

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAWYERS ALLIANCE FOR NEW YORK and)
NONPROFIT COORDINATING COMMITTEE)
OF NEW YORK,)

Plaintiffs,)

v.)

ERIC T. SCHNEIDERMAN, in his Official)
Capacity as the Attorney General of the State of)
New York,)

Defendant.)

CIVIL ACTION
DOCKET NO: _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. Plaintiffs Lawyers Alliance for New York (“Lawyers Alliance”) and Nonprofit Coordinating Committee of New York (“NPCC”) bring this action pursuant to 42 U.S.C. § 1983 seeking a declaration that New York Executive Law § 172-e violates the First and Fourteenth Amendments to the United States Constitution and an Order enjoining the Attorney General from enforcing it.

2. Executive Law § 172-e requires any 501(c)(3) nonprofit organization that donates “staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources” totaling \$2,500 or more in a six-month period to a 501(c)(4) nonprofit organization that engages in significant lobbying activity in New York to file a report with the Attorney General. That report must include the identity of any donor to the 501(c)(3) of \$2,500 or more. The report would be posted to a public website within 30 days of filing.

3. Because of the breadth of its language, Executive Law § 172-e would, for example, require community foundations and providers of legal services, management support

and other technical assistance to the nonprofit sector, including Plaintiffs and their clients and members, to severely curtail their activities with respect to 501(c)(4) nonprofit organizations, despite having no connection whatsoever to the lobbying activities of 501(c)(4)s, or face the chilling effects of disclosing their donors. Indeed, by eschewing any connection between either donations to a 501(c)(3) nonprofit organization or a 501(c)(3)'s "in-kind donations" – a term which is defined in an overbroad manner to encompass financial and other support of any kind – and lobbying by 501(c)(4) nonprofit organizations that the State has a legitimate interest in regulating, Executive Law § 172-e captures speech and expressive conduct in a way that goes far beyond what is permitted under the First Amendment.

4. Executive Law § 172-e will chill the speech and associational rights of Plaintiffs and their clients, members and donors. Accordingly, Plaintiffs ask the Court to declare Executive Law § 172-e unconstitutional and enjoin its enforcement.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because it arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

6. Venue lies in this district under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims have occurred or will occur in this district.

PARTIES

7. Plaintiff Lawyers Alliance, founded in New York in 1969, is a charitable not-for-profit corporation and a tax exempt public charity under section 501(c)(3) of the Internal Revenue Code (“IRC”). Lawyers Alliance’s principal place of business is 171 Madison Avenue, 6th Floor, New York, New York, 10016.

8. Lawyers Alliance is the leading provider of business and transactional legal services for nonprofit organizations that seek to improve the quality of life in New York City neighborhoods. By connecting lawyers, nonprofits, and communities, Lawyers Alliance helps nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

9. Plaintiff NPCC is a charitable not-for-profit corporation, formed in New York in 1984, and a tax exempt public charity under section 501(c)(3) of the IRC. NPCC’s principal place of business is 135 West 36th Street, 15th Floor, New York, New York, 10018.

10. With more than 1,450 members, NPCC is the largest and most diverse nonprofit membership organization in New York City. NPCC members operate in all five boroughs of New York City and Westchester, Nassau, and Suffolk counties. NPCC provides capacity building education, resources and advocacy designed to make 501(c)(3) nonprofit organizations stronger, more strategic and better able to improve the lives of millions of New Yorkers by achieving their missions related to social services, arts and culture, health, the environment and educational opportunities, among many others.

11. Defendant Eric T. Schneiderman is the Attorney General of the State of New York. As Attorney General, Defendant Schneiderman is the head of the New York State

Department of Law, *see* N.Y. Exec. Law § 60, which is the recipient of the funding disclosure reports mandated by Executive Law § 172-e. N.Y. Exec. Law § 172-e(2). Defendant Schneiderman’s official duties include the administration and enforcement of Executive Law § 172-e. N.Y. Exec. Law §§ 175, 177. The Attorney General is sued in his official capacity.

FACTS

I. SECTION 172-e.

12. In the early-morning hours of June 18, 2016, without consideration by committee or any public input, the New York State Senate and the New York State Assembly passed identical bills – S8160 and A10742, respectively. On August 24, 2016, Governor Andrew Cuomo signed S8160 into law as Chapter 286 of the Laws of 2016.

13. Chapter 286 includes a new and unprecedented provision, Executive Law § 172-e, which imposes a broad donor disclosure requirement on any nonprofit organization organized pursuant to 26 U.S.C. § 501(c)(3) (a “501(c)(3)”) that contributes “staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources” to any nonprofit organization organized pursuant to 26 U.S.C. § 501(c)(4) (a “501(c)(4)”) that engages in significant lobbying activity in New York. Executive Law § 172-e does not require that there be any connection between the contribution and the lobbying activity that triggers disclosure.

14. Section 172-e states: “Any covered entity that makes an in-kind donation in excess of two thousand five hundred dollars to a recipient entity during a relevant reporting period shall file a funding disclosure report with the department of law.” N.Y. Exec. Law § 172-e(2)(a).

15. A covered entity is “any corporation or entity that is qualified as an exempt organization or entity by the United States Department of the Treasury under I.R.C. 501(c)(3) that is required to report to the department of law pursuant to this section.” N.Y. Exec. Law § 172-e(1)(a).

16. An “in-kind donation” is defined broadly to mean “donations of staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources.” N.Y. Exec. Law § 172-e(1)(b).

17. A recipient entity is “any corporation or entity that is qualified as an exempt organization or entity by the United States Department of the Treasury under I.R.C. 501(c)(4) that is required to file a source of funding report with the joint commission on public ethics [JCOPE] pursuant to sections one-h and one-j of the legislative law.” N.Y. Exec. Law § 172-e(1)(d).

18. The legislative law therefore determines the 501(c)(4) organizations whose lobbying activities will trigger the donor disclosure requirement for 501(c)(3)s by specifying which 501(c)(4) organizations must file a “source of funding report.” It requires any organization – including 501(c)(4)s – that (1) retains or employs “any person or organization to carry on lobbying activities” on its behalf, (2) expends in excess of \$15,000 on lobbying in the calendar year or 12 months preceding a reporting period, and (3) devotes at least three percent of its total expenditures to lobbying in New York to file a source of funding report with JCOPE. N.Y. Legis. Law §§ 1-c(b), 1-h, 1-j.

19. To summarize, Executive Law § 172-e requires any 501(c)(3) organization that contributes “financial support . . . or any other resources” valued at \$2,500 or more to a 501(c)(4) organization that (1) retains or employs a lobbyist, (2) expends at least \$15,000 annually on

lobbying activity and (3) devotes at least three percent of its total expenditures to lobbying in New York to file a “funding disclosure report” with the department of law.

20. The “funding disclosure report” to be filed by each 501(c)(3) organization deemed a covered entity must include:

- (i) the name and address of the covered entity that made the in-kind donation;
- (ii) the name and address of the recipient entity that received or benefitted from the in-kind donation;
- (iii) the names of any persons who exert operational or managerial control over the covered entity. The disclosures required by this paragraph shall include the name of at least one natural person;
- (iv) the date the in-kind donation was made by the covered entity;
- (v) any donation in excess of two thousand five hundred dollars to the covered entity during the relevant reporting period including the identity of the donor of any such donation; and
- (vi) the date of any such donation to a covered entity.

N.Y. Exec. Law § 172-e(2)(a)(i)-(vi).

21. Once submitted, the funding disclosure report is forwarded to the JCOPE for publication on the JCOPE’s website within 30 days of the end of each biannual reporting period.

N.Y. Exec. Law §§ 172-e(1)(e), 172-e(3).

22. The Attorney General “may determine that disclosure of donations to the covered entity shall not be made public if, based upon a review of the relevant facts presented by the covered entity, such disclosure may cause harm, threats, harassment, or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation.” N.Y. Exec. Law § 172-e(3).

23. The Attorney General may impose a fine of up to \$1,000 per violation and \$100 for every day that the violation continues on any 501(c)(3) that fails to file a disclosure report as required, and may also deprive a charitable organization of the authority to solicit charitable contributions in New York by revoking or suspending its registration. N.Y. Exec. Law § 177.

II. LAWYERS ALLIANCE, NPCC AND THE NONPROFIT SECTOR.

24. Plaintiffs Lawyers Alliance and NPCC provide legal and technical assistance, management support and capacity-building services to, and advocate on behalf of, New York's nonprofit sector.

25. Lawyers Alliance, a 501(c)(3) nonprofit organization, provides business and transactional legal services to 501(c)(3) and 501(c)(4) nonprofit organizations.

26. Lawyers Alliance assists its clients in matters involving compliance with laws and regulations pertaining to corporate governance, real estate, intellectual property, tax exempt status, employment, lobbying registration and disclosure, campaign finance, and more.

27. From time to time, Lawyers Alliance helps its 501(c)(3) clients set up affiliates and seek tax exempt status for those affiliates under section 501(c)(4) of the IRC.

28. When a potential client seeks assistance with a new legal matter, Lawyers Alliance attorneys evaluate its needs and help the organization to identify and prioritize the legal issues that must be addressed.

29. New clients are charged an initial screening fee at a level that does not fully compensate Lawyers Alliance for the time of its staff attorneys. Existing and former clients do not pay anything for assistance of this kind.

30. For most matters, Lawyers Alliance staff recruit *pro bono* attorneys to act as co-counsel. However, Lawyers Alliance staff also handle some matters in-house, for an hourly fee that is well below market rates.

31. In furnishing legal advice, strategic guidance and in-house legal services to its clients for a minimal fee or at below market rates, Lawyers Alliance provides "staff time . . . or

any other resources” to its clients within the broad definition of an in-kind donation under Executive Law § 172-e.

32. NPCC, a 501(c)(3) nonprofit, is a membership organization that serves the nonprofit sector by providing 501(c)(3) organizations, including both public charities and private foundations, with tools and information to evaluate and improve all aspects of their performance and fulfill their missions.

33. NPCC provides its members with educational workshops focused on best practices in nonprofit management, facilitates membership group buying discounts and advocates for a fair and reasonable nonprofit regulatory environment. Its services are nonpartisan and are provided to all members regardless of a member’s mission or position on a particular policy or issue.

34. NPCC’s members pay dues on a sliding scale, based on their budget. More than half of NPCC’s member pay \$250 or less annually. However, members are entitled to use all of NPCC’s services for one fee and it is estimated that a member, depending on how it engages with NPCC’s services, may receive up to \$50 in value for every \$1 that it contributes in dues.

35. Many of Plaintiffs’ 501(c)(3) clients and members interact with and provide support to 501(c)(4) organizations. Those interactions have little or nothing to do with lobbying. However, the provision of legal services, technical assistance, management support, office space or financial support unrelated to lobbying activity to a 501(c)(4) organization may nevertheless subject 501(c)(3) organizations, including but not limited to Plaintiffs’ clients and members, to the donor disclosure requirement.

36. Numerous 501(c)(3)s that provide technical assistance to the nonprofit sector, as Plaintiffs do, may find it necessary to implement costly new record-keeping practices. Indeed,

technical assistance providers like Plaintiffs would be forced by Executive Law § 172-e to choose between supporting 501(c)(4) organizations, to the extent consistent with their missions, and risking exposure to the donor disclosure requirement, or declining to provide services consistent with their respective missions.

37. Further, when a 501(c)(3) technical assistance provider is deciding whether to assist a 501(c)(4) entity, it may be impossible to determine whether doing so will subject the 501(c)(3) to the donor disclosure requirement. That is so because the 501(c)(4) may be unsure whether it will reach \$15,000 in lobbying expenditures, or whether those expenditures will cross the 3% threshold.

38. For those reasons, Executive Law § 172-e would have a significant chilling effect on the provision of technical assistance and other services to 501(c)(4) organizations. Compelled disclosure would deter anonymous donors and donors who do not wish to make the size of their contributions public, and thereby deprive 501(c)(3) organizations such as Plaintiffs and their clients and members of significant sources of membership and support. The resulting choice for Plaintiffs – to either support organizations that align with their mission, or preserve the privacy of their donors by restricting their association with certain clients or partners – is one that the First Amendment does not allow the law to compel.

III. THE IMPACT OF THE DONOR DISCLOSURE REQUIREMENT ON LAWYERS ALLIANCE.

39. As a technical assistance provider to the nonprofit community that is itself a 501(c)(3) nonprofit organization, Lawyers Alliance faces not only the burden of ensuring its own compliance but must also provide advice and guidance to its clients concerning compliance with Executive Law § 172-e.

40. To determine its disclosure responsibilities, Lawyers Alliance must keep close track of the client organizations to which it provides legal assistance or other services that might be construed as an “in-kind donation” under the broad definition given that term by Executive Law § 172-e(1)(b).

41. Lawyers Alliance currently represents a number of 501(c)(4) clients, some of which are or were registered as lobbyists with the Joint Commission on Public Ethics. Those organizations have not yet exceeded the \$15,000 lobbying expenditure threshold during the current calendar year and do not know whether they will do so. Lawyers Alliance has asked those clients to inform Lawyers Alliance whenever they anticipate exceeding the \$15,000 and 3% thresholds.

42. If Lawyers Alliance receives such notification, it will endeavor to restrict the services that it provides to these clients to avoid providing them with in-kind donations of \$2,500 or more, consistent with the New York Rules of Professional Conduct. Lawyers Alliance would restrict its efforts on behalf of these clients not because of its mission or a desire to cease providing such services, but because of the donor disclosure requirement and the significant negative impact that compelled disclosure of its donors would have on its fundraising efforts.

43. Lawyers Alliance also has former clients that have 501(c)(4) status, each of which has, in the past, spent more than \$15,000 and at least 3% of its total expenditures on lobbying in a twelve-month period. Lawyers Alliance provided one of these organizations with pro bono in-house assistance within a single 6-month period that was worth well in excess of \$2,500. Lawyers Alliance wishes to continue to offer legal assistance to such organizations without triggering the obligation to disclose its donors.

44. In addition, another 501(c)(4) organization (“Corporation A”) has asked Lawyers Alliance to conduct a training regarding the legal regulation of civic engagement for the community-based organizations in its network. Corporation A is a past client – Lawyers Alliance drafted its incorporation papers and prepared Corporation A’s application to the IRS for 501(c)(4) status – and Lawyers Alliance hopes to be able to provide the requested training as soon as practicable. Organizing and conducting the training would require Lawyers Alliance to provide services to Corporation A valued in excess of \$2,500.

45. However, Corporation A reported to the Joint Commission on Public Ethics that it had incurred in excess of \$30,000 in lobbying expenditures in 2016, which lobbying expenditures were in excess of 3% of its revenues. Corporation A intends to engage in a similar amount of lobbying activity in 2017.

46. Thus, in order to avoid the risk that providing the requested training to Corporation A would trigger Executive Law § 172-e and require Lawyers Alliance to disclose its donors, Lawyers Alliance has declined to provide the training while Executive Law § 172-e is in effect.

47. Lawyers Alliance receives donations from more than 550 individuals, law firms, corporations, banks and foundations each year, including 135 gifts of \$2,500 or more in calendar year 2016.

48. Some of Lawyers Alliance’s donors give on the condition that their identity will not be disclosed. If Lawyers Alliance had to disclose their identities there is a very real risk that the donors would stop making these contributions.

49. Many other donors to Lawyers Alliance do not give anonymously but expect that the size of their gift will remain confidential.

50. Thus, if Lawyers Alliance were forced to disclose its donors because of services provided to a 501(c)(4) client, it is likely that there would be a significant detrimental impact on its fundraising efforts in the future.

IV. THE IMPACT OF THE DONOR DISCLOSURE REQUIREMENT ON NPCC.

51. Given the size and diversity of NPCC's membership, the full extent of the impact of Executive Law § 172-e on NPCC's member organizations is not fully known because, to date, NPCC has not had to track its members' interactions with 501(c)(4) entities.

52. However, among NPCC's members are foundations that, from time to time, provide grants or other support to 501(c)(4) entities. In most cases, such grants are provided as general funding rather than specifically to support lobbying activity.

53. For example, one of NPCC's members is a community foundation (the "Foundation") serving a region of New York State. The Foundation, which wishes to remain anonymous, receives contributions from hundreds of donors each year. The vast majority of the Foundation's grants are made to organizations exempt from tax under section 501(c)(3) of the IRC.

54. However, from time to time, as a part of its charitable mission, the Foundation makes grants in excess of \$2,500 to organizations recognized as tax exempt under section 501(c)(4) of the IRC. Some of the 501(c)(4) organizations that have received grants from the Foundation make expenditures for lobbying in New York State in excess of \$15,000 in a twelve month period, which lobbying expenditures are in excess of 3% of their revenues.

55. Based upon the requirements of Executive Law § 172-e, the Foundation decided to suspend grant making to 501(c)(4) organizations rather than being compelled to disclose its

donors, many of whom wish to remain anonymous (and whose contributions, for the vast majority, would not have been used to make grants to 501(c)(4) organizations). As a public charity exempt from tax under section 501(c)(3) of the IRC, the Foundation is not required to publicly disclose its donors on its annual report to the IRS.

56. Additionally, some NPCC members provide office space to 501(c)(4) entities at no or reduced cost, or may do so in the future. Because of the broad definition of an in-kind contribution in Executive Law § 172-e, NPCC members must track and quantify any such rental benefit; they are also deterred from providing support to a 501(c)(4) organization that happens to engage in lobbying activity by the threat of compelled disclosure of donors. For their part, donors who wish to remain anonymous are deterred from contributing to any member who supports a 501(c)(4) organization because of the risk that such organization would engage in substantial lobbying in New York and thus trigger the donor disclosure requirement.

CAUSE OF ACTION

Cause of Action: Section 172-e Violates the First and Fourteenth Amendments to the United States Constitution.

57. Plaintiffs repeat and reallege paragraphs 1-56, as if fully set forth here.

58. New York Executive Law § 172-e violates the First and Fourteenth Amendments to the United States Constitution because it regulates, through mandatory public disclosure, the expressive and associational activity of 501(c)(3) organizations and their donors, clients and members without a sufficient connection to a substantial governmental interest and in a vague and overbroad manner.

59. Among the protections afforded to speech and expressive conduct by the First Amendment is the “right to associate with others in pursuit of a wide variety of political, social,

economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Executive Law § 172-e violates Plaintiffs’ associational rights, and chills the exercise thereof, by disincentivizing Plaintiffs from supporting 501(c)(4) organizations whose work accords with their missions lest they disrespect the privacy wishes of their donors or members.

60. Indeed, it has long been the law that, given the “vital relationship between freedom to associate and privacy in one’s associations,” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), the threat of compelled disclosure of the identities of donors to 501(c)(3) organizations significantly impinges on the First Amendment by impairing the freedoms such donors enjoy to exercise their speech and associational rights while remaining anonymous. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

61. “[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Executive Law § 172-e burdens First Amendment protected activity far in excess of any legitimate governmental interest. It is unconstitutional.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

- A. a declaration that New York Executive Law Section 172-e is unconstitutional on its face;
- B. a permanent injunction enjoining Defendant from enforcing New York Executive Law Section 172-e;
- C. an award of Plaintiffs' costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and,
- D. Such other relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
J. David Pollock, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
(973) 596-4500

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