

## **Restrictions on the Affordable Housing Fund Created by H.R. 1461 Are Unconstitutional**

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The managers' amendment to the Federal Housing Finance Reform Act, H.R. 1461, which would create the Affordable Housing Fund, an important source of revenue to support the creation of new housing for very low and extremely low income families, would impose anti-democratic, unconstitutional restrictions on the Fund. The restrictions would require any organization seeking support from the Fund to sacrifice core First Amendment freedoms, including the freedom to engage in voter registration and get out the vote activities, the freedom to associate with others engaged in such activities, and in many instances, the freedom to lobby. The funding conditions, which are entirely unrelated to the Fund's goals, can be removed without affecting the remainder of the legislation.

### **The Legislation**

H.R. 1461 would establish the Affordable Housing Fund, a source of substantial funding for the work of organizations that support the creation of affordable housing. This would be a significant step toward addressing the housing crisis confronting low-income communities across the nation.

However, certain anti-democratic funding restrictions have been added that would control the activities of any non-profit organization seeking funding from the Fund. The restrictions would render ineligible for funding any non-profit organization that engages in voter registration, voter identification, or get-out-the-vote activity a year prior to or during the grant cycle. The restrictions would also disqualify certain non-profit organizations that engage in lobbying or grassroots lobbying during the same time period.

Moreover, the applicant would be ineligible if, during the same time period, it "affiliated" with any organization that engages in the forbidden activities. "Affiliation" is defined broadly to include, among other things, having overlapping board members; sharing physical space, employees, supplies, Internet or other public communications; or transferring more than 20% of the organization's funding to, or receiving 20% of the organization's funding from, another organization. For example, a potential applicant would be disqualified if it shared a fax machine with an organization that engaged in voter registration (or in any other prohibited activity).

### **The Constitutional Flaws in the Legislation**

#### **The Basic Principle**

Under the United States Constitution, funding conditions that impinge on constitutional rights are suspect. Courts examine such conditions skeptically, applying "heightened scrutiny," and they

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usually overturn blanket prohibitions that prevent recipients of government funding from using their own funding to engage in constitutionally protected speech. For example, when the Federal Communications Commission barred public television and radio stations that receive federal funds from using their own nonfederal funds to broadcast their own editorial views, the Supreme Court struck down the regulation.<sup>2</sup>

### Substantial Burden on Speech

Voter registration, voter identification, get-out-the vote activities, and lobbying are constitutionally protected functions that are cornerstones of our democratic society. The restrictions cut deep and wide, directly burdening these important freedoms.

### No Government Interest

When the government impinges on First Amendment rights, it must show that its actions are adequately tailored to further an important government interest.<sup>3</sup> The government cannot meet that standard here, as it cannot identify any legitimate interest.

The government is unable to claim that the restrictions are designed to ensure that organizations spend granted funds only as Congress has intended. How would banning the prohibited activities *before* the start of the applicant's grant cycle, disqualifying applicants based on affiliations with organizations that receive no grant funds at all, or restricting the use of funds from sources other than the Affordable Housing Fund conceivably achieve that goal?

Nor can the government possibly claim that it possesses any interest in stopping the promotion of participation in elections. The very purpose of such laws as the Help America Vote Act and the National Voter Registration Act is to encourage voter participation. Indeed, some of the organizations that would likely receive funding from the Affordable Housing Fund already receive funding under one or more of these other laws, and so operate under a federal mandate that requires them to engage in voter registration activities.

### Extreme Breadth

By penalizing affiliations between applicants and others, the law violates the rights of both, effectively isolating the Fund recipient organizations (their offices, staff, board members, funders, even their equipment) from a broad range of actors (individuals, nonprofits, for profit organizations, philanthropies, state and local governments, and others) engaged in (or helping to finance) the prohibited, though constitutionally protected, activities. The very broad sacrifice of the constitutional freedoms of speech and association is virtually unprecedented, and cannot be justified.

### Summary

For these reasons, the anti-democratic restrictions encumbering the Affordable Housing Fund will face inevitable challenge and are certain to be found unconstitutional. These restrictions could be deleted from the bill without in any way jeopardizing the goals of the Affordable Housing Fund or the overall goals of the legislation.

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<sup>2</sup> *F.C.C. v. League of Women Voters*, 468 U.S. 364, 400-01 (1984). See also *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-46 (1983) (upholding federal law prohibiting lobbying by 501(c)(3) groups, because the groups could still lobby through closely affiliated, legally separate 501(c)(4) groups); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (upholding federal law prohibiting groups receiving funds under the Title X program from conducting abortions, because the groups could still use private funding to engage in prohibited activities in a separate physical location).

<sup>3</sup> *League of Women Voters*, 468 U.S. at 380 (applying heightened scrutiny to funding restrictions that limited the use of private funding; declining to apply strict scrutiny only because of the government's significant control over broadcasting).