

Date of Hearing: April 15, 2021

ASSEMBLY COMMITTEE ON ELECTIONS
Marc Berman, Chair
AB 40 (Lorena Gonzalez) – As Amended April 6, 2021

SUBJECT: Political Reform Act of 1974: slate mailers.

SUMMARY: Requires a slate mailer that appears to be affiliated with or represent an organization, group, or class of individuals, to disclose the number of members who the slate mailer organization or committee sending the slate mailer represents. Requires a slate mailer to include the total amount paid by each candidate or ballot measure that has paid to appear in the slate mailer. Specifically, **this bill**:

- 1) Requires a specified “notice to voters” that is required to appear at least once on a slate mailer to include the following disclosure:

“(Name of slate mailer organization or committee primarily formed to support or oppose one or more ballot measures) is an organization representing (number of members the slate mailer organization or committee represents, as specified) members.”

- 2) Provides that if a slate mailer organization reasonably appears to be affiliated with or represent an organization, group, or class of individuals, that the number of “members” included in the disclosure specified above shall be the number of individuals within the organization, group, or class who, individually or through membership in a group, meet the following criteria:
 - a) A person who, pursuant to a specific provision of an organization’s articles or bylaws, may vote directly or indirectly for the election of a director or officer or for the disposition of all or substantially all of the assets of the organization in a merger or dissolution.
 - b) A person designated as a member in the articles or bylaws of an organization that is tax exempt under Section 501(c) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)) and who has the right to vote to change the organization’s articles or bylaws or has paid dues to the organization.
 - c) Members of a local union are considered to be members of any national or international union of which the local union is a part and of any federation with which the local, national, or international union is affiliated.

Requires the slate mailer, if the number of individuals required to be disclosed as “members” is zero, to include a statement that the slate mailer organization does not represent any individuals within the organization, group, or class in lieu of the disclosure specified above.

Provides that these provisions do not apply to a slate mailer that identifies itself as representing a public safety organization and thus that is subject to conflicting disclosure requirements under existing law.

- 3) Provides, for the purposes of this bill, that “organization, group, or class,” includes, but is not limited to, a particular occupation, profession, or union; a group that designates a former occupation, such as “veteran” or “retiree”; residents of any particular geographic area; racial, ethnic, or religious groups; groups that represent people with disabilities; groups affiliated with members of a certain sex, gender, gender identity, or sexual orientation; or a nonprofit or for-profit organization or business.
- 4) Requires, for each candidate or ballot measure that has paid to appear in a slate mailer, that the slate mailer include the total amount paid immediately below the name or ballot measure, in no less than 9-point roman type and in a color or print that contrasts with the background so as to be easily legible.
- 5) Repeals a provision of law that provides that the asterisk (*) that must appear next to the name of any candidate or ballot measure that has paid to appear in the slate mailer is not required to be larger than 10-point boldface type, and instead requires the asterisk to be the same type size as the name of the candidate or ballot measure in all circumstances.
- 6) Contains various findings and declarations, including the following:
 - a) Slate mail can be an important and efficient tool for direct voter engagement, but also has the potential to obfuscate or misrepresent affiliations and sources of positions.
 - b) In *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, the United States Supreme Court recognized how disclosure requirements serve an important governmental interest in transparency, “which enables the electorate to make informed decisions and give proper weight to different speakers and messages.”
 - c) In *Human Life of Washington Inc. v. Brumsickle* (2010) 624 F.3d 990, the United States Court of Appeals for the Ninth Circuit held that disclosure requirements “advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.”
 - d) In *Landslide Communications Inc. v. State of California* (2013) No. 2:13-cv-00716-GEB-KJN, the United States District Court for the Eastern District of California held that disclosure requirements relating to slate mail serve these important governmental interests. In particular, the court in *Landslide* reasoned that, by requiring a slate mailer to disclose the number of members in a certain organization it purports to represent, slate mail disclosure requirements aid the public in understanding what type of entity is speaking and who stands to benefit.
 - e) Disclosure requirements do not compel a slate mailer organization to speak ill of itself, the *Landslide* court found, but instead impose an obligation on slate mailers that identify themselves as representing certain organizations to disclose a neutral fact, a membership number, the interpretation of which is up to the electorate.
 - f) Moreover, because the required disclosures do not occupy a large portion of a slate mailer, the court in *Landslide* determined that any burden to a slate mailer organization’s

First Amendment rights would be modest.

- g) Accordingly, any burdens caused by these disclosure requirements are limited to certain types of election speech, a context in which the governmental interests served by disclosure requirements are particularly heightened.

EXISTING LAW:

- 1) Defines a "slate mailer" as a mass mailing that supports or opposes a total of four or more candidates or ballot measures.
- 2) Defines a "slate mailer organization" as a person who is involved in the production of one or more slate mailers, exercises control over the selection of the candidates and measures to be supported or opposed in the slate mailers, and receives or is promised payments totaling \$500 or more in a calendar year for the production of one or more slate mailers. Provides that none of the following are slate mailer organizations:
 - a) A candidate or officeholder or the controlled committee of a candidate or officeholder;
 - b) An official committee of any political party;
 - c) A legislative caucus committee; or,
 - d) A committee primarily formed to support or oppose a candidate, officeholder, or ballot measure.
- 3) Prohibits a slate mailer organization or a committee primarily formed to support or oppose one or more ballot measures from sending a slate mailer unless it contains all of the following:
 - a) The name, street address, and city of the slate mailer organization or committee on the outside of each piece of slate mail and on at least one of the inserts included with each piece of slate mail in no less than 8-point type;
 - b) A notice, in no less than 8-point type, that consists of the following statement:

NOTICE TO VOTERS

THIS DOCUMENT WAS PREPARED BY (name of slate mailer organization or committee primarily formed to support or oppose one or more ballot measures), NOT AN OFFICIAL POLITICAL 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 *.

- c) An asterisk (*) to designate each candidate and each ballot measure that has paid to appear in the slate mailer in the same type size, style, color, and legibility as is used for

the name of the candidate or the ballot measure name or number and position advocated., except that the asterisk is not required to be larger than 10-point boldface type.

- d) The political party preference of a candidate appearing in the slate mailer, in no less than 9-point type, if the candidate is not running for non-partisan office and is a member of a political party differing from the political party with which the mailer appears by representation or indicia to represent.
- 4) Requires a slate mailer organization that sends a slate mailer or other mass mailing that identifies itself or its source material as representing a nongovernmental organization with a name that includes the term "peace officer," "reserve officer," "deputy," "deputy sheriff," "sheriff," "police," "highway patrol," "California Highway Patrol," "law enforcement," "firefighter," "fire marshal," "paramedic," "emergency medical technician," "public safety," or any other term that would reasonably be understood to imply that the organization is composed of, or affiliated with, law enforcement, firefighting, emergency medical, or other public safety personnel, to disclose the total number of law enforcement, firefighting, emergency medical, or other public safety members in the organization identified in the slate mailer or mass mailing, as specified.
- 5) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author, "Voters must assess various sources of political information from all around them, including television, newspapers, social media, and mass mailings. These sources can help better inform voters, but can also contribute to the spread of misinformation and mislead voters about the decisions before them on the ballot. Slate mailers are consistently used to try to deceive voters in our state — more so in this past election than ever before. AB 40 would require additional information be disclosed on each slate mailer regarding the membership of the slate mail organization and contributions received, to provide additional transparency and help voters make informed decisions at the ballot box."
- 2) **Slate Mailer Disclaimer Requirements and Potential Constitutional Issues:** As is the case with campaign communications generally, the PRA requires any slate mailer that is sent by a slate mailer organization or a committee primarily formed to support or oppose one or more ballot measures to include specific disclaimers as part of the mailer. By requiring slate mailer publishers to include information in slate mailers that the publishers would prefer not to include, this bill may be subject to a legal challenge on the grounds that it violates the right to free speech that is guaranteed by the First Amendment to the United States Constitution and by Section 2 of Article I of the California Constitution. In fact, various slate mailer publishers have brought lawsuits challenging almost every change to California's slate mailer disclaimer requirements enacted in the last 25 years, arguing that those laws infringe upon their First Amendment right to freedom of speech.

In November 1996, California voters approved Proposition 208, which made various

significant changes to the PRA. Many of those changes were subsequently repealed or amended through the passage of Proposition 34, which was placed on the November 2000 ballot by SB 1223 (Burton), Chapter 102, Statutes of 2000. Among the provisions of Proposition 208 that were not affected by Proposition 34, however, were provisions that required certain information and specified disclaimers to be included on slate mailers. Among those provisions was a requirement that slate mailers identify any candidate or ballot measure that had paid to be included in the slate mailer with three dollar signs (\$\$\$), instead of with an asterisk (*), a requirement that certain information and disclaimers be included on every page of a slate mailer instead of appearing at least once on the slate mailer, and a requirement that slate mailers identify contributors who gave more than \$50,000 to ballot measures.

In *California Prolife Council PAC v. Scully* (2001), No. Civ. S-96-1965, the United States District Court for the Eastern District of California found that those provisions were unconstitutional, and the Court permanently enjoined them from enforcement. In its decision, the Court concluded that slate mailers are a form of “core political speech,” and that the slate mail-related provisions of Proposition 208 could be upheld only if they were “narrowly tailored to serve an overriding state interest.” In enjoining them from enforcement, the Court found the Proposition 208 slate mailer requirements to be “intrusive and extensive” compelled speech that could not be justified by the state’s interests in informing voters, avoiding deception, and addressing the potential for corruption.

Similarly, in *Levine v. Fair Political Practices Commission* (2002), 222 F. Supp. 2d 1182, the same District Court issued a preliminary injunction against two state laws governing the content of slate mailers. Those laws required any slate mailer that appeared to represent a political party to include a disclaimer whenever a candidate or position on a ballot measure endorsed in the slate mailer was different from the official endorsement of that political party. In issuing the preliminary injunction, the Court concluded that “forc[ing] slate mailer publishers to give space to [an] opposing view” was not the least restrictive means for the state to attempt to protect voters from confusion and fraud. Subsequent to the issuance of the preliminary injunction, the parties in *Levine* reached a settlement, and the slate mailer disclaimer requirements were modified through the passage of SB 604 (Perata), Chapter 478, Statutes of 2004.

More recently, the Legislature passed and Governor Brown signed SB 488 (Correa), Chapter 865, Statutes of 2012, which requires a slate mailer that represents the position of a public safety organization to include information about the total number of members in the organization identified in the slate mailer, among other provisions. SB 488 was intended to address concerns about slate mailers that purported to represent the position of public safety organizations even though the entity sending the slate mailers had no connection to or affiliation with public safety organizations. Supporters of SB 488 argued that these slate mailers, by giving voters a misleading impression that they represented the position of public safety personnel, could undermine trust in public safety organizations.

Shortly after the passage of SB 488, Landslide Communications, Inc., a slate mailer organization, filed a lawsuit in the United States District Court for the Eastern District of California challenging the provisions of SB 488. Among other arguments, the plaintiffs alleged that SB 488 unconstitutionally infringed upon their right to freedom of speech under the First Amendment; specifically, the plaintiffs argued that having to disclose the total

number of members in the organization identified in the slate mailer created a distorted message and would have a stigmatizing effect on the public safety oriented organizations that distribute slate mail. After hearing arguments on the parties' cross-motions for summary judgment, the district court rejected the plaintiffs' challenge to SB 488 and granted the defendants' motion for summary judgment. *Landslide Communications, Inc. v. State of California*, 2013 U.S. Dist. LEXIS 180811, (E.D. Cal. Dec. 27, 2013).

In its decision, the Court rejected the plaintiff's argument that SB 488 should be subject to the level of scrutiny that was used by the court in *California Prolife Council PAC and Levine*—namely, that the law had to use the least restrictive means to further a compelling state interest. Instead, the court noted that the United States Supreme Court explained in *Citizens United v. Federal Elections Commission* (2010) 558 U.S. 310 that disclaimer and disclosure requirements are subject to an exacting scrutiny test, and described that test as requiring the law to be substantially related to a sufficiently important governmental interest. Using that test, the *Landslide Communications* court found that the provisions of SB 488 served the important governmental interest of better informing the electorate and concluded that the law did not impose a serious burden on the plaintiff's First Amendment rights because the required disclaimer would not occupy an overly large portion of the slate mailer and required disclosure only of a neutral fact.

Some of the provisions of this bill are similar to the provisions of SB 488 that were upheld by the court in *Landslide Communications, Inc.*—namely, this bill's requirement that slate mailers include a disclosure of the number of members that the entity sending the slate mailer represents are similar to the membership disclosure requirements in SB 488. It is less clear how a court would view this bill's requirement that a slate mailer include a disclaimer identifying the total amount paid by each candidate or ballot measure that paid to appear in the slate mailer. Because this requirement would require the inclusion of information in the slate mailer next to *each* candidate or measure that paid to appear in the mailer, this requirement could take up a larger portion of the slate mailer than the disclaimer that was upheld in *Landslide Communications, Inc.* Furthermore, although the amount of money that a candidate or ballot measure paid to be included in a slate mailer is factual information, it's less clear whether a court would consider that information to be *neutral* information when included on a slate mailer. The *California Prolife Council PAC* court, in striking down the requirement that slate mailers identify any candidate or ballot measure that paid to be included in the slate mailer with three dollar signs (\$\$\$), found that the required use of dollar signs to designate candidates and measures was likely to “trigger strongly negative reactions” by consumers of the slate mailer, and described the “\$\$\$” symbol as “pejorative.” If the required inclusion of the dollar amount that a candidate or measure paid to be included in a slate mailer similarly would trigger negative reactions among voters, that provision of this bill may be more vulnerable to a court challenge.

- 3) **Arguments in Support:** In support of this bill, a coalition of labor organizations including Unite Here International Union, AFL-CIO, writes:

As many nonpartisan election observers and various media outlets have noted... slate mailers are often not what they seem. In many cases, organizations that send out slate mailers exist solely for the purpose of sending slate mailers and may receive monetary contributions to list a support or opposed position to a candidate or ballot measure. In some cases, candidates listed or portrayed on a slate mailer

may not support the other positions taken on the mailer. In other cases, the position of individuals that a voter might assume the slate mailer represents may not align with the position taken by the slate mailer...

We believe strongly in protecting election integrity by improved transparency. To address these issues, AB 40 will require slate mailers to disclose the number of members in the organization, the amount paid for a candidate or position to appear on the mailer, and make the font larger for a candidate or ballot measure that has paid to appear on the slate mailer. As it currently stands, the current requirements for slate mail are deceptive and confusing to voters. There needs to be true transparency around who is sending slate mail, and why certain candidates or ballot measures are included on a specific mailer.

- 4) **Arguments in Opposition:** Several individuals, including successful candidates for elective office, former political party officials, and a slate mailer publisher have written in opposition to this bill. In their letters, these individuals generally argue that slate mailers are the most cost-effective means for candidates to communicate to voters, especially for candidates for local office who are less likely to have the resources to be able to send their own campaign mailers, and for candidates that run in larger jurisdictions, including judicial candidates who run countywide. These individuals further contend that this bill unfairly singles out slate mailers for requirements that don't apply to other forms of political advertising. Finally, the opponents generally argue that this bill likely would be found to be unconstitutional in light of the *California Prolife Council PAC* and *Levine* cases. In his letter of opposition, Larry Levine, who is a slate mailer publisher and the named plaintiff in the *Levine* case, writes:

Lawsuits in federal court in Sacramento led to findings by U.S. Judge Lawrence Karlton that the slate mail provisions of Propositions 208 and 34 were unconstitutional. Judge Karlton's findings in reaching those decisions would apply as strongly to AB 40, which seeks to impose the same kind of regulations as were included in those earlier measures. Among Judge Karlton's findings in those earlier cases that would apply to AB 40 are:

- The first amendment right of free speech of slate publishers was being violated;
- As with all political speech, slate mail is entitled to the highest form of protection;
- By singling out slate mail among all forms of political advertising authors of the measures exhibited animus;
- Slate mail is no more corrupted or corruptible than any other form of political advertising;...
- The measures would deprive publishers of space available to advertise additional candidates and ballot measures by compelling publishers to print information that serves no constitutionally protected or politically necessary purpose;
- Many voters have a negative view of the association between money and politics and the requirements of the measures would taint and disadvantage those candidates who desire to avail themselves of the cost-efficient campaign tool provided by slate mail....

It is clear from a reading of those earlier measures, a review of Judge Karlton's decision and a reading of AB 40 that the requirements AB 40 seeks to impose regarding disclosure of financing are excessive and would be found unconstitutional in all the same ways as the two earlier measures.

- 5) **Previous Legislation:** SB 488 (Correa), Chapter 865, Statutes of 2012, required a slate mailer that represents the position of a public safety organization to include information about the total number of members in the organization identified in the slate mailer, among other provisions.

SB 226 (Hertzberg), Chapter 855, Statutes of 2017, increased the minimum size and specified the format and location of the disclosure required by SB 488 in a manner that generally required that disclosure to be more prominent.

- 6) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Teamsters Public Affairs Council
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Professional and Technical Engineers, IFPTE Local 21, AFL-CIO
Unite Here International Union, AFL-CIO
Utility Workers Union of America

Opposition

7 individuals

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