



TESTIMONY OF LAWYERS ALLIANCE FOR NEW YORK
BY LAURA ABEL, SENIOR POLICY COUNSEL,
BEFORE THE JOINT HEARING ON THE PUBLIC PROTECTION BUDGET
FEBRUARY 10, 2021

This year, for the first time, thousands of nonprofit organizations relying on charitable donations to help their communities will have to make a completely redundant filing with the Department of State. These organizations already file an annual financial report with the Attorney General's Charities Bureau. This year, they have to file that exact same report with the Department of State. For these nonprofits, every penny spent on administrative tasks is one that could be better spent helping their community. There is never a good time to waste charitable funding on unnecessary bureaucratic requirements, but the ongoing pandemic makes this a worse time than ever.

This unnecessary filing requirement was imposed in last year's PP GG Article VII budget bill, and this year's budget legislation is the right place to correct it. Part UU of last year's Article VII bill was aimed at 501(c)(4) social welfare organizations. It was intended to track the flow of in kind contributions from 501(c)(3) public charities to 501(c)(4) social welfare organizations, as well as issue advocacy by certain 501(c)(4)'s. But that portion of the bill was negotiated in the last hours of the budget season, as the pandemic was closing down the state. As a result, it perhaps unintentionally also swept in the thousands, or tens of thousands, of 501(c)(3) organizations that do not make in kind contributions to 501(c)(4) organizations.

We had hoped that the Department of State would enter into an MOU with the Charities Bureau, allowing the Department of State to access charities' annual financial reports without requiring the charities to file those reports twice. The Department of State has not done that. Instead, it has set up its own filing portal, and added its own filing fees. The Bureau allows nonprofits 11 1/2 months to file, in recognition of the fact that in order to prepare the annual financial report each organization must complete federal tax forms and complete an outside audit. It also has procedures in place to protect the privacy of the nonprofits' major donors. The Department of State's newly proposed regulations do neither of those things.¹

A.1141 would eliminate the redundant filing requirement for 501(c)(3) organizations that do not make in kind contributions to 501(c)(4) organizations and protect the privacy of major donors to charitable nonprofits. That bill should be included in the one-house budgets this year. We attach a memo in support of A.1141, to supplement this brief testimony.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of

¹ See NYS Register, Feb. 3, 2021, pp. 14-16.

experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help organizations to develop and provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit New Yorkers of all ages.



2021 LEGISLATIVE MEMO

Subject: A.1141 (Paulin)
Position: Strongly Support
Date: January 28, 2021

Our organizations strongly support this bill because it would eliminate a burdensome, unnecessary filing requirement and protect the privacy of our donors.

The Unnecessary, Redundant Filing Obligation

Every year, most 501(c)(3) nonprofit organizations registered with the NY Attorney General's Charities Bureau must file their full federal tax filing with the Charities Bureau. As of January 1, 2021, those organizations have to file *the same documents* again with the Department of State.¹ This is a wholly unnecessary, redundant filing requirement. It is particularly burdensome at a time when nonprofits are trying to streamline operations to save money. This bill would eliminate the duplicate Department of State filing requirement.

The Danger to Donors' Privacy

While most of a 501(c)(3) organization's federal tax filing (known as the IRS 990) is already publicly available on the IRS and Charities Bureau websites, the IRS and Charities Bureau strictly maintain the

¹ N.Y. Exec. Law § 172-b.

confidentiality of the names and addresses of major donors reported on the 990 Schedule B.² This bill would likewise require the NY Department of State to keep this information confidential, as well as making clear that donors' identities should not be disclosed under the Freedom of Information Law (known as FOIL).

Without this bill, the current risk of public disclosure will discourage giving to nonpolitical 501(c)(3) organizations by potential donors who prefer to remain anonymous, whether out of modesty, a religious imperative, a wish for privacy, or fear of retaliation or ostracism. New York is now the only state that requires 501(c)(3) public charities to file unredacted Schedule B's with a state agency and has no law or regulations requiring or allowing that agency to keep them confidential. In contrast, New Jersey and California have strong legal protections for this information.³ This lack of legal protection for Schedule B information also stands in stark contrast to the high levels of protection that New York provides for other types of confidential information filed with the state: it is a crime for the Tax Department to disclose corporate tax filings in the absence of a judicial order, and even federal and state officials cannot access those documents except on a need to know basis.⁴

This failure to provide legal protection for the confidentiality of charities' donor information is likely unconstitutional. In 2017, the Charities Bureau defended against a constitutional challenge to its Schedule B filing requirement by reassuring a federal court of appeals that unredacted Schedule B's are exempt from FOIL disclosure and the Charities Bureau "has a 'consistent practice' of keeping Schedule B's confidential and substantial protocols in place to maintain confidentiality."⁵ The next year, that court's rejection of the constitutional challenge relied heavily on its finding that "applicable law prevents the Attorney General from publicizing lists of donors."⁶

In the Schedule B litigation, the federal court of appeals warned that "[w]e would be dealing with a more difficult question if these disclosures went beyond the officials in the Attorney General's office charged with enforcing New York's charity regulations."⁷ We are now dealing with precisely that scenario – 501(c)(3) charities will be required to file names and addresses of their major donors with the Department of State, which has no rules or laws in place to protect the confidentiality of that information. For that reason, we ask the legislature to act promptly to pass this bill.

² See 13 N.Y.C.R.R. § 96.2; 26 U.S.C. § 6104(d)(3)(A).

³ NJSA 45:17A-31 ("the names, addresses and telephone numbers of contributors and amounts contributed by them ... shall not be considered a matter of public record and shall not be made available for public inspection, shall not be used for a purpose inconsistent with [New Jersey's charitable registration law], and shall be removed from the record in the custody of the Attorney General at such time that such information is no longer necessary for the enforcement of [that law]"); 11 Code of CA Regs. § 310 ("(b) Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows: (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or (2) In response to a search warrant.").

⁴ N.Y. Tax Law § 202 & Art. 37.

⁵ *Citizens United v. Schneiderman*, Brief of the Attorney General (April 7, 2017), p. 51 n.19.

⁶ *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018).

⁷ *Id.*