No. 2-12-0611

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

YOUNG AMERICA'S FOUNDATION, a not-for-profit corporation,	)	
Plaintiff-Appellant,	)	
v.	)	Circuit Number 11 L 1165
ALICE M. WOOD,	)	
Defendant-Appellee.	)	

On Appeal from the Circuit Court of the
18th Judicial Circuit, DuPage County
Judge Patrick L. Leston

BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, FREE SPEECH COALITION, INC. U.S. JUSTICE FOUNDATION, *ET AL.* IN SUPPORT OF APPELLANT

William J. Olson
Herbert W. Titus
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070
wjo@mindspring.com
Of counsel

Timothy B. Newitt
JOHNSON, WESTRA, BROECKER, WHITTAKER & NEWITT
380 South Schmale Road
Suite 102
Carol Stream, IL 60188
630-665-9600
timothy.newitt@jwbwn.com
Counsel for Amici Curiae

Mark B. Weinberg
WEINBERG, JACOBS & TOLAIN, LLP
10411 Motor City Drive, Suite 500
Bethesda, MD 20817
301-468-5500
Of counsel

Gary G. Kreep
U.S. JUSTICE FOUNDATION
923 D Street, Suite 3
Ramona, CA 92065-2355
760-788-6624
Of counsel

September 11, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

OTHER

INTEREST OF THE *AMICI CURIAE*

Amici curiae Citizens United, Citizens United Foundation, Free Speech Coalition, Inc., and U.S. Justice Foundation and the other *amici* herein, share a common interest in the proper construction of the Constitution and laws of the United States and the States.[1] Citizens United was the plaintiff in a case recently decided by the U.S. Supreme Court relevant to the issues herein, Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S.Ct. 876, 899 (2010). The Free Speech Coalition (www.freespeechcoalition.org) is a national coalition of those organizations interested in the protection of nonprofit organizations against the burden of excessive and unconstitutional restrictions and regulations. The U.S. Justice Foundation (www.usjf.net) is a national legal defense organization, *inter alia*, protecting constitutional liberties.

The complete list of *amici curiae* is as follows:

60 Plus Association
Advance Arkansas Institute
American Civil Rights Union
Americans for the Preservation of Liberty
Association for Healthcare Philanthropy
Buena Vista Regional Medical Center
Carleson Center Action Fund
Center for Science in the Public Interest
Chatham University
Christian Appalachian Project
Citizens United
Citizens United Foundation
Clare Boothe Luce Policy Institute
ClearWord Communications Group, Inc.
Commemorative Air Force
Connell & Associates
Conservative Legal Defense and Education Fund
Conway & Associates, LLC
Crown College
Defenders of Wildlife
Dubuque Mercy Health Foundation
Eberle Associates
Episcopal Community Services
Free Speech Coalition
Freedom Alliance
Friends of the Children NY
GBA Ships Florence Inc.
Habitat for Horses

---

[1] It is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Heritage Alliance
Hospice of the Red River Valley
Institute for Charitable Giving
Ivan Price Associates
Jessica White Associates
Kadlec Foundation
Keepers of the Wild
Lake Country School
Law Enforcement Legal Defense Fund
National Cancer Coalition
National Right to Work Legal Defense and Education Foundation, Inc.
Planned Giving Solutions, Inc.
Public Advocate of the United States
Robert Russell & Associates
SCA Direct
Scottsdale Healthcare Foundation
Southern Winds Equine Rescue & Recovery Center
Stetson University
The Conservative Caucus
The National Center for Public Policy Research
The National Children's Cancer Society
The Rutherford Institute
The University of Tampa
The Wheeler School
Tiger Missing Link Foundation
U.S. Justice Foundation
West Park Healthcare Centre Foundation

Most of the *amici curiae* which are nonprofit organizations are tax-exempt under either section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code. Most rely on donations, including bequests, to continue their missions and operations. The *amici curiae* which are for-profit corporations work with these nonprofit organizations in carrying out their educational programs and some help with raising support.

All *amici curiae* believe that their perspectives on the issues in this case will be of assistance to the Court in deciding the pending matter. These *amici curiae* are concerned about government encroachment on long-established Constitutional rights, and hope that this brief will bring to the attention of the Court a different perspective, discussing relevant matter not already brought to the Court's attention by the parties.

INTRODUCTION

The case below concerns an attorney malpractice claim arising out of a series of interstate transactions between Young America's Foundation ("YAF") and two Illinois residents, one of whom was Doris Pistole, the trustee or co-trustee of the Charles F. Appel and Lillian F. Appel Charitable Trust. Compl. ¶¶ 10-12 (R. V1, C4). Except for one meeting in 2003 which took place in Chicago (Compl. ¶ 18, (R. V1, C5)), the two parties engaged in conversations and discussions via telephone, e-mail, and other instrumentalities of interstate commerce related to funds promised YAF by gift from the Charitable Trust. *See* Compl. ¶¶ 15-18, 25-28 (R. V1, C5-7). In 2009, Alice Wood, the attorney defendant in this case, was engaged by Ms. Pistole to provide Ms. Pistole with legal services related to the promised bequests to YAF. YAF's malpractice claim in this case is limited solely to the services provided by Ms. Wood in relation to the trust funds that were the subject of the wholly interstate transactions between YAF and Ms. Pistole.

Defendant's motion to dismiss the complaint filed by YAF was predicated, and granted, on the basis of YAF having met the test of "conducting affairs" within Illinois — although factually and legally it did not *(see* section I, *infra*). However, this case does not turn exclusively on whether YAF was correctly required (by statute) to register. Rather, the statute as construed and applied by the court below conflicts with the power of Congress to regulate interstate commerce (*see* section II, *infra*). It also unreasonably burdens interstate commerce, which is already regulated and permitted under the Illinois Solicitation for Charity Act (*see* section III, *infra*). It also abridges YAF's First Amendment rights protected by the privileges and immunities clause of the United States

Constitution (s*ee* section IV, *infra*). Thus, for the reasons set out *infra*, YAF may not be denied access to Illinois courts to bring its claim against the defendant.

ARGUMENT

I. THE COURT BELOW ERRED IN APPLYING THE "CONDUCTING AFFAIRS" TEST FOR PURPOSES OF THE ILLINOIS FOREIGN NOT-FOR-PROFIT CORPORATION REGISTRATION STATUTE TO YAF.

Defendant argues that YAF has been "conducting affairs" within the meaning of the Illinois foreign not-for-profit corporation registration statute, and it therefore was required to register with the Illinois Secretary of State pursuant to 805 ILCS 105/113.70. Having failed to register, defendant argues YAF cannot bring this action. YAF disputed that it was "conducting affairs." YAF pointed out to the court below that "there are no cases" which discuss what it means to be "conducting affairs,"[2] and the statute does not define the term. In this situation, YAF suggested that the court could draw guidance from a comparison of the Illinois statute governing foreign nonprofit organizations and the statute governing foreign for-profit organizations, the latter of which employs the term "doing business." *Compare* 805 ILCS 105/113.70 *with* 805 ILCS 5/13.70. The court below rejected this argument.

---

[2] Plaintiff's Response to Alice M. Wood's Motion to Dismiss Plaintiff's Complaint, March 29, 2012 (R. V1, C172) (hereinafter "YAF Response"), p. 3.

A. The court below declared that YAF's activities constituted "conducting affairs," without ever defining the term.

These *amici* (like YAF) have been unable to find a single case defining what would constitute "conducting affairs" within the State of Illinois for the purpose of this statute. The lower court held that "YAF is clearly conducting affairs." Tr. Aug. 15, 2011, p. 22, ll. 21-22 (R. V1, C146). But the lower court gave no indication as to how it could be clear that YAF is "conducting affairs," when the court never defined what "conducting affairs" meant. There is no definition of "conducting affairs" provided in Illinois statutes. There is not a single Illinois case interpreting the phrase. There is no legislative history which illuminates the legislature's intent as to the meaning of the phrase. As the lower court correctly noted, there is absolutely "nothing to guide us as to what that means." Tr. Aug 15, 2011, p. 22, ll. 15-16 (R. V1, C146). Nonetheless, the court had no problem determining that YAF had met the statute's threshold criteria, while declining to define the term.

Defendant argued below that YAF's activities "were sufficient for [the court] to conclude that YAF met the standard for 'conducting affairs' in Illinois...." Motion to Dismiss of Alice M. Wood (R. V1, C95-96), January 9, 2012 (hereinafter "Motion to Dismiss"), pp. 5-6. Defendant claimed that "YAF was 'conducting affairs' within the meaning of Illinois law." Reply Brief in Support of Motion to Dismiss of Alice M. Wood (R. V1, C203), March 29, 2012 (hereinafter "Reply"), p. 2. At oral argument before Judge French, on August 15, 2011, counsel for Defendant claimed that the "conducting affairs" "standard is notably different than the standard ... about transacting business."

Tr. Aug. 15, 2011, p. 4, ll. 19-22 (R. V1, C128). The trial court apparently agreed, but neither the Defendant nor the court identified why the standard should be different.

YAF repeatedly pointed out that a logical connection could be made between the "conducting affairs" statute for nonprofits, and the "doing business" statute pertaining to for-profit corporations, since both terms are used in exactly the same context. *See* YAF Response, pp. 3, 8 (R. V1, C172, 177). Yet the lower court rejected this analogy, on the sole theory that the statutes use different language and there must be "a reason why ... the legislature ... used 'conducting affairs' versus 'doing business as.'"[3] Tr. Aug. 15, 2011, p. 22, ll. 10-14 (R. V1, C146).

It seems obvious that the term "transacting business" would be more suitable to be applied to describe the activities of a for-profit organization, while the term "conducting affairs" would be more suitable to apply to a nonprofit organization, making these two standards generally comparable. The lower court determined simply by fiat, despite the absence of a statutory definition, relevant case law, legislative history, or even similar statutes and case law from other jurisdictions regarding the meaning of the phrase, that the standards were different and that YAF met the definition for nonprofit organizations. *See* Tr. May 7, 2012, p. 23, ll. 7-8; Tr. Aug 15, 2011, p. 22, ll. 5-7 (R. V1, C146). In support of its view, the court did not even so much as reference a dictionary in order to determine the "plain meaning" of those words it was interpreting. YAF, on the other

---

[3] Ironically, Judge French had no difficulty substituting the different language and different context of "minimum contacts" as the meaning of "conducting affairs."

hand, did refer the court to the dictionary definitions of "conduct" and "affairs," which it found to be synonyms of "do" and "business." YAF Response, p. 8 (R. V1, C177).

The only statement from the court about the possible meaning of "conducting affairs" was Judge French's comment that it might be "kind of the same kind of thing" as "minimum contacts." Tr. Aug. 15, 2011, p. 22, ll. 18-19 (R. V1, C146). Of course, had the legislature intended that to be the meaning of "conducting affairs," it could have said so, since "minimum contacts" is a familiar jurisdictional term applying to both for-profit and nonprofit organizations. But the legislature did not do so.

Although different words were used, the two statutes clearly have the same intended purpose and effect, and the for-profit statute is surely a reasonable source of comparison for deriving the meaning of the nonprofit statute, especially when there is "nothing [else] to guide" the court. Indeed, these two statutes have the same purpose, using similar phrases to describe in-state activities by the two types of foreign organizations — and yet the court below found them to be completely different.

B. Illinois cases have used "doing business" and "conducting affairs" interchangeably.

Illinois courts have used the terms "doing business" and "conducting affairs" interchangeably in their opinions. In United Lead Co. v. J. W. Reedy Elevator Mfg. Co., 222 Ill. 199 (1906), the Illinois Supreme Court held that a "plaintiff was not authorized to transact business in this State," and that this "lack of authority to conduct its affairs in this State was interposed in bar of the action...." *Id.* at 202. In Apostolic New Life Church v. Dominquez, 292 Ill. App. 3d 879, 882 (Ill. App. Ct. 2d Dist. 1997), this court discussed a

situation in which a church had "filed an application for certificate of authority to conduct affairs," but then described the church as a "not-for-profit corporation doing business in Illinois under the General Not For Profit Corporation Act of 1986." *Id.* at 885. These Illinois courts, including the Illinois Supreme Court, viewed "conducting affairs" and "doing business" to be sufficiently similar concepts to be used as synonyms for each other.[4]

The Illinois official responsible for administering the laws applicable to all foreign corporations — the Illinois Secretary of State — provides only one manual which appears to give guidance for both for profit and nonprofit foreign corporations generally employing the phrase "transacting business" rather than either "doing business" or "conducting affairs." "A Guide For Qualifying Foreign Corporations" (rev'd Dec. 2003).[5] In providing guidance that seems analogous to soliciting contributions, the Secretary's publication specifies that "soliciting or obtaining orders, whether by mail or through employees or agents or otherwise..." are not considered "transacting business." *See, e.g.*, section 13.75. This administrative clarification is fully consistent with National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), reaffirmed with respect to the commerce clause in Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298 (1992).

---

[4] At oral argument on August 15, 2011, even counsel for Defendant, although arguing that the phrases were different, seemed to use them interchangeably, saying that "I think it's pretty clear we've established that [YAF] was conducting business…." Tr. Aug. 15, 2011, p. 7, ll. 5-6 (R. V1, C131). *See also id.*, p. 18, l. 19 (R. V1, C142).

[5] http://www.cyberdriveillinois.com/publications/pdf_publications/c216.pdf.

Additionally, "in a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems,' the established rule of statutory construction, is [to] construe the statute to avoid such problems unless such construction is plainly contrary to the intent [of the state legislature]." Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 626 (1993). Instead of applying this salutary rule of construction — and failing to draw upon appropriate judicial and administrative sources to determine the meaning of "conducts affairs" — the court below arbitrarily concluded that YAF's activities met an unarticulated standard.

II. THE TRIAL COURT ERRED IN DISMISSING YAF'S SUIT BECAUSE IT WAS BROUGHT TO ENFORCE A TRANSACTION THAT WAS "MADE FOR INTERSTATE COMMERCE."

The Illinois Supreme Court has determined that Illinois courts "cannot refuse to enforce" an agreement "made for interstate ... commerce." *See* Charter Finance Co. v. Henderson, 60 Ill. 2d 323 (1975). In Charter Finance, a Missouri corporation had made loans to residents in Illinois without first obtaining "a certificate of authority to transact business as a foreign corporation in Illinois," and then sued to collect on one of the loans. *Id.* at 324. As a preliminary matter, the Court determined that Charter Finance was "not engaging in business in this State," and thus, could not be required to obtain a certificate of authority. *Id.* at 327. But the Court then went further, "not[ing] also that even if Charter's activities had constituted the transaction of business, [the statutes requiring a certificate of authority] may still have been inapplicable" because "our 'statutes relative to foreign corporations cannot be given effect in such a way as to impede the Federal

authority and responsibility to insure the free flow of interstate commerce.'" *Id.* at 328. Though the Court had already ruled that Charter Finance was not transacting business, it also noted that "it is at least arguable that Charter's transactions with Illinois residents, involving the flow of money across State lines, were contracts made for interstate commerce which ... Illinois courts cannot refuse to enforce." *Id.*

In Charter Finance, the Illinois Supreme Court relied on the U.S. Supreme Court's decision in Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974), which held that a state's "refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause." *Id.* at 34. The Allenberg ruling conforms to a well-established rule that "[a] corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 291 (1921). The Allenburg line of authority is summarized in a Fordham Law Review article, which noted:

> Access to court cannot be barred ... if a plaintiff is litigating an interstate claim, such as a suit to enforce a contract for interstate or foreign commerce. Such a bar would impose an unreasonable burden on interstate commerce and therefore violate the commerce clause. [Crowe, William R., "A Proposed Minimum Threshold Analysis for the Imposition of State Door-Closing Statutes," 51 Fordham L. Rev. 1360, 1360-61 (1983).]

Even if YAF had been "conducting affairs" with respect to other transactions which would have required YAF to register to conduct affairs in Illinois, it cannot be

denied access to Illinois courts in order to enforce this transaction — a suit to require enforcement of a charitable pledge agreement — which was clearly made for interstate commerce,[6] involving the "flow of money across state lines." Charter Finance, 60 Ill. 2d at 328. Illinois has authority only over purely intrastate activity, and thus can deny unregistered corporations access to its courts only for intrastate matters. On the other hand, Illinois has no such authority over interstate commerce and, thus, cannot deny YAF the ability to litigate a matter which is in this case unquestionably interstate in purpose and effect. *See* Wenige-Epperson, Inc. v. Jet Lite Products, Inc., 28 Ill. App. 3d 320, 323-24 (Ill. App. Ct. 5th Dist. 1975). *See also* Allenberg Cotton at 31 ("interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States....").

Just as YAF cannot be required to register with Illinois in order to engage in interstate commerce, YAF cannot be required to register with Illinois in order to enforce its rights under transactions that involve interstate commerce. To penalize YAF by denying it access to the courts for interstate matters because it failed to obtain a

---

[6] In both of the cases involving the Pistole bequest pending in the court below, YAF's activities were said to constitute "conducting affairs." Tr. Aug. 15, 2011, p. 4 (R. V1, C128); Tr. May 7, 2012, Opinion, p. 4. Neither judge expressly held that the transaction at issue, a bequest to YAF through the Pistole Trust, does not involve interstate commerce. Judge Leston stated that "I hesitate to act as an Appellate Court over Judge French," and that he would "defer to [Judge French] on her findings." Tr. May 7, 2012, p. 22, ll. 11-12; p. 23, l. 16. Therefore, this *amicus curiae* brief cites to the findings of Judge French at the August 15, 2011 hearing since they are the foundation for the court's most recent (and final) order of May 7, 2012.

certification on intrastate matters would itself constitute a regulation of interstate commerce — something that Illinois may not do.

III. YOUNG AMERICA'S FOUNDATION HAS BEEN REGISTERED WITH THE ILLINOIS SECRETARY OF STATE UNDER ILLINOIS STATE REGISTRATION REQUIREMENTS FOR NONPROFIT ORGANIZATIONS SOLICITING FUNDS IN ILLINOIS.

The State of Illinois has enacted a comprehensive statutory scheme regulating and governing charitable fund raising by nonprofit organizations, whether the nonprofit organization be located and operating in-state or out-of-state: the Illinois Solicitation for Charity Act, 225 ILCS 460/1.[7] Approximately 40 states have laws of this type, often referred to as state charitable solicitation laws.[8]

The Illinois Solicitation for Charity Act was enacted November 5, 1975, (i) to regulate solicitations, such as those made by YAF, within the State of Illinois, (ii) to require registration by soliciting charitable entities with the State of Illinois, and (iii) to impose penalties on those nonprofit organizations which fail to register with the Illinois Attorney General's Charitable Trust Bureau. This Illinois statutory scheme governs charitable solicitations made by out-of-state nonprofits, irrespective of whether they meet the standard of "conducting affairs" for purposes of the Illinois foreign nonprofit corporation registration statute (805 ILCS 105/113.70). YAF originally registered under

---

[7] http://www.ag.state.il.us/charities/title14_400.html.
Implementing regulations are found at Title 14, Subtitle B, Chapter II, Part 400. http://www.ag.state.il.us/charities/solicit.pdf.

[8] This brief does not address, but does not concede, the constitutionality of state solicitation laws.

this law on December 5, 1979.[9] This is the specific statute which governs YAF's charitable solicitations at issue in this case, not the general statute which regulates the general operations of nonprofit organizations within Illinois. By soliciting funds in Illinois, YAF subjected itself to the Illinois Solicitation of Charity Act but not corporate registration which leads to a submission to the general jurisdiction of Illinois courts. An overview of the comprehensive statutory scheme underlying the Illinois state charitable solicitation law demonstrates the comprehensive and plenary role that this Illinois solicitation law was intended to have.

The primary purpose of state charitable solicitation laws is to combat fraud in deceptive charitable solicitations. Thus, the National Association of State Charitable Officers ("NASCO") whose members administer such state laws issued the following policy statement[10]:

> Most charitable organizations provide valuable services to society – services that are not provided by government or the private for-profit sector. At the same time, deceptive charitable solicitations, including fraud and misuse of charitable contributions, are significant problems in our country. Reasonable state oversight of charitable organizations and professional fundraisers can remedy or minimize such abuses while facilitating the charitable missions of those who provide needed services to our nation and communities, and by providing information and education to donors....

---

[9] YAF's Illinois Registration Number is 01010492. http://illinoisattorneygeneral.gov/charities/disclaimer.html.

[10] These Advisory Guidelines relate specifically to Charitable Solicitations Using the Internet, and are known as "The Charleston Principles." http://www.nasconet.org/wp-content/uploads/2011/05/Charleston-Principles-Final.pdf.

Along these same lines, NASCO and the National Association of Attorneys General[11] explain the basis for imposing such duties on nonprofit organizations as follows:

> Typically, states exercise regulatory authority over nonprofits based on one (or both) of two premises: the nonprofit is physically "present" in the state (e.g., has an office, owns real estate, or conducts program activities) or the nonprofit raises funds in the state.
>
> In either case, a state may require the nonprofit to "register," that is, to provide identifying information about the nonprofit and its operations.... Organizations of any size and any means may find that raising funds from the public -- even when conducted modestly from a single location -- will give rise to regulatory obligations to multiple states.[12]

The website of the Illinois Attorney General advises nonprofits: "Under Illinois law, fundraisers and charitable organizations are required to register each year with the Attorney General's office. Potential donors may then access important information such as income, expenditures, programs and administration before giving to the charity."[13]

The Attorney General provides an Instruction Sheet[14] regarding registration, which requires that all nonprofit organizations soliciting funds in Illinois must submit the following:

> 1. All fees, including the required registration fee ($15.00) or re-registration fee ($200.00), as well as any late registration fee ($200.00), annual report filing fee(s) ($15.00 each report), and/or late report filing fee(s) ($100.00 each late report) due.

---

[11] Illinois is one of the 37 states which permits use of what is known as the Unified Registration Statement developed by the National Association of State Charities Officials and National Association of Attorneys General. http://www.multistatefiling.org/. *See also* 85-page booklet explaining program. http://www.multistatefiling.org/urs_webv401.pdf.

[12] http://www.multistatefiling.org/b_introduction1.htm#why.

[13] http://illinoisattorneygeneral.gov/charities/index.html.

[14] http://illinoisattorneygeneral.gov/charities/co-1instructions.pdf.

2. "Charitable Organization Registration Statement" (Form CO-1).

3. A list of all Officers, Directors and/or Trustees including names, mailing addresses, and day time phone numbers.

4. A copy of the IRS Determination Letter or, if pending, a copy of IRS Form 1023 or 1024. If not available, provide written explanation.
5. If applicable, copies of all contracts with Professional Fund Raisers.

In addition, the Instruction Sheet states that incorporated nonprofits must submit a copy of its "Articles of Incorporation and all amendments to the Articles." *Id*.

The Charitable Organization Registration Statement referenced in the Instruction Sheet requires far more information about a nonprofit organization's organization and operations be filed than that specified on that Instruction Sheet.[15] That Registration Statement requires, *inter alia*, that the organization: (i) state the purposes for which contributions are to be used; (ii) whether and where else the nonprofit organization is registered with a governmental authority; (iii) information on the background of the organization's officers and directors; (iv) whether a professional fundraiser would be used; (v) the method of solicitations that would be used; and (vi) corporate bylaws, etc.[16] *See also* publication entitled "Illinois Charitable Organization Laws."[17]

Additionally, each year, nonprofit organizations must submit detailed financial information and information about their operations. Form AG990-IL (Rev'd 3/05).[18]

---

[15] *See* Charitable Organization Registration Statement. http://illinoisattorneygeneral.gov/charities/co-1form.pdf.

[16] Additionally, organizations in operation less than one year are required to file the Charitable Organization Financial Information Form. http://illinoisattorneygeneral.gov/charities/co-2form.pdf.

[17] http://www.ag.state.il.us/publications/pdf/charity.pdf.

[18] http://www.illinoisattorneygeneral.gov/charities/ag990-annualreport.pdf.

Moreover, as of January 1, 2010, Illinois requires each charitable organization with receipts of $25,000 to $300,000, which uses the services of a paid professional fundraiser, to have an audit, while all organizations with receipts over $300,000 must have an audit and submit audited financial statements.[19] Several financial and other penalties are detailed in this state law for violation by nonprofits soliciting funds in Illinois.

An out-of-state corporation which complies with these requirements of the Illinois Solicitation for Charity Act has done much of what is required to register to do business in Illinois.[20] Indeed, the Illinois Business Registration Application[21] requires much the same information as does the Illinois Charitable Organization Registration Statement.

Applying this state law to the matter at hand, YAF's solicitation of funds in Illinois is governed by the Illinois Solicitation for Charity Act. The penalty imposed by the court below on YAF by barring access to the doors of an Illinois courthouse for failure to domesticate itself in Illinois is an effort to use the wrong statutory scheme to regulate charitable solicitations by out-of-state nonprofits soliciting charitable contributions in Illinois. The consequence for solicitation of contributions in Illinois by an unregistered out-of-state nonprofit organization is already specified in the Illinois Solicitation for Charity Act, and even that penalty does not apply here. Those

---

[19] http://www.illinoisattorneygeneral.gov/charities/ag990-instructions.pdf. This form also explains a simplified filing option for small organizations with gross contributions and total assets of $25,000 or less during a fiscal year.

[20] *See* Standardized Registration for Nonprofit Organizations Under State Charitable Solicitation Laws (multistate instructions) supplement for Illinois which states: "Resident/Registered Agent required: Yes. May use #17 on URS." Appendix, p. 3. http://www.multistatefiling.org/urs_webv401.pdf.

[21] http://www.revenue.state.il.us/taxforms/Reg/REG-1.pdf

solicitation-related activities permitted by registered out-of-state nonprofits are governed by the Illinois Solicitation for Charity Act, are deemed permissible without registering to do business, and should not also constitute "conducting affairs" within Illinois.

There are limits to the extent that Illinois may burden out-of-state nonprofit organizations soliciting funds in Illinois. Nonprofit organizations soliciting charitable contributions in Illinois are generally aware that Illinois has enacted the Illinois Solicitation for Charity Act, and YAF is registered. However, the court below has now imposed a second layer of burdens on out-of-state nonprofits in barring access to the courthouse door for failure to comply with yet another, different, statutory burden which does not apply to in-state corporations. As such, it violates the Commerce Clause's non-discrimination principle: "No State may, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.'" Boston Stock Exchange v. State Tax Comm., 429 U.S. 318, 329 (1977), quoting Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450, 457 (1959).

The Illinois statutory scheme does not regulate evenhandedly to effectuate a legitimate public interest. Nor is its effect on interstate commerce only incidental. Rather, the scheme imposes a burden that is clearly excessive in relation to its putative local benefits. In short, it fails to meet the test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). *See* J. Nowak, R. Rotunda, & J. Young, Constitutional Law 275 (3d ed., West: 1986).

IV. AS APPLIED, 805 ILCS 105/113.70 UNCONSTITUTIONALLY ABRIDGES THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENSHIP AS SECURED TO YOUNG AMERICA'S FOUNDATION BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

YAF and the Settlor Ms. Doris A. Pistole "conducted activities" almost exclusively across state lines. YAF is committed to the "furtherance of Ronald Reagan's legacy." Compl. ¶ 2 (R. V1, C3). Headquartered in Herndon, Virginia, just outside the nation's capital, with other offices in Santa Barbara, California and at the Ronald Reagan Ranch (*see* Compl. ¶ 3 (R. V1, C3)), YAF is dedicated to "ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values." Compl. ¶ 2 (R. V1, C3). National in scope and purpose, YAF sought financial support from Americans throughout the nation, including Ms. Pistole, as evidenced by her enrollment in the "Ranch in the Sky Legacy Society," and by the recognition of her testamentary intentions on the "Freedom Wall at the Reagan Ranch" in Santa Barbara. Compl. ¶ 15 (R. V1, C5). Additionally, Ms. Pistole was contacted by telephone and e-mail from the YAF offices in Herndon.

To be sure, YAF met with Ms. Pistole on one occasion in a Chicago hotel. Compl. ¶ 13 (R. V1, C4). The discussion concerned her planned giving to YAF and the Heritage Foundation, both of which are dedicated to conservative principles implemented at the national level. Indeed, even the events sponsored by YAF in Illinois featured national political figures, not state or local ones. For example, in April 2004, YAF's

Rawhide Retreat speakers were the Hon. Edwin Meese, former Attorney General of the United States under President Reagan, Michelle Easton, who served 12 years in the Reagan and first Bush administrations, George Allen, then a U.S. Senator, Mike Pence, then a member of the U.S. House of Representatives, and Tim Pawlenty, then-Governor of the State of Minnesota. *See* Affidavit of Kimberly Begg ("Begg Aff.") ¶ 12 (R. V1, C183), Exhibit A, Plaintiff's Response to Alice M. Wood's Motion to Dismiss Plaintiff's Complaint. Among the notable speakers brought to several Illinois-based college campuses by YAF were national figures John Stossel of ABC news, Ward Connerly of California, former President George W. Bush Administration White House official Karl Rove, and nationally syndicated columnist Ann Coulter. Begg Aff. ¶¶ 19, 20, 24, and 26 (R. V1, C185-186).

It has long been recognized that "the right peaceably to assemble and to discuss [national] topics, and to communicate respecting them whether orally or in writing, is a privilege inherent in citizenship of the United States which the [Fourteenth] Amendment protects." Hague v. CIO, 307 U.S. 496, 512 (1939). In The Slaughter-House Cases, 83 U.S. 36 (1873) the Supreme Court recognized that there are two classes of citizenship, one national and one state, and that the former enjoyed privileges and immunities that could not be abridged by the latter. *Id.* at 73-76. And among those protected privileges and immunities of United States citizenship is "[t]he right of the people peaceably to

assemble ... for any thing ... connected with the powers or duties of the national government"[22]:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to [national] public affairs.... [*Id.* at 553.]

Initially, the United States Supreme Court ruled that only "[n]atural persons ... are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures...." Hague, 307 U.S. at 514. Since then, however, the "Court has recognized that First Amendment protection extends to corporations." Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S.Ct. 876, 899 (2010). After a comprehensive review of a host of cases involving the First Amendment claims of corporate entities, the Court concluded that it had "rejected the argument that political speech of corporations or other associations should be treated differently ... simply because such associations are not 'natural persons.'" *Id.* at 900. Quoting from the plurality opinion in Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 8 (1986), the Citizens United Court explained "'[t]he identity of the speaker is not decisive in determining whether speech is protected"[23]:

> Corporations and other associations, like individuals, contribute to the 'discussion, debate, and dissemination of information and ideas' that the First Amendment seeks to foster. [*Id.*]

Thus, YAF is considered within the "class of persons who are part of a national community" protected by the First Amendment. *See* United States v. Verdugo-Urquidez,

---

[22] *See* Cruikshank v. United States, 92 U.S. 542, 552 (1875).

[23] Citizens United, 130 S.Ct. at 900.

494 U.S. 259, 265 (2010). As part of that national community, it is a beneficiary of the protection afforded it by the privileges and immunities guarantee of the Fourteenth Amendment, in light of the fact that the source of its right to peaceably assemble to discuss national issues is found in the First Amendment. *See* The Slaughter-House Cases, 83 U.S. at 79 ("The right to peaceably assemble [is a] right[] of the citizen guaranteed by the Federal Constitution").

Having established that YAF's speech and assembly rights are embraced by the privileges and immunities guarantee of the Fourteenth Amendment, the Illinois statutory scheme requiring YAF to register with the Secretary of State to "conduct" its First Amendment "activities," at the risk of being denied access to the state's courts for failing to do so, is an unconstitutional abridgment of those constitutionally secured activities. As noted above, YAF has utilized the instrumentalities of interstate commerce, including travel into and out of the state, and the instrumentalities of such commerce, including telephone and e-mail transmissions, to conduct its national activities. The Illinois statutes in question place a direct burden upon YAF's utilization of those means of free ingress and egress necessary to participate fully in the nation's political life. *See* Crandall v. Nevada, 73 U.S. (6 Wall) 35, 43-44 (1867).

CONCLUSION

For the reasons set out above, the decision of the trial court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Timothy B. Newitt

By: _____
Counsel for Amici Curiae

Timothy B. Newitt
JOHNSON, WESTRA, BROECKER, WHITTAKER & NEWITT
380 South Schmale Road, Suite 102
Carol Stream, IL 60188
630-665-9600
timothy.newitt@jwbwn.com

Of counsel:

William J. Olson
Herbert W. Titus
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070
wjo@mindspring.com

Mark B. Weinberg
WEINBERG, JACOBS & TOLAIN, LLP
10411 Motor City Drive, Suite 500
Bethesda, MD 20817
301-468-5500
paladin@wjlaw.com

Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, CA 92065-2355
760-788-6624
usjf@usjf.net

September 11, 2012