NYCLU
NEW YORK CIVIL LIBERTIES UNION

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Sent by email

August 15, 2016

Governor Andrew Cuomo
The Executive Chamber
State Capitol
Albany, New York 12224

Re: A.10742/S.8160, legislation relating to the regulation of campaign finance and related matters

Dear Governor Cuomo:

The legislature has delivered to your desk a bill (A.10742/S.8160) that would establish a complex and broadly framed regulatory scheme governing not-for-profit organizations that engage in advocacy on matters of public concern. The intent of the legislation, which was introduced by lawmakers at the request of your office, is to establish greater accountability and oversight regarding campaign funds and expenditures related to electoral campaigns.[1]

However, the legislation includes several provisions that would regulate activity that is unrelated to electoral campaigns – including lobbying, as well as communication outside the definition of lobbying that addresses matters of public concern. These types of activity are afforded broad constitutional protections against government regulation. Nevertheless, if enacted in law, the proposed legislation would direct government officials to regulate, and circumscribe, New Yorkers' rights of speech and association. The bill is not only constitutionally unsound; it would promote public policies that are inimical to the mission of not-for-profit organizations that operate in the public interest.

For these reasons the NYCLU calls on you to reject the bill in its current form, and to engage representatives of the not-for-profit sector in addressing the objectives of this legislation in a manner that does not compromise the mission of individuals and organizations that serve the public interest.

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[1] A.10742/S.8160, Section 1 ("This act enacts into law major components of legislation relating to campaign funds").

This letter addresses objections regarding three provisions in the bill, which are described below.[2]

- **Reporting of personal information regarding donors to non-profit organizations**[3]

New York's Lobbying Act requires non-profit organizations organized under Section 501(c) (4) of the Internal Revenue Code to publicly disclose donations greater than $5,000, as well as personal information about individual donors, when the organization has spent more than $50,000 on lobbying activity in a calendar year (provided this amount constitutes at least 3 percent of the organization's total expenditures).[4] Donations and related donor information must be reported even when the donated money is not used to support lobbying activity.[5]

The proposed legislation lowers to $15,000 the spending threshold at which organizations are required to report donor information; the bill would require disclosure of all donations in amounts greater than $2,500, as well as personal information regarding individual donors.

- **Reporting "in-kind donations" made by a non-profit organization to another non-profit organization**[6]

The Lobbying Act provides that organizations registered under Section 501(c) (3) of the Internal Revenue Code are exempt from the requirement to disclose donor information.[7] However, the proposed legislation requires 501(c)(3) organizations to file with the Office of the Attorney General a report of donated funds or "in kind donations" – staff time, office space, office supplies, financial support, and "anything of value" – of $2,500 or more provided to a not-for-profit group organized as a 501(c)(4) that engages in lobbying.

Such disclosure reports must include any donations received by a 501(c) (3) organization in an amount greater than $2,500 in any six-month period, as well as donors' personal information. Disclosure of in-kind donations by 501(c) (3) organizations is required even when such donations are not designated or utilized for lobbying activities by a 501 (c) (4) organization. The Office of the Attorney General is directed to provide disclosures

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[2] The NYCLU has not, as of the date of this letter, taken a position on provisions of the bill other than those addressed in this letter.

[3] A.10742/S.8160, Part D.

[4] N.Y. Legislative Law § 1-h(c) (4).

[5] Source of Funding Regulations, 13 N.Y.C.R.R. 938.2 ("Amount of Contribution(s)").

[6] A.10742/S.8160, Parts D and F.

[7] N.Y. Legislative Law § 1-h(c) (4).

regarding in-kind donations to the Joint Commission on Public Ethics (JCOPE) for posting on the Commissions' web site.

The bill also includes a reciprocal reporting requirement regarding in-kind donations received by 501(c) (4) organizations that engage in lobbying. These groups must report to the Joint Commission on Public Ethics in-kind donations greater than $2,500 received from a 501(c) (3) organization, as well as the identity of the organization that made the donation.

- **Mandated disclosure of communications made by non-profit groups**[8]

The legislation would require 501(c) (4) organizations to file with the attorney general detailed information regarding a broad range of communications – including audio and video communication made via broadcast, cable or satellite, written communication, and other published statement[s] "relating to the outcome of any vote or substance of any legislation, potential legislation, pending legislation, rule, regulation, hearing, or decision by any legislative, executive or administrative body."

Any 501(c)(4) organization that makes expenditures of $10,000 for such communications in a calendar year must file a disclosure report that includes the name and address of any individual, corporation, or group that has made a donation of $1,000 or more to the 501(c)(4) that has engaged in such communications, as defined in the bill.[9] The report must also include a description of each communication and the amount paid to produce it.

These provisions, as described above, prescribe a sweeping regulatory scheme that directly implicates the right to petition government in support of or in opposition to legislation and related matters of public policy. This right is among the freedoms protected by the First Amendment.[10] In a representative democracy "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[11]

However, the compelled government disclosure of personal information about individuals who make financial contributions to lobbying organizations "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[12] Any attempt to compel the disclosure of information about people engaged in protected First Amendment activities must be

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[8] A.10742/S.8160, Part G.

[9] *Id.*

[10] *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).

[11] *Id.* at 137.

[12] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

narrowly tailored in furtherance of a specific government interest, and must minimize any impact on protected speech and associational rights.[13]

The proposed legislation fails this test. The bill also incorporates standards in existing law that are constitutionally suspect. The analysis that follows addresses a number of concerns regarding A.10742/S.8160 and the state's regulation of constitutionally protected activity related to lobbying and issue advocacy.

The proposed legislation incorporates, and expands upon, a definition of lobbying in existing law that is constitutionally overbroad

As currently written, the Lobbying Act and the Source of Funding regulations attempt to regulate any and all attempts to "influence the passage or defeat of any legislation," even if such efforts do not involve direct communication with lawmakers or a choreographed grassroots campaign. This extends well beyond established constitutional limits.

In light of the well-established First Amendment rights to express opinions on government action and to petition the government (both of which may involve lobbying activities), the Supreme Court has noted the necessity of construing disclosure requirements for lobbying activities "narrowly to avoid constitutional doubts."[14] The Court, in *U.S. v. Harriss*, accordingly concluded that the government can only regulate "lobbying in its commonly accepted sense – [ ] direct communication with members of [government] on pending or proposed [ ] legislation."[15]

The New York Lobby Act is quite similar to the statute that the Supreme Court in *Harriss* found to be unconstitutional.[16] By its terms, New York's law does not confine itself to "direct communications" with legislators, as is required by the Supreme Court in order to avoid constitutional invalidity. Rather, it seeks to reach any attempt "to influence the passage or defeat" of any legislation.[17]

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[13] *Id.*

[14] *U.S. v. Harriss*, 347 U.S. 612, 613 (1954).

[15] *Harriss*, 347 U.S. at 620.

[16] The Supreme Court in *U.S. v. Harriss*, 347 U.S. at 614, concluded that the federal lobby statute was unconstitutionally overbroad. That statute sought to require disclosures from lobbyists, defined as "any person...[who] receives money or any other thing of value to be used principally to aid (a) [t]he passage or defeat of any legislation by the Congress of the United States."

[17] In order to save the constitutional validity of the statute, the State Lobbying Commission has previously stated in an advisory opinion that it will not apply the New York statute "in any context outside the definition of lobbying contained in the *Harriss* case." *Commission of Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying*, 534 F. Supp. 489, 497 (N.D.N.Y. 1982). The State Lobbying Act's constitutional validity thus rests upon the grounds that it seeks to regulate *only* direct communications with lawmakers, and only so long as there is "no indication that this New York legislation requires disclosure of indirect lobbying activities." *Id.*

The proposed legislation would significantly broaden reporting requirements regarding donors that support the activities of not-for-profit organizations. To the extent the bill relies on the underlying definitions of lobbying in state law, the law and its implementing rules are constitutionally overbroad. The law should therefore be amended to include a definition of "lobbying" that comports with the constitutionally permissible scope of government regulation, reaching only organizational efforts to influence legislation which include direct communications with lawmakers or a choreographed grassroots campaign that makes a direct appeal to public officials.

The provisions in the legislation that require disclosures of information regarding individuals and organizations that make donations to non-profit organizations are overly broad, requiring disclosures about contributions neither designated for, nor utilized to support, lobbying activities

The Supreme Court has held that "contributions and persons having only an incidental purpose of influencing legislation" are excluded from the scope of acceptable government regulation of lobbying activities.[18] Notwithstanding this, the state's Source of Funding Regulations require organizations that meet the threshold requirements for disclosure to report *both* contributions "specifically designated for lobbying in New York" *as well as* contributions "not specifically designated for lobbying in New York" (the latter of which are reported as a percentage of the actual contribution).[19] The regulations therefore require that organizations disclose information about contributions that are merely *available* for lobbying activities, regardless of whether they are ever utilized for such a purpose.

This regulatory scheme extends beyond lobbying activities, requiring the disclosure of personal information from contributors whose funds will never be used to fund lobbying activities. The compelled disclosure of contributions that may only incidentally support an organization's attempts to influence legislation is unconstitutionally overbroad. The NYCLU therefore continues to object to the disclosure scheme to the extent that it requires the public sharing of personal donor information related to contributions that are not utilized by organizations to influence legislation.

The legislation will have a "chilling effect" on the willingness of individuals to engage in constitutionally protected expression

In assessing compelled government disclosure requirements, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."[20]

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[18] *Harriss*, 347 U.S. at 622 (internal quotation marks omitted).

[19] 13 N.Y.C.R.R. 938.2 ("Amount of Contribution(s)").

[20] *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010).

Regulations that encroach upon constitutionally protected rights "must be justified by more than a showing of a mere rational or legitimate interest."[21]

The proposed legislation would impose a significant burden on the exercise of free speech and associational rights. The bill broadens required disclosures regarding individual and organizational donors who contribute to 501(c)(4) organizations; creates new disclosure rules regarding donors who contribute to 501(c)(3) organizations that have donated funds or provided "in kind" donations to a 501(c)(4) organization that engages in lobbying; and establishes new disclosure provisions that require reporting of expenditures made by 501(c)(4) organizations for communications related to virtually any public policy issue – as well as identification of donors *whether or not* their contributions have been used to fund such communications.

Mandated disclosure of contributors' names, addresses, employers, and contribution information is likely to result in people either contributing less to advance issues that they believe in (so they do not fall within the scope of the compelled disclosure) or altogether withholding their support from organizations that are required to report on the identity of their donors. As a result, the legislation will have the effect of inhibiting the full and free exercise of the First Amendment right to petition the government, and to associate with likeminded individuals.

Disclosure requirements have been upheld only to the extent that they advance the important government interest in "stemming the reality or appearance of corruption in the electoral process."[22] Government regulation of campaign finance speech rests upon an interest in preventing any corruption that may be created by the relationship between a contributor and an elected official.

The concerns about corruption in the lobbying context are quite different. While there may be an interest in knowing which organizations are expending resources to influence legislation, there is a more attenuated interest in the personal information of donors who contribute to organizations that use those funds to hire a lobbyist who then undertakes advocacy on a various issues. As a matter of policy, it is unclear why any government interest in maintaining transparency would not be adequately served in this context by limiting the disclosure requirement to expenditures related to an organization's lobbying activities.

The provision in the state's Lobbying Act that grants controversial organizations an exemption from disclosure rules deviates impermissibly from the constitutionally mandated standard for granting such an exemption

A government requirement that an organization disclose the identity and personal information of financial supporters "can seriously infringe on privacy of association and belief guaranteed by

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[21] *Commission on Independent Colleges & Universities*, 534 F. Supp. at 494.

[22] *Citizens United v. F.E.C.*, 130 S. Ct. 876, 903 (2010).

the First Amendment."[23] Therefore any government-mandated disclosures of such contributors must provide exemptions for individuals or organizations when disclosure could result in harassment or reprisals.[24] The Supreme Court has held that the Constitution requires granting organizations an exemption from compelled disclosures when they can demonstrate "a *reasonable probability*" that the forced disclosure of their donors or members will "subject them to threats, harassment, or reprisals from either Government officials or private parties."[25]

State regulations promulgated pursuant to the Lobbying Act provide that the Joint Commission on Public Ethics "may" grant an exemption from the Source of Funding Disclosure requirements for 501(c)(4) organizations upon a showing that the organization's "primary activities involve areas of public concern that create a *substantial likelihood* that disclosure of its Single Source(s) will cause harm, threats, harassment or reprisals to the Single Source(s) or individuals or property affiliated with the Single Source(s)."[26]

Under the proposed legislation it is this standard that would govern when organizations seek such an exemption. However, this standard deviates from the constitutional requirement that exemptions must be provided when there is a "*reasonable* probability" of harm to contributors. What's more, the "substantial likelihood" standard appears to require a higher evidentiary showing of the likelihood of actual harm. Accordingly, the standard for exemptions should be amended to bring it more closely in line with the standard required by the Constitution – allowing for the granting of exemptions whenever there is a "reasonable" likelihood that the disclosure will lead to harassment or reprisal.[27]

Granting exemptions to organizations engaged in such issues will ensure that their financial supporters do not become the targets of harassment, and worse, for their support of controversial work. This will also ensure that organizations are not undermined in their ability to engage in such advocacy.

Conclusion

Based upon the foregoing analysis, the NYCLU must oppose A.10742/S.8160.

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[23] *Buckley*, 424 U.S. at 64.

[24] *See, e.g., Brown et al. v. Socialist Workers' '74 Campaign Committee*, 459 U.S. 87 (1982).

[25] *Socialist Workers*, 459 U.S. at 93 (citing *Buckley,* 424 U.S. at 74) (emphasis added); *see also Citizens United*, 130 S. Ct. at 914.

[26] 13 N.Y.C.R.R. 938.4(b) (emphasis added).

[27] As the Legislature noted in enacting the Lobbying Act, "organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption." 2011 N.Y.S. Legislative Bill and Veto Jackets, S.5679, L. 2011, ch. 399, at 10 (2011).

To summarize, the NYCLU objects to the legislation for the following reasons: First, government regulation of lobbying and the imposition of disclosure obligations are consistent with the First Amendment only if they are limited to "direct communication" with elected officials to influence legislation. Second, the legislation as well as the state's lobbying law and rules require the disclosure of information on contributors to organizations that engage in lobbying, even if the contributed funds are never utilized for that purpose. Third, the mandated disclosure of personal information about contributors will undoubtedly have a "chilling effect" on the exercise of protected speech and petition activities. Finally, the First Amendment requires that the proposed regulations provide for exemptions for controversial organizations upon a showing of a "reasonable" likelihood of harm from the disclosures.

My NYCLU colleagues and I would welcome the opportunity to discuss with your staff the issues raised in this letter.

Yours sincerely,

Robert A. Perry
Legislative Director

c: Senate Majority Leader John Flanagan
Assembly Speaker Carl Heastie