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VIA E-MAIL

Molly Corbett Broad
President
American Council on Education
One Dupont Circle NW
Washington, DC 20036

Re: **Senator McCaskill's Request for ACE's Congressional Investigation Training Materials**

Dear Ms. Broad:

We understand that Senator Claire McCaskill has requested that the American Council on Education ("ACE") produce to her the PowerPoint we used in connection with a "webinar" for ACE members entitled "Briefing on Congressional Investigations and the McCaskill Survey." The Senator has also requested to see a list of ACE members who participated in the briefing. You asked whether our firm authorizes ACE to produce the copyrighted Powerpoint to the Senator. We do.

The webinar was intended to familiarize participants, particularly your member institutions' in-house lawyers, with the congressional investigations process. It was based on numerous similar presentations that our firm has made over the years to clients, as well as to the public. For example, we have several times presented a similar Powerpoint presentation to participants in the Practicing Law Institute's webinars.

The Powerpoint used for the ACE webinar was widely disseminated to those members who participated in the webinar. They were not asked to treat the presentation as confidential. We therefore assumed that members could and likely would share the presentation with others. Neither ACE nor we designated the presentation as privileged. Accordingly, ACE is free to share it with the Senator.

We note, however, that the Senator's request for the presentation is extremely unusual. Law firms like ours routinely conduct webinars concerning congressional investigations and other legal topics for clients and prospective clients, including trade associations. We are not aware of prior instances in which a congressional committee has demanded to see materials related to a training presentation about congressional investigations, and for very good reason. Congressional investigations are unusual, and many institutions have never been the target of one. In-house lawyers often are not familiar with the court cases, rules, and peculiar practices that govern them. Training webinars are an essential way for association members freely to exchange information about issues they face and to better understand when they need to seek legal advice.

Compelled disclosure of the attendance list for this webinar, in particular, presents very serious constitutional concerns. It would have the effect of identifying the subset of ACE members with a particular interest in the presentation's topic, even though those members rightfully understood that their participation in the webinar would be held in confidence by ACE. Trade associations and their members enjoy a right of free association under the First Amendment that protects their ability to communicate with one another without governmental interference. Under the circumstances presented here, compelled disclosure of the attendance list would directly undermine that First Amendment right.

The United States Supreme Court has long held that an organization's membership lists are protected from compelled government disclosure absent a "compelling" and "subordinating" government interest in their production. *See NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."). These protections also apply to an association's attendance lists. *See International Action Center v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (names of individuals who attended or planned to attend protests are "exactly the kind of information the First Amendment is designed to protect").

The constitutional safeguards against compelled disclosure of membership and attendance lists also apply in the context of congressional and other legislative investigations. Over a half century ago, the Supreme Court recognized that legislative investigations seeking to compel disclosure of membership lists have the potential to "substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights" and cannot be sustained without a "compelling and subordinating

governmental interest essential to support direct inquiry" into the membership records. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *see also Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congressional investigations cannot abridge "the First Amendment freedoms of speech, press, religion, or political belief and association").

Other courts have similarly emphasized that requests for membership and attendance lists in connection with governmental investigations may have a significant chilling effect on protected First Amendment associational activities. *See International Action Center*, 207 F.R.D. at 3 (emphasizing that disclosure of attendees would improperly "thrust [the individual attendees] into the harsh glare of the limelight"); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) (suggesting that because "government investigation itself may indicate the possibility of harassment," a more "lenient" showing is required to establish an infringement of freedom of association when a government investigation "has already focused on a particular political group or groups"); *Local 491, International Broth. of Police Officers v. Gwinnett County*, 510 F. Supp, 2d 1271, 1296 (N.D. Ga. 2007) (prospect of "compelled questioning about [] organizational activities" creates a "chilling effect" on associational rights).

In this case, if Congress were to compel ACE to produce the attendance list, ACE's members surely would be deterred from again associating with other members to educate themselves regarding this congressional investigation or, for that matter, any other topic. Such a result cannot be reconciled with the First Amendment right of free association.

As the Supreme Court explained in *Gibson*, protecting membership lists from compelled disclosure lies at "the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights." Any departure from that standard would be inconsistent with "the maintenance of those essential conditions basic to the preservation of our democracy." *Id.* at 557.

Please do not hesitate to let us know if you have any questions.

Sincerely,

Robert K. Kelner

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