

March 6, 2019

RE: Vote NO H.R. 1, For the People Act of 2019

Dear Representative:

The American Civil Liberties Union, on behalf of its 3 million members, supporters and activists, opposes H.R. 1, the For the People Act of 2019, in its current form, and urges you to vote “no” on final passage.¹ We are very pleased to see that the House of Representatives had chosen to focus on strengthening and expanding participation in our democracy in the 116th Congress, and there are many provisions of H.R. 1 with which we strongly agree. The ACLU has particularly long-supported the provisions aimed at unobstructed and equal access to voting; we strongly support the federal standards envisioned by H.R. 1 in this regard. However, there are a number of areas in H.R. 1 in need of improvement. While some of our concerns have been addressed or mitigated since introduction, the bill, in its current form, would still unconstitutionally burden speech and associational rights. Last week, we sent a letter urging the House Rules Committee to make amendments addressing our concerns in order.² We were disappointed that the Committee did not do so. We therefore urge you to vote “no” on final passage of H.R. 1. The ACLU will score this vote.



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Vote “NO” on H.R. 1

We understand that H.R. 1 is the beginning of a sustained effort to reform and improve our democracy, but likely is not destined to become law. Senate Majority Leader Mitch McConnell apparently has stated that the Senate will not be considering H.R. 1 if it passes the House. We believe that the constituent parts of H.R. 1 have or will be introduced as stand-alone bills, and urge the House of Representatives to hold hearings and markups, and to vote on these separate provisions. The ACLU will strongly support the passage of many of those bills.

Until now, the ACLU has been working to try to secure changes to H.R. 1 that would minimize, if not entirely alleviate our concerns with the legislation, particularly the ways in which it would unconstitutionally burden free speech and associational rights. We want to be clear that we were very encouraged by our communications with staff and by the changes that we have already seen to the legislation to clarify language in more speech-protective ways. These discussions and their fruits, in both the changes we have seen in the bill as it was reported and some of the amendments that

¹ For the People Act of 2019, H.R. 1, 116th Cong. (2019).

² Letter to House Rules Committee On H.R. 1 (Mar. 1, 2019), *available at* <https://www.aclu.org/letter/aclu-letter-house-rules-committee-hr-1>.

have been made in order, give us hope for finding a path forward to achieve our shared goals in the longer term.³

We believe that we can work together to enact needed changes to the legislation in the future; however, H.R. 1 fails in some instances to embody those necessary changes now, and, if it became law, would overly burden the speech and associational rights of organizations that engage in issue advocacy. We not only cannot support this result, but find ourselves compelled to oppose, even in the face of the many provisions of the bill we have long championed and enthusiastically endorse.

To further explain our position, we detail both some areas of general agreement with policies H.R. 1 would implement and some, though not necessarily all, of our areas of concern. H.R. 1 is sweeping legislation, addressing many different facets of the laws surrounding participation in our democracy and elections. Division A of the bill would implement new voting and election regulations. Divisions B and C of the bill would create a new public financing system for federal elections and enact numerous revisions to current federal campaign finance, lobbying, and ethics laws. We address each in turn.

DIVISION A

The ACLU has long supported many of the federal voting rights protections advanced in H.R. 1. We review below our most significant priorities.

Commitment to Restoring the Protections of the Voting Rights Act

We commend Congress for reaffirming its commitment in H.R. 1 to restore the protections of the Voting Rights Act (VRA). States have unleashed a torrent of voting restrictions since the Supreme Court's 2013 decision in *Shelby County v. Holder* to disable the federal preclearance process under Section 5. The ACLU believes Congress's first mandate for repairing our democracy is to undertake a thorough, forensic examination of state and local actions denying or abridging the right to vote and build a comprehensive record to update the protections of the VRA. To this end, H.R. 1 rightfully expresses the need for Congress to undertake investigatory and evidentiary hearings to address the impact of the *Shelby County* decision through legislation.

For most of our country's history, racial and ethnic minorities have fought pernicious efforts to block them from exercising their right to vote. Congress enacted the Voting Rights Act in 1965⁴ after trying and failing for almost a century to remedy the affliction of racial discrimination in the voting process and failure to dismantle state-sanctioned disenfranchisement of African Americans in particular.⁵ Up until the *Shelby County*

³ For the People Act of 2019, H.R. 1, 116th Cong. (2019) (as ordered reported with amendments).

⁴ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁵ African Americans did not possess the right to vote prior to the Civil War. With the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, African Americans and others were granted the right to vote free from racial discrimination, U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1, and both amendments gave Congress express power to enforce the amendments with appropriate legislation. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend XV, §

decision, the most powerful enforcement tool in the Voting Rights Act had been the federal preclearance process established by Section 5. Section 5 requires certain states and political subdivisions with the worst record of voting discrimination to “preclear” voting changes with the federal government, either administratively with the Department of Justice or through a declaratory judgment action in federal court.⁶ Without the essential showing required by Section 5 that a proposed voting change did not have a discriminatory purpose or effect, voting changes in covered jurisdictions could not be enforced. Over its lifespan, Section 5 has succeeded in blocking more than a thousand instances of discriminatory voting changes in federal, state, and local elections that would have diluted minority voting rights or blocked minority voters from casting a ballot altogether.⁷ Section 5 also served as a strong deterrent against countless more voting changes from going forward.⁸

Since its enactment in 1965, Section 5 has had the greatest impact on dismantling discriminatory voting practices by state and local governments than any other congressional action. Because of its effectiveness, Congress reauthorized Section 5 four times, most recently in 2006.⁹ At the time, Congress concluded that although significant progress had been made in eliminating barriers to voting experienced by minority voters, there was continued evidence of a pattern of racial discrimination by the covered jurisdictions that justified reauthorization of Section 5’s protections.¹⁰ Despite the vast legislative record compiled by Congress—which included twenty-one hearings spanning two years and more than fifteen thousand pages of evidence¹¹—the Supreme Court’s 2013 decision in *Shelby County* invalidated the coverage formula under which jurisdictions

2. After a brief period of federal enforcement action at the end of the Civil War, Congress and the executive branch abandoned those efforts. For the next hundred years, Southern states undertook sweeping efforts to disenfranchise African Americans by continuing to enact procedural barriers and discriminatory prerequisites to voting, such as literary tests, as well as through state-sanctioned violence. *See generally* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

⁶ Voting Rights Act of 1965 § 5.

⁷ *See* H. R. Rep. No. 109–478, at 22 (2006).

⁸ *Id.* at 24.

⁹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

¹⁰ H.R. Rept. 109-478 p. 2, 21. Among its findings, the House Report cited evidence of continued discrimination by covered jurisdictions of: (i) over 700 objections interposed by the Justice Department between 1982 and 2006; (ii) hundreds of voting changes that were withdrawn after requests for more information by the Justice Department ; (iii) section 5 enforcement actions undertaken in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength; (iv) the number of requests for declaratory judgments denied by the D.C. District Court; (v) the continued filing of section 2 cases that originated in covered jurisdictions; (vi) litigation initiated by DOJ since 1982 to enforce sections 4(e), 4(f)(4), and 203 ensuring language minority access; and (vii) the tens of thousands of federal observers sent by DOJ to monitor elections between 1982 and 2006.

¹¹ *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

qualified for preclearance.¹² In doing so, the decision effectively immobilized the federal preclearance process.¹³ In the 5-4 opinion, the Court found that while “voting discrimination still exists,” the coverage formula was unconstitutional on the basis that it no longer reflected current conditions of discrimination.¹⁴ Importantly, however, the Court left in place the preclearance process itself, leaving it up to Congress to design a new coverage formula and restore the critical protections of Section 5.¹⁵ Though there has been legislation introduced to fix the *Shelby County* decision, these bills have not been enacted.¹⁶

As a result of the decision and inaction by Congress, since 2013 the ACLU, its affiliates, and scores of other voting rights groups, organizers, and litigators, have been battling a tsunami of discriminatory voting changes in the courts, legislatures, and local government bodies. Many of these changes to voting practices have been aimed squarely at voters of color to prevent them from casting their ballots or from electing their candidates of choice. Indeed, the most conservative federal courts in the country have struck down some of the most egregious voting changes, but only after elections had been held with the changes in force. In upholding a challenge to North Carolina’s enactment of a notoriously regressive voter suppression bill, the Fourth Circuit opined that the North Carolina legislature intentionally used data on voting patterns to “target African-American [voters] with almost surgical precision.”¹⁷ However, the Fourth Circuit’s judgement came two years after a district court denied a request to enjoin the law from implementation for the 2014 election cycle and judgment against the plaintiffs challenging the law. The Fifth Circuit, in affirming a lower court holding that Texas’ photo ID law discriminated against African-American and Hispanic voters, supported the district court’s finding of “a stark, racial disparity between those who possess or have access to [acceptable photo ID], and those who do not.”¹⁸ But that opinion came two years after the Fifth Circuit had previously stayed the district court’s ruling enjoining Texas from implementing the law, which permitted Texas to enforce it for the 2014 general election. As a result, the discriminatory impact of Texas’s photo ID law was felt by the state’s minority voters for that election.

The overwhelming evidence of the continued need for federal preclearance means that Congress must now carefully consider and develop new mechanisms for renewed federal oversight of discriminatory voting practices. We appreciate the commitment to restoring the Voting Rights Act expressed in H.R. 1 and urge members to continue the hard work of building a robust legislative record to enact an updated Voting Rights Act.

Voting Rights Restoration

¹² *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

¹³ *Id.* at 559 n.1 (Ginsburg, J., dissenting).

¹⁴ *Id.* at 554.

¹⁵ *Id.* at 557.

¹⁶ See, e.g., Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong. (2017); Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017).

¹⁷ *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

¹⁸ *Veasey v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016).

The inclusion of the Democracy Restoration Act in H.R. 1 is a powerful expression by Congress that the right to vote should be reinstated to returning citizens. Felon disenfranchisement laws are a racist Jim Crow era relic that took root in the latter half of the 19th century following the ratification of the Reconstruction Amendments to thwart Black voting participation, in addition to the slew of other discriminatory tactics such as literacy tests, poll taxes, registration requirements, and grandfather clauses.¹⁹ Yet while discriminatory tests and devices have since been outlawed, felon disenfranchisement laws continue to block millions of Americans from voting, denying them the most basic tenet of civic participation. According to the Sentencing Project, as of 2018, Black Americans were four times more likely to lose their voting rights than the rest of the adult population, with one out of every 13 Black adults disenfranchised.²⁰

There are additional strong public policy reasons for restoring the right to vote to reentering citizens. First, public safety experts support rights restoration, because increased opportunities for civic participation can help reduce recidivism and encourages reintegration into community life.²¹ Endowing reentering citizens with the rights and responsibilities of citizenship encourages civic engagement and helps rebuild ties with their communities.²² Additionally, there is no law enforcement purpose served by disenfranchising people who have returned to their communities.

Around the country, awareness of the racial injustice and inequitable nature of felon disenfranchisement laws has taken root. Most recently, Florida voters chose to restore voting rights to 1.4 million of its residents with 65 percent approval.²³ In the years preceding this historic win in Florida, several states had reformed their felon disenfranchisement laws in some manner.²⁴ Despite these gains, millions of Americans continue to be barred from voting because of a felony conviction. The inclusion of the Democracy Restoration Act in H.R. 1 will hopefully encourage more states to review their laws, adopt similar reforms, and give people a second chance.

Reauthorizing and Supporting the Election Assistance Commission

We are greatly encouraged by H.R. 1's inclusion of provisions shoring up the abilities of the U.S. Election Assistance Commission (EAC) to improve election administration nationwide.

¹⁹ See Angela Behrens et al., *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002* 563, AMERICAN JOURNAL OF SOCIOLOGY, Nov. 2003, https://users.cla.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf; see also ERIKA WOOD, BRENNAN CENTER FOR JUSTICE, RESTORING THE RIGHT TO VOTE 4-7 (2009)

²⁰ JEAN CHUNG, SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 4 (2018), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

²¹ See CHUNG, *supra* note 17, at 2; see also WOOD, *supra* note 16, at 8-9, 11.

²² WOOD, *supra* note 16, at 9.

²³ Adam Taylor, *Florida's move to allow ex-felons to vote brings U.S. closer to international election norms*, WASH. POST, Nov. 7, 2018, https://www.washingtonpost.com/world/2018/11/07/floridas-move-allow-ex-felons-vote-brings-us-closer-international-election-norms/?utm_term=.6cb34ffde81c.

²⁴ NATIONAL CONFERENCE OF STATE LEGISLATURES, FELON VOTING RIGHTS (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

The EAC is the singular federal agency empowered by Congress to promote modernized, accessible, and secure elections. The ACLU believes that a fully funded, empowered EAC is critical to supporting state and local election administrators in the performance of their obligation to run fair and accessible elections.

The 2018 mid-term elections presented yet another federal election cycle with an unacceptable level of election administration breakdowns. As in years past, malfunctioning voting machines, hours-long lines, and problems with the casting and counting of absentee and provisional ballots continued to be widely reported around the country and plagued voters on Election Day. These failures disenfranchise eligible voters by either blocking their ballots from counting or preventing voters from casting a ballot altogether. Congress entrusted the EAC with providing federal support to election officials to mitigate these problems by sharing resources, information, and funding.²⁵ Among its important responsibilities, the EAC provides voting systems testing and certification services and serves as a clearinghouse of information on election administration best practices on issues such as election management, voting access and opportunity, poll worker training, accessibility issues, and election technology.

Sadly, the agency has been hamstrung for several years due to substantial cuts to funding and staffing levels. H.R. 1 takes several important steps to recharge the agency, first by reauthorizing appropriations for the EAC for fiscal year 2019 and beyond. It also directs the EAC to undertake a self-assessment of its cyber security systems and to review and recommend improvements to the state-based administrative complaint procedures required by the Help America Vote Act. Finally, and very significantly, H.R. 1 requires that states submit election data requested by the EAC for the purpose of conducting nationwide post-election surveys. Incredibly, there remains absent a national census of election data that is complete, accurate, and reliable—data that is crucial to assessing election administration processes and outcomes on a state-by-state basis. Collectively, these provisions advance the promise of the EAC as an independent, bipartisan agency that supports election administration nationwide and, ultimately, American voters; we strongly support their inclusion.

Combatting Deceptive Practices

In addition to the problems posed by our country's aging and under-resourced elections infrastructure, recent elections in the United States and around the world have shown the increasing sophistication and success of disinformation campaigns intentionally misleading people to prevent or hinder them from voting.²⁶ The Deceptive Practices and Voter Intimidation Act would prohibit intentionally communicating knowingly false statements

²⁵ See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

²⁶ See Wendy R. Weiser and Adam Gitlin, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, at https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Ballot_Security_Voter_Intimidation.pdf; Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, at https://www.brennancenter.org/sites/default/files/legacy/Democracy/Ballot_Security_Voter_Suppression.pdf.

about the time, place, or manner of voting, or qualifications to vote with the intent to impede or prevent another person from voting. This provision is directed at conduct that is intended to prevent people from voting, and we support it.

However, while we understand the intention, we remain concerned about the provision criminalizing intentionally false statements about candidate endorsements. The Constitution protects false speech, even knowingly false speech, because speech needs “breathing space” in order to be truly free.²⁷ However, knowingly false speech may be proscribed when the speaker has the intent to cause harm.²⁸ Even though this provision would require that violators have the intent to impede voting rights, it is difficult to say whether the prohibition against false speech regarding who endorsed a candidate is sufficiently tied to the government’s legitimate interests in protecting the franchise. We are concerned that the provision may encompass too much constitutionally protected speech.

Redistricting Reform

Fair and equal representation is a cornerstone of American democracy. The Fourteenth Amendment requires states to apportion their congressional districts in conformance with the “one person, one vote” principle; improper redistricting can result in unequal representation in voting districts and fractured communities in violation of the Constitution.²⁹ The First Amendment also demands that citizens of all political views and affiliations have the right to associate for the advancement of their political beliefs, to express their political views, and participate in the political process; intentionally inoculating outcomes against evolving voter preferences undermines that right.³⁰ The Voting Rights Act establishes additional federal protections for fair and equal representation by prohibiting the use of redistricting plans that dilute minority voting strength, a necessary fortification due to the unique obstacles faced by racial minority voters, as discussed above.³¹ Notwithstanding these federal requirements, states continue to adopt redistricting practices and tactics that result in unequal voting power among citizens and the fragmentation of minority groups. Rather than reflecting voters’ evolving preferences, elections under these gerrymandered systems systematically lock in candidates in power, and discourage electoral competition. To achieve the constitutional principles of equal representation, the ACLU supports redistricting reform at the federal level.

²⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

²⁸ *United States v. Alvarez*, 567 U.S. 709 (2012)

²⁹ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

³⁰ See Complaint at 34-36, *A. Philip Randolph Institute et al. v. Kasich*, No. 1:18cv357 (S.D. Ohio), <https://www.aclu.org/legal-document/ohio-philip-randolph-institute-v-kasich-complaint>; see also ALORA THOMAS-LUNDBORG, ACLU VOTING RIGHTS PROJECT, WHY OHIO’S CONGRESSIONAL MAP IS UNCONSTITUTIONAL, <https://www.aclu.org/blog/voting-rights/gerrymandering/why-ohios-congressional-map-unconstitutional>.

³¹ Voting Rights Act of 1965 § 2.

Federal redistricting reform should meet two standards. First, the proposal should establish a set of criteria for states to comply with that ensures the drawing of political districts is constitutional, fundamentally fair, and takes special care to protect minority voting rights. Second, civic participation should be a centerpiece of a reform model so that communities are engaged in a collaborative process; this includes engagement among voters, lawmakers, redistricting experts, and various groups and organizations in a manner that is transparent, inclusive, and accountable. We support continued efforts to achieve an appropriate federal standard.

Stop Unfairly Purging Registered Voters from Voter Rolls

The ACLU supports the “Stop Automatically Voiding Eligible Voters Off Their Enlisted Rolls in States Act” (SAVE VOTERS Act), which responds to the U.S. Supreme Court’s June 2018 decision in *Husted v. A. Philip Randolph Institute* upholding Ohio’s practice of purging infrequent voters from its registration rolls.³² The case involved a challenge by the ACLU and Demos under the National Voter Registration Act (NVRA) to Ohio’s practice of removing voters from its registration rolls due to the voters’ failure to vote. Ohio identified registrants for potential removal from the voter rolls if they did not vote in one election; such voters were subsequently removed by the state if they did not vote in the following four-year period. This process wrongfully presumed that registrants’ failure to vote meant these voters had moved. During the course of litigation, the ACLU put forward evidence that tens of thousands of voters were removed under this practice, and that many of them arrived at the polls to vote only to learn that they were no longer registered.³³ The Supreme Court’s 5-4 decision upholding Ohio’s “use-it-or-lose-it” method of purging voters has signaled to states to use more aggressive tactics to target and remove voters. The SAVE VOTERS Act would correct this decision by clarifying that the NVRA does not permit states to target voters for removal from the rolls simply due to a period of nonvoting.

Voting Modernization

The ACLU believes that our voting system should give citizens the greatest opportunities to vote. H.R. 1 includes a series of proposals that the ACLU strongly supports to ensure that more Americans who want to cast a ballot are able to do so. These common sense proposals include early voting, no excuse absentee voting, same day voter registration, online voter registration, and automatic voter registration.

The total number of Americans who voted early, absentee, or by mail in federal elections increased from 24.9 million in 2004 to 57.2 million in 2016, going from one in five of all ballots cast to two in five.³⁴ H.R. 1 requires states to allow fifteen days of early voting and to have early voting sites be open for at least four hours each day and, to the extent possible,

³² *Husted v. A. Philip Randolph Institute*, 86 U.S. 4376 (2018).

³³ Press Release, American Civil Liberties Union, ACLU and Demos Present Arguments at Supreme Court in Ohio Voter Purge Case (Jan. 10, 2018), <https://www.aclu.org/news/aclu-and-demos-present-arguments-supreme-court-ohio-voter-purge-case>.

³⁴ U.S. ELECTION ASSISTANCE COMMISSION, EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING (Oct. 17, 2017), <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview/>.

be located near public transportation.³⁵ As of January 2019, 39 states and the District of Columbia allow any qualified voter to cast a ballot in person during a designated period prior to Election Day. Early voting provides convenience and flexibility for voters, shorter lines on Election Day, and improved poll worker performance. According to research from the EAC, the number of voters taking advantage of early voting periods in both presidential and midterm elections increased from almost 10.2 million early ballots in 2004 to 24.1 million ballots in 2016, an increase of 8.4% to 17.2% of total ballots cast.³⁶

H.R. 1 also prohibits states from imposing additional conditions or requirements for a person to be able to vote absentee by mail.³⁷ 28 states and the District of Columbia offer “no-excuse” absentee voting, which allows any registered voter to request an absentee ballot without requiring a stated reason for voting absentee.³⁸ Giving voters the option to vote by mail is a simple, common-sense reform that will make voting more convenient and offer greater flexibility to individuals with demanding work schedules, family member care responsibilities, or other life circumstances that can limit their ability to make it to the polls on Election Day. EAC data shows that the number of absentee ballots cast almost doubled from 14.7 million in 2004 to 24.8 million in 2016, while voting by mail tripled from 2.4 million casted mail ballots in 2008 to 8.2 million in 2016.³⁹

As critical as eliminating barriers to voting itself is eliminating barriers to register to vote. 17 states and the District of Columbia offer same-day registration, which allows any qualified resident of the state to register and vote in the same day. 16 of these states and the District of Columbia allow for same-day registration on Election Day. H.R. 1 requires states to allow same-day registration on Election Day and during any applicable early voting period.⁴⁰ A GAO report from 2016 reviewed research on election administration policies and found that 21 of 33 studies concluded that same-day registration increased voter turnout.⁴¹

³⁵ For the People Act of 2019, H.R. 1, 116th Cong. § 1611 (2019).

³⁶ U.S. ELECTION ASSISTANCE COMMISSION, EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING (Oct. 17, 2017), <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview/>.

³⁷ For the People Act of 2019, H.R. 1, 116th Cong. § 1621 (2019).

³⁸ NATIONAL CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING (Jan. 29, 2019), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

³⁹ U.S. ELECTION ASSISTANCE COMMISSION, EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING (Oct. 17, 2017), <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview/>.

⁴⁰ For the People Act of 2019, H.R. 1, 116th Cong. § 1031 (2019).

⁴¹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-16-630, ELECTIONS: ISSUES RELATED TO REGISTERING VOTERS AND ADMINISTERING ELECTIONS, at 35 (Jun. 2016), <https://www.gao.gov/assets/680/678131.pdf>.

H.R. 1 also promotes online voter registration. Currently 37 states plus the District of Columbia offer online registration.⁴² Online voter registration saves taxpayer dollars, increases the accuracy of voter rolls, and provides a convenient option for Americans who wish to register or update their information.⁴³ The EAC found that almost 13.5 million online registrations, which was 17.4% of the total registrations, were received in the 2016 election cycle, up from 5.3% of the total registrations for the 2012 elections.⁴⁴

Finally, the ACLU strongly supports automatic voter registration (AVR), another valuable process that makes it easier for people to register to vote. AVR includes several systems under which people who interact with government, most often through their states' Department of Motor Vehicle (DMV) agencies, are automatically registered to vote without having to go through a separate registration process. More than 25 million voter registration applications, which made up almost a third of the total applications received nationwide, came from state DMV agencies during the 2012 and 2016 elections.⁴⁵ Though H.R. 1 includes critical protections for ineligible people who were mistakenly registered, we recommend including protections for others who may be ineligible that are mistakenly registered such as people with criminal convictions who are still disenfranchised under state laws.

DIVISIONS B AND C

Divisions B and C of the bill would create a new public financing system for federal elections and enact numerous revisions to current federal campaign finance, lobbying, and ethics laws.⁴⁶ We begin by highlighting our areas of agreement.

Public Financing of Federal Election Campaigns

The lynchpin of Division B is the creation of a comprehensive public financing system for campaigns for the House of Representatives in both the primary and general elections and the enhancement of the current public financing system for Presidential elections.⁴⁷ Most encouragingly, qualifying small dollar donations could be matched at a rate of 600%,

⁴² ONLINE VOTER REGISTRATION, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 10, 2018), <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx#table>.

⁴³ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-16-630, ELECTIONS: ISSUES RELATED TO REGISTERING VOTERS AND ADMINISTERING ELECTIONS, at 12-18 (Jun. 2016), <https://www.gao.gov/assets/680/678131.pdf>.

⁴⁴ U.S. Election Assistance Commission, The Election Administration and Voting Survey: 2016 Comprehensive Report, at 50 (2017), https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

⁴⁵ U.S. ELECTION ASSISTANCE COMMISSION, EAVS DEEP DIVE: REGISTERING TO VOTE (Sep. 20, 2017), <https://www.eac.gov/documents/2017/09/20/eavs-deep-dive-registering-to-vote/>.

⁴⁶ For the People Act of 2019, H.R. 1, 116th Cong. Div. B and C (2019).

⁴⁷ *Id.* Title V.

subject to certain caps. By one estimate, congressional campaigns could qualify for up to \$5 million dollars in federal matching funds.⁴⁸

The ACLU has long supported a voluntary system of public campaign financing that provides sufficient support to all eligible candidates to mount viable campaigns.⁴⁹ We agree that the current system of private campaign financing can create disparities in the ability of groups to communicate their views and in the diversity of candidates that are able to run for office. A robust public financing system for federal elections will promote an engaged and invigorated electorate, as well as a diverse pool of candidates from which to choose. It will also serve to reduce the influence of large donors to campaigns, while preserving the free speech rights of those who would engage in truly independent advocacy. A meaningful public financing system will add more voices and more candidates to the public debate, values at the core of the Constitution. We hope to work with Congress on future legislation to make it a reality.

Limitation on the Use of Public Funds to Pay Discrimination Settlements

H.R. 1 would require Members of Congress to reimburse the government when employees receive awards or settlements based upon a Member's discriminatory conduct.⁵⁰ The ACLU strongly supports this provision. Members of Congress should not be permitted to discriminate against their employees at all and they certainly should not escape accountability for discrimination at taxpayer expense.

There are numerous other provisions with which we generally agree in divisions B and C of H.R. 1. For example, we agree that the definition of public communication in the Federal Election Campaign Act (FECA) should be expanded to include online advertising (i.e., paying to place an advertisement on another entity's internet web site), as the Honest Ads Act would do. We recognize that online advertising generally, and campaign advertising specifically has exploded in recent years and we agree that expanding FECA's provisions to include paid online advertisements would serve the law's legitimate purposes.⁵¹

Nonetheless, the ACLU still has significant concerns with the substantive tests for determining whether specific communications are subject to regulation, as discussed below, and our concerns are not altered by our general support for this provision.⁵² Furthermore, ACLU does not support every aspect of H.R.1's method for expanding the regulation of online campaign-related communications. For example, for congressional campaigns, online communications would not be required to be directed at the relevant electorate to be

⁴⁸ Kenneth P. Doyle, *Democrats' Bill Would Offer \$5 Million-Per-Candidate Bonanza*, BLOOMBERG GOVERNMENT (Jan. 15, 2019).

⁴⁹ The ACLU and *Citizens United*, <https://www.aclu.org/other/aclu-and-citizens-united>.

⁵⁰ For the People Act of 2019, H.R. 1, 116th Cong. § 9001 (2019).

⁵¹ See For the People Act of 2019, H.R. 1, 116th Cong. § 4205 (2019).

⁵² ACLU, Letter to Nevan F. Stipanovich, Assistant General Counsel to the Federal Election Commission (2018), available at <https://www.aclu.org/letter/aclu-comment-fec-public-communication>.

regulated as “electioneering communications.”⁵³ Thus, H.R. 1 would regulate online ads that appear *outside* of candidates’ districts, to persons with no power to vote for or against the candidate. The current definition of “electioneering communications” is already problematic and overbroad, as we point out in our discussion of the DISCLOSE Act below. For that reason, under H.R. 1, it is possible that purely issue-related ads mentioning candidates would now be subject to FEC regulation, *even when those viewing the ads have no power to vote for or against the candidate mentioned*. Without limiting the provision to speech within a candidate’s district, H.R. 1 would unconstitutionally expand the definition of electioneering communications for online ads beyond the bounds permitted by the Supreme Court.⁵⁴

We also generally support stricter enforcement of the rules against coordination between campaigns and independent-expenditure-only committees (super PACs),⁵⁵ though we do have some concerns about the ways in which H.R. 1 would accomplish that goal that also are discussed below.

The Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2019 (DISCLOSE Act)

The ACLU opposes the DISCLOSE Act because it unconstitutionally infringes on the freedom of speech and the right to associational privacy. As we have said numerous times before,⁵⁶ we believe that the sponsors of the DISCLOSE Act and of H.R.1 seek the worthy goal of fairer elections through a more informed electorate. The ACLU shares those aims. The public has a compelling interest in knowing who is providing substantial support to candidates for elected office. That information can help the electorate evaluate the potential effects of those funds on the candidates. For that reason, the ACLU supports mandated reporting of spending for public communications that expressly advocate the election or defeat of a candidate for office.

Unfortunately, the DISCLOSE Act of 2019 reaches beyond those bounds, and, like its predecessors, strikes the wrong balance between the public’s interest in knowing who supports or opposes candidates for office and the vital associational privacy rights guaranteed by the First Amendment. The upshot of the DISCLOSE Act, and the essence of why we oppose it, is that it would unconstitutionally chill the speech of issue advocacy

⁵³ For the People Act of 2019, H.R. 1, 116th Cong. § 4206 (2019).

⁵⁴ See *McConnell v. FEC*, 540 U.S. 93, 206 (2003) (upholding the definition of electioneering communications *because the vast majority of the communications are intended to influence an election*).

⁵⁵ For the People Act of 2019, H.R. 1, 116th Cong. Title VI, Subtitle B (2019).

⁵⁶ See, e.g., Letter to Senate Committee on Rules and Administration on S. 2156, the DISCLOSE Act (Jul. 22, 2014) (opposing S. 2156), available at <https://www.aclu.org/other/aclu-letter-commenting-s-2516-disclose-act-2014>; Press release, Bill Will Compromise Free Speech (Jul. 26, 2010) (opposing H.R. 5628, the DISCLOSE Act) available at <https://www.aclu.org/news/aclu-urges-no-vote-disclose-act>; Letter to Senate on S. 3628, the DISCLOSE Act (Jul. 23, 2010) (opposing S. 3628), available at <https://www.aclu.org/letter/aclu-letter-senate-urging-no-vote-disclose-act>; Letter to House of Representatives on H.R. 5175, the DISCLOSE Act (Jun. 17, 2010) (opposing H.R. 5175), available at <https://www.aclu.org/letter/aclu-letter-house-urging-no-vote-disclose-act>.

groups and non-profits such as the ACLU, Planned Parenthood, or the NRA that is essential to our public discourse and protected by the First Amendment. These groups need the freedom to name candidates when discussing issues like abortion, health care, criminal justice reform, tax reform, and immigration and to urge candidates to take positions on those issues or criticize them for failing to do so. The DISCLOSE Act interferes with that ability by impinging on the privacy of donors to these groups, forcing the groups to make a choice: their speech or their donors. Whichever they choose, the First Amendment loses.

As in previous versions of the DISCLOSE Act, the bill would mandate disclosure of the names and addresses of donors who gave \$10,000 or more⁵⁷ to organizations that engage in “campaign-related disbursements,” which includes electioneering communications and independent expenditures,⁵⁸ terms already well-established in election law.⁵⁹ Electioneering communications are any communications over certain media that *refer* to a candidate for federal office within certain timeframes in advance of a primary or general election.⁶⁰ Independent expenditures include public communications, uncoordinated with a campaign, that “expressly advocate” the election or defeat of a candidate or are the functional equivalent of express advocacy, defined as communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate.”⁶¹

The ACLU objects to the inclusion of electioneering communications in the definition of campaign-related expenditures because of the sheer breadth of the communications covered. Communications that refer to a candidate in the context of an important public policy issue may have nothing to do with supporting or opposing that candidate’s election, and yet that speech would trigger disclosure. When an organization’s speech has no relationship to the election or defeat of a candidate, the disclosure of that organization’s donors would do little, if anything, to serve the public’s interest in knowing who is providing substantial support to the election or defeat of candidates.

⁵⁷ For organizations that make campaign-related disbursements from a segregated bank account, only the names and addresses of donors to that account would be disclosed. For all other organizations, all names and addresses of donors giving \$10,000 or more to the organization would be disclosed unless the donor stated in writing that the money could not be used for campaign-related disbursements and the organization agreed and put that money in an account that is not used for such purposes, or disclosure would subject the donor to threats, harassment, or reprisal. For the People Act, H.R. 1, 116th Cong. § 4111 (2019).

⁵⁸ *Id.*

⁵⁹ Electioneering communications are broadcast, cable, or satellite communications that refer to a federal candidate and are made within 60 days of a general election or 30 days of a primary election, 52 U.S.C. § 30104(f)(3), though that definition would be expanded to include online communications by the Honest Ads Act, discussed above. H.R. 1, § 4206. An independent expenditure is an expenditure that expressly advocates the election or defeat of a candidate and is not coordinated with a candidate’s campaign. 52 U.S.C. § 30101(17).

⁶⁰ 52 U.S.C. § 30104(f)(3).

⁶¹ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

The ACLU's objections to the vaguely defined functional equivalence test for independent expenditures also are well-documented.⁶² Open-ended and unclear tests to determine whether a communication that merely references a candidate advocates that candidate's election or defeat simply chill too much protected speech entirely unrelated to federal elections. Advocacy groups speaking about the issues that matter most to them, like abortion or gun rights, may see no alternative but to steer far clear of the regulated zone to avoid penalties, or, in the case of the DISCLOSE Act, mandatory disclosure of their private associations.⁶³ Such a result "harm[s] not only [the organizations] but society as a whole."⁶⁴ For those reasons, the ACLU has opposed previous iterations of the DISCLOSE Act.⁶⁵

Unlike previously introduced versions of the DISCLOSE Act, H.R. 1 expands the definition of "campaign-related disbursements" potentially further than previous versions of the DISCLOSE Act by encompassing communications that "support or promote or attack or oppose" ("PASO") the election of a candidate, without regard to whether the communication expressly advocates the election or defeat of a candidate.⁶⁶ We were encouraged to see that the PASO standard has been narrowed from the standard included in the introduced version of the bill. It now more clearly refers only to communications that PASO *the election of a candidate*.⁶⁷ However, as with communications that are the functional equivalent of express advocacy, we remain concerned about applying vague and subjective standards to regulations of political speech. Arguably, any communication that mentions a candidate, or elected official, in the context of a public policy issue could be seen as "supporting" or "attacking" that candidate's election.⁶⁸ One can easily imagine an advertisement describing climate change as an urgent problem and urging President Trump to address it or highlighting the federal budget and naming the Democratic Members of Congress thought to be responsible for its size as opposing the candidates mentioned in the ads. In addition to the breadth of speech covered, the bill also expands the length of the disclosure period, increasing the amount of time that merely referring to a candidate for office in connection with the public issues of the day might result in mandated disclosure.⁶⁹

⁶² Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 13-15, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203 (arguing that open-ended functional equivalence tests will inevitably encompass genuine issue advocacy and would therefore be unconstitutional).

⁶³ *See Grayned v. Rockford*, 408 U.S. 108-9 (1972).

⁶⁴ *Wis. Right to Life*, 551 U.S. at 494.

⁶⁵ *See supra* note 56.

⁶⁶ For the People Act of 2019, H.R. 1, 116th Cong. § 4111 (2019).

⁶⁷ *Id.*

⁶⁸ *See Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976) ("The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals or government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.").

⁶⁹ Disclosures would be required during the "election reporting cycle," which would be the "2-year period beginning on the date of the most recent" general election for federal office. H.R. 1, § 4111.

The breadth of the content covered by the bill coupled with the expanded disclosure period mirrors the intense regulations of federal PACs, raising serious constitutional concerns.⁷⁰ Entities formed to support or oppose candidates, like PACs, can be regulated heavily under the Constitution precisely because that is their fundamental purpose.⁷¹ Tax-exempt groups like the ACLU, NRA, or Planned Parenthood do not share that primary purpose. For that reason, it is questionable at best whether regulating them similarly to PACs could withstand even heightened scrutiny.

Finally, the bill would also require disclosure of an overbroad number of donors. Even with the \$10,000 trigger, many donors to issue advocacy organizations may be surprised to find themselves held responsible for communications they may not know about, or, potentially, even support. It is unfair to hold donors responsible for every communication in which an organization engages. Moreover, it is unclear how such an overbroad requirement serves the government's interest in providing the electorate information about who is supporting or opposing a candidate for office.

The Constitution requires a healthy respect for associational privacy. In *NAACP v. Alabama*, the Supreme Court recognized that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”⁷² For that reason alone, we should be very cautious when contemplating invasions of that privacy. Because the DISCLOSE Act would expose the private associations of an overbroad number of donors, it fails to respect this first constitutional principle.

Should the DISCLOSE Act, as currently constituted, become law, it will have one of two effects. First, donors could choose not to give to organizations, even if they support their messages, or could be forced to give less than they otherwise might. Second, organizations, especially small organizations that either cannot afford the compliance costs or simply refuse to breach the trust that donors expecting anonymity have placed in them, could choose to refrain from speaking at all. Either way, the public discourse and the First Amendment lose.

We are also concerned that the DISCLOSE Act could reach even beyond organizations that engage in public communications. The bill would define some transfers of funds to be “campaign-related disbursements” requiring disclosure. In addition to transfers specifically earmarked for campaign-related disbursements, transfers to organizations that the transferring entity “knew or had reason to know” engaged in such disbursements exceeding \$50,000 in the previous two years or will make such disbursements in the ensuing two years would also be covered transfers triggering disclosure on the part of the transferring entity.⁷³ It is unclear how the “knew or had reason to know” standard would apply, especially prospectively. Without more clearly defined terms, there is a possibility that, for

⁷⁰ See FED. ELECTION CAMPAIGN COMM'N, GUIDES: POLITICAL ACTION COMMITTEES (PACs), available at <https://www.fec.gov/help-candidates-and-committees/guides/?tab=political-action-committees>.

⁷¹ See *Buckley*, 424 U.S. at 79.

⁷² *NAACP v. Ala. Ex rel. Patterson*, 357 U.S. 459, 462 (1958).

⁷³ For the People Act of 2019, H.R. 1, 116th Cong. § 4111 (2019).

instance, organizations that make grants could be caught up in this regulatory scheme and required to disclose their donors when one of their grantees happens to make campaign-related disbursements sometime within two years after having received a grant, which would not seem to serve the aims the DISCLOSE Act purports to achieve.

The ACLU supports disclosure requirements when applied to express advocacy, and parts of the DISCLOSE Act appear aimed to achieve that shared goal. However, the current language covers too much speech unrelated to that goal and creates too high a risk of chilling public discussion.

Stand By Every Ad Act

The Stand By Every Ad Act raises and compounds the constitutional concerns we have already discussed with regard to the DISCLOSE Act.⁷⁴ The bill would expand existing disclaimer requirements in campaign finance law to cover all “campaign-related disbursements” as defined by the DISCLOSE Act of 2019. In addition, organizations (other than candidates, political party committees, and certain PACs) would have to disclose, within each ad’s disclaimers, the top 5 donors to the organization, if the ad was a video ad, and the top 2 donors to the organization, if it was an audio ad. The disclosure of the donors’ names would not be tied to whether they had provided funds to create the particular ad at issue. Instead, it generally would apply to whoever gave the most money to the organization, with certain limitations.⁷⁵

Our concerns with the Stand By Every Ad Act are the same as those already stated for the DISCLOSE Act. The bill unduly burdens constitutionally protected associational rights by requiring widely distributed disclosure of the names of donors to organizations that are not engaged in express advocacy of the election or defeat of the candidate. Moreover, the donors themselves may not even be aware of or support the content of the ad that would now prominently include their names. Without a sufficient nexus between the covered communications and advocacy of the election or defeat of a candidate, the bill creates too great a risk of invading the privacy of donors to pure issue advocacy groups.

We note that the Stand By Every Ad Act does permit the elimination of the top donors from the ad itself (though the information would have to be made available elsewhere) if, in accordance with rules established by the FEC, the communication “is of such short duration that” including the donor list “would constitute a hardship ... by requiring a disproportionate amount of the content ... to consist” of disclosing donor names.⁷⁶

⁷⁴ For the People Act of 2019, H.R. 1, 116th Cong. § 4302 (2019).

⁷⁵ Donors could avoid being subject to disclosure if they state in writing that their donations are not to be used for campaign-related disbursements and the organizations receiving the donation placed their funds in a segregated account that is not used for such purposes. H.R. 1 § 4302.

⁷⁶ We note that burdensome and lengthy disclaimer requirements raise constitutional concerns in and of themselves because they increase the cost of ads and can force organizations to truncate their substantive messages in service of the information compelled by the government. *Citizens United*, 558 U.S. 366 (acknowledging that disclaimer requirements in current campaign finance laws burden speech and are subject to “exacting scrutiny”). Disclaimer requirements must, therefore, be

Individual donors could also avoid disclosure by specifically forbidding the use of their funds for campaign-related disbursements if the organization then places the funds in a segregated account. However, because the bill applies to an overly broad amount of genuine issue advocacy, the ability to leave donor names out of the ad in some circumstances is not enough to save it as it currently stands.

Expansion of the Foreign Donation Prohibition

In our letter to the House Rules Committee,⁷⁷ sent last week, we voiced our concerns that H.R. 1 would expand the prohibition⁷⁸ on political contributions and expenditures by foreign nationals to entities, such as corporations or partnerships, over which foreign nationals have “control” in ways that were vague and raised constitutional concerns.⁷⁹ Representative Lofgren, Chair of the House Administration Committee, introduced an amendment to this provision that was self-executed by the Rules Committee.⁸⁰ The amendment eliminates the proposed definition of what kinds of entities would be considered foreign nationals. In its place, it codifies the FEC’s current regulation prohibiting foreign nationals from directing or directly or indirectly participating in the decision-making process of any organization with respect to election-related activities.⁸¹ We believe this amendment represents a more speech-protective approach to limiting the influence of foreign nationals on our elections.

Stop Super PAC-Candidate Coordination Act

The ACLU strongly supports stricter enforcement of rules restricting coordination between campaigns and outside groups.⁸² H.R. 1 would make strides in the right direction by clarifying the definition of coordinated expenditures treated as contributions to a campaign.⁸³ The only interest that the Supreme Court has recognized as a legitimate reason to regulate political communications is preventing corruption and the appearance of

substantially related to a sufficiently important government interest to withstand judicial review. *Id.* This exception to the Stand By Every Ad Act appears to attempt to address these possible concerns.

⁷⁷ Letter to House Rules Committee On H.R. 1 (Mar. 1, 2019), *available at* <https://www.aclu.org/letter/aclu-letter-house-rules-committee-hr-1>.

⁷⁸ 52 U.S.C. § 30121(b).

⁷⁹ Letter to House Rules Committee On H.R. 1 (Mar. 1, 2019), *available at* <https://www.aclu.org/letter/aclu-letter-house-rules-committee-hr-1>.

⁸⁰ Amendment No. 108 to For the People Act of 2019, H.R. 1, 116th Cong. (2019) (as ordered reported with amendments) *available at* <https://amendments.rules.house.gov/amendments/Amendment%20109%20version%20234191646264626.pdf>.

⁸¹ *Id.*; *see also*, 11 C.F.R. § 110.20.

⁸² *See, e.g.*, Gabe Rottman, *Common Ground on Campaign Finance*, THE CAMPAIGN (Apr. 12, 2013), <https://www.aclu.org/blog/free-speech/campaign-finance-reform/common-ground-campaign-finance>; Michael W. Macleod-Ball, *FEC’s Coordination Definition Is a Big Hot Mess*, THE CAMPAIGN (Nov. 17, 2014), <https://www.aclu.org/blog/free-speech/campaign-finance-reform/fecs-coordination-definition-big-hot-mess>.

⁸³ For the People Act of 2019, H.R. 1 § 6102 (2019).

it.⁸⁴ It has found that interest triggered by contributions to candidates, but not independent expenditures. There is evidence that very large expenditures on behalf of a candidate's election or in opposition to a candidate's opponent, even if otherwise independent, can raise the specter of corrupt influence in much the same way that direct donations or formally coordinated expenditures can.⁸⁵ However, any legislation addressing this problem must be carefully drawn to avoid ensnaring truly independent advocacy.

We are concerned that some of the language in H.R. 1 defining coordination appears vague and could be interpreted broadly to encompass communications with the candidate about the public policy issues of the day without sufficient nexus to the potential corrupting influence of very large expenditures. The bill would also create a category of entities certain of whose campaign-related communications would be deemed to be coordinated with the candidate, regardless of whether any additional evidence of coordination existed, and without consideration for the amount of money spent.

According to H.R. 1, coordinated expenditures would be defined in two ways. Under the first, they are payments for certain kinds of communications made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate or committee or by agents of the candidate or committee. Coordination includes payments made pursuant to any general or particular understanding with *or pursuant to any communication with* the candidate or committee or agents of the candidate or committee about the payment or communication. Acting in accordance with or pursuant to a communication does not necessarily equate with acting on a common plan of action. It could, for example, simply mean holding to one's word after informing the campaign of a plan of action made independently of the campaign, and provided as a matter of courtesy.

This restriction is also not saved by applying it only to a subset of communications because the definition of covered communications is too broad to avoid ensnaring truly independent communications. Under the bill, entities might be deemed to have coordinated when their communications merely *refer* to a candidate or an opponent of a candidate 120 days before a general election or 60 days before a primary or caucus. The problems with this language are similar to those we have already expressed about electioneering communications; however, in this context, the consequences are far more severe. If communications that merely refer to a candidate can be deemed to be coordinated, they are treated as donations and subject to restrictive speech limitations that go beyond donor disclosure.⁸⁶

The second definition of coordinated expenditure covers "any payment for any communication which republishes, disseminates, or distributes, in whole or in part, any video or broadcast or any written, graphic, or other form of campaign material prepared by the candidate or committee or by agents of the candidate or committee" including any excerpt of such material. Without any limitation, this provision could apply to a wide array

⁸⁴ *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

⁸⁵ See Thomas B. Edsall, *After Citizens United, A Vicious Cycle of Corruption*, NY TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html>.

⁸⁶ See 52 U.S.C. 30116(a)(7)(B); 11 C.F.R. 109.21(b). See also FED. ELECTION COMM'N, COORDINATED COMMUNICATIONS, *available at* <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/> (last visited Feb. 28, 2019).

of independent advocacy. We recognize that current regulation already defines such activity as a campaign contribution; however, the FEC has also implemented necessary exceptions to this broadly worded rule, including an exception for the dissemination of this material when it is incorporated into a communication that ultimately presents the speaker's own message.⁸⁷ Failing to include these exceptions in H.R. 1, yet again, risks reaching beyond the bounds of what may be constitutionally restricted.

The bill also creates a new category of speakers to be known as “coordinated spenders.”⁸⁸ An entity would fall into the category if it is managed by a candidate's immediate family member, former employee, or consultant, the entity was established at the request or suggestion of the candidate, or the candidate fundraises on behalf of the entity. If a coordinated spender engages in any covered communication, defined as express advocacy of the election of the candidate or defeat of an opponent, any communications that promote the candidate or oppose an opponent of the candidate (regardless of whether the communication is express advocacy), or refers to the candidate or an opponent if the communication is disseminated close in time to either the general or a primary election, the communication is a coordinated expenditure subject to FECA contribution limits.

The Supreme Court has questioned political speech regulations based solely upon a speaker's identity.⁸⁹ However, the ACLU agrees that a speaker's identity coupled with the contents of the communications can be factors in determining whether a particular communication was coordinated with a candidate such that it should be considered a campaign contribution. Nevertheless, in addition to our reservations regarding the breadth of communications covered, we are concerned that deeming entire categories of communications from certain speakers to be coordinated, absent any additional information indicating the speaker acted pursuant to a common plan could hinder truly independent advocacy and could fail the strict scrutiny any reviewing court would apply.⁹⁰

Finally, the bill would carve out an exception from the definition of “coordinated expenditures” for certain policy discussions. We applaud this limitation, but it must be broadened to better protect pure issue-related communications. Specifically, the bill states that payments are not coordinated based solely upon discussions between the speaker and the candidate regarding legislative or policy positions, including urging the candidate to adopt those positions.⁹¹ However, this limitation would only apply if there was no discussion of, among other things, “message, strategy, [or] policy.”⁹² Discussion of “message” or “policy” is integral to discussions of legislative and policy positions. The line between the

⁸⁷ 11 C.F.R. § 109.23.

⁸⁸ For the People Act of 2019, H.R. 1, 116th Cong. § 6102 (2019).

⁸⁹ See *Citizens United*, 558 U.S. at 342.

⁹⁰ The Supreme Court has determined that independent expenditures do not create the same risks of candidate corruption that “prearranged” or coordinated communications do. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). For that reason, the government lacks the heightened interest required to regulate such purely political speech. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

⁹¹ For the People Act of 2019, H.R. 1, 116th Cong. § 6102 (2019).

⁹² *Id.*

two is at best unclear and at worst entirely absent. A more speech-protective limitation on findings of coordination for legislative and policy discussions when those discussions are not tied to coordinated expenditures advocating the election of the candidate or defeat of an opponent of the candidate is needed.

Lobbying Disclosure Reform

The word lobbying has taken on a negative connotation, but at its core it is another word for petitioning the government to make policy changes.⁹³ Such speech is at the core of the First Amendment and we must exercise caution when designing regulatory schemes for it.⁹⁴ Even so, the ACLU agrees that the government has an interest in protecting itself from improper influence, and the public has a right to know who is attempting to influence lawmakers. For example, the public has a right to know when former high-level government employees or Members of Congress are lobbying the government they formerly served and those former public servants should not be able to escape public disclosure by directing or substantially influencing the lobbying activities of others.

H.R. 1, as introduced, would have amended the definition of lobbying to include “legislative, political, and strategic counseling services.”⁹⁵ It would then have required any individual who, for financial compensation, provides such services to support the lobbying activities of another person, to count that other person’s lobbying contacts as though they were made by the person who provided counseling.

Under the amended version, this provision has been more clearly defined to cover counseling services provided by persons with authority to direct or substantially influence the lobbying activity of another person making a direct lobbying contact.⁹⁶ It was further clarified to apply only when the person that provided counseling has knowledge that a lobbying contact was made pursuant to that counseling. These changes were necessary to avoid ensnaring any and all contacts made with registered lobbyists within and outside an organization. We are pleased to see these amendments and believe they better serve the government’s interest in preventing the avoidance of registration on the part of former Members of Congress and high level government officials, while limiting the administrative burdens and confusion the previous language would have imposed.

Conflicts from Political Fundraising Act of 2019

H.R. 1, as introduced, also would expand conflicts of interest laws in a number of ways that raise constitutional concerns. The Conflicts from Political Fundraising Act would require certain appointees to high-level positions in the federal government to disclose their donations and the donations that they either solicited in writing or requested from others to

⁹³ See *Buckley*, 424 U.S. at 45; *United States v. Harriss*, 347 U.S. 612 (1954).

⁹⁴ *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (finding restrictions on advocating for changes in the law “trench[] upon an area in which the importance of First Amendment protections is ‘at its zenith’”).

⁹⁵ For the People Act of 2019, H.R. 1, 116th Cong. § 7201 (2019) (as introduced).

⁹⁶ For the People Act of 2019, H.R. 1, 116th Cong. § 7201 (2019) (as ordered reported with amendments).

527 tax-exempt groups that raise money for political activities and to social welfare organizations (501(c)(4)s and (6)s) that *promote or oppose changes in federal laws* administered by the agency the person will serve or is serving.⁹⁷ Moreover, the bill would deem these donations to be conflicts of interest, though waivers could be granted.

Representative Deutch has introduced an amendment to this provision for consideration on the House floor (Deutch Amendment) that has been made in order.⁹⁸ The amendment would narrow the required disclosures to donations to 527 organizations and tax-exempt 501(c) groups advocating certain changes in federal law that were solicited in writing by or at the request of a covered person. The amendment would eliminate the requirement that these donations be deemed conflicts of interest, and, instead, would allow the ethics official at the designated agency to determine whether the donations constitute a conflict of interest.

The ACLU agrees that the government has a right to guard itself against the possibility that an employee or potential employee could act in service of their own financial interests. We further appreciate that the Deutch amendment seeks to alleviate some of the associational privacy concerns raised by the introduced version of the bill and the decision to step back from deeming all of these activities to be conflicts of interest. We see these amendments as a step in the right direction.

However, even with the amendments, the disclosures required by the Conflicts from Political Fundraising Act continue to raise significant concerns. They do not appear to be narrowly tailored to serve the government's legitimate anti-corruption goals, particularly as it relates to the solicitation of or request for donations to organizations engaged in advocacy for changes in the law. All such disclosures will tell the public is that the covered person has been interested in the laws administered by the agency the person will serve, which would seem, if anything, to support that person's qualifications to hold the position, not reveal an insidious conflict of interest.

The Ethics in Public Service Act

The Ethics in Public Service Act would enact in statute a modified version of President Obama and President Trump's Executive Orders limiting the activities of senior government employees during and after their public service.⁹⁹ It would require certain government appointees first to pledge that they would not participate in any matter directly or substantially related to former clients or employers, and, for those who were registered lobbyists, that they will not participate in any matter on which they lobbied, or *in any issue area* covered by their lobbying.¹⁰⁰ After leaving government service, these public servants would be restricted from lobbying for two years. It would also extend the

⁹⁷ For the People Act of 2019, H.R. 1, 116th Cong. § 8041 (2019).

⁹⁸ Amendment No. 41 to For the People Act of 2019, H.R. 1, 116th Cong. (2019) (as ordered reported with amendments) *available at* https://amendments-rules.house.gov/amendments/DEUTCH_024_xml31191111311131.pdf.

⁹⁹ For the People Act of 2019, H.R. 1, 116th Cong. § 8061 (2019). *See* Exec. Order No. 13770 (2017); Exec. Order 13490 (2009).

¹⁰⁰ For the People Act of 2019, H.R. 1, 116th Cong. § 8061 (2019).

lobbying ban to communications beyond those with the agency where the covered employee had worked to contacts with *any appointee or non-career senior executive service employee* of the executive branch for the remainder of the administration for which they worked, which could last up to eight years.

There is no doubt that the government has a right to protect itself from improper influence. However, it cannot do so at the expense of the First Amendment.

As discussed, lobbying is another word for petitioning the government to effect changes in law and policy and the Supreme Court has held that such speech is fully protected by the First Amendment.¹⁰¹ Any restrictions on such speech must be closely tied to the government's interest in protecting itself from improper influence and use of government power. This provision is simply too broadly worded to serve those goals. It will deny or restrict the government's ability to hire the people of its choice to fill key positions specifically because of their speech and will do the same for private entities' ability to hire the advocate of their choice. It is difficult to see how this serves the government's interest in ensuring an ethical and functioning government.

Conclusion

H.R. 1 is expansive legislation that would amend wide swaths of federal law, in many cases for the better. The ACLU believes that a strong and robust electoral process can only grow in an environment that encourages and enables wide-ranging discussion. The ACLU strongly supports the provisions in H.R. 1 that would improve federal protections for voting rights. Many of these provisions have been introduced as stand-alone legislation. We urge Congress to give these bills separate hearings, markups, and votes. Furthermore, with the creation and strengthening of public financing of federal elections, H.R. 1 would take important steps in the right direction. We hope to continue working to make viable public financing of federal elections a reality. However, certain aspects of H.R. 1 would too greatly impinge upon the freedoms of speech and association, and we cannot support those provisions, or allow the House to vote without voicing our opposition to them. For those reasons the ACLU opposes H.R. 1 and urges you to vote "no" on passage of the bill. Please contact Kate Ruane, kruane@aclu.org, with any additional questions.

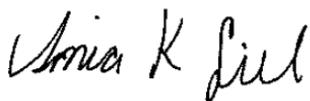
Sincerely,



Ronald Newman
National Political Director



Kate Ruane
Senior Legislative Counsel



Sonia Gill
Senior Legislative Counsel
