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*ADMITTED IN DC ONLY

December 30, 2016

Re: *Citizens Union of the City of New York, et al.* v. *The Governor of the State of New York, et al* (16-cv-09592-RMB)

Dear Judge Berman:

I write on behalf of Governor Andrew Cuomo in response to your Order of December 26, 2016.

The two sections of law at issue in this case were enacted as part of an omnibus ethics bill adopted by both houses of the New York legislature on June 18, 2016 and signed into law by Governor Cuomo on August 24, 2016. The legislation deals with a number of topics that were summarized by the Governor as "a comprehensive series of ethics, campaign finance, lobbying and public officers reform." Eleven separate topics are dealt with in the law. The two that are at issue in this case both impose new disclosure requirements. Section 172-e requires the disclosure of information about certain donations to charitable non-profit entities. Section 172-f requires the disclosure of certain activities of non-charitable non-profit entities.

As is common in the drafting and adoption of legislation in New York, the bill was adopted after a great deal of negotiation between representatives of the Governor and of the State Assembly and Senate. No single legislator crafted the language of the sections at issue in this case. It stemmed from a collaborative effort by representatives of the Governor's Counsel's Office and the Counsel's Offices of the State Assembly and Senate. In fact at any given time the negotiations involved five representatives of the majority conference of the Assembly, six representatives of the majority conference for the Senate and the Independent Democratic Conference of the Senate, and four to five representatives of the Governor's office. The legislation was initially drafted in March; intensive negotiations with respect to the bill occurred between June 1st and the bill's adoption on June 18th. A representative of the Governor, for example, met at least nine times with representatives of the two

houses in that time period with respect to the legislation, totaling 20 hours of negotiation. During the same time period, meetings as well occurred between representatives of the Governor and good government groups to obtain their feedback.

Under New York law, a bill must "age" for 3 days within the legislature prior to being called to the floor for a vote. The Governor may bypass this waiting period by issuing a "message of necessity" which is a statement by the Governor that immediate action on the bill is advisable. As a matter of practice, that may not occur unless, as occurred in this case, both houses and the Governor agree beforehand that a particular bill will be passed under a message of necessity and each house delivers a written request to the Governor seeking a message of necessity. After such agreement and receipt of that request, the Governor issued one with respect to this legislation. Each house must affirmatively vote to accept the message of necessity before any action on a bill issued pursuant to a message of necessity may be taken. New York State Assembly Rules, Rule IV, Section 10(b)(1)(d); Rules of the New York State Senate, Rule IX, Section 1. Such a message is hardly unique to this bill. Many bills are passed under a message of necessity including four of the six on-time budgets of this Governor. It is especially commonplace for such a message to be issued, as in this case, towards the conclusion of legislative sessions when the elected members in each house wish to conclude state business before departing Albany.

We wish to make clear that the constitutionality of the sections at issue is not, in any event, to be determined by the specific legislative process by which they were adopted. There is no claim that the legislature was not empowered to pass the law or that the Governor lacked authority to sign it into law. What remains to be decided is whether the law, as adopted, is consistent with the First Amendment.

In this respect, both of the sections of law at issue in this case were designed to assure that the public has more information about the identity of those individuals and entities that fund speech relating to elections and other public policy issues. Section 172-e addresses a specific issue of non-disclosure brought about by a loophole in the law that has been exploited by several not-for profit groups. Under Article I-A of the Legislative Law ("the Lobbying Act"), sections 1-h and 1-j, organizations subject to Section 501(c)(4) of the Internal Revenue Code that engage in lobbying either on their own behalf or for clients are required to disclose their "source of funding" to the Joint Commission on Public Ethics ("JCOPE"). However, under the law as it existed prior to the enactment of Section 172-e, Section 501(c)(3) organizations were exempt from such disclosure requirements. The result has been that organizations such as Citizens Union that have both a 501(c)(3) entity and a 501(c)(4) one can transfer moneys received from the former to the latter, thus avoiding any disclosure obligation. Indeed, for some such organizations, if one tries to donate to the 501(c)(4), one is directed to the donations page of the affiliated 501(c)(3).

Far from being overbroad, Section 172-e is extremely limited in its scope. It imposes new disclosure requirements *only* when Section 501(c)(3) entities provide "in kind donations" valued at $2,500 to a 501(c)(4) entity and only requires entities subject to Section 501(c)(3) to disclose larger donations. It also provides that if any 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" the Attorney General or his or her designee may determine not to require the disclosure, a decision subject to appeal to an independent "judicial hearing officer" who is "not affiliated with or employed by the department of law."

As for Section 172-f, it was intended to shed sunlight on dark money in politics by requiring Section 501(c)(4) entities that spend a significant amount of money (over $10,000) on issue advocacy, to disclose their identities and the identities of their large donors. Section 501(c)(4) entities that engage in lobbying are already required to register with JCOPE and to disclose their donors; the addition of entities that engage in issue advocacy is similarly constitutional. The law is narrowly tailored, only applying to Section 504(c)(4) entities and only when they spend and receive over a high dollar amount on a specific kind of public political advocacy. This is designed to promote transparency in the political process and to combat the role of dark money in politics. It contains, as well, the same protection for individuals or entities that assert that they may be harmed or harassed as a result of the newly required public disclosure as set forth above.

As Your Honor requested, I attach as Exhibits A, B and C respectively the Legislative Bill Jacket, the Governor's Message of Necessity and the Governor's Approval Message.

We are unaware of any other state that has sought to inform the public of who is playing what role in the political process in precisely the same way. But we are well aware of a number of cases, in the United States Supreme Court and in lower courts, that have affirmed the constitutionality of related donor disclosure legislation. In *Buckley* v. *Valeo*, 424 U.S. 1, 66 (1976), the Supreme Court upheld disclosure requirements on the ground that they "provid[ed] the electorate with information" about the sources of spending in elections. In *McConnell* v. *FEC*, 540 U.S. 93, 197 (2003), the Court upheld disclosure requirements on the ground that they could help citizens "'make informed choices in the political marketplace.'" And, most recently, in *Citizens United* v. *FEC*, 558 U.S. 310, 371 (2010), the Court upheld significant disclosure requirements by an 8-1 vote, stating that the First Amendment "protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way . . . [by] enab[ling] the electorate to make informed decisions and give proper weight to different speakers and messages." Lower court rulings as well have sustained challenges to other donor disclosure requirements. *See Center for Competitive Politics* v. *Harris,* 784 F.3d 1307 (9th Cir. 2015); *Citizens United* v. *Schneiderman,* 115 F. Supp. 3d 457 (S.D.N.Y. 2015) (Stein, J.).

We look forward to the pre-trial conference next week.

Respectfully submitted,

/s/ Floyd Abrams

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The Honorable Richard M. Berman
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BY ECF

cc: All Counsel of Record (by ECF)