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California's Tampon Tax: Will the Third Time be the Charm?

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California’s Tampon Tax: Will the Third Time be the Charm?

*Arielle Percival**

Code Section Affected

Government Code § 15676.2 (new); Revenue and Taxation Code §§ 6363.9, 6363.10, 6487.07 (new); §§ 6041.1, 6041.2, 6041.5, 6203, 6203.1, 7262 (amended).

SB 92 (Committee on Budget and Fiscal Review); 2019 STAT. CH. 34.

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I. INTRODUCTION

“I can’t afford tampons” posted a twenty-one-year-old, full-time student to an anonymous reddit board titled “off my chest.”¹ Although the student worked three jobs, after paying bills and spending \$20 on groceries each week, only \$0.76 remain in her bank account.² This is embarrassing for her; she cannot afford a box of tampons.³

On average, a box of tampons costs seven dollars.⁴ A woman will need menstrual products once a month for approximately thirty-eight years of her life.⁵ Throughout her lifetime, a woman will spend \$1,773.33 on tampons.⁶ The cost and access to menstrual products affect both cisgender women and transgender men who still have their monthly periods.⁷ For persons living at or below the poverty line, menstrual products cost proportionately more of their income, which forces some to choose food over tampons.⁸

Menstruation issues—historically considered too taboo to even discuss—became the conversation topic in news headlines around the world.⁹ At the 2015

1. Singmexsomethingsoft, *Off My Chest*, REDDIT (Jan. 25, 2016), https://www.reddit.com/r/offmychest/comments/42lm67/i_cant_afford_tampons/ (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. Jessica Kane, *Here's How Much a Woman's Period Will Cost Her Over a Lifetime*, HUFF POST (May 18, 2015, 12:05 pm), https://www.huffpost.com/entry/period-cost-lifetime_n_7258780?guccounter=1 (on file with *The University of the Pacific Law Review*).

5. *Id.*

6. *Id.*

7. Gabby Bess, *Periods are Miserable When You are Homeless. This Woman is Trying to Help*, VICE (Dec. 3, 2015), https://www.vice.com/en_us/article/kb4vne/periods-are-miserable-when-youre-homeless-this-woman-is-trying-to-help (on file with *The University of the Pacific Law Review*).

8. Linda Carroll, *Even in the U.S., Poor Women Often Can't Afford Tampons, Pads*, REUTERS (Jan. 10, 2019), <https://www.reuters.com/article/us-health-menstruation-usa/even-in-the-u-s-poor-women-often-cant-afford-tampons-pads-idUSKCN1P42TX> (on file with *The University of the Pacific Law Review*).

9. See Rose George, Opinion, *Bad Blood: The Taboo on Talking About Periods is Damaging Lives*, THE GUARDIAN (Mar. 2, 2016), <https://www.theguardian.com/commentisfree/2016/mar/02/taboo-period-menstruation-damaging-lives-euphemisms> (on file with *The University of the Pacific Law Review*) (discussing despite thousands of euphemisms, periods are still a taboo topic); see also Malaka Gharib, *Why 2015 Was The Year of The Period, And We Don't Mean Punctuation*, NPR (Dec. 31, 2015), <https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and->

London Marathon, runner Kiran Gandhi drew worldwide attention for deciding to “free bleed” as she ran.¹⁰ The hashtag #PeriodsAreNotAnInsult started trending on Twitter during a GOP debate, when President Donald Trump characterized moderator Megyn Kelly as having “blood coming out of her whatever.”¹¹ Even National Public Radio titled 2015 “The Year of the Period.”¹²

An increase in attention made menstruation an anchor of policy debate.¹³ State lawmakers called on their respective governments for “menstrual equity.”¹⁴ To further menstrual equity, lawmakers drafted bills to eliminate their states’ sales and use taxes (“sales tax”) on menstrual products.¹⁵ State governments assess a sales tax on the sale of goods and services, but most states exempt certain goods characterized as “necessities.”¹⁶ The “tampon tax” refers to the lack of a sales tax exemption for menstrual products.¹⁷ Thirty-two states impose the tampon tax and do not exempt tampons and sanitary napkins.¹⁸

Chapter 34 is California’s third attempt at eliminating the “tampon tax.”¹⁹ Removing the “only gender-specific tax on the books,” Chapter 34 increases access to menstrual products and prevents the government from profiting “off of a woman’s basic biological functions.”²⁰ However, some critique Chapter 34 for

we-dont-mean-punctuation (on file with *The University of the Pacific Law Review*).

10. Gharib, *supra* note 9.

11. *Id.*

12. *Id.*

13. See Jennifer Weiss-Wolf, U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda, 25 WM & MARY J. RACE GENDER AND SOC. JUST. 493, 495–98 (2019) (on file with *The University of the Pacific Law Review*) (recounting the policy and social conversations regarding menstrual equity developed).

14. See Karen Zraick, *It’s Not Just the Tampon Tax: Why Periods Are Political*, N.Y. TIMES (July 22, 2018) <https://www.nytimes.com/2018/07/22/health/tampon-tax-periods-menstruation-nyt.html> (on file with *The University of the Pacific Law Review*) (“‘Menstrual equity’ refers to equal access to hygiene products, but also to education about reproductive health.”).

15. See Weiss-Wolf, *supra* note 13, at 499 (recounting how the policy and social conversations regarding menstrual equity developed); see also Vivien Lee & David Wessel, *The History and Future of the Retail Sales Tax*, BROOKINGS (July 16, 2018), <https://www.brookings.edu/blog/up-front/2018/07/16/the-history-and-future-of-the-retail-sales-tax/> (on file with *The University of the Pacific Law Review*) (explaining sales tax as a tax on the purchase of tangible, personal, non-real property); and *State and Local Taxes*, U.S. DEP’T OF TREAS., <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx> (last updated Dec. 5, 2010) (on file with *The University of the Pacific Law Review*) (explaining use tax is “very similar to a sales tax.”).

16. See *State and Local Taxes*, U.S. DEP’T OF TREAS., *supra* note 15 (defining sales tax as a tax paid by consumers when they purchase goods and services).

17. See Weiss-Wolf, *supra* note 13, at 499 (explaining tampon tax is not an affirmative, additional tax imposed on menstrual products).

18. *Issues*, PERIOD EQUITY, <http://periodequity.org/issues> (last visited Dec. 17, 2019) (on file with *The University of the Pacific Law Review*).

19. See *Menstrual Tax Repeal Bill Reintroduced*, ASSEMBLYMEMBER CRISTINA GARCIA REPRESENTING THE 58TH CAL. ASSEMBLY DIST. 58 (Dec. 3, 2018), <https://a58.asmdc.org/press-releases/menstrual-tax-repeal-bill-reintroduced> (on file with *The University of the Pacific Law Review*) (announcing December 3rd, 2018, Assemblymember Cristina Garcia reintroduced the menstrual tax exemption to the Assembly).

20. John Wildermuth, *Gender Equity at Heart of Tampon Tax Battle; Repealing California’s Tampon Tax: Gender Equity Versus Budget Fears*, S.F. CHRON. (Mar. 22, 2019), <https://www.sfchronicle.com/politics/article/Repealing-California-s-tampon-tax-Gender-13707290.php> (on file with *The University of the Pacific Law Review*); *Menstrual Tax Repeal Bill Reintroduced*, *supra* note 19.

conceivably decreasing state, city, and county revenues by approximately \$20 million—the reason former Governor Jerry Brown vetoed a similar bill in 2016.²¹ Although excitement surrounds Chapter 34, California's Legislature may not extend the exemption if the cost to California's budget is higher than the observed benefit.²² While Chapter 34 moves California forward, two years is an insufficient period for the Legislature to fairly evaluate the benefits of the sales tax exemption for California's menstruators.²³

II. LEGAL BACKGROUND

A state possess the right to impose any tax on its citizens or entities so long as the tax does not violate the Supremacy Clause of the United States Constitution.²⁴ Existing law allows the federal government to collect income, payroll, estate, and gift taxes—but no federal law authorizes the collection of a sales tax.²⁵ Attempts to implement a national sales tax have failed; therefore, imposing a sales tax and exemptions remain a state issue.²⁶ A sales tax is a regressive tax because each person pays the same amount, regardless of his or her income.²⁷ Sales tax exemptions provide financial relief for groups the regressive tax affects.²⁸ Section A primes the discussion of exemptions and discusses sales tax generally and in California.²⁹ Section B provides how other states exempted menstrual products in their tax code.³⁰ Section C touches on discrepancies

21. Wildermuth, *supra* note 20.

22. See 2019 Cal. Legis. Serv. Ch. 34 §12(c)(2)(B)(i)–(ii) (S.B. 92) (WEST) (requiring the LAO analyze if bill is meeting its intended purpose and to make a recommendation to legislature); see also Jennifer Weiss-Wolf, Opinion, *Tampon Tax: California's Budget Tweak is Not Enough—the Practice Should Be Banned Nationwide*, NEWSWEEK (May 9, 2019), <https://www.newsweek.com/tampon-tax-california-budget-not-enough-illegal-1421100> (on file with *The University of the Pacific Law Review*) (indicating activists cheered when California announced eliminating the tampon tax).

23. See Weiss-Wolf, *supra* note 22 (opining Chapter 34 does not guarantee long term results of menstrual equity).

24. See *State and Local Taxes*, U.S. DEP'T OF TREAS., *supra* note 15 (discussing the constitutionality of states and federal government assessing taxes on its citizens).

25. See generally Fair Tax Act of 2003, H.R. 25, 108th Cong. (2003) (proposing to eliminate existing tax laws and replace with a federal sales tax).

26. See All Actions of H.R. 25, 108th Cong. (May 5, 2004), <https://www.congress.gov/bill/108th-congress/house-bill/25/all-actions> (last visited Aug. 10, 2019) (on file with *The University of the Pacific Law Review*) (showing the bills failure to move forward in Congress during the two-year Congressional session); Weiss-Wolf, *supra* note 13, at 499 (“Sales tax is legislated and levied state by state. Each state . . . [decides what] items to . . . exempt, at what rate items will be taxed, and if/how sub-bodies like counties or municipalities can do the same.”).

27. *State and Local Taxes*, U.S. DEP'T OF TREAS., *supra* note 15 (“Such a tax is called a regressive tax because the people with smaller incomes pay a larger percentage of their money into the sales tax system than people with higher incomes.”).

28. See *id.* (explaining different types of taxes that individual states levy on their citizens).

29. *Infra* Section II.A.

30. *Infra* Section II.B.

between different federal agencies' treatment of menstrual products.³¹ Lastly, Section D reviews California's previous attempts to enact a menstrual product sales tax exemption.³²

A. An Explanation of Sales Tax

Sales tax in the United States originated during the Great Depression as a new form of state revenue.³³ By 1947, sales taxes were the largest source of revenue for states.³⁴ Today, all but five states assess some form of a sales tax, but no universal process exists for assessing this tax.³⁵ Instead, each state establishes its own sales tax laws and exemptions.³⁶ Most states also allow cities and counties to generate income by levying a sales tax, but any exemption created at the state level applies to counties and cities as well.³⁷

A shift in consumer retail behavior from 1947 to today is decreasing the sales tax base and is shrinking the sales tax's contribution to state revenue.³⁸ However, sales tax revenue is still a vital component of state economies.³⁹ Sales tax generates revenue that helps fund both state General Funds and local municipal services like public safety.⁴⁰ States use their general funds to run programs such as education, infrastructure, and health services.⁴¹ California estimated that sales tax revenue will contribute to 18.8% or \$27.4 billion of its 2019–2020 General Fund.⁴²

Like many other states, California levies a sales tax on the retail sales of all “tangible personal property,” more commonly understood as goods.⁴³ A sales tax

31. *Infra* Section II.C.

32. *Infra* Section II.D.

33. Lee & Wessel, *supra* note 15.

34. *Id.*

35. See Tonya Moreno, *The Five U.S. States Without Sales Tax*, THE BALANCE, <https://www.thebalance.com/states-without-a-sales-tax-3193305> (last updated Apr. 3, 2019) (on file with *The University of the Pacific Law Review*) (listing Alaska, Oregon, Montana, Delaware, and New Hampshire as the five states without sales tax); Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate 'Tampon Tax'*, NPR (Mar. 6, 2016), <https://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> (on file with *The University of the Pacific Law Review*).

36. Gass-Poore, *supra* note 35.

37. See Moreno, *supra* note 35 (“Most states also allow local counties, cities, and municipalities to add their own separate sales taxes to the state rate, but there are a few consumer-friendly exceptions.”).

38. See Lee & Wessel, *supra* note 15 (noting the sharing economy contributes to decreasing the sales tax base).

39. See *id.* (asserting sales tax revenue comprises, on average, 34% of a state's total budget).

40. CAL. DEP'T. OF FIN., REVENUE ESTIMATES 155–157 (2019), available at <http://www.ebudget.ca.gov/2019-20/pdf/BudgetSummary/RevenueEstimates.pdf> (on file with *The University of the Pacific Law Review*).

41. See *The 2018-2019 Budget: California Spending Plan*, LEGISLATIVE ANALYST'S OFFICE, available at <https://lao.ca.gov/reports/2018/3870/spending-plan-2018.pdf> (Oct. 2, 2018) (on file with *The University of the Pacific Law Review*) (highlighting education, health care, and infrastructure as significant spending actions).

42. CAL. DEP'T. OF FIN., *supra* note 40, at 159.

43. See CAL. DEPT. OF TAX. AND FEE ADMIN., PUB. NO. 61, SALES AND USE TAXES: EXEMPTIONS AND

rate applies to each good and passes through to the consumer at the point of sale.⁴⁴ California allows local jurisdictions to charge a rate of 0.10%–1.00% in addition to the 7.25% state sales tax rate.⁴⁵ Not all goods are subject to the sales tax in California; goods that are “necessities of life,” like prescription medications, un-prepared food products, and animal feed and fertilizer, are exempt from California’s sales tax.⁴⁶ Since new sales tax exemptions impact local government, if an exemption creates lost revenue for the county or city, the state must reimburse the local governments.⁴⁷ However, the state is not required to reimburse local governments if the legislature did not appropriate funds when creating the new exemption.⁴⁸

B. Menstrual Product Exemptions in Other States

Like California, the majority of states that collect a sales tax created exemptions for particular categories of products.⁴⁹ States commonly exempt “necessities” such as groceries, prescription medication, and medical devices.⁵⁰ However, not all states classify the same items in the same way.⁵¹ Of the forty-five states assessing a sales tax, thirteen states exempt menstrual products; five of which exempted menstrual products before 2015—The Year of the Period.⁵² Since 2016, thirty-two states introduced legislation to eliminate the tampon tax—but many failed.⁵³ Of the states that introduced tampon tax legislation, eight successfully exempted menstrual products—either through new legislation or by reclassifying menstrual products to fit within an exemption category.⁵⁴ New

EXCLUSIONS (2018) (discussing California’s assessment of sales tax on all “tangible personal property”); *Tangible Personal Property*, BLACK’S LAW DICTIONARY (11th ed. 2019) (on file with *The University of the Pacific Law Review*) (“[P]ersonal property that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses, examples being furniture, cooking utensils, and books.”).

44. *California City & County Sales & Use Tax Rate*, CAL. DEPT. OF TAX. AND FEE ADMIN., <https://www.cdtfa.ca.gov/taxes-and-fees/sales-use-tax-rates.htm> (on file with *The University of the Pacific Law Review*).

45. *Id.*

46. *See* CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (separating sales tax exemptions into broad general categories).

47. *See* CAL. REV. & TAX. CODE § 2230 (West 1977) (requiring states to reimburse local governments twenty percent of lost revenue created by a new sales tax exemption).

48. *See id.* (requiring reimbursement to local governments only if the legislature appropriates funds).

49. *State and Local Taxes*, U.S. DEP’T OF TREAS., *supra* note 15.

50. Moreno, *supra* note 35.

51. *See* Weiss-Wolf, *supra* note 13, at 499 (discussing how different states exempt certain products).

52. *See id.* (listing five states having pre-2015 menstrual product exemptions: Maryland, Massachusetts, Minnesota, New Jersey, and Pennsylvania).

53. *See id.* at 506 (listing every state that has attempted menstrual tax legislation); Jennifer Weiss-Wolf & Emily McCormick, *Commentary: Tampon Tax Ends in Utah. Other States Should Follow Suit.*, SALT LAKE CITY TRIB. (Dec. 14, 2019) <https://www.sltrib.com/opinion/commentary/2019/12/13/commentary-tampon-tax/> (on file with *The University of the Pacific Law Review*).

54. *See* Weiss-Wolf & McCormick, *supra* note 53 (noting Connecticut, Nevada, New York, Illinois, Florida, Ohio, Rhode Island and California all exempted menstrual products from their sales tax since 2016).

Jersey was one of the earliest states to create a sales tax exemption for menstrual products.⁵⁵ In 2005, it elected to exempt tampons, pads, and similar menstrual products by classifying them as health care products.⁵⁶ Other states exempt menstrual products from their sales tax by categorizing the items either as “hygienic aids,” “health care items,” or carving tampons and pads out from their “household paper goods and soaps” category.⁵⁷

C. Federal Classifications of Menstrual Products

Differing classifications of menstrual products is not solely a state issue.⁵⁸ The United States Food and Drug Administration (“FDA”) regulates tampons as a Class II “medical device.”⁵⁹ Congress required the FDA to add menstrual products to its list of medical devices after other countries declined to import American-made tampons because of their materials.⁶⁰ Then in 1980, the FDA faced increased consumer pressure to better regulate tampons after the Center for Disease Control linked tampons to an outbreak of Toxic Shock Syndrome (“TSS”).⁶¹ Consumers learned the synthetic materials in tampons could cause

55. See Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, J. EMPIRICAL LEGAL STUD., 620, 624 (2018) (explaining New Jersey was one of the first states to exempt menstrual products from its sales tax).

56. See *id.* (reporting the effects of menstrual product sales tax exemption in new jersey); see also N.J. DEP’T OF TREAS., NEW JERSEY SALES TAX GUIDE TAX TOPIC BULLETIN S&U-4, 1, 5–13, available at <https://www.state.nj.us/treasury/taxation/pdf/pubs/sales/su4.pdf> (Nov. 2018) (on file with *The University of the Pacific Law Review*) (listing common retail items exempt from sales tax).

57. See *Spotlight on Maryland Taxes*, COMPTROLLER OF MD., <https://www.marylandtaxes.gov/business/sales-use/special-situations/medicine-medical-equipment.php> (last visited Dec 17, 2019) (on file with *The University of the Pacific Law Review*) (listing tampons and sanitary napkins as “hygiene aids” that are exempt from sales tax); *Guide Sales and Use Tax*, MASS. DEP’T. OF REV., <https://www.mass.gov/guides/sales-and-use-tax#-health-care-items-> (last visited June 22, 2019) (on file with *The University of the Pacific Law Review*) (explaining how Massachusetts defines certain taxable items and which items are exempt from the Massachusetts sales and use tax); see also Josh Barro, *The Latest Sales Tax Controversy: Tampons*, N.Y. TIMES (Jan. 7, 2016), <https://www.nytimes.com/2016/01/07/upshot/the-latest-sales-tax-controversy-tampons.html> (on file with *The University of the Pacific Law Review*) (mentioning Pennsylvania “threw in” an exemption for tampons because they were necessary).

58. See Weiss-Wolf, *supra* note 13, at 496-497 (explaining how the FDA and IRS treat menstrual products differently).

59. See *id.* at 496 (discussing the FDA’s consideration of menstrual products); see also *Is The Product a Medical Device?*, U.S. FOOD & DRUG ADMIN. (Mar. 22, 2018), <https://www.fda.gov/medical-devices/classify-your-medical-device/product-medical-device> (on file with *The University of the Pacific Law Review*).

[A]n instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory which is: . . . intended for use in the diagnosis of disease or other conditions, or . . . in the cure, mitigation, treatment, or prevention of disease, in man or other animals, and intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals.

60. See Ashley Fetters, *The Tampon: A History*, THE ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/394334/> (on file with *The University of the Pacific Law Review*) (describing Japan’s ban of Rely tampons because of its materials).

61. *Id.*

TSS but were unaware of the risk because the products did not require labeling.⁶² Manufacturers are not required to disclose all materials in tampons and sanitary napkins because the FDA labeled each product as a Class II device.⁶³ However, manufacturers must label their packaging with TSS information and the warning signs.⁶⁴

The Internal Revenue Service (“IRS”) diverges from the FDA’s classification of menstrual products because it does not classify the products as “medical necessities.”⁶⁵ Labeling items as medical necessities allows some individuals to purchase those items with pre-tax income.⁶⁶ To use pre-tax income, a person must have either a Health Savings Account (“HSA”) or a Flexible Spending Account (“FSA”).⁶⁷ Using pre-tax income for medical necessities benefits a consumer because it reduces the amount of income subject to federal and state income tax.⁶⁸ Essentially, it puts more money in individuals’ pockets.⁶⁹ Since the IRS does not label menstrual products as a medical necessity, a woman cannot use her HSA or FSA money to purchase tampons.⁷⁰

Past federal legislative efforts to classify menstrual products as medical necessities within the Internal Revenue Code did not advance in the United States Senate.⁷¹ In 2018, the United States House of Representatives passed a bipartisan bill that would have allowed an individual to purchase menstrual products with an HSA or FSA.⁷² United States Representative Grace Meng sponsored the “Restoring Access to Medication and Modernizing Health Savings Accounts

62. *Id.*

63. *Id.*

64. *Id.*

65. See Weiss-Wolf, *supra* note 13, at 497 (describing IRS’ treatment of menstrual products in connection with HSA and FSA accounts).

66. See Louise Norris, *What is the Difference Between a Medical FSA and an HSA?*, HEALTHINSURANCE.ORG (June 5, 2019), <https://www.healthinsurance.org/faqs/what-is-the-difference-between-a-medical-fsa-and-an-hsa/> (on file with *The University of Pacific Law Review*) (limiting purchases with account funds to qualified medical expenses).

67. See *id.* (explaining while there are differences, both a Flexible Spending Account and a Health Savings Account allow people to allocate pre-tax income for future spending on qualified medical expenses).

68. See Cinnamon Janzer, *The Ins and Outs of Pre-Tax Benefits*, ZENEFITS (May 29, 2019), <https://www.zenefits.com/blog/what-are-pre-tax-benefits/> (discussing the benefit or pre-tax deductions reduces an employee’s taxed wages) (on file with *The University of the Pacific Law Review*).

69. *Id.*

70. See *Feminine Hygiene Products: FSA Eligibility*, FSA STORE, <https://fsastore.com/FSA-Eligibility-List/F/Feminine-Hygiene-Products-E300.aspx> (last visited June 23, 2019) (on file with *The University of the Pacific Law Review*) (excluding menstrual products from the list of approved medical purchases); Christine Hsueh, Megan Baker, & Anna Resiman, *The IRS Doesn’t Think Tampons Are an Essential Health Care Item. That Has to Change.*, Hartford Courant (July 1, 2019) <https://www.courant.com/opinion/op-ed/hc-op-baker-hsueh-tampons-0701-20190701-vjxdfasfjqd2bmkgeyytbnprra-story.html> (on file with *The University of the Pacific Law Review*).

71. Morgan Gstalter, *House Passes ‘Menstrual Equality’ Measure to Allow Tampon, Pad Purchases with Health Spending Accounts*, THE HILL (July 28, 2018), <https://thehill.com/homenews/house/399360-house-passes-menstrual-equality-measure-for-tampon-pad-purchases-with-health> (on file with *The University of the Pacific Law Review*).

72. *Id.*

Act,” and promoted Meng’s “fight for menstrual equity.”⁷³ Although Meng’s bill had bipartisan support in the House, it lacked similar support in the Senate—likely because of the bill’s costs, and a crowded Senate calendar.⁷⁴

D. Three Failed Attempts: A Review of California’s Efforts to Eliminate the Tampon Tax

Despite being one of the first states to introduce tampon tax legislation, California took three years to enact an exemption for menstrual products.⁷⁵ Between 2016 and 2019, California introduced three different pieces of legislation to exempt menstrual products from sales tax.⁷⁶ Subsection 1 discusses California’s first and second attempts at eliminating the tampon tax, and Governor Brown’s veto of AB 1561.⁷⁷ Subsection 2 discusses California’s final attempt at eliminating the tampon tax and the impetus of Chapter 34.⁷⁸

1. AB 1561 and AB 9

In 2016, Assembly Members Ling Ling Chang and Christina Garcia introduced AB 1561, California’s first attempt at creating a sales tax exemption for menstrual products.⁷⁹ This bill received support from men and women from both sides of the political aisle.⁸⁰ Individuals outside the state applauded California for being the first state after the “Year of the Period” to take legislative action and correct menstrual inequities in the tax code.⁸¹ The Assembly and Senate approved the bill, and many supporters expected AB 1561 to go into effect the following year.⁸² However, former Governor Jerry Brown vetoed AB

73. *Id.*

74. See Geoff Manville, *House to Vote on Healthcare Changes, but Timing Uncertain*, MERCER’S LAW AND POLICY GROUP (July 19, 2018), <https://www.mercer.us/our-thinking/healthcare/house-to-vote-on-healthcare-changes-but-timing-uncertain.html> (on file with *The University of the Pacific Law Review*) (theorizing even if the bill passes the House it will not pass the Senate because of cost and calendar).

75. Weiss-Wolf, *supra* note 22.

76. *Id.*

77. *Infra* Section II.D.I.

78. *Infra* Section II.D.II.

79. See Anita Chabria, *California Lawmakers Introduce Bill That Would Eliminate ‘Tampon Tax’*, THE GUARDIAN (Jan. 7, 2016), <https://www.theguardian.com/world/2016/jan/07/california-tampon-tax-assembly-bill-women-gender> (on file with *The University of the Pacific Law Review*) (reporting AB 1561 is necessary legislation because “menstrual hygiene is not a choice”).

80. See Assembly Floor Vote of AB 1561, Unofficial Ballot (May 23, 2016), https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160AB1561 (last visited July 13, 2019) (on file with *The University of the Pacific Law Review*) (documenting ‘aye’ votes from democrats, republicans, men, and women).

81. See Weiss-Wolf, *Opinion, supra* note 22.

82. Complete Bill History of AB 1561, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB1561 (last visited May 30, 2019) (on file with *The University of Pacific Law Review*); see Weiss-Wolf, *supra* note 22 (opining the tampon tax should be permanently banned because it is an equity issue).

1561 explaining the exemption for menstrual products would cost governments \$20 million.⁸³ Governor Brown justified vetoing AB 1561 (and seven other bills) because the bills created sales tax exemptions which equated to new spending.⁸⁴ Reasoning that all new spending required discussion during budget negotiations, Governor Brown believed enacting a sales tax exemption post-budget-approval was inappropriate.⁸⁵

The following year, Assembly Member Garcia introduced AB 9 in the 2017–2018 Legislative session, a bill similar to AB 1561.⁸⁶ AB 9 differed from AB 1561 because it did not include the five-year sunset provision present in AB 1561.⁸⁷ Additionally, unlike AB 1561 which garnered much support from the Legislature, AB 9 was less popular than the previous version of the menstrual product exemption.⁸⁸ A dispute over excluding local governments from the sales tax exemption resulted in the Assembly committee pulling the bill from the agenda, thus killing the bill.⁸⁹

2. AB 31

In December 2018, Assembly Member Garcia introduced AB 31 to exempt menstrual products from sales tax—a nearly identical bill to AB 1561.⁹⁰ Like AB 1561, which garnered major support, AB 31 had more support than any other legislation proposed during the 2018–2019 Legislative session.⁹¹ Proponents hoped, with a new governor, it was possible to enact a menstrual product exemption.⁹²

83. See Weiss-Wolf, *supra* note 22 (explaining how Governor Brown vetoed the bill after its unanimous passage in the senate due to the austerity of the combined tax breaks from this bill and seven others).

84. Derek Hawkins, *With Governor's Veto California's Tampon Tax Will Survive*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/09/14/with-governors-veto-californias-tampon-tax-will-survive-for-now/?noredirect=on&utm_term=.7defc5a30751 (on file with *The University of the Pacific Law Review*).

85. *Id.*

86. Complete Bill History of AB 9, http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB9 (last visited June 23, 2019) (on file with *The University of the Pacific Law Review*).

87. AB 9, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended Mar. 28, 2017, but not enacted).

88. See Complete Bill History of AB 9, http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB9 (last visited June 23, 2019) (on file with *The University of the Pacific Law Review*) (failing to progress from the Assembly committee because of Constitutional issues).

89. Alexi Koeseff, *California Tax Free Tampons Bill Tied Up Over Whether Cities Should Be Included*, SACRAMENTO BEE (Mar. 13, 2017), <https://www.sacbee.com/news/politics-government/capitol-alert/article138356778.html> (on file with *The University of the Pacific Law Review*).

90. *Menstrual Tax Repeal Bill Reintroduced*, *supra* note 19.

91. Ben Christopher, *With a Whopping 2,628 Bills Pending, Here's the One Most Popular Among California Legislators*, CAL MATTERS (Mar. 5, 2019), <https://calmatters.org/politics/2019/03/most-popular-bill-california-legislature-bipartisan-coauthors/> (on file with *The University of the Pacific Law Review*).

92. Laurel Rosenhall, *'Governor Dad' Newsom Budgets Tax Breaks for Diapers, Focuses on Families*, CAL MATTERS (May 7, 2019), <https://calmatters.org/articles/blog/newsom-budget-governor-dad-california->

It appeared the bill's supporters gained a victory when Governor Newsom presented his revised budget during a press conference in May 2019.⁹³ At the conference, Governor Newsom announced his plan to exempt menstrual products from the sales tax.⁹⁴ After introducing bills over three legislative sessions, it seemed menstrual products would be exempt from the sales tax as of January 1, 2020.⁹⁵ A trailer bill with the 2019–2020 budget incorporated the menstrual product sales tax exemption but required further discussion after California passed the budget bill in June.⁹⁶ Fourteen days after the budget passed, California's Legislature approved Chapter 34—the Sales Tax Exemption trailer bill—which included the exemptions for “menstrual hygiene products” and diapers.⁹⁷

III. CHAPTER 34

Chapter 34 exempts menstrual hygiene products from sales tax by adding a new section to California's Revenue and Taxation code.⁹⁸ The statute creates an additional sales tax exemption for menstrual products—defining tampons, sanitary napkins, sponges, and menstrual cups as menstrual products—for two years.⁹⁹ The exemption will go into effect on January 1, 2020, and expires on January 1, 2022, unless the Legislature extends the exemption.¹⁰⁰ Existing law directs a portion of sales tax revenue to Local Revenue Fund 2011, which provides essential public safety services like training police officers and supervising neglected children.¹⁰¹ Under existing law, each fiscal year, the Department of Finance must calculate the lost revenue the exemption causes and credit Local Revenue Fund 2011.¹⁰² Chapter 34 also requires the Legislative Analyst's Office (“LAO”) to prepare a report, no later than January 1, 2021, for

families-family-leave-diapers-preschool/ (on file with *The University of the Pacific Law Review*).

93. *See id.* (reporting from the press conference Governor Newsom's platform for the budget bill).

94. *Id.*

95. *See id.* (mentioning Newsom's announcement would be incorporated in his May budget revision and finalized in June).

96. *See generally* Lauren Rosenhall, *Bitter or Sweet, Trailer Bills let California Lawmakers Slip New Policies into Budget*, CAL MATTERS (June 21, 2017), <https://calmatters.org/politics/2017/06/bitter-sweet-trailer-bills-let-california-lawmakers-slip-new-policies-budget/> (on file with *The University of the Pacific Law Review*) (explaining what trailer bills are and how California lawmakers use them).

97. *See* Complete Bill History of SB 92, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB92 (last visited June 27, 2019) (on file with *The University of the Pacific Law Review*) (noting chaptering of SB 92 on June 27, 2019).

98. CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34).

99. *Id.*

100. *Id.*

101. *See* CAL. GOV. CODE § 30027.11 (West 2012) (mandating the state to reimburse Local Revenue Fund 2011 if taxes contributing to the fund are decreased); *see also* CAL. GOV. CODE § 30025(i)(1)–(5) (West 2012) (listing all “Public Safety Services” included under the statute).

102. *See* 2019 Cal. Legis. Serv. Ch. 34 §11(a) (S.B. 92) (WEST) (requiring the state to reimburse Local Revenue Fund 2011 if tax exemptions decrease fund revenue).

the Assembly Committee on Revenue and Taxation and the Senate Governance and Finance Committee.¹⁰³ In the report, the LAO must provide its recommendations for the menstrual product exemption, and if it requires modifications, an extension, or discontinuance.¹⁰⁴

IV. ANALYSIS

After three failed attempts at passing a sales tax exemption for menstrual products, Chapter 34 finally eliminates the tampon tax in California.¹⁰⁵ Section A discusses how menstrual misunderstanding explains delays in sales tax exemptions for menstrual products.¹⁰⁶ Section B compares Chapter 34 to AB 31 to highlight Chapter 34's shortcomings.¹⁰⁷

A. Menstrual Misunderstanding: California's Attitude Shifts from 'Tampons are Luxuries' to 'Tampons are Necessities' . . . Sort of

The misunderstanding regarding menstruation and menstrual products may explain why California, and other states, have been slow to exempt menstrual products from the sales tax.¹⁰⁸ President Barack Obama suggested the tampon tax exists because male lawmakers—who do not experience menstruation—wrote sales tax laws.¹⁰⁹ California's Governor Newsom even admitted he was uncomfortable discussing menstrual products while echoing President Obama's sentiments during his budget press conference.¹¹⁰ Stating “[i]t’s remarkable how tone-deaf some men are on this topic and our politics is on this topic,” Governor Newsom suggests policymakers choose to remain misinformed about menstruation.¹¹¹ Uninformed lawmakers explain why there are classification discrepancies of menstrual products among the states.¹¹² Some states that exempt menstrual products from sales tax, classify tampons, pads, and menstrual cups as “health items.”¹¹³ Other states classify menstrual products as “hygiene products”

103. *Id.* at §12(c)(2)(B).

104. *Id.* at §12(c)(2)(B)(i)–(ii).

105. CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34).

106. *Infra* Section IV.A.

107. *Infra* Section IV.B.

108. *See Barro, supra* note 57 (examining complications state face exempting items from sales tax); *see generally Weiss-Wolf, supra* note 13, at 494–95 (providing history of the slow trend in the U.S. to eliminate the tampon tax).

109. Gass-Poore', *supra* note 35.

110. Louis Casiano, *California Governor Proposes Ending Sales Taxes on Tampons and Diapers*, FOX NEWS (May 8, 2019), <https://www.foxnews.com/politics/california-governor-proposes-ending-sales-taxes-on-tampons-and-diapers> (on file with *The University of the Pacific Law Review*).

111. *Id.*

112. *See generally Weiss-Wolf, supra* note 13, at 497 (recounting how the policy and social conversations regarding menstruation explain the tampon tax).

113. *See Guide Sales and Use Tax*, MASS. DEP'T. OF REV., *supra* note 57 (showing tampons and sanitary

and few directly recognize them as a necessity.¹¹⁴

The confusion about what menstruation is—along with reluctant, predominately-male, lawmakers hesitant to learn more—illuminates lawmakers’ failure to enact a sales tax exemption for menstrual products.¹¹⁵ States often create sales tax exemptions for items classified as “health-related” or “necessities of life.”¹¹⁶ Prescription medication like Viagra falls within the health-related exemption.¹¹⁷ Food products, vending machine food, “candy, confectionery snack foods, and bottled water” are examples of necessities of life.¹¹⁸ Before Chapter 34, a California consumer could purchase a Fruit Roll-Up without sales tax because it qualifies as a grocery under “necessity of life;” yet, menstrual products did not enjoy the same benefit.¹¹⁹

Chapter 34 finally transitions California to start recognizing menstrual products as necessities.¹²⁰ There is no precise definition of what a “necessity” is.¹²¹ Some definitions consider items essential for survival a “necessity”, while others define a “necessity” as something a person uses to maintain a minimum standard of living.¹²² Further, often defining “necessity” is highly subjective.¹²³ The subjectivity in determining necessity explains why individuals still think of menstrual products as “luxuries” and not “necessities.”¹²⁴ However, a product that enables a woman to participate fully and function in society is not a luxury.¹²⁵ Without tampons and pads, a woman menstruating is not able to

napkins as exempt “health items” on their website).

114. See Weiss-Wolf, *supra* note 13, at 505–07 (discussing the history of U.S. policy as it relates to the tampon tax); see also *Guide Sales and Use Tax*, MASS. DEP’T. OF REV., *supra* note 57.

115. See generally Weiss-Wolf, *supra* note 13, at 497 (recounting how the policy and social conversations regarding menstruation explain the tampon tax); see also Fetters, *supra* note 60 (quoting a microbiologist who stated the Tampon Safety and Research act did not pass U.S. Congress because men did not have vaginas).

116. See CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (separating sales tax exemptions into categories).

117. *Menstrual Tax Repeal Bill Reintroduced*, *supra* note 19.; see CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (listing prescription medication as a category exempt from sales tax).

118. See CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (listing food exemptions under necessities of life header).

119. See *Menstrual Tax Repeal Bill Reintroduced*, *supra* note 19 (asserting menstrual products are not exempt from sales tax, but other items are).

120. See *The 2018-2019 May Revision: Sales Tax Exemptions for Diapers and Menstrual Products*, LEGISLATIVE ANALYST’S OFFICE, <https://lao.ca.gov/Publications/Report/4040> (May 12, 2019), (on file with *The University of the Pacific Law Review*) (providing background on reasonable definitions of necessities in California).

121. *Id.*

122. *Id.* (offering examples of different definitions of necessity.)

123. *Id.* (providing a Pew survey where people considered cars as necessities as an example of subjectivity).

124. See Gass-Poore’, *supra* note 35 (commenting lawmakers in other states said tampon taxes were in place because the law treated the items as luxuries).

125. See Kimberly Tuttle, *Periods are Political: Tampon Tax Contributes to Gender Inequality*, CLAREMONT J.L. & PUB. POL’Y. (March 2, 2019), <https://5clpp.com/2019/03/02/periods-are-political-how-the-tampon-tax-contributes-to-gender-inequality/> (on file with *The University of the Pacific Law Review*) (arguing

participate in her community because the alternatives are for her to stay home or menstruate freely.¹²⁶ If a woman must stay home when she is on her period, then she is removed from her job and community for approximately one week every month.¹²⁷ Alternatively, if a woman were to menstruate freely, she would be ridiculed and considered unsanitary, thus creating additional shame.¹²⁸ With Chapter 34, California creates a sales tax exemption for menstrual products and starts dissolving the argument that menstrual products are “luxuries”, not “necessities”.¹²⁹

B. AB 31 vs. Chapter 34: Is the Watered-Down Version a Win for Menstrual Equity?

Although California finally exempted menstrual products from sales tax, Chapter 34 may not be the victory that menstrual equity supporters hoped.¹³⁰ There are several key differences between Chapter 34 and the original tampon tax bill—AB 31—suggesting Chapter 34 is less supportive of menstrual equity.¹³¹ Subsection one compares Chapter 34’s stated purpose of improving access to menstrual products with AB 31’s original purpose of menstrual equity.¹³² Subsection two discusses Chapter 34’s shortened sunset provision and analyzes the unknown effect the exemption has on California’s budget.¹³³ Lastly, subsection three compares New Jersey’s tampon tax exemption to Chapter 34 and suggests the exemption does not allow enough time for an informed legislative decision.¹³⁴

1. Purposely Not Acknowledging Gender Inequality in the Tax Exemption

Chapter 34’s legislative purpose differed from AB 31’s legislative purpose: create gender equality in California’s tax laws.¹³⁵ Instead, Chapter 34 states the

tampons are necessities, not luxuries and that the tampon tax is a tax of women having their periods).

126. See Weiss-Wolf, *supra* note 13, at 497–98 (explaining access to menstrual products ensures a fully participatory society).

127. See *id.* at 498 (asserting menstrual products affect a person’s ability to work).

128. See *id.* at 496 (recounting how the policy and social conversations regarding menstruation explain the tampon tax).

129. See Weiss-Wolf, *supra* note 22 (acknowledging California’s new law recognizes the impact menstruation has on over half the population).

130. See *id.* (calling for permanent removal of the tampon tax).

131. Compare AB 31, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended Apr. 4, 2019, but not enacted) (proposing language to exempt menstrual products from sales tax); with CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34) (enacting a menstrual product exemption longer than AB 31).

132. *Infra* Section IV.B.I.

133. *Infra* Section IV.B.II.

134. *Infra* Section IV.B.III.

135. Compare AB 31, *supra* note 131 (proposing the purpose of exempting menstrual products is for bridging gender inequities in the tax code); with 2019 Cal. Legis. Serv. Ch. 34 § 12 (S.B. 92) (West) (stating the exemption’s purpose is to expand menstrual product access).

exemption's purpose is to "promote public health by increasing affordability of, and expanding access to, menstrual hygiene products."¹³⁶ By not incorporating the goal of achieving gender equality in the text of the statute, the Legislature fails to recognize that inequity exists.¹³⁷ In evaluating California's tax code, there is no other gender-specific item subject to sales tax.¹³⁸ Removing gender inequities from sales tax laws helps gender equality overall, especially when women face higher costs for hygiene products that are nearly identical to its male alternative.¹³⁹

Furthermore, having a clear and accurate purpose recognizing the need to shore up gender-inequity is essential if there is ever a successful challenge to the validity of sales tax on menstrual products.¹⁴⁰ Courts often engage in statutory interpretation to evaluate the validity of a statute, frequently looking to the Legislature's stated purpose.¹⁴¹ Since Chapter 34's stated purpose is to improve access to menstrual products, the court may not be willing to comport the purpose of gender equity when analyzing legislative intent.¹⁴²

2. The Sun May Set Soon on the Tampon Tax: Financial Implications of the Exemptions

A second key difference between AB 31 and Chapter 34 is the shortened sunset provision.¹⁴³ Chapter 34 creates a sales tax exemption for only two years, appreciably less than the five-year exemption AB 31 prescribed.¹⁴⁴ During budget talks, Governor Newsom and the California legislature debated over the exemption's time frame.¹⁴⁵ Governor Newsom's office and the California Senate

136. 2019 Cal. Legis. Serv. ch. 34 §12 (enacting CAL. TAX. CODE §§ 6363.9–6363.10).

137. *See generally id.* (seeing nowhere in the bill cites gender bias or inequity as a reason for the exemption).

138. Wildermuth, *supra* note 20.

139. *See Tuttle, supra* note 125 (describing the "pink tax" and how prices for feminine products like razors are higher than men's).

140. *See DiSimone v. California*, No. CGC-16-552458, 2018 Cal. Super. LEXIS 1814, at 1 (Jan. 29, 2018) (granting summary judgment to California Department of Tax and Fee Administration and denying plaintiff's claim that tax on menstrual products violated Equal Protection rights).

141. *See* William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (on file with *The University of the Pacific Law Review*) ("[T]he leading treatise states that '[f]or the interpretation of statutes, 'intent of the legislature' is the criterion that is most often cited.'").

142. *See generally id.* (explaining what courts evaluate when engaging in statutory interpretation).

143. *Compare* AB 31, *supra* note 131 (proposing language to exempt menstrual products from sales tax for five years); *with* CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34) (exempting menstrual products from sales tax for two years).

144. *Compare* AB 31, *supra* note 131 (proposing language to exempt menstrual products from sales tax); *with* CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34) (providing language different from AB 31 for the exemption).

145. Adam Beam, *Tampon Tax Among 8 Issues in Debate Over California's Proposed \$213 Billion Budget*, O.C. REG. (June 8, 2019), <https://www.ocregister.com/2019/06/08/8-parts-of-californias-proposed-213-billion-budget-that-have-gov-gavin-newsom-and-lawmakers-debating/> (on file with *The University of the Pacific Law Review*).

agreed on a two-year time frame, while the Assembly requested a ten-year time frame for the exemption.¹⁴⁶ Agreeing with the Assembly, the Legislative Analyst's Office ("LAO") also suggested a longer time frame for the exemption—citing equity as the reason to be less flexible with the compromise.¹⁴⁷

Ultimately, Chapter 34 exempts menstrual products from sales tax for two years—a significantly shorter period than the authors of AB 31 desired.¹⁴⁸ It is unclear how eliminating the tampon tax will affect California's General Fund budget.¹⁴⁹ Three different monetary figures and an insufficient reporting mechanism may explain why lawmakers hesitate to pass a longer exemption because the effect on the budget is uncertain.¹⁵⁰ When Governor Brown vetoed AB 1561, he supported his veto by explaining the exemption would cost the state \$20 million.¹⁵¹ Yet, the California Assembly on Appropriations noted the state would lose \$8.8 million—not \$20 million.¹⁵² The California Assembly Committee on Revenue and Taxation produced another inconsistent figure.¹⁵³ According to their calculations, the state would lose \$19 million, not \$20 million.¹⁵⁴ The various monetary figures suggest an inaccurate reporting mechanism for sales tax exemptions and their accompanying revenue loss to the General Fund.¹⁵⁵ Sales tax laws do not require retailers to submit an itemized list of sold property when they pay sales tax because their gross sales receipts

146. LEGIS. ANALYST'S OFF., SALES TAX EXEMPTIONS FOR DIAPERS AND MENSTRUAL PRODUCTS (2019), available at https://lao.ca.gov/handouts/Conf_Comm/2019/Sales-Tax-Exemptions-053019.pdf (on file with *The University of the Pacific Law Review*).

147. *Id.*

148. *See* CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34) (adopting a two-year exemption); *see also id.* (noting Assembly wanted a longer exemption period).

149. *Compare* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 31, at 1 (May 1, 2019) (stating the revenue loss of the exemption would be \$8.8 million); *with* ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 31, at 2 (Apr. 22, 2019) (stating revenue loss would be \$19 million).

150. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 31, at 1 (May 1, 2019) (stating the revenue loss of the exemption would be \$8.8 million); *also compare* AB 31, *supra* note 131 (stating women pay annually \$20 million in sales tax for menstrual products); *with* ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 31, at 2 (Apr. 22, 2019) (stating revenue loss would be \$19 million); *see generally* CAL. DEPT. OF TAX. AND FEE ADMIN., PUB. NO. 401, INSTRUCTIONS FOR COMPLETING THE CDTFA-401-A, STATE, LOCAL, AND DISTRICT SALES AND USE TAX RETURN (describing required information a business must submit on their sales tax return).

151. *See* Weiss-Wolf, *supra* note 22 (recounting Governor Brown's veto of AB 1561); *see* AB 31, *supra* note 131 (stating women pay annually \$20 million in sales tax for menstrual products).

152. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 31, at 1 (May 1, 2019).

153. ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 31, at 2 (Apr. 22, 2019).

154. *Id.*

155. *Compare* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 31, at 1 (May 1, 2019) (stating the revenue loss of the exemption would be \$8.8 million); *with* AB 31, *supra* note 131 (stating women pay annually \$20 million in sales tax for menstrual products); *also with* ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 31, at 2 (Apr. 22, 2019) (stating revenue loss would be \$19 million).

determine the amount they owe.¹⁵⁶ To better understand the results of the fiscal impact the exemption causes, Chapter 34 creates a reporting mechanism that was not present in AB 31.¹⁵⁷ After one year, the LAO must evaluate the exemption's effectiveness and make a recommendation to the appropriate Assembly and Senate Committees.¹⁵⁸

3. New Jersey's Menstrual Product Exemption is Predictive for California

The cost to the General Fund, and if the exemption provides greater access to menstrual products, will likely determine whether the tampon tax exemption extends after 2022.¹⁵⁹ Of course, early supporters of the bill say balancing the budget “on a person’s uterus” is never appropriate, regardless of any lost revenue.¹⁶⁰ Nonetheless, if given sufficient time, Chapter 34 could create positive effects like in New Jersey.¹⁶¹ New Jersey eliminated the tampon tax in 2005, and consumers benefited greatly.¹⁶² Specifically, low-income consumers in New Jersey received a financial benefit greater than the cost of the sales tax before its repeal.¹⁶³ By eliminating the 6.9% sales tax on menstrual products, New Jersey consumers, in effect, received a 7.3% reduction in prices.¹⁶⁴ If repealing the tampon tax has the same effect in California as it did in New Jersey, Chapter 34 may fulfill its stated purpose of increasing affordability and expanding access to menstrual products.¹⁶⁵ However, to provide a proficient recommendation to the Legislature, the LAO should analyze the difference in prices between pre-exemption and post-exemption, as done in New Jersey.¹⁶⁶ Chapter 34 does not set forth a particular standard for the LAO to base its recommendation, except to see if the exemption is fulfilling its intended purpose.¹⁶⁷

156. See CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 150 (providing instructions for businesses submitting a sales tax return).

157. 2019 Cal. Legis. Serv. ch. 34 §12(c)(2)(B)(i)–(ii) (enacting CAL. TAX CODE §§ 6363.9–6363.10).

158. See *id.* (requiring an evaluation of the exemption after one year).

159. See *id.* (requesting the LAO make a recommendation if there are better ways to provide affordable access to menstrual products).

160. *Menstrual Tax Repeal Bill Reintroduced*, *supra* note 19.

161. See Cotropia & Rozema, *supra* note 55, at 622 (finding eliminating the tampon tax provided a benefit to consumers).

162. *Id.*

163. *Id.*

164. See *id.* (comparing prices of tampons the year before the exemption and prices of tampons the year after the exemption).

165. See *id.* at 637 (“We find that, relative to consumers in control states, consumers in New Jersey upgrade the quality of their product by roughly 3 percent after the tampon tax repeal[.]”); see also 2019 Cal. Legis. Serv. ch. 34 § 12(c)(1) (enacting CAL. TAX CODE §§ 6363.9–6363.10) (declaring the purpose of the menstrual product exemption).

166. See Cotropia & Rozema, *supra* note 55, at 622 (designing the study to calculate data between 2004 and 2006 when New Jersey exempted menstrual products from sales tax in 2005).

167. See 2019 Cal. Legis. Serv. ch. 34 §12(c)(2)(B)(i)–(ii) (enacting CAL. TAX CODE §§ 6363.9–6363.10) (detailing no metrics for the LAO to comply with when making their recommendation).

Additionally, requiring the LAO to make a recommendation after one year raises concerns if the Legislature will use insufficient information to decide whether to extend the exemption.¹⁶⁸ Further, the current reporting methods for collecting data on sales tax exemptions are inconsistent; therefore, the LAO may not have accurate data for its recommendation.¹⁶⁹ New Jersey's results foreshadow future benefits of the exemption in California but given Chapter 34's sunset provision, California may not realize a benefit, if any, to its consumers.¹⁷⁰

V. CONCLUSION

Chapter 34's journey to exempt menstrual products from California's sales tax was longer than the exemption itself, spanning more than three years over three legislative cycles.¹⁷¹ Unlike the legislation's long excursion to approval, the guaranteed exemption for menstrual products from sales tax is rather short—only two years.¹⁷² Understandably, the Legislature wants to be well advised and know the effects the exemption has on the budget before committing to a longer exemption period.¹⁷³ Even so, two years may not provide the Legislature with enough time and information to make an informed decision about whether to extend the exemption after 2022.¹⁷⁴ For persons fighting to eliminate the tampon tax, Chapter 34 appears more like a soundbite for legislative budget talks than a substantive effort to create menstrual and gender equity in California's tax code.¹⁷⁵ However, if the exemption has the same effect in California as it did in New Jersey, it will at least provide a benefit in the short-term to consumers who need it the most.¹⁷⁶

168. See *id.* (requiring the LAO to make a recommendation after only one year).

169. See CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (describing the origin of the data, how it is collected and evaluated, and noting not all data is reliable).

170. See Cotropia & Rozema, *supra* note 55, at 622 (noting the study analyzed data from 2004-2006); see also CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34).

171. See Weiss-Wolf, *supra* note 22 (recounting California's previous attempts to eliminate the tampon tax).

172. CAL. REV. & TAX. CODE § 6363.10 (enacted by Chapter 34).

173. See Karen Zraick, *supra* note 14 (quoting Governor Newsom's want to extend the exemption so long as California is in a good fiscal position).

174. See 2019 Cal. Legis. Serv. ch. 34 §12(c)(2)(B)(i)-(ii) (enacting CAL. TAX CODE §§ 6363.9-6363.10) (requiring the LAO to submit a recommendation to Congress after the exemption is in effect for one year); see also CAL. DEPT. OF TAX. AND FEE ADMIN., *supra* note 43 (explaining lost revenue data does not derive from sales tax returns).

175. Weiss-Wolf, *supra* note 22.

176. See Cotropia & Rozema, *supra* note 55, at 622 (finding eliminating the tampon tax provided a benefit to consumers); Singmexsomethingsoft, *supra* note 1 (posting on reddit her struggle to afford tampons on her student income).