INSTITUTE FOR FREE SPEECH

Analysis of H.R. 1 (Part One)

"For the People Act" Replete with Provisions for the Politicians

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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.

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 involved[14] 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.

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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]

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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 nonprofit 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

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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]

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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 sources[77] 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 facially[103] 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 "exacting 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*, PandoraForBrands.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.*, Garett 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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