UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITIZENS UNION OF THE CITY OF NEW YORK, et al.,	)	
Plaintiffs,	)	
	)	No. 16 Civ. 9592 (RMV) (KHP)
v.	)	
THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,	)	
Defendant.	)	

BRIEF OF *AMICI CURIAE* INSTITUTE FOR FREE SPEECH, ALLIANCE FOR JUSTICE, AND THE PHILANTHROPY ROUNDTABLE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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The Institute for Free Speech is a § 501(c)(3) nonprofit corporation dedicated to the defense of the political rights protected by the First Amendment. As part of this mission, the Institute often represents nonprofit clients in state and federal litigation concerning governmental regulation or suppression of speech. A sampling of the Institute's cases on these questions include *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) and *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015).

The Alliance for Justice ("AFJ") is a § 501(c)(3) organization dedicated to progressive values and the creation of an equitable, just, and free society. One program that AFJ runs in support of this mission is Bolder Advocacy, which offers training on nonprofit compliance through webinars, in-person sessions, and a technical assistance hotline. Through Bolder Advocacy's trainings and technical assistance, AFJ's attorneys work with over 500 nonprofit organizations each year.

AFJ has anonymous donors. Those donors' anonymity will be threatened if Bolder Advocacy provides advice to an organization that is subject to the reporting requirement in New York Executive Laws § 172-e. Accordingly, if Defendant prevails, Bolder Advocacy will need to reconsider whether it will continue to offer cost free compliance trainings to organizations based in New York.

Amicus curiae The Philanthropy Roundtable is a leading network of charitable donors. Its 650 members include individual philanthropists, family foundations, and other private grantmaking institutions.

Amicus seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct

charitable assets—while also seeking to reduce or eliminate government regulation that would diminish private giving or limit the diversity of charitable causes Americans support.

As an organization whose members include individual charitable donors and private grantmaking institutions, *amicus* has a substantial interest in the outcome of this case, which implicates not only donor privacy, but also donor freedom to choose which organizations and causes to support in building a robust civil society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Constitution guarantees all Americans the right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958). By contrast, "[d]isclosure chills speech," *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016), and threatens the "guaranteed…right to express any thought, free from government censorship." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). Consequently, "state scrutiny" and publication of individuals' nonprofit affiliations is presumptively unconstitutional because it harms the "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 466; *id.* at 462.

Courts must apply a rigorous form of review whenever a state seeks to pierce the veil of associational privacy. Historically, only a few public disclosure regimes have survived this exacting scrutiny. Compelled disclosure has been permitted where it directly targets the financial constituencies of candidates for office, *see Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (*per curiam*), or the financial "disclosure of…direct pressures, exerted by" lobbying operations. *United States v. Harriss*, 347 U.S. 612, 620 (1954).

New York Executive Laws § 172-e and § 172-f ("the Law") make no serious effort to stay within these constitutional bounds. Instead, those provisions indiscriminately target nonpartisan

and even entirely nonpolitical nonprofit corporations. Going far beyond any other measure in the Nation, the Law aggressively seeks to publicize the identities of charitable donors based upon factors entirely out of the regulated nonprofits' control, and in situations where the disclosed donor will very often have had little or no connection to the regulated communications.

The Law, then, constitutes an unprecedented violation of Americans' right to private association. It can only reduce the quantity and quality of both charitable works and "completely nonpartisan public discussion of issues of public importance." *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*).

ARGUMENT

I. THE LAW TARGETS NONPROFITS GENERALLY, NOT POLITICAL ACTIVITY.

New York's law is a direct challenge to the general presumption that donors to § 501(c)(3) and (c)(4) nonprofit organizations are entitled to privacy.[1] Indeed, as far as *Amici* are aware, the Law is the Nation's least tailored and most invasive effort to publicize private charitable giving. *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. __, 134 S. Ct. 1434, 1456 (2014) ("In the First Amendment context, fit matters.").

The Law relies upon two interlocking mechanisms. First, § 172-f forces the online publication of donors giving $1,000 or more[2] if the recipient § 501(c)(4) spends ten thousand

[1] At the federal level, nonprofits must provide a limited donor list to the Internal Revenue Service ("IRS") for tax purposes. But § 501(c)(3) and § 501(c)(4) donor information is kept private. 26 U.S.C. § 6104(d)(3)(A). If an unauthorized person reviews or leaks a donor list, she will run into a panoply of civil and criminal sanctions. 26 U.S.C. §§ 7431 (civil damages for unauthorized inspection or disclosure); 7213(a)(1) (criminal sanctions for disclosure by federal employees); 7213(a)(2) (criminal sanctions for disclosure by state employees); 7213A(a)(2), 7213A(b)(1) (criminal sanctions for unauthorized inspection, including by state employees); 7216 (criminal sanctions for disclosure by tax preparers).

[2] It is noteworthy that the IRS only requires the disclosure of those giving at least $5,000 or more than 2% of an organization's annual total donations, whichever is higher, in a given year. 26 U.S.C.

dollars making statements about legislative or administrative action, including "potential" legislation. There is no requirement that the relevant donors give for the purpose of the triggering activity, which is itself defined so broadly as to give little effective guidance to the nonprofits concerned.

Next, the law compels general donor disclosure from § 501(c)(3) groups—charities banned from participating in "*any* political campaign" and limited in their legal ability to lobby. 26 U.S.C. § 501(c)(3) (emphasis supplied); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) (upholding statutory ban on substantial lobbying). Even though these groups cannot, by definition, serve as political organizations, the Law demands a § 501(c)(3)'s donor list if that charity provides "staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources" to a § 501(c)(4) that later falls within the poorly-circumscribed scope of N.Y. Leg. Law §§ 1-h or 1-j. N.Y. Exec. Law § 172-e(1)(b). There is no requirement that the § 501(c)(3) have any knowledge of the § 501(c)(4)'s activity, nor that the provided assistance be used for lobbying or political activity before triggering disclosure.

All the more troubling is the Law's vague requirements for what constitutes a "covered communication." The Law defines a "covered communication" as any "published statement" about "the position of any elected official or administrative or legislative body" regarding "potential legislation" conveyed "to five hundred or more members of a general public audience." N.Y. Exec. Laws § 172-f(1)(b).

It is unclear whether any of these examples constitutes a covered communication:

§ 6104(d); IRS Form 990, Sch. B. Even then, as explained above, the information is carefully protected from public dissemination.

- A § 501(c)(4) dedicated to social justice employs a social media manager for $20,000 a year. The manager's job is to post on the nonprofit's Facebook, Twitter, Instagram, and Snapchat accounts. From time to time, she posts messages on Twitter stating that "Something needs to be done about gentrification. People need to stop being forced out of their communities!"
- A national § 501(c)(4) opposed to the President's immigration policies runs a 30 second radio ad in Manhattan condemning the proposed border wall. The ad ends by saying "New York needs to stand up to President Trump."
- A § 501(c)(4) sends out a mass mailing to 50,000 households in Buffalo highlighting the organization's commitment to placing orphans in loving homes. While promoting the nonprofit's adoption network, the mailing references the Catholic Church's belief that abortion is murder and should be prohibited.

On the face of the Law, any of these could be read as a call for "potential legislation." Or not; no one knows for sure. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

Worse, how could a § 501(c)(3) reasonably determine whether the § 501(c)(4) was a covered group? Must nonprofits track the granular details of other organizations' activities and future plans before joining with them on unrelated, common projects? *Grayned*, 408 U.S. at 109 ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (citations and quotation marks omitted, punctuation altered).

Such ambiguity is unacceptable. The Supreme Court has instructed that regulation of speech must "be guided by objective, workable standards." *Minn. Voters Alliance v. Mansky*, 585 U.S. __, No. 16-1435, slip. op. at 18 (U.S. June 14, 2018). The Law fails to provide such guidance, and the State has failed to issue any curative rules creating "explicit standards" to prevent "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108.

II. THE LAW WILL IMPOSE SUBSTANTIAL COSTS UPON CHARITIES AND DONORS, CAUSING SIGNIFICANT COLLATERAL DAMAGE TO CIVIL SOCIETY.

Under current disclosure rules, over 97 percent of federal campaign finance expenditures are made by organizations whose donors are public.[3] Similarly, federal legislation adopted in 1995 and 2007 subjected paid lobbying in Washington to robust reporting requirements. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6-8 (D.C. Cir. 2009) (describing history of federal lobbying reforms). Both of these federal systems are largely replicated in the states, including New York.

But, generally speaking, nonprofits (regardless of their specific tax status) are only swept into these disclosure regimes when they engage in overt electoral or lobbying activity. Even then, disclosure is required only of those donors giving for the purpose of supporting those endeavors. Consequently, nonprofits, including *amici*, are unlikely to inadvertently trigger these laws, and even if they do, only they pay the price for their inattention.[4] Not so here.

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[3] Luke Wachob, *Putting 'Dark Money' In Context: Total Campaign Spending by Political Committes and Nonprofits per Election Cycle*, Institute for Free Speech, May 8, 2017, http://www.ifs.org/wp-content/uploads/2017/10/2017-05-08_IFS-Issue-Brief_Wachob_Putting-Dark-Money-In-Context.pdf.

[4] Even for these better-tailored approaches, social studies have found that unsophisticated actors struggle with compliance. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Institute for Justice, Oct. 2007 ("[n]o one completed the forms correctly" in study of 255 participants asked to fill out campaign finance reports from California, Colorado, or Missouri "based on a simple scenario" of political activity).

a. The Law is both vague and overbroad, and it will seriously dampen the First Amendment rights of nonprofit and charitable corporations.

As the examples provided above demonstrate, the Law will be difficult to follow in practice, and will threaten the services of tax-exempt nonprofits and charities nationwide. Much of this harm is caused by the Law's poorly considered scope.

For example, at the federal level, communications that mention a political candidate may trigger reporting requirements, but this is only true within 30 days of a primary or 60 days of a general election, and only for large broadcast advertisements directed at that candidate's constituency. 52 U.S.C. § 30104(f). Similarly, only donors giving specifically to support that communication are publicly disclosed. 11 C.F.R. § 104.20(c)(9). By contrast, the law challenged here works year-round, touches every type of publishable content, and triggers disclosure of general donors. Additionally, it provides misleading information to the public by suggesting that donors are responsible for communications they may know nothing about.

As the examples provided above at page 5 demonstrate, no § 501(c)(4) that dares to talk about public policy could ever be certain that it will not trigger the Law. And, because the Law imposes reporting requirements based upon a recipient's *subsequent* political or lobbying activity, no § 501(c)(3) group could ever be certain that the § 501(c)(4) would not trip into being a "recipient entity" at some point during a reporting period. N.Y. Exec. Law § 172-e(2)(a). "In these conditions it blankets with uncertainty whatever may be said," *Thomas v. Collins*, 323 U.S. 516, 535 (1945), eliminating a vibrant "spirit of liberty" that presently exists in the charitable nonprofit space. *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) (citation and quotation marks omitted).

Moreover, the Law places nonprofits on the horns of a dilemma. They must either tell their donors that they can never guarantee their privacy, or they must cease any discussion of individual

legislators, administrative agencies, public policy, and the like.[5] "The dampening effect on [F]irst [A]mendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

b. The Law will similarly harm donors to charities, while misrepresenting who really supports electoral or lobbying efforts.

The Law commits another fundamental error. It assumes that somebody who gives to a § 501(c)(3) organization must be responsible for, and approve of, not just future acts of that § 501(c)(3) (already a doubtful proposition), but also the future actions of any § 501(c)(4) that group assists in turn.

Just two years ago, the D.C. Circuit explained how a disclosure regime that fails to require a genuine meeting of the minds between a donor and the activity being regulated may simply result in "junk disclosure" that actively misleads the public:

> Imagine the following not unlikely scenario. A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did

[5] The State argues that § 172-f(2)(a)(iv) of the Law, which permits § 501(c)(4) groups to maintain segregated bank accounts for covered communications, saves the statute. Def. MOL at 26-27. This contention blinks reality for at least three reasons. First, § 172-f(2)(a)(iv) does nothing for § 501(c)(3) groups and their supporters. Second, the suggestion that donors will "direct that their donations not be used to fund such accounts" assumes a level of donor sophistication belied by the comparatively low dollar threshold—$1,000 per reporting period—triggering disclosure. Def. MOL at 27. Third, nonprofits fundraise on an annual basis, with large portions of their support coming at the end of the year (that is, *after* the campaign season). *See* Jessica Levinsohn, *30% of Annual Charitable Donations Made in Dec.*, N.Y. Post, Dec. 21, 2013, https://www.nypost.com/2013/12/21/30-of-annual-charitable-donations-made-in-dec/.

In practice, then, organizations must either solicit funds earmarked for covered communications months in advance, even though they may never be used, thus cannibalizing general revenue and scaring off donors who prefer to remain anonymous, or else refrain from commenting on the issues of the day. There is no indication the Legislature—or the Attorney General—has given any thought to this dynamic, which itself chills speech.

> *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?

Van Hollen v. Fed. Election Comm'n, 811 F.3d 486, 497 (D.C. Cir. 2016) (emphasis in original).

The Law takes this scenario one step further. Here, the American Cancer Society, a § 501(c)(3) group, would not even have to advertise. It could simply provide some unrelated assistance—say, research on young adults diagnosed with cancer—to a § 501(c)(4) that works on similar issues and, as a small part of its overall activity, lobbies for both cancer funding and Medicaid expansion. In fact, the recipient's lobbying efforts could have nothing to do with the American Cancer Society's mission. They might, for instance, be critical of Republican members of Congress interested in reducing the deficit by cutting government spending *entirely unrelated* to grants for cancer research. Nevertheless, the hypothetical Republican donor to the ACS would still be publicly identified as a supporter of the § 501(c)(4)'s criticism of those Republican officeholders—even though he never gave that group a cent.

Can a donor ever truly feel secure under such a regime? Absent foreswearing discussions of public policy or any connection with allies that do so, could a responsible nonprofit assure a donor of his or her privacy?

But even if a donor wished to act at her peril, any resulting disclosure would be contrary to the constitutionally accepted rationale for infringing upon her privacy: "provid[ing] the electorate" with credible information "in order to aid the voters in evaluating those who seek [or hold]…office," *Buckley*, 424 U.S. at 66-67, or revealing "who is being hired, who is putting up the money, and how much" to support paid lobbying efforts. *Harriss*, 347 U.S. at 625. By suggesting donors have affiliations or influence that they do not, the Law will provide only useless background noise.

c. There are ways of regulating potentially harmful conduct without imposing these burdens on nonprofits and their donors.

These harms can be avoided. If the Law were limited only to revealing donations that were provided for genuine electoral or lobbying activity, it would provide more certainty and security for *amici* and their donors, while also providing useful (and, more importantly, true) information to the public and to legislators.

Not only would this approach avoid infringing upon the First Amendment, it would properly reflect *why* Congress chose to enact §§ 501(c)(3) and (c)(4) of the Internal Revenue Code in the first place. Far from being a public danger, these groups are tax-exempt, and donations to § 501(c)(3) groups are tax-deductible, precisely because their work, and the raising of resources to support it, is a public good.

III. ANONYMOUS CHARITABLE GIVING IS A VENERABLE AMERICAN PRACTICE.

Despite the Law's assumption to the contrary, anonymous gifts are "one of the most ancient and esteemed philanthropic practices." 1 Philanthropy in America: A Comprehensive Historical Encyclopedia 23 (Dwight F. Burlingame ed., 2004). The two most recent years for which data is available support the idea that anonymous charitable giving is an established norm. In 2016, out of roughly 960 publicly announced gifts of $1 million or more from individual donors, 86 were anonymous, and 104 out of about 860 similarly-sized gifts from individual philanthropists in 2015 were anonymous.[6] Indeed, "Duke University philanthropy expert Joel Fleishman estimates that around 10 percent of all individual gifts are currently made without attribution. That's tens of

[6] Indiana Univ. Center on Philanthropy, Million Dollar List: By Donor, https://milliondollarlist.org/data/donors/index.html.

billions of dollars every year." Karl Zinsmeister, *Privacy as a Philanthropic Pillar*, Philanthropy Magazine, Apr. 2017.[7]

As just one example, starting last December, a donor known only as "Pine" showered $56 million in bitcoin donations on over 60 organizations, including "at least 28 organizations created in the past decade." Drew Lindsay, *'It Just Felt Like a Miracle': Small Groups Win Big in Bitcoin Donor's $56 Million Giving Spree*, The Chronicle of Philanthropy, Feb. 22, 2018.[8] "Pine," who spoke to reporters about his/her gift only on condition of anonymity, would have doubtless been chilled by the State's law. *Id.*; *Van Hollen*, 811 F.3d at 488 ("Disclosure chills speech.").

Nor is the private giving of money to charity a game for millionaires and billionaires. Even a cursory look at crowdfunding sites, such as GoFundMe, reveals that many contributors choose to withhold their name from publication when donating.[9] The Law makes no effort to discriminate between wealthy individuals and the merely prosperous: it will require publicizing a donor giving approximately a hundred dollars a week to a covered § 501(c)(3).

And while the Law's plain text assumes that all private giving is suspect, the opposite is more often the case. Some donors keep their information private for religious reasons, taking to heart the teachings of the 12th century Jewish theologian Maimonides, or Christ's admonition against boastful giving in the Sermon on the Mount, or the Quranic statement that "[i]f you disclose your charitable contributions, they are good; but if you conceal them and give them to the poor, it

[7] https://www.philanthropyroundtable.org/philanthropy-magazine/article/spring-2017-privacy-as-a-philanthropic-pillar.
[8] https://www.philanthropy.com/article/Anonymous-Bitcoin-Donor-Rains/242606.
[9] *See, e.g.*, https://www.gofundme.com/lung-stem-cell-treatment-for-ipf. On this project, which raised over $150,000, the last donation was $100, made anonymously. And while that specific site is not itself organized under § 501(c)(3), nonprofits regularly avail themselves of crowdfunding. Tina Jepson, *How To Use Crowdfunding For Nonprofits*, CauseVox, Feb. 6, 2016, https://www.causevox.com/blog/use-crowdfunding-nonprofits/.

is better for you, and He will remove from you some your misdeeds" thereby. Surat Al-Baqarah 2:271. Others give anonymously simply to avoid having their information "trade[d] or share[d]" with other charitable organizations "in order to avoid being buried by the hundreds of mail appeals that can start with one single donation." Charity Navigator, *More Donors Giving Anonymously*, May 11, 2009.[10] Still others choose to give charitable donations in the name of another, either to honor that person as a gift, or occasionally to make a cathartic political statement. Lisa Ryan, *Planned Parenthood Has Already Received 82,000 Donations From 'Mike Pence,'"* The Cut, Dec. 8, 2016 ("Pence will get thank-you notes for each of the donations…26 percent of the donations Planned Parenthood has received since the election have come from 'Mike Pence'").[11]

In fact, charities are *expected* to preserve their donors' privacy as a basic matter of professional competence. Doing so is often a criterion used by charity watchdogs, including the Better Business Bureau, to determine whether a charity is trustworthy and reputable. *How We Accredit Charities*, BBB Wise Giving Alliance.[12] There is no evidence that this basic fact was so much as considered by the Legislature, perhaps reflecting the complete lack of deliberation surrounding the Law's passage.

In the end, private gifts inevitably help charities pursue their efforts to—as they see it—make the world a better place. As a result, anonymous giving has long been a respected and vital fixture within the charitable community. New York is wrong to stand in its way.

[10] http://blog.charitynavigator.org/2009/05/more-donors-giving-anonymously.html
[11] https://www.thecut.com/2016/12/how-many-planned-parenthood-donations-came-from-mike-pence.html.
[12] https://www.give.org/for-charities/How-We-Accredit-Charities/.

CONCLUSION

New York Executive Laws §§ 172-e and 172-f impose substantial, and unjustified, burdens on charities and other nonprofit groups. These burdens reflect the Legislature's lack of care in drafting those provisions, and do little to advance the Law's purported goals. Plaintiffs' suit represents the concerns of many members of the nonprofit community, and should prevail.

Respectfully submitted,

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