INSTITUTE FOR FREE SPEECH

Analysis of H.R. 1 (Part One):
"For the People Act" Is Replete with Provisions for the Politicians

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INTRODUCTION

This analysis examines Title IV, Subtitles B ("DISCLOSE Act"), C ("Strengthening Oversight of Online Political Advertising"; formerly known as "Honest Ads"), and D ("Stand by Every Ad") of Division B of H.R. 1 (117th Congress).[2]

As a preliminary matter, these provisions 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, the Institute for Free Speech ("IFS") previously created a redlined version of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, to show the changes the version of H.R. 1 introduced in the U.S. House in 2019 would make to this statute. This document is available on the Institute's website.[3] Because there are additional changes to existing law in the version of H.R. 1 introduced in the U.S. House in 2021, this document provides a baseline of understanding, but readers will need to account for changes in the 2021 bill described in this analysis.

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 and their supporters will be further deterred from speaking or be forced 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. Consequently, citizens who would have otherwise heard their speech will have less information about their government.

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[2] This analysis has been updated from a previous version analyzing H.R. 1, as introduced in the 116th Congress. *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. 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.

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

EXECUTIVE SUMMARY

Specifically, H.R. 1 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a vague, subjective, and dangerously broad standard that asks whether the speech "promotes," "attacks," "supports," or "opposes" ("PASO") the candidate or official. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn't announced their retirement.

- 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 to support or oppose policy issues, including legislation like H.R. 1.

- Compel groups to declare on new, publicly filed "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.

- Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. 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 stop giving to nonprofits, or these groups will self-censor.

- Subject far more issue ads to lengthy 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' message, exacerbating the politics of personal destruction and further coarsening political discourse.

- For the first time ever, subject groups that sponsor communications about judicial nominees to burdensome campaign finance reporting, donor exposure, and disclaimer requirements without any sound policy justification or recognized constitutional basis for doing so.

- Force organizations that make grants to file 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 so-called "campaign-related disbursements." This new vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant-making programs.

- Increase regulation of the online speech of American citizens while purporting (and failing) 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, social media platforms, 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. A federal appeals court already has found a state law taking this same approach to be 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-budget, grassroots movements. Some online outlets may decide to discontinue accepting such ads due to the heavy costs of compliance.

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

- Inflict liability on broadcast, cable, satellite, and Internet media platforms, 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 from American speakers that may make many forms of small, popular, and cost-effective ads advocating government policy changes or the election or defeat of candidates effectively impossible.

ANALYSIS

I. H.R. 1 Would Impose Unconstitutionally Overbroad Regulations on Speech About Policy Issues and Judicial Nominees. It Would Subject Many Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment, Chilling Speech, and Deterring Financial Support.

A) Overbroad Definition of "Campaign-Related Disbursements"

H.R. 1 creates a new category of highly regulated speech it calls "campaign-related disbursements." But much, if not most, of the regulated speech would not be campaign-related at all. Specifically, the following four types of speech would be classified as "campaign-related disbursements":

(1) Generally, any public communications at any time that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the election of a candidate or official, "without regard to whether the communication expressly advocates a vote for or against" that candidate;

(2) Generally, any public communications that are "susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation" of a federal judicial nominee.

(3) So-called "electioneering communications." This includes the current law definition – *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. But other non-broadcast communications would also be swept up in the bill's expanded definition (as discussed more below in Section III); and

(4) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are "the functional equivalent of express advocacy."[4]

Of these four categories, the U.S. Supreme Court has only determined that the last – 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 types of speech that can be regulated under the new terminology of "campaign-related disbursements."

[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).

B) A New and Dangerously Broad Standard That Threatens Free Speech

H.R. 1 would regulate a dangerously and unconstitutionally overbroad universe of speech about public officials and their policies under the "promote," "support," "attack," or "oppose" content standard. This standard, known to campaign finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would regulate 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, six years away for senators, or, in the case of judicial nominees, where there are no elections at all – *because the federal judiciary is not elected*.[6]

This analysis addresses the application of the PASO standard to judicial nomination communications in H.R. 1 separately below. For now, the focus is on how the PASO standard in H.R. 1 would apply to communications about elected officials. Suppose that President Biden (or another future president) files for and begins fundraising for re-election soon after winning election, as former President Trump did.[7] Under the campaign finance law that H.R. 1 would amend, Biden would be considered a "candidate."[8] As such, nearly all ads by advocacy groups that seek to prioritize issues with the administration or to oppose administration policies or positions would be subject to onerous reporting and donor exposure requirements.

For example:

- A left-leaning organization sponsors a social media campaign calling on President Biden to support the "Bernie Sanders single-payer healthcare plan" – a policy that Biden pointedly disavowed during the 2020 campaign.[9]

- An environmental advocacy organization sponsors a television ad campaign urging Biden to adopt "AOC's Green New Deal" climate policy – a program that Biden said during one of the presidential debates "is not my plan."[10]

- A socially conservative organization sponsors a radio ad campaign opposing Biden's recent executive order on LGBTQ protections.[11]

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[6] *See* U.S. CONST., Art. III.

[7] *See* FEC Form 99, Donald J. Trump (filed Jan. 20, 2017), *at* https://docquery.fec.gov/pdf/569/201701209041436569/201701209041436569.pdf.

[8] *See* 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3.

[9] Jacob Knutson, *Biden: "I am the Democratic Party right now,"* AXIOS (Sept. 30, 2020), *at* https://www.axios.com/biden-democratic-party-trump-a8a71bfc-945d-4e27-9241-cc2accc1cf6a.html.

[10] David Roberts, *What Joe Biden was trying to say about the Green New Deal*, VOX (Oct. 7, 2020), *at* https://www.vox.com/energy-and-environment/21498236/joe-biden-green-new-deal-debate.

[11] *See* Samantha Schmidt, Emily Wax-Thibodeaux, and Moriah Balingit, *Biden calls for LGBTQ protections in Day 1 executive order, angering conservatives*, WASH. POST (Jan. 21, 2021), *at* https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/.

All these examples could be said to "oppose" President Biden under the vague standard in the bill. The first two examples could be said to implicitly oppose Biden because they advocate policies that he did not support during the 2020 campaign and presumably still does not support as president. They could also be said to oppose Biden by perpetuating rifts within the Democratic coalition and make it more difficult for Biden to govern. Moreover, the first example could be said to "support" Senator Bernie Sanders, while the second example could be said to "support" Representative Alexandria Ocasio-Cortez, both of whom are currently candidates for re-election.[12]

H.R. 1 purports to tether the PASO standard to whether a communication "promotes or supports… or attacks or opposes *the election*" of a named candidate. But this attempt at narrowing the scope of regulation only to supposedly election-related communications is misleading. The bill otherwise says that speech may be regulated as PASO "without regard to whether the communication expressly advocates a vote for or against a candidate." In other words, the PASO regulatory standard in H.R. 1 seeks to determine what is *implied* by a communication and how others might perceive it. This will vary from person to person based on his or her subjective interpretation and perception. Moreover, as all of the examples above may sway public opinion against Biden's policies or make his job more difficult, they could all be said to undermine his chances at re-election in some way (*i.e.*, "oppose" his re-election). In short, PASO is an arbitrary "know it when I see it"[13] standard that is incapable of being applied consistently or fairly.

If these concerns seem speculative and alarmist, consider how courts have, in practice, upheld regulation of pure issue speech as election campaign activity. In *Independence Institute v. FEC*, a Section 501(c)(3) think tank (prohibited by federal tax law from political campaign activity) wished to run the following ad that focused entirely on advocating for a criminal justice reform bill pending in Congress:

> 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, a federal three-judge panel upheld the regulation of the ad as an "electioneering communication" under existing law. The judges reasoned that the ad could be interpreted as "tak[ing] a position [] against the identified Senate candidate" (*i.e.*, Senator Udall, who was up for re-election at the time), and "if the Senate candidate has already taken a position against the bill,

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[12] *See* FEC Form 2, Bernard Sanders (amend. filed Mar. 4, 2019), *at* https://docquery.fec.gov/cgi-bin/forms/S4VT00033/1318178/; FEC Form 2, Alexandria Ocasio-Cortez (amend. filed Nov. 5, 2020), *at* https://docquery.fec.gov/cgi-bin/forms/H8NY15148/1471629/.

[13] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 752 (2013) (Sotomayor and Kennedy, JJ., dissenting) (repudiating a "know it when I see it" regulatory standard).

the advertisement could very well be understood by [voters] as criticizing the Senate candidate's position."[14] (In fact, like most senators, Udall had not yet taken a position on the bill.) Under this reasoning, any issue ad that merely urges an elected official to change their position (*e.g.*, on single-payer healthcare or the "Green New Deal") – even without saying anything about the official's existing position – could certainly be said to "attack" or "oppose" the official's re-election under the PASO standard. Even if the official has yet to take a position, an ad could be interpreted to "oppose" the official's re-election.

Ironically, under the reasoning the court articulated in *Independence Institute*, the ads that groups ran beginning in February 2021 urging various members of Congress to support H.R. 1 would be regulated as PASO communications.[15] This means these groups would be subject to burdensome new reporting, donor exposure, and disclaimer requirements and have to declare on FEC reports their opposition to the members of Congress named in their ads.

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.[16] 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 *political parties* are presumed to be in connection with election campaigns."[17]

However, H.R. 1 would expand the PASO standard to *all* speakers. Everyone knows why a political party speaks about candidates – its purpose is to support its candidates. Unlike political parties, it is *not* reasonable to presume that all the policy advocacy activities of groups like those in the examples above 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,[18] 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.[19] 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 and Internet ads. 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.

As if the PASO standard were not bad enough on its own, a separate provision of H.R. 1 would exacerbate its problems by radically changing the structure of the Federal Election Commission charged with applying this standard. As IFS explains in a separate analysis, that part of H.R. 1 would create a new speech czar, who is likely to be a member of the president's party

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[14] *Independence Institute v. FEC*, 216 F.Supp.3d 176, 188-89 (D.D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).
[15] *See* David Hawkings, *First HR 1 ad campaign is about keeping purple district Democrats in the fold*, THE FULCRUM (Feb. 3, 2021), *at* https://thefulcrum.us/big-picture/legislation-hr-1.
[16] *See* 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).
[17] *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).
[18] *Id*. at 170 n.64.
[19] *Citizens United*, 558 U.S. at 335.

and would effectively control interpretation of the PASO standard, thereby increasing the risks for speakers.[20]

C) 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.[21] Under 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[22] since, as discussed above, only such communications are unambiguously campaign-related.[23]

Given H.R. 1's overbroad regulation of "campaign-related disbursements," using the examples from before, left-leaning organizations calling on President Biden to adopt a more left-leaning agenda could be required to affirmatively and publicly declare to the FEC that their ads "oppose" Biden, even if they are otherwise agnostic to or may even support his re-election. This type of compelled speech is obnoxious to its core and goes beyond "mere disclosure," thereby making it especially likely to be held unconstitutional.[24] There is no government interest in publishing false or misleading information.

D) 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,[25] 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 redundant and confusing reports, and may mislead some into thinking the reports cover different activities.

Additionally, H.R. 1 departs from existing law by imposing additional donor identification requirements on campaign finance reports.[26] Organizations that make "campaign-related disbursements" totaling more than $10,000 during a two-year "election reporting cycle"[27] (or

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

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

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

[23] *See Buckley*, 424 U.S. at 80.

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

[25] *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.").

[26] The bill could easily expand the existing independent expenditure ("IE") and electioneering communication ("EC") reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports (*i.e.*, both IE/EC *and* "campaign-related disbursement" reports) for each communication. However, the bill does not take this more streamlined approach.

[27] 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)).

during a calendar year, for so-called "federal judicial nomination communications," which are discussed more below) 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 those donations are 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).[28] Both of these so-called options are impractical for many, if not most, groups. They would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported) and would still result in many donors being included 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.[29]

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.[30] This is particularly true when the cause is contentious – as with abortion, gun control, LGBTQ rights, or civil rights – and association with either side on such 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 many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, a desire to avoid solicitations by others, and a wish to remain out of the public spotlight.[31]

It is wholly inappropriate, for example, for donors to an environmental organization, an ideological nonprofit action group, or social issues advocacy organization to be publicly identified on campaign finance reports as "supporting" or "opposing" the president, if the organization sponsors an ad urging the president to support their view on government policies. These reporting scenarios likely 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. And many advocacy groups would choose silence or ads that are far less effective.[32] Either way, the public would lose the right to hear the strong voices needed for robust public debate.

Importantly, H.R. 1's gratuitous reporting requirements 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 file the same reports and publicize its own donors, if:

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[28] *Id*. (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).
[29] *Id*. (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).
[30] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).
[31] *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.
[32] *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…").

(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.[33]

Grant-making institutions that wish to protect their donors' privacy 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 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."[34] 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.[35]

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[33] 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 our day," *Citizens United*, 558 U.S. at 324, and the same principle should hold true for groups providing grants to enable other groups to speak about political issues.

[34] H.R. 1 (to be codified at 52 U.S.C. § 30126(a)(3)(C)).

[35] *See, e.g.*, FEC Adv. Op. No. 2016-23 (Socialist Workers Party); Casey Seiler, *JCOPE rejects three source-of-funding disclosure exemptions*, TIMES UNION (Aug. 4, 2015), *at* https://blog.timesunion.com/capitol/archives/239408/jcope-rejects-three-source-of-funding-disclosure-exemptions/.

E) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.[36] These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.[37] 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."[38] H.R. 1 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" in the form of a public communication.[39] 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, 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.[40] Ads containing video content or that are in the form of "an Internet or digital communication which is transmitted in a text or graphic format" would have to identify the organization's top five donors of $10,000 or more during the prior 12 months.[41] Ads containing only audio content (including telephone calls) would have to identify the organization's top two donors at or exceeding the same threshold.[42]

The bill purports to shield certain donors from being identified in the disclaimers,[43] 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.[44] However, H.R. 1 also provides that donors may be shielded from public

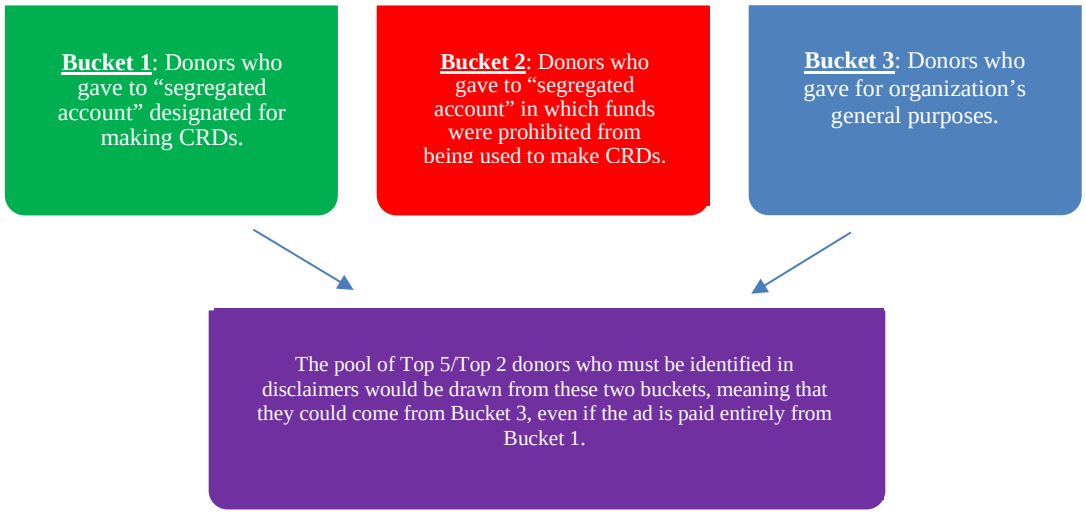
[36] 52 U.S.C. § 30120.
[37] *See* FEC Adv. Op. No. 2007-33 (Club for Growth PAC) (although this advisory opinion specifically addressed disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; *see* 52 U.S.C. § 30120).
[38] *Citizens United*, 558 U.S. at 366.
[39] H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(a)).
[40] 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" are being referenced. *See id.* (to be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the disclaimer requirement, while conventional PACs that accept contributions subject to amount limitations and source prohibitions would be exempt. *See* H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(e)(6)).
[41] *Id*. § 4302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).
[42] *Id*. (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 4303.
[43] *Id*. § 4302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[44] *Id*. § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).

identification on 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."[45]

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.[46] 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, the law would often require advertising disclaimers with false information. That will, in turn, lead to news stories that have false information about who paid for the communications.

The following diagram illustrates this donor identification paradox in H.R. 1's disclaimer requirement:



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."[47] (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.[48] "Campaign-related disbursements" sponsored by individuals would have to include disclaimers featuring the individual.[49]

[45] *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).
[46] *Id.* § 4302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[47] *Id.* (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).
[48] *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).
[49] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A) & (4)(a)).

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, do not appear to have any relation – let alone a "substantial relation" – to any important governmental interest, or any governmental interest other than deterring speech.[50] Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substance of the groups' message. One can easily imagine circumstances where the required individual might not want to or be physically able to deliver such a message, such as those who are mute, battling a serious illness, or recuperating from surgery or an 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 further contribute to the politics of personal destruction.[51]

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.[52] Internet advertisers already struggle often to fit the FEC disclaimers in their ads. Internet video "pre-roll" ads, for example, "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."[53] 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 advocacy or political communication.[54] One of the requirements for video ads mandates display of a disclaimer for "at least 6 seconds,"[55] making it illegal to use 5 second video ads.

II. For the First Time, H.R. 1 Would Subject Groups That Sponsor Communications About Judicial Nominees to Burdensome Campaign Finance Reporting, Donor Exposure, and Disclaimer Requirements, Despite Lacking Any Acceptable Policy Rationale or Legitimate Constitutional Justification.

As noted above, ads that PASO a federal judicial nominee would fall under H.R. 1's "campaign-related disbursement" reporting and donor exposure requirements. These new burdens suffer from the same unconstitutional vagueness problems with the PASO standard already discussed.[56] Furthermore, the regulation of communications discussing judicial nominees under

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[50] *See Citizens United*, 558 U.S. at 366.

[51] In any event, the "stand by your ad" disclaimer requirement has not reduced the amount of negative ads, as it was intended. *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.

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

[53] FEC Adv. Op. No. 2007-33 (Club for Growth PAC), Comments of Sierra Club *at* 3.

[54] 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 when 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 a decade over when disclaimer exemptions should apply to digital ads, and H.R. 1 fails to give the agency any more legislative clarity on this issue. *See*, *e.g.*, FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging LLC), and 2017-12 (Take Back Action Fund).

[55] *See* note 54, *supra*.

[56] For some inexplicable reason, for ads about federal judicial nominees, H.R. 1 on its face only specifically regulates communications that are "susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation" of a federal judicial nominee. *See* H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)(2)(ii)). The "no reasonable interpretation other than" qualifier is generally known as the "functional equivalent of" standard. In other

the campaign finance laws is extraordinary, unprecedented, and without any recognized constitutional basis.

A) U.S. Supreme Court Precedents on Campaign Finance Regulation in Judicial Elections

The U.S. Supreme Court has upheld campaign finance regulation over the judicial selection process only in the context of state judicial elections.

In *Williams-Yulee v. The Florida Bar*, the Court upheld a state canon of judicial conduct prohibiting judicial candidates and incumbent judges running for re-election from personally soliciting campaign contributions (while still allowing them to establish campaign committees to solicit contributions on their behalf).[57] The Court reasoned that "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity."[58]

In *Caperton v. A.T. Massey Coal Co.*, the Court held that a justice of the West Virginia Supreme Court of Appeals was required to recuse from a case where the CEO of the appellant in the case had: (1) contributed $2.5 million to a Section 527 political organization to intervene in the justice's race; and (2) spent another $500,000 on independent expenditures of his own in connection with the race.[59] The Court "conclude[d] that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[60] The Court noted that *Caperton* was "an exceptional case" where the "temporal relationship between the campaign [spending], the justice's election, and the pendency of the [appellant's] case" before the West Virginia state court were "critical" to the Court's ruling.[61]

B) U.S. Supreme Court Precedents on Campaign Finance Reporting Requirements

The U.S. Supreme Court has recognized that campaign finance reporting requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and therefore may not be imposed indiscriminately or without sufficient justification.[62] Rather, laws requiring organizations to publicly report their donors, such as H.R. 1, are subject to "exacting scrutiny."[63] This means the law must further "governmental interests sufficiently important to outweigh the possibility of infringement," and there must be a "substantial relation between the governmental interest and the information required to be disclosed."[64]

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words, H.R. 1 purports not to regulate ads that outright PASO a judicial nominee, but rather only those ads that are the functional equivalent of PASO. This is extremely confusing and illogical. Under H.R. 1's regulatory standard, one could argue ads that expressly advocate for the confirmation or rejection of a nominee or that explicitly "promote," "support," "attack," or "oppose" such nominees would not be regulated. However, as a matter of logic, H.R. 1's "functional equivalent of" PASO standard should still arguably cover such ads.

[57] 575 U.S. 433, 437, 439 (2015).

[58] *Id*. at 445.

[59] 556 U.S. 868, 872, 873 (2009) (Technically, *Caperton* was not strictly a case about campaign finance regulation *per se*, but rather about the standards for judicial recusal. However, the case centered on campaign finance activity and therefore is directly relevant to questions about the constitutionality of H.R. 1's regulation of ads about judicial nominees.).

[60] *Id*. at 884.

[61] *Id*. at 883, 886.

[62] *Buckley*, 424 U.S. at 64.

[63] *Id*.

[64] *Id*. (internal quotation marks and citations omitted); *id*. at 66.

The Court has articulated three "sufficiently important" governmental interests for campaign finance reporting laws:

First, the Court has reasoned that identifying a candidate's sources of financial support "allows voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office."[65]

Second, campaign finance reporting requirements "deter actual corruption and avoid the appearance of corruption" by allowing the public "to detect any post-election special favors that may be given in return" for campaign contributions.[66]

Third, campaign finance reporting requirements aid in "detect[ing] violations of the contribution limitations" that apply to contributions to candidates.[67]

Taking these three justifications in reverse order: The third rationale – detecting violations of the contribution limits – clearly does not apply. Federal judicial nominees do not raise campaign funds and are not subject to contribution limits.

The second rationale – deterring corruption and the appearance of corruption – also is weak or nonexistent for federal judicial nominations. Since federal judicial nominees do not receive campaign contributions, the only potential source of corruption is the independent spending of groups advocating for or against the nominees.

As a matter of law, the U.S. Supreme Court has held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[68] There do not appear to be any allegations that the organizations advocating on federal judicial nominations targeted by H.R. 1 or their donors are coordinating with the nominees or that the nominees are raising funds for such communications. While H.R. 1 itself contains no legislative findings regarding this provision, the provision is based on the "Judicial Ads Act,"[69] which, in turn, appears to have been an outgrowth of the "Captured Courts" report issued by the Senate Democratic Policy and Communications Committee.[70] That report also does not allege any coordination between independent groups and federal judicial nominees.

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[65] *Id*. at 66-67; *see also Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (noting that the Court upheld the Bipartisan Campaign Reform Act amendments to the FECA in *McConnell v. FEC*, 540 U.S. 93 (2003), "on the ground that they would help citizens 'make informed choices in the political marketplace.'") (quoting *McConnell*, 540 U.S. at 197).
[66] *Buckley*, 424 U.S. at 67.
[67] *Id*. at 67-68.
[68] *Citizens United*, 558 U.S. at 357.
[69] S. 4183 (116th Cong.). *See* Eric Wang, *Analysis of the "Judicial Ads Act" (S. 4183): Bill Appears to Be Aimed Solely at Exposing Independent Groups' Donors to Public Disfavor and Serves No Apparent Legitimate "Disclosure" Interest*, Institute for Free Speech (July 2020), *at* https://www.ifs.org/wp-content/uploads/2020/07/2020-07-29_IFS-Analysis_S-4183_Judicial-Ads-Act.pdf.
[70] *See Captured Courts*, Democratic Policy & Communications Committee (May 2020), *at* https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf, at 47. ("Over the coming months, Democrats in the Senate . . . will propose legislative reforms" to address the issues raised in the report.).

Even if, as the Court found in *Caperton*, it is asserted that *elected* judges may feel beholden to supporters for their independent campaign spending on judges' behalf, there is still a fundamental difference between state elected judges and federal appointed judges.

IFS takes no position on the long-running debate over having elected or appointed judges. However, the entire rationale for an independent federal judiciary with lifetime tenure is that the judges are independent.[71] By design, federal judges are independent of the presidents that nominate them, the Senators who vote to confirm them, and any groups that may support their nominations. Indeed, from Justice David Souter's liberal rulings to Justice Neil Gorsuch's recent majority opinion on Title VII's protection of employees' sexual orientation, members of the federal judiciary have often and famously bucked the expectations of the presidents that nominated them and their supporters.[72]

In short, the independent federal judiciary is already a "prophylactic measure"[73] against judicial bias that is fundamental to and baked into our constitutional structure. Therefore, any pretense H.R. 1 may have of further protecting federal judges from feeling beholden to groups supporting their nominations (and those groups' donors) is the type of "prophylaxis-upon-prophylaxis approach" that is strongly disfavored for campaign finance laws.[74]

Indeed, reporting laws like H.R. 1 may actually enhance the risk of corruption and bias rather than alleviate such concerns. There are no apparent indication or allegations that federal judicial nominees are even aware of who is donating to groups supporting their nominations. This is in contrast to the situation in *Caperton*, where the West Virginia judge would know or could easily find out that a litigant appearing before him had spent millions supporting the judge's election, because that information was required to be publicly reported.[75]

This illustrates the double-edged sword of "disclosure." Where donors to groups supporting or opposing government decisionmakers would otherwise remain anonymous, the donor exposure laws essentially create lists of "friends" and "enemies" that aid government officials in rewarding and retaliating against those who ponied up and those who didn't.[76] Indeed,

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[71] *See* U.S. CONST., Art. III, § 1.

[72] *See, e.g.*, David Von Drehle, *George Herbert Walker Bush, the 41st President of the United States and the Father of the 43rd, Dies at 94*, TIME (Dec. 1, 2018), *at* https://time.com/longform/president-george-hw-bush-dead/ ("Believing that he was getting a pragmatic conservative, [President George H.W.] Bush was disappointed to see Souter move steadily to the left during his 20 terms on the high court."); Howard Kurtz, *Gorsuch draws personal attacks for breaking ranks on gay rights*, FOXNEWS.COM (Jun. 17, 2020), *at* https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights ("Carrie Severino, president of the Judicial Crisis Network, which spent millions to help confirm Gorsuch and Brett Kavanaugh, said Gorsuch had acted 'for the sake of appealing to college campuses and editorial boards. This was not judging, this was legislating – a brute force attack on our constitutional system.'"); Brett Samuels, *Trump says 'we live' with SCOTUS decision on LGBTQ worker rights*, THE HILL (Jun. 15, 2020), *at* https://thehill.com/homenews/administration/502812-trump-says-we-live-with-scotus-decision-on-lgbtq-worker-rights ("'I've read the decision, and some people were surprised,' [President] Trump said.").

[73] *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

[74] *Id*.

[75] *Caperton*, 556 U.S. at 884; *see also* 26 U.S.C. § 527(j)(3)(B) (requiring Section 527 political organizations, such as the one the litigant in *Caperton* had contributed to, to report their donors); *Caperton*, 556 U.S. at 873 (noting that the litigant also was required to file "state campaign finance disclosure filings" for his own independent expenditures in support of the judge).

[76] *See, e.g.*, *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*) (noting that campaign finance reporting requirements "make[] it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped."); *Akins v. FEC*, 66 F.3d 348, 356 (D.C. Cir. 1995) (noting that when a contribution made to a candidate is reported, "the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents.").

while congressional Democrats[77] are proposing H.R. 1 now, some prominent Democrats have made this very point in the past in opposing such disclosure requirements.[78]

This leaves us with the first and only remaining rationale the U.S. Supreme Court has recognized for campaign finance reporting requirements – helping voters identify candidates' place "in the political spectrum" and identify the interests to which they are likely to be responsive. Again, federal judges are not elected. Therefore, this rationale would have to be applied by analogy to informing the Senators voting to confirm nominees about the sources of the nominees' support.

However, this is decidedly not the rationale that appears to be underlying H.R. 1's regulation of judicial ads. Rather, to the extent the aforementioned Senate Democratic Policy and Communications Committee report appears to articulate the provision's rationale, the goal is to expose the donors to groups: (1) supporting "judges [who] were chosen not for their qualifications or experience – which are often lacking – but for their demonstrated allegiance to Republican Party political goals"; and (2) "work[ing] to ensure that corporate America, the ultra-rich, and the Republican Party would succeed in the courts."[79]

Putting aside the partisan attacks, at a macro level, the rationale is simply to expose what is already plainly obvious: that nominees put forward by each administration will have a certain judicial philosophy and will be inclined to rule a certain way. Indeed, former President Trump made his intention to nominate certain types of federal judges a mainstay of his campaign, including a list of potential Supreme Court nominees, and it was no secret what type of judicial philosophy those nominees would have.[80]

Therefore, to the extent that: (1) federal judicial nominees' approach to the law is already generally well-known; and (2) the congressional Democrats supporting H.R. 1 and Senators voting on nominees appear to have already made up their minds on the nominees' (a) judicial philosophies, (b) ideological leanings, and (c) affinity toward certain interests,[81] there does not appear to be any serious argument that exposing the finances of the groups supporting those nominees would add any value to the nomination process.

Instead, the sole goal of H.R. 1's judicial ads provision appears to be exposing the donors of groups supporting federal judicial nominees that the bill's sponsors oppose for the purpose of suppressing speech about the nominees and ginning up public disfavor. This is decidedly not a legitimate justification for campaign finance reporting requirements. Indeed, it is precisely why

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[77] The Institute for Free Speech is a nonpartisan organization. By identifying the political affiliation of H.R. 1's sponsors, IFS does not mean to impugn their political affiliation in any way, but merely notes that members of their party previously have taken the opposite (and what IFS believes to be the correct) position on the pitfalls of "disclosure."

[78] Alexander Bolton and Mike Lillis, *Opposition to contractors disclosure rule grows among Dems*, THE HILL (May 13, 2011), *at* https://thehill.com/homenews/senate/161007-opposition-to-disclosure-rule-grows-among-dems (reporting that former Senators Joe Lieberman and Claire McCaskill wrote at the time, "The requirement that businesses disclose political expenditures as part of the offer process creates the appearance that this type of information could become a factor in the award of federal contracts.").

[79] *Captured Courts*, *supra* note 70 at 3-4.

[80] *See*, *e.g.*, Nick Gass, *Trump unveils 11 potential Supreme Court nominees*, POLITICO (May 18, 2016), *at* https://www.politico.com/story/2016/05/trumps-supreme-court-nominees-223331.

[81] *Captured Courts*, *supra* note 70 at 3-4.

the Supreme Court and lower courts (all of the tribunals with future nominations that this bill would impact) have recognized that such laws infringe on core First Amendment rights.[82]

C) U.S. Supreme Court Precedent on Lobbying Reporting Requirements

While H.R. 1 proposes to amend federal campaign finance law, the judicial ads provision nonetheless might be defended as a measure to regulate so-called "grassroots lobbying," insofar as it would regulate activity directed at the U.S. Senate's role in confirming judicial nominees. Even when analyzed under the rubric of the federal lobbying laws, however, the bill fares no better.

In *U.S. v. Harriss*, the U.S. Supreme Court upheld the federal lobbying reporting laws on the grounds that members of Congress have the prerogative to evaluate "the myriad pressures to which they are regularly subjected" in the form of lobbying.[83] The Court explained that Congress may require "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" so as "to know who is being hired, who is putting up the money, and how much."[84]

The lobbying law that *Harriss* upheld was quite "narrow," as the Court emphasized multiple times.[85] Specifically, under the law the Court upheld:

> (1) the person must have solicited, collected, or received contributions; (2) *one of the main purposes of such person, or one of the main purposes of such contributions,* must have been to influence the passage or defeat of legislation by Congress; [and] (3) the intended method of accomplishing this purpose must have been through *direct communication* with members of Congress.[86]

The Judicial Ads Act provision in H.R. 1 is materially different from the lobbying law upheld in *Harriss*. The bill would indiscriminately apply to all groups speaking about judicial nominations, regardless of whether their advocacy on such nominations is "one of the[ir] main purposes." The bill also would require such groups to indiscriminately report their donors, regardless of whether "one of the main purposes of such contributions" was to advocate on judicial nominations.

These differences are significant. With respect to the bill's failure to target only those groups whose "main purpose" is to advocate on judicial nominations, the Court has cautioned that "the relation of the information sought to the purposes of the [law] may be too remote" in such

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[82] *See Buckley*, 424 U.S. at 64; *see also, e.g., Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) ("'public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute' and 'expose contributors to harassment or retaliation.' [] Ironically, these two values the *Buckley* Court acknowledged would be harmed by the disclosure requirements were the very same values the *McIntyre* Court later believed 'exemplified the purpose behind the Bill of Rights and of the First Amendment in particular' – namely, 'protecting unpopular ideas from suppression' and 'individuals from retaliation.'") (quoting *Buckley*, 424 U.S. at 68 and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)) (brackets and ellipses in the original omitted).

[83] 347 U.S. 612, 625 (1954).

[84] *Id*.

[85] *Id*. at 623.

[86] *Id*. (internal quotation marks omitted, emphasis added).

circumstances.[87] Similarly, "[t]o insure that the reach of [the law] is not impermissibly broad," the Court has required contributor reporting mandates to apply only to "contributions earmarked" for the purposes the law purports to regulate.[88]

This type of narrowing not only is good law, it is sound policy and common sense. As IFS has explained many times before, to indiscriminately require groups to report donors who had nothing to do with the communications being regulated would result in "junk disclosure" that spreads misinformation and thus serves no legitimate public interest.[89]

Equally fatal to H.R. 1's Judicial Ads provision is its singling out of judicial nomination communications for regulation of so-called "grassroots lobbying" – *i.e.*, ads disseminated openly and widely to influence public opinion, as opposed to one-on-one direct communications with members of Congress and their staff. For the 75 years that federal lobbying has been regulated,[90] only direct lobbying has been regulated. Proposals to regulate federal grassroots lobbying have been proposed numerous times in Congress throughout the years and rejected.[91]

While the Senate's role in confirming federal judges is an important, constitutionally prescribed function, it is only one of the innumerable issues that Congress votes on. The Judicial Ads Act's singular and unprecedented focus on grassroots lobbying on judicial nominations is therefore peculiarly underinclusive. When a law that regulates First Amendment activity is underinclusive in this manner, it "raises a red flag" and creates "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[92] As discussed previously, that appears to be precisely the case here: congressional Democrats have minced no words in expressing their disapproval of the groups advocating on federal judicial nominations that this bill would regulate.[93]

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

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

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, which was written with broad cross-ideological support, online political speech generally is unregulated unless it occurs in the form of paid ads. By negating the FEC's carefully considered Internet regulations,[94] H.R. 1

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[87] *Buckley*, 424 U.S. at 80.
[88] *Id*.
[89] *See, e.g.*, Matt Nese, *House Floor Amendment 1 to Kentucky Senate Bill 75: A Threat to Nonprofit Groups' Speech and Kentuckians' Privacy*, Institute for Free Speech (Mar. 7, 2017), *at* https://www.ifs.org/wp-content/uploads/2017/04/2017-03-07_House-Talking-Points_KY_HFA-1-To-SB-75_EC-Disclosure.pdf; Matt Nese, *Constitutional Issues with California Assembly Bill 45*, Institute for Free Speech (Apr. 23, 2013), *at* https://www.ifs.org/wp-content/uploads/2013/04/2013-04-23_Assembly-ER-Comments_CA_AB-45_Multipurpose-Organization-Donor-Disclosure.pdf.
[90] *See* Federal Regulation of Lobbying Act of 1946, 2 U.S.C. § 261 *et seq.*; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq*.
[91] *See, e.g.*, R. Eric Petersen, *Lobbying Disclosure and Ethics Proposals Related to Lobbying Introduced in the 109th Congress: A Comparative Analysis*, Congressional Research Service (Mar. 23, 2006), *at* https://fas.org/sgp/crs/misc/RL33234.pdf, at 9-11.
[92] *Williams-Yulee*, 575 U.S. at 448-49 (internal quotation marks and citation omitted).
[93] *See Captured Courts*, *supra* note 70 at 3-4.
[94] *See* FEC, *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006), *at* https://www.govinfo.gov/content/pkg/FR-2006-04-12/pdf/06-3190.pdf.

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."[95]

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 heightening the 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.[96] However, other forms of online communications, such as mass e-mails; creating, maintaining, or hosting a website; unpaid Facebook posts; unpaid Twitter tweets; YouTube uploads; or "any other form of communication distributed over the Internet" are not regulated.[97]

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."[98] 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.[99] Indeed,

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[95] *Id*. at 18,590-18,591.
[96] 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.
[97] *Id*. § 100.155(b).
[98] H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)).
[99] *See id*. § 4207 (addressing 11 C.F.R. § 110.11(f)(1)(i), (ii)).

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."[100]

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."[101] Similarly, a group that shares 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.[102] In other words, H.R. 1's "Strengthening Oversight of Online Political Advertising" provision 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.[103]

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,[104] and reporting requirements, which apply to regulated communications of as little as $250.[105] (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 current disclaimer requirements, which are simple by comparison.[106] Violations of the disclaimer and

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[100] *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)).

[101] 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 Adv. Op. No. 1999-25 (DNet) (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 and 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.

[102] *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).

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

[104] 11 C.F.R. § 110.11(a)(2).

[105] 52 U.S.C. § 30104(c)(1).

[106] Joe Trotter, *FEC Complaint: Mayday PAC violated campaign finance laws*, Institute for Free Speech (Nov. 20, 2014), *at* http://www.ifs.org/2014/11/20/fec-complaint-mayday-pac-violated-campaign-finance-laws/.

reporting requirements, whether inadvertent or intentional, also subject speakers to monetary penalties (after enduring complaints and investigations).[107] 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.[108] Many speakers, especially smaller groups, would choose silence instead.

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

H.R. 1's online ads provisions purport to be premised on the unique ability of Internet advertising to microtarget recipients,[109] 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 unrelated to any election. Take the example discussed earlier of an ad asking members of the public to contact their Senators about a criminal justice reform bill pending in Congress, which was held to be an "electioneering communication" in *Independence Institute*, even though the ad did not praise or criticize the elected officials in any way. 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."[110]

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.[111] Like express advocacy communications, "electioneering communications" are subject to complex FEC disclaimer, reporting, and recordkeeping requirements.[112]

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[107] *See* 52 U.S.C. § 30109(a).
[108] *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.").
[109] H.R. 1 § 4203.
[110] 52 U.S.C. § 30104(f)(3).
[111] 11 C.F.R. § 100.29.
[112] 11 C.F.R. §§ 110.11(a)(4), (b)(3) & (c)(4); 104.20(d).

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.[113] Notably and ironically, given the bill's concern about microtargeting on online platforms,[114] H.R. 1 dispenses with any targeting requirement at all for online "electioneering communications."[115]

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 Chuck Schumer, who represents New York, 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,[116] 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[117] and as-applied to "pejorative" ads about then-Senator Hillary Clinton's 2008 bid for the Democratic presidential nomination.[118] But the Court did so because it said "the vast majority of [electioneering communication] ads clearly" sought to elect candidates or defeat candidates.[119] The government documented through a record "over 100,000 pages long"[120] that Congress had precisely targeted the type of communication and forms of media required to regulate "candidate advertisements masquerading as issue ads."[121] 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."[122]

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 targeted to recipients who are ineligible to vote for or against the referenced candidates; and (2) the bill does not cite – and its sponsors have not produced – any evidence whatsoever that online issue ads are "candidate advertisements masquerading as issue ads."

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[113] H.R. 1 § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)).
[114] *Id*. § 4203.
[115] *Id*. § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A)(i)(III)).
[116] U.S. CONST., Art. I § 2(1) and Amend. XVII § 1.
[117] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003).
[118] *Citizens United*, 558 U.S. at 366-367; *see 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).
[119] *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).
[120] *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).
[121] *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.").
[122] *McConnell*, 540 U.S. at 206 n.88.

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."[123]

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 and address for the sponsor's contact person; and a list of the chief executive officers or board members of the sponsor.[124]

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.[125] 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 "Black Lives Matter," pandemic shutdown orders, or impeaching former President Trump, 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

[123] H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(k)).
[124] *Id*.
[125] *See* 47 U.S.C. § 315(e)(1)(B)(iii).

accessible for at least four years after each ad is purchased.[126] Penalties could amount to several thousand dollars per violation.[127] (Oddly enough, H.R. 1 also would place these requirements under the campaign finance law, granting enforcement authority to the FEC, even though much of the speech covered by these requirements – just like the provisions discussed above pertaining to speech about judicial nominees – would have nothing to do with federal elections.[128]) 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.

Senator Amy Klobuchar, who sponsored the original online ads provision incorporated into H.R. 1,[129] mistakenly claimed these "public file" requirements would "harmonize[] the rules governing broadcasters, radio, print, on one hand, and online on the other."[130] In fact, advertisers using telephone calls, canvassing, and print (*e.g.*, newspapers, magazines, direct mail, and pamphlets) are not subject to the "public file" requirement.[131] Broadcasters must comply with the "public file" requirement because they are required to act in the "public interest," due to the scarcity of the portion of the public electromagnetic spectrum over which content and data may be transmitted, or, for cable and satellite operators, because their services affect broadcast service.[132]

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, such limitations are a function of privately owned and operated infrastructure and are not in any way comparable to the limitations in public spectrum for broadcast media. 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 applicable 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 the U.S. Court of Appeals for the Fourth Circuit recently held was unconstitutionally burdensome.[133] 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.[134] 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 either a "strict scrutiny" or "exacting scrutiny" standard of judicial review.[135] At a minimum, "there must be a 'substantial relation' between an 'important' government interest and 'the information required to be disclosed.'"[136]

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[126] H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(k)(5)).
[127] *Id*. (to be codified at 52 U.S.C. § 30104(k)(7)); *see also* 52 U.S.C. § 30109(a)(5), (6)).
[128] *See id*.
[129] *See* S. 1989 (115th Cong.).
[130] *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.
[131] *See* note 125, *supra*.
[132] *See* 47 U.S.C. § 309; *Licensing*, Federal Communications Commission, *at* https://www.fcc.gov/licensing-databases/licensing; *In re* Expansion of Online Public File Obligations To Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees, FCC (Jan. 28, 2016), *at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-4A1.pdf, ¶¶ 5-7; *Public Inspection Files*, FCC, *at* https://publicfiles-demo.fcc.gov/; *Cable Television*, FCC, *at* https://www.fcc.gov/media/engineering/cable-television.
[133] *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).
[134] *See id.*; H.R. 1 § 4203.
[135] *Wash. Post*, 944 F.3d at 520.
[136] *Id*. (quoting *Buckley*, 424 U.S. at 64-66).

H.R. 1 fails the test of having a "substantial relation" to its purported goal of countering foreign interference because 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.[137] H.R. 1 also inaptly focuses on paid advertising when most of the Russian propaganda was in the form of unpaid social media posts.[138] Further, H.R. 1 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."[139]

Online platforms have already implemented their own measures to address foreign propaganda, which contain some similarities to the "public file" requirement that H.R. 1 would impose.[140] 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 options and evolving foreign threats.

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.[141] 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, and may exceed,[142] 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.[143]

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[137] 22 U.S.C. § 611 *et seq*.

[138] *Wash. Post*, 944 F.3d at 521 ("foreign nationals rarely, if ever, relied on paid content to try to influence the electorate. Instead, as the state concedes, 'Russian influence was achieved primarily through unpaid posts' on social media.") (certain internal quotation marks omitted); *see also The Tactics & Tropes of the Internet Research Agency*, New Knowledge, *at* https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf; *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, Computational Propaganda Research Project, *at* https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report-2018.pdf.

[139] *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 305 (D. Md. 2019) (noting that "[a] buyer who wishes to avoid detection – as any self-respecting foreign operative surely would – can simply" withhold accurate information or "submit false information" to the online "public file.").

[140] 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.

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

[142] *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.

[143] Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, THE 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/.

This is especially the case since "reasonable efforts" are not well-defined, except for ads purchased with a credit card.[144] For ads purchased with other payment methods, the bill fails to affirmatively define what constitutes "reasonable efforts." Instead, the bill oddly only specifies what does *not* constitute "reasonable efforts" (*i.e.*, not asking the purchaser whether the purchase is being made by a foreign national, "directly or indirectly").[145] This seems to suggest that media companies may have to take other "reasonable efforts," such as their own independent research into a purchaser's status.

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,[146] 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.

V. H.R. 1 Would Impose Inflexible and Impractical Disclaimer Mandates on Speakers.

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.[147] 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.[148] 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]."[149] 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

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[144] H.R. 1 § 4209 (to be codified at 52 U.S.C. § 30121(d)(2)).
[145] *Id.* (to be codified at 52 U.S.C. § 30121(d)(1)).
[146] *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").
[147] H.R. 1 § 4207 (to be codified at 52 U.S.C. § 30120(a), (e)).
[148] 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).
[149] 11 C.F.R. § 110.11(b)(1).

candidate that appears during the voice-over statement.[150] TV ads also must contain an on-screen text disclaimer containing "a similar statement" of candidate approval.[151]

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 seconds.[152] Online video ads also are commonly much shorter than broadcast TV ads.[153]

The FEC's existing disclaimer requirements exempt "small items" and communications where it is "impracticable" to include a disclaimer.[154] Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.[155]

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.[156] At a minimum, a digital ad would have to contain on its face the name of the ad's sponsor. This information could not be displayed by alternative means, such as "clicking through" the ad.[157] 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 is technically impossible or impractical or if the vendor does not allow for it.[158] 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.[159] Thus, H.R. 1 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

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CONCLUSION

Any of the provisions discussed above, standing alone, would create significant infringements on free speech or associational and donor privacy. H.R. 1 compounds the severe practical and constitutional problems in these provisions exponentially by stitching them together into a single slapdash legislative monstrosity. This is not a bill "For the People," as its title falsely suggests. Buried in the measure's nearly 800 pages is a censor's wish list of one burden after another on political and civic discourse. It proposes a democracy where civic engagement is punished and where fewer people have a voice in government and public life. H.R. 1 is an affront to the people.

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[150] *Id.* § 110.11(c)(3).
[151] *Id.*
[152] *See Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), *at* http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/ and Martin Luenendonk, *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Oct. 10, 2020), *at* https://www.cleverism.com/everything-about-podcast-advertising/.
[153] *See, e.g.*, Garett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE (Jul. 26, 2017), *at* http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/.
[154] 11 C.F.R. § 110.11(f)(1)(i), (ii).
[155] *See* FEC Adv. Op. No. 2010-19 (Google).
[156] H.R. 1 § 4207(b)(2).
[157] *Id.* § 4207 (to be codified at 52 U.S.C. § 30120(e)(1)).
[158] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(B)).
[159] *Id.*