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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY LEVINE; TOM KAPTAIN;
SCOTT HART; and CALIFORNIA
REPUBLICAN ASSEMBLY,

NO. CIV. S-02-199 LKK/DAD

Plaintiffs,

v.

O R D E R

FAIR POLITICAL PRACTICES
COMMISSION,

TO BE PUBLISHED

Defendant.

_____ /

Plaintiffs seek a preliminary injunction barring enforcement of both Cal. Gov't Code section 84305.6 and subsection (a) (6) of Cal. Gov't Code section 84305.5, as it stood before it was amended by Proposition 208. They assert that the requirements of these provisions violate their right to free speech protected by the First Amendment to the Constitution of the United States. I resolve their motion on the pleadings and evidence filed herein and after oral argument.

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I.

BACKGROUND

Over a number of years, California, both through its legislative and initiative processes, has imposed various disclosure requirements on so-called slate mailers.¹ Prior to the passage of Proposition 208 in 1996, slate mail organizations were required to print the following disclosure in at least 8-point roman boldface type on each slate mailer:

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 *.

See Cal. Gov't Code § 84305.5(a)(2) (prior to amendment by Proposition 208). In addition, Cal. Gov't Code § 84305.5(a)(6), as it stood before Proposition 208, prohibited sending a slate mailer unless:

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)

¹ Generically a slate mailer receives a fee for preparing and mass-mailing to prospective voters brief documents, often 8 ½ x 11" in size, supporting lists of candidates or propositions. See infra n.2 for the statutory definition, and n.3 for the statutory definition of a slate mailer organization.

1 PARTY.

2 See id.

3 Proposition 208 amended Cal. Gov't Code § 84305.5. The
4 above provisions were replaced by other slate mail disclosure
5 provisions. The new provisions were ultimately found to be
6 unconstitutional and their enforcement enjoined by this court.
7 See California Prolife Council v. Scully, 96-1965, March 1, 2001
8 Order.

9 While Proposition 208 was being litigated, Proposition 34
10 was passed.² Cal. Gov't Code § 84305.6, enacted by Proposition
11 34, reads, in pertinent part:

12 In addition to the requirements of Section 84305.5, a
13 slate mailer organization . . . may not send a slate
14 mailer unless any recommendation in the slate mailer
15 to support or oppose a ballot measure or support a
16 candidate that is different from the official
17 recommendation to support or oppose by the political
18 party that the mailer appears by representation or
19 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."

20 See id.

21 The plaintiffs in this case have all published slate
22 mailers as defined in Cal. Gov't Code § 82048.3.³ As to all but

23
24 ² Because the passage of Proposition 34 rendered the decision
25 on Proposition 208 of limited value, the court elected not to
publish it.

26 ³ This section provides that a "[s]late mailer' means a mass
mailing which supports or opposes a total of four or more

1 the California Republican Assembly, it is uncontested that
2 plaintiffs are slate mail organizations as defined by Cal. Gov't
3 Code § 82048.5.⁴ Each of the plaintiffs publish slate mail that
4 targets either Democratic or Republican voters, and their
5 mailers include captions that contain the words "Democrat,"
6 "Democratic," or "Republican," along with other symbols or
7 references typically associated with such parties.⁵ In their
8 slate mail, plaintiffs have included, and represent that they
9 will continue to include, the disclaimer set forth in Cal. Gov't
10 _____
11 candidates or ballot measures."

12 ⁴ This section defines a slate mail organization as:

13 [A]ny person who, directly or indirectly, does all of
14 the following:

15 (1) Is involved in the production of one or more slate
16 mailers and exercises control over the selection of the
17 candidates and measures to be supported or opposed in
the slate mailers.

18 (2) Receives or is promised payments totaling five
19 hundred dollars (\$500) or more in a calendar year for
20 the production of one or more slate mailers.

21 ⁵ Plaintiff Larry Levine, who publishes slate mailers through
22 his organization known as "Voter Information Guide," printed a
23 slate mailer in 1996 with the caption, "Voter Information Guide for
24 Democrats." More recently, for the 2000 primary election, Levine's
25 slate mailer was titled only "Voter Information Guide," and for
26 each candidate, listed the different endorsing organizations,
including the Democratic Party. Plaintiff Scott Hart publishes
slate mailers through an organization he controls known as
"Continuing the Republican Revolution." His slate mailer carries
this title, alongside pictures of former President Ronald Reagan
or President George W. Bush. Plaintiff Tom Kaptain's slate mail
organization, entitled, "Democratic Voters' Choice," published a
slate mailer for the 2000 primary election that included on the
front of the mailer the words "Vote Democratic" around a donkey
logo, along with the statement that, "The Democratic Party was
Established in 1823." The inside of the mailers, which contained
the slate listing, had the headline "Our Democratic Team" or "The
Team for Democratic Voters."

1 Code § 84305.5(a)(2) (prior to amendment by Proposition 208).⁶
2 They take issue, however, with the requirements of Proposition
3 34, as codified in Cal. Gov't Code § 84305.6, contending that it
4 violates their First Amendment rights. Similarly, to the extent
5 that defendant intends to enforce Cal. Gov't Code
6 § 84305.5(a)(6) as it stood before Proposition 208, plaintiffs
7 contend that this provision also violates their First Amendment
8 rights. Plaintiffs ask this court to preliminarily enjoin
9 defendant from enforcing sections 84305.6 and 84305.5(a)(6)
10 against them.

11 **II.**

12 **STANDARDS FOR ISSUING A PRELIMINARY INJUNCTION**

13 The purpose of the preliminary injunction as provided by
14 Fed. R. Civ. P. 65 is to preserve the relative positions of the
15 parties -- the status quo -- until a full trial on the merits
16 can be conducted. See University of Texas v. Camenisch, 451
17 U.S. 390, 395 (1981). The limited record usually available on
18 such motions renders a final decision on the merits
19 inappropriate. See Brown v. Chote, 411 U.S. 452, 456 (1973).

20 ////

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22 ⁶ Whether, due to the fact that this court found Proposition
23 208 unconstitutional, this provision is now again in effect is a
24 matter at issue in this litigation. If this provision is not again
25 in effect the fact that plaintiffs represent that they will
26 continue to conduct their affairs in accordance with its
requirements clearly would not bind them to do so. Accordingly,
although the court considers that representation relative to this
motion for a preliminary injunction, it is not clear that the
representation would bear any significant weight in considering a
permanent ban.

1 "The [Supreme] Court has repeatedly held that the basis for
2 injunctive relief in the federal courts has always been
3 irreparable injury and the inadequacy of legal remedies."
4 Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In the
5 Ninth Circuit, two interrelated tests exist for determining the
6 propriety of the issuance of a preliminary injunction. The
7 moving party carries the burden of proof on each element of
8 either test. See Los Angeles Memorial Coliseum Comm'n v.
9 National Football League, 634 F.2d 1197, 1203 (9th Cir. 1980).
10 Under the first "traditional" test, the court may not issue a
11 preliminary injunction unless each of the following requirements
12 is satisfied: (1) the moving party has demonstrated a
13 likelihood of success on the merits, (2) the moving party will
14 suffer irreparable injury and has no adequate remedy at law if
15 injunctive relief is not granted, (3) in balancing the equities,
16 the non-moving party will not be harmed more than the moving
17 party is helped by the injunction, and (4) granting the
18 injunction is in the public interest. See Martin v.
19 International Olympic Committee, 740 F.2d 670, 674-75 (9th Cir.
20 1984).

21 Under the second "alternative" test, the court may not
22 issue a preliminary injunction unless the moving party
23 demonstrates either "probable success on the merits and
24 irreparable injury . . . or . . . sufficiently serious questions
25 going to the merits to make the case a fair ground for
26 litigation and a balance of hardships tipping decidedly in favor

1 of the party requesting relief." Topanga Press Inc. v. City of
2 Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993) (citations
3 omitted). The Ninth Circuit has explained that the two parts of
4 the alternative test are not separate and unrelated, but are
5 "extremes of a single continuum." Benda v. Grand Lodge of
6 International Association of Machinists, 584 F.2d 308, 315 (9th
7 Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). We are taught
8 that the critical element within this alternative test is the
9 relative hardship to the parties. See id. "[T]he required
10 degree of irreparable harm increases as the probability of
11 success decreases." United States v. Nutri-cology Inc., 983
12 F.2d 394, 397 (9th Cir. 1992) (citations and internal quotation
13 marks omitted). Even if the balance tips sharply in favor of
14 the moving party, however, "it must be shown as an irreducible
15 minimum that there is a fair chance of success on the merits."
16 International Olympic Committee, 740 F.2d at 674-75. (citation
17 omitted).

18 III.

19 ANALYSIS

20 A. JURISDICTION

21 The plaintiffs in this case sue the Fair Political
22 Practices Commission ("FPPC"), an arm of the State of
23 California. It is established Eleventh Amendment jurisprudence,
24 however, that this court lacks "federal jurisdiction over suits
25 against consenting States." Seminole Tribe of Florida v.
26 Florida, 517 U.S. 44, 54 (1996). Thus, before this action can

1 proceed I must be satisfied that the State has consented.

2 To note that defendant has not objected to this court's
3 jurisdiction on the basis of the Eleventh Amendment, while
4 pertinent, is not the end of the matter. The test for
5 determining whether a state has consented to this court's
6 jurisdiction "is a stringent one." Mitchell v. Franchise Tax
7 Bd. (In re Mitchell), 208 F.3d 1111, 1117 (9th Cir. 2000). A
8 state waives its immunity when it "voluntarily invokes [federal]
9 jurisdiction or . . . makes a 'clear declaration' that it
10 intends to submit itself to [federal] jurisdiction." Shulman v.
11 California (In re Lazar), 237 F.3d 967, 976 (9th Cir. 2001).
12 Such "clear declaration," however, need not be express. Rather,
13 "a state 'waive[s] its Eleventh Amendment immunity by conduct
14 that is incompatible with an intent to preserve that immunity.'" Indus. Comm'n of Ariz. v. Bliemeister (In re Bliemeister), 296
15 F.3d 858, 861 (9th Cir. 2002) (quoting Hill v. Blind Indus. &
16 Servs., 179 F.3d 754, 758 (9th Cir. 1999)).

18 Here, while the defendant did not explicitly address the
19 question of sovereign immunity, it twice stated that it did not
20 dispute this court's jurisdiction. First, in its answer to
21 plaintiffs' complaint, defendant stated in pertinent part:

22 The FPPC admits the allegations of Paragraph 1,
23 that this Court has jurisdiction pursuant to 28
24 U.S. C §§ 1331, 1343(a) (3), and 1343(a) (4), and
25 that this is a civil action brought under 42 U.S.C.
§ 1983, arising under the First and Fourteenth
Amendments to the Constitution of the United
States.

26 Answer of Defendant Fair Political Practices Commission, filed

1 February 13, 2002, at 2 ¶ 1. Later, in a status report to this
2 court, the defendant stated, "Defendant does not dispute
3 jurisdiction but may move the Court to abstain or stay these
4 proceedings" Defendant's Status Report filed April 19,
5 2002 at 2:18-19. These representations, alongside the fact that
6 the defendant has actively participated in this litigation, see,
7 e.g. Bliemeister, 296 F.3d at 861, are "incompatible with an
8 intent to preserve immunity." Id. Accordingly, I find that
9 defendant has consented to the jurisdiction of this court.

10 **B. JUSTICIABILITY**

11 "Whether the question is viewed as one of standing or
12 ripeness," before considering the plaintiffs' motion, this court
13 must be assured that the plaintiffs face an actual injury. See
14 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138
15 (9th Cir. 2000). To establish the requisite ripeness and
16 standing for purposes of a preliminary injunction, plaintiffs
17 must demonstrate that they will likely succeed in establishing
18 "a realistic danger of sustaining a direct injury as a result of
19 the statute's operation or enforcement." Id. See Lujan v.
20 Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("each element
21 [of standing] must be supported in the same way as any other
22 matter on which the plaintiff bears the burden of proof, i.e.,
23 with the manner and degree of evidence required at the
24 successive stages of the litigation").

25 Of course each plaintiff must demonstrate that it has
26 standing to sue. In this regard, I note that it is uncontested

1 that the California Republican Assembly is not a slate mail
2 organization within the meaning of Cal. Gov't Code § 82048.5.
3 It follows that it is not subject to either of the provisions
4 that plaintiffs seek to enjoin. Accordingly, it lacks standing
5 for purposes of this motion.

6 As to all the other plaintiffs, it is equally uncontested
7 that they are slate mail organizations within the meaning of the
8 provisions at issue. It further appears that, due to the party
9 references in plaintiffs' mailers, plaintiffs are likely to
10 have these provisions enforced against them.

11 First, it is clear that, under defendant's interpretation,
12 the party references in plaintiffs' mailers cause them to
13 "appear[] by representation or indicia to represent" a given
14 political party. Cal. Gov't Code § 84305.5(a)(6) (prior to
15 amendment by Proposition 208); Cal. Gov't Code § 84305.6.
16 Although defendant has not issued regulations⁷ specifying the
17 enforcement parameters for these provisions, a FPPC advice
18 letter to non-party witness Fred Huebscher demonstrates that the
19 defendant's position is that the mere use of the word
20 "Democratic" in connection with a political candidate or
21 proposition makes a mailer "appear[] by representation or

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23 ⁷ The absence of regulations caused the court to inquire
24 whether it should defer its decision pursuant to Arizonans for
25 Official English v. Arizona, 520 U.S. 43 (1997). The parties agree
26 that, in the absence of a mechanism under which this court
could certify the issue to the California Supreme Court, such
deference is inappropriate. See California Prolife Council
Political Action Committee v. Scully, 989 F. Supp. 1282, 1288
(E.D. Cal. 1998).

1 indicia to represent" the Democratic Party.⁸ Moreover, while
2 defendant has pointed out that this advice letter is not
3 binding, defendant would be hard-pressed to argue that it does
4 not understand the provisions at issue to reach plaintiffs'
5 mailers. Many of the slate mailers submitted as exhibits in
6 support of defendant's opposition to plaintiffs' motion were
7 published by the plaintiffs.⁹ See Bowler Decl. and Exhibits;
8 see also Defendant's Opposition to Plaintiffs' Motion for
9 Preliminary Injunction at 3 (likening the plaintiffs' use of
10 "the name 'Democrat' or 'Republican' or other indicia such as
11 the donkey or the elephant" to fraudulent conduct enjoined by a
12 district court in Tomei v. Finley, 512 F. Supp. 695 (N.D. Ill.,
13 1981)).

14 Second, defendant has already taken steps that could lead

15
16 ⁸ Fred Huebscher is a publisher of slate mail. He consulted
17 the FPPC in the year 1998 regarding his proposed mailer, in which
18 "the only place 'Democratic' will be printed on the mailer . . .
19 is in the disclaimer mandated by section 84305.5 because the name
20 of the slate mailer organization is California Democratic
21 Alliance." Woodlock Decl. Exh. A, FPPC Advice Letter to Fred
22 Huebscher, May 1, 1998. Under § 84305.5, the disclaimer would have
23 read in pertinent part:

24 THIS DOCUMENT WAS PREPARED BY California Democratic Alliance,
25 NOT AN OFFICIAL PARTY ORGANIZATION.

26 The FPPC informed Huebscher that this proposed slate mailer
triggered the disclaimer provisions of Section (a)(6) because it
would contain "indicia" of a political party due to the name,
"California Democratic Alliance" in the disclaimer.

⁹ The defendants assert that the legitimate governmental
purpose supporting the contested statutes is to eradicate
fraudulent endorsements leading to confusion among the voters as
to the position of the official parties. The slate mailers
submitted were, inter alia, in support of, and asserted examples
of, the need for such regulation.

1 to an enforcement action against one of the plaintiffs. After
2 the March 2000 primary election, plaintiff Kaptain was contacted
3 by the FPPC and informed that the FPPC wanted further
4 information from him regarding his slate mailer in connection
5 with an inquiry into whether he had violated Cal. Gov't Code
6 § 84305.5(a)(6).¹⁰ The investigation by the FPPC concerned the
7 lack of an (a)(6) disclaimer in Kaptain's slate mailer, which
8 contained references to the Democratic Party, after he endorsed
9 a candidate who was different than the candidate endorsed by the
10 Democratic party. While it appears that no probable cause or
11 violation proceedings have been noticed against Kaptain or the
12 other plaintiffs, "Abbot Laboratories does not require Damocles'
13 sword to fall before we recognize the 'realistic danger of
14 sustaining a direct injury' that is the heart of the
15 constitutional component of ripeness." City of Auburn v. Qwest
16 Corp., 260 F.3d 1160, 1172 (9th Cir. 2001). Rather, where
17 plaintiffs face a dilemma in which they must choose between
18 complying with burdensome restrictions or risk a credible threat
19 of enforcement, the constitutional component of ripeness is
20 satisfied. See id. Indeed, in the First Amendment context,
21 where the burdensome restrictions carry with them the danger of
22

23 ¹⁰ Although, as discussed at note 10, infra, the continuing
24 viability of subsection (a)(6) is in question, for purposes of
25 justiciability it is sufficient that the FPPC continues to view it
26 as enforceable. Further, although the FPPC action arose in the
context of subsection (a)(6) only, it is equally significant when
considering the threat of enforcement of § 84305.6, as that
provision is identical in every pertinent way to (a)(6).

1 self-censorship, it is especially appropriate to find that the
2 matter is ripe. See Virginia v. American Booksellers Ass'n,
3 Inc., 484 U.S. 383, 393 (1988) (“[T]he alleged danger of this
4 statute is, in large measure, one of self-censorship; a harm
5 that can be realized even without an actual prosecution.”).

6 Finally, I note that the prudential ripeness considerations
7 set forth in Abbot Laboratories v. Gardner, 387 U.S. 136 (1967)
8 are also satisfied here. As is evident from the discussion
9 below, a judicial decision may be made on an essentially legal
10 basis. See id. at 149. Likewise, as required for a preliminary
11 injunction to issue, I explain below that the balance of the
12 hardships falls upon the plaintiffs. See id. at 153.

13 **C. LIKELIHOOD OF SUCCESS ON THE MERITS**

14 As an initial matter, I note that whether Cal. Gov’t Code §
15 84305.5(a)(6) is currently in force is at issue in this
16 litigation.¹¹ While this court must ultimately determine the

17
18 ¹¹ It may be that subsection (a)(6) was revived by virtue of
19 the fact that the amendment to § 84305.5 was found unconstitutional
20 by this court. Generally speaking, it appears that under state law,
21 statutory provisions are not affected by a subsequent
22 unconstitutional law. See Lewis v. Dunne, 134 Cal. 291, 299
23 (1901) (declaring an act unconstitutional, the California Supreme
24 Court further explained that it was “void for all purposes, and is
25 inoperative to change or in any way affect the law of the state as
26 it stood immediately before the approval of said act”); see also
Sapiro v. Frisbie, 93 Cal. App. 299, 312 (1928) (Ordinance stands
in original form, where purported amendment thereof is
unconstitutional). On the other hand, Cal. Gov’t Code § 84305.6,
which is nearly identical to, but more comprehensive than §
84305.5(a)(6), may have repealed subsection (a)(6) by implication.
See Smith v. Matthews, 155 Cal. 752, 758 (1909) (while an existing
statute is not ordinarily abrogated by the enactment of a new one,
it may be where the latter fully covers the whole subject matter
of the prior).

1 applicability of subsection (a) (6), the question need not be
2 resolved for purposes of this motion. Rather, even if I were to
3 find that subsection(a) (6) remains in force, plaintiffs would
4 nonetheless be likely to succeed because § 84305.5(a) (6) suffers
5 from the same constitutional defect that is present in §
6 84305.6, which I now address.

7 Section 84305.6 requires slate mail organizations, whose
8 mailers "appear by representation or indicia to represent" a
9 political party, to disclose such party's opposing view each
10 time the recommendation on the mailer differs from that of the
11 party. For example, if a Democrat-oriented slate mailer,
12 falling within the purview of § 84305.6, favors Proposition X
13 while the Democratic Party's Central Committee does not, the
14 mailer must disclose that "this is not the official position of
15 the Democratic Party," essentially advertising the party's
16 negative position on Proposition X. Put directly, the statute
17 does not merely require a disclaimer, rather it requires the
18 mailer to articulate the position of the official party. As I
19 now explain, however, such a requirement cannot pass
20 constitutional muster.

21 It is well-established that a statute compelling speech,
22 like a statute forbidding speech, falls within the purview of
23 the First Amendment. See Wooley v. Maynard, 430 U.S. 705, 714
24 (1977) ("The right to speak and the right to refrain from
25 speaking are complementary components of the broader concept of
26 'individual freedom of mind'"). The question here is whether

1 the slate mail, by virtue of its status as paid political
2 advertisements, or because of their potential to confuse or
3 mislead the electorate, may nonetheless be constitutionally
4 subject to § 84305.6's requirement of compelled speech.
5 Defendant argues that because the slate mail publishers are
6 paid, and because the object is to prevent confusion, § 84305.6
7 warrants only limited scrutiny or, in the alternative,
8 withstands strict scrutiny. I consider these contentions in
9 turn.

10 First, assuming arguendo, that slate mailers are commercial
11 speech,¹² or that § 84305.6 applies only to fraudulent mailers,
12 it does not follow that a standard other than strict scrutiny
13 applies. Rather, regardless of what type of speech or conduct¹³
14 triggers the requirements of § 84305.6, there is no question
15 that, once triggered, § 84305.6 compels specific speech with a
16 political message contrary to that propounded by the slate
17 mailer. Thus, § 84305.6 is a content-based regulation
18 "operat[ing] as a command in the same sense as the statute or
19 regulation forbidding [a person] to publish specified matter."

20
21 ¹² But see N.Y. Times v. Sullivan, 376 U.S. 254, 265
22 (1964) ("That the Times was paid for publishing the advertisement
is as immaterial [as to whether the First Amendment applies] as is
the fact that newspapers and books are sold.").

23 ¹³ It is established that fraudulent speech is treated as
24 conduct and thus its regulation is ordinarily not subject to First
25 Amendment review at all. See, e.g., McIntyre v. Ohio Elections
26 Comm'n, 514 U.S. 334, 357 (1995) (distinguishing the permissible
punishment of fraud from "indiscriminately outlawing a category of
speech"); see also Gervetz v. Robert Welch, Inc., 418 U.S. 323, 340
(1974) ("there is no constitutional value in false statements").

1 Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256
2 (1974) (holding unconstitutional a statute that required a
3 newspaper to publish a rebuttal after it assailed the character
4 of a political candidate). “Mandating speech that a speaker
5 would not otherwise make necessarily alters the content of the
6 speech. We therefore consider the [disclosure requirement] as a
7 content-based regulation of speech.” Riley v. Nat’l Federation
8 of the Blind, 487 U.S. 781, 795 (1988). Put directly, it is not
9 the trigger but the consequence, the compelled speech, which
10 requires that § 84305.6 be subject to strict scrutiny.

11 Defendant argues that California has a compelling interest
12 in protecting voters from confusion and fraud. See, e.g.,
13 Burson v. Freeman, 504 U.S. 191 (1992) (upholding prohibition on
14 electioneering within 100 feet of the entrance to a polling
15 place). As the plaintiffs point out, however, § 84305.6 is
16 likely overbroad for this purpose. While fraud is a proper
17 concern, it is far from clear what is meant by the phrase
18 “appear by representation or indicia to represent” a political
19 party. Assuming, however, that a narrowing construction could
20 be imposed on this language, such a construction, as noted
21 above, would only limit the type of speech or conduct that
22 triggered the requirements of § 84305.6. The question remains
23 whether the disclosure requirement of § 84305.6 is the “least
24 restrictive means to further the articulated interest.”¹⁴ Sable

25
26 ¹⁴ Because a narrowing construction would not be dispositive
in this case, Pullman abstention is not warranted. See Cedar Shake

1 Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

2 Clearly, it is not.

3 Present California law provides a less restrictive means
4 for preventing a fraud on the electorate. See California
5 Elections Code §§ 20006, 20007 (prohibiting false claims that a
6 candidate has been endorsed by a party central committee, and
7 permitting any member of the party central committee or any
8 registered voter to bring an action in Superior Court to enjoin
9 any such misrepresentation). Moreover, even if it were
10 established that a compelled disclosure statement were indeed
11 the least restrictive means to further the State's interest in
12 protecting voters from confusion and fraud, the disclosure
13 compelled by § 84305.6 goes beyond neutralizing the fraudulent
14 or misleading aspect of the slate mailer. Cf. former Cal. Gov't
15 Code § 84305.5(a)(2) (before amendment by Proposition
16 208) (requiring a disclosure that the mailer is not an official
17 party publication and does not necessarily represent the views
18 of a party).¹⁵ Rather, § 84305.6 essentially forces slate mail

19 _____
20 and Shingle Bureau v. City of Los Angeles, 992 F.2d 620, 622 (9th
21 Cir. 1993) (citing Railroad Commission of Texas v. Pullman Co., 312
22 U.S. 496 (1941) (abstention warranted only where "a definitive
ruling on the state issues by a state court could obviate the need
for constitutional adjudication by the federal court").

23 ¹⁵ Defendants argue that a disclosure such as that required
24 by former Cal. Gov't Code § 84305.5(a)(2) cannot adequately protect
25 voters from truly egregious mailers. That which is freely
26 asserted, however, can be freely denied. Notably, defendant had
no actual examples of such egregious mailers, and had to doctor one
of the plaintiffs' mailers to show the court why the provisions at
issue could be necessary. This hypothetical mailer states in large
letters "Official Democratic Party Guide" on the front of the

1 publishers to give space to the opposing view. Cf. Miami Herald
2 Publ. Co., supra. Because § 84305.6 does not appear to be the
3 least restrictive means available to protect voters from
4 confusion and fraud, it is highly likely that the plaintiffs in
5 this case will prevail on the merits.

6 **D. IRREPARABLE HARM AND BALANCING THE EQUITIES**

7 Plaintiffs have shown a high likelihood that the provisions
8 at issue will violate rights guaranteed them by the First
9 Amendment. "The loss of First Amendment freedoms, for even
10 minimal periods of time, unquestionably constitutes irreparable
11 injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). It is
12 further clear that, at this juncture, plaintiffs' injury is
13 imminent. See Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044
14 (9th Cir. 1999) ("the ripeness requirement serves the same
15 function in limiting declaratory relief as the imminent-harm
16 requirement serves in limiting injunctive relief"). With the
17 November 2002 elections on the immediate horizon, absent an
18 injunction, plaintiffs will have to choose between self-
19 censorship or the real possibility of an enforcement action by
20 the FPPC. This harm outweighs any that would be suffered by

21 _____
22 mailer, with a § 84305.5(a)(2) disclosure on the back stating that
23 the mailer is not an official party publication. While it may be
24 that the neutral disclosure of former § 84305.5(a)(2) would be
25 insufficient to allay the confusion caused by the hypothetical
26 mailer's blatantly untrue statement, it is not clear that the
§ 84305.6 disclosure would do so either. Moreover, as noted above,
California Elections Code §§ 20006 and 20007 provide one example
of a less restrictive means of addressing this kind of fraud on the
electorate.

1 defendant or the public by the issuance of a preliminary
2 injunction. Although defendant's interest and the public
3 interest in preventing fraud and voter confusion is legitimate,
4 these concerns are mitigated by the disclosure provision that
5 plaintiffs presently place on slate mailers, in combination with
6 the enforcement options provided by California Elections Code
7 §§ 20006, 20007. Furthermore, it is "in the public interest to
8 terminate the unconstitutional application" of a statute.
9 Zeller v. The Florida Bar, 909 F. Supp. 1518 (N.D. Fla. 1995).

10 **E. BOND**

11 No preliminary injunction shall issue "except upon the
12 giving of security by the applicant, in such sum as the court
13 deems proper, for the payment of such costs and damages as may
14 be incurred or suffered by any party who is found to have been
15 wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).
16 Under the Rule, it is "well settled that Rule 65(c) gives the
17 court wide discretion in the matter of setting security."
18 Natural Resources Defense Counsel v. Morton, 337 F. Supp. 167,
19 168 (D.D.C. 1971) (motion for summary reversal dismissed), 458
20 F.2d 827 (D.C. Cir. 1972). See also Urbain v. Knapp Bros. Mfg.
21 Co., 217 F.2d 810, 815-16 (6th Cir. 1954); Doyme v. Saettele,
22 112 F.2d 155, 162 (8th Cir. 1940). In considering the
23 appropriate amount of the bond, I note on the one hand that the
24 only likely expenses which the bond stands for are the costs of
25 suit, on the other hand, I note that plaintiffs are business
26 people with some means at their disposal. Accordingly, bond is

1 set in the amount of one thousand dollars (\$1,000).

2

IV.

3

CONCLUSION

4

Based on the foregoing considerations, the court hereby
5 makes the following orders:

6

1. Except as to the California Republican Assembly,
7 plaintiffs' motion for a preliminary injunction is GRANTED.

8

2. Defendant is preliminarily ENJOINED from enforcing
9 former Cal. Gov't Code section 84305.5(a)(6) and Cal. Gov't Code
10 section 84305.6. against said plaintiffs.

10

11

3. Plaintiffs shall POST BOND in the amount of one
12 thousand dollars (\$1,000) within ten (10) days.

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IT IS SO ORDERED.

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DATED: September 20, 2002.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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