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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LANDSLIDE COMMUNICATIONS,
INC. and JAMES V. LACY, in
his capacity as President of
LANDSLIDE COMMUNICATIONS,
INC.,

Plaintiffs,

v.

STATE OF CALIFORNIA; KAMALA
HARRIS, in her capacity as
Attorney General of
California; CALIFORNIA FAIR
POLITICAL PRACTICES
COMMISSION; ANN RAVEL, in her
capacity as Chair of the Fair
Political Practices
Commission,

Defendants.

No. 2:13-cv-00716-GEB-KJN

**ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT**

Pending are cross-motions for summary judgment on all claims in Plaintiffs' First Amended Complaint ("FAC"). Plaintiffs challenge a recently-enacted California statute prescribed in California Government Code section 84305.7(c), which governs certain election mail. Plaintiffs' FAC comprises the following claims: declaratory relief that the statute does not apply to Plaintiffs' California Public Safety Newsletter and Voter Guide publication (hereinafter referred to as "mailing" or by full title), and that if it applies, it is unconstitutional as

1 applied; and injunctive relief under 42 U.S.C. § 1983 preventing
2 violations of Plaintiffs' rights under the First Amendment Free
3 Speech and Association Clauses, the Fourteenth Amendment Due
4 Process Clause, and the Fourteenth Amendment Equal Protection
5 Clause.

6 Oral argument was heard on November 11, 2013. For the
7 reasons stated below, Defendants' motion is GRANTED, and
8 Plaintiffs' motion is DENIED.

9 I. LEGAL STANDARD

10 A party seeking summary judgment bears the initial
11 burden of demonstrating the absence of a genuine issue of
12 material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317,
13 323 (1986). "A fact is 'material' when, under the governing
14 substantive law, it could affect the outcome of the case."
15 Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 322 F.3d
16 1039, 1046 (9th Cir. 2003) (quoting Anderson v. Liberty Lobby,
17 Inc., 477 U.S. 242, 248 (1986)). An issue of material fact is
18 "genuine" when "'the evidence is such that a reasonable jury
19 could return a verdict for the nonmoving party.'" Id. (quoting
20 Anderson, 477 U.S. at 248). To meet this burden, the movant must
21 "inform[] the district court of the basis for its motion, and
22 identify[] those portions of the pleadings, depositions, answers
23 to interrogatories, and admissions on file, together with the
24 affidavits, if any, which it believes demonstrate the absence of
25 a genuine issue of material fact." Celotex Corp., 477 U.S. at 323
26 (internal quotation marks omitted).

27 If the movant satisfies its "initial burden," "the
28 nonmoving party must set forth, by affidavit or as otherwise

1 provided in Rule 56, 'specific facts showing that there is a
2 genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pac. Elec.
3 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting
4 former Fed. R. Civ. P. 56(e)); see also Fed. R. Civ. P. 56(c)(1).
5 The nonmoving party "cannot 'rest upon the mere allegations or
6 denials of the adverse party's pleading' but must instead produce
7 evidence that 'set[s] forth specific facts showing that there is
8 a genuine issue for trial.'" Tucker ex rel. Tucker v. Interscope
9 Records, Inc., 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting
10 Anderson, 477 U.S. at 248).

11 Further, Local Rule 260(b) prescribes:

12 Any party opposing a motion for summary
13 judgment or summary adjudication [must]
14 reproduce the itemized facts in the [moving
15 party's] Statement of Undisputed Facts and
16 admit those facts that are undisputed and
17 deny those that are disputed, including with
each denial a citation to the particular
portions of any pleading, affidavit,
deposition, interrogatory answer, admission,
or other document relied upon in support of
that denial.

18 If the nonmovant does not "specifically . . . [controvert duly
19 supported] facts identified in the [movant's] statement of
20 undisputed facts," the nonmovant "is deemed to have admitted the
21 validity of the facts contained in the [movant's] statement."
22 Beard v. Banks, 548 U.S. 521, 527 (2006) (finding that a party
23 opposing summary judgment who "fail[s] [to] specifically
24 challenge the facts identified in the [moving party's] statement
25 of undisputed facts . . . is deemed to have admitted the validity
26 of [those] facts"). "Because a district court has no independent
27 duty 'to scour the record in search of a genuine issue of triable
28 fact,' and may 'rely on the nonmoving party to identify with

1 reasonable particularity the evidence that precludes summary
2 judgment,' . . . the district court . . . [is] under no
3 obligation to undertake a cumbersome review of the record on the
4 [nonmoving party's] behalf." Simmons v. Navajo Cnty., Ariz., 609
5 F.3d 1011, 1017 (9th Cir. 2010) (quoting Keenan v. Allan, 91 F.3d
6 1275, 1279 (9th Cir. 1996)).

7 When deciding cross-motions for summary judgment, each
8 motion is evaluated on its own merits, "giving the nonmoving
9 party in each instance the benefit of all reasonable inferences."
10 ACLU v. City of Las Vegas, 466 F.3d 784, 790-791 (9th Cir.2006)
11 (internal citations and quotations omitted). When the defendant
12 is the moving party and is seeking summary judgment on one or
13 more of a plaintiff's claims, the defendant

14 has both the initial burden of production and
15 the ultimate burden of persuasion on [the
16 motion]. In order to carry its burden of
17 production, the [defendant] must either
18 produce evidence negating an essential
19 element of the [plaintiff's] claim . . . or
20 show that the [plaintiff] does not have
enough evidence of an essential element to
carry its ultimate burden of persuasion at
trial. In order to carry its ultimate burden
of persuasion on the motion, the [defendant]
must persuade the court that there is no
genuine issue of material fact.

21 Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102
22 (9th Cir. 2000) (citations omitted).

23 **II. UNDISPUTED FACTS**

24 The following facts are undisputed under Local Rule
25 260(b). Under California law, a "slate mailer" is a "mass mailing
26 which supports or opposes a total of four or more candidates or
27 ballot measures." Cal. Gov't Code § 82048.3. (Def.' Resp. to
28 Pl.' Statement of Undisputed Facts ¶ 6, ECF No. ECF No. 29.)

1 Plaintiffs' "[mailing] is a slate mailer." (Id. ¶ 9; see FAC ex.
2 2; ECF No. 15.) "Plaintiffs' California Public Safety Voter Guide
3 [hereinafter referred to as "the Guide" or by full name] is a
4 slate mailer organization" within the meaning of California
5 Government Code section 82048.4 because "[i]t is involved in the
6 production of one or more slate mailers, exercises control over
7 the selection of candidates and measures found in the slate
8 mailers, and receives payments totaling five hundred dollars
9 . . . or more in a calendar year to produce slate mailers."
10 (Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 8.)

11 California Government Code section 84305.7(c)
12 prescribes that "[i]f a slate mailer organization sends a slate
13 mailer . . . that identifies itself or its source material as
14 representing a nongovernmental organization" with a public
15 safety-related name, then it "shall disclose on the outside of
16 each piece of mail . . . the total number of members in the
17 organization identified in the slate mailer" (Id. ¶ 5.)

18 Plaintiffs' mailing lists its publisher with the following phrase
19 in the upper-left corner of the first page of its mailing: "[The
20 Guide] is a Special Project of the Policy Issues Institute." (FAC
21 ex. 2, p. 1.) A silhouette of a firefighter battling a blaze is
22 prominently displayed on the first page below the publication's
23 title. (Id.)

24 Plaintiffs and their slate mailer organization, The
25 Guide, have no members. (Defs.' Resp. to Pls.' Statement of
26 Undisputed Facts ¶¶ 10, 11.) "Plaintiffs do not wish to publish
27 'the total number of members' on any piece of slate mail they
28 distribute." (Id. ¶ 15.)

1 III. DISCUSSION

2 A. Application of California Government Code Section 84305.7(c)
3 to Plaintiffs

4 Plaintiffs argue in their opposition to Defendants'
5 cross-motion for summary judgment that California Government Code
6 section 84305.7(c) does not apply to the subject mailing. (Pls.'
7 Rep. to Defs.' Opp'n & Opp'n to Defs.' Cross-Mot. Summ. J.
8 ("Pls.' Rep. & Opp'n") 5:8-21, ECF No. 31.) The statute
9 prescribes:

10 If a slate mailer organization
11 sends a slate mailer or other mass mailing
12 that identifies itself or its source material
13 as representing a nongovernmental
14 organization
15 with a name that includes the term "peace
16 officer," "reserve officer," "deputy,"
17 "deputy sheriff," "sheriff," "police,"
18 "highway patrol," "California Highway
19 Patrol," "law enforcement," "firefighter,"
20 "fire marshal," "paramedic," "emergency
21 medical technician," "public safety," or any
22 other term that would reasonably be
23 understood to imply that the organization is
24 composed of, or affiliated with, law
25 enforcement, firefighting, emergency medical,
26 or other public safety personnel,

27 [then] the slate mailer or mass mailing shall
28 disclose on the outside of each piece of mail
and on at least one of the inserts included
with each piece of mail in no less than 12-
point roman type, which shall be in a color
or print that contrasts with the background
so as to be easily legible, the total number
of members in the organization identified in
the slate mailer or mass mailing.

25 Cal. Gov't Code § 84305.7(c) (paragraph breaks inserted for
26 clarity). The statute only applies to "slate mailer
27 organization[s]" that "send[] a slate mailer or other mass
28 mailing." Id. Plaintiffs admit that "California Public Safety

1 Voter Guide," which Plaintiffs' mailer describes as a "Special
2 Project of the Policy Issues Institute," is a "slate mailer
3 organization" and its publication, entitled "California Public
4 Safety Newsletter and Voter Guide," is a slate mailer. (Pls.'
5 Statement Undisputed Facts ¶ 8, 9 ECF No. 25-5; FAC Ex. 2, p. 1)
6 However, Plaintiffs contend this slate mailer "does not identify
7 itself or its source material as representing a nongovernmental
8 organization." (Pls.' Rep. & Opp'n 5:15-18.) Plaintiffs also
9 argue that the phrase "slate mailer organization" is a legal term
10 of art, and thus "an entity that send[s] . . . slate mailers" is
11 not necessarily an "organization as that term is generally
12 understood." (Id. 7:6-8.)

13 California Government Code section 82048.4 defines
14 "slate mailer organization"; however, the statute does not define
15 "nongovernmental organization" or "organization." See § 82048.4
16 (defining "slate mailer organization" as "any person who . . .
17 [i]s involved in the production of one or more slate mailers").
18 Defendants argued during the hearing on the motions that the
19 statute's definition of "slate mailer organization" in section
20 82048.4 is not the appropriate definition of the word
21 "organization" in section 84305.7(c). Plaintiffs argue that the
22 following definition of "organization" in the Random House
23 Dictionary should be used: "a group of persons organized for some
24 end or work." (Id. 6:16-18 (emphasis added).) Under Plaintiffs'
25 definition of "organization," their slate mailer identifies both
26 "itself" and "its source material as representing a
27 nongovernmental organization." Cal Gov't Code § 84305.7(c).

28 Plaintiffs' slate mailer "identifies itself . . . as

1 representing a nongovernmental organization" through the use of
2 the word "institute." Id. The publisher of Plaintiffs' slate
3 mailer is identified in the upper-left corner of the first page
4 of the slate mailer document as follows: "California Public
5 Safety Voter Guide is a Special Project of the Policy Issues
6 Institute." (First Amend. Compl. Ex. 2, p. 1.) The word
7 "institute" implies that the publisher identified is—consistent
8 with Plaintiffs' definition of "organization"—"a group of
9 persons organized for some end or work." Webster's Third New
10 International Dictionary defines the word "institute" as "(1): an
11 organization for the promotion of some estimable or learned cause
12 or the welfare of some group" and "(2): an association of persons
13 or organizations that collectively constitute a technical or
14 professional authority in a field or work or study." Webster's
15 Third New International Dictionary 1171 (1986). These definitions
16 of "institute" comport with Plaintiffs' definition of
17 "organization." Under the first definition, an institute cannot
18 promote its public policy cause without constituent individuals.
19 Further, the second definition directly mirrors Plaintiffs'
20 definition of "organization" since an "association of persons" is
21 a synonym for "a group of persons." Therefore, by describing the
22 "California Public Safety Voter Guide" as a "Special Project of
23 the Policy Issues Institute," the slate mailer identifies itself
24 as a nongovernmental organization.

25 Plaintiffs' slate mailer also identifies "its source
26 material as representing a nongovernmental organization." Cal.
27 Gov't Code § 84305.7(c). The prominent use of the noun
28 "California" in the mailer's title, "California Public Safety

1 Newsletter and Voter Guide," implies the source material is
2 connected to an organization of public safety officials employed
3 in California. Further, considering the words "California Public
4 Safety" in conjunction with the silhouette of a firefighter
5 battling a blaze directly below, it is clear that Plaintiffs have
6 represented their source material as being a "group of persons,"
7 specifically public-employee firefighters. (See First Amend.
8 Compl. Ex. 2, p. 1.) Therefore, Plaintiffs' slate mailer, through
9 its title, identifies "its source material as representing a
10 nongovernmental organization."

11 Since the slate mailer both "identifies itself" and
12 "its source material as representing a nongovernmental
13 organization," the statute applies if the nongovernmental
14 organization is identified "with a name that includes the term
15 . . . 'public safety.'" Cal. Gov't Code § 84305.7(c). The term
16 "public safety" is included both in the name of the publisher,
17 "California Public Safety Voter Guide," and the document title,
18 "California Public Safety Newsletter and Voter Guide," either of
19 which is the name of the organization the mailing purports to
20 represent. (See First Amend. Compl. Ex. 2, p. 1.) Therefore,
21 section 84305.7(c) applies to Plaintiffs' slate mailer.

22 **B. First Amendment Freedom of Speech Challenge**

23 Plaintiffs argue section 84305.7(c) unconstitutionally
24 infringes their First Amendment right to freedom of speech both
25 facially and as applied to their mailing. "Facial challenges are
26 disfavored" because, inter alia, they "run contrary to the
27 fundamental principle of judicial restraint that courts should
28 neither anticipate a question of constitutional law in advance of

1 the necessity of deciding it nor formulate a rule of
2 constitutional law broader than is required by the precise facts
3 to which it is to be applied." Wash. State Grange v. Wash. State
4 Republican Party, 552 U.S. 442, 449 (2008). "A facial challenge
5 to a legislative Act is . . . the most difficult challenge to
6 mount successfully, since the challenger must establish that no
7 set of circumstances exists under which the Act would be valid."
8 United States v. Salerno, 481 U.S. 739, 745 (1987). Plaintiffs'
9 facial challenge is based only on conclusory arguments that are
10 insufficient to support such a challenge. Nevertheless, "[i]f
11 [Plaintiffs'] as-applied challenge fails, then [Plaintiffs']
12 facial challenge necessarily fails as well because there is at
13 least one set of circumstances where application of" section
14 84305.7(c) would not violate First Amendment free speech rights.
15 Williams Jefferson & Co. v. Bd. Of Assessment & Appeals No. 3 ex
16 rel. Orange Cnty., 695 F.3d 960, 963 (9th Cir. 2012).

17 **1. Standard of Review**

18 The parties dispute the level of judicial scrutiny
19 applicable to Plaintiffs' First Amendment free speech as-applied
20 challenge. Plaintiffs argue the "strict scrutiny" standard
21 applies, contending this standard requires Defendants to bear
22 "the burden of proving that the [California disclosure
23 requirement] at issue [is] (1) narrowly tailored, to serve (2) a
24 compelling state interest." (Pls.' Mot. Summ. J. ("Pls.' Mot.")
25 7:14-17, ECF No. 25 (quoting Cal. Pro-Life Council, Inc. v.
26 Randolph, 507 F.3d 1172, 1178 (9th Cir. 2007) (internal quotation
27 marks removed)).) Further, Plaintiffs argue this standard
28 requires the statute to "use the least restrictive means to

1 further the articulated interest.” (Id. 7:17-18 (quoting ACLU of
2 Nev. v. Heller, 378 F.3d 979, 993 (9th Cir. 2004).) Defendants
3 counter that the statute is subject to the less demanding
4 “exacting scrutiny” standard, which has been illuminated in
5 recent authority. (Defs.’ Cross-Mot. Summ. J. & Opp’n Pls.’ Mot.
6 Summ. J. (“Defs.’ Cross-Mot. & Opp’n”) 7:15-8:21, ECF No. 26.)

7 Although the strict scrutiny standard is typically
8 applied to content-based speech restrictions, the Supreme Court
9 has recently explained that disclosure and disclaimer
10 requirements are subject to an “exacting scrutiny” standard.
11 Citizens United v. Fed. Elections Comm’n, 558 U.S. 310, 366-67
12 (2010). Therefore, the exacting scrutiny standard is applied to
13 Plaintiffs’ as-applied challenge to the statute’s disclosure
14 requirement, which Plaintiffs characterize as a disclaimer
15 requirement, to determine “whether the law’s requirement[] [is]
16 substantially related to a sufficiently important governmental
17 interest.” Human Life of Wa., Inc. v. Brumsickle, 624 F.3d 990,
18 1005 (9th Cir. 2010).

19 Under the exacting scrutiny standard, the proponent of
20 an electoral disclosure or disclaimer requirement must identify
21 an “important governmental interest” the statute serves. Family
22 PAC v. McKenna, 685 F.3d 800, 806 (9th Cir. 2011). If the
23 proponent identifies an important governmental interest, the
24 court then determines whether the regulation “bear[s] a
25 substantial relationship” to that governmental interest.
26 Brumsickle, 624 F.3d at 1008. “To survive exacting scrutiny, ‘the
27 strength of the governmental interest must reflect the
28 seriousness of the actual burden on First Amendment rights.’”

1 McKenna, 685 F.3d at 806 (quoting Davis v. Fed. Elections Comm'n,
2 554 U.S. 724, 744 (2008)). A court, therefore, weighs the
3 strength of the governmental interest against the actual burden
4 on First Amendment rights. See id. at 806-11. If the governmental
5 interest outweighs the burden on speech, then the regulation
6 survives the free speech challenge.

7 **2. California Government Code Section 84305.7(c)**
8 **Survives Exacting Scrutiny**

9 Defendants argue the statute's disclosure requirement
10 serves, inter alia, California's informational interest in better
11 informing the electorate of who is speaking before an election.
12 (Defs.' Cross-Mot. & Opp'n 9:8-24.) "Informing the public,"
13 McKenna, 685 F.3d at 806, more specifically, "providing the
14 voting public with the information with which to assess the
15 various messages vying for their attention in the marketplace for
16 ideas," is an important governmental interest. Brumsickle, 624
17 F.3d at 1008. By requiring a slate mailer to disclose the number
18 of members in a public safety-related organization it purports to
19 represent, the statute aids the public in understanding what type
20 of entity is speaking and who stands to benefit. "The increased
21 'transparency' engendered by disclosure laws 'enables the
22 electorate to make informed decisions and give proper weight to
23 different speakers and messages.'" Id. (quoting Citizens United,
24 558 U.S. at 371) Moreover, "[a]ccess to reliable information
25 becomes even more important as more speakers . . . enter the
26 marketplace, which is precisely what has occurred in recent
27 years." Id. at 1007. Therefore, California's "interest in an
28 informed electorate . . . is of the utmost importance." McKenna,

1 685 F.3d at 809.

2 Plaintiffs argue Defendants' asserted governmental
3 interest in an informed electorate cannot justify the burden of
4 compelled speech the statute imposes on their free speech rights
5 by requiring them to disclose that their organization has no
6 members. Plaintiffs explain:

7 [The statute] severely handicaps non-
8 membership public safety-related slate mailer
9 organizations by sending their slate mailers
10 out into the marketplace of ideas with the
11 equivalent of a sandwich-board sign saying,
12 "Feel free to ignore me." To force a non-
13 membership slate mailer organization such as
14 that of Plaintiffs to say that it has no
15 members is so stigmatizing and marginalizing
16 that it amounts to a muzzle and invitation to
17 readers and voters to disregard the mailers,
18 regardless of how worthy the messages are.

19 (Pls.' Rep. & Opp'n 3:15-21.)

20 The essence of the burden Plaintiffs identify is the
21 disclosure requirement's potential to damage their perceived
22 credibility. A "California Public Safety Newsletter and Voter
23 Guide" displaying an image of a firefighter without any reference
24 to the size of the represented organization could garner greater
25 esteem than the same mailing with a disclosure that the
26 represented organization has zero members, since a reader of
27 Plaintiffs' mailing without this disclosure may be inclined to
28 believe that the "organization" publicizing the mailer represents
29 public-employee firefighters.

30 But if the disclosure has the potential to undermine
31 the author's credibility, this potential consequence results from
32 the author's representation that its message is endorsed by
33 public-employee firefighters. Thus, the potential damage posed to

1 Plaintiffs' credibility under the circumstances at issue does not
2 constitute a serious and "actual burden" "on [Plaintiffs'] First
3 Amendment rights." McKenna, 685 F.3d at 806. Here, the statute
4 does not, as Plaintiffs argue, require them to "speak ill" of
5 themselves. (Pls.' Rep. & Opp'n 12:19.) Rather, it imposes an
6 obligation on slate mailers that identify themselves as
7 representing public safety-related organizations to disclose a
8 neutral fact—a membership number—and it is up to the electorate
9 to interpret that fact. Further, the statute's disclosure
10 "requirements do not extend indiscriminately to all issue
11 advocacy conducted at any time." Brumsickle, 624 F.3d at 1018.
12 Instead, the statute, by its definition of "slate mailer," only
13 targets election speech and only certain types of election
14 speech. See Cal. Gov't Code § 82048.3 (defining "slate mailer" as
15 a "mass mailing[,] which supports or opposes a total of four or
16 more candidates or ballot measures"). Additionally, the mandated
17 disclosure, which must be written "in no less than 12-point roman
18 type," would not occupy an overly large portion of Plaintiffs'
19 slate mailer. Cal. Gov't Code § 84305.7(c). Therefore, to the
20 extent that the statute burdens Plaintiffs' First Amendment
21 speech rights, this burden is modest.

22 "[T]he people in our democracy are entrusted with the
23 responsibility for judging and evaluating the relative merits of
24 conflicting arguments. They may consider, in making their
25 judgment, the source and credibility of the advocate."
26 Brumsickle, 624 F.3d at 1008 (quoting First Nat'l Bank of Bos. v.
27 Bellotti, 435 U.S. 765, 791-92 (1978)). The disclosure statute in
28 this case is aimed directly at California's interest in aiding

1 the voting public in understanding "the source and credibility"
2 of "advocate[s]." Id. Weighing the government's strong
3 informational interest against any modest burden on Plaintiffs'
4 speech rights, the statute survives Plaintiffs' as-applied First
5 Amendment free speech challenge.

6 **C. First Amendment Freedom of Association Challenge**

7 Plaintiffs also cursorily argue that the statute
8 unconstitutionally interferes with their First Amendment right to
9 free association. However, Plaintiffs do not explain how the
10 statute interferes with their ability to associate. Plaintiffs
11 argue that certain organizations desire the number of members
12 they have to remain private; however, revealing the size of an
13 organization does not harm its "privacy of association and belief
14 guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1,
15 64 (1976). Right of association case law focuses on disclosure of
16 the names of an organization's members or internal campaign
17 documents, and such disclosure is not at issue in this case. See
18 NAACP v. Alabama, 357 U.S. 449, 462 (1958) (holding that
19 compelled disclosure of the names and addresses of all members of
20 a group violated members' right of association); Perry v.
21 Schwarzenegger, 591 F.3d 1126, 1145 (9th Cir. 2009) (granting a
22 petition for a writ of mandamus to prevent disclosure of campaign
23 strategy documents). Therefore, the statute survives Plaintiffs'
24 First Amendment right of association challenge.

25 **D. Due Process Vagueness Challenge**

26 Plaintiffs also challenge the statute under the Due
27 Process Clause of the Fourteenth Amendment as unconstitutionally
28 vague on its face.

1 “A law is unconstitutionally vague if it fails to
2 provide a reasonable opportunity to know what conduct is
3 prohibited, or is so indefinite as to allow arbitrary and
4 discriminatory enforcement.” Brumsickle, 624 F.3d at 1019
5 (quoting Tucson Woman’s Clinic v. Eden, 379 F.3d 531, 555 (9th
6 Cir. 2004)). “Nevertheless, perfect clarity is not required even
7 when a law regulates protected speech, and we can never expect
8 mathematical certainty from our language.” Id. (internal citation
9 omitted) (internal quotation marks omitted). Moreover,
10 “uncertainty at a statute’s margins will not warrant facial
11 invalidation if it is clear what the statute proscribes ‘in the
12 vast majority of its intended applications.’” Cal. Teachers Ass’n
13 v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001)
14 (quoting Hill v. Colorado, 530 U.S. 703, 733 (2000)). “The
15 touchstone of a facial vagueness challenge in the First Amendment
16 context . . . is not whether *some* amount of legitimate speech
17 will be chilled; it is whether a *substantial* amount of legitimate
18 speech will be chilled.” Id. at 1152.

19 Plaintiffs specifically argue that the prescribed
20 phrase in the statute stating “or any other term that would
21 reasonably be understood to imply that the organization is
22 composed of, or affiliated with, law enforcement, firefighting,
23 emergency medical, or other public safety personnel,” which is
24 contextualized as follows, is unconstitutionally vague. (Pls.’
25 Mot. 13:7-11.)

26 If a slate mailer organization sends a slate
27 mailer or other mass mailing that identifies
28 itself or its source material as representing
a nongovernmental organization

1 with a name that includes the term "peace
2 officer," "reserve officer," "deputy,"
3 "deputy sheriff," "sheriff," "police,"
4 "highway patrol," "California Highway
5 Patrol," "law enforcement," "firefighter,"
6 "fire marshal," "paramedic," "emergency
7 medical technician," "public safety,"

8 or any other term that would reasonably be
9 understood to imply that the organization is
10 composed of, or affiliated with, law
11 enforcement, firefighting, emergency medical,
12 or other public safety personnel,

13 [then] the slate mailer or mass mailing shall
14 disclose on the outside of each piece of mail
15 and on at least one of the inserts included
16 with each piece of mail in no less than 12-
17 point roman type, which shall be in a color
18 or print that contrasts with the background
19 so as to be easily legible, the total number
20 of members in the organization identified in
21 the slate mailer or mass mailing.

22 Cal. Gov't Code § 84305.7(c) (emphasis added) (paragraph breaks
23 inserted for clarity). Plaintiffs argue this provision is
24 unconstitutionally vague because the terms "reasonable[ness],"
25 "affiliation," and "other public safety personnel" are not
26 defined. (Pls.' Mot. 13:11-12.) Plaintiffs argue that the
27 "statute will undoubt[ably] encourage 'arbitrary and
28 discriminatory enforcement' simply due to the lack of clarity of
the terms." (Id. 13:17-18.)

29 However, these "otherwise imprecise terms [] avoid
30 vagueness problems" here where they are "used in combination with
31 terms that provide sufficient clarity." Gammoh v. City of La
32 Habra, 395 F.3d 1114, 1120 (9th Cir. 2005). The terms that
33 precede the provision, including "peace officer," "sheriff,"
34 "police," "law enforcement," "firefighter," and "paramedic," and
35 "public safety," all give meaning to the provision's text: "any
36 other term that would reasonably be understood to imply that the

1 organization is composed of, or affiliated with, law enforcement,
2 firefighting, emergency medical, or other public safety
3 personnel." Cal. Gov't Code § 84305.7(c). The statute does not
4 list every term that triggers its application, but from reading
5 the exemplars, it is clear that in order to trigger
6 applicability, a non-listed term should connote the same meaning
7 as one of the many listed terms.

8 While the terms Plaintiffs attack as vague may be
9 susceptible to some differences in interpretation, "speculation
10 about possible vagueness in hypothetical situations not before
11 the Court will not support a facial attack on a statute when it
12 is surely valid 'in the vast majority of its intended
13 applications.'" Brumsickle, 624 F.3d at 1021 (quoting Hill v.
14 Colo., 530 U.S. 703, 733 (2000)). Plaintiffs do not provide any
15 evidence of actual confusion over this provision or even submit
16 example terms that would illustrate the provision's vagueness.
17 Because it is "clear what the [statute] as a whole prohibits,"
18 the provision survives the vagueness challenge. Grayned v. City
19 of Rockford, 408 U.S. 104, 110 (1972).

20 Plaintiffs also raise vagueness concerns about the
21 statute's requirement that covered slate mailer organizations
22 disclose "the total number of members in the organization
23 identified." Cal. Gov't Code § 84305.7(c). Plaintiffs argue it is
24 unclear if an organization with zero members must specifically
25 use the number "0" or an explanation that a group "has no
26 members" would suffice. (Pls.' Rep. & Opp'n 19:3-5.) Although "it
27 is solely within the province of state courts to authoritatively
28 construe state legislation," employing the plain meaning

1 "traditional tool[] of statutory construction" it is evident that
2 the issue of whether Plaintiffs could satisfy the requirement in
3 the statute by responding with an explanation rather than a
4 number does not present a concrete vagueness constitutional
5 challenge that should be resolved by a federal court. Cal.
6 Teachers Ass'n, 271 F.3d at 1146-47. Plaintiffs also question the
7 clarity of the term "members," arguing "[t]he term could refer to
8 those who are able to vote as a member of an organization, or
9 instead to those who have merely expressed an interest in an
10 organization." (Pls.' Rep. & Opp'n 19:12-14.) However, Plaintiffs
11 admit that their group has zero members; thus, Plaintiffs'
12 argument regarding the meaning of the term members is exactly the
13 type of "hypothetical situation[] not before the Court [that]
14 will not support a facial attack." Brumsickle, 624 F.3d at 1021.
15 Further, Plaintiffs provide no evidence that any confusion
16 surrounding the definition of "member" would chill a "substantial
17 amount of legitimate speech." Cal. Teachers Ass'n, 271 F.3d at
18 1151. Therefore, the statute survives Plaintiffs' Fourteenth
19 Amendment vagueness challenge.

20 **E. Equal Protection Challenge**

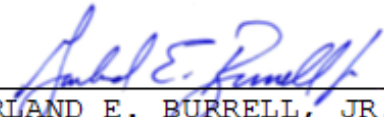
21 Finally, Plaintiffs seek summary judgment on their
22 claim that the statute violates their rights under the Equal
23 Protection Clause of the Fourteenth Amendment. (Pls.' Mot. 14:1-
24 3.) Plaintiffs, however, later abandoned their equal
25 protection claim "by not raising [it] in opposition to the
26 [State's] [cross-] motion for summary judgment" or addressing it
27 at oral argument. Jenkins v. Cnty. of Riverside, 398 F.3d 1093,
28 1095 n.4 (9th Cir. 2005). Further, even had Plaintiffs' equal

1 protection claim not been abandoned, Plaintiffs' claim would fail
2 because Plaintiffs have not made the threshold showing that they
3 are "similarly situated to other entities not affected by the law
4 at issue." Safeway Inc. v. City & Cnty. of S.F., 797 F. Supp. 2d
5 964, 971 (9th Cir. 2011). Therefore, Plaintiffs' equal protection
6 claim is not reached, as it is deemed waived.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Plaintiffs' motion for
9 summary judgment is DENIED, and Defendants' cross-motion for
10 summary judgment is GRANTED.

11 Dated: December 27, 2013

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15 GARIAND E. BURRELL, JR.
16 Senior United States District Judge
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