March 21, 2019

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

The Honorable Brian M. Kolb
Assembly Minority Leader
LOB 933
Albany, NY 12248

The Honorable Carl E. Heastie
Speaker of the Assembly
LOB 932
Albany, NY 12248

The Honorable John J. Flanagan
Minority Conference Leader
Room 315, State Capitol Building
Albany, NY 12247

The Honorable Andrea Stewart-Cousins
Senate Majority Leader
188 State Street Room 907
Legislative Office Building
Albany, NY 12247

RE: Lobbying Proposals in FY2020 Article VII Bill

Dear Governor Cuomo, Speaker Heastie, Senate Majority Leader Stewart-Cousins, Assembly Minority Leader Kolb, and Senate Minority Leader Flanagan:

We write to express our concerns regarding Parts R, S and W of the Good Government and Ethics Reform Article VII Legislation (S1510/A2010). These Parts do not promote reform but rather would burden, discourage and even prevent small organizations from advocating with government, would jeopardize constitutional rights to free speech and to petition government, and would allow for intimidation and harassment of persons engaged in advocacy. It is unfortunate that those provisions are in a bill with many salutary provisions, including creating a system for public financing of campaigns. We urge that Parts R, S and W not be passed.

Part R

This provision would lower the threshold for which lobbyists and organizations must register and report lobbying activities from $5000 to $500 annually, effective in 2021. While we understand the value of

having reporting requirements for lobbyists and organizations which exercise significant influence through lobbying activities, we do not see how an entity that spends a penny over $500 per year seeking to advocate for or against legislation or a particular government action is exercising such influence. Yet it would be forced to pay an annual registration fee of $200 and go through the technical requirements of registering and reporting. The registration and reporting requirements could well have the effect of discouraging some of the many thousands of small organizations in New York from reaching out to government officials on a matter of significant public concern. According to the legislative declaration accompanying the state's Lobbying Law:

> The legislature hereby declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and governmental operations;

Certainly, groups with small budgets and staffs would not be able to have "the fullest opportunity" to advocate if the reporting threshold were lowered to $500.

This legislative change would not affect what we envision as "lobbyists for hire", nor would it affect large corporations and organizations. These generally are spending more than the current $5000 threshold to convey their views to government officials, and thus are subject to reporting. Rather, this bill would ensnare small nonprofit organizations and small businesses that barely lobby at all, as spending $500 over the course of a year on advocacy activities might not amount to more than one trip to Albany. In addition, many of these organizations and small businesses might unwittingly exceed such a low threshold and inadvertently violate the law's provisions, possibly subjecting them to serious penalties that far exceed the amount of lobbying small organizations actually undertake.

Part S

Part S provides that any lobbyist, public corporation or client who knowingly and willfully fails to file a lobbying report or statement on time or knowingly and willfully files false information or violates the provision against gifts to officials not only shall be guilty of a misdemeanor and subject to hefty fines, but also may be barred from lobbying for up to two years. Anyone guilty of such an offense who was convicted of any of these offenses within the prior ten years would automatically lose the right to engaging in lobbying activities for a period of two to six years. Part S also imposes or increases other penalties including substantial criminal and monetary penalties, on violations of the lobbying law.

While the State needs the authority to punish serious violations of the Lobbying Law, we are concerned that section 6 of Part S would, for the first time, give JCOPE the authority to assess fees and penalties personally against the shareholders, owners, members, partners, directors and officers of an entity that is a lobbyist or lobbying client, even if that entity is a nonprofit corporation. With only a few exceptions, state and federal law protects volunteer directors and officers of nonprofit corporations from personal liability for the corporation's debts. *See* 42 U.S.C. sec. 14503 (Volunteer Protection Act); NY N-PCL secs.

719 to 720-a. Without that protection from personal liability, few people would agree to donate their time to serve on the board of a nonprofit corporation. This provision could be triggered when a nonprofit manager forgets to file a lobbying report on time with JCOPE, leading to the imposition of financial penalties on a Board member of that nonprofit – who may not even be aware that the report was due. For this reason, the joint and several liability provision should be deleted from Part S.

In addition, Part S expands the use of a bar on lobbying to additional offenses, including the late filing of reports. Lobbying bans again would have a particularly harmful effect on small nonprofit organizations that no not hire third-party lobbyists to advocate for them but rather engage in minimal advocacy and struggle with the extensive reporting requirements for both lobbyists and clients. They often rely on a small, overworked staff with no expertise in financial reporting. It is not hard to conceive of an employee misreporting or otherwise violating the lobbying law provisions under these circumstances. The imposition of a lobbying bar would jeopardize such an organization's ability to communicate with government officials, even on an issue which directly affects the organization's survival. The problem would be exacerbated if the lobbying threshold were reduced to $500, thus requiring many more entities to register and report.

Finally, we are concerned that such an extensive bar to a client advocating for itself may run afoul of the federal and state constitutional provisions regarding the right to petition government. For example, Section 9 of Article I of the state constitution provides that:

> No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof;

While we recognize the constitutionality of lobbying bans is an open question, we believe that barring a client from advocating for its own issues with government officials raises serious constitutional issues.

Part W

Part W would establish a lobbyist code of conduct, setting forth detailed provisions governing lobbyists' interactions with clients and government officials. The provision carries potential civil penalties of up to $25,000 for a knowing and willful violation of any provision of the code (and under section 6 of Part S, the penalties could be assessed against the directors and officers of a nonprofit lobbyist). Any subsequent offense could subject the lobbyist to a ban on lobbying of up to 5 years.

This provision applies both to outside lobbyists hired by an individual or entity and to employees who lobby for an entity. Thus, it would again affect all entities, even small ones, that advocate with government. Among the provisions of the code are that a lobbyist shall (i) not represent clients with conflicting interests or interests "that appear to be conflicting" without the relevant client's written consent; (ii) not knowingly provide untruthful "or deceptive" information to a government official or client; (iii) verify the accuracy of all information conveyed to government officials and clients; and (iv)

"act in a manner that is respectful to his or her clients and to the government institutions that he or she interacts with."

We understand the desire to require lobbyists to deal fairly and behave well when conducting their activities. However, Part W imposes harsh penalties on any violation of the code, even those that are not material, and the code is rife with vague and undefined terms, terms that indeed defy definition, thus providing inadequate guidance as to how lobbyists can avoid violations. What is a "deceptive" statement? What is the "appearance" of a conflict, and appearance to whom? How does one define, sufficient to justify imposition of a fine and ban on lobbying, how a lobbyist must be "respectful" to clients and government institutions s/he interacts with? There is no time limit as to when a statement must be corrected, so a statistical figure given to an official must be updated into the indefinite future.

Furthermore, it is not clear that the rules of behavior of registered lobbyists are limited to communications made in the course of lobbying. Any communication with a client (which could include thousands of employees of a major corporation) or a government official may be covered by this code. A casual inaccurate remark to a legislator at a street fair, for example, having nothing to do with lobbying, could subject the lobbyist to a monetary penalty.

The imposition of such a vague code with penalties for noncompliance provides the opportunity for government officials to harass and intimidate those who seek to advocate with them. Even the threat of investigation of "disrespectful" behavior could be costly to a lobbyist or organization, in terms of time and legal fees, and serve as a very effective harassment tool. And we note that there are no comparable provisions guiding the behavior of a public official. If a lawmaker yells at a lobbyist or otherwise goads a lobbyist into behavior in kind, the lobbyist may face stiff penalties, but not the lawmaker. Similarly, these provisions might discourage individuals who seek to inform lawmakers about their organizations' concerns from having frank conversations with, and responding to criticisms from, government officials.

Indeed, we are not aware of any state that has taken such a draconian measure in establishing a code of conduct for lobbyists and severe penalties for violations. The language of the code and the threat of penalties for noncompliance pose serious restrictions both to free speech and the right to petition government.

. . .

In sum, we see Parts R, S and W of the Good Government and Ethics Reform Article VII Legislation as burdening the right to advocate with government officials, potentially entrapping small organizations in a maze of regulations and penalties, and limiting or barring the ability of advocates to interact with government. These provisions are being touted as the ethics reforms being advanced in this year's legislative session, but we see these provisions as making advocacy more burdensome without sufficient benefit to providing a more transparent and ethical government. We look forward to seeing legislation that will promote those objectives without burdening constitutional rights, such as greater disclosure of how state funds are spent, legislatively-established limits on outside income and banning pay-to-play for

state vendors. We hope such proposals are forthcoming and look forward to working with the Governor and Legislature to make those happen.

Sincerely,

Betsy Gotbaum
Executive Director
Citizens Union

Susan Lerner
Executive Director
Common Cause New York

Sean Delany
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Lawyers Alliance for New York

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