DEMOCRACY 21

March 7, 2019

Re: Response to ACLU Letter on H.R. 1

Dear Representative:

Democracy 21 strongly supports H.R. 1, the "For the People Act of 2019," and urges you to vote for the legislation, which is the most comprehensive effort to repair our democracy since the post-Watergate reforms of the 1970's.

In particular, the bill contains a series of important reforms to address serious problems with our campaign finance system. The legislation provides a small donor, matching funds system for House and presidential elections that will encourage small donations and remove candidate dependence on wealthy contributors and special interest money. It also contains important improvements to the disclosure laws to address the growing problem of undisclosed "dark money" that is being spent to influence federal elections. And it provides effective standards to ensure that supposedly "independent" spending is not done in cooperation or coordination with candidates or their agents, thus evading contribution limits.

We want to address constitutional concerns about some of these measures that have been raised by the ACLU in a letter dated March 6, 2019. We note that the ACLU has participated as a plaintiff or amicus to seek invalidation of reform measures in key Supreme Court cases, including *Buckley v. Valeo*, 424 U.S. 1 (1976), *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 130 S.Ct. 876 (2010). Many of the ACLU's challenges to campaign finance reform measures, including disclosure requirements, were rejected by the Court in these cases.

ACLU concerns about disclosure provisions

The provisions of the DISCLOSE Act incorporated into H.R. 1 are essential to closing gaping disclosure loopholes through which, in the last four elections, wealthy donors and special interests gave $1 billion in secret, unlimited contributions to nonprofit groups that spent the money to influence federal elections. Unlimited, secret contributions, also known as dark money, are the most dangerous contributions in American politics because there is no way to hold the donor and officeholder accountable for corrupt practices.

In its March 6 letter, the ACLU particularly criticizes the DISCLOSE Act provisions in H.R. 1. Those provisions require disclosure of the sources of funding used for "campaign-related disbursements" that are intended to influence federal elections. Dating back to the *Buckley* case, and as reaffirmed in *Citizens United*, the Supreme Court has consistently upheld disclosure requirements because they serve the important governmental interests of "providing the

electorate with information about the sources of election-related spending" in order to help citizens "make informed choices in the political marketplace." *Citizens United,* 130 S.Ct. at 914.

As Justice Kennedy wrote for an 8-1 majority in *Citizens United,* disclosure provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *Id*. In *Citizens United,* the Supreme Court upheld disclosure provisions applicable to section 501(c)(4) nonprofit groups.

The ACLU's principal objection is that H.R. 1 requires disclosure of spending that "reaches beyond the bounds" of express advocacy. ACLU Ltr. at 12. Yet the Court in *Citizens United* addressed precisely this issue and upheld a disclosure requirement for a broadcast ad that referred to a candidate in the pre-election period, but that did not contain express advocacy.

The Court explicitly stated that "we reject Citizens United's contention that the disclosure requirement must be limited to speech that is the functional equivalent of express advocacy." *Id*. at 916.

Thus, the principal constitutional argument raised by the ACLU with regard to the DISCLOSE Act – that disclosure requirements cannot extend beyond express advocacy – has already been squarely and overwhelmingly rejected by an 8 to 1 vote in the Supreme Court. While the ACLU states that it particularly objects to disclosure requirements for "electioneering communications," *i.e.,* non-express advocacy ads that refer to a candidate in the pre-election period, ACLU Ltr. at 13, this is the very issue that the Court addressed in upholding such disclosure requirements in *Citizens United*.

The ACLU also objects to disclosure requirements for money spent on ads that promote, support, attack or oppose (PASO) the election of a candidate, complaining about "applying vague and subjective standards to regulation of political speech." ACLU Ltr. at 14. Yet again, the Supreme Court directly addressed this issue, and rejected an identical criticism of the same test in the *McConnell* case.

In *McConnell,* the Court stated that the words used in the PASO test – promote, attack, support, oppose – are not unconstitutionally vague because they "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" 540 U.S. at 170 n. 64 (internal citations omitted).

The Court further stated that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating. The record on this score could scarcely be more abundant." *Id.* at 170. These rulings should put to rest the objections raised by the ACLU about the PASO test.

The ACLU also raises privacy and associational concerns with the disclosure requirements in the legislation. It invokes the Court's decision in *NAACP v. Alabama,* 357 U.S. 459 (1958), which protected the associational interests of a civil rights group against disclosure of the group's membership lists when the group was under attack from government officials in the 1950s South. We note that the NAACP today is itself a supporter of H.R. 1, and that the disclosure provisions

in H.R. 1 could not be more different from the disclosure requirements addressed by the Court in the 1958 *NAACP* decision.

The DISCLOSE Act provisions in H.R. 1 require disclosure only of donors who give $10,000 or more in a two-year election cycle to a group which engages in campaign-related spending. That high dollar threshold alone will exclude disclosure of the vast majority of donors to, and members of, most membership organizations, and instead will require disclosure only of very large donors to such groups.

Furthermore, the Supreme Court in both *Buckley* and *McConnell* has already rejected the analogy between campaign finance disclosure requirements and the disclosure of membership lists that was struck down in the *NAACP* case. The Court said in *McConnell*, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure." *Id*. at 198.

Indeed, H.R. 1 has an explicit safe harbor from disclosure for any donor who may be subject to "serious threats, harassment or reprisals." Sec. 4111(a) adding Sec. 324(a)(3)(C). This again aligns with the Supreme Court's requirements on this issue.

The Court has made clear that disclosure requirements are not invalid because of a generalized or theoretical concern about "public harassment," but instead are invalid *only* in specific cases where a group can show a "reasonable probability" that disclosing the names of its contributors would "subject them to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United,* 130 S.Ct. at 916.

Absent such a showing, campaign finance disclosure requirements are constitutional. And even if there is such a specific showing of a specific threat, the disclosure requirements would be held unconstitutional *only for the specific group involved* based on the specific showing of harm to that group. The disclosure laws would otherwise remain constitutional.

The ACLU states a concern that the bill would "require disclosure of an overbroad number of donors," ACLU Ltr. at 15, but it fails to acknowledge or to give proper weight to other protections for privacy interests that are contained in the bill. A group can set up a separate bank account for its spending on campaign-related disbursements and then is required to disclose only those donors of $10,000 or more to this separate account. All other donors to the organization would not be disclosed.

In addition, *any* donor can restrict his or her donation to the organization from being used for campaign-related disbursements. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. By these measures, groups and donors can ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure, thereby respecting any donor's particularized privacy interests.

ACLU concerns about coordination provisions

A second area of concern with H.R. 1 raised by the ACLU is the provisions related to strengthening the coordination rules in the campaign finance laws. These rules play a major role

in protecting the integrity and efficacy of contribution limits which are, in turn, the major bulwark against corruption.

While independent spending is not subject to contribution limits, any spending that is coordinated with a candidate or his agents is treated as a contribution and therefore is subject to limits. Because of weak rules and even weaker enforcement by the Federal Election Commission, the existing coordination rules do not effectively restrain campaign-related spending by Super PACs, nonprofit groups and other outside spenders from being functionally coordinated with the candidates supported by the spending.

In this fashion, the rise of individual-candidate Super PACs has played an especially pernicious role. These Super PACs are typically set up with the involvement of the candidate or his or her close associates, and the candidate is often involved in helping to raise unlimited huge contributions for the Super PAC.

This money is then spent, purportedly independently of the candidate, to promote the candidate's election. But because there are not effective rules against coordination, these individual-candidate Super PACs have operated in *de facto* coordination with the candidates they are set up to support. In practice, they have become dedicated soft money campaign accounts for candidates, thus eviscerating the contribution limits which should apply to money raised and spent by federal candidates.

While the use of individual-candidate Super PACs began after *Citizens United* with presidential candidates in 2012, they rapidly have spread to congressional races. By the 2018 election cycle, 259 individual-candidate Super PACs supporting federal officeholders and other candidates had raised $176 million in unlimited contributions.

The coordination provisions in H.R. 1 strengthen existing coordination rules to conform to Supreme Court decisions which require independent spending to be "totally" independent of a candidate. *Buckley,* 424 U.S. at 47.

The ACLU tempers its objections to these provisions of the bill, noting that it "strongly supports stricter enforcement of rules restricting coordination between campaigns and outside groups" and acknowledging that "H.R. 1 would make strides in the right direction by clarifying the definition of coordinated expenditures treated as contributions to a campaign." ACLU Ltr. at 17. Yet it objects that the definition of coordination could encompass "communications with the candidate about the public policy issues of the day without a sufficient nexus to the potential corrupting influence of very large expenditures." *Id.* at 18.

In stating this objection, the ACLU fails to give proper weight to an explicit provision in the bill which protects such communications by creating a safe harbor from application of the coordination rules for any person's "discussions with the candidate or committee, or with any agent of the candidate or committee, regarding that person's position on a legislative or policy matter (including urging the candidate or committee to adopt that person's position)…" Sec. 6102 adding sec. 326(b)(2).

The ACLU acknowledges this safe harbor, Ltr. at 19, but misinterprets it. As set forth in the text of the bill, the safe harbor applies to legislative or policy discussion "so long as there is no communication between the person and the candidate or committee … regarding the candidate's or committee's campaign advertising, message, strategy or policy," *id.* (emphasis added).

The ACLU's concern that "[d]iscussion of 'message' or 'policy' is integral to discussion of legislative and policy positions," *id.*, is already adequately addressed by the safe harbor provision, which permits all legislative message and policy discussion so long as it is not about campaign policy, or the campaign's message.

Raising additional concerns, the ACLU objects to treatment as a coordinated expenditure of a payment by an outside spender for republication of a candidate's own campaign material, although it correctly notes that this same republication provision has long been part of existing law. ACLU Ltr. at 18. It notes that there are regulations issued by the FEC which have interpreted this provision of existing law, and claims those regulations are necessary to the constitutionality of the law. Even if true, there is nothing in H.R. 1 which would prevent the FEC from similarly construing the bill's re-promulgation of the same republication language, which is all that the bill does on this matter.

Finally, the ACLU notes that the coordination provisions of H.R. 1 create a new category of "coordinated spenders," based on certain specified relationships, activities or status between candidates and outside spenders. The bill then provides that certain specified categories of campaign-related spending by such "coordinated spenders" will be treated as coordinated. The ACLU questions whether such treatment can be "based solely upon a speaker's identity." ACLU Ltr. at 19.

This is, at best, a half-hearted objection because the ACLU also then "agrees that a speaker's identity coupled with the contents of the communications can be factors in determining whether a particular communication was coordinated with a candidate such that it should be considered a campaign contribution." *Id.* The ACLU nonetheless questions whether spending can be treated as coordinated "absent any additional information indicating the speaker acted pursuant to a common plan." *Id.*

But the Court has never limited the definition of coordinated spending only to spending pursuant to an explicit discussion about, or a "common plan" for, a particular expenditure. The Court has instead cast a wide net in demanding that independent spending be "totally independent," *Buckley*, 424 U.S. at 29, and "not pursuant to any general or particular understanding with a candidate," *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614 (1996), and "truly independent" or "without any candidate's approval (or wink or nod)." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 442 (2001).

The standards set forth in H.R. 1 look both to certain relationships between the outside spender and the candidate, and certain activities between the outside spender and the candidate, to determine whether the spending meets the standard set by the Court of being "totally" and "truly" independent. If the relationship between the candidate and spender, or the activities of the candidate on behalf of the spender (such as helping to fundraise for the spender), indicate that

they do not meet this high standard for true independence, then the proposed rule would appropriately deem spending by that person to be coordinated.

Conclusion

The reforms contained in H.R. 1 will make essential improvements in the transparency of the money spent to influence federal elections and in shutting down avenues that are currently being exploited to evade and eviscerate candidate contribution limits. The bill is carefully drafted to conform to the Supreme Court's campaign finance rulings, and to appropriately balance constitutionally protected privacy and speech interests with the government's compelling interests in deterring corruption and the appearance of corruption through disclosure and the restoration of effective contribution limits.

Democracy 21 urges you to vote for H.R. 1.

Sincerely,

/s/ Fred Wertheimer
Fred Wertheimer
President

/s/ Donald J. Simon
Donald J. Simon
Counsel