



**INSTITUTE FOR
FREE SPEECH**

**BEFORE THE
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*H.R. 1: Strengthening Ethics Rules
for the Executive Branch*

TESTIMONY OF

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Founded in 2005 as the Center for Competitive Politics, the Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

Introduction

Thank you Chairman Cummings, Ranking Member Jordan, and Members of the House Oversight and Reform Committee for inviting me to testify today at this hearing on “H.R. 1: Strengthening Ethics Rules for the Executive Branch.”

As you know, H.R. 1 is a massive piece of legislation, totaling an astounding 570 pages in length and altering or uprooting longstanding rules for virtually every piece of U.S. campaign, election, and government ethics law. Of necessity, therefore, I will focus these opening remarks on just a few portions of the bill. For the benefit of this Committee and members of the public, the Institute for Free Speech has produced detailed analyses on individual portions of this lengthy bill, and I have attached those analyses to these remarks and ask that they be considered part of my prepared testimony. I will refer to them in these comments.

Despite proponents’ insistence that H.R. 1 is “For the People,” the bill is anything but. More appropriately labeled the “For the Politicians Act,” H.R. 1 would make seismic changes to the long-held ability of Americans to speak and associate with other Americans on the issues about which they are passionate. The bill would radically transform oversight over the labyrinth of laws that regulate political speech, from its historic bipartisan structure to partisan control. It would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public. Other sections of the bill would violate the privacy of advocacy groups and their supporters, stringently regulate political speech on the Internet, and compel speakers to include lengthy government-mandated messages in their communications. The proposal would also coerce Americans into funding the campaigns of candidates with which they may disagree in a system that research has proven hasn’t worked elsewhere. These issues represent only the tip of the iceberg of what’s included in H.R. 1.

The area of H.R. 1 I will focus on in my comments today is Title VI, “Campaign Finance Oversight,” and I’ll also add a few comments on other portions of this legislation.

Creating a Campaign Speech Czar and Enabling Partisan Enforcement of Campaign Finance Law

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency – the Federal Election Commission (FEC). The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.

As the late Sen. Alan Cranston (D-Ca.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern

expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”¹ That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats on the FEC were able to do it. Throwing that away is reckless and presents an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission’s legitimacy by significantly increasing the likelihood that the agency’s decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto “Speech Czar.” In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission’s Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission’s Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair’s Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president’s team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and

¹ Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

if necessary re-written) with a specific eye to the 2022 and 2026 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel’s power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel’s recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel’s recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC’s decision, if challenged in court. This “heads I win, tails you lose” approach harms respondents and biases court decisions against speakers.
- Establish a non-binding “Blue Ribbon Advisory Panel” to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public’s dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstring the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

All these changes are said to be necessary to “restore integrity” to the regulation of campaigns. In fact, nothing would more rapidly damage the FEC’s integrity than H.R. 1’s proposed restructuring. Supporters of the out party would have no confidence in the agency’s decisions, a surefire way to increase skepticism among Americans that our elections are fair and unbiased.

The attached analysis, “*Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights*,” provides a more detailed explanation of why Title VI, Subtitle A of H.R. 1, wrongly dubbed the “Restoring Integrity to America’s Elections Act,” would in fact do just the opposite.²

² This analysis is also available on the Institute for Free Speech’s website. See Bradley A. Smith, Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights, Institute for Free Speech (Jan. 31, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31_IFS-Analysis_US_HR-1_Creating-A-Partisan-FEC.pdf.

Targeting Speech by All Groups Under the Guise of “Stopping Super PAC-Candidate Coordination”

Subtitle B of Title VI is incorrectly titled, “Stopping Super PAC-Candidate Coordination.” This is truly misleading in the most literal sense of the word, because Subtitle B applies not only to super PACs, but to literally *any* American or group of Americans who seek to speak about candidates or public affairs. This should be repeated at the outset – none of the new restrictions in Subtitle B are limited in their application to “super PACs.”

In addition, Subtitle B of Title VI of H.R. 1 would place sweeping new limitations on speech about campaigns and public affairs. It would make illegal huge amounts of speech that have either never before been illegal in America, or more specifically, not been illegal since the brief reign of the Alien and Sedition Acts. It does so in a very complex, vague, and unintuitive manner. The provisions are so complex and open to so many possible interpretations that my comments may well understate the chill this portion of the legislation might place on speech. For advocacy groups, unions, and trade associations, several of the limits proposed in H.R. 1 would operate as a total ban on speech.

The goal seems to be to limit discussion of candidates to the candidates and parties themselves, at the expense of the public at large. However, even candidates are likely to find their speech severely restricted were H.R. 1 to become law.

In short, Subtitle B would raise the following concerns:

- Although this portion of H.R. 1 purports to be focused on “Stopping Super PAC-Candidate Coordination,” it is important to reiterate that the changes it would make to the law create regulations and penalties that would apply to *every group* engaged in public discussion of issues and elections, not just super PACs.
- Under this portion of H.R. 1, speakers will be silenced both literally – through direct prohibitions on speaking – and also through fear, known as chill. Many communications by advocacy groups about legislation that are made routinely today would be illegal under H.R. 1. Many (and likely the vast majority) of these communications have nothing to do with election campaigns. Rather, groups will be silenced when trying to participate in public debate on important policy issues.
- Under existing law, if a civic group, trade association, union, nonprofit, or any other type of organization wants to spend money to discuss candidates and issues, it is regulated as a coordinated expenditure only if it meets both “content” and “conduct” standards. The “content” standards are intended to allow groups to communicate with the public about issues of concern without fear of triggering federal investigations. The “conduct” standards are meant to ensure that groups are not held liable for later expenditures merely because they have general conversations with candidates and officeholders about legislative priorities and issues. H.R. 1 attacks both.

- The radical new coordination standard proposed in H.R. 1 would be interpreted and enforced by a revamped FEC, which for the first time would be under partisan control of the president. If the FEC decides that certain communications are “coordinated,” the agency could impose hefty fines on the organization.
- The “promote, attack, support, oppose” (PASO) standard that applies year-round to the content of coordinated communications is a green light for the government and even private litigants to impose huge legal costs on almost any group’s effort to communicate about politics and issues – except through the speech of candidates and parties themselves.
- H.R. 1 would replace carefully defined rules about what conduct constitutes “coordination” with a sweeping definition that would subject even minimal and mundane communication with members of Congress on legislation to investigation and possible fines and punishment.
- Using virtually any publicly available information that communicates a candidate’s suggestions on the type of message his or her campaign seeks to convey would trigger the conduct standard for coordination. Likewise, any public information regarding the campaign’s strategy would do so too. If taken literally, H.R. 1 would require potential speakers to not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone to avoid possible coordination.
- H.R. 1 would also define many groups as “coordinated spenders,” even if they never actually “coordinate” anything, but speak truly independently of any candidate or party. Incorporated nonprofits defined as “coordinated spenders” would be banned from spending money on speech. This provision is directly contrary to Supreme Court precedent. In *Colorado Republican Federal Campaign Committee v. FEC*, the Supreme Court held that the FEC could not simply presume coordination – rather, coordination had to actually be proven to exist in fact in order to be regulated.³ The reason for this is that these types of restrictions on speech are only permissible to prevent quid pro quo corruption. But, if an organization is not actually coordinating its activity with a candidate or officeholder, the danger of that corruption doesn’t exist.
- This portion of H.R. 1 is also likely to be found unconstitutional due to its overbreadth and vagueness. It requires spending to be “*entirely* independent[] of the candidate,” a standard which it says is not met if there is any “general or particular understanding” between the spender and the candidate, or “*any* communication with the candidate, committee, or agents about the payment or communication.”⁴ Even discussions of purely legislative or policy matters would be covered and subject to coordination restrictions unless there was “*no* communication ... regarding the candidate’s or committee’s campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or other campaign activities.”⁵

³ 518 U.S. 604 (1996) (lead opinion by Breyer, J.).

⁴ Please note that § 6102 of H.R. 1 includes under subsection (b) a new § 326. Accordingly, all citations to §6102(b) include a reference to this proposed § 326. *See, e.g.*, H.R. 1 § 6102(b) (*i.e.* § 326(b)(1)) (emphasis added).

⁵ *Id.* (*i.e.* § 326(b)(2)) (emphasis added).

Federal courts have emphatically rejected the idea that mere knowledge of a campaign's plans and strategies is sufficient to find coordination, even when the information was not public. Rather, "coordination" necessitates candidate control over the expenditures or, at a minimum, "substantial discussion or negotiation." That means the campaign and the spender had to discuss such things as the content, timing, location, means, or intended audience for the communication – the standards since captured in the existing law that H.R. 1 seeks to repeal and replace. "Coordination" is found only where "the candidate and spender emerge as partners or joint venturers."⁶

- Title VI, Subtitle B of H.R. 1 also imposes unconstitutionally overbroad and vague descriptions of the type of speech that government can prohibit. The Supreme Court has long held that to the extent government can regulate independent campaign speech at all, it must do so in a manner that is neither overly broad nor excessively vague in its language. In particular, to be regulated, such speech must "be susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."⁷

The PASO standard in H.R. 1 clearly fails this test. Suppose, for example, a government employees' union wished to purchase a newspaper ad saying, "Government employees should not be held hostage to a border wall. It's time to end the government shutdown." Is that a statement "attacking" President Trump? Suppose it referred to "Trump's wall." If that is a statement attacking Trump, it would meet the content standard in H.R. 1, and the union would be banned from making such speech, if it also met the newly expanded "conduct" standard discussed above.

- Like current law, H.R. 1 would make republication of campaign material a coordinated activity. However, current law provides several sensible exceptions, which H.R. 1 repeals. Failure to include such exceptions would suppress publication of useful information.
- H.R. 1 eliminates the "safe harbor" for firewalls that allow for use, in certain circumstances, of a common vendor. The effect will be to make it harder for smaller groups to hire good professional help. More specifically, this will negatively impact new and smaller grassroots organizations at the expense of established, bigger spending actors.

Subtitle B responds to a concern that, in certain particular cases, super PACs are working closely with individual candidates, by laying vast new restrictions on political speech by American citizens. It cannot be said too often: Nothing in this Title restricts its provisions to super PACs. Rather than narrowly target and respond to that specific concern, this portion of H.R. 1 will effectively silence all groups that speak about campaigns and public affairs. Consequently, many portions of Subtitle B are clearly unconstitutional under existing Supreme Court precedent.

⁶ *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) ("joint venturers" standard); *see also Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997) (standard finding "coordination" where there was "any" oral communication between spender and candidate was unconstitutionally overbroad). *See generally* Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603, 621-626 (2013).

⁷ *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

The Institute for Free Speech has analyzed these (and other) problems with H.R. 1 in “*Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of ‘Stopping Super PAC-Candidate Coordination,’*” which is attached to this statement.⁸

Violating Americans’ Privacy, Regulating Internet Speech, and Compelling Government-Sponsored Messages

Numerous other parts of H.R. 1 are also problematic, either as a matter of policy, constitutional law, or both. Specifically, H.R. 1 would:

- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission, if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials on policy issues.
- Compel groups to declare on these so-called “campaign-related disbursement” reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
- Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) “campaign” ads in FEC reports and disclaimers, many donors will choose simply not to give to nonprofit groups.
- Subject far more issue ads to burdensome disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.
- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications’ substantive message, thereby exacerbating the politics of personal destruction and further coarsening political discourse.
- Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have “reason to know” that a donee entity has made or will make “campaign-related disbursements.” This vague and subjective standard will greatly increase the legal costs of vetting grants, and many groups will simply end grant programs.
- Likely eliminate the ability of many employees to make voluntary contributions through employee-funded PACs, which give employees a voice in the political process with respect to issues that affect their livelihoods.

⁸ This analysis is also available on the Institute for Free Speech’s website. See Bradley A. Smith, *Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of “Stopping Super PAC-Candidate Coordination,”* Institute for Free Speech (Feb. 5, 2019), at https://www.ifs.org/wp-content/uploads/2019/02/2019-02-03_Smith-Analysis_US_HR-1_Coordination-Restrictions.pdf.

- Effectively prohibit many domestic subsidiaries, and perhaps most corporations with even a single foreign shareholder with voting shares, from making independent expenditures, contributions to super PACs, or contributions to candidates for state and local office, thus usurping the laws in more than half of the states that allow such contributions. (This appears to be a thinly veiled artifice to overturn *Citizens United* and to unconstitutionally accomplish by legislation what congressional Democrats failed to achieve by constitutional amendment in 2014.)
- Disproportionately burden the political speech rights of corporations vis-à-vis unions, thereby ending the long-standing parity in campaign finance law between corporations and unions.
- Increase regulation of the online speech of American citizens while purporting to address the threat of Russian propaganda.
- Expand the universe of regulated online political speech (by Americans) beyond paid advertising to include, apparently, communications on groups' or individuals' own websites and e-mail messages.
- Regulate speech (by Americans) about legislative issues by expanding the definition of “electioneering communications” – historically limited to large-scale TV and radio campaigns naming a candidate that are targeted to the electorate in close proximity to an election – to include online advertising, even if the ads are not targeted in any way at a relevant electorate.
- Impose what is effectively a new public reporting requirement on (American) sponsors of online issue ads by expanding the “public file” requirement for broadcast, cable, and satellite media ads to many online platforms. The public file requirements would compel some of the nation’s leading news sources to publish information, which is likely unconstitutional.

Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept in these files, which would increase the costs of online advertising, especially for low-cost grassroots movements. Some of these online outlets may decide to discontinue accepting such ads due to the expense of complying with the requirements.⁹ The “public file” also may subject (American) organizers of contentious but important political causes like “Black Lives Matter” and the Tea Party to harassment by opponents or hostile government officials monitoring the content, distribution, and sponsorship of their activities.

⁹ Indeed, both Google and Facebook have been forced to stop accepting certain types of ads in both Maryland and Washington State as a result of laws and regulations recently passed in those jurisdictions. See Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, BALTIMORE SUN (Jun. 29, 2018), at <https://www.baltimoresun.com/news/maryland/politics/bs-md-google-political-ads-20180629-story.html>; *Facebook to stop accepting campaign ads in Washington State*, ADAGE (Dec. 20, 2018), at <https://adage.com/article/tech/facebook-stop-accepting-campaign-ads-washington-state/316066/>.

- Make broadcast, cable, satellite, and Internet media platforms liable if they allow political advertising by prohibited speakers to slip through, thereby driving up the costs of political advertising, especially for online ads where compliance costs are relatively high.
- Impose inflexible disclaimer requirements on online ads that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.

These provisions are discussed in greater detail in the Institute for Free Speech analysis, “*Analysis of H.R. 1 (Part One): ‘For the People Act’ Replete with Provisions for the Politicians,*” which is attached to this prepared statement.¹⁰

Taxpayer-Financed Campaigns: A Record of Failure Forcing Americans to Subsidize Politicians’ Campaign Coffers

Finally, I wish to address briefly the provisions of the bill calling for the government to finance election campaigns.¹¹ H.R. 1 would provide for the government to match contributions to politicians’ campaigns with \$6 in tax money for every \$1 contribution, up to the first \$200 of a contribution. In some cases, the match can reach 9 to 1: nine dollars in tax money for every dollar donated.

As a matter of first principles, it is morally wrong that, if a donor contributes \$1 to Donald Trump’s re-election campaign – or any candidate’s campaign – it forces those opposed to that candidate to contribute \$6 or even \$9 in public tax money to support that candidate and his or her dissemination of ideas those taxpayers may find abhorrent. But beyond these first principles, the idea has problems on its own terms.

Candidates with close ties to advocacy or labor groups that have large canvassing operations will likely benefit from H.R. 1. If the bill becomes law, it’s a safe bet that these canvassing operations will be made available for hire to favored candidates. For a measure touted as insulating candidates from so-called “special interests,” that’s a major loophole.

Another likely winner under tax-financed campaigns will be candidates who take extreme positions that appeal to small, concentrated groups of voters.¹² Rather than appealing to the middle of the electorate, a viable strategy may be to “play to the base” where supporters are more passionate – and partisan.¹³ Given the low turnout in party primaries, taking extreme positions to appeal to a base may even become the dominant strategy.

¹⁰ This analysis is also available on the Institute for Free Speech’s website. See Bradley A. Smith, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf.

¹¹ For a comprehensive examination of taxpayer-financed campaign programs and their record of failure at achieving goals set by their proponents, see Taxpayer-Financed Campaigns: A Costly and Failed Policy, Institute for Free Speech (Jul. 16, 2014), at https://www.ifs.org/wp-content/uploads/2014/07/2014-07-16_IFS-Policy-Primer_Taxpayer-Financed-Campaigns.pdf.

¹² See David Keating, H.R. 1’s Tax-Financing Program Could Increase Political Polarization, Institute for Free Speech (Jan. 17, 2019), at <https://www.ifs.org/blog/h-r-1s-tax-financing-program-could-increase-political-polarization/>.

¹³ See Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization*, Harvard University (Aug. 13, 2014), at http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf.

Traditionally in American politics, political parties have been instrumental in candidate selection and have served as a moderating force overall. Parties have a large incentive to win and therefore want to nominate candidates who appeal to broad swaths of the American public and can win over swing voters. Political parties have used their fundraising apparatuses to favor candidates who fit this mold. Meanwhile, candidates who were viewed as extreme often received little support or funding from the party. While party support (or the lack thereof) didn't always prevent these candidates from winning elections, the parties' gatekeeping mechanism certainly provided a moderating function on the types of candidates who were nominated. Taxpayer financing of campaigns threatens to provide a final crushing blow to this important party role.

Look no further than the last election, where some of the best small dollar fundraisers were Donald Trump and Bernie Sanders, respectively. Neither candidate had long been a member of the party whose nomination they sought, yet both came close to securing it, and one did. Programs that turbocharge small dollar candidate fundraising and relegate the parties to the sidelines, like that proposed in H.R. 1, will only lead to more candidates following their example.

Consider how much more difficult it would be for political parties to raise money. What sensible donor would give \$50 to a political party if she could give the same \$50 to a candidate of that party and have taxpayers foot the bill for \$300 or more to match it?

The subsidy will most likely drive donors away from the moderating forces exerted by parties and toward individual candidates. This will likely have the effect of further starving parties that were already hit hard by changes to campaign finance law in 2003.

The potential for tax-financing programs to incentivize polarizing and extreme candidates isn't merely conjecture. The example of Thomas Lopez-Pierre's recent campaign for New York City Council is instructive. In 2017, Lopez-Pierre campaigned for a City Council seat on the platform of making "greedy Jewish Landlords" pay.¹⁴ Ultimately, Lopez-Pierre qualified for \$99,000 in taxpayer dollars to help spread his hateful message.¹⁵ New Yorkers, including those on the City Council, were rightly appalled by Lopez-Pierre's anti-Semitic message. Then-Council Speaker Melissa Mark-Viverito said that to "have someone be able to spend [taxpayer dollars] to put forth that kind of a message is despicable."¹⁶ But under New York City's matching fund system, there was nothing the City could do. The First Amendment prohibits laws from discriminating against individuals based on the content of their message. As such, if H.R. 1 is enacted, American taxpayers would be constitutionally required to fund the speech of all candidates that meet the qualifications for matching government funding – including those with racist, anti-Semitic, sexist, homophobic, transphobic, or otherwise hateful messages. As Lopez-Pierre's campaign proves, this concern isn't unfounded.

Supporters of taxpayer-financed campaign programs often argue that these programs will prevent corruption, but the record suggests otherwise. For a more comprehensive review of corruption in Arizona, Maine, and New York City's tax-financing programs, please consult the

¹⁴ Editorial Board, Taxpayer-funded hate, thanks to the city campaign-finance system, NEW YORK POST (Mar. 3, 2017), at <http://nypost.com/2017/03/03/taxpayer-funded-hate-thanks-to-the-city-campaign-finance-system/>.

¹⁵ Josh Nathan-Kazis, Candidate Who Condemned 'Greedy Jewish Landlords' Faces Uphill Election Bid, FORWARD (Sept. 12, 2017), at <https://forward.com/news/382466/candidate-who-condemned-greedy-jewish-landlords-faces-uphill-election-bid/>.

¹⁶ See note 14, *supra*.

Institute for Free Speech report, “*Clean Elections and Scandal: Case Studies from Maine, Arizona, and New York City.*”¹⁷ The Institute’s study found that between 2001 and 2013, a staggering total of more than \$19.2 million in taxpayer dollars was distributed to participating candidates in New York City’s so-called “clean elections” program, who were then investigated for – and, in many cases, convicted of – abuse, fraud, and other forms of public corruption.¹⁸ The same issues are true in other localities with these programs, such as Los Angeles and Connecticut.¹⁹ Whether its embezzlement, fraud, bribery, personal use, forgery, or straw donor schemes, for any number of abuses, tax-financing programs have a history of corrupt actors exploiting the system for personal gain at the expense of hardworking American taxpayers. In general, wherever tax-financing has been enacted, abuses of these programs – and, by extension, taxpayer dollars – have followed.

It’s perhaps unsurprising tax-financing programs have a history of corruption in every jurisdiction in which they exist. In reality, these programs *create* new incentives for corrupt candidates – or corrupt staffers and campaign consultants – to cheat and defraud the taxpayers. As just one example, Seattle, which had its first election with tax-financing in the form of the city’s “Democracy Vouchers” program in 2017, already saw its first allegations of fraud. A candidate for Seattle City Council was accused by her campaign manager of contributing her own money to the campaign and claiming it came instead from small donors.²⁰ This would have entitled her to \$100,000 in public financing had she not been turned in by her former campaign manager (and defeated in the primary). Regardless of the outcome, the structure of the matching component of Seattle’s program is what incentivized that individual to commit fraud. As we’ve seen in Arizona, Maine, New York City, and elsewhere, Seattle is not an outlier in this regard.

Finally, the Institute for Free Speech (formerly the Center for Competitive Politics) has examined and debunked a number of theories about how tax-financing programs fail to meet the lofty standards promised by their supporters using evidence from existing programs around the country:

- Legislative voting behavior is unchanged when elected officials participate in tax-financing programs;²¹
- Tax financing fails to reduce lobbyist or special interest influence in government;²²

¹⁷ Matt Nese and Tom Swanson, Issue Review: Clean Elections and Scandal: Case Studies from Maine, Arizona, and New York City, Institute for Free Speech (Aug. 14, 2013), at http://www.ifs.org/wp-content/uploads/2013/08/2013-08-05_Issue-Review_Swanson_Clean-Elections-Scandal-Case-Studies-From-Maine-Arizona-And-New-York-City.pdf.

¹⁸ *Id.* at 36-37.

¹⁹ See Matt Nese, Oregon H.B. 4076; Taxpayer-Financed Campaigns – A Failed and Costly Policy, Institute for Free Speech (Feb. 8, 2018), at https://www.ifs.org/wp-content/uploads/2018/02/2018-02-08_IFS-House-Rules-Committee-Comments_OR_HB-4076_Tax-Financing-Policy-Issues.pdf.

²⁰ Bob Young, Seattle candidate accused of defrauding first-in-nation democracy-voucher program, THE SEATTLE TIMES (Aug. 17, 2017), at <https://www.seattletimes.com/seattle-news/times-watchdog/seattle-candidate-accused-of-defrauding-democracy-voucher-program/>. H.R. 1 creates a “My Voice” Voucher pilot program modeled after Seattle’s “Democracy Voucher” program. See H.R. 1 § 5101.

²¹ Jason Farrell, Sean Parnell, & Brett Sullivan, Issue Review: Meet the New Legislature, Same as the Old Legislature: A quantitative analysis of the Connecticut Citizens’ Election Program, Institute for Free Speech (Oct. 22, 2012), at <http://www.ifs.org/wp-content/uploads/2012/11/Connecticut-Clean-Elections.pdf>.

²² Matt Nese and Luke Wachob, Issue Analysis No. 1: Do Taxpayer-Funded Campaigns Reduce Lobbyist and Special Interest Influence?, Institute for Free Speech (Aug. 14, 2013), at <http://www.ifs.org/wp-content/uploads/2013/08/Issue-Analysis-1.pdf>.

- The diversity of occupational backgrounds of state legislators does not increase after implementing tax financing,²³ nor does the percentage of women legislators;²⁴
- Giving money to politicians does not save taxpayer dollars in the long run;²⁵
- Voter turnout fails to increase when states institute tax financing;²⁶ and
- Political competition against incumbent lawmakers does not improve in states with tax financing.²⁷

Conclusion

There are many other provisions in H.R. 1 that I haven't covered in my comments, dealing with redistricting, early voting, the Voting Rights Act, lobbying, and more. My comments today cover only those provisions of the bill that most directly impact the First Amendment rights of American citizens. The first step towards fixing the many flaws in H.R. 1 is to split the bill into its component parts, so that it can be properly considered and amended. At that time, the speech portions of H.R. 1 will demand a significant rewrite that respects the benefits of bipartisan campaign enforcement, allows unfettered exchange of political information by U.S. citizens, and protects the First Amendment rights of all Americans.

Thank you.

²³ Alex Cordell, Issue Analysis No. 2: Legislator Occupations – Change or Status Quo After Tax-Funded Campaigns?, Institute for Free Speech (Jun. 28, 2017), at http://www.ifs.org/wp-content/uploads/2013/08/2017-06-28_Issue-Analysis-2_Cordell_Legislator-Occupations-Change-Or-Status-Quo-After-Tax-Funded-Campaigns.pdf.

²⁴ Alex Cordell, Issue Analysis No. 3: Do Tax-Funded Campaigns Increase the Percentage of Women in State Legislatures?, Institute for Free Speech (Jul. 11, 2017), at http://www.ifs.org/wp-content/uploads/2013/08/2017-07-11_Issue-Analysis-3_Cordell_Do-Tax-Funded-Campaigns-Increase-The-Percentage-Of-Women-In-State-Legislatures.pdf.

²⁵ Matt Nese and Luke Wachob, Issue Analysis No. 4: Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?, Institute for Free Speech (Nov. 1, 2013), at https://www.ifs.org/wp-content/uploads/2013/11/2013-11-19_Issue-Analysis-4_Do-Taxpayer-Funded-Campaign-Actually-Save-Taxpayer-Dollars.pdf.

²⁶ Luke Wachob, Issue Analysis No. 8: Do Taxpayer-Funded Campaigns Increase Voter Turnout?, Institute for Free Speech (Dec. 11, 2013), at http://www.ifs.org/wp-content/uploads/2013/12/2013-12-03_Issue-Analysis-8_Do-Taxpayer-Funded-Campaign-Increase-Voter-Turnout.pdf.

²⁷ Joe Albanese, Issue Analysis No. 10: Do Taxpayer-Funded Campaigns Increase Political Competitiveness?, Institute for Free Speech (Jun. 7, 2017), at http://www.ifs.org/wp-content/uploads/2017/06/2017-06-05_Issue-Analysis-10_Albanese_Do-Taxpayer-Funded-Campaigns-Increase-Political-Competitiveness.pdf.



Analysis of H.R. 1 (Part One)

“For the People Act” Replete with Provisions for the Politicians

Eric Wang, Senior Fellow¹

January 2019

Introduction

This analysis examines Title IV, Subtitles B (“DISCLOSE Act”), C (“Honest Ads”), and D (“Stand by Every Ad”) of H.R. 1 (116th Congress). The Institute for Free Speech (IFS) previously analyzed earlier versions of these provisions when they were introduced as standalone bills.² Due to the evolving and obscure legislative language, this analysis represents IFS’s latest understanding of the legislation and supersedes any prior analyses IFS has released on these measures. As it continues to analyze these and other sections of H.R. 1 that regulate First Amendment rights, IFS expects to release additional analyses of the bill. IFS’s written analyses may not address every concern it may have with the proposal, as the 570-page bill’s provisions are simply too numerous and complex to be able to effectively discuss the bill’s contents in their entirety.

As a preliminary matter, Title IV, Subtitles B, C, and D of H.R. 1 contain a hodgepodge of partially related and overlapping campaign finance definitional, reporting, and disclaimer provisions that are scattered in a variety of different bill sections. Instead of consolidating and presenting these provisions in an organized, cohesive, and streamlined manner, the bill’s sponsors threw together previously separate bills in a way that severely frustrates public understanding of legislative language that was already exceedingly vague and complex. This thoughtless, obfuscatory, and expedient approach to legislating, which is convenient only for the politicians pushing the bill, belie its title purporting to be “For the People.” To assist public comprehension of certain parts of H.R. 1, IFS has created a redlined version of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, to show the changes the bill would make to this statute. The document is available for public consumption on the IFS website.³

H.R. 1’s substance further underscores how the bill would help politicians and campaign finance attorneys more than it would benefit the public. The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations will be further deterred from speaking or will have to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers. Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means politicians will be able to act with less accountability to public opinion and criticism.

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² See, e.g., Eric Wang, Analysis of the “DISCLOSE Act of 2018” (S. 3150): Newer Bill, Same Old Plan to Crack Down on Speech, Institute for Free Speech, at https://www.ifs.org/wp-content/uploads/2018/12/2018-12-19_Legislative-Brief_Federal_S-3150_DISCLOSE-Act-Of-2018.pdf and Eric Wang, Analysis of Klobuchar-Warner-McCain Internet Ads Legislation (S. 1989, 115th Cong.): So-Called “Honest Ads Act” Is Dishonest About Its Effects, Institute for Free Speech, at https://www.ifs.org/wp-content/uploads/2017/11/2017-11-01_Legislative-Brief_Federal_S.-1989_Honest-Ads-Act.pdf.

³ See Institute for Free Speech, Changes to Current Campaign Finance Laws Proposed by H.R. 1, at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-22_Annotated-Code_US_HR-1_Changes-To-Current-Campaign-Finance-Laws-Proposed-By-H.R.-1.pdf.

Executive Summary

Specifically, H.R. 1 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a severely vague, subjective, and broad standard that asks whether the speech “promotes,” “attacks,” “opposes,” or “supports” (“PASO”) the candidate or official.
- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission (“FEC”) if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials on policy issues.
- Compel groups to declare on these so-called “campaign-related disbursement” reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
- Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) “campaign” ads in FEC reports and disclaimers, many donors will choose simply not to give to nonprofit groups.
- Subject far more issue ads to burdensome disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.
- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications’ substantive message, thereby exacerbating the politics of personal destruction and further coarsening political discourse.
- Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have “reason to know” that a donee entity has made or will make “campaign-related disbursements.” This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.
- Likely eliminate the ability of many employees to make voluntary contributions through employee-funded PACs, which give employees a voice in the political process with respect to issues that affect their livelihoods.
- Effectively prohibit many domestic subsidiaries, and perhaps most corporations with even a single foreign shareholder with voting shares, from making independent expenditures, contributions to super PACs, or contributions to candidates for state and local office, thus usurping the laws in more than half of the states that allow such contributions.

This appears to be a thinly veiled artifice to overturn *Citizens United* and to unconstitutionally accomplish by legislation what congressional Democrats failed to achieve by constitutional amendment in 2014.

- Disproportionately burden the political speech rights of corporations, thereby ending the long-standing parity in the campaign finance law between corporations and unions.
- Increase regulation of the online speech of American citizens while purporting to address the threat of Russian propaganda.
- Expand the universe of regulated online political speech (by Americans) beyond paid advertising to include, apparently, communications on groups’ or individuals’ own websites and e-mail messages.
- Regulate speech (by Americans) about legislative issues by expanding the definition of “electioneering communications” – historically limited to large-scale TV and radio campaigns targeted to the electorate in a campaign for office – to include online advertising, even if the ads are not targeted in any way at a relevant electorate.

- Impose what is effectively a new public reporting requirement on (American) sponsors of online issue ads by expanding the “public file” requirement for broadcast, cable, and satellite media ads to many online platforms. The public file requirements would compel some of the nation’s leading news sources to publish information, which is likely unconstitutional.

Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept in these files, which would increase the costs of online advertising, especially for low-cost grassroots movements. Some of these online outlets may decide to discontinue accepting such ads due to the expense of complying with the requirements.

The “public file” also may subject (American) organizers of contentious but important political causes like “Black Lives Matter” and the Tea Party to harassment by opponents or hostile government officials monitoring the content, distribution, and sponsorship of their activities.

- Make broadcast, cable, satellite, and Internet media platforms liable if they allow political advertising by prohibited speakers to slip through, thereby driving up the costs of political advertising, especially for online ads where compliance costs are relatively high.
- Impose inflexible disclaimer requirements on online ads that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.

Analysis

I. H.R. 1 Would Impose Unconstitutionally Overbroad Regulations on Issue Speech and Subject Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment and Deterring Financial Support.

A) Overbroad Definition of "Campaign-Related Disbursements"

H.R. 1 would regulate three types of speech as "campaign-related disbursements":

- (1) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are the "functional equivalent of express advocacy";
- (2) So-called "electioneering communications" – i.e., television and radio ads that so much as mention a federal candidate or elected official who is subject to re-election if the ads are disseminated within the jurisdiction the official or candidate represents or seeks to represent within certain pre-election time windows; and
- (3) Any public communications that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the candidate or official.⁴

Of these three categories, the U.S. Supreme Court has only determined that the first – express advocacy independent expenditures – sets forth a bright-line category for regulating speech that is "unambiguously" campaign-related.⁵ While some "electioneering communications" may be intended to influence elections, the purpose of many (if not most) of these ads is to call public and official attention to various policy issues and positions. As discussed more below, H.R. 1 would make an already bad law even worse by expanding the regulation of "electioneering communications" as "campaign-related disbursements."

H.R. 1 goes completely off the rails, however, by regulating any public communication that mentions a federal candidate or elected official – at any time – if the message is deemed to "promote," "support," "attack," or "oppose" the candidate or official. This standard, known to campaign-finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would unconstitutionally regulate a large universe of speech that has nothing to do with elections. Despite that, the bill characterizes such ads as "campaign-related disbursements," even though the election may be nearly two years away for representatives, four years away for the president, or six years away for senators.

For example, soon after President Trump took office in 2017, the AARP aired television ads touting Trump's campaign stance on Medicare.⁶ These ads obviously were intended to shore up political support for Medicare, and it is inconceivable that the AARP intended them to "support" Trump's 2020 re-election. However, it is quite conceivable, if not likely, that if this bill had been law then, the AARP would have had to report to the Federal Election Commission ("FEC") that these ads were "campaign-related disbursements" because they "support" a Trump campaign position and therefore AARP's ads must be listed as "support" for Trump's re-election.

Similarly, if an organization were to disseminate public communications highlighting Trump's campaign statements on building a wall on America's southern border and urging him to stick to his promise, such ads very likely would be regulated under H.R. 1 as "supporting" Trump. Conversely, organizations that oppose the Administration's immigration policies very likely would be regulated for "attacking" and "opposing" Trump if their ads mention the President.⁷ As the Supreme Court has noted, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."⁸

Notably, the PASO standard comes from the provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. "McCain-Feingold") that regulates the funds state and local party committees may use to pay for communications that PASO federal candidates.⁹ The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it "clearly set[s] forth the confines within which potential *party speakers* must act" because "actions taken by *the political parties* are presumed to be in connection with election campaigns."¹⁰

4 H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)); see also 52 U.S.C. § 30104(f) (defining "electioneering communication").

5 *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); see also *FEC v. Wis. Right to Life*, 551 U.S. 449, 469-470 (2007).

6 See AARP Advocates, Protect Medicare, at <https://www.youtube.com/watch?v=hV0DueXoKFA>.

7 See, e.g., Need to Impeach, at <https://www.needtoimpeach.com/> and Rebel Resist, at <http://rebelresist.com/>.

8 *Buckley*, 424 U.S. at 42.

9 See 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).

10 *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).

However, H.R. 1 would expand the PASO standard to *all* speakers. Unlike political parties, it is *not* reasonable to presume that all of the legislative advocacy activities of groups like the AARP, Planned Parenthood, Sierra Club, NRA, gun control groups, chambers of commerce, trade associations, and unions are “in connection with election campaigns.” Moreover, while the Supreme Court initially suggested that speakers could seek advisory opinions from the FEC to clarify what the PASO standard means,¹¹ the Court has subsequently denounced vague campaign finance laws that effectively force speakers to seek FEC advisory opinions as “the equivalent of” an unconstitutional “prior restraint” on speech.¹² In short, H.R. 1’s reliance on the PASO standard to regulate “campaign-related disbursements” not only is unwise, it is very likely unconstitutional.

It is important to keep in mind that “public communications” cover not just broadcast ads, but any form of paid communications including mailings, Internet ads, billboards, magazine ads, etc. Many groups raise money, identify supporters of a cause, and build their brand through such communications and are not attempting to elect or defeat a candidate.

B) Compulsory Declarations of Allegiance

H.R. 1 would impose a binary choice on sponsors of “campaign-related disbursements” that are public communications to declare on campaign-finance reports “whether such communication[s] [are] in support of or in opposition to” the candidate referenced in the communication.¹³ Under the current law, only reports for independent expenditures that expressly advocate the election or defeat of candidates are required to state whether the communication supports or opposes the candidate involved¹⁴ since, as discussed above, only such communications are unambiguously campaign-related.¹⁵

Given H.R. 1’s overbroad regulation of “campaign-related disbursements,” using the examples from before, the AARP very likely would have to affirmatively and publicly declare to the FEC whether its television ads “support” or “oppose” President Trump. Similarly, groups advocating for or against the construction of a wall on the Mexican border would have to affirmatively and publicly declare whether they “support” or “oppose” President Trump if they so much as mention or depict Trump in their public communications. This type of compelled speech is obnoxious to its core and goes beyond “mere disclosure,” thereby making it especially likely to be held unconstitutional.¹⁶

The ads do not even have to be hard-hitting to trigger regulation or force a group to declare if the communication is in support of or opposition to an elected official. For example, a radio ad in the *Independence Institute v. FEC* case only advocated support for a judicial reform bill. Here is the entire text of the ad:

Let the punishment fit the crime. But for many federal crimes, that’s no longer true. Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt. And for what purpose? Studies show that these laws don’t cut crime. In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes. Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it’s time to let the punishment fit the crime.

Incredibly, the judges on the three-judge panel ruled “the advertisement could very well be understood by Coloradans as criticizing” Sen. Michael Bennett’s position on the bill.¹⁷ Clearly, a PASO standard is not cabined to hard-hitting ads that are often more effective at persuading lawmakers to change their position.

C) Overbroad Reporting and Donor Identification Requirements

As an initial matter, H.R. 1’s reporting requirements for “campaign-related disbursements” appear to be largely duplicative of the existing reporting requirements for independent expenditures and electioneering communications,¹⁸ since the latter two categories of speech are encompassed within the former category. If the bill’s intent is to create additional and duplicative reporting requirements, the added administrative burden for speakers is unconstitutional as it serves no public interest, would clutter the FEC’s website with duplicative and confusing reports, and may mislead some into thinking the reports cover different activities.

11 *Id.* at 170 n.64.

12 *Citizens United*, 558 U.S. at 335.

13 H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(C)).

14 *See* 52 U.S.C. § 30104(c)(2)(A); *compare id. with id.* § 30104(f)(2)(D) (reporting requirement for electioneering communications).

15 *See Buckley*, 424 U.S. at 80.

16 *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

17 *See Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff’d per curiam*, 137 S. Ct. 1204 (2017).

18 *See* 52 U.S.C. § 30104(c), (f); H.R. 1 § 4111(g) (“Nothing in this section shall be construed to waive or otherwise affect any other requirement of this Act which relates to the reporting of campaign-related disbursements.”).

H.R. 1 departs from existing law by imposing additional donor identification requirements on campaign finance reports.¹⁹ Organizations that make “campaign-related disbursements” totaling more than \$10,000 during a two-year “election reporting cycle”²⁰ would have to publicly report all of their donors (including their addresses) who have given \$10,000 or more during that same period, unless such communications are paid for using a segregated account (the donors to which must be reported), or if donors affirmatively restrict their donations from being used for such purposes and that donation is deposited “in an account which is segregated from any account used to make campaign-related disbursements” (in which case the other donors still must be reported).²¹ Both of these so-called options are impractical, would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported), and would still put many donors on campaign finance reports with the implication they are financing “campaign-related disbursements” that they knew nothing about and may not even agree with. Moreover, while sources of business revenues are exempt from reporting, dues-paying members are not.²²

The right to associate oneself with a nonprofit group’s mission and to support the group financially in private is a bedrock principle of the First Amendment that the government may not abridge casually.²³ This is particularly true when the cause is contentious, such as abortion, gun control, LGBTQ rights, or civil rights, and association with either side on any of these issues may subject a member or donor to retaliation, harassment, threats, and even physical attack, as recent events have tragically reminded us. The potential divisiveness of these issues does not diminish their social importance and the need to hash out these debates in public while preserving donors’ privacy. Even when a group’s cause is not controversial, there are still many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, and a desire to remain out of the public spotlight.²⁴

It is wholly inappropriate, for example, for donors who support a retiree organization’s general activities to have to be publicly identified on campaign finance reports as “supporting” the president if the organization sponsors a television ad about entitlement reform mentioning the president.²⁵ Similarly, donors to an immigration advocacy organization, for example, should not have to be publicly identified on campaign finance reports as “opposing” the president if the organization were to sponsor a radio ad criticizing the president’s immigration policy. Both of these reporting scenarios would result from the passage and enactment of H.R. 1. Faced with the prospect of these public reporting consequences, many donors will simply choose not to give,²⁶ thereby limiting the funds available to finance speech to the detriment of our private civic sector and our public debate.

H.R. 1’s gratuitous reporting requirements also are not limited to organizations that sponsor public communications. An organization that makes payments or grants to other organizations also would be deemed to be making “campaign-related disbursements,” and would have to make the same filings and report its own donors, if:

- (1) the organization making the payments or grants has itself made “campaign-related disbursements” other than in the form of certain “covered transfers” totaling \$50,000 or more during the prior two years;
- (2) the organization making the payments or grants “knew or had reason to know” that the recipient has made “campaign-related disbursements” totaling \$50,000 or more in the previous two years; or
- (3) the organization making the payments or grants “knew or had reason to know” that the recipient will make “campaign-related disbursements” totaling \$50,000 or more in the two years from the date of the payment or grant.²⁷

19 The bill could easily expand the existing independent expenditure and electioneering communication reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports for each communication. However, the bill does not take this more streamlined approach.

20 An “election reporting cycle” is defined as being coterminous with the two-year congressional election cycle. H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(4)(C)).

21 *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).

22 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).

23 *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

24 See Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropy Roundtable, at https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy-white-paper.pdf?sfvrsn=566a740_6.

25 See note 6, *supra*.

26 *Buckley*, 424 U.S. at 68 (noting that reporting “will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights . . .”).

27 H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(1)-(2), (d), (f)(1)(D) & (E)). Donor organizations must affirmatively restrict their payments or grants in writing from being used by donees for “campaign-related disbursements” in order to avoid having to file reports on the donor side. But note that if the donee organization deposits that donation into an account later used to finance a “campaign-related disbursement,” the exemption would no longer apply. *Id.* (to be codified at 52 U.S.C. 30126(f)(2)(B)). Either scenario typically will function as a trap for the unwary for organizations that do not retain one of the select few campaign finance attorneys steeped in the nuances of this law. As the Supreme Court has noted, “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of the day,” *Citizens United*, 558 U.S. at 324, and the same should hold true for groups providing grants to enable other groups to speak about political issues.

Grant-making institutions that wish to protect their donors' privacy therefore would need to research a recipient group's past activities to determine if the group has engaged in any "campaign-related disbursements." It is unclear whether it would be sufficient under H.R. 1 to rely on any FEC reports that a recipient group has filed within the previous two years. For example, if a group made "campaign-related disbursements" but inadvertently did not report them, would the provider of a grant to that group still be on the hook for having to file its own "campaign-related disbursement" reports and to publicly report its own donors? The types of investigations donor organizations would have to conduct on donees may go far beyond the standard due diligence that is currently performed in the grant-making community, especially among charities. While attorneys will certainly benefit from the thousands of dollars in additional fees that it will cost to vet any donation or grant to a non-profit organization, there is little other apparent upside to this reporting burden.

The bill's vague and subjective "had reason to know" standard is even worse when applied prospectively. Grant-making organizations effectively will need to consult a crystal ball in order to know whether a group they are giving to will, within the next two years, make "campaign-related disbursements" that would require the donor organization to report its own donors.

Lastly, H.R. 1 purports to allow the FEC to exempt donors' names and addresses from reporting "if the inclusion of the information would subject the person to serious threats, harassment, or reprisals."²⁸ In practice, the FEC and similar agencies have been unable to agree on when such exemptions should apply or to grant exemptions consistently and objectively, and very few exemptions have ever been granted without a court order.²⁹

D) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.³⁰ These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.³¹ The Supreme Court specifically has recognized that these disclaimer requirements "burden the ability to speak," and therefore are subject to "exacting scrutiny," which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."³² H.R. 1 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" that are in the form of a public communication.³³ As discussed above, many of these communications would merely mention elected officials in the context of discussing policies, and treating them as campaign ads subject to the campaign-finance disclaimer requirements is likely unconstitutional.

In addition to expanding the scope of speech covered by the disclaimer requirements, H.R. 1 also would expand the information that must be included in the disclaimers, and specifically the "stand by your ad" portion of the disclaimer. Organizations – other than candidates, certain PACs, and political party committees – that sponsor such ads would have to include in the ads' disclaimers certain donor information.³⁴ Ads containing video content would have to identify the organization's top five donors of \$10,000 or more during the prior 12 months.³⁵ Ads containing only audio content (including robocalls) would have to identify the organization's top two donors.³⁶

The bill purports to shield certain donors from being identified in the disclaimers, but the exemption in the disclaimer provision is illogical. It also fails to track the donor identification requirement in the reporting provisions. This mismatch will cause enormous confusion for organizations seeking to comply with the law and those trying to understand who supposedly paid for the regulated communications.

Part of the confusion stems from H.R. 1's use of the term "*segregated* bank account" to describe two different concepts. For "campaign-related disbursement" reports, an organization may choose to pay for such disbursements using one type of "*segregated* bank account." Donors to this account *would* be publicly reported. Donors whose funds are not deposited in this account would not be reported.³⁷ However, H.R. 1 also provides that donors may be shielded from public identification on

28 H.R. 1 (to be codified at 52 U.S.C. § 30126(a)(3)(D)).

29 See, e.g., FEC Adv. Op. Request No. 2016-23 (Socialist Workers Party); JCOPE Denies Funding Disclosure Exemptions, THE STATE OF POLITICS (Aug. 2015), at <http://www.nystateofpolitics.com/2015/08/jcope-denies-funding-disclosure-exemptions/>.

30 52 U.S.C. § 30120.

31 See FEC Adv. Op. No. 2007-33 (Club for Growth) (although this advisory opinion specifically addressed disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; see 52 U.S.C. § 30120).

32 *Citizens United*, 558 U.S. at 366.

33 H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(a)).

34 H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)). The bill exempts "certain political committees" from the donor identification disclaimer requirement, but it is unclear which "certain political committees" this is in reference to. See *id.* (to be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the requirement, while conventional PACs that accept contributions subject to the amount limitations and source prohibitions would be exempt from this requirement. See *id.* § 4111 (to be codified at 52 U.S.C. § 30126(e)(6)).

35 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).

36 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 4303.

37 *Id.* § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).

reports if they give to another form of a segregated account. This would be “an account which is *segregated* from any account used to make campaign-related disbursements.”³⁸

As if that were not confusing enough, H.R. 1 only shields donors from being identified in disclaimers for campaign-related disbursements as the top five or top two donors if they give to the “segregated” account that cannot be used for campaign-related disbursements.³⁹ Incredibly, communications *paid for only from* the segregated account used to pay for regulated communications must list the organization’s top donors, even if their funds were *never* deposited in the account used to fund the communication.

That means a communication paid for by one set of donors (and only those donors) will often list donors in a disclaimer who *did not give any funds* to distribute the communication. In other words, such a law would often require advertising disclaimers with false information. That will, in turn, lead to real news stories that have false information about who paid for the communications.

In addition, the disclaimers would have to include a statement by an organization’s CEO or highest-ranking officer identifying himself or herself and his or her title and stating that he or she “approves this message.”⁴⁰ (Current law allows announcers to read disclaimers for organizations.) Ads containing video content would have to include “an unobscured, full-screen view” of the CEO or highest-ranking officer reading the disclaimer or a photo of the individual.⁴¹ “Campaign-related disbursements” sponsored by individuals would have to include disclaimers featuring the individual.⁴²

It is unclear that any of these disclaimer requirements, especially the requirement to include an image or picture of a sponsoring individual or a sponsoring organization’s CEO or highest-ranking officer, has any relation – let alone a “substantial relation” – to any important governmental interest, or what the governmental interest even is here.⁴³ Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substantive message itself. One can easily imagine circumstances where the required individual might not want to or not be physically able to deliver such a message, such as during a serious illness, after surgery, or after injury from an accident or attack. Ironically, while the original (and dubious) purpose of the “stand by your ad” disclaimer was to improve the quality of political ads, H.R. 1 would personalize political discourse and may thereby further contribute to the politics of personal destruction.⁴⁴

Moreover, H.R. 1 would expand the “stand by your ad” disclaimer requirement beyond the television and radio ads it currently covers to also apply to Internet ads that contain video and audio content.⁴⁵ Internet advertisers already struggle to fit the FEC disclaimers in their ads. Internet video “pre-roll” ads are “usually short, often 10 seconds or 15 seconds long, so as not to unduly annoy viewers who don’t wish to wait long for the clip.”⁴⁶ Expanding the “stand by your ad” disclaimer requirement to Internet ads would require substantial portions of ads to be devoted to the disclaimer and would threaten the very viability of the Internet as a medium for political communication.⁴⁷ One of the requirements for video ads mandates display of a disclaimer for “at least 6 seconds,”⁴⁸ making it illegal to use 5 second video ads.

38 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).

39 *Id.* (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).

40 *Id.* § 4302 (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).

41 *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).

42 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A)).

43 See *Citizens United*, 558 U.S. at 366.

44 In any event, the “stand by your ad” disclaimer requirement has not reduced the amount of negative ads, as it was intended to do. See Bradley A. Smith, THE MYTH OF CAMPAIGN FINANCE REFORM, NATIONAL AFFAIRS (Winter 2010), at <https://nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform>.

45 H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)(1)).

46 FEC Adv. Op. Request No. 2007-33 (Club for Growth), Comments of Sierra Club.

47 While the bill purports to allow the FEC to adopt regulations to exempt certain ads from the top five or top two funders portion of the disclaimer if the disclaimer would take up a “disproportionate amount” of the ad, the bill also increases the amount of time that the disclaimer must be displayed in video ads to at least six seconds (up from four seconds under the current requirements for television ads). Compare H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (C)) with *id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(i)); see also 52 U.S.C. § 30120(d)(1)(B)(ii). The bill’s contrary directives raise serious questions about how much discretion the FEC would have to exempt ads from the expanded disclaimer requirement. The FEC already has struggled for nearly a decade over when disclaimer exemptions should apply to digital ads, see, e.g., FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging), and 2017-12 (Take Back Action Fund), and the DISCLOSE Act fails to give the agency any more legislative clarity on this issue.

48 See note 47, *supra*.

II. H.R. 1 Seeks to Broadly Prohibit Political Engagement by Corporations and Employee-Funded PACs and to Indirectly Overturn *Citizens United* by Legislation.

A) H.R. 1's Foreign National Provisions Could Make It Practically Impossible for *Any* Corporation, Whether Foreign or Domestic, to Speak.

H.R. 1 would treat any corporation as a foreign entity if any foreign national “has the power to direct, dictate, or control the decisionmaking process of the corporation . . . with respect to its interests in the United States.”⁴⁹ Such a corporation would be prohibited from making any political contributions or expenditures in connection with U.S. elections.⁵⁰

The owner of even one share of a publicly traded company could have “the power to direct, dictate, or control the decision-making process of the corporation” by means of a shareholder meeting or a proxy vote,⁵¹ and it is likely that every publicly traded American company has at least one foreign national shareholder. H.R. 1 provides no additional gloss on this point and leaves subjective enforcement decisions to unelected bureaucrats.

Few rational corporations would run the risk of an aggressive interpretation of this provision, and thus H.R. 1 could effectively prohibit corporations altogether from making political contributions and expenditures in the U.S. Because the foreign national provision of federal law the bill would amend applies to elections not only for federal office, but also for state and local office,⁵² the bill also would usurp the laws in more than half of the states that permit corporations to make contributions in connection with state and local elections.⁵³

This extreme outcome is not an implausible interpretation of the legislative language. After all, it is an approach FEC Commissioner Ellen L. Weintraub has suggested for essentially overturning the *Citizens United* decision by legislation. As Commissioner Weintraub wrote in a *New York Times* op-ed on countering *Citizens United*, “Arguably . . . for a corporation to make political contributions or expenditures legally, it may not have *any* shareholders who are foreigners or federal contractors.”⁵⁴ And if H.R. 1 were enacted, Weintraub could be one of the FEC commissioners interpreting and implementing this provision.

Consider also that this provision of H.R. 1 is derived from the so-called “DISCLOSE Act,”⁵⁵ and 39 of the 40 sponsors of the DISCLOSE Act who were in the Senate in 2014 voted to amend the First Amendment to override *Citizens United*.⁵⁶ Albeit constitutionally proper,⁵⁷ their 2014 effort to amend the First Amendment failed,⁵⁸ and it has been the black-letter law of this land for more than two centuries that Congress may not now attempt to accomplish the same result by mere legislation.⁵⁹

This covert assault on corporations’ political speech is also unwarranted and contrary to the public interest. The vast majority of Americans work at a corporation, whether it is a Fortune 500 company or a local pizza joint.⁶⁰ More than half of Americans, including 56 percent of middle-class Americans, have ownership in corporations, whether through stocks or mutual funds.⁶¹ Not surprisingly, then, most Americans believe that it is sensible for corporations to take political action, whether it

49 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)(3)(C)).

50 See existing 52 U.S.C. § 30121(a); see also H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30121(a)(1)(A)).

51 See, e.g., U.S. Securities and Exchange Comm’n, Spotlight on Proxy Matters, at <https://www.sec.gov/spotlight/proxymatters.shtml>.

52 See 52 U.S.C. § 30121(a). Under federal law, corporations may contribute to super PACs in connection with elections for federal office but may not make contributions to candidates for federal office. See *id.* and FEC Adv. Op. No. 2010-11 (Commonsense Ten). However, under existing law, state laws otherwise govern state and local elections (although some municipalities may have their own campaign finance laws).

53 See Nat’l Conference of State Legislatures, Contribution Limits Overview, at <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (noting that 28 states permit corporate contributions).

54 Ellen L. Weintraub, *Taking On Citizens United*, N.Y. TIMES (Mar. 30, 2016) (emphasis added); see also Allen Dickerson, *No, Commissioner Weintraub, the FEC Can’t Circumvent Citizens United*, HUFFINGTON POST (Mar. 31, 2016).

55 H.R. 1 § 4100.

56 Compare S. 3150 (115th Cong.) (DISCLOSE Act of 2018) with S.J. Res. 19 (113th Cong., 2nd Sess.), Roll Call Vote No. 261 (Sep. 11, 2014). Sen. Gillibrand, who was a DISCLOSE Act sponsor, did not vote on the 2014 resolution. *Id.* The other DISCLOSE Act sponsors – Senators Catherine Cortez Masto, Tammy Duckworth, Kamala Harris, Maggie Hassan, Doug Jones, Gary Peters, Tina Smith, and Chris Van Hollen – were not in the Senate at the time.

57 See U.S. Const., Art. V.

58 See note 56, *supra*.

59 *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178 (1803) (“Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.”).

60 See U.S. Census Bureau, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012* (Feb. 2015), at <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf>.

61 Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, Gallup.com, at <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx>.

is in the form of lobbying or making political contributions.⁶² Based on the largely positive public reaction to the unmistakable political messaging by many corporate advertisers during the 2017 Super Bowl,⁶³ it appears that most Americans also would welcome corporations weighing in more on political issues. Even many progressives who initially opposed *Citizens United* may be coming around to the idea that corporations have a lot to contribute to the nation's political discourse.⁶⁴

B) Even If H.R. 1 Is Not Interpreted to Prohibit Most Corporate Contributions and Expenditures, It Would Still Shut Most Domestic Subsidiaries of Foreign Corporations Out of the Political Process Altogether.

Even if H.R. 1 is not read so broadly as to treat any corporation with a single foreign shareholder as a foreign national, the bill would still subject a corporation in which any foreign national “owns or controls” 20 percent or more of the voting shares to the ban on foreign national contributions and expenditures.⁶⁵ This would likely erode the FEC’s existing distinction between domestic subsidiaries and their foreign parents, which allows domestic subsidiaries, regardless of percentage foreign ownership, to make political contributions and expenditures as long as: (1) the funds used are generated exclusively from the subsidiary’s U.S. operations; and (2) all decisions on contributions and expenditures are made by U.S. citizens or permanent residents.⁶⁶

Domestic subsidiaries of foreign corporations, such as Anheuser-Busch, Bayer, BMW, Honda, Siemens, etc., employ millions of Americans in congressional districts across the country and contribute to the national and local economies.⁶⁷ We can have a debate about whether this level of foreign investment and ownership in our economy is good for the country. But the campaign finance law is not the proper arena for weighing in on this debate, and the interests of millions of Americans who work at domestic subsidiaries should not be shut out of the political arena because their employer can’t speak about candidates.

Putting aside domestic subsidiaries of foreign corporations, many corporations that are thought of as “American” also may be considered foreign under H.R. 1’s low 20 percent threshold. For example, almost 17 percent of The New York Times Company is owned by Carlos Slim, a Mexican national.⁶⁸ If he increased his stake by a few more percentage points, the Times may not qualify as an American company under the bill.

C) H.R. 1 Could Drastically Affect Employee-Funded PACs, Either Effectively Prohibiting Them Altogether or Prohibiting Them for Employees of Domestic Subsidiaries of Foreign Corporations.

As discussed above, depending on how broadly the vague language of H.R. 1 is interpreted, the bill could treat any corporation with even one foreign shareholder as a foreign entity. At a minimum, corporations that have 20 percent or more foreign ownership would be treated as foreign entities. This aspect of H.R. 1 could have drastic consequences for employee-funded PACs.

Under existing law and the FEC’s implementation, corporations that are considered foreign nationals may not directly establish and administer employee-funded PACs; only the domestic subsidiaries of foreign-national corporations may have PACs.⁶⁹ However, because H.R. 1 could treat substantially all publicly traded corporations as foreign nationals or, at the very least, erase the distinction between domestic subsidiaries and foreign corporations, the bill appears to broadly threaten the continued permissibility of employee-funded corporate PACs in general or, at the very least, for domestic subsidiaries of foreign corporations. While the bill purports to set forth various conditions under which employee-funded PACs may continue to operate, it is not at all clear whether these conditions would override the pre-existing and general rule that foreign-national corporations may not establish and administer employee-funded PACs.⁷⁰

62 Press Release: 2015 Public Affairs Pulse Survey: Most Americans Say it’s Smart for Big Companies to Get Political, Public Affairs Council (Sep. 10, 2015), at <https://pac.org/news/general/most-americans-say-its-smart-for-big-companies-to-get-political>.

63 See, e.g., Sapna Maheshwari, *During Breaks in Super Bowl, Advertisers Enter Political Debate*, N.Y. TIMES (Feb. 6, 2017), at <https://www.nytimes.com/2017/02/06/business/super-bowl-ads-politics.html>.

64 See, e.g., Garrett Epps, *When Corporations Are Good Citizens*, THE ATLANTIC (Aug. 17, 2017), at <https://www.theatlantic.com/politics/archive/2017/08/when-corporations-display-good-citizenship/537231/>.

65 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)). For corporations in which a foreign country (which likely includes sovereign wealth funds) or foreign government official holds ownership, the cutoff for foreign ownership would be five percent. *Id.* (to be codified at 52 U.S.C. § 30121(b)(3)(A)(ii)).

66 See, e.g., FEC Adv. Op. No. 2006-15 (TransCanada).

67 See, e.g., Brookings Institution, *FDI in U.S. Metro Areas: The Geography of Jobs in Foreign-Owned Establishments*, at <https://www.brookings.edu/research/fdi-in-u-s-metro-areas-the-geography-of-jobs-in-foreign-owned-establishments/> (“Foreign-owned U.S. affiliates directly employ some 5.6 million workers spread across every sector of the economy.”).

68 The New York Times Co., 2018 Proxy Statement, at https://s1.q4cdn.com/156149269/files/doc_financials/annual/2017/Final-2018-Proxy-Statement.pdf.

69 See FEC Adv. Op. Nos. 1977-53 (APCAC) and 1982-34 (Sonat).

70 See H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30118(b)(8)). Ironically, the section heading in the bill purports this provision is a “clarification” of the law, but it confuses more than it clarifies.

Just as the positions of the DISCLOSE Act's supporters may shed light on H.R. 1's legislative intent, IFS cannot help but note that H.R. 1 is a bill proposed and supported exclusively by congressional Democrats,⁷¹ many of whom have expressed their categorical opposition to the idea of employee-funded PACs and have rejected PAC contributions.⁷² This assault on PACs is misguided. Employee-funded PACs are comprised entirely of voluntary, after-tax, amount-limited contributions by certain eligible employees who wish to have a voice in the political process with respect to issues that affect their livelihoods.⁷³

Notably, H.R. 1's potential effects on PACs in this respect also would only affect employee-funded PACs that are established and administered by corporations, but would not affect PACs established and administered by labor unions.⁷⁴ This would end the campaign finance law's longstanding equal treatment of corporations and unions.⁷⁵ For example, while the Service Employees International Union ("SEIU") describes itself as "a large international labor organization"⁷⁶ that receives income from foreign sources⁷⁷ and maintains foreign bank accounts,⁷⁸ it is unlikely to have foreign owners that would subject the union to treatment as a foreign-national entity under H.R. 1.

III. H.R. 1 Would Impose Sweeping Regulations on Online and Digital Speech That Are at Once Overbroad and Underinclusive in Addressing Foreign Propaganda.

A) H.R. 1 Would Undo the FEC's Internet Exemption

H.R. 1 would undo the FEC's "Internet exemption," which continues to set the appropriate framework for regulating online political speech. Under this exemption, online political speech generally is unregulated unless it is in the form of paid ads. By negating the FEC's carefully considered Internet regulations,⁷⁹ H.R. 1 would increase the costs of online political speech and subject many online speakers to the risk of legal complaints, investigations, and penalties.

In enacting the agency's "Internet exemption," the FEC recognized the Internet is unique in that:

- it "provides a means to communicate with a large and geographically widespread audience, often at very little cost";
- "individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others"; and
- "[w]hereas the corporations and other organizations capable of paying for advertising in traditional forms of mass communication are also likely to possess the financial resources to obtain legal counsel and monitor Commission regulations, individuals and small groups generally do not have such resources. Nor do they have the resources . . . to respond to politically motivated complaints in the enforcement context."⁸⁰

None of these justifications for an enlightened regulatory approach to Internet communications has changed since the FEC enacted its Internet rules. By imposing additional FEC disclaimer and reporting requirements and risk of legal liability, H.R. 1 would add significant regulatory costs to online political speech and substantially negate the tremendous benefits of Internet media. As the FEC noted, this is a particular challenge for the smaller and less well-established grassroots organizations, for whom the Internet has provided a low-cost and effective means of organizing and getting their message out, and one that is far superior to any other communications medium available.

At the outset, it is important to note that, even under the current rules, paid Internet advertising is subject to regulation. Specifically, under the FEC's existing rules, "communications placed for a fee on another person's Web site" are regulated.⁸¹ However, other forms of online communications, such as mass e-mails; creating, maintaining, or hosting a website; unpaid

71 See, e.g., Peter Overby, *House Democrats Introduce Anti-Corruption Bill As Symbolic 1st Act*, NPR (Jan. 5, 2019), at <https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act>. As a nonpartisan organization, IFS does not support or oppose any political party.

72 See, e.g., Alexi McCammond, *Nearly 200 Democrats are refusing corporate PAC money*, Axios (Aug. 7, 2018), at <https://www.axios.com/democrats-refusing-corporate-pac-money-2018-midterms-025e9e71-f63d-4516-971c-e9e7c9a10630.html>.

73 See 11 C.F.R. § 114.5.

74 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)).

75 See 52 U.S.C. § 30118.

76 SEIU, IRS Form 990 (2016), Part III Line 1, at <https://pdf.guidestar.org/PDF/Images/2016/360/852/2016-360852885-0ec457b8-9O.pdf>.

77 *Id.* Part IV Line 14b.

78 *Id.* Part V, Line 4a.

79 See FEC, *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

80 *Id.* at 18,590-18,591.

81 11 C.F.R. §§ 100.26, 100.155. Although the rule's exclusive reference to "Web site" is somewhat outdated, it is generally understood to also apply to "apps" and other similar digital advertising platforms.

Facebook posts; unpaid Twitter tweets; YouTube uploads; or “any other form of communication distributed over the Internet” are not regulated.⁸²

H.R. 1 would severely erode the FEC’s current Internet rules by changing the standard that triggers regulation of a “public communication” to include any “paid internet, or paid digital communication.”⁸³ This is a vaguer and broader standard than what the FEC’s rules currently regulate. The bill’s use of different terminology to describe the scope of regulated Internet communications suggests an intentional effort to cover additional forms of online speech. This is especially so in light of the bill drafters’ apparent familiarity with the FEC’s regulations.⁸⁴ Indeed, the “paid internet, or paid digital communication” standard is broader than even the standard set forth elsewhere in H.R. 1 for “electioneering communications” (discussed more below) that are “placed or promoted for a fee on an online platform.”⁸⁵

Thus, if H.R. 1 were enacted, it is likely that anyone operating a website, for example, may unwittingly run afoul of the FEC’s disclaimer and reporting requirements by posting unflattering information about a federal candidate or elected official. This is because the costs of hosting and maintaining a website likely would qualify the website as a “paid internet, or paid digital communication.”⁸⁶ Similarly, a group that sends out a voter guide or a legislative scorecard using a paid e-mail service or mobile device app likely would be making a “paid internet, or paid digital communication” under H.R. 1. Even a group’s Facebook posts, Twitter tweets, and YouTube uploads could be regulated if paid staff are used to create such content.⁸⁷ In other words, H.R. 1’s “Honest Ads Act” component would regulate communications that are not “ads” at all. This is especially problematic where, as discussed above, H.R. 1’s “DISCLOSE Act” provisions also would impose an extremely vague and broad standard for when the content of a “public communication” would trigger regulation.⁸⁸

H.R. 1’s effective repeal of the FEC’s Internet exemption would cause much more online and digital speech to become subject to the FEC’s existing disclaimer requirements, which apply to regulated communications of any dollar value whatsoever,⁸⁹ and reporting requirements, which apply to regulated communications of as little as \$250.⁹⁰ (These disclaimer and reporting requirements are in addition to the expanded disclaimer and reporting requirements that H.R. 1’s “DISCLOSE Act” provisions would impose on certain Internet ads, as discussed above.)

While compelling speakers to comply with disclaimer and reporting requirements may, in theory, seem like no big deal, in practice, these requirements are anything but straightforward. As IFS has demonstrated, a super PAC ran by Harvard Law Professor Larry Lessig, a self-styled campaign finance policy expert and advocate, was unable to correctly decipher the FEC’s disclaimer requirements.⁹¹ Violations of the disclaimer and reporting requirements, whether inadvertent or intentional, also subject speakers to monetary penalties (after enduring complaints and investigations).⁹² Thus, H.R. 1 will force speakers, at great expense, to consult the small cottage industry of campaign finance attorneys (most of whom are concentrated “inside the Beltway”) before speaking.⁹³ Many speakers, especially smaller groups, would choose silence instead.

82 *Id.* § 100.155(b).

83 H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)).

84 *See id.* § 4207 (addressing 11 C.F.R. § 110.11(f)(1)(i), (ii)).

85 *Compare* H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)) *with id.* § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)); *see also Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

86 Prior to the FEC adopting its current regulation in 2006, which H.R. 1 would upend, the FEC routinely found that any expenditure of funds to maintain a personal or group website constituted a regulated expenditure. *See, e.g.*, FEC Adv. Op. No. 1998-22 (Leo Smith) (where an individual citizen creates a website with political content, “costs associated with the creation and maintaining of the web site, ... would be considered an expenditure under the Act and Commission regulations.”); FEC Advisory Opinion 1999-25 (D-Net) (website maintained by League of Women Voters would not be regulated as a campaign “expenditure” only if it was operated on a nonpartisan basis). *See also, e.g.*, FEC Matter Under Review 6795: Citizens for Responsibility for Ethics in Washington (“CREW”) allegedly failed to file FEC reports for content on its website impugning the character and fitness for office of various federal candidates and elected officials, and for maintaining a list of the “Most Corrupt Members of Congress,” among other activities. As two of the FEC’s commissioners explained, CREW’s activities fell within the Internet exemption. *Id.* Statement of Reasons of Commissioners Lee E. Goodman and Caroline C. Hunter. H.R. 1 would remove the Internet exemption for organizations like CREW.

87 *See* FEC, Matter Under Review 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (explaining that YouTube videos are covered by the Internet exemption).

88 H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)(1)(B)).

89 11 C.F.R. § 110.11(a)(2).

90 52 U.S.C. § 30104(c)(1).

91 Inst. for Free Speech, *FEC Complaint: Mayday PAC violated campaign finance laws* (Nov. 20, 2014), at <http://www.ifs.org/2014/11/20/fec-complaint-mayday-pac-violated-campaign-finance-laws/>.

92 *See* 52 U.S.C. § 30109(a).

93 *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.”).

B) H.R. 1 Would Expand Regulation of Issue Speech to the Internet

H.R. 1's "Honest Ads Act" provisions purport to be premised on the unique ability of Internet advertising to micro-target recipients,⁹⁴ but the bill's "electioneering communications" provision doesn't match the bill's premise. Not only would H.R. 1 expand the existing disclaimer and reporting requirements for "electioneering communications" to online advertising, but it would do so indiscriminately by covering communications that are not even targeted to any relevant electorate. In other words, an online ad only running in Texas that named a Senate leader from New York would become a regulated communication. A similar TV or radio ad would not. The bill's regulation of online issue speech in this overbroad manner raises serious questions about its constitutionality.

Despite their name, so-called "electioneering communications" often encompass issue speech not related to any election. For example, an ad asking members of the public to contact their Senators about a criminal justice reform bill pending in Congress has been held to be an "electioneering communication," even though the ad did not praise or criticize the elected officials in any way.⁹⁵ Under existing law, broadcast, cable, or satellite ads that refer to federal candidates or elected officials, but that do not expressly advocate their election or defeat, are regulated as "electioneering communications" if they:

- (1) Refer to a clearly identified federal candidate or elected official;
- (2) Are publicly distributed within 60 days before the general election in which the referenced candidate or official is on the ballot, or within 30 days before the primary election or party convention or caucus in which the candidate or official is seeking the party's nomination; and
- (3) Are "targeted to the relevant electorate."⁹⁶

Importantly, with respect to the last condition, the ad must be capable of reaching at least 50,000 or more persons in the jurisdiction the candidate seeks to represent, in the case of congressional candidates, or, in the case of presidential candidates, in the state holding the primary or anywhere in the country in the case of a national nominating convention.⁹⁷

Like express advocacy communications, "electioneering communications" are subject to complex FEC disclaimer, reporting, and recordkeeping requirements.⁹⁸

H.R. 1 would extend the regulation of "electioneering communications" to "any communication which is placed or promoted for a fee on an online platform," and which references a federal candidate or officeholder within a relevant 30- or 60-day pre-election time window.⁹⁹ Notably and ironically, given the bill's concern about micro-targeting on online platforms,¹⁰⁰ H.R. 1 dispenses with any targeting requirement whatsoever for online "electioneering communications."¹⁰¹

Thus, an online issue ad could be regulated as an "electioneering communication" if it targets Iowa farmers to contact House Speaker Nancy Pelosi, whose district consists of the San Francisco area, to urge her to help pass an agriculture bill, or if it targets residents of Gulf Coast states to contact Senate Majority Leader Mitch McConnell, who represents Kentucky, to urge him to help pass a hurricane relief bill. Even an ad that refers to a bill by the sponsor's name would trigger regulation if the sponsor were up for election, notwithstanding that the ad was targeted to a "geofenced" area 1,000 miles away from the sponsor's state or district. Obviously, the recipients of the online ads in these examples are ineligible to vote for or against the referenced elected officials,¹⁰² and it makes no sense for H.R. 1 to regulate these ads as "electioneering" under the campaign finance laws, even if they were to be disseminated within the designated pre-election time windows.

The Supreme Court has upheld the current federal "electioneering communication" regime against constitutional challenges, both facially¹⁰³ and as-applied to "pejorative" ads about then-Senator Hillary Clinton's 2008 bid for the Democratic presidential nomination.¹⁰⁴ But it did so because "the vast majority of [electioneering communication] ads clearly" sought to elect

94 H.R. 1 § 4203.

95 See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).

96 52 U.S.C. § 30104(f)(3).

97 11 C.F.R. § 100.29.

98 11 C.F.R. §§ 110.11(a)(4), (b)(3), (c)(4); 104.20(d).

99 H.R. 1 § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)).

100 *Id.* § 4203.

101 *Id.* § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A)(i)(III)).

102 U.S. Const., Art. I § 2(1) and Amend. XVII § 1.

103 *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003).

104 *Citizens United*, 558 U.S. at 366-367; also *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *cert.*) ("And finally in *Citizens United v. Federal Election Comm'n*, the Court concluded that federally required disclosure 'avoid[ed] confusion by making clear' to voters that advertisements naming then-Senator Hillary Clinton and 'contain[ing] pejorative references to her candidacy' were 'not funded by a candidate or political party'" (quoting *Citizens United*, 558 U.S. at 368)).

candidates or defeat candidates.¹⁰⁵ The government documented through a record “over 100,000 pages long”¹⁰⁶ that Congress had precisely targeted the type of communication and forms of media required to regulate “candidate advertisements masquerading as issue ads.”¹⁰⁷ However, the Supreme Court also has cautioned that “the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”¹⁰⁸

By contrast, the regulation of online issue ads under H.R. 1 as “electioneering communications” would run into a potential constitutional buzz saw because: (1) the bill would regulate ads that are targeted to recipients ineligible to vote for or against the referenced candidates; and (2) the bill recites no evidence whatsoever that online issue ads are “candidate advertisements masquerading as issue ads.”

C) H.R. 1 Would Impose Unconstitutionally Burdensome “Public File” Requirements for Online Ads

H.R. 1 also would require online advertisers and platforms to comply with the “public file” requirements that currently apply to broadcasters and cable and satellite system operators. This is, in effect, a new reporting and recordkeeping requirement for online ads that would cover not only speech about candidates, but also speech about any “national legislative issue of public importance.” The “public file” requirement would raise the costs of online speech and likely would impede or deter, and may even end, many small grassroots advertising efforts.

Specifically, any person or group spending as little as \$500 during a calendar year on “qualified political advertisements” on many popular and widely-accessed Internet platforms (including news and social networking websites, search engines, and mobile apps) would have to provide certain information to those platforms, and the information would have to be posted in an online “public file.”¹⁰⁹

These files would have to include:

- A digital copy of the regulated ad;
- A description of the audience targeted by the ad, the number of views generated, and the dates and times the ad was first and last displayed;
- The average rate charged for the ad;
- The name of, and the office sought by, the candidate referenced in the ad, or the “national legislative issue of public importance” discussed in the ad; and
- For ad sponsors that are not candidates or their campaign committees, the name of the sponsor; the name, address, and phone number for the sponsor’s contact person; and a list of the chief executive officers or board members of the sponsor.¹¹⁰

The term “national legislative issue of public importance” is not defined and is borrowed from the “public file” requirements for broadcasters under the federal Communications Act, which also does not define this term.¹¹¹ In practice, broadcasters’ advertising departments have interpreted this term loosely to cover most forms of non-commercial advertising. Thus, grassroots groups using social media to promote contentious but important causes, such as support or opposition for a wall on the U.S.-Mexico border, immigration reform, the “Tea Party,” “Black Lives Matter,” or the “Women’s March,” to targeted supporters, may find themselves targeted for harassment and retaliation by opponents monitoring the content and scope of their online advertising campaigns using the information reported in the “public file.”

Moreover, H.R. 1 would impose liability on both advertisers and online platforms for properly providing and collecting the information, which must be retained and made publicly accessible for at least four years after each ad is purchased.¹¹² Penalties could amount to several thousand dollars per violation.¹¹³ (Oddly enough, H.R. 1 also would place these requirements

105 *McConnell*, 540 U.S. at 206; *id.* at 193 (“And although the resulting advertisements do not urge the viewer to vote for or against a candidate *in so many words*, they are no less *clearly intended* to influence the election.”) (emphasis added).

106 *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

107 *McConnell*, 540 U.S. at 132 (quotation marks omitted); *id.* at 127-128 (noting that “so-called issue ads,” which “eschewed the use of magic words,” were “almost all [] aired in the 60 days immediately preceding a federal election.”).

108 *McConnell*, 540 U.S. at 206 n.88.

109 H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)).

110 *Id.*

111 *See* 47 U.S.C. § 315(e)(1)(B)(iii).

112 H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)(5)).

113 *Id.* (to be codified at 52 U.S.C. § 30104(j)(6)); *see also* 52 U.S.C. § 30109(a)(5), (6).

under the campaign finance law, granting enforcement authority to the FEC, even though much of the speech covered by these requirements would have nothing to do with federal elections.¹¹⁴) The combination of these compliance costs and legal risks may cause many online platforms to conclude that it is simply not worth their while to offer any political or issue advertising at low-dollar amounts, to the detriment of small grassroots groups.

Sen. Amy Klobuchar, who sponsored the original “Honest Ads Act” incorporated into H.R. 1,¹¹⁵ mistakenly claimed the proposed requirements would “harmonize[] the rules governing broadcasters, radio, print, on one hand, and online on the other.”¹¹⁶ In fact, advertisers using telephone calls, canvassing, and print (e.g., newspapers, magazines, direct mailers, and pamphlets) are not subject to the “public file” requirement.¹¹⁷ Moreover, broadcasters are subject to the “public file” requirement because they are required to act in the “public interest” due to the scarcity of the portion of the electromagnetic spectrum over which content and data may be transmitted, or, in the case of cable and satellite operators, because their services affect broadcast service.¹¹⁸

The “online platforms” that would be regulated by H.R. 1 are not at all like broadcast, cable, or satellite services. To the extent that they have any “bandwidth” limitations, they are not in any way comparable to the spectrum limitations for broadcasters. Regardless of whether there are alternative policy reasons for subjecting online platforms to heightened regulation, lawmakers should not be misled by the false proposition that the “public file” justifications that apply to broadcast, cable, and satellite media also apply to Internet media.

H.R. 1’s “public file” provisions are similar to a Maryland law that a federal court recently issued a preliminary injunction against for likely being unconstitutionally burdensome.¹¹⁹ While the Maryland law has some material differences, the general infirmity in H.R. 1 – as in the Maryland law – is that the bill’s requirements are a poor fit for the Russian propaganda campaign against Americans that the “public file” provisions purport to counteract.¹²⁰ As a bill that would regulate core political speech and compel speech in the form of information that online platforms must publish, H.R. 1 would be subject to the “strict scrutiny” standard of judicial review.¹²¹ As such, the bill may be neither overbroad nor underinclusive in terms of the speech it regulates and fails to regulate.¹²²

H.R. 1 is overbroad in that its “public file” requirements would apply mostly to speech by American citizens. This is especially apparent when H.R. 1 is held up against the Foreign Agents Registration Act, which imposes registration and reporting requirements only with respect to agents of foreign persons, foreign organizations, foreign governments, and foreign political parties.¹²³ H.R. 1 also is underinclusive in its exclusive focus on paid advertising when most of the Russian propaganda has been in the form of unpaid social media posts.¹²⁴ H.R. 1 also is generally a poor fit for the Russian threat because it is rather fanciful to think that a foreign government adversary bent on wreaking havoc on American society is going to bother to comply with the law by providing accurate information for the “public file.”¹²⁵

Facebook and Twitter have recently announced their own efforts to address foreign propaganda, which contain some similarities to the “public file” requirement that H.R. 1 would impose.¹²⁶ Nevertheless, these self-initiated measures are preferable to inflexible, one-size-fits-all legislation, as they can be adjusted and tailored over time to meet each platform’s unique advertising program and changing foreign threats.

114 See *id.*

115 See S. 1989 (115th Cong.).

116 Sens. Warner & Klobuchar Introduce the Honest Ads Act, Youtube.com (Oct. 19, 2017) at <https://www.youtube.com/watch?v=LVEJjNNLWlk> at 7:00-7:10.

117 See note 111, *supra*.

118 See 47 U.S.C. § 309; FCC, Licensing, at <https://www.fcc.gov/licensing-databases/licensing>; FCC, *In re* Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees (Jan. 28, 2016) ¶¶ 5-7, at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-4A1.pdf; FCC, Public Inspection Files, at <https://publicfiles-demo.fcc.gov/>; FCC, Cable Television, at <https://www.fcc.gov/media/engineering/cable-television>.

119 *Wash. Post v. McManus*, Case No. 1:18-cv-02527-PWG, Memo. Op. (D. Md. Jan. 3, 2019).

120 See *id.*; H.R. 1 § 4203.

121 *Wash. Post*, Memo. Op. at 14-16. Unlike other campaign finance reporting laws, which require filing reports with government agencies, H.R. 1 would impose the reporting requirement with the online platforms and would charge them with publishing the information, and thus the more lenient “exact-ing scrutiny” that typically applies to campaign finance reporting laws would not apply here. See *id.* at 26-29.

122 *Id.* at 38.

123 22 U.S.C. § 611 *et seq.*

124 *Wash. Post*, Memo. Op. at 41-42; New Knowledge, *The Tactics & Tropes of the Internet Research Agency*, at <https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf>; Computational Propaganda Research Project, *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, at <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report-2018.pdf>.

125 *Wash. Post*, Memo. Op. at 47.

126 Mary Clare Jalonick, *Facebook announces new transparency for political ads before Russia hearing*, CHICAGO TRIBUNE (Oct. 27, 2017), at <http://www.chicagotribune.com/bluesky/technology/ct-facebook-ads-20171027-story.html>; Cecilia Kang and Daisuke Wakabayashi, *Twitter Plans to Open Ad Data to Users*, N.Y. TIMES (Oct. 24, 2017), at <https://www.nytimes.com/2017/10/24/technology/twitter-political-ad-data.html>.

IV. H.R. 1 Would Make Media Outlets Liable for Policing Prohibited Speakers

H.R. 1 also would make broadcast, cable, satellite, and Internet media companies liable for failing to “make reasonable efforts to ensure that” “campaign related disbursements” are not purchased “directly or indirectly” by any foreign national.¹²⁷ Similar to the imposition of liability on online platforms for maintaining a “public file,” this requirement for media outlets to act as gatekeepers against foreign nationals will ultimately be passed on in the form of increased costs for all advertisers – especially for online ads, where the cost of compliance will often be far higher relative to, and may exceed,¹²⁸ the revenue from the ads themselves. Online platforms may stop selling political ads altogether, as they have done in response to similar state laws being enacted in Maryland and Washington.¹²⁹

This is especially the case since “reasonable efforts” are undefined, and careful lawyers will doubtlessly suggest a conservative approach that will further drive up the costs of small-scale advertising. Moreover, given the apparently discrete ad buys by Russian interests driving this legislation,¹³⁰ Congress will be understood to have targeted both large-scale ad buys where individual vetting is economically viable, and small-scale advertising where it is not. Basic economics suggests the result: online platforms will not offer small-scale products that are unprofitable.

Lastly, media outlets may be spurred by liability concerns to engage in undesirable profiling, or to impede advertising containing disfavored viewpoints under the guise of investigating a speaker’s eligibility to sponsor an ad.¹³¹

V. H.R. 1 Would Impose Inflexible and Impractical Disclaimer Requirements

In addition to the disclaimer requirements discussed above that H.R. 1 would impose on Internet ads containing video and audio content, the bill would impose other general and inflexible disclaimer burdens on all Internet ads.¹³² Many of these rules are written for broadcast ads and are impractical for many online ad formats – not just small-sized display ads.

The existing FEC disclaimer requirements that H.R. 1 would extend to online ads are already unwieldy, especially for space-limited ads. For independent expenditures and electioneering communications, the disclaimer must provide the sponsor’s name; street address, telephone number, or website URL; and state that the ad is not authorized by any candidate or candidate’s committee.¹³³ In addition, TV and radio ads must include an audio disclaimer declaring that “[Sponsor’s name] is responsible for the content of this advertising,” and video ads must also contain a similar text disclaimer. As discussed above, H.R. 1 also would require additional donor information to be included in this existing disclaimer language for video and audio ads.

For candidate-sponsored ads, the disclaimer must state, “Paid for by [name of candidate’s campaign committee].”¹³⁴ In addition, TV and radio ads must include an audio disclaimer spoken by the candidate stating his or her name, and that he or she has approved the message, and TV ads also must contain a full-screen view of the candidate making the statement or a photo of the candidate that appears during the voice-over statement.¹³⁵ TV ads also must contain an on-screen text disclaimer containing “a similar statement” of candidate approval.¹³⁶

127 H.R. 1 § 4209 (to be codified at 52 U.S.C. § 30121(d)).

128 See Peter Kafka, *Facebook will spend so much reviewing political ads this year that it will lose money on them*, RECODE (May 1, 2018) at <https://www.recode.net/2018/5/1/17309514/facebook-money-politics-advertising-2018-mark-zuckerberg>.

129 Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, BALTIMORE SUN (Jun. 29, 2018), at <https://www.baltimoresun.com/news/maryland/politics/bs-md-google-political-ads-20180629-story.html>; *Facebook to stop accepting campaign ads in Washington State*, ADAGE (Dec. 20, 2018), at <https://adage.com/article/tech/facebook-stop-accepting-campaign-ads-washington-state/316066/>.

130 See, e.g., Tom Huddleston, Jr., *Russian Facebook Ads Targeted Muslims, Gun Owners, Black Lives Matter*, FORTUNE.COM (Oct. 2, 2017), at <http://fortune.com/2017/10/02/facebook-russian-ads-congress/> (describing “nearly 3,000 ads” from “hundreds of Russian-linked accounts”).

131 See, e.g., Kyle Swenson, *Twitter calls foul on Rep. Marsha Blackburn ad because of ‘baby body parts’ comment*, WASH. POST (Oct. 10, 2017), at https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm_term=.a34e139ad8d0.

132 H.R. 1 § 4207 (to be codified at 52 U.S.C. § 30120(d), (e)).

133 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).

134 11 C.F.R. § 110.11(b)(1).

135 *Id.* § 110.11(c)(3).

136 *Id.*

The current radio ad disclaimers – which H.R. 1 would make even lengthier – often run for as long as 10 to 15 seconds, depending on the name of the group and contact information provided, but many online radio or podcast ad formats are limited to only 10 to 15 second lengths.¹³⁷ Online video ads also are commonly much shorter than broadcast TV ads.¹³⁸

The FEC’s existing disclaimer requirements exempt “small items” and communications where it is “impracticable” to include a disclaimer.¹³⁹ Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.¹⁴⁰

H.R. 1 would make “qualified internet or digital communications” (i.e., those “placed or promoted for a fee on an online platform”) ineligible for these exemptions from the disclaimer requirements.¹⁴¹ At a minimum, a digital ad would have to contain on its face the name of the ad’s sponsor, and this information could not be displayed by alternative means, such as “clicking through” the ad.¹⁴² The ad also would have to provide some means for recipients to obtain the complete required disclaimer, thus barring the use of formats where this may be technically impossible or impractical or if the vendor does not allow for it.¹⁴³ Notably, the complete disclaimer also could not be provided by linking to the advertiser’s website where all of the remaining information would be available, but rather must be provided on a stand-alone page.¹⁴⁴ Thus, H.R. 1 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

Conclusion

H.R. 1 is clearly a slapdash legislative vehicle that stitches together prior standalone bills comprised of unworkable and likely unconstitutional provisions that rightfully went nowhere. For this reason, the bill may seem like an unserious political ploy that is unlikely to pass the Senate or to be signed into law. Nonetheless, it should be examined carefully and subjected to critical pushback. As the first bill to be introduced in the House of Representatives for the 116th Congress, H.R. 1 is a disturbing statement of legislative priorities that does not augur well for efforts to protect free speech and associational and donor privacy for the rest of this Congress.

137 See *Personalization of Audio: Shorter Audio Ads*, PANDORA FOR BRANDS.COM (Aug. 24, 2017), at <http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/> and *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Apr. 9, 2016), at <https://www.cleverism.com/everything-about-podcast-advertising/>.

138 See, e.g., Garrett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE.COM (Jul. 26, 2017), at <http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/>.

139 11 C.F.R. § 110.11(f)(1)(i), (ii).

140 See FEC Adv. Op. No. 2010-19 (Google).

141 H.R. 1 § 4207(b)(2).

142 *Id.* § 4207 (to be codified at 52 U.S.C. § 30120(e)(1)).

143 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(b)).

144 *Id.*

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Analysis of H.R. 1 (Part Two)

Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights

Bradley A. Smith, Chairman

January 2019

Introduction

While most of the attention on H.R. 1 has focused on “hot” issues, such as earmarking government subsidies for political campaigns, gerrymandering, and new restrictions on grassroots organizations that engage in public affairs,¹ twenty pages of the bill are devoted to the unsexy, yet vitally important, issue of the Federal Election Commission’s (FEC) composition and operating procedures.²

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.³

As the late Sen. Alan Cranston (D-Ca.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”⁴ That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats were able to do it. Throwing that away and simply hoping a new agency will side with your preferred party is reckless and an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

1 See, e.g., Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf.

2 As the Institute for Free Speech (IFS) continues to analyze this and other sections of H.R. 1 that regulate First Amendment rights, it expects to release additional analyses of the bill. IFS’s written analyses may not address every concern it may have with the proposal, as the 570-page bill’s provisions are simply too numerous and complex to be able to effectively discuss the bill’s contents in their entirety.

3 See Scott Blackburn, Delusions about “Dysfunction”: Understanding the Federal Election Commission, Institute for Free Speech (Oct. 5, 2015), at https://www.ifs.org/wp-content/uploads/2015/10/2015-10-05_IFS-Issue-Brief_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf.

4 Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

Executive Summary

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission's legitimacy by significantly increasing the likelihood that the agency's decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto "Speech Czar." In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission's Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission's Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair's Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.
- Establish a non-binding "Blue Ribbon Advisory Panel" to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstring the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

Analysis

I. Creating A Partisan FEC

A) Background

Title VI, Subtitle A of H.R. 1, dubbed the “Restoring Integrity to America’s Elections Act,” begins by abolishing the FEC’s historic, bipartisan structure.

Since it was created in 1974, the FEC has been a true bipartisan commission, with each major party effectively controlling 3 of its 6 seats. (Current law says that “[n]o more than 3 members of the [FEC] ... may be affiliated with the same political party.”)⁵ Under the post-Watergate statute creating the FEC, four votes are needed for the Commission to initiate investigations or to prosecute alleged violations.⁶ As a result, it is impossible for an investigation or prosecution of a Democratic campaign to go forward on the basis of Republican votes alone, and vice versa – there must be at least some bipartisan agreement that an investigation or charges are warranted.

Critics who favor more regulation of political speech have long complained that this bipartisan structure hampers FEC enforcement efforts and detracts from the legitimacy of the Commission. With 3 Republicans and 3 Democrats, the Commission, they argue, “frequently deadlocks” and is unable to move forward on enforcement matters.⁷ Effectively, two-thirds of commissioners must agree before the Commission moves forward. This critique, however, is wrong on several fronts.

First, any small commission requires a sizeable supermajority to operate, including commissions with an odd number of members. A five-member body requires a 60% majority; a three-member body requires a two-thirds majority.

But, in fact, tie votes have always been a small percentage of FEC votes. Historically, they have totaled approximately one percent to four percent of Commission votes on enforcement matters.⁸ During the peak years of alleged “gridlock” on the Commission, 2008-2014, they still totaled less than 15 percent of overall votes.⁹

Second, even when deadlocks occur, that does not leave an enforcement matter unresolved. Rather, it means that the FEC will not open an investigation, or will not prosecute an alleged violation, as the case may be. A 3-3 vote on such a motion means the motion fails – there is nothing mysterious or out of the ordinary about it. And since the goal is to assure some degree of bipartisan agreement before proceeding, that is the proper result.

That leads to the third and most important point: Although critics claim that tie-votes sap the FEC’s ability to enforce campaign finance laws, in fact, it is assuredly the opposite. The only reason that the FEC has any legitimacy is its bipartisan makeup. Particularly in the current environment, it is inconceivable that an agency empowered to make prosecutorial decisions about the legality of campaign tactics, communications, funding, and activities on a straight party-line vote would have any legitimacy.

B) Creating a Partisan Commission

1. Abandoning the FEC’s Equal Party Makeup

H.R. 1 does away with the FEC’s historic bipartisan makeup, creating a 5-member Commission and allowing a simple majority vote to launch an investigation or to prosecute an alleged violation.¹⁰

⁵ 52 U.S.C. § 30106(a)(1).

⁶ 52 U.S.C. § 30106(c).

⁷ See, e.g., Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), at <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> and Justin Miller, *Reform Advocates’ Elusive Goal: Fix the FEC*, THE AMERICAN PROSPECT (Mar. 3, 2016), at <https://prospect.org/blog/checks/reform-advocates%e2%80%99-elusive-goal-fix-fec>.

⁸ See, e.g., Bradley A. Smith, Opening Statement of Bradley A. Smith, Chairman of the Federal Election Commission Before the Senate Committee on Rules and Administration, Federal Election Commission (Jul. 14, 2004), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smithstatement05.pdf>; Bradley A. Smith and Stephen M. Hoersting, A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission, ELECTION LAW JOURNAL (Vol. 1, No. 2, 2002), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smitharticle01.pdf> at 159.

⁹ See, e.g., Lee E. Goodman, End of Year Statement from Chairman Lee E. Goodman, Federal Election Commission (Dec. 2014), at http://www.fec.gov/members/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf at 2; Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), at <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

¹⁰ H.R. 1 § 6002(a).

The bill attempts to cover this partisan makeup by providing that no more than two of the five commissioners may be members of any one political party. This means that the fifth member would have to be a member of a minor party, or a political independent. This is not, however, a barrier to partisan control. For example, under this criteria, Senator Bernie Sanders, who nearly gained the 2016 Democratic presidential nomination, would not count as a Democrat on the Commission (technically, Sanders remains an “independent”), allowing him to join two other Democrats in a Commission majority. The same would be true for Angus King, the Maine senator elected as an independent, but who caucuses with Democrats.

Indeed, the FEC currently has an independent serving, Commissioner Steven Walther. But Walther was nominated at the behest of former Democratic Senate Majority Leader Harry Reid, having served as Reid’s lead attorney in a 1998 recount election Reid won by just 428 votes.¹¹ Walther holds a “Democratic” seat on the Commission, and is regularly identified as a Democrat.¹² Under H.R. 1, Walther would be the “balance of power.” Does that really sound nonpartisan?

The Pew Research Center has found that roughly two-thirds of self-identified “independents” are reliable supporters of one of the two major parties, and tend to be so because they intensely dislike the other major party.¹³ In short, any president worth his salt would have no trouble finding an “independent,” or perhaps a Green or Libertarian, with views favorable to his or her party’s position, and inclined to particularly distrust the other major party. This is no recipe for nonpartisan enforcement.

What little fig leaf is added by having an “independent” member of the Commission can also be stripped away by the president. Under the current law, there must always be some level of bipartisan support for the Commission to undertake an investigation or prosecution. But H.R. 1 provides that a simple majority of sitting commissioners (but no less than three) constitutes a quorum and can take official action.¹⁴ Thus, merely by refusing to fill vacancies set aside for the opposition party or the nominally independent fifth member, the president can assure that his or her two party appointees – with or without the support of the nominal independent or any member of another party – can enact a partisan enforcement agenda.

It is hard to imagine a better way to spread distrust of federal regulation of campaign speech.

2. A More Powerful, Partisan Chair – A Campaign Speech Czar

Under the FEC’s longstanding structure, the Chair of the Commission is elected by the Commissioners themselves to a one-year term at the start of each year and can only serve as Chair once in a six-year term. The Vice Chair and Chair must be from different parties. The Chair is not devoid of added power, but to a substantial extent, the position is ceremonial, because almost all major decisions, including hiring and firing key staff, issuing subpoenas, initiating enforcement actions, and approving proposed budgets for submission, must be made by a majority Commission vote. Again, the obvious purpose is to legitimize the Commission by assuring that it does not operate as a partisan agency.

H.R. 1 would create a speech czar in the form of a much more powerful Chair, appointed by the president, who would dominate the Commission. Under the legislation, the Chair would become the “Chief Administrative Officer” of the Commission, with the sole power to appoint – and remove – the Commission’s Staff Director, prepare its budget, “require ... any person to submit, under oath, such written reports and answers to questions as the Chair may prescribe,” issue subpoenas, and compel testimony.¹⁵ The legislation would require the Chair to “consult” with other commissioners on these matters, but, in the end, the Chair would have full authority to act alone.¹⁶

About the only administrative act the Chair cannot do alone is appoint the agency’s General Counsel. The Chair must make the appointment, but at least two other commissioners (again, no required bipartisanship) must concur.¹⁷ Whether a majority of the Commission can appoint or dismiss the General Counsel over the Chair’s objections is not clear, but even if it can, no bipartisanship is required. The General Counsel has enormous influence on the Commission’s enforcement policies, and, as we will see below, H.R. 1 grants him or her even greater powers.

11 See Matt Bewig, Chair of the Federal Election Commission: Who Is Stephen Walther?, AllGov (May 16, 2017), at <http://www.allgov.com/news/top-stories/chair-of-the-federal-election-commission-who-is-steven-walther-170516?news=860181>.

12 That Commissioner Walther, after 13 years on the Commission, must still regularly make the point that he is not a registered Democrat illustrates that being an “independent” does not strip one of partisan leanings. See Tisha Thompson, et al., Deadlock: FEC Commissioners Say They’re Failing to Investigate Campaign Violations, NBC Washington (Sept. 19, 2016), at <https://www.nbcwashington.com/investigations/Deadlock-FEC-Commissioners-Say-Theyre-Failing-to-Investigate-Campaign-Violations-394014971.html>.

13 See Samantha Smith, 5 Facts about America’s political independents, Pew Research Center (Jul. 5, 2016), at <http://www.pewresearch.org/fact-tank/2016/07/05/5-facts-about-americas-political-independents/>.

14 H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(1)).

15 *Id.* § 6003 (to be codified at 52 U.S.C. § 30107(a)(1)(A)(i), (iii) and 52 U.S.C. § 30107(a)(1)(B)(ii), (iv)-(v)).

16 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(A)).

17 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(B)(i)).

The Chair's power to appoint the Staff Director may sound like an innocuous administrative post, but, in fact, this is a powerful position and one that, like the General Counsel, exercises considerable sway in the FEC's enforcement processes as well as administration. That is because the FEC's Audit and Reports Analysis divisions and its Alternative Dispute Resolution Office fall under the direction of the Staff Director. Commission audits are extremely time-consuming for the committees and campaigns that are audited, and may require them to reveal substantial information about their political strategies and tactics. Audits may uncover violations, intentional or inadvertent, leading to fines and penalties. The Reports Analysis Division is responsible for compliance with the law's extensive reporting requirements, and its efforts, too, often identify violations – typically inadvertent, but still leading to penalties and bad publicity. And the Alternative Dispute Resolution Office has been a highly successful program through which the Commission resolves many contested or inadvertent violations. Any of these offices could easily be subverted to partisan use by a presidentially-appointed Chair and his or her hand-picked Staff Director.

Thus, the Chair's sole power to appoint or dismiss the Staff Director is not merely a matter of administration, but a matter of enforcement and enforcement policy. What will be the criteria for selecting campaigns and committees to be audited? What violations will be a priority for the Reports Analysis Division? Once again, current law requires bipartisan agreement to appoint or dismiss the Staff Director, but H.R. 1 subjects the position to partisan control.

Finally, H.R. 1 does away with the provision in existing law that the Vice Chair come from a different party than the Chair.¹⁸ This further allows power to be consolidated within one party.

With the power to craft the agency budget, appoint the Staff Director at their sole discretion, appoint the General Counsel without bipartisan support, issue subpoenas, and compel testimony and reports on their sole authority, the Chair, appointed by the president, will be the single dominant member of the Commission, fully deserving of the speech czar label.

C) The Provision's Timing Is Intended to Ensure Ongoing One-Party Control of the Commission

While most provisions of H.R. 1 take effect in 2020, the provisions regarding FEC appointments take effect in 2021.¹⁹ This means the victor in the 2020 presidential elections will appoint all five commissioners and name the initial Chair of the reconstructed commission. Furthermore, this president will be able to assure that his or her appointees constitute a majority of the Commission through at least 2027, even if he or she is not re-elected in 2024. That president will also have appointed the "independent" commissioner and the powerful Chair's Office through at least 2030.²⁰ That Chair and his or her majority will then name the Staff Director and General Counsel.

That means that all the new regulations required under other provisions of H.R. 1 will be written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel, and can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races. That same group would also respond to Advisory Opinion Requests and approve or disapprove of all enforcement actions.

Working with these potential advantages, if that president is re-elected in 2024, he or she could appoint a Commission majority through 2033.

D) Summary

In sum, under the guise of fixing a non-problem (alleged "gridlock"), H.R. 1 abandons the longstanding idea of a nonpartisan FEC and establishes a five-member commission subject to de facto partisan control. It adds to that partisan structure by giving enormous power to the Chair, acting alone, to establish agency priorities, issue subpoenas, appoint the powerful Staff Director without consent of other commissioners, and appoint the General Counsel.

The end result will be to weaponize the FEC as a potential tool of partisan campaign finance law enforcement, eroding public trust in the legitimacy of the agency and in the fairness of the election process more generally.

II. Enhancing the General Counsel's Power and Eroding Commission Accountability

Historically, as with other FEC decisions, the decision to hire or fire an agency General Counsel has required some degree of bipartisan agreement. As we have seen, H.R. 1 would destroy that bipartisan requirement, allowing the president's appointed Chair to name the General Counsel with the support of any two of the other four commissioners appointed by that same president – and no bipartisan support.

¹⁸ *Id.* (to be codified at 52 U.S.C. § 30106(a)(5)(C)).

¹⁹ *Id.* § 6007(a).

²⁰ *Id.* § 6002 (to be codified at 52 U.S.C. § 30106(a)(2)(A)-(B)).

The General Counsel has always been a powerful voice at the agency, since that office, subject to Commission approval, investigates and prosecutes violations, litigates on behalf of the Commission, and drafts regulations and advisory opinions, among other duties. The FEC budget provides for just one attorney position directly under control of each commissioner (two for the Chair and Vice Chair – who, under the new structure, can both come from the president’s party), so commissioners are of necessity heavily reliant on the legal advice and recommendations of the General Counsel and his or her staff.

H.R. 1 enhances the power of the General Counsel in several ways.

First, under current law, the FEC does not launch an investigation without the approval of the Commission²¹ – again, an approval requiring bipartisan agreement. H.R. 1 provides, instead, that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel’s recommendation within 30 days.²² Not only does this allow investigations to begin without bipartisan support, but it also allows commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel’s recommendation take effect.

Similarly, once an investigation is begun, H.R. 1 enhances the power of the General Counsel to issue subpoenas on his or her own authority. Under current law, subpoenas must be approved by the Commission. As a matter of efficiency, the FEC often authorizes the General Counsel to engage in broad discovery at the start of an investigation, without seeking approval at each step. But the Commission remains in the saddle. Under H.R. 1, the General Counsel need merely notify the Commission of his or her intent to conduct discovery, and unless a majority of the Commission affirmatively votes against the discovery within 15 days, the Counsel can proceed with whatever discovery is desired.²³ Again, the commissioners are absolved of the responsibility to vote on the matter, and the default option is to proceed with the investigation and subpoenas.

This section does include one of the few good provisions of this portion of H.R. 1 – extending the time for respondents to file briefs challenging the General Counsel’s recommendation to find a violation of the Federal Election Campaign Act from 15 to a more realistic 30 days,²⁴ but this minor technical change doesn’t even begin to offset the serious problems with the bill.

As with provisions for the appointment of the Commission itself, H.R. 1 is structured so that the party that gains initial control of the Commission will be able to keep its choice of a General Counsel in office through at least 2030 even if, and perhaps especially if, the General Counsel proves to be a rank partisan, and even if the presidency changes parties before then and the new president appoints a Chair from his or her own party.

III. New Standards of Judicial Review Weaken Rights of Respondents

The Federal Election Campaign Act has long included a provision allowing for citizen suits where the Commission has failed to act on a complaint, or the party believes the Commission has wrongfully dismissed the complaint.²⁵ In such cases, the complainant can file suit in the U.S. District Court for the District of Columbia. H.R. 1 appropriately increases the time that the Commission has to act on a complaint from an unrealistic 120 days to a more realistic one year,²⁶ but it’s downhill from there.

H.R. 1 provides that any such review into the lawfulness of the FEC’s dismissal of a complaint shall be decided under *de novo* review.²⁷ This means the Court gives no deference to any prior finding of the agency, but looks at the issue as if it were deciding the case in the first instance. This is contrary to the so-called *Chevron* doctrine that federal courts normally use when reviewing the decisions of administrative agencies, such as the FEC.

Under *Chevron* doctrine, if a statute is ambiguous, a court will defer to the agency’s reading of the law, unless it finds that the agency’s interpretation is clearly wrong. This is known as “*Chevron* deference.” Under *de novo* review, however, if the statute is ambiguous, the Court gives no deference to the agency’s reading of the law, but merely applies its own best reading of the statute. In recent years, *Chevron* doctrine has come under tremendous fire, primarily from conservatives, who have argued that it is the role of the courts to interpret statutes, and giving any special weight to the agency’s interpretation is not so much “deference” as “bias” in favor of one of the litigants – the government – on the exact issue in dispute.

We take no position in this analysis on the wisdom or validity of the *Chevron* doctrine. But regardless of how one feels about *Chevron* deference, H.R. 1 takes a curious approach. First, it is a partial, one-time invalidation of the *Chevron* doctrine for

21 52 U.S.C. 30109(a).

22 H.R. 1 § 6004 (to be codified at 52 U.S.C. § 30109(a)(2)(A)).

23 *Id.* (to be codified at 52 U.S.C. § 30109(a)(2)(B)).

24 *Id.* (to be codified at 52 U.S.C. § 30109(a)(3)(B)).

25 52 U.S.C. 30109(a)(8).

26 H.R. 1. § 6004 (to be codified at 52 U.S.C. § 30109(a)(8)(B)(i)).

27 *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii), (B)(ii)).

a single agency. While Congress clearly has the power to set standards of judicial review, and thus to overturn the *Chevron* doctrine, H.R. 1 is critical of *Chevron* only to the extent that *Chevron* deference might actually work in favor of respondents at the Federal Election Commission. If a respondent challenges in court a Commission decision finding that it violated the law, the *Chevron* doctrine will apply, and the court will defer to any reasonable interpretation the agency gives to the statute. But if the respondent wins at the Commission – if the Commission determines that the respondent’s conduct is not illegal – then the *Chevron* doctrine does not apply, and no deference will be given to the FEC’s decision.²⁸ For respondents, it’s a “heads I win, tails you lose” approach.

Furthermore, it is not clear if *de novo* review applies only to legal questions, or also to questions of fact. The better reading, we think, is that it applies only to legal questions, but the language is not clear. Historically, of course, courts have always given deference to the determinations of the original fact finder.

The bill also provides that, in any case where the alleged violation might trigger a fine greater than \$50,000, the agency may not rely, even in part, on “prosecutorial discretion” in defending in court its decision not to proceed.²⁹ This runs contrary to longstanding administrative law doctrine that gives agencies the authority to decide what cases they wish to devote resources to. For example, imagine a losing presidential campaign that spent \$600 million, and an allegation that the campaign illegally coordinated just over \$25,000 in expenditures by an outside group – a violation that, if proven, could trigger a penalty over \$50,000.³⁰ The FEC might conclude that, though it believes the law was broken, the law is admittedly murky as to whether the conduct actually was illegal; the facts would be extremely difficult to prove; and the candidate lost and is not in office, nor likely to run again. In such circumstances, the FEC might conclude that it was not worth pursuing a violation for an amount that was less than one one-hundredth of the campaign’s total spending, in litigation that could last years and use up hundreds of thousands of taxpayer dollars in time and resources, with a relatively low probability of success. Prosecutorial discretion allows the agency to simply decline to prosecute, so that it can use its resources more effectively on other matters. H.R. 1 requires a zero-tolerance approach that would strip the agency of the discretion to decline to prosecute in order to efficiently manage resources. Eliminating prosecutorial discretion is akin to saying that a cop must ticket everyone going more than 5 miles per hour over the speed limit.

There is no evidence that the FEC has been abusing its discretion by dismissing major violations on the grounds of prosecutorial discretion, and no reason to abolish *Chevron* deference only in cases where the agency has interpreted the law in favor of the respondents.

In summary, H.R. 1 would rig judicial review in favor of punishing those who speak in a campaign context.

IV. Miscellaneous Mischief

Two other provisions of the “Restoring Integrity to America’s Elections Act,” embedded in the “For the People Act,” deserve mention.

First, while the Act leaves it to the president to appoint FEC commissioners – as, constitutionally, it must – it provides for a “Blue Ribbon Advisory Panel” to make non-binding recommendations to the president. The odd-numbered panel will consist of “retired Federal judges, former law enforcement officials, [and] individuals with experience in election law,” and will publicly recommend one to three candidates to the president for each seat.³¹ It’s not really clear what the purpose of the panel is, since the president is always free to consult whom he or she likes regarding appointments. Rather, it seems to be the hope of those desiring more speech regulations that they will be selected to the “Blue Ribbon Advisory Panel” and then be able to pressure the president to choose from among their preferred candidates for each position.

What is interesting about this provision is that it would exempt this “Blue Ribbon Advisory Panel” from the requirements of the Federal Advisory Committee Act, which exists precisely to assure that such advisory committees operate with transparency.³² It’s an interesting way to “restore integrity” to elections – by creating an elite committee to debate in secret, on the public’s dime, and with the imprimatur of the government, on whom the president should appoint.

Finally, H.R. 1 also hamstring the FEC in its advisory opinion process. Under the law, any party can request an opinion as to whether its proposed activities are legal. If the Commission gives the go-ahead, the requestor cannot later be prosecuted for that behavior, nor can others who operate on the same terms, and in good faith reliance on the Opinion. Advisory Opinion

²⁸ *Id.*
²⁹ *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii)).
³⁰ For reference, Hillary Clinton’s 2016 presidential campaign spent \$768 million. See Christopher Ingraham, *Somebody just put a price tag on the 2016 election. It’s a doozy*, WASHINGTON POST (Apr. 14, 2017), at https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?utm_term=.91558b0ec51d.
³¹ H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(3)(B)(i)-(ii)).
³² *Id.* (to be codified at 52 U.S.C. § 30106(a)(3)(B)(iv)).

Requests are public documents, and anyone can submit comments to the Commission making recommendations on how it should decide the request. The Commission then considers the request at an open, public meeting.

Over a decade ago, the Commission began to allow requestors to appear in person before the Commission. The logic was simple: frequently, as the Commissioners considered a request, new questions about the intended activity, or the requestor, would come to the fore. Typically, the requestor, or its attorney, would be seated in the public audience and could readily answer the question involved, but the Commission had no provision allowing them to testify, even for the limited purpose of answering the question on the spot. Thus, the matter would be delayed, and a written request would go out to the requestor seeking an answer, after which the matter would be re-scheduled for further debate at a later Commission meeting. Allowing the requestor to appear in person at the public hearing to answer such questions while the matter was debated was mere common sense and stopped some needless delays.

H.R. 1 would provide that, if the Commission allows a requestor to appear before it in person, it must also allow “an interested party who submitted written comments ... in response to the request ... to appear before the Commission to present testimony.”³³

Simply put, there is no real point to this provision, since these “interested parties” cannot answer the types of questions the Commission asks of requestors and have already submitted their views on the legal framework. On certain Advisory Opinion Requests, there may be a dozen or more commenters, pro and con, who would all have to be given an opportunity to appear. Of course, if the Commission felt it would be helpful to hear from such parties, it can alter its procedures to allow for it. But there is no need to tie the Commission’s hands with a blanket rule requiring this procedure. It would be a bit like dictating to Congress who has a right to testify in committee hearings. But securing the ability to testify orally on Advisory Opinion Requests has been a pet priority of leading groups that advocate for more speech regulations ever since the FEC began allowing requestors to appear in person.

The impetus for this proposal is well-known to the campaign finance bar – those advocating speech restrictions simply want an opportunity to further lobby the Commission to deny most requests to speak. That such an arcane provision made it into the bill is a clear sign that its contents were written by lobbyists from speech censorship groups.

Conclusion

The FEC “reform” provisions tucked into the “For the People Act” would, if enacted, abolish a bipartisan commission in favor of one under partisan control and beholden to the president, do away with checks and balances within the Commission, attempt to bias judicial proceedings against respondents, and hamstring the efficient operations of the agency. On the basis of this section of H.R. 1 alone, members of Congress and the public would be well-served to carefully scrutinize this legislation.

³³ *Id.* § 6005 (to be codified at 52 U.S.C. 30108(e)).

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Analysis of H.R. 1 (Part Three)

*New Restrictions Target Speech by All Groups
Under the Guise of “Stopping Super PAC-Candidate Coordination”*

Bradley A. Smith, Chairman

February 2019

Introduction

Under the guise of “Stopping Super PAC-Candidate Coordination,” H.R. 1 would place sweeping new limitations on speech about campaigns and public affairs. It does so in a very complex, vague, and unintuitive manner. The provisions are so complex and open to so many possible interpretations that the discussion below may well understate the chill this portion of the legislation might place on speech.¹

These limitations would reach far beyond campaign speech to regulate discussion of legislative issues and public affairs. The restrictions also extend far beyond “super PACs” to apply to literally any civic or membership organization that engages in such discussion. For advocacy groups, unions, and trade associations, several of the limits proposed in H.R. 1 would operate as a total ban on speech.

The goal seems to be to limit discussion of candidates to the candidates and parties themselves, at the expense of the public at large. However, even candidates are likely to find their speech severely restricted were H.R. 1 to become law.

¹ As the Institute for Free Speech (IFS) continues to analyze this and other sections of H.R. 1 that regulate First Amendment rights, it may release additional analyses of the bill. IFS’s written analyses may not address every potential impact on First Amendment rights, as the 570-page bill’s provisions are simply too numerous and complex to review in their entirety.

Executive Summary

- Although this portion of H.R. 1 purports to be focused on “Stopping Super PAC-Candidate Coordination,” it is important to remember that the changes it would make to the law create regulations and penalties that would apply to *every group* of American citizens engaged in public discussion of issues and elections, not just super PACs.
- Under H.R. 1, speakers would be silenced both literally – through direct prohibitions on speaking – and also through fear, known as chill. Many communications by advocacy groups about legislation that are made routinely today would be illegal under H.R. 1. Many (and likely the vast majority) of these communications have nothing to do with election campaigns. Rather, groups will be silenced when trying to participate in public debate on important policy issues.
- Under existing law, if a civic group, trade association, union, nonprofit, or any other type of organization wants to spend money to discuss candidates and issues, it is regulated as a coordinated expenditure only if it meets both “content” and “conduct” standards. The “content” standards are intended to allow groups to communicate with the public about issues of concern without fear of triggering federal investigations. The “conduct” standards are meant to ensure that groups are not held liable for later expenditures merely because they have general conversations with candidates and officeholders about legislative priorities and issues. H.R. 1 attacks both.
- This radical new coordination standard would be interpreted and enforced by a revamped FEC, which for the first time would be under partisan control of the president. If the FEC decides that certain communications are “coordinated,” the agency could impose hefty fines on the organization.
- The “promote, attack, support, oppose” (PASO) standard that applies year-round to the content of coordinated communications is a green light for the government and even private litigants to impose huge legal costs on almost any group’s effort to communicate about politics and issues – except through the speech of candidates and parties themselves. It is, furthermore, contrary to Supreme Court precedent limiting the regulation of speech to communications that could have no reasonable meaning other than to advocate the election or defeat of a candidate.
- H.R. 1 would replace carefully defined rules about what conduct constitutes “coordination” with a sweeping definition that would subject even minimal and mundane communication with members of Congress on legislation to investigation and possible fines and punishment.
- Using virtually any publicly available information that communicates a candidate’s suggestions on the type of message his or her campaign seeks to convey could trigger the conduct standard for coordination. Likewise, any public information regarding the campaign’s strategy could do so too. If taken literally, H.R. 1 would require potential speakers to not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone to avoid possible coordination. But, if the language cannot be taken literally (at least we think it cannot), it’s certainly not clear what it means.
- H.R. 1 would also make many groups “coordinated spenders,” even if they speak truly independently of any candidate or party. Incorporated nonprofits deemed “coordinated spenders” would be banned from spending money on speech. This provision is directly contrary to Supreme Court precedent holding that the state may not presume coordination in the absence of actual coordination.
- Like current law, H.R. 1 would make republication of campaign material a coordinated activity. However, current law provides several sensible exceptions, which H.R. 1 repeals. Failure to include such exceptions would suppress publication of useful information.
- H.R. 1 eliminates the “safe harbor” for firewalls that allow for use, in certain circumstances, of a common vendor. The effect will be to make it harder for smaller groups to hire good professional help. In particular, this will negatively impact new and smaller grassroots organizations at the expense of established, bigger spending actors.

Analysis

I. Background

Super PACs are widely misunderstood, but the basic concept is simple.² Under Supreme Court precedent dating back over forty years,³ individuals are free to spend as much money as they like to urge fellow Americans who to vote for, so long as they do so independently of the candidates or party whose electoral fortunes they wish to support.

For many years, the Federal Election Commission (FEC) interpreted the Supreme Court decision to apply only to individuals spending on their own. That is, if Jane Smith wished to spend \$25,000 of her own money, independent of any candidate, to advocate for the election of a candidate, she could. John Doe could do the same on his own. But if the two joined together, the FEC held that neither could contribute more than \$5,000 to their combined efforts. This made no sense and rewarded ultra-rich and already influential individuals at the expense of groups of like-minded Americans who wished to pool their resources and amplify their voice.

This approach was finally challenged in a case called *SpeechNow.org v. FEC*.⁴ SpeechNow was primarily a small group of friends, only three of whom sought to contribute more than \$5,000, who formed an organization to support and oppose candidates. In an *en banc*, 9-0 decision, the U.S. Court of Appeals for the District of Columbia agreed with the plaintiffs. It held that, so long as the groups operated independently of the candidate or party in question, there was no more danger of corruption if they pooled their resources than if each person was forced to spend money individually. The government chose not to appeal, and every other U.S. court of appeal to hear a similar case has reached the same conclusion.⁵ As one court said, “[f]ew contested legal questions are answered so consistently by so many courts and judges.”⁶

Contrary to much popular belief, super PACs do not take anonymous contributions, and they report all their contributions and expenditures to the FEC, which are then made available online.⁷

Some people have questioned, however, whether some super PACs are truly operating independently of candidates. This is, in some cases, a legitimate factual question. But H.R. 1 attempts to use this legitimate concern, arising in the context of specific acts, organizations, and candidates, to make all independent spending in elections or effective grassroots advocacy by citizen organizations difficult or impossible.

II. H.R. 1 Places Ordinary Speech Under the Government’s Thumb and Applies to All Organizations, Not Just Super PACs

Pursuant to Supreme Court decisions, contributions for independent expenditures cannot be limited in size or by source.⁸ However, expenditures that are “coordinated” with a candidate or party are treated as contributions and limited to the amounts that one may contribute directly to the candidate’s campaign. That limit is \$5,000 in the case of a political committee (PAC), and nothing in the case of a corporation, including nonprofit corporations such as the Sierra Club or a chamber of commerce. By expanding the definition of “coordination” to include more speech, H.R. 1 works to silence speakers.

Under H.R. 1, speakers will be silenced both literally – through direct prohibitions on speaking – and also through fear, known as chill. Many communications by advocacy groups about legislation that are made routinely today would be illegal under H.R. 1. Many (and likely the vast majority) of these communications have nothing to do with election campaigns. Rather, groups will be silenced when trying to participate in public debate on important policy issues.

Under existing law, if a civic group, trade association, union, nonprofit, or any other type of organization wants to spend money to discuss candidates and issues, it is regulated as a coordinated expenditure only if it meets both “content” and “conduct” standards. The “content” standards are intended to allow groups to communicate with the public about issues of concern without fear of triggering federal investigations. The “conduct” standards are meant to ensure that groups are not

² See Luke Wachob, Super PACs: Expanding Freedom of Speech, Institute for Free Speech (Oct. 30, 2017), at https://www.ifs.org/wp-content/uploads/2017/10/2017-10-30_Issue-Brief_Wachob_Super-PACs-Expanding-Freedom-Of-Speech.pdf.

³ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴ 599 F.3d 686 (2010). The Institute for Free Speech represented the plaintiffs in the lawsuit as co-counsel with the Institute for Justice.

⁵ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Wisc. Right to Life Inc. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Republican Party v. Kind*, 741 F.3d 1089 (10th Cir. 2013); *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013); *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483 (2nd Cir. 2013).

⁶ *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2nd Cir. 2013).

⁷ See note 2, *supra*.

⁸ *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010). But contributions and expenditures by non-U.S. nationals may be prohibited. *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *sum. aff’d* 565 U.S. 1104 (2012).

held liable for later expenditures merely because they have general conversations with candidates and officeholders about legislative priorities and issues. H.R. 1 attacks both.

Although Title VI, Subtitle B of H.R. 1 purports, in its title, to be about super PACs, it is important to remember that the following changes in the law create regulations and penalties that would apply to every group engaged in public discussion of issues and elections, not just super PACs.

III. Re-Defining “Coordination” to Outlaw Historically Protected Speech

A) Content: Re-Defining Ordinary Speech as Campaign Speech

Under the “content” prong of existing law, an expenditure must fall into one of the following categories to be subject to coordination limits:

- It republishes the candidate’s own campaign material;
- It expressly advocates the election or defeat of a candidate, using words such as “vote for,” “vote against,” “support,” “defeat,” and “re-elect”;
- It is a public ad that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate”;
- It mentions a candidate in a broadcast ad or ads that cost at least \$10,000 and are targeted to that candidate’s electorate in the final 60 days before a general election or 30 days before a primary or caucus; or
- It references a clearly identified candidate or party in public advertising in the candidate’s jurisdiction within 90 or 120 days of an election (depending on whether a congressional or presidential election is at issue).⁹

The last two parts of this definition are already unconstitutional or of dubious constitutionality. The Supreme Court has clearly held that, before Congress can place dollar limits on independent speech, it must adopt clear, objective standards so that citizens know what they can and cannot say.¹⁰ The standards must also be tailored to a substantial government interest. The Court has held that the “express advocacy” standard meets these tests. Further, the Court held that the limitation on broadcast ads mentioning a candidate within 60 days of an election must also meet the test of being “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”¹¹ The last of the criteria above – any communication mentioning a candidate within 90 or 120 days of an election – clearly fails the tailoring standard, unless it is interpreted to include an additional provision that it is susceptible to no interpretation other than an appeal to vote for or against a candidate. To date, the FEC has not issued such a clarification. The Court has not yet been ruled on whether a broader standard is constitutional for “coordinated” communications, but the Court’s clear concern about vagueness strongly suggests a broader standard would not be constitutional.

Regardless, H.R. 1 broadens the content definition of a “coordinated expenditure” far beyond the already constitutionally dubious current law. It would apply to the funding of any speech – not just broadcast advertising – that refers to a candidate and is disseminated within 120 days of a general election.¹² The definition, more drastically, also applies to any communication made at any time that “promotes or supports the candidate, or attacks or opposes an opponent of the candidate.”¹³

To emphasize the point, the “promote,” “attack,” “support,” or “oppose” language (PASO) applies year-round, even in non-election years.¹⁴ It would give major headaches to any group that speaks on public issues. One huge headache is whether the speech would even be legal.

Suppose, for example, a government employees’ union wished to purchase a newspaper ad saying, “Government employees should not be held hostage to a border wall. It’s time to end the government shutdown.” Is that a statement “attacking” President Trump? Suppose it referred to “Trump’s wall”? If that is a statement attacking Trump, it would meet the content standard

9 11 C.F.R. 109.21(c). Notice that except for unpaid Internet communications, the final category subsumes the third and fourth categories in virtually every instance.

10 *Buckley*, 424 U.S. at 42 (“the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application”).

11 *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

12 Please note that § 6102 of H.R. 1 includes under subsection (b) a new § 326. All citations to §6102(b) in this analysis include a reference to this proposed § 326. See, e.g., H.R. 1 § 6102(b) (i.e. § 326(a)(1)(A), (d)(1)(C), and (d)(2)(A)).

13 *Id.* (i.e. § 326(d)(1)(B)).

14 *Id.*

in H.R. 1, and the union would be banned from making such speech, if it also met the newly expanded “conduct” standard, discussed below.

Consider another possible ad. A group of Venezuelan émigrés, who are now naturalized U.S. citizens, take out an ad: “President Trump has recognized the new Interim Government of Venezuela. We thank the President for this action and ask all Americans to support the return of democracy to our country of birth.” Would the FEC deem that an ad “promoting” or “supporting” President Trump?

How about this hypothetical ad from an environmental group: “Climate change is real. Call Senator X and urge him to start taking action on climate change.” Attack? How about a business group’s ad: “The Democrats’ tax hike would cost thousands of jobs in our state. Call Senator A, and ask him to vote ‘no’ on the job-killing tax bill.” Is that an attack? Some might deem it one, asking why the group would run the ad if the senator already planned to vote ‘no.’

Note that the PASO standard applies to any ad that can be seen in a candidate or officeholder’s district on the Internet or any other medium. Not only does it apply year-round, even in non-election years, but despite the deceptive name of the title of this portion of the bill – “Stopping Super PAC-Candidate Coordination” – it applies to trade associations, unions, business groups, and advocacy organizations, such as Planned Parenthood and the National Right to Life Committee. It applies, it turns out, to almost every citizen or group of citizens that might want to comment on public life or candidates with one exception: the organized press. *The Washington Post*, CNN, and NPR can coordinate with candidates and spend all they want to speak out on any issue or election campaign. A nonprofit group’s blog,¹⁵ Twitter account, or Facebook page? It can’t.¹⁶

The importance of a rigorous content standard comes about because almost any group that runs public education campaigns on issues is also likely to have considerable contact with members of Congress to discuss legislation and legislative strategies. Many of those members will participate in their party’s political campaign activities. Thus, a facially credible complaint alleging possible coordination could often be made, even if there were no coordination in fact. This would effectively force organizations to choose between discussing issues and legislation with members or engaging in public education campaigns. Doing both would invite complaints from political adversaries, eating up time and resources, spending tens of thousands on legal fees, and possibly forcing the organization to divulge confidential strategies and conversations.

Keep in mind that this radical new coordination standard would be interpreted and enforced by a revamped FEC, which for the first time would be under partisan control of the president.¹⁷ If the FEC decided that the communications were “coordinated,” the agency could impose hefty fines.¹⁸ If the FEC believed coordination was knowing and willful, the fine on nonprofit advocacy groups could be triple the communications’ costs.¹⁹ If the trebled fines bankrupt the group or were unpaid, the FEC could collect the unpaid amounts from the organization’s senior employees or directors.²⁰ A criminal prosecution could also be brought by the Justice Department, with the threat of up to five years in prison for responsible individuals.

A clear content standard allows groups that wish to avoid these huge risks to do so, simply by making sure that their ads do not advocate the election or defeat of a candidate or candidates. This tailoring ensures that the restrictions make sense, and thus do not infringe on the right to speak or to hear.

In short, the PASO standard is a green light for the government and even private litigants to impose huge legal costs on almost any group’s effort to communicate about politics and issues – except through the speech of candidates and parties themselves. For this very reason, the Supreme Court has long and repeatedly held that in order to regulate the financing of public communications, government must adopt clear, objective standards: “express advocacy”; or mentioning a candidate in a paid ad within a clear, specific time frame close to an election in an ad that is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.²¹ H.R. 1 ignores this clear precedent in a straightforward assault on the speech of citizen groups.

15 Although, as noted above, communications on a person’s own website (including blogs) are currently exempt from regulation, a separate provision in H.R. 1 (§ 4205) would undo the FEC’s Internet exemption and would thus subject blogs to regulation. See Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf at 11-12.

16 H.R. 1 § 6102(b) (i.e. § 326(a)(2)(A)).

17 *Id.* §§ 6001 to 6007. See also Bradley A. Smith, Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights, Institute for Free Speech (Jan. 31, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31_IFS-Analysis_US_HR-1_Creating-A-Partisan-FEC.pdf.

18 H.R. 1 § 6102(b) (i.e. § 326(e)(1)(A)).

19 *Id.* (i.e. § 326(e)(1)(B)).

20 *Id.* (i.e. § 326(e)(2)).

21 *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 194 (2003) (such statutes must be “both easily understood and objectively determinable”).

B) Conduct: If You Talk to a Member of Congress, You Might Be “Coordinating”

Though almost any speech by advocacy nonprofits that mentions a political officeholder or candidate could, under H.R. 1, be barred, at least speakers must still actually “coordinate” their activity with the candidate before being subject to limitations, right? Well no, at least not in the way most people would use the term “coordinate” in the everyday common sense usage of the term.

Under existing law, “coordination” occurs when a third party makes expenditures in the following circumstances:

- At the request or suggestion of a candidate, a political committee, or its agent;
- If the candidate or committee is materially involved in decisions pertaining to the content of the communication, the intended audience, the means of the communication, the timing or frequency of the communication, or the size or duration of the communication;
- If the communication is created, produced, or distributed after substantial discussions about the communication between the person or organization paying for it and the candidate or committee, or their agents; a discussion is “substantial” only if “information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication”;
- The spender uses a commercial vendor, who provided services to the candidate within the preceding 120 days, for development of a media strategy, polling, fundraising, producing a public communication, identifying voters or developing voter, mailing, or donor lists, selecting personnel for the campaign, or providing political or media advice; or
- The spender is or employs a person who was an employee or contractor of the candidate or the candidate’s opponent in the previous 120 days.²²

These rules require that there be actual coordination between the spender and the candidate or committee. They further recognize that campaign information more than four months old is almost never of value to a spender, given the fast-changing nature of campaigning, and that the world of experienced vendors and potential employers in this market is small.

H.R. 1 would replace these carefully defined rules with a sweeping definition that would subject even minimal and mundane communication with members of Congress on legislation to investigation and possible fines and punishment. It would define coordination as any activity “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, an authorized committee of a candidate, a political committee of a political party, or agents of the candidate or committee,”²³ or any republication of any campaign material prepared by a candidate (such as a clip from the candidate’s ad).²⁴ The definition goes on to say that to avoid coordination, any activity must be “*entirely* independent[] of the candidate,” a standard which it says is not met if there is any “general or particular understanding” between the spender and the candidate, or “*any* communication with, the candidate, committee, or agents about the payment or communication.”²⁵

An exception is made if the communication between a candidate and spender consists of nothing more than discussing a candidate’s position on a legislative or policy matter, but only so long as there is “*no* communication ... regarding the candidate’s or committee’s campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or other campaign activities.”²⁶ In other words, “this would be popular in your district” is a no-no, as is “I’m going to make some speeches on this issue.”

As an example, if a local environmental group sought legislation providing funds for clean-up of a local waterway and said to a representative, “Not only is this the right thing to do, but it will be hugely popular. Our polling shows that more than 70 percent of voters would look more favorably on a candidate who supported this legislation,” that would trigger the coordination standard and thus prohibit future PASO spending by the organization. Similarly, if the officeholder asked the organization’s representatives, “How would you suggest I present this to my constituents?” any response would trigger a coordination finding for any future PASO spending.

²² 11 C.F.R. 109.21(d)(1)-(5).

²³ H.R. 1 § 6102(b) (*i.e.* § 326(b)(1)).

²⁴ *Id.* (*i.e.* § 326(a)(1)(B)).

²⁵ *Id.* (*i.e.* § 326(b)(1)) (emphasis added).

²⁶ *Id.* (*i.e.* § 326(b)(2)) (emphasis added).

C) Conduct: If You Read the News, You Might Be “Coordinating”

Current law logically says, “if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source,” it is not a coordinated communication.²⁷ H.R. 1 repeals the current coordination regulations and does not provide an exclusion for the use of public information.²⁸

As noted above, coordination is defined, in part, as a communication “at the request or suggestion of, a candidate, an authorized committee of a candidate, [or] a political committee of a political party.”²⁹ Another provision seems to, at the least, imply that coordination would be triggered if the speaker obtains information “regarding the candidate’s or committee’s campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or other campaign activities.”³⁰

It would appear this means that virtually any publicly available information that conveys a candidate’s suggestions on the type of message his or her campaign seeks to convey could trigger the conduct standard for coordination. Likewise, any public information regarding the campaign’s strategy could do so too.

Given the failure to exclude publicly available information from triggering the conduct standard, independent speakers would have to hermetically isolate themselves from the rest of the world, lest their speech be considered “coordinated” with a candidate. If taken literally, H.R. 1 means that potential speakers could not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone. That is because candidates’ plans or messages are typically a matter of public knowledge, and the media routinely reports on this subject.

Of course, none of these news sources is clairvoyant. Presumably, they were apprised of the candidates’ planned expenditures by the candidates or their campaigns. Thus, any independent speaker who is informed by these publicly available reports would – in the language of the proposal – have received information about the candidate’s or party’s campaign needs or plans that the candidate or committee provided to the person making the expenditure for the communications.

Similarly, every time a candidate or campaign aide speaks, every time a campaign distributes a public communication, and every time a campaign creates a website, it is providing information concerning its campaign messaging. Surely, an independent expenditure cannot fairly be said to be coordinated simply because it is informed by, or even parrots, some of a candidate’s publicly available talking points or rhetoric. But from the text of the bill, that would appear to be the case.

But if the language cannot be taken literally (at least we think it cannot), what does it mean? For example, in a public Q&A session, a relatively unknown candidate is asked, “What makes you think you can win this race?” The candidate responds, “I think my background as a nonpartisan problem solver will be attractive to voters.” Can an organization that supports the candidate’s election make expenditures promoting him as a nonpartisan problem solver? Suppose in a public interview, a candidate’s campaign manager (an agent of the candidate) says, “This race comes down to who can get their base voters to turn out.” An organization favoring that candidate then seeks to design ads that it thinks will appeal to what it perceives to be that candidate’s voter base. Is that illegal coordination? A candidate says, “If elected, I’ll tirelessly fight corruption and wasteful spending in the current administration.” Can supporters make public communications critical of corruption in the current administration?

The chilling effect – an organization would decide not to speak, lest, at best, it is forced to dedicate thousands of dollars and hours of time to defending itself, or, worse, is found liable – is real. If citizens cannot even use public information to discuss candidates, what is left to discuss? But if that is not the intent, why does H.R. 1 repeal the “publicly available source” exception in existing law?

D) Conduct: You Might Be “Coordinating,” Even if You Didn’t Coordinate

As if such restrictions on citizen/legislator interaction weren’t enough, H.R. 1 would also create a category of “coordinated spenders” who are covered regardless of whether they actually coordinate anything with a candidate or committee. These include:

- any organization which, during the four years prior to the expenditure being made, was “directly or indirectly formed or established by or at the request or suggestion of, or with the encouragement of, the candidate” – including a person who only years later becomes a candidate – or the candidate’s agents;

²⁷ 11 C.F.R. 109.21(d)(3).

²⁸ H.R. 1 § 6102(c)(1)(A).

²⁹ *Id.* (i.e. § 326(b)(1)) (internal quotation marks omitted).

³⁰ *Id.* (i.e. § 326(b)(2)).

- any organization for which a candidate or committee has solicited funds, appeared at a fundraising event, or provided names of potential donors, during the election cycle for the office – a period ranging from two years (for House members) to six years (for senators);
- any organization “established, directed, or managed by the candidate” or by any person who has worked for the candidate as a political, media, or fundraising advisor or consultant for four years prior to the expenditure, or who held a position in any other campaign or organization directly or indirectly controlled by the candidate in that four-year period, or who worked on the candidate’s office staff at any time in the prior four years;
- any organization that has retained the professional services of any person who, in the prior two years, provided professional services to the candidate or committee, including services in support of the campaign’s “advertising, messag[ing], strategy, policy, polling, allocation of resources, fundraising, or campaign operations.” (Oddly, it excludes legal services – apparently lawyers were involved in drafting this legislation); and
- any organization “established, directed, or managed by” an immediate family member of the candidate, or by a person who has had “more than incidental discussions” about the campaign with a family member of the candidate.³¹

Under these rules, here are just a few sample scenarios in which organizations would be prohibited from spending any money at all on public communications that might be deemed to “promote, support, attack, or oppose” (PASO) a candidate:

- A volunteer raises funds for a state environmental advocacy group. Eighteen months later, he decides to run for Congress. The environmental group may not spend at all on PASO communications.
- A member of the House purchases a ticket for \$100 and attends the annual fundraiser of a pro-life organization. Five years later, the member declares his candidacy for U.S. Senate. The organization cannot spend anything on PASO communications, even if done independently of the candidate and campaign.
- The executive director of a state ACLU chapter resigns her position and declares herself a candidate for Congress. The ACLU becomes a “coordinated spender” and is prohibited from spending on PASO communications, even if done independently of the candidate and campaign and done a year later.
- A trade association hires a junior legislative aide who previously worked as a paid summer intern for a state senator that then successfully runs for Congress. For four years after that internship, the association would be precluded from spending on any public communications that “promote, support, attack, or oppose” that candidate or his opponent.
- In 2020, candidate Jones hires a consulting firm to assist with its media strategy. In 2021, a nonprofit hires the same firm to assist it in developing an ad campaign in another state. In 2022, the nonprofit decides it should support the re-election of now-Congressman Jones. It is barred from speaking using PASO communications, even if done independently of the campaign and done using another consultant.
- A college professor on sabbatical helps establish a think tank to produce research on economic issues, then returns to his job at the university. Five years later, the professor’s brother-in-law decides to run for U.S. Senate. The think tank must be sure that it does not spend any funds to produce any combination of white papers or other publications that could be deemed to “promote, support, attack, or oppose” either candidate in the race. Not only would such expenditures trigger fines from the FEC, but if the think tank did so, it might lose its tax-exempt status.³²

Many of these restrictions could be violated unintentionally. Even these unintentional violations could trigger costly fines and legal fees. These kinds of restrictions are overkill that would put a deep chill on speech by citizen groups, making organizations and groups of citizens afraid to spend any money on any public communications that might somehow be deemed to “promote, support, attack, or oppose” a candidate.

Similarly illogical restrictions would also apply to super PACs and regular PACs. All of the above examples, other than the think tank, would be relevant to PACs. Super PACs would be barred from spending at all on express advocacy or PASO communications if it were a coordinated spender under the same examples too. Regular PACs could spend up to \$5,000.

Such rules are also unconstitutional. In *Colorado Republican Federal Campaign Committee v. FEC*, the Supreme Court held that the FEC could not simply presume coordination – rather, coordination had to actually be proven to exist in fact in order

³¹ *Id.* (i.e. § 326(c)(2)(A)-(E)).

³² All of these examples assume the groups in question are incorporated, as the vast majority are. If the group were not incorporated, its spending would not be completely banned, but it would be limited to just \$5,000.

to be regulated.³³ The reason for this is that these types of restrictions on speech are only permissible to prevent quid pro quo corruption. But, if an organization is not actually coordinating its activity with a candidate or officeholder, the danger of that corruption doesn't exist.

Even without the unconstitutional presumption of coordination, holding that a group had engaged in coordination because an officeholder or candidate merely “encouraged” the formation of an organization is likely to be held unconstitutional. Although few courts have explored in detail exactly how much contact and discussion is needed to constitute “coordination,” they have insisted upon something considerably more than mere encouragement.³⁴ This is because, once an expenditure is found to be “coordinated,” it is severely restricted, thus directly burdening the organization’s speech, and the right of those to hear the message.

One of the few federal courts to consider the standard in detail rejected the idea that mere knowledge of a campaign’s plans and strategies – what it termed an “insider trading” theory – was sufficient to find coordination. Rather, it found that “coordination” necessitated candidate control over the expenditures or, at a minimum, “substantial discussion or negotiation.” That meant the campaign and the spender had to discuss such things as the content, timing, location, means, or intended audience for the communication – the standards since captured in the existing law that H.R. 1 seeks to repeal and replace. According to the court, “coordination” could only be found where “the candidate and spender emerge as partners or joint venturers.”³⁵

H.R. 1 would also fail almost any constitutional test for vagueness. What does a future candidate have to have done that would constitute “encouragement” for the formation of an organization? Would it include an op-ed article? A podcast interview? What if the candidate in that op-ed or podcast said, “People concerned about the issues I’ve been discussing need to get active and support my candidacy”? Or, “I welcome the support of your listeners. Get active.”? What does it mean for a candidate to “indirectly” control an organization? Would a fellow member of Congress be deemed an agent of another candidate if he had discussed with a colleague the political pressures bearing on his colleague on a particular issue, and then later endorsed or made a contribution his colleague’s re-election? How many conversations with a candidate’s immediate family members constitute “more than incidental discussions” about the candidate’s campaign?

E) Conduct: Other Absurdities that Suppress Speech

Like current law, H.R. 1 would make republication of campaign material a coordinated activity. However, current law provides several sensible exceptions, which H.R. 1 repeals. The exceptions include reprinting material in order to advocate “the defeat of the candidate or party that prepared the material” or the “campaign material used consists of a brief quote of materials that demonstrate a candidate’s position.”³⁶

Failing to include such exceptions would suppress useful information. On its face, this would appear to include even recordings of candidates at fundraisers. Remember the one that hurt Mitt Romney’s presidential campaign? When he said 47% of voters were with President Obama because they were “dependent upon government”?³⁷ Or the one when candidate Barack Obama spoke about many working class Pennsylvania voters who “get bitter, they cling to guns or religion or antipathy to people who aren’t like them”?³⁸ If an advocacy group published that type of info – which the public should see – doing so would appear to be illegal if H.R. 1 were to become law.

F) Conduct: No Safe Harbor Firewall Allowed

These constitutional and practical problems are compounded by the fact that H.R. 1 takes away the “safe harbor” now included in the law. For example, under current regulations, a candidate and a spender are freed from the restriction on the use of a common vendor, if that vendor has established an effective “firewall” to ensure that confidential information is not traded between the candidate or campaign and the spender.³⁹

³³ 518 U.S. 604 (1996).

³⁴ See, e.g., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 621-22, 116 S. Ct. 2309, 2319 (1996) (“An agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot (for constitutional purposes) make it one”).

³⁵ *Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999) (“joint venturers” standard); see also *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997) (standard finding “coordination” where there was “any” oral communication between spender and candidate was unconstitutionally overbroad). See generally Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 Willamette L. Rev. 603, 621-626 (2013).

³⁶ 11 C.F.R. § 109.23(b).

³⁷ David Corn, *SECRET VIDEO: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters*, MOTHER JONES (Sept. 17, 2012), at <https://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser/>.

³⁸ Ed Pilkington, *Obama angers midwest voters with guns and religion remark*, THE GUARDIAN (Apr. 14, 2008), at <https://www.theguardian.com/world/2008/apr/14/barackobama.uselections2008>.

³⁹ 11 C.F.R. 109.21(h).

This safe harbor is a recognition that the universe of vendors with the proper skills, geographic location, knowledge, and ideology (most political vendors tend to work almost or entirely exclusively with candidates of one party or groups on one side of the political spectrum) is often quite small. H.R. 1 abolishes that safe harbor, which will make it harder for smaller groups to hire good professional help.⁴⁰ If H.R. 1 forces vendors to choose, they will inevitably go with the established, bigger spending speakers, leaving new and smaller grassroots organizations with few options for qualified professional help.

Conclusion

Title VI, Subtitle B of H.R. 1 deceptively labels itself the “Stopping Super PAC-Candidate Coordination Act.” In fact, it applies not only to super PACs, but to any and every civic organization or membership group that communicates with the public about public affairs and legislation.

Its effect will be to drive independent citizen voices out of advocating on legislation and policy. The candidate and parties themselves, along with the legacy media of major networks and newspapers, might well have a virtual monopoly on the public discussion of such issues and legislation. In addition, H.R. 1 provides for the first time for general regulation of speech by grassroots organizations operating on the Internet, one of the most effective and inexpensive ways for small organizations to compete in the marketplace of ideas.

Many of the provisions in this subtitle – particularly the presumption of coordination where no actual coordination exists – are clearly unconstitutional under Supreme Court precedent.

However, if you believe that candidates, parties, and legacy media should monopolize the flow of information that voters are allowed to hear, the deceptively named “Stopping Super PAC-Candidate Coordination Act” provisions of H.R. 1 will be just your cup of tea.

⁴⁰ H.R. 1 § 6102(b) (*i.e.* § 326(b)(4)).

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