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January 26, 2006

Senator Richard C. Shelby, Chair
Banking, Housing, and Urban Affairs Committee
110 Hart Senate Office Building
Washington, DC 20510

Senator Paul S. Sarbanes, Ranking Member
Banking, Housing, and Urban Affairs Committee
309 Hart Senate Office Building
Washington, DC 20510

Re: Manager's Amendment to H.R. 1461

Dear Senators Shelby and Sarbanes:

I write on behalf of the Association of the Bar of the City of New York to express the Association's strong opposition to language in H. Amdt. 596, a manager's amendment to H.R. 1461, that would disqualify nonprofit organizations from participating in a federal grant program designed to increase the supply of affordable housing for low-income families if the organizations or their affiliates have engaged in nonpartisan voter registration, get-out-the-vote drives or lobbying within the past twelve months. The amendment would further prevent organizations and their affiliates from engaging in those activities after receiving affordable housing grants even if they fund those activities from other sources.

These restrictions in the manager's amendment will not further, and in fact may hinder, the goal of the legislation - the creation of affordable housing. Worse yet, by penalizing organizations for activities designed to encourage citizens to exercise their right to vote and to participate in the political process, the restrictions will trammel on the First Amendment rights of low-income constituents and the organizations that serve them. The manager's amendment also directly conflicts with federal legislation enacted for the express purpose of increasing voter registration and political participation. Because these restrictions in the manager's amendment contravene both the Constitution and good public policy, the Association strongly urges you to reject the amendment.

Support for H.R. 1461

The Association fully supports the goals of H.R. 1461, which is designed to encourage the creation of affordable housing for low-income families. Among other things, it establishes a Federal Housing Finance Agency and a Housing Finance Oversight Board, and it sets forth operations, procedures and goals for creating low-income housing. Likewise, the Association finds laudable many of the provisions of the manager's amendments, including those that would (1) expand the affordable housing roles of Fannie Mae and Freddie Mac; (2) include new single-family and multi-family housing goals while emphasizing the duty to serve lower-income markets; and (3) speed up the implementation of the program by moving the effective date of the bill from one year to six months following enactment. The assistance afforded by the bill is particularly timely and welcome because it prioritizes for federal funding projects in areas devastated by Hurricane Katrina.

The Association also appreciates the need to ensure that grants given for purposes of affordable housing are used solely for that purpose. But there are already sufficient safeguards in H.R. 1461 and in existing law to prevent the improper use of grant funds. There is simply no need for additional prohibitions beyond the requirement that grant funds be used solely for grant purposes.

Opposition to Manager's Amendment

The restrictions in the manager's amendment go far beyond the purpose of ensuring that federal funds are used only for their stated purposes, are unreasonable, and would have seriously deleterious effects on potential grantees and the citizens they assist. In addition to specific restrictions on the use of federal grants, the amendment's eligibility requirements prohibit nonprofit organizations and their affiliates from engaging in a broad range of legitimate activities regardless of the source of the funding for those activities. These activities, which include "federal election activity, electioneering communications or lobbying," have no effect on the ability of nonprofits to carry out the goals of the federal funding if done with funds derived from other sources. Yet, inexplicably, the amendment not only prohibits organizations from engaging in those activities using separate funds but also disqualifies them if they have done so for a period of one year before applying for the grants. These restrictions raise grave constitutional and political concerns.

The Restrictions are Unconstitutional

Longstanding constitutional law holds that government funding restrictions that infringe on constitutional rights are suspect. Under the "doctrine of unconstitutional conditions," courts recognize that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."[1] Chief among those impermissible reasons are ones that implicate core constitutional interests: the government "may not deny a benefit to a person on a basis that infringes his constitutionally

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1 *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (citation omitted).

protected interests—especially, his interest in freedom of speech."[2] The fact that a restriction is tied to the receipt of government funds for which an organization voluntarily applies and is not the result of a direct order from the federal government does not make it acceptable. Rather, when a funding restriction imposes "significant penalties" on "the exercise of rights guaranteed by the First Amendment," it is unconstitutional unless it is "narrowly tailored to further vital government interests."[3]

Here, the potential constitutional restrictions are serious ones. Voter registration, efforts to increase voter participation, and lobbying are core democratic activities protected by the First Amendment.[4] Government restrictions on those activities violate not only the First Amendment rights of organizations that engage in them, but also the speech and voting rights of the citizens with whom they interact. Thus, the proposed funding conditions in the manager's amendment would be struck down unless they are necessary to serve a compelling government interest.

While the government's interest in ensuring that affordable housing grants are used solely for their intended purposes is certainly important, it has no legitimate interest in regulating grant recipients' speech funded by other sources, especially when the speech is completely unrelated to the grant purposes. Indeed, courts generally hold invalid blanket restrictions that prevent recipients of federal funds from using their own funds to engage in constitutionally protected speech.[5] When the Supreme Court has upheld restrictions on the use of federal funds, it has made clear that the government may not extend the restrictions to activities of the recipient that are wholly outside of the program.[6] The manager's amendment makes no such distinctions; it not only creates an absolute bar to an organization's exercise of First Amendment activities but also punishes it for having engaged in those activities even before the bill itself creating the grant was passed. The government does not have a legitimate interest in preventing non-partisan voter participation activities. And there is no conceivable way in which penalizing organizations for engaging in such activities up to one year before applying for federal grants can be said to further the government's interest in ensuring that federal funds are used properly. In short, the restrictions in the manager's amendment are in no way narrowly tailored to serve any important government interest.

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2 *Id.* (citation omitted)

3 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990).

4 *Monterey County Democratic Central Comm. v. U.S. Postal Serv.*, 812 F.2d 1194, 1196 (9th Cir. 1987) (noting that voter registration is "speech protected by the first amendment"); *Hernandez* v. *Woodward,* 714 F. Supp. 963 (N.D. 111. 1989) (upholding constitutional challenge to rule restricting voter registration activities); *cf. Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182 (1999) (striking down restrictions on circulation of ballot initiative petitions); *Meyer v. Grant,* 486 U.S. 414 (1988) (same); *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983) (noting that restrictions on, *inter alia,* voter registration affect the right to vote).

5 See, e.g., F.C.C. v. League of Women Voters, 468 U.S. 364, 400-01 (1984).

6 *See, e.g. Rust v. Sullivan,* 500 U.S. 173, 196 (1991).

The Restrictions Undermine Federal Policy Encouraging Voter Participation

The restrictions in the manager's amendment also conflict with the National Voter Registration Act of 2003 (the "Motor Voter" law),[7] which was enacted for the express purpose of increasing voter participation. To enhance democracy, the Motor Voter law encourages and creates a "legally protected interest" in conducting voter registration drives.[8] The manager's amendment, however, discourages voter registration drives and even penalizes organizations that have engaged in them. This not only undermines the voter registration provisions of the Motor Voter law but also flies in the face of the federal government's "duty," recognized by Congress, "to promote the exercise" of the fundamental right of citizens to vote."[9]

Conclusion

The provisions of the manager's amendment prohibiting recipients of federal funding designed to promote affordable housing from engaging in protected political activities is both unconstitutional and undemocratic. These prohibitions would bar from participation in a vital affordable housing program precisely those groups that have the most to offer - that is, experience in the provision of housing services and the dedication to use all available means, including political participation, to advocate for the interests of low-income families. These provisions have no proper place in an affordable housing bill, and we urge you to oppose their inclusion.

Sincerely,

Bettina B. Plevan

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7 42 U.S.C. §§ 1973gg *etseq.*

8 *Charles H. Wesley Educ. Found., Inc. v. Cox,* 408 F.3d 1349, 1353 (11th Cir. 2005).

9 42 U.S.C. § 1973gg(a)(2).

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