NYCLU
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April 24, 2014

Rob Cohen
Special Counsel & Director of Ethics and Lobbying Compliance
New York State Joint Commission on Public Ethics
540 Broadway
Albany, N.Y. 12207

Dear Mr. Cohen:

The New York Civil Liberties Union ("NYCLU") writes to appeal the decision by the Joint Commission on Public Ethics ("JCOPE" or "the Commission") to deny the NYCLU's application for an exemption from JCOPE's Source of Funding Reporting Requirements. Founded in 1951, the NYCLU is a not-for-profit, nonpartisan organization with eight chapters and approximately 50,000 members across New York State. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobby Act[1] and the NYCLU reports to JCOPE as a lobbying "client."[2] The NYCLU is required to submit semi-annual lobbying reports to JCOPE twice annually, on January 15 and July 15 each year.[3] The NYCLU also files bi-monthly lobbying reports to JCOPE six times a year.

In 2013, JCOPE promulgated a regulation requiring organizations to report information regarding their financial donors, including personal information about individual donors. The NYCLU submitted several applications for an exemption from JCOPE's Source of Funding disclosure requirements.[4] The NYCLU was notified in writing on April 4, 2014, that its application for an exemption had been rejected by the Commission.

The NYCLU appeals the determination that it did not successfully demonstrate that disclosure of personal information about its donors would present a "substantial likelihood" that those donors would be subject to harassment. The NYCLU's ten page application to the Commission included multiple specific, recent examples of NYCLU staff and members being targeted for threats and violence – including attempted home invasions, slashed tires, crosses burned on front lawns, the words "F--- u ACLU" and "die fag" painted on cars, and repeated death threats. The factual record set out in the NYCLU's application demonstrates that the pattern of threats and harassment

[1] N.Y. Leg. Law 1-a, *et seq.*
[2] *See* N.Y. Leg. Law § 1-j(4).
[3] *See* N.Y. Leg. Law § 1-j(4).; N.Y. Leg. Law §§ 1-j(a),(b).
[4] *See* 19 N.Y.C.R.R. § 938.4(b).

reflects overt hostility toward the NYCLU's advocacy on issues of civil rights and civil liberties. These facts also make clear that harassment and violence directed at the staff and members of the NYCLU would also be directed at the organization's financial donors if the State requires publication of their personal information.

Moreover, there are reasons to believe that the Commission's rejection of the NYCLU's request for an exemption did not rest upon a meaningful discussion of the merits of the NYCLU's application or the potential threat posed to the NYCLU's donors. This conclusion is supported both by an examination of the records of the JCOPE meetings and by the statements of members of the Commission who dissented from the denial of the NYCLU's application. In short, JCOPE's denial of an exemption was clearly erroneous, and should be reversed on appeal in the interest of protecting the personal safety and constitutional rights of the NYCLU's financial supporters, and in the interest of rudimentary consideration of fair processes.

A. Background

New York's Lobby Act requires organizations subject to regulation by JCOPE to report information on donors who contribute more than $5,000 to such organizations (regardless of whether the funds were actually used for lobbying) if the organization has made lobbying expenditures that exceed a certain threshold amount.[5] JCOPE has promulgated a series of "Source of Funding" regulations, pursuant to this statutory requirement.[6] While the Lobby Act requires organizations to report the names of Single Source donors (organizations or individuals who have contributed more than $5,000 to the organization),[7] JCOPE's regulations require filing entities to supply additional personal information about financial supporters – including business addresses and dates of contributions.[8]

On January 9, 2013, JCOPE issued a Notice of Emergency Adoption and Revised Rule Making regarding the new Source of Funding reporting requirements. The proposed regulations went into effect immediately after issued, six days before the January 15 filing deadline. Consistent with the underlying statute, the regulations permitted a 501(c)(4) organization to seek an exemption from reporting donors' personal information if the organization showed that its "primary activities involve areas of public concern that create a *substantial likelihood*" that complying with the reporting requirements "will cause harm, threats, harassment or reprisals to the Single Source(s) or individuals or property affiliated with the Single Source(s)."[9] The NYCLU submitted comments that raised a number of constitutional concerns with the Single Source Disclosure regulations on February 8, 2013. The NYCLU's comments are included as Exhibit C.

On April 30, 2013, the JCOPE Commissioners met and subsequently announced revisions (effective immediately) to the substantive standard used to grant exemptions from the Source of

[5] N.Y. Legis. Law § 1-j(4).
[6] 19 N.Y.C.R.R. 938 *et seq.*
[7] N.Y. Legis. Law § 1-j(4).
[8] 19 N.Y.C.R.R. 938.3(e).
[9] 19 N.Y.C.R.R. 938.4(b) (Jan. 9, 2013).

Funding disclosure requirements.[10] Specifically, the new regulation permitted exemptions to be granted if organizations demonstrated a "*reasonable probability*" that sharing personal information about donors would cause "harm, threats, harassment or reprisals" to the donors.[11]

The NYCLU submitted an application for exemption from the Source of Funding reporting requirements on July 10, 2013. The five-page application contained multiple examples of acts of harassment and property damage at the homes and offices of NYCLU staff and NYCLU members across the state. On July 24, 2013, the NYCLU supplemented its application with additional evidence of threats against other NYCLU staff and against staff at ACLU affiliates across the country. The regulations, as they existed at the time of the NYCLU's initial filing, required that any materials submitted in support of an exemption from the Source of Funding requirements "shall" be kept confidential by JCOPE.[12]

On October 23, 2013, JCOPE issued another Notice of Emergency Adoption and Proposed Rule Making for the Source of Funding Regulations.[13] The regulation, again, changed the standard by which JCOPE would determine whether to grant exemptions, reverting back to the requirement that organizations demonstrate a "*substantial likelihood*" that disclosure would result in threats to donors.[14] The new regulations also eliminated the provision that required JCOPE to maintain the confidentiality of the contents of applications for exemptions.[15] The regulations were, once again, effective immediately. The NYCLU was informed of the imminent change on October 17, 2013, and was required to re-submit its application, along with any proposed redactions to protect the confidentiality of people mentioned in the application, within six days. In light of the fact that the NYCLU had to follow up with ACLU affiliates around the country in order to obtain approval for making public the personal stories of harassment, the NYCLU was given an extension to file an amended application. The NYCLU submitted its revised application on October 29, 2013. The revised application included a request to redact certain names and other personal information about the NYCLU and ACLU staff profiled in the application.

The NYCLU was next contacted by JCOPE on November 27, 2013 and informed that its request to redact names and personal information submitted in support of its exemption application had been rejected by the Commission. The NYCLU was required to re-submit its application within four business days, including the Thanksgiving holiday – this time, with a new cover sheet created by JCOPE, and with the understanding that any materials submitted in support of the NYCLU's application would be made publicly available. The NYCLU submitted its revised application on

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[10] *See* Joint Commission's Revisions to the Source of Funding Regulations and Reportable Business Relationship Disclosure Guidelines (May 2013), *available at* www.jcope.ny.gov/pubs/eblast/May%202013%20RBR%20%20SOF%20EBLAST%20FINAL.pdf.

[11] 19 N.Y.C.R.R. 938.4(b) (April 30, 2013). With this amendment to the standard for granting an exemption from the requirement to disclose donor information, the Commission adopted the standard prescribed by the U.S. Supreme Court. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) ("as-applied challenges [are] available if a group could show a *reasonable probability* that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties") (internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976)).

[12] 19 N.Y.C.R.R. 938.4(b) (April 30, 2013).

[13] Proposed Amended Source of Funding Regulations Now in Effect (Oct. 2013 e-blast), *available at* www.jcope.ny.gov/public/2013/eblastSOFrevised.pdf.

[14] 19 N.Y.C.R.R. 938.4(b) (Oct. 23, 2013).

[15] 19 N.Y.C.R.R. 938.8 (Oct. 23, 2013).

December 3, 2013. A copy of this version of the NYCLU's application, which is the version considered by JCOPE, is attached as Exhibit A.

On January 28, 2014, the Commission voted to deny the NYCLU's application for an exemption from the Source of Funding disclosure requirements. On April 4, 2014, the NYCLU received a written denial of its application. A copy of the denial is attached as Exhibit B.

Pursuant to 19 N.Y.C.R.R. 938.6, the NYCLU herewith appeals JCOPE's denial of its exemption from the Source of Funding reporting requirements. The standard for review on appeal is whether the Commission's denial was "clearly erroneous in view of the evidence in the record."[16]

B. The NYCLU demonstrated a substantial likelihood that public disclosure of personal information about the NYCLU's financial supporters will result in threats, harassment and possibly violence.

The evidence submitted by the NYCLU in support of its exemption application demonstrates that when the names and addresses of the NYCLU's members are made public they have episodically become the targets of harassment and threats of violence.[17] Individuals associating with the NYCLU have been stalked at their homes and threatened with physical harm; their property has been vandalized.[18] This has occurred not only to those associated with the NYCLU, but also to ACLU members and employees throughout the country. These episodes are sufficiently disturbing as to warrant protection against their reoccurrence.

This record further demonstrates there is a "substantial likelihood" that if the identities of those who financially support the NYCLU's work were disclosed, they would face similar treatment. The Commission's rejection of the NYCLU's application for an exemption from the Source of Funding disclosure rules is based upon a perfunctory and conclusory assertion that the evidence presented by the NYCLU in support of its application was "too remote and speculative to establish a substantial likelihood of harm."[19] In support of its conclusion, the Commission offered no analysis of the legal standard as applied to the facts. And for these reasons the Commission's ruling regarding the NYCLU's application is unsupported and unsupportable.

The Supreme Court has consistently recognized that compelled disclosure of information about the financial supporters of organizations "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[20] The Court has accordingly held that the Constitution

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[16] 19 N.Y.C.R.R. 938.7(c) (as of April 24, 2014). JCOPE has subsequently promulgated another emergency regulation, effective immediately, that eliminates the right to appeal denials of Source of Funding exemptions sought by 501(c)(4) organizations. *See* 43 N.Y. Reg. 8-9 (Jan. 22, 2014) (JPE-43-13-00021-E) (adding Part 938.6(a) to Title 19 N.Y.C.R.R.). Commissioners have stated that they do not intend the removal of the right to an appeal to apply "retroactively" to organizations that were denied exemptions at a meeting of JCOPE commissioners on January 28, 2014. *See* Video of the Feb. 18, 2014 Commission Meeting (*available at* http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv). The NYCLU submits this appeal in reliance on that assertion.

[17] *See* NYCLU Request for exemption from the disclosure requirements in the revised source-of-funding regulations adopted by the Joint Commission on Public Ethics, (Dec. 3, 2013) ("Exhibit A") at 3-10.

[18] *Id.*

[19] JCOPE Denial of NYCLU Source of Funding Disclosure Requirements, (April 4, 2014) ("Exhibit B") at 2.

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

requires that organizations must be granted exemptions from compelled disclosures of their members if the organization 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."[21] The Court has noted that organizations must be afforded "sufficient flexibility" in the evidence that they are permitted to submit to demonstrate a likelihood of injury.[22] The principle underlying these cases is clear: nobody should be required to publicly disclose their affiliation with a controversial organization if it will result in physical or mental harm.

The Lobby Act, JCOPE's enabling statute, states that Source of Funding disclosures "shall not apply to" registered 501(c)(4) organizations where:

> [The (c)(4) organization's] primary activities concern any area of public concern determined by the commission to create a substantial likelihood that application of this disclosure requirement would lead to harm, threats, harassment, or reprisals to a source of funding or to individuals or property affiliated with such source, **including but not limited to the area of civil rights and civil liberties and any other area of public concern determined pursuant to regulations promulgated by the commission to form a proper basis for exemption on this basis from this disclosure requirement.**[23]

The statute's legislative history further says that:

> The bill expressly identifies the area of "civil rights and civil liberties" as one area in which organizations are expected to qualify for such an exemption in the Joint Commission's regulations. **Among other issues included in this area, 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.**[24]

Every day, the NYCLU engages in activities to advocate on behalf of individuals and communities across New York State. In the daily pursuit of its mission, the NYCLU seeks to prohibit discrimination on the basis of race, gender, sexual orientation, ethnicity, or gender expression; to

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[21] *Brown et al. v. Social Workers' '74 Campaign Committee*, 459 U.S. 87, 93 (1982); *see also, Citizens United v. F.E.C.*, 130 S. Ct. 876, 914 (2010). The NYCLU maintains its objection, noted in its exemption application, to the evidentiary standard being employed by the Commissioners in determining whether organizations have demonstrated that disclosures will result in harm to their donors. The Supreme Court has consistently stated that the appropriate standard is whether organizations can demonstrate a "reasonable probability" that disclosure will result in harm. JCOPE's requirement that applicants demonstrate a "substantial likelihood" of harms deviates impermissibly from the constitutionally required standard.

[22] *Socialist Workers*, 459 U.S. at 93.

[23] N.Y. Leg. Law. § 1-j(c)(4)(ii) (emphasis added).

[24] 2011 NYS Legislative Bill and Veto Jackets, S:5679, L 2011, ch 399, at 10 (2011) (emphasis added).

expand rights for non-citizens; to reform the criminal justice system and uphold the constitutional protections for those impacted by the criminal justice system; and to safeguard the free speech rights of all New Yorkers, including those whose message the majority does not agree with, and those perceived to have a diminished right to speak. The contest over the exercise of civil rights and civil liberties often pits the interests of an individual or a minority group against a far more powerful majority.

It is therefore not surprising that the NYCLU's work frequently becomes a matter of controversy that arouses strong feelings among members of the public, and occasionally results in threats to people affiliated with the organization. In support of its application for an exemption from the JCOPE Source of Funding disclosures, the NYCLU submitted a ten page document which included extensive examples of specific acts of harassment and violence directed at NYCLU staff members, and at persons associated with ACLU affiliates around the country. The evidence submitted by the NYCLU demonstrated that when certain individuals know where to find people affiliated with the NYCLU, those individuals harass and threaten people affiliated with the NYCLU.

When aggressive acts are directed against individuals associated with the NYCLU such acts occur because of the controversial issues with which the NYCLU is involved. To suggest that those who have intense animus against the NYCLU will act on that animus towards employees and members of the NYCLU (JCOPE does not question or challenge the factual record submitted by the NYCLU) but will not act on that animus against the NYCLU's financial donors is simply to ignore the reality as set out in the factual record the NYCLU submitted to the Commission. The Commission would seem to require a demonstration of past harm to the NYCLU's donors before granting the organization an exemption from the Source of Funding disclosure rule. But the NYCLU has never published the personal information of its donors out of the very concern that led the Legislature to require an exemption from such a disclosure requirement: to do so would place those individuals at serious risk of harm, and that this threat of harm would not only jeopardize the safety of these individuals but would also seriously compromise their constitutional rights of association and belief.

Following are examples of threats and harassment directed at individuals associated with the NYCLU. These incidents appear, with further context and factual detail, in the NYCLU's application to JCOPE seeking an exemption from the Source of Funding disclosure requirements.

- An NYCLU staff member involved in a case defending the Ku Klux Klan's free speech rights received multiple threatening calls at their home, was harassed with ringing door-bells all hours of the night, and ultimately had their apartment building broken into in an attempted home invasion. The apartment building and NYCLU office building were subsequently required to hire 24-hour security to protect the staff member and other inhabitants of the buildings.
- An NYCLU client had a cross burned on their front lawn, after speaking publicly about their intent to host an event for LGBT teenagers at their youth center.
- An NYCLU member who had been a vocal opponent of an ordinance to ban law signs had their car tires deflated, and had the phrases "F--- u ACLU" and "die fag" painted on their car while it was parked in their front driveway.

- NYCLU Chapter Offices around the State and the NYCLU main office in Manhattan have received bomb and death threats.
- NYCLU staff members have been forced to remove their names from their mailboxes and request removal from the phone book to avoid harassment at their homes.

In addition to acts of harassment and violence against NYCLU staff members, the NYCLU also submitted specific incidents of threats to staff at other ACLU affiliates across the country. The evidence included examples of bomb threats and actual bombing attempts, regular harassment, and even the assertion that staff would "end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit."[25]

JCOPE's Source of Funding regulations are novel, and the NYCLU has never before been required to publicly share extensive personal information about its financial supporters. It is therefore impossible for the NYCLU to submit evidence that its financial supporters have been the target of similar harassment, when their personal information and NYCLU affiliation have not been made public. However, the evidence submitted by the NYCLU clearly demonstrates that if there is public disclosure of persons who fund the NYCLU's work, it is likely that harassment or threats will be directed, at some point, to one or more of the funders.

C. The Commission failed to meaningfully consider the NYCLU's application for an exemption from the Source of Funding disclosure provisions.

It is difficult for the NYCLU to respond to the Commission's denial of its application for an exemption from the Source of Funding reporting requirements when the NYCLU was not provided with any specific reasons for its rejection. The denial letter (included as Exhibit B) simply states that the NYCLU's application "did not present sufficient evidence" that compliance would create a "substantial likelihood" of harm to the NYCLU's donors, and that the evidence presented was "too remote and speculative." As discussed above, the NYCLU submitted ten pages of specific, recent examples of NYCLU staff and members being harassed, threatened, and targeted at their homes and businesses when those addresses were publicly available.

It is not surprising that JCOPE failed to provide the NYCLU with specific reasons for the denial: a review of the Commission meetings at which the NYCLU's exemption application was considered reveals that the substance of the application was never even discussed by the Commissioners.[26] The Commissioners never talked about the evidence submitted by the NYCLU; they made no findings and offered no analysis regarding the multiple examples of harassment against NYCLU staff and affiliates. In fact, the entire public review of the NYCLU's application was comprised of comments by a single Commissioner who stated that, in that Commissioner's opinion, the NYCLU *had* supplied compelling circumstantial evidence that compelled disclosure of donors' personal information would lead to their harassment.[27] At the subsequent JCOPE meeting, despite

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[25] *See* Exhibit A at 3-10.

[26] *See, generally,* Video of the Jan. 28, 2014 Commission Meeting (*available at* www.jcope.ny.gov/public/webcast/20140128_JCOPE.wmv); Video of the Feb. 18, 2014 Commission Meeting (*available at http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv*).

[27] *See,* Video of the Jan. 28, 2014 Commission Meeting (*available at* www.jcope.ny.gov/public/webcast/20140128_JCOPE.wmv).

multiple requests by Commissioners that there be public statements about the merits of the applications for exemptions, there was no further discussion.[28]

In their dissent to the NYCLU's denial, Commissioners Casteliero, Jacob, and Judge Roth, observed that "there was no meaningful discussion by the Commission of the evidence proffered by the applicants" and that the Majority "ignored a dissenter's request to consider the threats and acts of hostility directed at the officers, employees, volunteers and affiliates of the applicants in determining whether the required demonstration of substantial likelihood of harm had been met."[29]

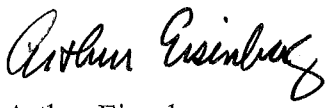
D. Conclusion

In support of its request for an exemption from the disclosure provisions in the Source of Funding regulation, the NYCLU submitted to JCOPE a substantial factual record. The record indicated there is a substantial likelihood that NYCLU donors would be subjected to harm, threats and harassment if information identifying them were made public by the State.

Those commissioners who voted to deny an exemption to the NYCLU simply ignored the factual record; they dismissed the evidence out of hand. And in failing to exercise a good faith effort to provide a basis in law and fact for its determination, the commissioners of JCOPE reached a result that is clearly erroneous.

In the interest of protecting the NYCLU's financial supporters from threats and harassment, the NYCLU respectfully requests that the decision to deny its exemption from the Source of Funding disclosure requirements is reversed.

Sincerely,



Arthur Eisenberg
Legal Director

Donna Lieberman
Executive Director

Robert Perry
Legislative Director

[28] Video of the Feb. 18, 2014 Commission Meeting (*available at* http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv).

[29] Exhibit B at 2.

Exhibit A: New York Civil Liberties Union Application for Exemption from Source of Funding Disclosure Requirements

NYCLU
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Sent by email

December 3, 2013

Robert Cohen
Special Counsel and Director of Ethics and Lobbying Compliance
New York State Commission on Public Integrity
540 Broadway
Albany, New York 12207

Re: Request for exemption from the disclosure requirements in the revised source-of-funding regulations adopted by the Joint Commission on Public Ethics [1]

Dear Mr. Cohen:

On October 23, 2013, the Joint Commission on Public Ethics (JCOPE) adopted amendments to recently promulgated regulations that require an organization that engages in lobbying activities to disclose the names, addresses, employers and contribution information regarding any contributor who provides at least $5,000 to such an organization.[2] We write on behalf of the New York Civil Liberties Union (NYCLU) seeking an exemption from the regulations' public disclosure provisions related to source(s) of funding.

The revised regulations provide that the Commission "shall grant an exemption to disclose all Sources of Contributions to a Client Filer if (i) the Client Filer has exempt status under I.R.C. §501(c)(4); and (ii) the Client Filer shows that its primary activities involve areas of public concern that create a *substantial likelihood* that disclosure of its Source(s) will cause harm, threats, harassment or reprisals to the Source(s) or individuals or property affiliated with the Source(s)."[3] (Emphasis added.)

In requesting this exemption from the source-of-funding disclosure provisions, we state our objection to the amended standard by which the Commission will determine eligibility for such an exemption. The Supreme Court has long held that the appropriate standard for exempting organizations from the requirement to publicly disclose information regarding their financial

[1] 43 N.Y. Reg. 18-19 (Oct. 23, 2013) (JPE-43-13-00021-EP) (Amendment of Part 938 of Title 19 NYCRR).
[2] *Id.*
[3] *Id.* at § 938.4 (b)

donors is a showing that there is a "reasonable probability" such disclosure would cause harm, threats or reprisal to those donors or to their property.[4] It is this standard that was adopted by the commissioners of JCOPE in a regulation adopted on April 10, 2013. [5] The newly amended regulation, however, adopts a heightened standard – "substantial likelihood" of harm or harassment – as the basis for granting such an exemption. We believe this is in error both as a matter of constitutional law and public policy; and the NYCLU reserves the right to appeal a ruling by JCOPE that is made pursuant to this standard.

Having stated this objection, we set out below a legal analysis and factual record that demonstrates the public disclosure of information as required by the source-of-funding regulations would, in fact, create a substantial likelihood of harm to the NYCLU and to its members and donors.

The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. The NYCLU is organized under the I.R.C. as a §501(c) (4) organization. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobby Act,[6] and the NYCLU reports as a lobbying "client."[7] The organization has approximately 40,000 members statewide, with offices in Buffalo, Rochester, Syracuse, Albany, Hempstead (Nassau County), and Central Islip (Suffolk County).

The contest over the exercise of civil rights and liberties often pits the interests of an individual or a minority group against a far more powerful majority, which not infrequently is aligned with government entities that wield the power and authority of the state. It is in the very nature of this contest that strong opinions and feelings are aroused. To advocate on behalf of individuals' rights and liberties is to engage in what is often a highly public controversy.

It is expressive advocacy of this nature that legislators sought to exempt from the public disclosure regulations promulgated pursuant to the Public Integrity Reform Act of 2011 (PIRA).[8] The sponsor's memorandum accompanying that legislation explicitly states that "civil rights and civil liberties" organizations, among others, "are expected to qualify for such an exemption in the Joint Commission's regulations."[9] The commentary on the bill, as provided by the sponsoring legislators, elaborates on this point: "[O]rganizations 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."[10]

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[4] *Buckley v. Valeo*, 424 U.S.1, 88 (1976).
[5] 35 N.Y.Reg. 17-19 (April 10, 2013) (JPE-37-12-0010-E).
[6] N.Y. Leg. Law 1-a, *et seq.*
[7] *See* N.Y. Leg. Law § 1-j(4).
[8] Chapter 399, Laws of 2011
[9] Legislative introduction, A.8301 (2011). (See Sponsor's memorandum, Part B, Section 1: "Disclosure by Lobbyists . . .")
[10] *Ibid.*

The substantive issues of law and policy identified in the sponsors' commentary on the proposed Public Integrity Reform Act read as if they had been excerpted from the NYCLU's mission statement. The NYCLU's advocacy agenda, in support of this mission, is well documented in the organization's annual reports.

Even a cursory review of news reports will confirm that the aforementioned issues often generate fierce, and violent, controversy. Such controversy is driven by deeply held opinions and intense emotions, which often lead to overt acts of hostility and aggression towards the NYCLU and its staff.

This is in the very nature of the advocacy in which the NYCLU engages. Following are a number of examples:

- In 1999, the NYCLU filed a lawsuit on behalf of a group affiliated with the Ku Klux Klan, an organization widely known for its hostility directed at certain minority groups. The suit challenged a state law banning more than two individuals wearing masks from congregating in public. The NYCLU argued that the ordinance violated First Amendment rights of expression and association. Individuals and groups opposed to the plaintiff's ideology began protesting against the NYCLU for its decision to litigate the case.

  Protests against the NYCLU escalated as the case progressed. NYCLU staff affiliated with the case became the targets of threats, harassment, and, on one occasion, an attempted home invasion. For example, an organization found the home address of a staff member on the case, and posted it to the group's website. This individual began receiving threatening phone calls at home. Unknown individuals rang the staff member's door buzzer at all hours of the night. Several members of the group entered this individual's apartment building and tried to break into the staff member's apartment. A neighbor called the police who chased the men out of the building.

  In December 2002, the group held a protest at the staff member's home and the building was obliged to hire security guards for the duration of the case to protect residents from any further problems. These activities made it necessary to hire private security guards to protect NYCLU staff for the duration of the case. During this period, the staff member, fearful for the safety of family members, would not enter or exit the apartment building with family members.

- The same group that targeted NYCLU staff during the litigation related to the ban on wearing of masks also publicly announced efforts to target a high-level NYCLU official during the same period. However, the NYCLU official had an unlisted home telephone number and the group failed to locate the official's home address. The official nonetheless felt compelled to remove their name from any visible listings in their apartment building directory and mail boxes.

  Every year, this NYCLU official receives a half dozen or more email messages or letters that are of a threatening nature. For a number of years, in the Christmas season, this official and the NYCLU staff receive dozens of greeting cards and letters reviling the

organization and, in some cases, offering prayers for the demise of the organization, which is typically characterized as God-less or satanic. This official was likewise the recipient of hostile and belligerent communications as a result of the organization's support for the establishment of a new mosque near the former site of the World Trade Center.

- On a daily basis, the NYCLU's seven regional offices across the State are engage in advocacy on behalf of minority groups, and represent people expressing unpopular positions within their communities. The NYCLU employees who staff these offices, as well as local NYCLU members, have actively engaged in efforts to promote the rights of religious minority groups, including Muslim communities in the wake of the September 11th attacks; the rights of communities of color in predominantly white portions of upstate and central New York; and the freedoms of expression and association of gay and transgender teenagers.

The directors of the NYCLU's chapter and regional offices and their local NYCLU members have been subject to harassment and threats as a direct result of these efforts. For example, in June 2009, an NYCLU client in Sherburne, N.Y., was threatened with a cross burning on his lawn after he publicly suggested the possibility of hosting a night for gay teenagers at his youth center, an event which the NYCLU was supporting his right to hold.

In 2007, the NYCLU's Central New York Chapter Director and an NYCLU member were opposing a proposed town ordinance that would ban all lawn signs. After several months of attending town meetings and testifying against the proposed lawn sign ban, the NYCLU member had his car tires deflated, and had the phrases "F--- u ACLU" and "die fag" painted on his car while it was parked in the driveway at his home. The member also received a ransom-style letter with a death threat. After this incident, the chapter director and the NYCLU member had to be escorted by law enforcement in order to attend the town hall meeting where the lawn sign ban was ultimately voted on. These are just a few of many other times when NYCLU members have been threatened with violence in connection with their public affiliation with the NYCLU.

- S (who prefers not to have his name identified in this document) answers telephone calls made to the main number at the NYCLU's New York City office. He responds to general inquiries and he takes information from individuals regarding alleged civil liberties violations. He receives many calls from individuals angry with the advocacy of the NYCLU or other ACLU affiliates around the country. S has been employed with the NYCLU for thirty-one years, during which time he has received approximately six death threats or threats of physical assault while at work. In one instance, a caller stated that he would come to the NYCLU's offices and "go postal." On another occasion a caller said he would come to the building, wait for S to emerge, and attack him. On several occasions, S has received suspicious packages at the front desk, which required building security agents to remove the packages for inspection with an X-ray device.

In order to protect himself, S uses a pseudonym when conversing with those who call the NYCLU to report a civil liberties violation or to complain about a position taken by the

NYCLU. In order to protect his identity, he does not allow reporters who attend news conferences at the NYCLU offices to photograph him at his desk. And for this reason his actual name does not appear on the NYCLU's web site. He takes these precautions out of concern that members of the public could use this information to carry out the threat of an attack against him.

- The director of the NYCLU's Western Regional office has received death threats on three occasions, in response to the organization's advocacy work in the Buffalo area. The first of these threats was made in 2000 by an individual who told the executive director in a phone call, "If I catch you, I'll kill you."

The second death threat – to bomb the NYCLU's office in Buffalo – was made in the period shortly after September 11, 2001. Police had directed an individual to remove from his van a sign that read, "Allah sucks." The individual complied; later he called the NYCLU, claiming his First Amendment rights had been violated. The NYCLU's director explained that there was no longer a controversy because the man had complied with the police order. He responded with a voice-mail message threatening to bomb the NYCLU's offices.

The third death threat against this employee also involved detonation of a bomb at the NYCLU offices. In 2003 the anti-abortion group Army of God threatened to bomb the NYCLU's Western Regional office and a women's health clinic. Both offices were located in Buffalo. A few years earlier Barnett Slepian, a physician who provided abortion services in Buffalo, had been murdered outside his home.[11] In 2003, Dr. Slepian's killer was on trial for the crime. Members of the Army of God came to Buffalo to show their support for the murderer, and to condemn the supporters of abortion rights – among whom the NYCLU and women's health clinic were prominent.

- In 2013, the NYCLU published notification regarding certification of a prospective class of plaintiffs in litigation charging that legal services to indigent defendants often failed to meet constitutional standards. In response, one individual sent a letter to the NYCLU that was addressed, "Dear Bloodsuckers." The author of the letter exclaimed, "F--- you---you bastards are just trying to tear down society, and acting pious all the time." The letter demanded, "Who pays for this bulls--t?"

- In 2007, a man dressed in a black robe would regularly appear at the NYCLU's offices in lower Manhattan – which is also the location of the national office of the ACLU. The man marched outside the building, waving signs denouncing the NYCLU and ACLU as "dogs" and "Jews." He also maintained a website with claims that the NYCLU and ACLU were parties to a broad Jewish conspiracy. On this website he posted photographs of several ACLU and NYCLU staff and clients.[12]

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[11] http://www.prochoice.org/about_abortion/violence/james_kopp.html. David Staba, "Abortion Foe who killed doctor is sentenced to 25 years to life" NYTimes (May 10, 2003), http://www.nytimes.com/2003/05/10/nyregion/abortion-foe-who-killed-doctor-is-sentenced-to-25-years-to-life.html?ref=barnettaslepian&gwh=4011064C66A9222C06DB5C58E6C7D613.

[12] Brother Nathanael's website is available at http://www.brothernathanael.com/index.php. A picture of him at the NYCLU and ACLU office in New York is available at http://www.flickr.com/photos/nickcalyx/800628902/. A

- In January of 2011, the director of the NYCLU's chapter office in Rochester, New York, received a series of emails from an individual who had contacted the office to complain about the local court system. The hostility expressed in these emails intensified over time; as it did, the NYCLU seemed to become part of the problem. The last in this series of emails included this comment: "this government is the enemy and people better start realizing that sooner than later. They better drive around in bullet proof cars. [...] Best of luck in life. I'm buying a weapon I can find fast. I suggest you do the same."

These examples of harassment and intimidation are not extraordinary, or even unusual, events in the course of the NYCLU's work. They represent, unfortunately, the volatile nature of public discourse when issues of civil rights and civil liberties are in dispute.

As the New York State affiliate of the American Civil Liberties Union, the NYCLU is often implicated in controversies and conflict related to the exercise, or suppression, of civil liberties that arise anywhere in the United States. (See, attached, Supplemental Statement of Facts.)

The phenomenon of retaliatory animus toward the NYCLU is inherent to the advocacy the organization pursues. And as the Supreme Court has observed, a government requirement that an organization (such as the NYCLU) disclose the identity and personal information of financial supporters can compromise that mission by "seriously infring[ing] on privacy of association and belief guaranteed by the First Amendment."[13]

The federal court for the Southern District of New York has held that a statutory reporting scheme requiring "political committees" to make public reports of information related to receipts and expenditures, including the names and addresses of contributors, imposed "excessive restraints on the exercise of First Amendment rights. . . ."[14] The ruling includes what is, in effect, a judicial finding that the required source of funding disclosures will cause direct harm to the staff and members of the NYCLU and, more broadly, to the First Amendment rights of others who advocate on behalf of New Yorkers' civil rights and civil liberties.

> Defendants admit that at least five of the NYCLU's approximately 40,000 members have been subjected to community hostility after their association with plaintiff had become known. This, admittedly, was sufficient to deter these persons from associating with plaintiff. Based on the above facts . . . [p]laintiff has demonstrated, as required by the Supreme Court in *Buckley [v. Valeo]*, 424 U.S. at 74, that there is a "reasonable probability that the compelled disclosure of a (group's) contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[15]

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collage that includes a picture of NYCLU legal director Art Eisenberg and an interview in which Brother Nathanael discusses his protest of the NYCLU and ACLU is available at http://www.realjewnews.com/?p=18. A collage with a picture of ACLU/NYCLU client Edie Windsor and ACLU legal director Steven Shapiro is available at http://www.realjewnews.com/?p=835.

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

[14] *NYCLU v. Acito*, 459 F.Supp 75 (1978)

[15] *Id.* at 88 (footnote omitted).

In reviewing this request for an exemption from the disclosure provisions of the source of funding regulation, the NYCLU urges the members of the Commission on Public Ethics to consider the underlying rationale that informs the New York State Legislature's and the Supreme Court's adoption of rules and standards that protect organizations engaged in promoting civil rights and civil liberties from disclosing information about donors and supporters.

It is well settled in Supreme Court jurisprudence that the right to petition the government to take a position on proposed legislation is among the freedoms protected by the First Amendment.[16] In a representative democracy "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[17]

And to require that the NYCLU (and similarly situated organizations) disclose personal information of donors and supporters is to subject those individuals to risk of harm, threats, harassment and reprisal. This is an unwarranted risk, and an unnecessary one. It is a risk that we ask the Commission to eliminate as regards the NYCLU by providing the organization an exemption from the public disclosure requirements.

We believe that, at this juncture and on the basis of this submission, including the attached supplemental statement of facts, the NYCLU should be granted the exemption that we seek here. I declare that the information contained in this application is true, correct, and complete to the best of our knowledge and belief. However, if the Commission regards this submission as inadequate for any reason, we would be prepared to supplement further our legal and factual presentation.

Thank you for your consideration of this matter.

Yours sincerely,

Donna Lieberman
Executive Director

Robert Perry
Legislative Director

Arthur Eisenberg
Legal Director

[16] *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).
[17] *Id.* at 137.

Supplemental statement of facts in support of the NYCLU's request for an exemption from the source-of-funding disclosure requirements

December 3, 2013

The facts presented in the foregoing letter, to which this supplement is attached, describe incidents involving NYCLU staff members and the organization's non-staff members and supporters who have been the target of threats and harassment as a direct consequence of their affiliation with the NYCLU and its advocacy on behalf of civil rights and civil liberties.

With this supplemental statement of facts, the NYCLU provides further evidence of the threats and harassment that are often directed at the organization's employees, clients and supporters. We do so in the interest of providing the members of the Commission with a deeper understanding as to the heightened risk of harm that would be created if the NYCLU were required to make public the personal information of the organization's supporters.

It has been recognized that controversial organizations seeking exemptions from disclosure obligations under *Buckley v. Valeo*,[18] and under court rulings that develop the legal standards articulated in *Buckley*,[19] are permitted to rely upon their own organizational experiences as well as those of comparable organizations. We follow those precedents here.

The NYCLU is the New York affiliate of the American Civil Liberties Union. There is an ACLU affiliate in every state, and in Puerto Rico. The ACLU affiliates pursue a common mission – upholding individual rights and liberties. For that reason the staff of the ACLU's state affiliates report similar experiences regarding threats and reprisal that follow from this type of advocacy. In this sense all ACLU affiliates are similarly situated.

It is also the case that state affiliates often become the representation of the national ACLU, particularly when the national organization is involved in controversy. For example, should the ACLU's national office bring widely publicized litigation on behalf of an individual in California or Florida, personnel with the state affiliates throughout the country become the representatives, and spokespersons, for the ACLU. That is, local staff members become the face of a national controversy. To the general public, the local affiliate is the ACLU. And to the extent the ACLU is associated with a controversial or provocative issue, people will often direct their support, or rage, at the local affiliate.

We ask that JCOPE consider this institutional dynamic in its review of the facts set out below.

- The reproductive rights programs of the ACLU and the NYCLU undertake litigation, legislative advocacy and public education with the objective of increasing access to reproductive health care, including abortion care. This advocacy, particularly as regards abortion rights, has made staff members the target of threats by anti-abortion activists. For example, a former director of the ACLU, as well as a former ACLU staff attorney and legal fellow, are listed in the "Nuremburg Files" website, which vilifies reproductive-

[18] 424 U.S. 1, 74 (1974)

[19] *See*, e.g., *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 99-102 (1982).

rights advocates as well as health care professionals involved in reproductive services.[20] The web site displays the names and locations of various doctors who perform abortions throughout the United States. Dr. Barnett Slepian, a Buffalo physician, appears on the site's list of "aborted or nearly aborted abortionists." In 1988, Dr. Slepian was murdered by an anti-abortion zealot. In 2007, the Ninth Circuit Court of Appeals ordered "Wanted" posters removed from the website because they constituted a "true threat" to the physicians identified in the posters.[21]

- A high-ranking official of the ACLU's affiliate in Iowa, received a threatening letter in June of 2013, the day after he was quoted in a newspaper article commenting on an ACLU report that addressed racial disparities in marijuana arrests. The letter stated,

"Dear Shithead [ ]:

I read with disgust your article … accusing the police of targeting the Darkies. That is nothing but a pack of lies. You're just trying to stir up trouble like your two-bit ACLU is well known for. Well, I have an ultimatum for you. Get your nasty ass out of Iowa by July 1st or end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit."

After a fictitious signature, the letter closed with: "By the way, thought of a new meaning for your groups [sic] initials which is much more fitting: Atheists Create Ludicrous Untruths."

- In October 2008, local law-enforcement officials in Weld County, Colorado, seized the business records of a local tax-preparation company. The records had been seized in an effort to identify undocumented immigrants using fraudulent social security numbers. The ACLU of Colorado ultimately represented clients of the business who filed a lawsuit challenging the seizure of their records.[22] Prior to the filing of the lawsuit, ACLU lawyers spoke out in opposition to the Weld County police actions. The ACLU staff, and people involved in the litigation, received a number of threatening and harassing communications as a result of their public comments about the police action. For example, on November 15, 2008, the plaintiff received a phone message, "Watch your step lady!" Another phone message a few days later stated, "You're a criminal. Go back to Mexico with your people. [….] I hope like heck that they run your butt back over the border. I don't care if you're an American citizen or not, you need to go back where they're coming from." The ACLU received similar messages as well, including this email on January 14, 2009, "Hey Retards! […] You people need to move away, somewhere very far away, like deep into Mexico . . . Kiss off, a-holes!" The judge in this case ruled from the bench that the risk of retaliation and harassment directed at the clients of the tax preparation business was so great that they could proceed in the litigation as anonymous "John Doe" plaintiffs.

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[20] Nuremburg Files, http://www.christiangallery.com/atrocity/aborts.html.

[21] *Planned Parenthood v. Amer. Coalition of Life*, 290 F.3d 1058 (9th Cir. 2002).

[22] *In Re Search of Amalia's Translation and Tax Service*, summary and filings available at http://aclu-co.org/case/re-search-amalias-translation-and-tax-service.

- In response to advocacy promoting LGBT rights, the ACLU of Oklahoma was sent a hostile music video that intercut pictures of activists with images of a fire.[23] The video was delivered with a message: "In watching the link to [the] song/video, understand that though the courts may give you a false sense of victory, soon you will receive the treatment that is being applied in France. A prayer has gone out against you. It is only a matter of time. You are unnatural. When you play with fire, you will get burned. You are forcing your disgusting, vile, corrupt, and immoral lifestyle upon people who soundly reject it, and for that you will ultimately suffer consequences. So be prepared to defend yourselves for the actions you take. You can never say that you were never warned!"

As recently as last week, the ACLU of Oklahoma continues to receive threats to the safety of their staff. On Friday, October 18, 2013, the ACLU of Oklahoma received a bomb threat in the form of a voicemail. The caller asked:

> Are y'all part of the same ACLU that sued the [unintelligible] school district in Ohio because they had a picture of Jesus?...That's a bunch of goddamn bullsh---. You know what? Maybe I should go up there and bomb your goddamn place, you mother f---ers. Pissing people off. Mother f---ers.

- In July 2010, a man named Byron Williams loaded his car with guns and body armor. He then headed for San Francisco with the intention of killing employees at the offices of the ACLU of Northern California and at the offices of the Tides Foundation, a philanthropic organization that supports environmental preservation and other social justice issues.[24] Before Williams reached San Francisco, police pulled him over for driving erratically, and he engaged in a brief gun battle with the officers. After his arrest, authorities reported he told them that his goal had been to "start a revolution."[25]

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[23] The video is available at http://www.youtube.com/watch?v=BEQNianUW_E.
[24] Henry K. Lee, "Alleged gunman says he wanted a 'revolution,'" SFGate.com (July 21, 2010), http://www.sfgate.com/crime/article/Alleged-gunman-says-he-wanted-a-revolution-3180744.php
[25] Ibid.

APPLICATION REQUESTING AN EXEMPTION FROM SOURCE OF FUNDING DISCLOSURE REQUIREMENTS

NYS Joint Commission on Public Ethics
540 Broadway, Albany, NY 12207
518-408-3976/jcope@jcope.ny.gov

The regulations governing a Client Filer's obligation to disclose sources of funding are contained in 19 NYCRR Part 938. These regulations provide that a Client Filer may seek an exemption from the source of funding disclosure requirements. Part 938.4 sets forth the applicable standards upon which an exemption shall be granted by the Joint Commission on Public Ethics. In addition to completing this form, please review the procedures to apply for an exemption in Part 938.5.

ALL CLIENT FILERS SEEKING AN EXEMPTION TO THE SOURCE OF FUNDING DISCLOSURE OBLIGATIONS MUST FILL OUT THIS FORM.

Name of Client Filer Requesting Exemption: New York Civil Liberties Union

Name of Individual Authorized to File Request: Donna Lieberman

Title: Executive Director

Telephone Number: (212) 607-3300

Address: 125 Broad St. #19
New York, N.Y. 10004

E-Mail Address: info@nyclu.org

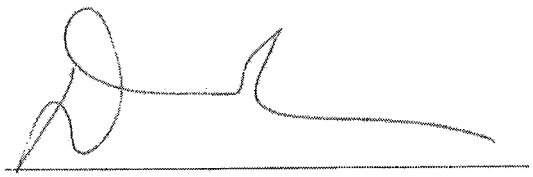
1. Client Filer is an IRC §501(c)(4) organization seeking an exemption from disclosing all Sources pursuant to 19 NYCRR Part 938.4(b), which requires a showing that the Client Filer's "primary activities involve areas of public concern that create a substantial likelihood that disclosure of ... its Sources will cause harm, threats, harassment or reprisals to the Sources or individuals or property affiliated with the Sources." X
2. Client Filer is not an IRC §501(c)(4) organization and is seeking an exemption for a Source, Sources, or class of Sources pursuant to 19 NYCRR Part 938.4(a), which requires a showing by "clear and convincing evidence that disclosure of the Source [or Sources] will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source [or Sources]." _____

All Client Filers must submit, *with this form*, a letter addressed to the Commission requesting an exemption and setting forth in detail why the applicable regulatory standard (19 NYCRR Part 938.4(a) or (b)) has been met.

- All information in support of the exemption request must be submitted together with the letter.
- The letter must also contain the following signed declaration: "I declare that the information contained in this application is true, correct, and complete to the best of my knowledge and belief."

All information submitted in support of an exemption will be made publicly available and discussed in the Public Session of the Commission's meeting. The only exception to this rule is information for which the Commission has granted a Client Filer's request for confidential treatment.

I declare that the information contained in this application is true, correct, and complete to the best of our knowledge and belief.



Donna Lieberman
Executive Director
New York Civil Liberties Union

12/3/13
Date

Exhibit B: Joint Commission on Public Ethics
Rejection of NYCLU Application

DANIEL J. HORWITZ
CHAIR

DAVID ARROYO
PAUL CASTELEIRO
HON. JOSEPH COVELLO
LASHANN M. DEARCY
MITRA HORMOZI
MARVIN E. JACOB
SEYMOUR KNOX, IV
GARY J. LAVINE
HON. MARY LOU RATH
DAVID A. RENZI
MICHAEL A. ROMEO, SR.
HON. RENEE R. ROTH
GEORGE H. WEISSMAN
MEMBERS

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

540 BROADWAY
ALBANY, NEW YORK 12207
www.jcope.ny.gov

LETIZIA TAGLIAFIERRO
EXECUTIVE DIRECTOR

PHONE: (518) 408-3976
FAX: (518) 408-3975

April 4, 2014

Via U.S. Mail & E-mail

Donna Lieberman
Executive Director
New York Civil Liberties Union
125 Broad Street
New York, New York 10004

Dear Ms. Lieberman:

On December 3, 2013, the New Yorker Civil Liberties Union ("NYCLU") submitted an application to the Joint Commission on Public Ethics ("Commission") for an exemption from the Source of Funding Disclosure requirements contained in in Legislative Law Article one-A §§1-h(c)(4), 1-j(c)(4) and 19 NYCRR Part 938. The Commission considered the NYCLU's application at its January 28, 2014 meeting. As it received the votes of only three Commissioners, the application was denied. Pursuant to 19 NYCRR Part 938.5(d), the Commission, by this letter, sets forth reasons and bases for the denial of the application.

By way of background, the Public Integrity Reform Act of 2011 ("PIRA") (Chapter 399, Laws of 2011) amended Legislative Law article one-A by enacting unprecedented disclosure requirements that, through increased transparency, better inform the public about efforts to influence governmental decision-making. The Source of Funding Disclosure provisions of the Legislative Law require lobbyists who lobby on their own behalf and clients of lobbyists, who devote substantial resources to lobbying activity in New York State, to make publicly available each source of funding over $5,000 for such lobbying. The purpose of these statutory provisions is clear: to provide the public with increased transparency and important information about those who seek to influence governmental decision-making.

The statute and the regulations permit entities to apply for an exemption from these disclosure requirements. The NYCLU sought an exemption pursuant to 19 NYCRR Part 938.4(b), which is available for organizations that have exempt status under Section 501(c)(4) of

the Internal Revenue Code of the United States. Under both the statutory and regulatory provisions, the NYCLU was required to show that its "primary activities involve areas of public concern that create a substantial likelihood that disclosure of its [sources of funding] will cause harm, threats, harassment or reprisals to the [sources of funding] or individuals or property affiliated with the [sources of funding]." 19 NYCRR Part 938.4(b); *see* also Legislative Law §§1-h(c)(4), 1-j(c)(4).

Pursuant to Executive Law §94(6), at least eight Commissioners must vote in favor of an application in order for the exemption to be granted. Here, the NYCLU's application failed to garner the sufficient number of votes. In the view of the Commissioners who did not support the exemption request, the NYCLU's application did not present sufficient evidence demonstrating that the NYCLU's compliance with the disclosure requirements would create a "substantial likelihood" of harm to its sources of funding (including individuals and property associated with those sources). Rather, the evidence presented was too remote and speculative to establish a substantial likelihood of harm.

Sincerely,

Daniel J. Horwitz (on behalf of himself and the following Commissioners):

Hon. Joseph Covello
Mitra Hormozi
Gary J. Lavine
David Renzi
George Weissman

Statement in Opposition

We write to explain our dissent from the denial by the Joint Commission of Public Ethics of the applications of New York Women's Equality Coalition, Family Planning Advocates NYS, and the New York Civil Liberties Union for exemption from disclosing their sources of funding.

The Commissioners who did not support the exemption requests (the "Majority") explain the denials by stating that the applicants did not present sufficient evidence to demonstrate a "substantial likelihood" of harm to its sources of funding because such evidence was "too remote and speculative."

We observe first that there was no meaningful discussion by the Commission of the evidence proffered by the applicants. In fact, the Majority ignored a dissenter's request to consider the threats and acts of hostility directed at the officers, employees, volunteers and affiliates of the applicants in determining whether the required demonstration of "substantial likelihood of harm" had been met.

Most important, however, is the Majority's narrow interpretation of the governing statute which sets an impossible standard for any applicant to meet. By stating that the applicants' evidence

is "too remote and speculative", the Majority, in effect, declares that only a showing of harm to the funding source can comply with the applicable standard. To require applicants to prove harm to its sources who to date have been unknown to those who would do them harm, is to require applicants to do the impossible and to impute to the Legislature the intention of enacting a statutory standard that is meaningless. We construe the statute to require the Commission to examine the harm, threats, harassment or reprisals that have been directed to the applicant and its employees and affiliates and extrapolate from that whether there is a "substantial likelihood" that the applicant's source of funding will suffer similar acts. There can be no other reasonable construction. When so viewed, the present applications clearly meet the statutory standard and should be granted.

Such view is consistent with the exemption the Commission previously granted NARAL. The Majority has not explained, nor can it, why these very similar applications have failed and NARAL's did not.

Finally, we are mindful of the legislative declaration in Section 1-a of increased transparency in the governmental process, but we cannot completely ignore, as does the Majority, the other legislative mandate to grant exemptions where appropriate.

Paul Casteliero
Marvin E. Jacob
Hon. Renee R. Roth
Commissioners

Exhibit C: New York Civil Liberties Union Comments on JCOPE Source of Funding Disclosure Regulations

NYCLU
NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Comments of the New York Civil Liberties Union

regarding

Joint Commission on Public Ethics
Source of Funding Regulations

February 8, 2012

The following comments are submitted regarding the Joint Commission on Public Ethics (JCOPE) Source of Funding Disclosures on behalf of the New York Civil Liberties Union. Founded in 1951, the New York Civil Liberties Union (NYCLU) is a not-for-profit, nonpartisan organization with eight chapters and 50,000 members across New York State. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobby Act,[1] and the NYCLU reports as a lobbying "client."[2] The NYCLU is thankful for the opportunity to comment on the Source of Funding Disclosures to facilitate the development of JCOPE's regulations.

I. Introduction

It is well settled that the right to petition the government to take a position on proposed legislation is among the freedoms protected by the First Amendment.[3] In a representative democracy "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[4]

Equally well established is the right to make contributions in order to advance one's beliefs, and the right of "like-minded persons to pool their resources in furtherance of common political goals."[5] However, the compelled government disclosure of personal information about individuals who make financial contributions to lobbying organizations "can seriously infringe

[1] N.Y. Leg. Law 1-a, *et seq.*
[2] *See* N.Y. Leg. Law § 1-j(4).
[3] *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).
[4] *Id.* at 137.
[5] *Buckley v. Valeo*, 424 U.S. 1, 22 (U.S. 1976).

on privacy of association and belief guaranteed by the First Amendment."[6] Any attempts to compel the disclosure of information about people engaged in protected First Amendment activities must be narrowly tailored in furtherance of a specific government interest, and must minimize any impact on protected speech and associational rights.[7]

Existing New York State law requires organizations engaged in lobbying activities to submit twice-yearly reports on the names, addresses, and compensation provided to individuals who engage in lobbying activities.[8] The Joint Commission on Public Ethics has proposed a new set of disclosure requirements which will additionally require any organization that engages in lobbying activities to disclose the names, addresses, and employer and contribution information for all contributors who have provided at least $5,000 to a lobbying organization.[9] These mandated disclosures implicate core First Amendment rights to petition the government and to advocate for or against potential government action.

JCOPE's proposed regulations raise a number of concerns. 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 JCOPE regulations require the disclosure of information on contributors to organizations that engage in lobbying, even if the contributed funds are never utilized for such a purpose. This provision is overly broad, and as a consequence, infringes upon First Amendment rights. 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. Each of these will be addressed in turn.

II. In seeking to regulate all attempts to "influence the passage or defeat of any legislation," the Lobby Act and the Source of Funding regulations extend beyond the scope of activities the government is constitutionally permitted to regulate.

As currently written, the Lobby 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. Accordingly, the regulations should be amended to include the constitutionally required, narrow definition of lobbying activities subject to government regulation.

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[6] *Buckley*, 424 U.S. at 64.
[7] *See, id.*
[8] N.Y. Leg. Law §§ 1-h(4), 1-j(4).
[9] *Source of Funding Regulations*, 13 N.Y.C.R.R. 938, *et seq.*

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."[10] 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."[11]

The New York Lobby Act is, on its face, considerably overbroad. It is quite similar in this respect to the statute that the Supreme Court in *Harriss* found to be unconstitutional.[12] The Lobby Act defines lobbying as "any attempt to influence the passage or defeat of any legislation" or any of a number of other activities aimed at influencing government actions which carry the force of law.[13] 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.

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."[14] The State Lobby Act's constitutional validity thus rests upon the grounds that it seeks to regulate *only* direct communications with lawmakers, and so long as there is "no indication that this New York legislation requires disclosure of indirect lobbying activities."[15]

The new JCOPE regulations contain no definition of "lobbying" activities which are subject to regulation. To the extent that the regulations rely on the underlying definition of "lobbying" provided in the Lobby Act, they are relying on an unconstitutionally over broad definition. The regulations 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.

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

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

[12] 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."

[13] N.Y. Leg. Law 1-c(c)(i)-(x).

[14] *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).

[15] *Id.*

III. The proposed Source of Funding Regulations are overly broad, requiring the disclosure of information 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.[16] Notwithstanding this, JCOPE'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).[17] 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 which may only incidentally support an organization's attempts to influence legislation is unconstitutionally over broad. The NYCLU therefore objects 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.

IV. In seeking the disclosure of personal information, JCOPE's regulations will undoubtedly 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."[18] Regulations which encroach upon constitutionally protected rights "must be justified by more than a showing of a mere rational or legitimate interest."[19]

The 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 Single Source Disclosure requirements may inhibit the full and free exercise of the First Amendment right to petition the government, and to associate with likeminded individuals.

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[16] *Harriss*, 347 U.S. at 622 (internal quotation mark omitted).
[17] 13 N.Y.C.R.R. 938.2 ("Amount of Contribution(s)").
[18] *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010).
[19] *Commission on Independent Colleges & Universities*, 534 F. Supp. at 494.

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."[20] Government regulation of campaign finance speech rests upon an interest in preventing any corruption which 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 which then use those funds to hire a lobbyist to take action on a variety of proposed issues. As a matter of policy, it is unclear why the government's 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.

V. The standards for granting controversial organizations an exemption from the disclosure requirements deviate impermissibly from the constitutionally mandated standard.

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 the First Amendment."[21] Therefore any government-mandated disclosures of such contributors must provide exemptions for individuals or organizations for whom disclosure could result in harassment or reprisals.[22] The Supreme Court has found that the constitution requires that organizations be granted exemptions from compelled disclosures if 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."[23] Organizations must be afforded "sufficient flexibility" in the evidence that they are permitted to offer in demonstrating a likelihood of injury from the disclosures.[24]

JCOPE's regulations provide that the Commission "may" grant an exemption from the Single Source disclosure requirements for 501(c)(4) organizations, provided that the organization "shows that its 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)."[25] This standard deviates from the constitutionally required standard that exemptions are provided whenever there is a "*reasonable* probability" of harm to contributors. Further, the "substantial

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[20] *Citizens United*, 130 S. Ct. at 903.

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

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

[23] *Socialist Workers*, 459 U.S. at 93 (citing *Buckley,* 424 U.S. at 74) (emphasis added); *see also, Citizens United v. F.E.C.*, 130 S. Ct. 876, 914 (2010).

[24] *Socialist Workers*, 459 U.S. at 93.

[25] 13 N.Y.C.R.R. 938.4(b) (emphasis added).

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 closer 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.

In order to protect the associational privacy of contributors to organizations that work on controversial issues, the NYCLU urges JCOPE to grant such exemptions upon the showing of a reasonable likelihood that the disclosure will lead to harm. As the Legislature noted in enacting the Lobby 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."[26] 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.

VI. Conclusion

JCOPE's Source of Funding Regulations implicate speech and activities at the core of the First Amendment's protections. The NYCLU encourages JCOPE to narrow its reporting requirements so that they require only the reporting of information that actually advances the State's interest in promoting transparency, without compromising First Amendment rights. The regulations should define "lobbying" activities consistent with the definition upheld by the Supreme Court: attempts to influence legislation which include direct contact with legislators or a choreographed grassroots campaign. Further, the disclosure requirements should only require reporting on contributions that are actually utilized by an organization to support lobbying activities. As a matter of policy, the NYCLU questions the mandated disclosure of personal information about contributors, given the foreseeable chilling of constitutionally protected activities, and the absence of any clear connection or relationship between such contributions and the effort to contact, or influence, elected officials. Finally, the standard for granting controversial organizations exemptions from the disclosure requirements should be amended so as to be consistent with the constitutionally necessary standard for such exemptions.

[26] 2011 NYS Legislative Bill and Veto Jackets, S:5679, L 2011, ch. 399, at 10 (2011).