



Analysis of H.R. 1 (Part Three)

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

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February 2019

Introduction

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

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

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

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

Executive Summary

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

Analysis

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷ See note 2, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 *Id.* (i.e. § 326(d)(1)(B)).

14 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

19 *Id.* (i.e. § 326(e)(1)(B)).

20 *Id.* (i.e. § 326(e)(2)).

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

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

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

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

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

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

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

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

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

²² 11 C.F.R. 109.21(d)(1)-(5).

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

²⁴ *Id.* (*i.e.* § 326(a)(1)(B)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ 11 C.F.R. 109.21(d)(3).

²⁸ H.R. 1 § 6102(c)(1)(A).

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

³⁰ *Id.* (i.e. § 326(b)(2)).

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

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

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

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

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

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

³¹ *Id.* (i.e. § 326(c)(2)(A)-(E)).

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

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

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

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

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

E) Conduct: Other Absurdities that Suppress Speech

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

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

F) Conduct: No Safe Harbor Firewall Allowed

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

³³ 518 U.S. 604 (1996).

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

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

³⁶ 11 C.F.R. § 109.23(b).

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

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

³⁹ 11 C.F.R. 109.21(h).

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

Conclusion

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

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

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

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

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

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