

March 1, 2019

Rep. Jim McGovern
Chairman
House Rules Committee
408 Cannon House Office Building
Washington, DC 20515

Rep. Tom Cole
Ranking Member
House Rules Committee
2207 Rayburn House Office Building
Washington, DC 20515



Re: H.R. 1, the For the People Act of 2019.

Dear Chairman McGovern and Ranking Member Cole:

Washington Legislative
Office
915 15th Street, 6th FL
Washington DC 20005
T: (202) 544-1681
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

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 as it was reported out of the House Administration Committee.¹ We strongly urge the Rules Committee to allow floor amendments that would mitigate our concerns with the provisions that unconstitutionally infringe the freedoms of speech and association.

To be clear, there are many provisions of H.R. 1 that we strongly support and have long championed, we would readily support these provisions if considered as separate bills. These include, but are not limited to, a renewal of Congress's commitment to restoring the Voting Rights Act, ensuring that citizens returning to society after incarceration will have the right to vote, expanding early voting, redistricting reform, and preventing voters from being purged from the rolls simply for failing to vote for a period of time. If amended to resolve the concerns explained in this letter, we would support the bill.

However, there are also provisions that unconstitutionally impinge on the free speech rights of American citizens and public interest organizations. They will have the effect of harming our public discourse by silencing necessary voices that would otherwise speak out about the public issues of the day.

¹ H.R. 1, 116th Cong. (2019) (as ordered reported with amendments).

We detail our areas of concern with the bill as it was reported below and urge the Committee to allow amendments on the floor to address them.

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

As the ACLU has said numerous times before,² 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 chill the speech of issue advocacy 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 more³ to organizations that engage in "campaign-related disbursements," which includes electioneering

² 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>.

³ 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. H.R. 1, § 4111.

communications and independent expenditures,⁴ terms already well-established in election law.⁵ 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.⁶ 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.”⁷

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.

The ACLU’s objections to the vaguely defined functional equivalence test for independent expenditures also are well-documented.⁸ 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.⁹ Such a result “harm[s] not only [the organizations] but society as a whole.”¹⁰ For those reasons, the ACLU has opposed previous iterations of the DISCLOSE Act.¹¹

⁴ *Id.*

⁵ 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 below. 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).

⁶ 52 U.S.C. § 30104(f)(3).

⁷ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

⁸ 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).

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

¹⁰ *Wis. Right to Life*, 551 U.S. at 494.

¹¹ See *supra* note 2.

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.¹² 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.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶ Entities formed to support or oppose candidates, like PACs, can be regulated heavily under the Constitution precisely because that is their fundamental purpose.¹⁷ 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

¹² H.R. 1, § 4111.

¹³ *Id.*

¹⁴ *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.”).

¹⁵ 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.

¹⁶ *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>.

¹⁷ *See Buckley*, 424 U.S. at 79.

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.”¹⁸ 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.¹⁹ 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 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.

¹⁸ *NAACP v. Ala. Ex rel. Patterson*, 357 U.S. 459, 462 (1958).

¹⁹ H.R. 1, § 4111.

Stand By Every Ad Act

The Stand By Every Ad Act raises and compounds the concerns we have already discussed with regard to the DISCLOSE Act.²⁰ 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.²¹

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 Federal Election Commission (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.²² 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.

²⁰ H.R. 1 § 4302.

²¹ 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.

²² 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 substantially related to a sufficiently important government interest to withstand judicial review. *Id.* This exception to the Stand By Your Ad Act appears to attempt to address these possible concerns.

Honest Ads Act

We generally support the Honest Ads act because 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).²³ 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.

Nonetheless, the ACLU still has significant concerns with the substantive tests for determining whether specific communications are subject to regulation, as discussed above, and our concerns are not altered by our general support for this provision.²⁴ The ACLU is also very concerned that online communications would not be required to be directed at the relevant electorate to be regulated as "electioneering communications."²⁵ In other words, the Honest Ads Act would regulate online ads that appear *outside* of candidates' districts, to persons with no power to vote for or against the candidate. Therefore, 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 expands the definition of electioneering communications for online ads beyond the bounds permitted by the Supreme Court.²⁶

Expansion of the Foreign Donation Prohibition

H.R. 1 would expand the prohibition²⁷ on political contributions and expenditures by foreign nationals to entities, such as corporations or partnerships, over which foreign nationals have "control" as defined by the bill.²⁸ An entity would be controlled by a foreign national if a foreign national, among other things, "has the power to direct, dictate, or control the decision-making process of the" entity with respect to its interests in the United States.²⁹ The amended version of H.R. 1 excepts the activities of domestic corporate political action committees (PACs) from the prohibition, as long as certain conditions are met.³⁰

²³ See H.R. 1, § 4205.

²⁴ 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>.

²⁵ H.R. 1, § 4206.

²⁶ 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*).

²⁷ 52 U.S.C. § 30121(b).

²⁸ H.R. 1 §§ 4101-02.

²⁹ *Id.* § 4101.

³⁰ *Id.*

The definition of foreign national is vague and has the potential to apply broadly.³¹ If Congress wishes to expand these total speech bans, the lines it draws, at a minimum, must clearly demarcate entities truly under the control of a foreign national from entities in which foreign nationals have invested. Otherwise, American companies, whose speech rights are fully protected by the constitution, may see their speech chilled, or, worse yet, banned altogether, a result clearly prohibited by the Constitution.³² While it is true that under the amended version of the bill, domestic subsidiaries of foreign corporations subject to the prohibition will be able to establish corporate PACs, this change does not alleviate the confusion over which entities are foreign nationals in the first instance. An objective test to determine whether a corporation is controlled by foreign nationals is necessary to assuage concerns for the restriction's constitutionality while limiting influence on our elections by foreign nationals.

Stop Super PAC-Candidate Coordination Act

The ACLU strongly supports stricter enforcement of rules restricting coordination between campaigns and outside groups.³³ H.R. 1 would make strides in the right direction by clarifying the definition of coordinated expenditures treated as contributions to a campaign.³⁴ The only interest that the Supreme Court has recognized as a legitimate reason to regulate political communications is preventing corruption and the appearance of it.³⁵ 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.³⁶ 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

³¹ See Eric Wang, *Analysis of H.R. 1 (Part 1)*, Institute for Free Speech at 9 (Jan. 2019) (arguing that “[t]he 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.”).

³² *Citizens United v. FEC*, 558 U.S. 310 (2010).

³³ 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>.

³⁴ H.R. 1 § 6102.

³⁵ *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

³⁶ 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>.

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.

The restriction on coordination 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 in the context of the DISCLOSE Act; 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.³⁷

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 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.³⁸ Failing

³⁷ See 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.21(b). See also Fed. Election Comm'n webpage, Coordinated Communications, available at <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/> (last visited Feb. 28, 2019).

³⁸ 11 C.F.R. § 109.23.

to include these exceptions in H.R. 1, yet again, risks reaching beyond the bounds of what may be constitutionally restricted. This defect could be easily fixed by adding the FEC's current exemptions from the definition to the bill.

The bill also creates a new category of speakers to be known as “coordinated spenders.”³⁹ 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 Federal Election Campaign Act (FECA) contribution limits.

The Supreme Court has questioned political speech regulations based solely upon a speaker's identity.⁴⁰ 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.⁴¹

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.⁴² However, this limitation would only apply if there was no discussion of, among other things, “message, strategy, [or] policy.”⁴³ Discussion of “message” or “policy” is integral to discussions of legislative and policy positions. The line between the two is at best unclear and at worst

³⁹ H.R. 1 § 6102.

⁴⁰ See *Citizens United*, 558 U.S. at 342.

⁴¹ 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).

⁴² H.R. 1 § 6102.

⁴³ *Id.*

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.

Conflicts from Political Fundraising Act of 2019

In addition to the overbroad requirements of the DISCLOSE and Stand By Your Ad Acts already discussed, H.R. 1 also would expand conflicts of interest laws in a number of ways that raise constitutional concerns. The Conflicts from Political Fundraising Act, particularly, 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 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.⁴⁴ Moreover, the bill would deem these donations to be conflicts of interest, though waivers could be granted.

We understand that Representative Deutch plans to introduce an amendment to this provision for consideration on the House floor (Deutch Amendment). 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 and urge that a floor vote be allowed.

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

⁴⁴ H.R. 1 § 8041.

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.⁴⁵ 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.⁴⁶ After leaving government service, these public servants would be restricted from lobbying for two years. It would also extend the 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. 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.⁴⁷ 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

While there are many aspects of H.R. 1 that we strongly support, the provisions outlined above must be changed to avoid unconstitutionally burdening political speech. We urge the Rules Committee to allow floor amendments that would specifically address our concerns. Please contact Kate Ruane, kruane@aclu.org, with any additional questions.

⁴⁵ H.R. 1 § 8061. See Exec. Order No. 13770 (2017); Exec. Order 13490 (2009).

⁴⁶ H.R. 1 § 8061.

⁴⁷ See *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Newman". The signature is fluid and cursive, with the first name being more prominent.

Ronald Newman
National Political Director

A handwritten signature in black ink, appearing to read "Kate Ruane". The signature is cursive and somewhat stylized, with the first name being the most legible part.

Kate Ruane
Senior Legislative Counsel