)(2), (3) (West 2015).

47. See generally AB 13, 2001 Leg., 2001–2002 Sess. (Cal. 2001) (an act to amend the PRA, which was not passed by the legislature); AB 707, 2005 Leg., 2005–2006 Sess. (Cal. 2005) (an act to amend the PRA, which was not passed by the legislature).

48. AB 13, 2001 Leg., 2001–2002 Sess. (Cal. 2001).

49. *Id.*

50. Assembly Floor Vote of AB 13, Unofficial Ballot (Jan. 29, 2002), <https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?billid=200120020AB13> (on file with *The University of the Pacific Law Review*); Assembly Appropriations Committee Vote of AB 13, Unofficial Ballot (Jan. 24, 2002), <https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?billid=200120020AB13> (on file with *The University of the Pacific Law Review*); Assembly Environmental Safety & Toxic Materials Committee, Unofficial Ballot (Jan. 15, 2002) <https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?billid=200120020AB13> (on file with *The University of the Pacific Law Review*).

51. AB 707, 2005 Leg., 2005–2006 Sess. (Cal. 2005).

52. *Id.* When a bill is gutted and amended, the author “remove[s] the current contents in their entirety and replace[s] them with different provisions.” CAL. ST. LEG., GLOSSARY OF LEGISLATIVE TERMS (last visited July 10, 2014), available at <http://www.legislature.ca.gov/quicklinks/glossary.html#G> (on file with *The University of Law Review*).

53. AB 707, 2005 Leg., 2005–2006 Sess. (Cal. 2005).

E. *The Basis of State Power to Regulate Lobbyists*

Whenever a legislative body, whether federal or state, imposes restrictions on lobbyists, it activates concern over whether those restrictions infringe upon the lobbyist's constitutional rights.⁵⁴ Lobbyist regulations trigger discussions regarding the rights of freedom of speech, freedom of association, and the freedom of associational privacy under the First Amendment, as well as Fourteenth Amendment equal protection issues.⁵⁵ When a matter is brought to trial, the court balances the Lobbyist's First Amendment rights and the legitimate public interest in curbing special interests' influence on government affairs.⁵⁶

1. *Challenges to Lobbyist Campaign Contribution Restrictions*

The Supreme Court has repeatedly held that contributing to election campaigns is a type of First Amendment protected speech.⁵⁷ Thus, courts scrutinize any legislation that limits this right.⁵⁸ Currently, in California, lobbyists are barred from making political contributions to officials and candidates they are registered to lobby.⁵⁹ Courts have upheld this provision as constitutional because it is sufficiently narrow in that it “does not prohibit contributions by all lobbyists to all candidates.”⁶⁰ Instead, the restriction “only prohibits contributions by lobbyists . . . to those persons the lobbyist will be paid to lobby.”⁶¹ Courts have balanced the narrow limitation with the potential for corruption and undue influence.⁶² Courts have found that the public has an interest in not allowing a lobbyist to be able to influence the government official through financial means.⁶³

54. Steve A. Browne, *The Constitutionality of Lobbyist Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 717 (1995).

55. *Id.* at 737.

56. *N.C. Right to Life, Inc. v. Bartlett*, 168 F. 3d 705, 716 (4th Cir. 1999).

57. *Buckley v. Valeo*, 424 U.S. 1, 20 (1976); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 120 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

58. *McConnell*, 540 U.S. at 134–35.

59. CAL. GOV'T CODE § 85702 (West 2015). The statute states:

An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer.

Id.

60. *Inst. of Gov't Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001).

61. *Id.*

62. *Id.*; *N.C. Right to Life, Inc.*, 168 F.3d at 716.

63. *See N.C. Right to Life, Inc.*, 168 F.3d at 716 (holding that the state has an interest in preventing “actual corruption and the appearance of corruption” that may arise from lobbyist's campaign contributions).

Lobbyists have also suggested that regulating their contributions to officials is unconstitutional because it completely bans, rather than just limits, such contributions.⁶⁴ Courts have rejected this argument based on the *Nixon* test that a ban is only invalid if the resulting participation is “so low as to impede the ability of candidates to amass the resources necessary for effective advocacy.”⁶⁵ Courts have reasoned that a lack of financial assistance from lobbyists will not overly impair elected officials’ ability to raise contributions and run for office.⁶⁶

Additionally, an argument lobbyists have brought to combat restrictions is that restrictions on lobbyists violate the equal protection clause under the Fourteenth Amendment.⁶⁷ Proponents of this theory argue that restricting interactions between lobbyists and politicians is discriminatory.⁶⁸ The argument basis is that non-lobbyist individuals have no such restrictions placed upon them and therefore lobbyists are placed into a separate class of individuals who have had their rights unnecessarily and unfairly restricted.⁶⁹

To address this concern, courts have applied the “rational relationship” test.⁷⁰ The “rational relationship” test requires the fact-finder to answer two questions: first, the court must identify “the goals or ends sought to be achieved or furthered by the statute;” second, whether the classification “rests upon some reasonable ground of differentiation which fairly relates to the object of the regulation.”⁷¹ As to the first question, the court has examined the strong public policy of prophylactically reducing the risk of corruption and undue influence in the government.⁷² On the second question, the courts look to the fact that lobbyists are a different class of individuals⁷³—that lobbyists are paid to influence legislative or administrative action is the basis for their separate classification.⁷⁴ As a result, lobbyists are afforded access to government officials in a manner which others are not.⁷⁵ Because of this close interaction, a higher level of concern for corruption exists than the average person’s interaction with a government official.⁷⁶ In conclusion, the restrictions on lobbyists are appropriate because the

64. *Inst. of Gov’t Advocates*, 164 F. Supp. 2d at 1190; *N.C. Right to Life, Inc.*, 168 F.3d at 716.

65. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Inst. of Government Advocates*, 164 F. Supp. 2d at 1190.

66. *Inst. of Gov’t Advocates*, 164 F. Supp. 2d at 1190.

67. *Id.* at 1195.

68. *Id.* at 1194.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1191.

73. *Id.* at 1195.

74. *Id.*

75. *Id.*

76. *Id.*

disparate treatment is rationally related to the goal of reducing corruption and undue influence in the government.⁷⁷

2. Contingency Fee Bans and the Constitution

The Supreme Court has not firmly established where in the Constitution the right to lobby exists.⁷⁸ However, many scholars believe that the right exists in the First Amendment right to petition.⁷⁹ Lobbying can be an immensely expensive political endeavor.⁸⁰ Scholars have offered contingency fees as a means to create easier access to the lobbying process.⁸¹ The argument is premised on the rationale that a contingency fee would allow a party to seek the assistance of a lobbyist without facing high entry costs.⁸² Proponents argue that without the ability to utilize contingency fees, some groups or individuals are unable to afford lobbying services, and are therefore prohibited from exercising their First Amendment right to petition the government.⁸³ As a result, these scholars argue that courts should strike down prohibitions of lobbyist contingency fee arrangements as unconstitutional.⁸⁴

Courts disagree and have consistently upheld the constitutionality of prohibitions on lobbyist contingency fee arrangements.⁸⁵ These courts reason that narrow abridgement of one's constitutional rights is allowed if there are legitimate public policy concerns and the abridgement is necessary.⁸⁶ The relevant public policy concern is that the government should not enforce contracts that may be used for improper means, even if that is not the contracts' primary purpose.⁸⁷

III. AB 1200

AB 1200 sought to amend the Political Reform Act of 1974, expanding the definition of "administrative action" to include state government procurement

77. *Id.*

78. Stacie L. Fatka & Jason Miles Levien, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 581 (1998).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Fla. League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996); see Associated Industries of Kentucky v. Commonwealth, 912 S.W.2d 947 (Ky. 1995) (holding that contingency fee arrangements are against public policy and therefore void, and that prohibiting them is constitutional).

86. Buckley v. Valeo, 424 U.S. 1, 42 (1976).

87. Providence Tools Co. v. Norris, 69 U.S. 45, 55 (1864).

contracts.⁸⁸ AB 1200 would have required a person to register as a “lobbyist” if he or she communicated with a state government official to influence a state government procurement contract that exceeded \$250,000.⁸⁹ Behaviors requiring registration as a “lobbyist” with respect to the government procurement contract would have included preparing the terms or bid documents of the contract, and soliciting, approving, or rejecting the procurement contract.⁹⁰

AB 1200’s expanded definition would not have included activities such as submitting a bid or testifying at a public hearing about the state government procurement contract.⁹¹ AB 1200 also would have carved out an exception for placement agents employed by the prospective contractor.⁹²

IV. ANALYSIS

Section A discusses how AB 1200 would have financially affected lobbyists, lobbyist employers, and lobbying firms and how they carry out their procurement operations.⁹³ Section B explores the impact AB 1200 would have had on increasing transparency in government.⁹⁴ Section C examines the constitutionality of AB 1200.⁹⁵ Section D looks at the future of AB 1200 and government procurement contract reform.⁹⁶

A. AB 1200’s Impact on New and Existing Lobbyists

Registration as a lobbyist requires the individual to pay a \$100 fee.⁹⁷ A lobbyist employer must pay a \$100 fee, as well as an additional \$100 for each lobbyist employee.⁹⁸ This registration lasts for the entirety of the legislative session.⁹⁹ The rules for renewal are similar for both lobbyists and lobbyist employers: both must re-register before the end of the next legislative session, or within ten days of meeting the “time spent” threshold of a subsequent legislative session.¹⁰⁰ Thus, the registration cost for a lobbyist employer would be at least \$200; that figure increases with each additional lobbyist employee.¹⁰¹ For a large

88. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Infra* IV.A.

94. *Infra* IV.B.

95. *Infra* IV.C.

96. *Infra* IV.D.

97. *California Lobbying Disclosure*, *supra* note 13, at 6.

98. *Id.*

99. *Id.*

100. CAL. GOV’T CODE §§ 86100; 86106–86107 (West 2015).

101. *Id.* § 86102.

firm—such as Capitol Advocacy, LLC, which works with major corporations including American Airlines, 7-11, and Fox Entertainment, and advertises its experience with procurement contracts—the additional registration of employees who deal with procurement contracts may not have a large impact.¹⁰² However, some fear the registration requirement may harm smaller or minority lobbying firms, because it would be harder for smaller firms to cover these costs.¹⁰³ Democratic California Assembly Member, Sebastian Ridley-Thomas from Los Angeles, stated this fear as his reason for voting against the bill while it was in the Assembly Elections and Redistricting Committee.¹⁰⁴

Higher costs go against AB 1200's stated intention of creating an equal playing field between big and small lobbyist employers.¹⁰⁵ However, AB 1200 would have ensured that all individuals involved in influencing procurement contracts over \$250,000 adhered to PRA restrictions by requiring them to register as lobbyists or lobbyist employers.¹⁰⁶ These restrictions included limiting the amount of money lobbyists can spend on gifts, travel, and entertainment, and would have prevented former officials from influencing government procurement contracts for a period of a year.¹⁰⁷ These limitations could have helped smaller or minority lobbying employers by ensuring that it would cost less to get a state official's attention.¹⁰⁸ Alternatively, AB 1200 may have had a negative impact on larger lobbyist employers or firms for similar reasons: firms like Capitol Advocacy, LLC or KP Public Affairs that advertise their familiarity with the procurement process would need to change their way of offering procurement services if they did not meet the PRA's new standards under AB 1200.¹⁰⁹

B. AB 1200's Impact on Transparency in Government

One primary motivation behind AB 1200 was to create more transparency in the lobbying process specifically as it relates to procurement contracts.¹¹⁰ By requiring individuals who influence government procurement contracts over

102. *Procurement*, CAPITOL ADVOCATES, LLC, <http://www.capitoladvocacy.com/services-solutions/procurement/> (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*) [hereinafter *Procurement*]; *Lobbying Activity*, CAL-ACCESS, <http://cal-access.sos.ca.gov/Lobbying/Firms/Detail.aspx?id=1147785&session=2015> (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

103. Mason, *supra* note 14.

104. *See id.* (noting that Assembly Member Ridley-Thomas did vote to pass the bill and send it to the Senate).

105. *Lobbying Transparency Would Protect Taxpayers Funds*, *supra* note 9.

106. *California Lobbying Disclosure*, *supra* note 13, at 3.

107. *Id.* at 10–11.

108. *Id.*

109. Mason, *supra* note 14; *Procurement*, *supra* note 102; *KP—Broad Expertise*, KP PUBLIC AFFAIRS, <http://ka-pow.com/go/KP/expertise/#thirteen> (last visited Apr. 19, 2016) (on file with *The University of the Pacific Law Review*).

110. *Lobbying Transparency Would Protect Taxpayers Funds*, *supra* note 9.

\$25,000 to register as lobbyists, AB 1200 attempted to shed some light onto the procurement process.¹¹¹ The PRA requires registered lobbyists, lobbyist employers, and lobbying firms to disclose all related expenses—such as gifts, travel, contributions, and fees—that benefit a state official, state agency and legislative officials, candidates, or any immediate family of those in the categories listed above.¹¹² In addition, AB 1200 would have provided the public with detailed information regarding who is influencing which bids.¹¹³

AB 1200 may not have provided Californians with the level of transparency that the authors expected, as those looking to influence procurement contracts may utilize existing loopholes in the disclosure requirements of the PRA.¹¹⁴ State law allows lobbyists to disclose money spent under the category of “other payments to influence.”¹¹⁵ While lobbyists, lobbyist employers, and lobbying firms still must report the amount of money spent, they do not have to report what that money was spent on.¹¹⁶ For example, consultants who assist clients to understand California’s governmental structure and process, but do not operate in a way that would require them to register as lobbyists, are able to escape disclosure requirements.¹¹⁷ This loophole may mean that firms who help clients navigate the complexities of California procurement law without interacting with the agency or decision maker directly may be able to avoid having to register as a lobbyist.¹¹⁸ As such, the consulting party avoids the stringent disclosure and expense requirements.¹¹⁹ These firms often have former California legislators or officials on staff, so many see these firms as having an unfair advantage.¹²⁰ Firms and individuals required to disclose a great deal of their lobbying activities must compete with those that wield similar or greater influence but do not deal with the same disclosure requirements under California law.¹²¹ Similar practices may have occurred under AB 1200, thus nullifying one of the primary purposes of the bill: transparency.¹²²

111. *Id.*

112. *California Lobbying Disclosure*, *supra* note 13, at 7–10.

113. Mason, *supra* note 14.

114. Laurel Rosenhall, *California’s Lobby Laws Keep Many Influence-Peddling Details Secret*, SACRAMENTO BEE (Jan. 13, 2013), <http://www.sacbee.com/news/investigations/the-public-eye/article2576369.html> (on file with *The University of the Pacific Law Review*).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Lobbying Transparency Would Protect Taxpayers Funds*, *supra* note 9.

C. *Constitutional Questions Regarding the Expansion of the PRA and Procurement Contracts*

As AB 1200 attempted to expand the definition of administrative action to include procurement contracts, individuals, firms, and employers who were not considered lobbyists would have had to register as such.¹²³ With this new influx of registered lobbyists, questions about lobbyist regulations and their constitutionality may have resurfaced.¹²⁴ The expansion of the activities requiring lobbyist registration may have raised overbreadth concerns.¹²⁵ To determine whether this was true of AB 1200, the court would have looked at the restricted group's breadth and the strength of the policy considerations underlying the restriction.¹²⁶ Although AB 1200 would have expanded who must register as a lobbyist, the new label requirements still would have been sufficiently narrow because it only prevented some lobbyists from contributing to some candidates.¹²⁷ Additionally, the strong policy considerations to prevent government corruption remained the same as the PRA's previous lobbyist requirements.¹²⁸ As a result, the policy considerations behind AB 1200 would have likely outweighed concerns over a lobbyist's freedom of speech.¹²⁹

AB 1200's opponents may also argue that the bill infringes on their right to commercial speech under the First Amendment.¹³⁰ Courts define "commercial speech" as "expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services."¹³¹ Procurement contracts deal with buying and selling goods.¹³² Therefore, any speech an agent uses to influence a state government official regarding a procurement contract would be considered commercial speech.¹³³ However, courts afford commercial speech less protection under the First Amendment because there is potential for deception or confusion.¹³⁴

123. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

124. Fatka & Levien, *supra* note 78, at 572.

125. *Inst. of Gov't Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001).

126. *Id.*; *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712–13 (4th Cir. 1999).

127. *Inst. of Gov't Advocates*, 164 F. Supp. 2d at 1190; *N.C. Right to Life, Inc.*, 168 F.3d at 716.

128. *Inst. of Gov't Advocates*, 164 F. Supp. 2d at 1190.

129. *Lobbying Transparency Would Protect Taxpayers Funds*, *supra* note 9.

130. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 560 (1980).

131. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 933 (3d Cir. 1990).

132. *Our Key Services*, *supra* note 10.

133. Here, the discussion refers to the specific good or service being procured and the speaker is being paid to speak to the state government official regarding the service or good. *U.S. v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005) (citing a three-element test to determine whether an expression is commercial speech: (1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech).

134. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563; *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 65 (1983).

Therefore, the government can limit commercial speech if a court finds that: (1) the government's interest is substantial; (2) the regulation advances the government's interest; and (3) the regulation is narrowly tailored to address the government's interest.¹³⁵ AB 1200 would have survived this test because preventing corruption in government is a substantial interest, creating more transparency in lobbyist activity advances this goal, and AB 1200 is sufficiently narrow because it would have only affected those influencing state government officials regarding procurement contracts.¹³⁶

Additionally, if lobbyists raised a Fourteenth Amendment challenge against AB 1200, the court would employ the "rational relationship" test.¹³⁷ This test has two elements: first, the court must identify "the goals or ends sought to be achieved or furthered by the statute;" second, the court must determine whether the classification "rests upon some reasonable ground of differentiation which fairly relates to the object of the regulation."¹³⁸ As courts are likely to uphold the strong societal interest in keeping corruption out of government, and will likely view lobbyists as a special class with the ability to influence government officials in ways most citizens cannot, a rational relationship exists between the goals underlying AB 1200 and the PRA, generally, to prevent corruption and undue influence and the restrictions they place on lobbyists.¹³⁹ Therefore, a Fourteenth Amendment challenge to AB 1200 would have been unlikely to succeed.¹⁴⁰

One particularly relevant concern is the prohibition of contingency fee agreements and procurement contracts.¹⁴¹ Many individuals involved in the procurement process rely on contingency fee arrangements to be paid.¹⁴² AB 1200 would require these individuals and groups to register as lobbyists even though they are just selling goods.¹⁴³ AB 1200 was amended to address this concern by expressly exempting "placement agents" from having to register as lobbyists.¹⁴⁴ Consequently the amendment exempted employees of the prospective good or service provider from needing to register as lobbyists.¹⁴⁵ Instead, AB 1200 would

135. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

136. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015); *Inst. of Gov't Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999).

137. *Inst. of Gov't Advocates*, 164 F. Supp. 2d at 1190.

138. *Id.*

139. *Id.*; *Lobbying Transparency Would Protect Taxpayers Funds*, *supra* note 9; *About the Political Reform Act*, *supra* note 20.

140. *Inst. of Gov't Advocates*, 164 F. Supp. 2d at 1190.

141. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

142. ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 1200 (Apr. 27, 2015).

143. *Id.*

144. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

145. *Id.*

have only required those outside contractors specifically hired to influence government procurement actions to register.¹⁴⁶

D. What is Next for AB 1200

AB 1200 was removed from the inactive file, and, as of this writing, is awaiting concurrence in Senate amendments.¹⁴⁷ In the meantime, Gary Winuk, former Fair Political Practices Commission enforcement chief, submitted a ballot measure with similar language to AB 1200 to the State of California.¹⁴⁸ The ballot measure has a wider aim than AB 1200, and seeks to reform many facets of California's state government.¹⁴⁹ The measure would expand disclosure requirements in the election process and in government decisions, as well as promote government accountability and ethics.¹⁵⁰ Additionally, the measure targets individuals who leave public office in order to become a lobbyist or work with lobbyist groups.¹⁵¹ The proposed changes to Section 82002 of the California Government Code, regarding procurement contracts, are very similar to those changes in AB 1200.¹⁵² This is also reflected in the language regarding exemptions for bona fide salespeople—which was removed from AB 1200—and placement agents.¹⁵³ It is still too early to speculate how the ballot measure will fare.¹⁵⁴

V. CONCLUSION

AB 1200 would have amended the PRA regarding lobbyist registration and procurement contracts in a way that would not have been overly burdensome to the individuals affected.¹⁵⁵ The changes also would have allowed smaller businesses and service providers to compete with larger industries.¹⁵⁶ AB 1200

146. *Id.*

147. ASSEMB. DAILY FILE, Apr. 4, 2016, 2015–2016 Sess. (Cal. 2016), available at ftp://www.leginfo.ca.gov/pub/dailyfile/asm/assembly_Regular_Session.pdf (on file with *The University of the Pacific Law Review*).

148. *Id.*

149. Letter from Jim Heerwagen to Kamala Harris, Attorney Gen. of California (Sept. 16, 2015).

150. *Id.*

151. *Id.*

152. *Id.* at 5, 6; AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

153. Letter from Jim Heerwagen to Kamala Harris, *supra* note 149; AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015).

154. *Ballot Initiatives—Frequently Asked Questions*, STATE OF CAL. DEP'T OF J., OFF. OF THE ATT'Y GEN., <https://oag.ca.gov/initiatives/faqs> (last visited Mar. 6, 2016) (on file with *The University of the Pacific Law Review*). As of this writing, the initiative is being circulated for signatures. *Initiatives—Active Measures*, STATE OF CAL. DEP'T OF J., OFF. OF THE ATT'Y GEN., <https://oag.ca.gov/initiatives/active-measures> (last visited Mar. 6, 2016) (on file with *The University of the Pacific Law Review*).

155. AB 1200, 2015 Leg., 2015–2016 Sess. (Cal. 2015); *supra* Part IV.A.

156. *Supra* Part IV.A.

would have continued the initial goals of the PRA by increasing transparency and accountability in the California government.¹⁵⁷ AB 1200 did not provoke any substantial constitutional challenges.¹⁵⁸ Furthermore, AB 1200 would have closed a loophole in the PRA that the legislature had ignored and avoided.¹⁵⁹ Californians will have to wait to see if AB 1200 makes its way through the legislature: only then will the public know if Governor Jerry Brown has returned to his reformer roots.

157. *Supra* Part IV.B.

158. *Supra* Part IV.C.

159. *Supra* Part II.B.