**2019 JOINT LEGISLATIVE MEMORANDUM**

**Subject:** **Executive Chamber's Proposed FY20 Good Government & Ethics Reform Article VII Legislation, Part Q**

**Position:** **Oppose**

**From:** **Citizens Union**
**Lawyers Alliance for New York**
**New York Civil Liberties Union**
**Nonprofit Coordinating Committee of New York**

**Date:** **March 4, 2019**

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Our organizations are plaintiffs in an ongoing federal lawsuit challenging Executive Law sections 172-e and 172-f, on the grounds that they deter individuals from contributing to and thereby associating with charitable and issue-oriented organizations, in violation of the First Amendment.

Anonymous speech was a common feature of political discourse at our Nation's founding. Recognizing its historical pedigree as well as its instrumental value, the Supreme Court has long held, as a general rule, that anonymous political speech is protected by the First Amendment.[1] The Court has permitted burdening such speech with donor disclosure requirements only in the context of electoral advocacy and lobbying. But, Executive Law sections 172-e and 172-f require public disclosure of donors to non-profit organizations, even when those donors and donations support speech and expressive activities on matters of public concern unrelated to elections or lobbying. The amendments proposed in Part Q of the budgetary legislation do not cure the serious constitutional deficiencies inherent in these two statutory provisions.

For instance, § 172-e requires the public disclosure by a 501(c)(3) tax exempt nonprofit of all of its donors and donations over $2,500, if the 501(c)(3) makes contributions valued at $2,500 or more – including in-kind donations – to a 501(c)(4) nonprofit that is required to make a filing under New York lobbying laws. This requirement applies even if the donations are entirely unrelated to lobbying activity, never make their way to the 501(c)(4), or are

[1] *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

earmarked by the donor or 501(c)(3) for a purpose other than lobbying. Part Q offers a 501(c)(3) the hypothetical ability to limit disclosure by making all monetary donations to a 501(c)(4) out of a segregated bank account, and disclosing only donors whose contributions are placed in that account. But, the creation of segregated funds will often be burdensome for small 501(c)(3) organizations. Moreover, if the 501(c)(3) makes any *in-kind* contributions to a 501(c)(4) organization, as often occurs, that segregation option disappears and the 501(c)(3) must disclose all donors and donations.

Thus, for instance, providing pro bono legal assistance worth $2,500 or more to a 501(c)(4) organization would still require Lawyers Alliance for New York or the New York Civil Liberties Union to disclose the source of all donations of $2,500 or more. It is also important to recognize that there will undoubtedly be circumstances where a donor makes a general, non-earmarked contribution to a 501(c)(3) organization and thereafter, the organization finds itself needing to use non-earmarked donations to fund activities covered by Section 172-e. Such a circumstance provides a dilemma for the organization that secured the contribution because it would require the disclosure of the donor's identity even though the money given to the 501(c)(3) organization had not been earmarked for lobbying.

The proposed revision to Executive Law section 172-f fares no better. The revision still leaves the provision as one that is fatally overbroad and a serious trap for the unwary. The revision in Part Q would still require disclosures related to published statements which refer to and advocate for or against an elected official or any candidate for elected office, or the drafting, adoption or defeat of any rule, regulation or decision by any legislative, executive or administrative body whether or not the rule, regulations or decision is codified. There is no limitation as to time and place of the decision. It covers the past, present and indefinite future and covers any conceivable topic that has been considered by any government entity, even if far removed from the context of lobbying or electoral politics. There is no explanation of what potential legislation means, and every government decision is potentially included. The breadth of this provision is breathtaking. It is absurd to expect all organizations subject to this provision to know when they have violated the law.

Finally, the proposed amendments would transfer administrative responsibility for the enforcement of these provisions from the Office of the Attorney General to the Joint Commission on Public Ethics (JCOPE). This proposal would dangerously blur the lines of JCOPE's authority. JCOPE bears the responsibility to regulate lobbying communications. But, as noted above, Executive Law sections 172-e and 172-f reach communication that extends well beyond lobbying and well beyond electoral speech. The proposed legislation, therefore, represents a significant and open-ended expansion of JCOPE's current mandate.

These criticisms present only the most prominent deficiencies inherent in the proposals set forth in Part Q. The proposals are problematic in other respects, as well. At bottom, however, the "reforms" promised by Part Q do not quell the statute's underlying constitutional concerns and do not moot the litigation. We accordingly urge lawmakers to reject Part Q.