



1-1-2005

# Elections / That Time and Once Again: Chapter 478 Promises Efficiency Gains, Policy Regressions in Amending the Political Reform Act of 1974

Janelle A. Ruley

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legislation Commons](#)

## Recommended Citation

Janelle A. Ruley, *Elections / That Time and Once Again: Chapter 478 Promises Efficiency Gains, Policy Regressions in Amending the Political Reform Act of 1974*, 36 McGEORGE L. REV. 843 (2005).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol36/iss4/22>

## **That Time and Once Again: Chapter 478 Promises Efficiency Gains, Policy Regressions in Amending the Political Reform Act of 1974**

*Janelle A. Ruley*

### *Code Sections Affected*

Government Code §§ 81008, 84103, 84108, 84203, 84204, 84502 (amended); § 84305.6 (repealed); § 84305.5 (repealed and new).  
SB 604 (Perata); 2004 Stat. ch. 478

### I. INTRODUCTION

For as long as California's voters and lawmakers have been reforming state politics and elections law, they have been fighting to reform those very reforms.<sup>1</sup> Since the Political Reform Act was passed in 1974, it has been amended (or sought to be amended) at least three times.<sup>2</sup> Chapter 478 offers a new round of changes.

To understand why changes are so frequent, one need only look back to 2003. While running gubernatorial recall campaigns, Cruz Bustamante and Arnold Schwarzenegger exploited campaign finance loopholes in Proposition 34, the last word on campaign finance rules.<sup>3</sup> Mr. Bustamante accepted \$5 million from "Indian casinos," promising not to tax their slot machines.<sup>4</sup> Despite caps on individual contributions,<sup>5</sup> Bustamante was able to collect unlimited contributions into his erstwhile Lieutenant Governor campaign committee.<sup>6</sup> After losing a lawsuit,<sup>7</sup> Bustamante shifted \$5 million out of his campaign and into a fund to

---

1. *Reinventing California: Yank the 'For Sale' Sign*, L.A. TIMES, Oct. 26, 2003, at 1, available at <http://www.pulitzer.org/year/2004/editorial-writing/works/editorial3.html> [hereinafter *Reinventing California*] (on file with the McGeorge Law Review).

2. LEAGUE OF WOMEN VOTERS, *Nonpartisan Pros & Cons of Proposition 34: Campaign Contributions and Spending. Limits. Disclosure.*, Oct. 20, 2000, at <http://ca.lwv.org/lwvc/files/nov00/pc/prop34.html> [hereinafter *Nonpartisan Pros & Cons*] (on file with the McGeorge Law Review).

3. *A Tale of Two Loopholes: Schwarzenegger's [sic.] Loans + Bustamante's Old Committees = Failed Campaign Reform*, Recall Money Line, No. 13, Oct. 13, 2003, available at <http://www.recallmoneywatch.com/archives/oct3.html> [hereinafter *Two Loopholes*] (on file with the McGeorge Law Review).

4. *Reinventing California*, *supra* note 1.

5. See *Two Loopholes*, *supra* note 3 (explaining that while Proposition 34 limited contributions made to gubernatorial candidates to \$21,200, the legislation was silent on contributions made to pre-existing election committees).

6. *Id.*

7. See *Johnson v. Bustamante*, No. 03AS04931 (Cal. Super. Ct., Sacramento County filed Sept. 4, 2003) (holding that Senator Ross Johnson exhausted the Fair Political Practice Commission's (FPPC) regulatory protocol and won a civil lawsuit against Bustamante).

battle Proposition 54.<sup>8</sup> The advertisements “actually amounted to Bustamante commercials . . . by the time the courts ruled against the shell game Bustamante used to pay for those ads, he had spent the \$5 million.”<sup>9</sup>

Governor Schwarzenegger manipulated the Fair Political Practices Commission’s (FPPC) flexible interpretation of Proposition 34 by loaning personal funds to his campaign in excess of statutory limits.<sup>10</sup> Personal loans in campaigns are problematic because of the potential for a candidate to seemingly raise funds for “interests in front of him,” while instead reimbursing himself.<sup>11</sup>

Campaign finance reform contextualizes a discussion of the need for real change in political reform. Chapter 478,<sup>12</sup> by amending the Political Reform Act of 1974, makes two general, administrative changes to current government code sections. However, its major impact will be felt on independent expenditure disclosures and late independent expenditure reports, cumulative contributions and late contribution reports, and slate mailer organizations.

## II. EXISTING LAW

### A. Administrative Changes

The previous iteration of the Political Reform Act mentioned the specific months when California held statewide primary and statewide general elections: June and November, respectively.<sup>13</sup> These dates were used as a benchmark for when campaign statements were to be available for public inspection—the

---

8. See *Reinventing California*, *supra* note 1; see also LEAGUE OF WOMEN VOTERS, VOTE NO ON PROPOSITION 54, available at <http://ca.lwv.org/action/prop0310/prop54.html> (explaining that Proposition 54 was Ward Connerly’s proposed constitutional amendment prohibiting state and local governments from classifying racial data).

Currently, the state and local governments collect race-related information on their personnel and for programmatic purposes. In the majority of cases, the federal government requires this information to ensure compliance with federal nondiscrimination laws (particularly equal employment opportunity laws) or as a condition of receiving various federal funds (for education and Medi-Cal, for example).

*Id.*

9. *Reinventing California*, *supra* note 1.

10. See *Two Loopholes*, *supra* note 3 (explaining that personal loans from candidates to their committees were purported to be limited to \$100,000, but Schwarzenegger loaned at least \$4.5 million to his recall campaign).

11. *Id.*

12. See Press Release, Office of the Governor, Legislative Update #2, (Sept. 10, 2004), available at [http://www.governor.ca.gov/state/govsite/gov\\_htmldisplay.jsp?BV\\_SessionID=@@@@1157041075.1100462613@@@@&BV\\_EngineID=cccdadcmjijgldgcfnegcfkmdffidfof.0&sCatTitle=Press+Release&sFilePath=/govsite/press\\_release/2004\\_09/20040910\\_GAAS39804\\_LegUpdate.html&sTitle=Legislative+Update+%232&iOID=58597](http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?BV_SessionID=@@@@1157041075.1100462613@@@@&BV_EngineID=cccdadcmjijgldgcfnegcfkmdffidfof.0&sCatTitle=Press+Release&sFilePath=/govsite/press_release/2004_09/20040910_GAAS39804_LegUpdate.html&sTitle=Legislative+Update+%232&iOID=58597) (on file with the *McGeorge Law Review*) (indicating that Governor Schwarzenegger signed Chapter 478 of the Statutes of 2004 into law on September 10, 2004).

13. CAL. GOV’T CODE § 81008(b) (West 1993).

Saturday preceding the June primary and the Saturday preceding the November general election.<sup>14</sup>

Current law provides various means for filing, with the Secretary of State, a late-formed committee's statement of organization,<sup>15</sup> a late amendment to a committee's statement of organization,<sup>16</sup> a slate mailer organization's statement of organization,<sup>17</sup> and late contribution<sup>18</sup> reports either made to or received by candidates or committees.<sup>19</sup> These filing means include telegram and personal delivery.<sup>20</sup>

### *B. Independent Expenditure Disclosures and Late Independent Expenditure Reports*

Current statutory law has detailed *disclosure requirements* for independent expenditures and detailed *reporting requirements* for late independent expenditures.<sup>21</sup> Both independent expenditures<sup>22</sup> and late independent expenditures<sup>23</sup> are terms of art in the government code.

---

14. *Id.*

15. *See id.* § 84101(b) (indicating that a late committee formation is defined as one that qualifies for the statutory definition of committee "before the date of an election in connection with which the committee is required to file preelection statements, but after the closing date of the last campaign statement required to be filed before the election"); *see also id.* § 82013(a)-(c) (defining committee). Section 82013 indicates:

[A]ny person or combination of persons who directly or indirectly does any of the following:  
(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year,  
(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or (c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.

*Id.*

16. *See id.* § 84103(a) (explaining that "whenever there is a change in any of the information contained in a statement of organization, an amendment shall be filed within 10 days to reflect the change"); *see also id.* § 84103(b) (detailing that a late change requiring an amendment to the statement of organization, filed by telegram or personal delivery within 24 hours, includes "(1) The name of the committee. (2) The name of the treasurer or other principal officers. (3) The name of any candidate or committee by which the committee is controlled or with which it acts jointly").

17. *Id.* § 84108(a).

18. *See id.* § 82036 (defining late contribution). The section states:

"Late contribution" means any of the following: (a) Any contribution including a loan that totals in the aggregate one thousand dollars (\$1,000) or more that is made to or received by a candidate, a controlled committee, or a committee formed or existing primarily to support or oppose a candidate or measure before the date of the election at which the candidate or measure is to be voted on but after the closing date of the last campaign statement required to be filed before the election. (b) Any contribution including a loan that totals in the aggregate one thousand dollars (\$1,000) or more that is made to or received by a political party committee, as defined in Section 85205, before the date of any state election, but after the closing date of the last campaign statement required to be filed before the election.

*Id.*

19. *Id.* § 84203(b).

20. *Id.* §§ 84101(b), 84103(b), 84108(b), 84203(b).

21. *Id.* § 84204 (emphasis added).

22. *See id.* § 82031 (defining independent expenditure). The section states:

Disclosure requirement rules were triggered when independent expenditures were used to support or oppose a candidate or ballot measure via broadcast or mass mailing advertisements.<sup>24</sup> A disclosure statement had to accompany all independent advertising expenditures.<sup>25</sup> The statement was required to include the name of the committee making the independent expenditure and the names of the two persons making the largest contributions to the committee.<sup>26</sup>

There were several existing reporting requirements for committees making late independent expenditures.<sup>27</sup> The most salient reporting requirements were that the committee was to report the late independent expenditure within twenty-four hours, by the filing methods mentioned above,<sup>28</sup> and that the committee was to report the name and contact information of any persons contributing more than one hundred dollars to the late independent expenditure.<sup>29</sup> The reporting requirements applied to all committees making late independent expenditures.<sup>30</sup>

### C. Cumulative Contributions and Late Contribution Reports

Cumulative contributions appeared in the Political Reform Act in two instances: as an independently defined provision<sup>31</sup> and as part of the disclosure requirements for committees using independent expenditures to advertise for or against a candidate or a ballot measure.<sup>32</sup> Previously, cumulative contributions began to toll on the first day the statement of organization was filed.<sup>33</sup>

---

an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

*Id.*

23. See *id.* § 82036.5 (defining late independent expenditure). The section states: “Late independent expenditure” means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

*Id.*

24. *Id.* § 84506(a).  
25. CAL. GOV’T CODE § 84506(a)(1)-(2) (West Supp. 2004).  
26. *Id.*  
27. CAL. GOV’T CODE § 84204 (West 1993).  
28. *Id.* § 84204(a); *supra* notes 15-20.  
29. See CAL. GOV’T CODE § 84204(b) (West 1993) (referring readers to *id.* § 84211(f)(1)-(5)).  
30. *Id.* § 84204.  
31. *Id.* § 84502.  
32. *Id.* § 84506.  
33. CAL. GOV’T CODE § 84502 (West Supp. 2004).

Existing law applied identical regulations to all candidates or committees that made or received late contributions.<sup>34</sup> As with late independent expenditure reports, when a candidate or committee made or received a late contribution, the contribution was to be reported within twenty-four hours.<sup>35</sup> Afterwards, the contributor was required to report personal information, indicate the contribution's beneficiary, and reveal the date and amount of the contribution.<sup>36</sup> Alternatively, the recipient was required to report personal information and contact information for the contributor.<sup>37</sup>

#### D. Slate Mailer Organizations

##### 1. What are Slate Mailers?

Slate mailers, utilized in California before most other states, are a popular and economically efficient way to reach voters during elections for both partisan slates and single-issue platforms.<sup>38</sup> Mailers often consist of a single card, the size of a full or half sheet of paper, which direct recipients to vote based on partisan affiliation.<sup>39</sup> State regulatory measures are triggered once the mailer supports or opposes a total of four or more candidates or ballot measures.<sup>40</sup> The card must then include a box for required disclosures and notices.<sup>41</sup> A slate mailer organization is a group that prepares and mails out these slates.<sup>42</sup>

---

34. CAL. GOV'T CODE § 84203 (West 1993); *see also id.* § 82036 (defining late contribution). The section states:

Late contribution means any of the following: (a) Any contribution including a loan that totals in the aggregate one thousand dollars (\$1,000) or more that is made to or received by a candidate, a controlled committee, or a committee formed or existing primarily to support or oppose a candidate or measure before the date of the election at which the candidate or measure is to be voted on but after the closing date of the last campaign statement required to be filed before the election. (b) Any contribution including a loan that totals in the aggregate one thousand dollars (\$1,000) or more that is made to or received by a political party committee, as defined in Section 85205, before the date of any state election, but after the closing date of the last campaign statement required to be filed before the election.

*Id.*

35. *Id.* § 84203(b).

36. *Id.* § 84203(a).

37. *Id.*

38. SHANTO IYENGAR ET AL., THE STEALTH CAMPAIGN: EXPERIMENTAL STUDIES OF SLATE MAIL IN CALIFORNIA 3-5 (Center for Research in Society and Politics, Working Paper No. 3-2000, 1999), *available at* <http://repositories.cdlib.org/crisp/3-2000> (on file with the *McGeorge Law Review*).

39. *See id.* at 4-5 (explaining that one side contains the voter's address, photographs of some candidates appearing on the slate, endorsements of propositions or candidates, information on the date of the election, location of the voter's polling place, and any other relevant logos or graphics, while the other side contains the slate itself, a listing of all endorsed candidates or measures).

40. CAL. GOV'T CODE § 82048.3 (West 1993).

41. IYENGAR ET AL., *supra* note 38, at 5.

42. *Levine v. Fair Political Practices Comm'n*, 222 F. Supp. 2d 1182, 1184 (E.D. Cal. 2002).

## 2. *What Is the Problem with Slate Mailers?*

Slate mailers, and the organizations that produce them, are hot topics in California legislation because they create tension between two competing policy goals: informing voters by protecting them from fraud<sup>43</sup> and free speech rights for the slate mailer organizations.<sup>44</sup> The Legislature is bound by the Political Reform Act of 1974 to regulate information sent to voters and to impose sanctions on organizations that defraud voters.<sup>45</sup> The Judiciary is obliged to protect the mailer organizations' rights. Courts consistently strike down regulations that impinge too much on an organizations' free speech.<sup>46</sup>

The most glaring problem with slate mailers is that they are easily manipulated to fool voters. In 2002, noted conservative activist James Lacy flooded Santa Monica residents with slate mailers urging voters to choose prominent Democrats, and supporting liberal ballot measures such as abortion rights and education.<sup>47</sup> The mailers also urged a "No" vote on Measure JJ.<sup>48</sup> Measure JJ would have required local employers earning more than \$5 million annually to pay hourly workers \$12.50 an hour or \$10.50 an hour plus health care benefits,<sup>49</sup> an issue most Democrats would support. Though the measure had been leading in polls up to election day, it ultimately lost by a small margin.<sup>50</sup>

By sending out seemingly liberal slates, and gambling that Democratic voters would simply take the mailer into their polling place to follow all its suggestions, Lacy was able to mislead liberal voters into striking down a measure they likely would have supported without the influence of the mailer.<sup>51</sup> Pursuant to slate mailer regulations, Lacy did place an asterisk next to "No on JJ."<sup>52</sup> The asterisk referred the reader to a note that the mailer was paid for by an organization called "Democratic Voters Ballot Guide."<sup>53</sup> As it turns out, this was merely a front for a group of hotel owners who paid for the mailer.<sup>54</sup> The organization followed the disclosure regulations; however, given the Organization's name, even voters who chose to investigate the asterisk were likely deceived.

---

43. *See id.* (referring to the Political Reform Act of 1974).

44. *See id.* (previewing the constitutional argument made by the slate mailer organizations).

45. *Id.*

46. *Id.*

47. Nick Schou, *Slate Nailer: Conservative James Lacy Plays Turncoat to Sway Elections*, OC WEEKLY (Orange County, Cal.), Dec. 13-19, 2002, available at <http://www.laane.org/pressroom/stories/smart/sm021213ocweekly.html> (on file with the *McGeorge Law Review*).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

### 3. *How Have Slate Mailers Been Regulated in the Past?*

Existing law governing mandatory disclosures on slate mailers covers three such disclosures: "Notice to Voters," candidate endorsements differing from those of the official political party, and support or opposition of candidates or measures differing from the official party platform.<sup>55</sup> California's path toward regulating slate mailer organizations has included a number of stops, via both legislation and the initiative process.<sup>56</sup>

Prior to the 1996 election, slate mailer organizations were statutorily required to print two types of information on any piece of slate mail: a Notice to Voters<sup>57</sup> and a note identifying any candidate endorsements that differed from the official endorsement of the indicated political party.<sup>58</sup> The "Notice to Voters" was a generic disclaimer alerting voters that the slate mail was not sent by an official party organization, but instead by the named organization.<sup>59</sup> The candidate endorsement regulation was triggered when a piece of slate mail appearing, by indicia or by words, to represent a political party, offered an endorsement of a candidate that differed from the official party endorsement.<sup>60</sup> In such instances, a disclaimer had to be placed immediately below the endorsement stating that the endorsement was not the official position of the party.<sup>61</sup> Further, the disclaimer could not be smaller than nine-point boldface roman type and had to be in a color that contrasts with the background of the mailer.<sup>62</sup>

In 1996, Proposition 208 amended both of the subsections explained above and replaced them with new provisions.<sup>63</sup> One of the changes made by Proposition 208 was a disclosure requirement that candidates and measures that

55. *Levine*, 222 F. Supp. 2d at 1184.

56. *Id.*

57. *See id.* (quoting text of former CAL. GOV'T CODE § 84305.5(a)(2)). The section states:  
NOTICE TO VOTERS. THIS DOCUMENT WAS PREPARED BY (name of slate mail organization), NOT AN OFFICIAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an \*.

*Id.*

58. *See id.* (quoting text of former CAL. GOV'T CODE § 84305.5(a)(6)). The section states:  
Any candidate endorsement appearing in the slate mailer that differs from the official endorsement of the political party which the mailer appears by representation or indicia to represent is accompanied, immediately below the endorsement, in no less than 9-point roman boldface type which shall be in a color or print that contrasts with the background so as to be easily legible, the following notice: THIS IS NOT THE POSITION OF THE (political party which the mailer appears by representation or indicia to represent) PARTY.

*Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*



paid to appear on the slate mailer had to be designated with dollar signs (\$\$).<sup>64</sup> These new provisions “were ultimately found to be unconstitutional and their enforcement [was] enjoined by [the United States District Court for the Eastern District of California].”<sup>65</sup>

During the course of litigation on Proposition 208, California voters passed Proposition 34 in November 2000.<sup>66</sup> Proposition 34 did not itself change the dollar sign disclosure requirement; since that requirement was found unconstitutional, the provision already reverted back to the pre-Proposition 208 asterisk designation.<sup>67</sup> However, Proposition 34 enacted an additional provision to the existing disclosure requirements: any slate mailer sent out that recommended or opposed a ballot measure or candidate that differed from the official party’s recommendation had to add a disclaimer.<sup>68</sup> As it stood then, requirements for slate mailers included: (1) the Notice to Voters; (2) an asterisk designation for a candidate endorsement that deviated from the official party’s endorsement (if the mailer seemed to represent a party); (3) a dollar-sign designation for all candidates and measures that paid to be included on the mailer; and (4) a disclaimer for candidate or measure recommendations that deviated from the official party’s recommendation (if the mailer seemed to represent a party).<sup>69</sup>

#### 4. Current Statutory Law

Prior to Chapter 478, statutory regulations of slate mailers included four disclosure requirements.<sup>70</sup> First, the name, street address, and city of the slate mailer organization or committee primarily formed to support or oppose one or more ballot measures must be shown on the outside of each piece of slate mail

---

64. CAL. FAIR POLITICAL PRACTICES COMM’N, PROPOSITION 34: CHANGES TO CALIFORNIA CAMPAIGN FINANCE LAW (2003) at <http://www.fppc.ca.gov/index.html?id=244> (on file with the *McGeorge Law Review*).

65. See *Levine*, 222 F. Supp. 2d at 1184 (referring to *Cal. Prolife Council v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998)).

66. *Id.*

67. CAL. FAIR POLITICAL PRACTICES COMM’N, *supra* note 64; see also *Levine*, 222 F. Supp. 2d at 1184-85 (printing text of CAL. GOV’T CODE § 84305.6, in pertinent part). The section states:

In addition to the requirements of Section 84305.5, a slate mailer organization . . . may not send a slate mailer unless any recommendation in the slate mailer to support or oppose a ballot measure or support a candidate that is different from the official recommendation to support or oppose by the political party that the mailer appears by representation or indicia to represent is accompanied, immediately below the ballot measure or candidate recommendation in the slate mailer, in no less than nine-point roman boldface type in a color or print that contrasts with the background so as to be easily legible, the following notice: ‘THIS IS NOT THE OFFICIAL POSITION OF THE (political party that the mailer appears by representation or indicia to represent) PARTY.’

*Id.*

68. *Levine*, 222 F. Supp. 2d at 1184-85.

69. *Id.* at 1184.

70. CAL. GOV’T CODE § 84305.5(a) (Supp. 2004).

and on every insert.<sup>71</sup> Second, the Notice to Voters must be set-off by a printed or drawn box and must appear at the top of each side or surface of a slate mailer or at the top of each side or surface of a postcard or other self-mailer.<sup>72</sup> Third, each candidate or ballot measure that has paid to appear on the slate mailer must be designated by three dollar signs (\$\$\$).<sup>73</sup> This requirement is triggered when any payment is made to the organization by or at the behest of a candidate or committee, the sum of which meets statutory reporting requirements.<sup>74</sup> Fourth, the name of a candidate appearing on the slate mailer must be accompanied by his party designation, if his party differs from that which appears by representation to be the proponent of the mailer.<sup>75</sup> Therefore, current law does not include the endorsement and recommendation disclosure requirements ultimately found unconstitutional.<sup>76</sup>

### 5. *Judicial Involvement in Slate Mailer Disclosure Requirements*

In anticipation of the November 2002 statewide general election, three slate mailer organizations<sup>77</sup> sought a preliminary injunction to block the FPPC from enforcing both Proposition 34's disclaimer for deviations from the official party's candidate or measure recommendation and the pre-Proposition 208 disclaimer for deviations from the official party's endorsement of a candidate or measure.<sup>78</sup> Although they conceded the Notice to Voters was acceptable, the plaintiffs in *Levine* argued that these other two requirements violated their right to free speech.<sup>79</sup> Defendant FPPC argued that the mailers sent out by plaintiffs in the past, which appear to represent a political party, would stand in violation of both provisions.<sup>80</sup> While the FPPC had yet to issue enforcement regulations, it did send an advice letter intimating that the mere use of the word "Democratic" would cause a mailer to appear to represent the Democratic party, thus triggering the recommendation disclaimer.<sup>81</sup>

71. *Id.* § 84305.5(a)(1).

72. *Id.* § 84305.5(a)(2).

73. *Id.* § 84305.5(a)(4).

74. *Id.* § 84305.5(b).

75. *Id.* § 84305.5(a)(5).

76. *Supra* notes 63-65 and accompanying text.

77. *See Levine*, 222 F. Supp. 2d at 1185 (E.D. Cal. 2002) (identifying plaintiffs as: Larry Levine (Voter Information Guide), Tom Kaptain (Democratic Voters' Choice), and Scott Hart (Continuing the Republican Revolution)).

78. *Id.* at 1183-84.

79. *See id.* at 1184-85 (noting that all plaintiffs, save the California Republican Assembly, publish slate mail that targets either Democratic or Republican voters, and their mailers include captions that contain the words "Democrat," "Democratic," or "Republican," along with other symbols or reference that typically associated with such parties).

80. *Id.* at 1187.

81. *Id.* at 1188.

In *Levine*, Judge Karlton<sup>82</sup> focused his analysis primarily on Proposition 34's recommendation disclaimer.<sup>83</sup> The court took the view that this disclaimer effectively requires any slate mailer deviating from the official party's position to advertise for the party: "[p]ut directly, the statute does not merely require a disclaimer, rather it requires the mailer to articulate the position of the official party."<sup>84</sup> Explaining that a statute compelling speech, like a statute restricting speech, violated the First Amendment, *Levine* held Proposition 34 to be unconstitutional and enjoined the FPPC from enforcing it.<sup>85</sup> The Legislature's efforts to mandate more transparent reporting to the public were quashed by the courts.

However, the court in *Levine* offered another option for regulating disclosures on slate mailers. To satisfy the constitutional standard, compelled speech must be the "least restrictive means to further the articulated interest."<sup>86</sup> California Elections Code sections 20006 and 20007 are indeed less restrictive.<sup>87</sup> These code sections merely prohibit false claims that a candidate has been endorsed by a political party and permit any member of the party's central committee or any registered voter to bring suit to enjoin such action.<sup>88</sup> Given this option, the court was unwilling to permit the enforcement of a higher standard that more significantly restricted speech by compelling it.<sup>89</sup>

### III. ABOUT CHAPTER 478

#### A. Administrative Changes

Chapter 478 changes the specific mention of June primaries and November general elections in the Political Reform Act, and replaces them with the more general reference of "statewide primary or statewide general election."<sup>90</sup> This language still pertains to the time when campaign statements are to be made available for public inspection.<sup>91</sup>

Chapter 478 removes telegrams as an acceptable means of filing a late-formed committee's statement of organization, a late amendment to a committee's statement of organization, a slate mailer organization's statement of organization, and late

---

82. Judge Karlton authored both of the Proposition 208 cases: *Levine v. Fair Political Practices Commission*, 222 F. Supp. 2d 1182, 1184 (E.D. Cal. 2002) and *California Prolife Council v. Scully*, 989 F. Supp. 1182 (E.D. Cal. 1998).

83. *Levine*, 222 F. Supp. 2d at 1189.

84. *See id.* at 1189 (adding that "such a requirement cannot pass constitutional muster").

85. *Id.*

86. *See id.* at 1190 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

87. *Id.* at 1190-91.

88. *Id.*

89. *Id.*

90. CAL. GOV'T CODE § 81008(b) (amended by Chapter 478).

91. *Id.*

contribution reports made to or received by candidates or committees.<sup>92</sup> Instead, Chapter 478 allows for filing via facsimile transmission and guaranteed overnight delivery.<sup>93</sup> For amendments to committees' statements of organization only, Chapter 478 also permits online transmission.<sup>94</sup>

### *B. Independent Expenditure Disclosures and Late Independent Expenditure Reports*

Chapter 478 did not amend the guidelines for when committees may make independent expenditures to advertise (either broadcast or mass mailing) support for or opposition against a candidate or ballot measure.<sup>95</sup> Instead, Chapter 478 changes the *content* of the disclosure statement.<sup>96</sup> Rather than including the names of the top two contributors, the disclosure must include the name of the committee making the independent expenditure and the names of the top two persons from whom the committee has received cumulative contributions of over \$50,000.<sup>97</sup>

Chapter 478 does not substantively change the actual reporting requirements for committees making late independent expenditures,<sup>98</sup> but it does create options for committees to reclassify their expenditures as something other than independent expenditures.<sup>99</sup> Essentially, if the candidate or his or her agent is involved in the expenditure, the late independent reporting requirements are not triggered.<sup>100</sup>

92. *Id.* §§ 84101(b), 84103(b), 84108(b), 84203(b).

93. *Id.*

94. *Id.* § 84103(b).

95. *Id.* § 84506(a).

96. *Id.* § 84506(a)(1)-(2).

97. *Id.* § 84506(a)(1).

98. *See id.* § 84204(a)-(d) (indicating the only change to be in the filing methods included in § 84204(a)).

99. *Id.* § 84204(e); *see also* CAL. GOV'T CODE § 85500(b) (West 1993) (explaining how committees can reclassify their expenditures.) The section states:

An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances: (1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate. (2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate. (3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure.

*Id.*

100. CAL. GOV'T CODE § 85500(b)(1)-(3) (West 1993).

*C. Cumulative Contributions and Late Contribution Reports*

Chapter 478 redefines cumulative contributions.<sup>101</sup> The term now means “the cumulative amount of contributions received by a committee beginning 12 months prior to the date the committee made its first expenditure to qualify, support, or oppose the measure and ending within seven days of the time the advertisement is sent to the printer or broadcast station.”<sup>102</sup>

Chapter 478 does not substantively change the actual reporting requirements for late contribution reports.<sup>103</sup> It does, however, limit the occasions in which a late contribution report must be made.<sup>104</sup> When a candidate or committee is required to make what would amount to a late contribution report under the guise of another statutory provision, it does not also have to file a late contribution report.<sup>105</sup>

*D. Slate Mailer Organizations*

With respect to slate mailer organizations, Chapter 478 has two primary provisions.<sup>106</sup> First, it mandates what must be included in the statement of organization filed with the Secretary of State.<sup>107</sup> Second, it mandates what must be included on all mailers sent out to voters.<sup>108</sup> The statement of organization filed with the Secretary of State must include: the full legal name, street address, and telephone number of (1) the organization itself;<sup>109</sup> (2) the treasurer and other principal officers;<sup>110</sup> and (3) each person within the organization who has final decision making authority as to which candidates or measures will be supported or opposed.<sup>111</sup> The statement of organization must be filed with the Secretary of State within ten days after the organization receives, or is promised, five hundred dollars or more for production of slate mailers.<sup>112</sup> If, however, the funds are received within the window set for late filing and the slate mailer is set to go out before the imminent election, the statement of organization must be filed within twenty-four hours via fax, guaranteed overnight delivery, or personal delivery.<sup>113</sup>

---

101. CAL. GOV'T CODE § 84502 (amended by Chapter 478).

102. *Id.*

103. *Id.* § 84203(a)-(d).

104. *Id.* § 84203(e).

105. *Id.* § 85309(a)-(b).

106. *Id.* §§ 84108, 84305.5.

107. *Id.* § 84108.

108. *Id.* § 84305.5.

109. *Id.* § 84108(b)(1).

110. *Id.* § 84108(b)(2).

111. *Id.* § 84108(b)(3).

112. *Id.* § 84108(c).

113. *Id.* § 84108(c).

The disclosure requirements for information that must be printed on slate mailers remain the same; Chapter 478 makes only minor changes to reflect constitutional challenges.<sup>114</sup> First, the full legal name,<sup>115</sup> street address, and city of the slate mailer organization must appear on the outside of each piece of slate mail; if the mailer includes inserts, the information need only appear on *at least one* of the inserts included.<sup>116</sup> Second, the Notice to Voters<sup>117</sup> did not change, but its placement did: Chapter 478 specifies that the Notice appear on the top *or bottom of the front surface of at least one insert* or at the top *or bottom* of one side or surface of a postcard or other self-mailer.<sup>118</sup> Third, candidates or ballot measures that paid to appear on the mailer must be designated by an asterisk (\*) immediately following the coinciding name or number, and that any candidate or measure that has not paid may not be designated by an asterisk (\*).<sup>119</sup> Further, the asterisk must be in the same type style, color or contrast, and legibility as that used for the name of the candidate or measure to which it refers, but in no case may the asterisk exceed ten-point boldface type.<sup>120</sup> Proposition 208 attempted to change the asterisk designation into a dollar sign designation, but the court threw out the law as unconstitutional;<sup>121</sup> it seems a safe assumption, though, that the asterisk will survive such challenges again, as it has in the past. Finally, the requirement to disclose a candidate's party that differs from the party indicated as the thrust of the mailer remains unchanged.<sup>122</sup>

#### IV. ANALYSIS

##### A. Administrative Changes

The change in nomenclature from the specific reference of June and November to the more general "statewide primary or statewide general election"

---

114. *Infra* notes 115-22 and accompanying text.

115. See CAL. GOV'T CODE § 84108(b)(1) (amended by Chapter 478) (stating that, "[w]henever identification of a slate mailer organization is required by this title, the identification shall include the full name of the slate mailer organization as contained in its statement of organization").

116. *Id.* § 84305.5(1) (emphasis added).

117. See *id.* § 84305.5(2) (mandating the Notice to Voters). The section states:

NOTICE TO VOTERS. THIS DOCUMENT WAS PREPARED BY (name of slate mail organization), NOT AN OFFICIAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an \*.

*Id.*

118. CAL. GOV'T CODE § 84305.5(2) (added by Chapter 478) (emphasis added).

119. *Id.* § 84305.5(4).

120. *Id.*

121. See *Levine*, 222 F. Supp. 2d at 1184-85.

122. CAL. GOV'T CODE § 84305.5(5) (added by Chapter 478).

gives the law an added degree of elasticity and reflects current practices.<sup>123</sup> California moved June primaries up to March after the 1996 presidential election in an effort to have a greater impact on the national primary season; to have a primary as late as June meant that California's voters had little voice in selecting the Democratic and Republican presidential candidates.<sup>124</sup>

The changes to filing methods simply updated the antiquated language of existing code to reflect current technology advances.<sup>125</sup> Telegrams are infrequently used, whereas faxes and guaranteed overnight delivery are much more commonplace.<sup>126</sup>

#### *B. Independent Expenditure Disclosures and Late Independent Expenditure Reports*

The changes in independent expenditure disclosures mean that the disclosure statement committees have to make does not have to include the names of the most generous contributors, provided the committee can demonstrate that monies from those top two contributors were spent on something besides an advertisement for or against a candidate or ballot measure.<sup>127</sup> Prior to Chapter 478, top contributors' names appeared on advertisements no matter how their dollars were spent; now the names do not need to appear if the committee can show it spent those contributions before it paid for the advertisement, protecting the highest givers' identities.<sup>128</sup>

The change in reporting requirements for late independent expenditures eliminates duplicative filing requirements.<sup>129</sup> An entity that must file electronic campaign reports, as well as electronic independent expenditure reports for expenditures of over \$1,000, does not also need to file a late independent expenditure report.<sup>130</sup> Chapter 478, in this regard, simplifies the campaign filing process.<sup>131</sup>

---

123. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 2 (Aug. 24, 2004).

124. John J. Pitney, Jr., *The California Primary: Too Late, Too Weird, Too Big, Too Lopsided*, SAN DIEGO UNION-TRIB., Feb. 29, 2004, available at [http://www.signonsandiego.com/uniontrib/20040229/news\\_mz1e29pitney.html](http://www.signonsandiego.com/uniontrib/20040229/news_mz1e29pitney.html).

125. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 2 (Aug. 24, 2004) (noting, "Currently, all of the sections refer to telegrams, and some refer to guaranteed overnight delivery through the United States Postal Service, which is no longer the only acceptable overnight delivery method. By advice letter, the Fair Political Practices Commission (FPPC) has said any guaranteed overnight delivery service is permissible.").

126. SENATE COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, COMMITTEE ANALYSIS OF SB 604, at 2 (Apr. 2, 2003).

127. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 4 (Aug. 9, 2004).

128. *Id.*

129. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 4 (Aug. 24, 2004).

130. *Id.* at 2.

131. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 4 (Aug. 24, 2004).

### C. Cumulative Contributions and Late Contribution Reports

Modifying the definition of cumulative contributions is an important step toward cleaning up the old provisions of the Political Reform Act.<sup>132</sup> Prior to Chapter 478, the process for determining which top contributors' names had to be disclosed on advertisements was to simply identify contributors based on *how much* they contributed, not *when* they contributed.<sup>133</sup> This process is flawed in its over-inclusiveness.<sup>134</sup> Because Proposition numbers were reused in California,<sup>135</sup> the name of a top contributor to a "Yes on 13" committee from 1978 would have to be disclosed in a "Yes on 13" committee formed in 2004.<sup>136</sup> Chapter 478, here, makes a sensible change: it limits the scope of cumulative contributions to monies received during the twelve months between a committee's first measure advocacy expenditure and the advertisement that would trigger disclosure requirements.<sup>137</sup>

Changes to late contribution reporting result in efficiency gains.<sup>138</sup> Just as with late independent expenditure reports, duplicative late contribution reports do not have to be filed if electronic campaign reports and electronic contribution reports also have to be filed.<sup>139</sup>

### D. Slate Mailer Organizations

#### 1. Statement of Organization Information Reporting

In theory, legislators meet the voter protection goals of the Political Reform Act of 1974 by establishing strict and inclusive requirements for the contents of slate mailer organizations' statements of organization. Chapter 478 mandates that the name, address, and telephone number of the slate mailer organization, its treasurer and other principal officers, and other persons with decisionmaking authority are filed with the Secretary of State.<sup>140</sup> This allows voters (or election watchdog agencies or organizations) to access the kinds of information that

---

132. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 3 (Aug. 9, 2004).

133. *Id.*

134. *Id.*

135. See FARLEX, THEFREEDICTIONARY.COM, *California Ballot Proposition*, at <http://encyclopedia.thefreedictionary.com/California%20ballot%20proposition>. While California originally would restart Proposition numbers at 1 each year, confusion resulted when a well-known Proposition number was reused. Then, "in 1982, the proposition numbers were not reused but would continue to increment until at least a decade had passed from when a particular one had appeared on the ballot. Starting with the 1998 ballot, the count was reset back to 1 and will be reset every 10 years." *Id.*

136. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 3 (Aug. 9, 2004).

137. *Id.*

138. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 2 (Aug. 9, 2004).

139. *Id.*

140. CAL. GOV'T CODE § 84108(b) (amended by Chapter 478).



might have preempted the Measure JJ scenario explained above.<sup>141</sup> But whether those goals are met in practice is another question altogether.

According to one study, the “most important benefit is the particular ability of slate mail to convey a campaign message grounded in partisan, coalitional politics.”<sup>142</sup> Slates are quickly and easily identified with larger political causes or positions.<sup>143</sup> The very nature of slate mail is that it speaks to a busy electorate in clear and concise language.<sup>144</sup> While filing requirements are a good fix on paper, they may have little practical impact in informing voters.

Further, no matter how stringent disclosure and filing laws are, bureaucratic or administrative processes inevitably break down.<sup>145</sup> In Irvine, for example, after the 2000 election, the District Attorney was asked to look into funding for the “Hometown Voter Guide.”<sup>146</sup> The organization sent out between five and ten full-color slate mailers backing the mayor and other council candidates.<sup>147</sup> When members of the public contacted the Registrar of Voters, where financial information was to be reported, they found only a two-page summary of contributors, not the required itemized list.<sup>148</sup> The organization claimed to have mailed the list, but admitted that it was returned via the mail.<sup>149</sup> Additionally, the organization could not account for a discrepancy of \$80,000 worth of payments.<sup>150</sup>

An Irvine Councilman offered a seemingly intuitive solution that was not included in Chapter 478: a website that publishes the information filed with the Secretary of State.<sup>151</sup>

“I think people just want to know who is contributing and if we can have open and prompt disclosure, people can look and see who is contributing. If they don’t agree, that helps their decision about who to vote for. Everyone ought to disclose. Not three or four months after the election, but often.”<sup>152</sup>

Chapter 478 does not address websites, and online reporting in most counties.<sup>153</sup> By taking advantage of technology, Chapter 478 could have better protected voters by making slate mailer organizations even more transparent.

---

141. *Id.*

142. IYENGAR ET AL., *supra* note 38, at 6.

143. *Id.*

144. *Id.*

145. Tanya Rose, *D.A. Asked to Look Into Slate Mailer Finances*, IRVINE WORLD NEWS, Mar. 29, 2001, at 1.

146. *Id.*

147. *Id.* at 1-2.

148. *Id.* at 2-3.

149. *Id.* at 3.

150. *Id.*

151. *Id.* at 4.

152. *Id.*

153. CAL. GOV’T CODE §§ 84108, 84305.5 (amended by Chapter 478).

## 2. Disclosure Requirements Analysis: Are There Other Solutions?

Disclosure requirements for information placed on slate mailers have changed little from current statutory law, and the changes the legislature made largely favor the organizations themselves, not the voters.<sup>154</sup>

Because Chapter 478 omits the contested disclosure requirements whose enforcement was enjoined in *Scully* and *Levine*, it is expected that it will pass constitutional challenges.<sup>155</sup> But where, as here, a new law reverts the statutory scheme to where it was eight years ago, it should be subject to a higher level of scrutiny. In particular, three questions remain outstanding. First, does Chapter 478 maintain a balance between voter protection and free speech?<sup>156</sup> Second, does Chapter 478 achieve the least restrictive standard from *Levine*?<sup>157</sup> And third, will Chapter 478 be replaced to include additional solutions to political reform?<sup>158</sup>

## V. CONCLUSION

By amending the language of the government code to reflect current voting practices, the legislature both updated the code and gave it flexibility should voters once again decide to change the date of primary elections.<sup>159</sup> It is not hard to imagine, however, that the next round of legislative code update will almost

---

154. See *id.* § 84305.5(1) (indicating that placement of the slate mailer organization's name and address are only required on one insert, not on all inserts); see also *id.* § 84305.5(4) (indicating placement of the Notice to Voters may be on the top or bottom of a piece of slate mail, and it needs only appear on the front); *supra* text accompanying note 121 (indicating paid appearances on the mailer are to be designated by asterisks, not dollar signs, as the latter were found unconstitutional); Pitney *supra* note 125 (no change was made to the requirement that the political party of any candidate must be listed, immediately following his or her name, if that candidate is not affiliated with the party the mailer seems to represent).

155. See ASSEMBLY COMMITTEE ON ELECTIONS, REDISTRICTING, AND CONSTITUTIONAL AMENDMENTS, COMMITTEE ANALYSIS OF SB 604, at 6 (July 8, 2003) (stating: "This bill reflects these court decisions by deleting the enjoined provisions of Propositions 208 and 34 relating to slate mail disclosure").

156. As a practical example, Chapter 478 means that a conservative slate mailer organization could not place Senator Dianne Feinstein's name on an otherwise Republican-looking mailer without stating directly that she is a Democrat. A voter who doesn't notice pictures of elephants or other Republican indicia on the mailer, but instead only associates Senator Feinstein's name with a particular ballot measure, would be alerted that she is a Democrat, but would still have to make the connection that the ballot measure may not be one traditionally associated with the Democratic party's platform. Instead of using an asterisk each time a candidate or ballot measure is endorsed or recommended in conflict with the official party's platform, voters are now required to put more thought into slate mailers, even nothing indicates that they will.

157. *Levine*, 222 F. Supp. 2d at 1190.

158. See John Wood, *Living Wage Supporters Call for Investigation*, SANTA MONICA DAILY PRESS, June 28, 2003, at 2 (delineating four suggestions from the Santa Monica commission as follows. Implement a "three strikes" law to "penalize repeatedly deceptive campaigners by disqualifying them from paid election work for ten years." Require slate mailers to list their contributors on the actual mailer. Publish all contributions to slate mailers within twenty-four hours of receipt. And, print information about the laws governing slate mailers in the ballot book.).

159. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 2 (Aug. 24, 2004).

certainly provide for online transmission means for more than just amendments to a committee's statement of organization.<sup>160</sup>

The changes to independent expenditures allow candidates and committees that have to make such disclosures to have more room to strategically disclose top individual contributors.<sup>161</sup> Additionally, Chapter 478 results in efficiency gains for candidates and committees that otherwise would have to make duplicative filings to report late independent expenditures.<sup>162</sup>

Limiting the definition of cumulative contributions to only a twelve month window allows for more flexibility and fairness in giving.<sup>163</sup> Furthermore, Chapter 478 results in efficiency gains for candidates and committees that would otherwise have to make duplicative filings to declare late contributions.<sup>164</sup>

Finally, Chapter 478 returns the slate mailer disclosure provisions to where they were before Proposition 208, Proposition 34, and *Levine*.<sup>165</sup>

---

160. SENATE COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, COMMITTEE ANALYSIS OF SB 604, at 2 (Apr. 2, 2003).

161. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 3 (Aug. 9, 2004).

162. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 4 (Aug. 24, 2004).

163. SENATE THIRD READING, FLOOR ANALYSIS OF SB 604, at 3 (Aug. 9, 2004).

164. *Id.* at 2.

165. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 604, at 2 (Aug. 24, 2004).