

Federal Court Invalidates New York Donor Disclosure Law

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A federal judge has invalidated a New York state Ethics Law requiring § 501(c)(3) and § 501(c)(4) tax-exempt organizations to publicly report their donors under certain circumstances.

Background. Organizations exempt from taxation under Internal Revenue Code (“IRC”) § 501(c)(3) (charitable organizations) are expressly prohibited from participating in any political campaign activity for or against a candidate for public office. Such organizations are permitted to engage in lobbying, but lobbying activity may not constitute a “substantial part” of their activities. By contrast, organizations exempt from taxation under IRC § 501(c)(4) (civic leagues or social welfare organizations) may engage in substantial lobbying, and may engage in some political activity so long as that is not their primary activity. Donations to § 501(c)(3) organizations are generally tax-deductible, while donations to § 501(c)(4) organizations generally are not. A § 501(c)(3) organization may make cash or in-kind donations to a § 501(c)(4) organization but it must ensure that its tax-deductible contributions are not used to fund lobbying.

In 2016, as part of an Ethics Law intended to address certain election and campaigning issues, New York enacted Executive Law §§ 172-e and 172-f (together, the “Provisions”). Section 172-e requires a § 501(c)(3) organization to disclose all donors who contributed over \$2,500 if the § 501(c)(3) itself makes an in-kind donation in excess of \$2,500 to a § 501(c)(4) organization that engages in lobbying in New York. Section 172-f requires a § 501(c)(4) organization to disclose donors who contributed \$1,000 or more if the § 501(c)(4) expends more than \$10,000 in a calendar year on communications made to at least 500 members of the public concerning the position of an elected official relating to any “potential” or pending legislation (unless the contributions are restricted to a segregated account that was not used to support such communications). According to New York’s Governor, the Provisions were intended to facilitate “[d]isclosure of political relationships and funding behaviors widely recognized to be influential, but which operate in the shadows.”

Legal Action. Citizens Union of the City of New York (“Citizens Union”) is a nonpartisan group that works to foster accountability and transparency in New York City and State government; it is a § 501(c)(4) organization with an affiliated § 501(c)(3) organization. In 2016, Citizens Union filed suit challenging the Provisions on the grounds that they unconstitutionally burden the First Amendment rights of free speech and association.

In *Citizens Union of the City of New York et al. v. Attorney General of the State of New York* (case no. 1:16-cv-09592, U.S. District Court for the Southern District of New York), the court evaluated the Provisions under the “exacting scrutiny” standard, which is applicable when considering content-neutral disclosure requirements challenged under the First Amendment. According to the court, “there is no question that public disclosure of donor identities burdens the First Amendment rights to free speech and free association.” Under exacting scrutiny, the Provisions are permissible only if there is a “substantial relation between the disclosure [requirements] and a sufficiently important governmental interest.”

As described by the court, the U.S. Supreme Court has recognized three governmental interests that may justify donor disclosure in the context of election campaigns despite the burden on First Amendment rights:

- First, disclosure provides voters with information about where political campaign money comes from and how it is spent by a candidate; sources of a candidate's financial support also alert voters to the interests to which a candidate is most likely to be responsive.
- Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by publicly exposing large contributions and expenditures.
- Third, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of limits on campaign contributions.

In striking down § 172-e, the court asserted that there was no substantial relation between the requirement that the identity of donors to § 501(c)(3) organizations be publicly disclosed and any important government interest. It reasoned that other disclosure laws that have been upheld based on a showing that disclosures furthered an important government interest were drawn far more narrowly than § 172-e. Similarly, the court found that § 172-f unconstitutionally intrudes on donors' rights to anonymously discuss and advocate on issues of public interest because it requires disclosure whenever a § 501(c)(4) organization engages in pure public issue advocacy. According to the court, § 172-f reaches a far broader swath of communications than did other lobbying- and election-related statutes that were previously upheld.

When Citizens Union initially challenged the law in 2016, the New York Attorney General agreed to a stay of enforcement, so the Provisions have never actually been enforced. We will provide an update if there are any further developments.

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