

FOR THE PEOPLE: OUR AMERICAN DEMOCRACY

HEARING BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS FIRST SESSION

FEBRUARY 14, 2019

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FOR THE PEOPLE: OUR AMERICAN DEMOCRACY

THURSDAY, FEBRUARY 14, 2019

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 8:30 a.m., in Room 1310, Longworth House Office Building, Hon. Zoe Lofgren [Chairperson of the Committee] presiding.

Present: Representatives Lofgren, Raskin, Davis of California, Butterfield, Fudge, Aguilar, Davis of Illinois, and Loudermilk.

Staff Present: Jamie Fleet, Staff Director; Eddie Flaherty, Director of Operations; Sean Jones, Legislative Clerk; David Tucker, Parliamentarian; Khalil Abboud, Deputy Staff Director; Veleter Mazyck, Chief of Staff, Office of Representative Fudge; Elizabeth Hira, Elections Counsel; Stephen Spaulding, Elections Counsel; Peter Whippy, Communications Director; Lisa Sherman, Chief of Staff, Office of Representative Susan A. Davis; Evan Dornier, Office of Representative Aguilar; Laura Doney, Office of Representative Raskin; Jen Daulby, Minority Staff Director; Brittany Randall, Minority Professional Staff; Tim Monahan, Minority Professional Staff; David Ross, Office of Representative Rodney Davis; Carson Steelman, Office of Representative Walker; and Susannah Johnston, Minority Legislative Assistant.

The CHAIRPERSON. Good morning, and we welcome our witnesses and members. And I would like to bring the Committee on House Administration to order and thank everyone in attendance.

Just a few housekeeping matters. We do have the funeral of our former colleague, John Dingell, this morning, and so we are going to have panel one prior to that, and we will reconvene around 1 o'clock for the second panel.

I will just say that I am pleased that we are having this hearing on "For the People: Our American Democracy." We have a distinguished group of witnesses who will share their insights and experiences.

Before we hear from them and from the Ranking Member, I would be remiss if I did not thank Congressman John Sarbanes for the tremendous effort that he has made over the years for H.R. 1 that is before us.

As we know, trust in government is at a low point. We have many challenges that we have to work on together.

One thing is that everyone in this country has a stake in how our country works, and the way they express that is through their vote and deciding who their government will be.

The mechanics of our democracy—access to voting, running for office, holding government accountable—have all undergone radical changes in recent years, and these changes have tended to restrict the rights of eligible voters to vote. It has made the voices of the wealthy and powerful so loud that they can drown out the voices of ordinary people, our neighbors and our communities.

Cutbacks to early voting, shutting down polling places, and purging eligible voters from the voter rolls all put barriers to participation to our elections, and certainly we have issues with technical matters relative to voting and voting machines.

There is hope that we can work to restore our democratic promise, and H.R. 1 is the beginning of that. Ultimately, if we are to address the problems that we face tomorrow, and in the years and decades ahead, it is essential that our democracy works and the voices of all our citizens, rich and poor, young and old, are heard and heard equally. The promise of our democracy is indeed for the people.

So I look forward to our time this morning.

I would now like to recognize our Ranking Member, Mr. Davis, for any statement he may have.

[The statement of the Chairperson follows:]

ZOE LOFGREN, CALIFORNIA
CHAIRPERSON

JAMIE RASKIN, MARYLAND
VICE CHAIRPERSON

SUSAN DAVIS, CALIFORNIA
G.K. BUTTERFIELD, NORTH CAROLINA
MARCIA FUDGE, OHIO
PETE AGUILAR, CALIFORNIA

JAMIE FLEET, STAFF DIRECTOR

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RODNEY DAVIS, ILLINOIS
RANKING MINORITY MEMBER

MARK WALKER, NORTH CAROLINA
BARRY LOUDERMILK, GEORGIA

ONE HUNDRED SIXTEENTH CONGRESS
JEN DAULBY, MINORITY STAFF DIRECTOR

For the People: Our American Democracy Chairperson Zoe Lofgren Opening Statement

Good morning, and we welcome our witnesses and Members. I'd like to bring the Committee on House Administration to order and thank everyone in attendance. Just a few housekeeping matters—we do have the funeral of our former colleague John Dingell this morning, and so we are going to have panel one prior to that and we will reconvene around 1 o'clock for the second panel.

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As we know, trust in Government is at a low point, we have many challenges that we have to work on together. One thing is that everyone in this country has a stake in how our country works and the way they express that is through their vote and deciding who their government will be.

The mechanics of our democracy—access to voting, running for office, holding government accountable—have all undergone radical changes in recent years. These changes have tended to restrict the rights of eligible voters to vote. It has made the voices of the wealthy and powerful so loud that they can drown out the voices of ordinary people, our neighbors and our communities.

Cutbacks to early voting, shutting down polling places, and purging eligible voters from the rolls all put barriers to participation to our elections and certainly we have issues with technical matters relative to voting and voting machines. There is hope that we can work to restore our democratic promise and H.R. 1 is the beginning of that.

Ultimately, if we are to address the problems that we have tomorrow, and in the years and decades ahead, it is essential that our democracy works and the

voices of all our citizens, rich and poor, young and old are heard and heard equally.
The promise of our democracy is indeed For the People.

Mr. DAVIS of Illinois. Thank you, Madam Chairperson.

Welcome to the new members of the Committee. Glad to have you here.

This is a great debate. America's election system, as I think everybody in this room can attest, can always be improved. While there are some reforms and provisions in H.R. 1 where I believe Republicans and Democrats can find common ground, there are several provisions that I simply find egregious, and I cannot support H.R. 1 in its current form because of those.

We should all share a common goal of ensuring our elections be open, free, fair, and functioning with the highest level of integrity, and, unfortunately, I don't believe H.R. 1 is going to accomplish that goal.

This bill was drafted without any consultation of Republican Members of Congress, without any consultation of Republican members even on this Committee, and there are only three of us. Introducing one-sided election reform is not the way to create positive and effective change for our Nation's election system.

Now, I mentioned the egregious provisions in H.R. 1. One of the most egregious ones is that it creates a six-to-one government match to any small dollar campaign contributions up to \$200. So when my good friend Pete Aguilar over there gives me 200 bucks in my next campaign—

Mr. AGUILAR. It won't happen.

Mr. DAVIS of Illinois. It won't now because the Federal Government will take your tax dollars and match that with \$1,200. Of course it won't happen now.

But you know what, those are some of the things that I don't think the American people understand about this bill where their tax dollars are going to go help put more money into politics when we are hearing from the American people we want to take money out of politics. I just find it hard to believe the average American taxpayer is going to want the taxpayers to create a political candidate's ATM.

This matching program would also apply to Presidential campaigns with a limit of \$250 million of Federal taxpayer dollars to each candidate running for President's campaign. I don't know if any on the other side of the aisle in this room are planning to run for President, but they would be eligible for—if there are 20 candidates in the Democratic primary in this next Presidential election, let's just say that is \$5 billion of Federal funding that these candidates can use to create campaign ads, hold events, and travel on taxpayer dollars.

Now I am understanding why, when we tried to abolish the Presidential Election Campaign Fund to put \$370 million-plus into paying down the debt or pediatric cancer research 2 years ago, that this Committee voted to send that when we were in the majority on a partisan ballot.

Not only will the Federal Government match campaign donations through H.R. 1, but it is going to also create a new government program that is going to create subsidies, a voucher pilot program that provides eligible voters with \$25 to give to a political candidate. We need another government program to put more money into politics with no limitations?

Once you open the door to public financing, it is never enough. It is another way that money and politics is corrosive, something that my Democratic colleagues and Republican colleagues say they want to expose and remove from our political system.

I would also like to remind my colleagues that we still have not seen the CBO score for H.R. 1. I just mention this simple math, \$5 billion just for Presidential candidates. With all the taxpayer dollars from these provisions alone, I am curious to know how much it would cost taxpayers for the entire bill to be implemented, not just one provision.

Another reason I cannot support H.R. 1 in its current form is it is increasing the election system's vulnerability by failing to implement necessary checks and balances regarding who is eligible to register to vote. H.R. 1 will force States like Washington, Illinois, Georgia, California, North Carolina to implement systems that may continue to burden our local officials and take away our States' rights, their constitutional responsibilities to run elections.

We don't want H.R. 1 taking power away from the States given to them by the Constitution. We don't want H.R. 1 to place voters at risk by forcing States to adopt subjective practices that allow for things like signature verification as proof of eligibility without any safeguards ensuring that those who are eligible to vote are the ones that are going to vote.

H.R. 1 creates a false sense of security by federalizing and centralizing our election system, and I think it makes it more vulnerable to an attack. Well, we can look no further than former President Obama, who said: "There is no serious person out there who would suggest somehow that you could even rig America's elections, in part because they are so de-centralized and the number of votes involved."

H.R. 1 demonstrates the increasing Federal control of elections through numerous reporting requirements, and we want to make sure that the oversight authority of the Election Assistance Commission, the Department of Homeland Security, and the Department of Justice remain true as they are today.

Finally, it is just a constitutional overreach that places limits on free speech protected by the First Amendment. And as I have already mentioned, it also violates the separation of powers by Congress by mandating ethics standards for the Supreme Court.

Bipartisan election reforms can happen, but not with Republicans not even being consulted when a 571-page bill is thrown right at us. And I would argue many of the entire Democratic Caucus who cosponsored this bill may be having second thoughts when they realize some of the egregious provisions that are in there before they probably read it.

With that, Madam Chairperson, thank you. I yield back.
[The statement of Mr. Davis of Illinois follows:]

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ONE HUNDRED SIXTEENTH CONGRESS

JEN DAULBY, MINORITY STAFF DIRECTOR

For the People: Our American Democracy Ranking Member Rodney Davis Opening Statement

America's election system can always be improved. While there are some reforms and provision in H.R. 1 where I believe Republicans and Democrats can find common ground, there are several provisions that I simply find egregious, and I cannot support H.R. 1 in its current form.

We should all share a common goal of ensuring our elections be open, free, fair, and functioning with the highest level of integrity. H.R. 1 in this current form will not accomplish this goal. H.R. 1 was drafted without the input of Republican Members of Congress, without the Republican Members who serve on this very panel. Introducing one-sided election reform is not the way to create positive and effective change for our Nation's election system.

One of the more egregious provisions in H.R. 1 is that it creates a 6 to 1 government match to any small-dollar campaign contributions up to \$200. For example, when Pete Aguilar sends me his annual check for \$200, the federal government is going to send my campaign \$1200. I find it hard to believe that the average American taxpayer would want their tax dollars going to a political candidate whom they don't support. Since when does the federal government serve as a candidate's ATM?

This matching program would also apply to presidential campaigns with a limit of \$250 million of federal dollars per each candidate's campaign. If there are 20 candidates in an election who reach that limit, that's \$ 5 billion dollars of federal funding that presidential candidates can use to create campaign ads, hold events, and travel on taxpayer dollars. Not only will the federal government match campaign donations through H.R. 1, but it will create new donations through public subsidies. H.R. 1 creates a voucher pilot program that provides eligible voters with \$25 to donate to a political candidate.

Once you open the door to public financing, it's never enough. It's simply another way that money in politics is corrosive, something that my Democratic colleagues say they want to expose and remove from our political system.

I'd also like to remind my colleagues that we still have not seen the CBO score of H.R. 1. With all of the taxpayer dollars from these provisions alone, I'm curious to know how much it would cost the taxpayers should H.R. 1 be implemented.

Another reason I cannot support H.R. 1 in its current form is it's increasing the election system's vulnerability by failing to implement the necessary checks and balances regarding who is registering to vote. H.R. 1 will force states to adopt new voter registration policies, including automatic, online, and same-day registration. While states are told they must implement these new registration policies, state and local officials are severely limited in their right to maintain the accuracy of their own voter registration rolls.

Aside from these new registration practices, H.R. 1 would implement 15 days of early voting, a federal holiday for Election Day, and no-excuse absentee voting and provisional ballots. These practices of expanding voter registration or expanding the ways eligible voters can vote are not the concern, but the concern is the security of these practices. H.R. 1 forces states to implement these practices without providing any additional safeguards. H.R. 1 will force states to implement systems that may continue to burden local officials and take away our state's rights, their Constitutional responsibilities to run elections.

H.R. 1 is placing voters at risk by forcing states to adapt to subjective practices that allow for signature verification as proof of eligibility. What else can we expect from a bill that disregarded the state and local election officials who are responsible for administering the elections in this country? I think we can agree across the aisle that every American deserves to have their vote counted, but shouldn't we also ensure those voters are protected? H.R. 1 creates a false sense of security by federalizing and centralizing our election system, making it more vulnerable to attack. We have to look no further than President Barack Obama, who said, "There is no serious person out there who would suggest somehow that you could even rig America's elections, in part because they're so decentralized, and the numbers of votes involved."

H.R. 1 demonstrates the increasing federal control of elections through numerous new reporting requirements for election officials, including gathering race and ethnicity data on voters. It would give more power over elections and oversight authority to the Election Assistance Commission, the Department of Homeland Security, and the Department of Justice. Finally, H.R. 1 is a Constitutional overreach. It places limits on free speech, protected by the First Amendment; impedes states' ability to determine their registration and voting practices, as protected under Article 1, Section 4 of the Constitution, as I've already

mentioned; and violates separation of powers by Congress mandating ethics standards for the Supreme Court.

Bipartisan election reforms are necessary to improve voting access and election security, but that's not going to be accomplished through H.R. 1. We should try to work together on this panel in a real, bipartisan fashion to create effective election reform that will benefit the American people. Every American's vote should be counted and protected.

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Every American's vote should be counted and protected.

The CHAIRPERSON. Thank you. The gentleman yields back.

We will now go to our witnesses. I would ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks, and written statements may be part of the record. And with no objection, that is ordered.

We have 5 minutes for each witness to testify. As noted, your written statements will be made a part of the record. I would like to introduce the witnesses now.

First, we have Chiraag Bains, who is the Director of Legal Strategies at Demos. Wendy Weiser, the Director of the Democracy Program at the Brennan Center for Justice at the NYU School of Law. Fred Wertheimer, who is the President of Democracy 21 and a longtime advocate for ethics in government. And the Honorable Kim Wyman, the Secretary of State of the State of Washington. Welcome.

Thank you all for coming.

We will now start with Mr. Bains.

Mr. Bains, you are recognized for 5 minutes.

STATEMENTS OF CHIRAAG BAINS, DIRECTOR OF LEGAL STRATEGIES, DEMOS; WENDY WEISER, DIRECTOR, DEMOCRACY PROGRAM, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW; FRED WERTHEIMER, PRESIDENT, DEMOCRACY 21; AND THE HONORABLE KIM WYMAN, SECRETARY OF STATE, STATE OF WASHINGTON

STATEMENT OF CHIRAAG BAINS

Mr. BAINS. Thank you Chairperson Lofgren, Ranking Member Davis, and all the members of the Committee, for the opportunity to testify today. My name is Chiraag Bains, and I am Director of Legal Strategies for Demos, a civil rights organization that champions ways to address inequity in our political and economic systems, putting communities of color at the center of how and why we do our work.

I am also the child of immigrants. I took the citizenship test and naturalized at age 18, raising my right hand and pledging to support the Constitution. Over time, each member of my family followed, right on through to my 99-year-old grandfather, who is proud to be able to cast his vote.

As new Americans learn, the promise of this country is that every person has a voice and every person ought to be counted. Our history has been one of struggle to make that promise a reality particularly when it comes to race.

From the dispossession of native peoples, to slavery, to Jim Crow, to the Chinese Exclusion Act, to the War on Drugs, we have often fallen short. Today, voting rights are under attack and our big money political system allows billionaires and corporations to drown out the voices of everyday Americans.

These dynamics have serious racial equity consequences. The problems that are most pressing for people of color—economic inequality, education disparities, police abuse, just to name a few—are sidelined or exacerbated.

The For the People Act takes a comprehensive approach to voting and campaign finance reform. First, our democracy is stronger

when more people participate. But voter suppression poses a clear and present danger to our system.

One increasingly common tactic is aggressive voter purges. Last year Demos won an injunction to stop Indiana from removing thousands of voters from the rolls, without notice, based on Crosscheck, a program that purports to identify people who have moved out of State, but is wrong an estimated 99 percent of the time based on academic research.

Just last week, we sued Texas to stop the State from purging voters. Texas' Secretary of State announced that up to 95,000 non-citizens are registered and up to 58,000 have voted. The State attorney general and President Trump quickly fired off tweets alleging voter fraud.

That claim is false. The overwhelming majority, if not all, of these individuals are naturalized citizens like our client, Nivien Saleh. Nivien, who describes the Declaration of Independence as "the greatest political document I can imagine," was horrified to find herself on the list. She told us she felt apprehensive, insulted, and angry that her registration could be canceled.

We also sued Ohio over the practice of targeting infrequent voters for purging. Ohio turned voting into a use-it-or-lose-it right.

That also had a discriminatory impact. Voters in majority black neighborhoods were purged at over twice the rate as voters in majority white neighborhoods in Cincinnati. Due to a court order, 7,500 wrongly purged Ohioans were able to vote in the 2016 election.

Now, unfortunately, the Supreme Court later upheld the program five to four. H.R. 1 would correct the Court's mistake and ensure that voters are removed only based on reliable evidence.

Voter suppression has been on the rise in other ways since the Supreme Court gutted the Voting Rights Act in 2013. At least 23 States have passed new restrictive voting laws—photo ID, cuts to early voting, polling place closures. And now, under President Trump, the Justice Department, where I worked for 6½ years, has slowed voting rights enforcement, even switching sides in key cases.

For these reasons it is critical that H.R. 1 commits to restoring the Voting Rights Act, and it has proactive measures, like automatic voter registration and same-day registration, that ensure more Americans can take part in our elections.

Now we also must curb the distorting influence of money in politics. Less than a 1 percent of the population provides the majority of campaign funds. Just 25 people poured \$600 million into the 2016 election. This donor class is overwhelmingly white, wealthy, and male, and its policy preferences are far out of step with those of communities of color and working people of all backgrounds.

Our big money political system also functions as a barrier to entry for candidates of color because they lack access to the same networks of rich friends and business associates that white candidates have access to. When candidates do run, they raise on average 47 percent less than their white counterparts.

This Act would curb the influence of big money in politics in our elections through the small-donor match program and the democracy voucher program.

America's brightest moments have involved welcoming people into the political process. The For the People Act fits into that tradition. It will do more than any legislation since the civil rights era to build a truly inclusive democracy. Demos strongly supports it.
[The statement of Mr. Bains follows:]

Dēmos

Written Testimony of

Chiraag Bains
Director of Legal Strategies
Dēmos

Hearing: “For the People: Our American Democracy”

Committee on House Administration
U.S. House of Representatives

Longworth House Office Building
Room 1310

February 14, 2019

I. INTRODUCTION

Thank you, Chairperson Lofgren, Ranking Member Davis, and all members of the Committee, for the opportunity to testify in support of H.R. 1, the For the People Act—the boldest and most comprehensive proposal to strengthen our democracy since the aftermath of Watergate.

My name is Chiraag Bains, and I am Director of Legal Strategies for Dēmos. Dēmos is a public policy and advocacy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Our name—meaning “the people”—is the root word of democracy, and it reminds us that, in America, the true source of our greatness is the diversity of our people.

We at Dēmos stand in strong support of the For the People Act, a visionary bill that can transform our democracy by addressing the deep political, racial, and economic inequalities that hold us back.

The bill would strengthen voting rights by expanding access to the polls, modernizing voter registration, requiring independent redistricting, and protecting voters from aggressive purging—including by correcting the Supreme Court’s wrongheaded 5-4 decision in Dēmos’ case against Ohio’s use-it-or-lose-it system, *Husted v. A. Philip Randolph Institute*. It would commit to restoring the full protections of the Voting Rights Act, the evisceration of which in *Shelby v. Holder* has unleashed restrictive voting laws across the country, and make findings related to

structural democracy reforms like DC statehood and voting rights in the territories. The legislation would also curtail the corrupting role of big money in politics, which drowns out the voices of everyday people, and promote more equitable ways to finance federal campaigns. It incorporates the Government By the People Act, which Dēmos has long supported and which would amplify the voices of small-dollar donors and allow more candidates of color and low-income candidates to run on the issues that matter to their constituents. And the bill would put new ethics restrictions in place for federal officials at a time when we badly need them.

It is fitting that the For the People Act address both voting rights and the role of big money in politics in the same legislative package, because they are truly two sides of the same coin. Whether Americans of all races are fighting for access to the ballot box or to curb the outsized influence of a tiny slice of wealthy donors over who runs for office and who wins elections, the fight is essentially to become a full member of society with an equal say over the decisions that affect our lives.

Voter suppression—sometimes through blatantly racist maneuvers, sometimes through sophisticated, ostensibly race-neutral tactics—poses an existential threat to our democracy. We must put a stop to these practices and protect the fundamental right to vote. The vote lacks its full meaning, however, if voters cannot cast their ballots for candidates who reflect the priorities of everyday Americans. For generations, communities of color and working-class people have gone unseen by politicians who court rich individual donors and corporate interests. The high cost of running for office has also been a barrier to entry for candidates of color, resulting in a political class that is disproportionately white. Moreover, the combination of voter suppression and big money in politics has serious racial equity consequences. The problems that are most pressing for people of color—economic inequality, education disparities, police abuse, to name a few—are sidelined, neglected, and in some cases, made worse.

In short, our democracy faces substantial and complicated challenges. It will take a big legislative package to address them. H.R. 1, the For the People Act, has the range and depth to help us build the truly inclusive democracy that Americans deserve.

I. VOTING RIGHTS

A. Voting rights are under attack, and we must fully restore the Voting Rights Act.

When it passed the Voting Rights Act (VRA) in 1965, Congress took a major step toward fulfilling the promise of the Fifteenth Amendment that no citizen would be denied the right to vote “on account of race, color, or previous condition of servitude.”¹ The centerpiece of the Act was a provision requiring certain states and other jurisdictions to get approval from the federal government before making any changes to their voting practices and procedures. This “preclearance” protection applied to jurisdictions with a history of voting discrimination and helped to protect the right to vote for marginalized populations. Five years ago, in *Shelby County v. Holder*, the Supreme Court struck down the formula used to determine what jurisdictions were subject to preclearance, declaring that “[o]ur country has changed” and voting discrimination was no longer a major concern. In a 5-4 decision split along ideological lines, the Court stripped

¹ U.S. Const. amend. XV.

voters in nine states and dozens of counties and municipalities of the protection Congress had put in place.²

Since *Shelby County*, at least 23 states have implemented new restrictions on voting, including onerous ID measures, cuts to early voting, and polling place closures.³ By 2018, 34 states had some form of voter ID law on their books; 17 of those requested photo IDs,⁴ to which roughly 11 percent of the American population does not have access.⁵ That 11 percent is disproportionately comprised of voters of color, seniors, or low-income citizens.

We know these restrictive laws keep voters of color from full participation in our democracy. Recent survey research shows that black and Latino voters are three times as likely as white voters to encounter hurdles when trying to vote. They are more likely to be unable to take time off from work to go to the polls, be told that they do not have a proper form of ID, discover that their name is not on the list of registered voters, and be harassed or bothered at the polls.⁶

The following cases studies provide evidence that voter suppression is on the rise:

North Carolina

North Carolina's photo ID law—passed as part of a larger package slashing strong elections reforms, including early voting and same-day registration, immediately after the Supreme Court decided *Shelby County*—had both the intent and effect of disenfranchising black voters. Court documents showed that legislators had requested from county officials information as to which demographic groups had access to which IDs, and that only those IDs whites had greater access to made it into the list of approved forms of voter ID. As the Fourth Circuit Court of Appeals

² *Shelby County v. Holder*, 570 U.S. 529 (2013).

³ Eric Badner, *Discriminatory Voter Laws Have Surged in Last 5 Years, Federal Commission Finds*, CNN POLITICS, September 12, 2018, available at <https://www.cnn.com/2018/09/12/politics/voting-rights-federal-commission-election/index.html>.

⁴ National Conference of State Legislatures, *Voter Identification Requirements – Voter ID Laws*, available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. Of the 17 states requesting photo ID to vote, 7 of those have strict requirements, meaning that, unless a voter produces ID at the polls or at an elections office within a prescribed period of time post-election, that vote will not be counted. Additionally, one of the biggest problems with voter photo ID laws is that, even if they are not strict, they often produce much confusion. For example, even though Texas's strict voter photo ID law was not in place for the 2016 or 2018 elections, many would-be voters reported confusion as to what documentation they needed to vote. Many stayed home. Poll workers too were confused about the requirements, leading to long lines and disenfranchisement. See Jessica Huseman, *Texas Voter ID Law Led to Fears and Failures in 2016 Election*, PROPUBLICA, May 2, 2017, available at <https://www.propublica.org/article/texas-voter-id-law-led-to-fears-and-failures-in-2016-election>.

⁵ See Keesha Gaskins and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice (July 18, 2012), available at <https://www.brennancenter.org/publication/challenge-obtaining-voter-identification>; Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST, May 23, 2016, available at https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.9911008ca3b1.

⁶ Alex Vandermaas-Peeler et al., *American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization*, PUBLIC RELIGION RESEARCH INSTITUTE (July 17, 2018), <https://www.prrri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018/>.

noted, legislators there “target[ed] African-Americans with almost surgical precision.”⁷ Because the full protections of the VRA haven’t yet been restored, North Carolina attempted once again to create the electorate of its choosing through a new photo ID law that it passed in the lame-duck period after the 2018 election. Restoration of the VRA could have prevented this.

Texas

On the same day the U.S. Supreme Court eviscerated protections for voters of color in *Shelby v. Holder*, the Texas legislature introduced the country’s most antagonistic ID bill against black and brown voters, demanding as a prerequisite to voting one of several photo IDs that hundreds of thousands of Texas voters lack. The Fifth Circuit upheld the lower court’s finding that the law—which permitted a voter to cast a ballot after showing a gun permit but not a state university-issued ID—had a discriminatory effect on voters of color. Rather than scrap the law altogether, Texas legislators reworked the legislation to keep many provisions in place, which the appellate court upheld for the 2018 election.

Georgia

Many have called Georgia “ground zero” for vote suppression, and with good reason. For years, former State Secretary Brian Kemp, now Governor, targeted for removal from voter registration rolls individuals who had missed just a couple of federal elections. As a result, hundreds of thousands of legitimate voters have been cut from the rolls and, unless they re-registered, were precluded from voting in 2018. Right before the midterm, moreover, the Secretary of State’s office placed 53,000 voter registration applications—70 percent of which belonged to black voters—in “pending” status. Georgia’s “Exact Match” law, which requires information from voter registration applications to match up exactly with other state agency records, enabled elections officials to avoid processing records with even slight mis-matches (such as the omission of a hyphen).⁸ More often than not, county and agency error is to blame for the mismatches.⁹ Had it not been for a successful lawsuit filed by advocacy groups,¹⁰ tens of thousands of Georgians would have lost their right to vote in the 2018 midterm elections. Litigation helps restore rights on a case-by-case basis, but comprehensive reform, as provided for in the For the People Act, would prevent much of this illegal behavior from occurring in the first place.

Because of these ongoing attempts to suppress the vote, particularly for voters of color, Dēmos calls for full restoration of the Voting Rights Act’s protections, and we applaud H.R. 1’s inclusion of Subtitle A in Title II reaffirming Congress’s commitment to restore the Voting Rights Act.

⁷ Adam Liptak and Michael Wines, *The Challenge of Obtaining Voter Identification*, N.Y. TIMES, May 15, 2017, available at <https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html>

⁸ Miriam Valverde, *Georgia’s “Exact Match” Law and the Abrams-Kemp Governor’s Election, Explained*, VOX (Oct. 19, 2018), available at <https://www.politifact.com/georgia/article/2018/oct/19/georgias-exact-match-law-and-its-impact-voters-gov/>.

⁹ *Id.*

¹⁰ See Complaint, *Ga. Coalition for the People’s Agenda v. Kemp*, available at <https://lawyerscommittee.org/wp-content/uploads/2018/10/Georgia-exact-match-complaint-.pdf>.

B. Voter purges and intimidation are, increasingly, used as suppressive tactics against voters of color.

1. Voter purges

Over the past several years, handfults of states have made voter registration—already a burdensome requirement—even more restrictive. Examples from Dēmos’ litigation in Ohio, Indiana, and Texas show how purges exclude voters of color from the political process.

Ohio

Last year, the U.S. Supreme Court considered *Husted v. A. Philip Randolph Institute*, a case challenging Ohio’s practice of using non-voting to initiate a voter purge process. Overturning the Sixth Circuit’s decision, the Court held that practices like Ohio’s do not violate the National Voter Registration Act’s (NVRA) prohibition on roll-maintenance programs or activities that “result in the removal of the name of any person” from the registration rolls “by reason of the person’s failure to vote.”¹¹

Members of Congress made clear during Supreme Court briefing that Section 8 of the NVRA was designed to prevent purge practices like Ohio’s.¹² H.R. 1 would amend Section 8 of the NVRA to address the *Husted* decision and prohibit states from initiating a purge procedure based on non-voting—a metric that simply does not reliably indicate that a voter has moved, and the use of which disproportionately targets, removes, and disenfranchises traditionally marginalized persons from the registration rolls.

As numerous amici in *Husted* explained, barriers to voting such as transportation issues, inflexible work schedules, care-giving responsibilities, illnesses, inaccessible polling locations, and language access problems can disproportionately prevent persons of color, housing-insecure individuals, persons with disabilities, low-income individuals, older voters, and persons with limited English proficiency from making it to the polls to vote.¹³ Using a person’s failure to vote to initiate a removal process will therefore disproportionately target such groups and result in their subsequent removal from the registration rolls. This was borne out in an analysis of the number of infrequent voters purged in Hamilton County, Ohio from 2012 through 2015, which found that “African-American-majority neighborhoods in downtown Cincinnati had 10 percent

¹¹ *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1841–46 (2018); see also 52 U.S.C. § 20507(b)(2).

¹² Brief of Certain Members of the Congressional Black Caucus as *Amici Curiae* in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980 (U.S. Supreme Court Sept. 22, 2017).

¹³ See generally, e.g., Brief of *Amici Curiae* National Association for the Advancement of Colored People and the Ohio State Conference of the NAACP in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980 (U.S. Supreme Court Sept. 22, 2017) (“NAACP Br.”); Brief of National Disability Rights Network, Disability Rights Ohio, AARP, AFL-CIO, SEIU, Democracy Initiative, National Coalition for the Homeless, Columbus Coalition for the Homeless, and Miami Valley Voter Protection Coalition as *Amici Curiae* in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980 (U.S. Supreme Court Sept. 22, 2017); Brief of Asian Americans Advancing Justice I AAJC, National Association of Latino Elected and Appointed Officials Education Fund, LatinoJustice PRLDEF, and Seventeen Other Organizations as *Amici Curiae* in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980 (U.S. Supreme Court Sept. 22, 2017); see also Brief of Current and Former Ohio Elections Officials as *Amici Curiae* in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980, at 5-6 (U.S. Supreme Court Sept. 22, 2017) (“Election Official Br.”).

of their voters removed due to inactivity, compared to only four percent of voters in a suburban, majority-white neighborhood.”¹⁴

Indiana

In 2017, Indiana adopted a law requiring elections officials to purge voters on Crosscheck’s list of “Potential Double Registrants” without first notifying them or offering a chance to correct or verify Crosscheck’s information. Crosscheck, the brainchild of former Kansas Secretary of State Kris Kobach, purports to identify people who register and vote in multiple states. But its formula for matching voter registration records across more than half the states is fundamentally flawed, resulting in millions of people being falsely flagged as double registrants. According to a 2008 study,¹⁵ finding different people with identical first names, last names, and date of birth—the only criteria Crosscheck uses to flag duplicate registrations, even when other information conflicts—is surprisingly common. What is not surprising is that Crosscheck is wrong an estimated 99 percent of the time.¹⁶ Once voters have been flagged under this flawed formula, they are then subjected to scrutiny and can be purged from the voter rolls.

In a major win for Indiana voters, U.S. District Judge Tanya Walton Pratt granted Dēmos’ motion for a preliminary injunction in *Common Cause v. Lawson* and blocked the law. Had it gone into effect, though, many voters would not have learned they’d been purged until they showed up at the polls. But voters in Ohio don’t have the same protection as Hoosiers do. And the problem with the Supreme Court’s holding in *Husted* is that now any state can adopt these sorts of practices, without strong legislation prohibiting them.

Texas

Just last week, Dēmos and its partners filed a lawsuit and an emergency motion to stop Texas from discriminating against voters of color and purging naturalized citizens who are eligible to vote from the voter rolls. David Whitley, Texas’s Secretary of State, recently made highly publicized accusations that 95,000 non-citizens may be registered to vote and that 58,000 may have actually voted in the state’s elections, based on DMV records. That claim is false. It is based on data the state knows is flawed, and it ignores the reality that many people who were lawfully in the country when they applied for a driver’s license or state ID, years ago, have now become naturalized citizens—entitled to full voting rights under our Constitution.

That did not stop Texas Attorney General Ken Paxton from issuing a reckless “VOTER FRAUD ALERT” and President Donald Trump tweeting about voter fraud and calling it “just the tip of the iceberg.” Moreover, the Secretary has encouraged county election officials to send notices to these individuals and, if they don’t respond with documentary proof of citizenship within 30 days, purge them from the voting rolls.

¹⁴ NAACP Br., *supra* note 13, at 18 (referencing Andy Sullivan & Grant Smith, *Use it or Lose it: Occasional Ohio Voters May Be Shut Out in November*, Reuters (June 2, 2016), <http://www.reuters.com/article/us-usa-votingrights/ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0Y019D>).

¹⁵ Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888.

¹⁶ Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Oct. 24, 2017), available at <https://scholar.harvard.edu/files/morse/files/1p1v.pdf>.

These heedless accusations have left thousands of naturalized citizens outraged and fearful that their hard-won right to vote is in jeopardy. Nivien Saleh, a Harris County voter and one of our clients, gained her citizenship in January 2018, after living lawfully in the U.S. under a student visa and then an H1B visa since 1997. In a declaration filed with the court, Ms. Saleh describes her experience voting for the first time in the March 2018 Texas primaries as “the culmination of many years of hard work” and “an experience I will always remember.” Finding herself wrongly accused of unlawfully registering to vote has left Ms. Saleh “apprehensive, insulted and angry.” She explains, “I have worked hard to be a productive, law-abiding citizen,” and says that the Secretary’s false accusation “disturbs me deeply.”

Attempts to purge eligible voters from the rolls—as we’ve seen recently in Ohio, Indiana, and Texas—undo the work that goes into registering eligible citizens. Numerous states have noted that “voter inactivity is a poor measure to identify ineligible voters” and that “[t]here is no pressing need for States to target nonvoters,” as much more credible evidence exists to determine if a voter has become ineligible.¹⁷ Amending Section 8 of the NVRA to prevent states from using non-voting alone to initiate removal procedures would uphold the NVRA’s expressed purposes of increasing the number of citizens registered to vote, increasing participation, and “ensure that accurate and current voter registration rolls are maintained.”¹⁸ It would also help prevent qualified voters from being removed from the registration rolls and becoming disenfranchised.

If Congress is committed to voter registration reform, then it must also preserve those registrations through protections against aggressive attempts to remove them from the rolls. H.R. 1 takes a holistic approach to registration and appropriately includes Title I, Subtitle A, Part 4 on conditions for removal on the basis of interstate cross-checks and Title II, Subtitle F with a section on saving voters from purging.

2. Intimidation at the polling place

In our 2012 report *Bullies at the Ballot Box*,¹⁹ Dēmos and Common Cause highlighted the impact that illegal interference and intimidation can have on eligible voters at the polls. Organizers affiliated with True the Vote, for example, have claimed that their goal is to train one million poll watchers to challenge and confront other Americans as they go to the polls. They say they want to make the experience of voting “like driving and seeing the police following

¹⁷ Brief for the States of New York, California, Connecticut, Delaware, Hawai’i, Illinois, Iowa, Kentucky, Maryland, New Mexico, Oregon, and Washington, and the District of Columbia, as *Amici Curiae* in Support of Respondents, *Husted v. A. Philip Randolph Institute*, Case No. 16-980, at 11-12 (U.S. Supreme Court Sept. 22, 2017); see also Election Official Br., *supra* note 13, at 2 (“Ohio elections officials implement other mechanisms that do in fact protect against ineligible voters staying on the rolls, while at the same time ensuring that eligible voters remain registered. And, if the State wanted to further increase the accuracy of the voting rolls, there are other more targeted measures that could be adopted without disenfranchising duly registered Ohioans. By contrast, abstaining from casting a ballot has nothing to do with an Ohio voter’s eligibility to vote.”); see also *id.* at 9-11 (discussing other methods of roll maintenance that are already, and could be, used).

¹⁸ 52 U.S.C. § 20501(b)(1)-(2), (4).

¹⁹ LIZ KENNEDY ET AL., DĒMOS & COMMON CAUSE, *BULLIES AT THE BALLOT BOX* (2012), available at <https://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf>.

you.”²⁰ There is a real danger that voters will face overzealous volunteers who take the law into their own hands to target voters they deem suspect.

Even in states with clear legal boundaries for challengers and poll watchers, too often these boundaries are crossed. Laws intended to ensure voting integrity are instead used to make it harder for eligible citizens to vote—particularly those in communities of color. Moreover, the laws of many states fall short when it comes to preventing improper voter caging and challenges. This should concern anyone who wants a fair election with a legitimate result that reflects the choices of all eligible Americans. There is no place for bullies at the ballot box, and government has a responsibility to protect voters from illegal interference and intimidation.

Clear rules can help prevent interference with voter rights. That’s why Subtitles C and D from Title I of H.R. 1 on preventing caging and voter intimidation are key provisions for the improvement and safeguarding of our elections.

C. Registration continues to be a barrier to participation.

Registration is still the number-one barrier to participation in our democracy. Fifty to 60 million eligible voters, disproportionately people of color, remain unregistered. Dēmos has worked for years to enforce the National Voter Registration Act of 1993 to ensure that every eligible American, when conducting a transaction at a motor vehicle office or public assistance agency, gets the opportunity to register to vote. We estimate that our NVRA compliance work across nearly two dozen states has resulted in more than 3 million new voter registration applications being submitted through public assistance agencies under Section 7 of the NVRA alone.²¹

Millions of United States citizens find elections more accessible because of the NVRA, but significant hurdles remain. In the November 2016 general election, nearly 1 in 5 (18 percent) people who were eligible but did not vote cited registration issues as their main reason for not casting a ballot.²² We are proud of the work we have done to ensure compliance with the NVRA, but we know that states can and should do much more when it comes to registering eligible voters.

That’s why we have conducted research on and advocated for reforms such as same-day registration (SDR) and automatic voter registration (AVR), both of which increase registration rates and boost participation—particularly among voters of color and youth. SDR increases turnout by upwards of 10 percentage points,²³ and AVR is expected to increase participation

²⁰ *Id.* at 1.

²¹ LAURA WILLIAMSON, PAMELA CATALDO & BRENDA WRIGHT, DĒMOS, TOWARD A MORE REPRESENTATIVE ELECTORATE: THE PROGRESS AND POTENTIAL OF VOTER REGISTRATION THROUGH PUBLIC ASSISTANCE AGENCIES (2018), available at <https://www.Demos.org/publication/toward-more-representative-electorate-progress-and-potential-voter-registration-through->.

²² CENSUS BUREAU, CURRENT POPULATION SURVEY, NOVEMBER 2016 VOTING AND REGISTRATION SUPPLEMENT. Reasons cited for not voting include “did not meet registration deadlines,” “did not know where or how to register,” and “did not meet residency requirements/did not live here long enough.”

²³ Dēmos, *Same Day Registration*, https://www.Demos.org/sites/default/files/publications/Sdr-Factsheet-Final_1.pdf.

significantly as well. Due to the efforts of Demos and other advocates, 17 states and the District of Columbia now have SDR.

While some states have moved to restrict access to the ballot box, others are taking appropriate steps to adopt measures like online, same-day, and automatic voter registration. Yet more can and should be done to ensure that all Americans, no matter where they live, have access to the kinds of registration reform that H.R. 1 addresses.

With voter registration modernization—including online, automatic, and same-day voter registration, as required by H.R. 1’s Title I, Subtitle A—low-income voters of color will be brought into the system and will have greater access to the ballot. This package of reforms has the potential to shrink and perhaps even eliminate the great registration divide between low- and high-income Americans.

D. The exclusion of over 5 million individuals through felony disenfranchisement laws perpetuates a legacy of racial bias.

Felony disenfranchisement laws in the United States have troubling race and class dimensions that cannot be reconciled with our shared present-day values of equal citizenship and equal dignity. Scholar Ward Elliott has observed that the spread of disenfranchisement laws may have been a response to the abolition of property-holding requirements, which “had served a number of indispensable functions, such as holding down the voting strength of free blacks, women, infants, criminals, mental incompetents, unpropertied immigrants, and transients.”²⁴ After Reconstruction, states in the South began to tailor their disenfranchisement laws to cover crimes for which black citizens were most frequently prosecuted, “as part of a larger effort to disfranchise African American voters and to restore the Democratic Party to political dominance.”²⁵ Over time, states stopped distinguishing between kinds of crimes, instead imposing blanket disenfranchisement for all felony convictions.

Although states have repudiated discriminatory barriers to voting such as poll taxes and literacy tests, criminal disenfranchisement laws have persisted. And they continue to have a disproportionate racial impact due to the pervasive racial bias in the criminal justice system. As we noted in a letter that Dēmos and 19 other national organizations wrote in support of a New Mexico bill to end felony disenfranchisement,²⁶ African Americans and Latinos make up 32 percent of the U.S. population but in 2015 comprised 56 percent of all incarcerated persons in the country.²⁷ This is because individuals of color are prosecuted and sentenced at much higher rates than whites for comparable behavior. For example, in a national survey on drug use, it was reported that “African Americans and whites use drugs at similar rates, but the imprisonment rate

²⁴ WARD E. Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY* 43 (1974).

²⁵ Pippa Holloway, “*A Chicken-Stealer Shall Lose His Vote*”: *Disenfranchisement for Larceny in the South, 1874-1890*, 75 J. S. HIST. 931, 931 (2009).

²⁶ See Dēmos, Letter of Support for HB 57 to End Felony Disenfranchisement in New Mexico (Jan. 28, 2019), available at <https://www.Demos.org/sites/default/files/publications/National%20Org%20Letter%20to%20NMHJC%20on%20HB57%2020190128.pdf>.

²⁷ NAACP, Criminal Justice Fact Sheet, available at <https://www.naacp.org/criminal-justice-fact-sheet/>.

of African Americans for drug charges is almost *six times that of whites*.²⁸ African Americans “represent 12.5 percent of illicit drug users, but 29 percent of those arrested for drug offense and 33 percent of those incarcerated in state facilities for drug offenses.”²⁹

Because people of color are policed, prosecuted, convicted, and incarcerated for crimes at disproportionately higher rates than whites, they lose their right to vote at disproportionately higher rates too. As a result, the electorate is disproportionately white. Communities of color experience reduced political power and the underrepresentation of their interests in government. Ending felony disenfranchisement, therefore, would help restore equality and equity to the democratic process. It would also aid with reentry and promote public safety.³⁰

As such, we applaud the inclusion of Title I, Subtitle E, the Democracy Restoration Act, in the For the People Act.³¹

II. MONEY IN POLITICS

The struggle for fair and equal access to the ballot continues, and our nation has taken some tragic steps backwards in recent years. But even when we win full and equal voting rights, our work will not be complete. As Dēmos has explained elsewhere,³² there is another substantial barrier to fair and equal representation for people of color as well as working-class Americans of all races: the role of big money in determining who runs for office, who wins elections, and what issues are prioritized in Washington, D.C. and state capitals. Overcoming the barrier of big money to equal representation is part of the unfinished business of the civil rights struggle.

Now the biggest barrier to people of color (as well as all low-income Americans) is not the all-white primary³³ but rather the “wealth primary,”³⁴ through which the wealthy, white donor class filters the candidate pool before anyone has the chance to cast a single vote. These wealthy donors act as gatekeepers up and down the ballot. The biggest spenders do not always win their races, but raising millions, tens of millions, or even hundreds of millions of dollars is currently a prerequisite to compete for federal office. If you want to run for president these days, you need a billionaire or two willing to fund a Super PAC dedicated to your cause. If you want to run for Congress, you typically need hundreds of people willing and able to write \$2,000 or \$5,000

²⁸ *Id.* (emphasis added).

²⁹ *Id.*

³⁰ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 197 (2004-2005).

³¹ See also ALEX EWALD, DEMOS, PUNISHING AT THE POLLS (2003), available at https://www.demos.org/sites/default/files/publications/FD_-_Punishing_at_the_Polls.pdf.

³² See DAVID CALLAHAN & J. MUHN CHA, DEMOS, STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA 5 (2013) (“STACKED DECK I”), available at http://www.Demos.org/sites/default/files/imce/StackedDeck_1.pdf; ADAM LIOZ, DEMOS, STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDERMINES OUR DEMOCRACY AND OUR ECONOMY (2015) (“STACKED DECK II”), available at http://www.Demos.org/sites/default/files/publications/StackedDeck2_1.pdf. This testimony draws upon original research presented in these two reports.

³³ *Smith v. Allwright*, 321 U.S. 649 (1944).

³⁴ See Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 111 YALE L. & POL. REV. 273 (1993), available at <https://digitalcommons.law.yale.edu/ylpr/vol11/iss2/3/>.

checks. To match the average 2014 U.S. Senate winner, you would need to raise \$3,300 every single day for six years.³⁵

Figure 1.



Source: Shanton & Lioz. PIRG analysis of FEC data.

While occasionally candidates with broad national appeal are able to raise tens of millions of dollars from a broad network of online small donors, the vast majority rely on large donors to reach the threshold amount they need to compete. One study of 2014 competitive congressional races found, for example, that “[o]nly two of 50 candidates in these competitive races raised less than 70 percent of their individual funds from large donors, while seven relied on big donors for more than 95 percent of their individual contributions.”³⁶

The role of big money in restricting alternatives is one big reason why more than 90 percent of elected officials are white, only two percent of members of Congress have ever had working-class backgrounds, and tens of millions of Americans choose to stay home each Election Day.

Over more than two centuries of Court cases and constitutional amendments, the American people have decided that access to the ballot should not depend upon race, geography or wealth. In a democracy, the size of your wallet isn’t supposed to determine the strength of your voice. Under “one person, one vote,” each American must have an equal say over the decisions that affect our lives.

Unfortunately, rich and powerful corporations have far greater say than the rest of us. They use their wealth to amplify their own voices and drown out those of middle- and working-class Americans. This donor class is overwhelming wealthy, white, and male—deeply unrepresentative of the United States in 2019—and it tends to support the election of disproportionately wealthy, white, and male public officials. At the same time, these donor-gatekeepers’ interests diverge sharply from those of everyday people, particularly people of color, and yet they routinely win out in the arenas of legislative debate. In short, our big-money

³⁵ ADAM LIOZ & KAREN SHANTON, THE MONEY CHASE: MOVING FROM BIG MONEY DOMINANCE IN THE 2014 MIDTERMS TO A SMALL DONOR DEMOCRACY (2015), available at <https://www.demos.org/publication/money-chase-moving-big-money-dominance-2014-midterms-small-donor-democracy>.

³⁶ *Id.* at 1.

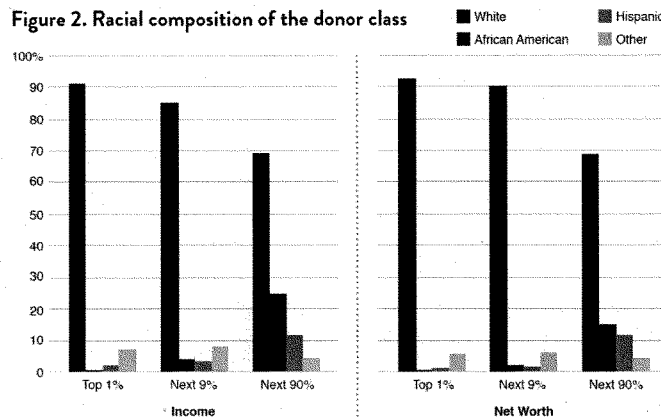
political system actively undermines racial equity and gives us public policy out of step with the needs and preferences of the American public.

The For the People Act would help curb the influence of big money in our elections and advance racial equity. Particularly through the small-donor match and democracy voucher pilot program in Title V of the bill, the Act would lower barriers to entry for candidates of color, amplify the influence of people of color and low-income individuals so that they can be heard alongside those of special interests, and promote more equitable public policy.

A. The donor class is overwhelmingly white, rich, and male.

A history of racial subordination and ongoing racial discrimination has compounded to produce a striking racial wealth gap in America. The Forbes 400 billionaires have as much wealth as the entire black population and a quarter of the Latino population combined. The median white household owns \$140,500 in wealth, compared to just \$3,400 for black households and \$6,300 for Latino households.³⁷ Put another way, the top 1 percent are more than 90 percent white; the top 10 percent are 85-90 percent white.³⁸ These are the groups that dominate political giving in America.³⁹

Figure 2. Racial composition of the donor class



Source: Lisa Kellner, *The One Percent*, 40 *Ann. R. of Sociology* 347 (2014).

³⁷ Chuck Collins, *New Study Shows Wealth Inequality Hits Communities of Color Hardest*, YES! (Jan. 29, 2019), <https://www.yesmagazine.org/new-economy/new-study-shows-wealth-inequality-hits-communities-of-color-hardest-20190129>.

³⁸ LIOZ, STACKED DECK II, *supra* note 32, at 4.

³⁹ Both 2016 presidential candidates relied on the very wealthy. Millionaires make up 3 percent of the adult population, but 42 percent of the money Hillary Clinton raised and 27 percent of the money Donald Trump raised came from millionaires. A third of money raised by both candidates came from Americans with a net worth between \$300,000 and \$1,000,000. SEAN MCELWEE, BRIAN SCHAFFNER & JESSE RHODES, DEMOS, WHOSE VOICE, WHOSE CHOICE? 1-2 (2016), available at https://www.Demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf.

Just 25 people pumped more than \$600 million into the 2016 elections through political action committees, Super PACs, and direct contributions to candidates and parties.⁴⁰ Less than 1 percent of the population provides the majority of the funds that determine who runs for office, who wins elections, and what issues get attention from our elected officials.⁴¹

Election donors, and especially the mega-donors driving campaigns, are overwhelming white. Ninety-two percent of federal election donors in 2014 and 91 percent of donors in 2012 were white. The numbers are even more skewed among large donors. Ninety-four percent of those giving more than \$5,000 in 2014 and 93 percent in 2012 were white. Men make up slightly less than half of the population, but comprised 63 percent of federal election donors in 2012 and 66 percent of donors in 2014. The pool of donors who give more than \$1,000 has less gender diversity, with men making up 65 percent of donors giving more than \$5,000.⁴²

B. Our big-money political system is a barrier to entry for candidates of color.

By comparison to white Americans, people of color lack access to networks of wealthy friends, associates, and business interests, making it difficult for them to raise the funds needed to be viable candidates. And when candidates of color do run, they raise less money than their white counterparts. A study of more than 3,000 candidates running in more than 2,000 state legislative races in 2006 found that adjusting for factors such as incumbency, partisanship, and district income, “non-white candidates raise an average of 47 percent less compared to white candidates when all other mitigating factors are controlled.”⁴³ In the South, candidates of color raised nearly 64 percent less than white candidates.⁴⁴ Other studies show that business interests across a host of fields—manufacturing, retail, finance, insurance, real estate, and energy—give more to white candidates.⁴⁵ White candidates are also far more likely to be in a position to self-fund their campaigns.⁴⁶

The candidate with the most money does not always win—just an overwhelming majority of the time. In a typical cycle, 90 percent or more of candidates who raise the most money prevail.⁴⁷ In this way, our big-money political system disproportionately excludes people of color from

⁴⁰ “Top Individual Contributors: All Federal Contributors,” CENTER FOR RESPONSIVE POLITICS, available at <https://www.opensecrets.org/overview/topindivs.php>.

⁴¹ “Donor Demographics,” CENTER FOR RESPONSIVE POLITICS, available at <https://www.opensecrets.org/overview/donordemographics.php>.

⁴² MCELWEE, SCHAFFNER & RHODES, WHOSE VOICE, WHOSE CHOICE?, at 10-18.

⁴³ Laura Merrifield Albright, *Not Simply Black and White: The Relationship between Race/Ethnicity and Campaign Finance in State Legislative Elections* (Aug. 4, 2014), available at <http://ssrn.com/abstract=2475889>.

⁴⁴ *Id.*

⁴⁵ LIOZ, STACKED DECK II, *supra* note 32, at 29.

⁴⁶ *Id.*

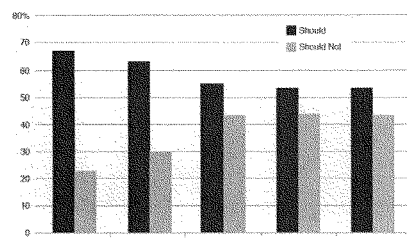
⁴⁷ More than 90% of the biggest campaign fundraisers and spenders routinely win elected office. Money does not always win the day, but raising more money certainly gives a candidate a better chance to win. See Center for Responsive Politics, *Money Wins Presidency and 9 of 10 Congressional Races in Priciest U.S. Election Ever* (Nov. 5, 2008), <http://www.opensecrets.org/news/2008/11/money-wins-white-house-and/>; Wesley Lowery, *91% of the time the better financed candidate wins. Don't act surprised*, Washington Post (April 4, 2014).

serving in elected office. It should be no surprise, then, that 90 percent of Americans' elected officials are white, even though 37 percent of us are people of color.⁴⁸

C. The wealthy, white donor class sets the agenda in Washington and state capitals across the country.

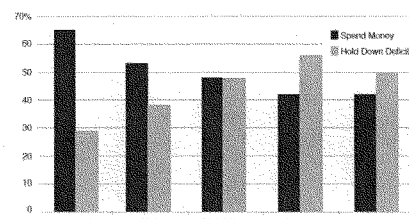
The wealthy, white donor class has markedly different policy preferences from the general public, and particularly from people of color. For example, on economic policy, polls show that people of color support the role of government in reducing inequality at significantly higher rates (67 percent) than do whites (53 percent) and those earning at least \$100,000 (53 percent).⁴⁹ People of color are also much more likely to list job creation as a priority over holding down the deficit, whereas whites and the wealthy are more likely to say the opposite:

Figure 3. Views on government policy to reduce the wealth gap by race and income Do you think the federal government should or should not pursue policies that try to reduce the gap between wealthy and less well-off Americans?



Source: Post-ABC Poll, December Monthly (2013).

Figure 4. Views on creating jobs versus holding down deficit by race and income Which is more important, spending money to create jobs or holding down the federal budget deficit?



Source: Post-ABC Poll, December Monthly (2013).

The preference gap plays out on issues beyond the economy, and in some cases touches directly upon issues of racial equity. For example, a majority of whites believe that “blacks and other minorities receive equal treatment as whites in the criminal justice system” as do half of those making more than \$100,000 per year.⁵⁰ Yet only 41 percent of those making less than \$50,000 believe this, and only 26 percent of people of color.⁵¹ And, when asked what is most important to help them achieve the American dream, wealthy and white respondents listed lower taxes as their first priority, whereas people of color listed access to an affordable college education as their top choice.⁵²

⁴⁸ LIOZ, STACKED DECK II, *supra* note 32, at 25.

⁴⁹ *Id.* at 15.

⁵⁰ July 2013 Washington Post-ABC News Poll – National Politics, Trayvon Martin, Health Care, WASH. POST (July 26, 2013), http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/07/22/National-Politics/Polling/question_11458.xml?uuiid=x1qfYvLnEeKEZFflevhikA#.

⁵¹ *Id.*

⁵² Post-Miller Center Poll: American Dream and Financial Security, WASH. POST (Nov. 25, 2013), http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/09/28/National-Politics/Polling/question_11899.xml?uuiid=zM932CiSEeOKs7WqzI4RZQ.

The clear differential in policy preferences between the wealthiest Americans and people of color on critical issues means that when Congress focuses on the priorities and preferences of the wealthy, it enacts policies that cater far more to the interests of white households and ignores the priorities of the diverse and vibrant communities of color throughout the United States.

Not only that, studies show that the government is sharply more responsive to the preferences of the wealthy than to those of the average voter. Princeton political scientist Martin Gilens's groundbreaking work has shown that when the preferences of the top 10 percent of income earners diverge from the rest of us, that 10 percent trumps the 90 percent.⁵³ Another scholar, Larry Bartels, found that "the preferences of people in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials."⁵⁴

D. Our big-money political system has resulted in social and economic policy that is contrary to the interests of people of color.

Because of the overwhelming influence of money in elections—with wealthy candidates running to represent wealthy people's wants—the interests of everyday Americans, including people of color and low-income individuals, get overlooked or quashed. To take just two examples:

Minimum wage. The federal minimum wage has stagnated for years. It has held steady at \$7.25 since 2009 and has been dropping in value due to inflation and rising costs. As Pew Research found, "today's real average wage (that is, the wage after accounting for inflation) has about the same purchasing power it did 40 years ago. And what wage gains there have been have mostly flowed to the highest-paid tier of workers."⁵⁵ Recent polling, though, indicates that Americans on both sides of the aisle—74 percent (including 58 percent of Republicans)—favor raising the minimum wage.⁵⁶ Support is especially robust among people of color, but a living wage is not a priority for affluent individuals, with only 40 percent supporting a minimum wage that ensures a family with a full-time worker will not live in poverty.⁵⁷

The Subprime Lending Crisis and Recovery. Deregulation of large financial institutions led to the subprime housing crisis, which caused borrowers of color to lose between \$164 billion and \$213 billion from 2000 to 2008—the largest loss of wealth for communities of color in American history.⁵⁸ Following the financial crisis, the federal government bailed out large banks rather than homeowners who found themselves underwater because of the deceptive and aggressive marketing practices of lenders. Lobbyists for the banking industry successfully eliminated a key provision from the Helping Families Save Their Homes Act of 2009 that would have allowed

⁵³ MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 234 (2014).

⁵⁴ LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285 (2008).

⁵⁵ Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH, Aug. 7, 2018, available at <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>

⁵⁶ Niv Elis, *Poll: Bipartisan Majority Supports Raising Minimum Wage*, THE HILL (June 1, 2017), available at <https://thehill.com/homenews/335837-poll-bipartisan-majority-supports-raising-minimum-wage>.

⁵⁷ LIOZ, *STACKED DECK II*, *supra* note 32, at 61.

⁵⁸ Paul Taylor et. al, *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RESEARCH CENTER (2011), http://ehub29.webhostinghub.com/~busine87/assignments/business_statistics_-_wealth.pdf.

bankruptcy judges to write down mortgages on a primary residence to the current fair market value of the property.⁵⁹ The banks won this and other victories despite the desire of vast majorities of Americans for greater regulation.⁶⁰

E. The For the People Act would help curb the racially exclusionary nature of our big-money political system by amplifying the voices of everyday Americans.

Congress has repeatedly recognized and attempted to rein in the influence of powerful monied interests in elections. Time and again, however, the Supreme Court has invalidated common-sense protections under the First Amendment, on the misguided theory that all money is speech and that the government's only legitimate interest in regulating campaign finance is to combat the reality or appearance of quid pro quo bribery. The Supreme Court has struck down:

- Limits on how much personal wealth candidates can spend on their own campaigns⁶¹
- Limits on total candidate spending⁶²
- Limits on contributions to or spending by individuals or groups supposedly not connected to candidates' campaigns⁶³
- Limits on contributions to ballot initiatives⁶⁴
- Bans on corporate spending on ballot initiatives⁶⁵
- Strict contribution limits set at levels that average Americans can afford to give⁶⁶
- Bans on direct spending through so-called "independent expenditures" by corporations and unions to influence candidate elections⁶⁷
- Limits on the total amount one wealthy donor can contribute to candidates, parties, and political committees.⁶⁸

The result is that millionaires, billionaires, and corporations can use their wealth to amplify their voices and drown out the voices of average Americans. This allows them to translate their economic might into political power, distorting our democracy and making a mockery of the one person, one vote principle. And because people understand this, rulings like *Citizens United* have reduced the public's confidence in our system and the people who serve within it. In fact, 85

⁵⁹ Arianna Huffington, *Lobbyists on a Roll: Gutting Reform on Banking, Energy, and Health Care*, HUFFINGTON POST (June 25, 2009), http://www.huffingtonpost.com/arianna-huffington/lobbyists-on-a-roll-gutti_b_220521.html; Alex Ulam, *Why a Mortgage Cramdown Bill Is Still the Best Bet to Save the Economy*, THE NATION (Oct. 20, 2011), <http://www.thenation.com/article/164096/why-mortgage-cramdown-bill-still-best-bet-save-economy#>.

⁶⁰ Jim Lardner, *Americans Agree on Regulating Wall Street*, U.S. NEWS (Sept. 16, 2013), available at <https://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/16/poll-shows-americans-want-more-wall-street-regulation-five-years-after-the-financial-crisis> ("Regulating financial services and products is seen as either 'important' or 'very important' by more than 90 percent of voters....").

⁶¹ *Buckley v. Valeo*, 424 U.S. 1, 53 (1976).

⁶² *Id.* at 55-56; *Randall v. Sorrell*, 548 U.S. 230, 240-46 (2006).

⁶³ *Buckley*, 424 U.S. at 43-51.

⁶⁴ *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-99 (1981).

⁶⁵ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-95 (1979).

⁶⁶ *Randall*, 548 U.S. at 248-53.

⁶⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); see also *SpeechNow.org v. Fed. Elec. Comm'n*, 599 F.3d 686 (D.C. Cir. 2010), cert. denied, *Keating v. Federal Election Comm'n*, 131 S. Ct. 553 (2010) (striking down limits on contributions to groups that make independent expenditures to influence elections).

⁶⁸ *McCutcheon et al. v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

percent of Americans think we need to “fundamentally change” or “completely rebuild” our system for funding campaigns.⁶⁹

A promising and constitutional means of fundamentally changing our system exists: public funding of public election campaigns (often referred to as “public financing” for short). Public financing amplifies the voices of ordinary Americans, including people of color, so that elected officials listen to and work for all of their constituents, not just the privileged few.

The For the People Act contains two public financing programs for candidates for the presidency or Congress: (1) a six-to-one match on small dollar donations, up to \$200, for candidates who raise 1,000 such contributions or \$50,000 in such contributions, and (2) a pilot program of “My Voice” vouchers that would provide eligible voters with \$25 to contribute to congressional candidates. These programs have the potential to curb candidates’ reliance on big money, enable more candidates of color to run for office, and avert the corruption and policy distortion that results from our current campaign finance system.

While large donors are overwhelmingly white, there appears to be significant racial diversity among small donors. Research on New York City’s small-donor match program, which provides a six-to-one match on donations up to \$175, shows that donors giving \$10 or less live in neighborhoods that are more racially diverse than the city as a whole. These donors live in neighborhoods where people of color comprise 62 percent of the population, versus 56 percent of the population of the city overall.⁷⁰ A similar analysis concluded that small contributors come from a much more diverse range of neighborhoods than large donors and “there can be little doubt that bringing more small donors into the system in New York City equates to a greater diversity in neighborhood experience in the donor pool.”⁷¹ In Arizona, meanwhile, the state’s public financing system more than tripled the number of contributors to gubernatorial campaigns between 1998 and 2002 and increased the economic, racial, and geographic diversity of contributors.⁷² Candidates participating in Arizona’s “clean elections” system raised twice the proportion of their contributions from heavily Latino zip codes than did privately-funded candidates.⁷³

Public financing programs can also produce policy outcomes that better reflect the public’s preferences, including priorities for communities of color that otherwise would go unrealized.

⁶⁹ Nicholas Confessore and Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?_r=1.

⁷⁰ Public Campaign preliminary analysis of donor demographics and small donor impact in New York City elections conducted in the spring of 2013, using contribution data from 2009 and American Community Survey 2007-2013 five-year averages.

⁷¹ Michael J. Malbin et al., *Small Donors, Big Democracy: New York City’s Matching Funds As A Model for the Nation and States*, 11 ELECTION L.J. 3, 13 (2012).

⁷² CLEAN ELECTIONS INSTITUTE, RECLAIMING DEMOCRACY IN ARIZONA: HOW CLEAN ELECTIONS HAS EXPANDED THE UNIVERSE OF CAMPAIGN CONTRIBUTORS 3 (2004), available at <http://www.followthemoney.org/assets/press/Reports/200409301.pdf>.

⁷³ Nancy Watzman, *All Over the Map: Small Donors Bring Diversity to Arizona’s Elections*, PUBLIC CAMPAIGN 1-2 (2008), available at http://www.washclean.org/Library/AOTM_AZ08_Rpt.pdf.

Connecticut is a case in point.⁷⁴ A paid sick leave proposal was bottled up in the Connecticut legislature until the state passed a “fair elections” system that enabled candidates to run for office without depending upon wealthy donors and special interests. Following this change, Connecticut became the first state in the nation to guarantee paid sick leave.⁷⁵ Because the public financing programs in H.R. 1 could have similar salutary racial justice impacts, Dēmos strongly supports these provisions.

III. CONCLUSION

Not since the aftermath of the Watergate scandal has Congress introduced so bold a proposal to enhance our democracy. The For the People Act would make voting more accessible and combat voter suppression efforts, blunt the distorting influence of big money in politics, and advance racial equity. For too long, our system of government has catered to special interests at the expense of the working families and to the detriment of communities of color. Dēmos strongly supports the For the People Act and looks forward to seeing it signed into law.

⁷⁴ J. MUJIN CHA & MILES RAPOPORT, DĒMOS, FRESH START: THE IMPACT OF PUBLIC CAMPAIGN FINANCING IN CONNECTICUT (2013), available at

https://www.demos.org/sites/default/files/publications/FreshStart_PublicFinancingCT_0.pdf.

⁷⁵ Chad Garland, *Gov. Jerry Brown Signs Bill to Require Paid Sick Leave*, L.A. TIMES (Sept. 10, 2014), <http://www.latimes.com/business/la-fi-brown-paid-sick-leave-20140911-story.html>.

The CHAIRPERSON. Thank you very much.
 Ms. Weiser, you are now recognized for 5 minutes.

STATEMENT OF WENDY WEISER

Ms. WEISER. Thank you, Chairperson Lofgren, Ranking Member Davis, and members of the Committee.

As you know, there are extraordinary problems facing our democracy today: brazen and widespread voter suppression; elections funded by dark money groups and a tiny number of wealthy donors; extreme gerrymandering and redistricting; persistently low voter participation and low trust in government; and foreign adversaries trying to exploit our at-risk voting technology. But, as you also know, there has been an extraordinary pushback, with Americans across the country recognizing the urgent need for action.

This Congress was elected with the highest voter turnout in over a century. Many of you were elected pledging to reform our democracy as your top priority. And in States and localities across the country Americans, passed by large bipartisan margins a record number of ballot measures tackling voting, redistricting, and money in politics.

The message is clear: The best way to respond to attacks on our democracy is to strengthen our democracy. And that is what H.R. 1 does. It includes the key reforms needed to revitalize American democracy, and I will highlight three.

First, as Mr. Bains testified, it must be a top priority for Congress to restore the full protections of the Voting Rights Act, which the Supreme Court hobbled in the *Shelby County* decision. The absence of these protections enabled many of the worst abuses we saw last year and before.

And building a strong legislative record is key in this regard. It is also time sensitive. Without action, 2021 will be the first redistricting cycle since 1965 without these protections in place, and that could erase a lot of the progress communities have made towards fair representation.

The second reform, and one with the potential to truly transform American elections is automatic voter registration.

Automatic registration is simple but powerful. Every time an eligible citizen interacts with the government, whether to renew a driver's license or to apply for Social Security benefits, she will be automatically registered to vote unless she declines. No one will be registered against their will, and there is no extra paperwork. If adopted nationally, it could add as many as 50 million eligible voters to the rolls.

We know this reform is popular. In a few short years it has been adopted by 15 States and D.C. Many of these States passed it with bipartisan support, as they did in Washington State. Alaska voters passed it in 2016 with 64 percent of the vote, and Michigan and Nevada voters did so this past year.

We know it works. It is already up and running in nine States, and it has been extremely successful. Our research has shown that it dramatically increases registration rates in nearly every State. In Oregon, rates quadrupled at DMV offices. And we also know that it bolsters the security and accuracy of our voter rolls while saving money.

No reform is more important to boost participation and improve our elections.

Third, small-donor matching could also have a profound impact on our elections, strengthening the voices and influence of ordinary Americans. Despite the celebrated surge of small donors in the last election, they accounted for less than 20 percent of the \$5.7 billion spent on campaigns last year.

But my home city of New York has had a matching system for decades, and we have really seen the benefits. It has created a political donor base that is far more representative of the city as a whole. Donors for city elections are in 90 percent of the city's census blocks, while donors in State elections, which don't have matching, are more concentrated in wealthy neighborhoods.

It has allowed elected officials to focus on outreach to constituents, instead of dialing for dollars and to run viable campaigns doing so. Its cost has been modest, only a few hundredths of a percent of the city's operating budget and this cost has been more than offset by savings from reduced corruption.

Perhaps more than ever Americans understand the problems facing our democracy today. They are hungry for bold and effective solutions to those problems, solutions like those in H.R. 1 and real action on those solutions. We strongly urge this Congress to pass it.

[The statement of Ms. Weiser follows:]

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Testimony of

Wendy R. Weiser

Director, Democracy Program
Brennan Center for Justice at NYU School of Law¹

Hearing on H.R. 1, The For the People Act
The Committee on House Administration, U.S. House of Representatives

February 14, 2019

Chairperson Lofgren, Ranking Member Davis, and members of the Committee:

Thank you for the opportunity to submit this statement in support of House Resolution 1, the *For the People Act* ("H.R. 1" or "the Act"), a sweeping set of much-needed reforms to revitalize and restore faith in American democracy.

The Brennan Center for Justice enthusiastically supports H.R. 1. It is historic legislation. We cherish our democracy, the world's oldest. But for far too long, public trust has declined, as longstanding problems with our system of self-government have worsened. In this past election, we saw the result: some of the most brazen and widespread voter suppression in the modern era; super PACs and dark money groups spending well over \$1 billion, raised mostly from a tiny class of megadonors; the ongoing effects of extreme gerrymandering; large-scale purges of the voter rolls; and a foreign adversary exploiting at-risk election technology in an attempt to meddle with our elections.

¹ The Brennan Center for Justice at NYU Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I direct the Center's Democracy Program, which focuses on voting rights and election administration, money in politics and ethics, redistricting, and fair courts. Over more than two decades, the Brennan Center has built up a large body of nationally-respected research and work on these issues. This work has been widely cited by legislators, government agencies, courts, academic journals, and the media. The Brennan Center's experts have testified dozens of times before Congress and state legislatures around the country. Public officials across the political spectrum have relied on the Brennan Center's research in crafting innovative policies. Indeed, a number of the Center's signature policy proposals have been incorporated into the Act. I thank the staff of the Center's Democracy Program, and especially Senior Counsel Daniel I. Weiner, for assistance with this testimony. Michael Waldman, Max Feldman, Sidni Frederick and Natalie Giotta also provided important assistance.

BRENNAN CENTER FOR JUSTICE

But in 2018, we also saw citizens awoken to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you took office with a pledge to reform democracy. And in states across the country, voters approved ballot measures aimed at unrigging the political process, tackling redistricting, voting, and money in politics, often by large bipartisan majorities.² Voters sent a clear message: the best way to respond to attacks on democracy is to strengthen it.

The public hunger for change demands a strong response. This legislation includes the key reforms to revitalize American democracy—including automatic voter registration, small donor public financing, redistricting reform, and a commitment to restore the Voting Rights Act. It is fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central project for our politics now and going forward.

This testimony focuses on what we view as the most critical provisions of H.R.1. It is based on years of research and advocacy in states across the country. Every single major provision of this legislation draws on strong and successful models already in use. These carefully honed proposals meet a specific, urgent need. We commend the House for taking up the entire Act and look forward to working with members to ensure its passage.

I. Voting Rights

In the Federalist Papers, Alexander Hamilton and James Madison laid down a standard for our democracy: “Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.”³ For over two centuries, we have worked, but not fully succeeded, to live up to that ideal. Many have struggled, and continue to struggle, for the franchise. The right to vote is at the heart of effective self-government.

A. Voter Registration Modernization (Title I, Subtitle A, Parts 1, 2, and 3 & Title 2, Subtitle F)

One of the most important parts of H.R. 1 is a package to modernize registration. The centerpiece of that proposal is a plan for automatic voter registration (AVR). This bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy. It is now the law in fifteen states and the District of Columbia.⁴ It should be the law of the land.

Outdated Voter Registration Systems. More than many realize, an outdated registration system poses an obstacle to free and fair elections. One in four eligible Americans is not

² See, e.g., Lee Drutman, “One Big Winner Last Night: Political Reform,” *Vox*, Nov. 7, 2018, <https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner>.

³ The Avalon Project: Documents in Law, History and Diplomacy, “Federalist No. 57,” accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.

⁴ Thirteen states and D.C. enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively. See Brennan Center for Justice, “History of AVR & Implementation Dates,” last updated Nov. 7, 2018, <https://www.brennancenter.org/analysis/history-avr-implementation-dates>.

registered to vote.⁵ This quiet disenfranchisement is partly due to an out-of-date, and in some places ramshackle, voter registration system. The United States is the only major democracy in the world that requires individual citizens to shoulder the onus of registering to vote (and re-registering when they move).⁶ In much of the country, voter registration still largely relies on error-prone pen and paper. In 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.⁷

These problems contribute to low voter turnout.⁸ Each Election Day, millions of Americans go to the polls only to have trouble voting because of registration flaws.⁹ Some find their names wrongly deleted from the rolls.¹⁰ Others fall out of the system when they move.¹¹ One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.¹² Election Protection, the nonpartisan voter assistance hotline, reported that registration issues were the second most common problem voters faced in both the 2018 and 2016 elections.¹³ Registration errors affect more than those voters who are not

⁵ Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade*, 2012, 1; see also U.S. Census Bureau, *Voting and Registration in the Election of 2016*, 2017, Tbl. 1, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

⁶ Jennifer S. Rosenberg, *Expanding Democracy: Voter Registration Around the World*, Brennan Center for Justice, 2009, 2-3, available at <https://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world>.

⁷ Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012.

⁸ According to a 2001 commission chaired by former Presidents Ford and Carter, "[t]he registration laws in the United States are among the most demanding in the democratic world ... [and are] one reason why voter turnout in the United States is near the bottom of the developed world." See Carter and Ford: National Commission on Election Reform, *Reports of the Task Force on the Federal Election System*, 2001, 1-3. In too many parts of America this is still true.

⁹ A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. See R. Michael Alvarez, Stephen Ansolabehere, et al., 2008 Survey of the Performance of American Elections, (2009), 59, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; see also Stephen Ansolabehere, Testimony Before the U.S. Senate Rules Committee 19 (Mar. 11, 2009); Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, 2013, 70, <http://dvn.iq.harvard.edu/dvn/dv/measuringelections>.

¹⁰ Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, Harvard Dataverse, 2013, ii, <http://dvn.iq.harvard.edu/dvn/dv/measuringelections>; U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8-10, <https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Stewart found 2.8% of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5% percent voted in person on election day (56.5%) or early (9%). 65.5% of 131,590,825 voters, multiplied by the 2.8% figure from Stewart's study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election).

¹¹ Thomas Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Vintage Books, 2002), 178.

¹² Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

¹³ Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers' Committee for Civil Rights Under Law, 2018, 4, <https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf>; see also Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, available at https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINAL.pdf; Walter Shapiro, Brennan Center for Justice, "Election Day Registration Could Cut Through many of the Arguments

on the rolls. As the bipartisan Presidential Commission on Election Administration found in 2014, registration problems cause delays at the polls and are a principal cause of long lines.¹⁴

Outdated registration systems also undermine election integrity. Incomplete and error-laden voter lists create opportunities for malefactors to defraud the system or disenfranchise eligible citizens. And they are far more expensive to maintain than more modern systems. Arizona’s Maricopa County, for example, found that processing a paper registration cost 83 cents, compared to 3 cents for applications processed electronically.¹⁵

1. Automatic Voter Registration (Title I, Subtitle A, Part 2)

Automatic voter registration (“AVR”) is a simple but transformative policy that could bring millions into the electoral process and energize our democracy. Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. If adopted nationwide, it could add as many as 50 million new eligible voters to the rolls.¹⁶

AVR shifts registration from an “opt-in” to an “opt-out” approach. When eligible citizens give information to the government—for example, to get a driver’s license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline. This reflects how the human brain works; behavioral scientists have shown that we are hard-wired to choose the default option presented to us.¹⁷

The policy also requires that voter registration information be electronically transferred to election officials, rejecting paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.¹⁸

AVR Works. Oregon and California became the first states to adopt AVR in 2015.¹⁹ Since then, thirteen more states and the District of Columbia followed—many with strong

in the Voting Wars,” last modified Oct. 16, 2018, <https://www.brennancenter.org/blog/election-day-registration-could-cut-through-many-arguments-voting-wars>.

¹⁴ *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, <http://web.mit.edu/supportthevoter/www/files/2014.01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

¹⁵ Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, 2010, 12, available at <https://www.brennancenter.org/publication/voter-registration-digital-age>.

¹⁶ Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.

¹⁷ *Id.* 6-7. Opt-out systems have led to increased program-participation rates across a variety of fields. See, e.g., Alberto Abadie and Sebastian Gay, “The impact of presumed consent legislation on cadaveric organ donation: a cross-country study,” *Journal of Health Economics* 25 (2006): 599–620, <http://www.sciencedirect.com/science/article/pii/S016762960600004X> (25-30% higher participation in organ donation programs); James J. Choi et al., “Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance,” *Tax Policy and the Economy* 16 (2002): 67–114, <http://www.nber.org/papers/w8655.pdf> (401(k) participation over 30 percentage points higher with automatic enrollment).

¹⁸ Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

¹⁹ Brennan Center for Justice, “History of AVR & Implementation Dates,” last updated Nov. 7, 2018, <https://www.brennancenter.org/analysis/history-avr-implementation-dates>.

bipartisan support.²⁰ In Illinois, for example, the state legislature passed AVR unanimously, and a Republican Governor signed it into law.

The new system has proven extraordinarily successful. In nine states and the District of Columbia, AVR is already up and running. In Oregon, registration rates quadrupled at DMV offices.²¹ In Vermont, registrations jumped 62 percent in the six months after AVR was put in place compared to the same period in the previous year.²² One state, California, experienced minor glitches at first, because of a computer programming design flaw. But that error was quickly caught and contained, and according to the state's motor vehicle office has since been fixed.²³ California too has seen dramatic increases in voter registration. As the Brennan Center finds in a forthcoming report, AVR has dramatically increased registration rates in nearly every state.

There is strong reason to believe that the reform also boosts turnout.²⁴ Oregon saw the nation's largest turnout increase after it adopted AVR.²⁵ It had no competitive statewide races, and yet the state's turnout increased by 4 percent in 2016, which was 2.5 percentage points higher than the national average.²⁶ Other registration reforms have measurably improved turnout.²⁷ When voters are automatically registered, they not only are relieved of an obstacle to voting but also are exposed to direct outreach from election officials and others.²⁸ AVR sends a strong message that all eligible citizens are welcome and expected to participate in our democracy.

Election officials enthusiastically back AVR because it improves administration and saves money. Virtually every state to have transitioned to electronic transfer of registration information has reported substantial savings from reduced staff hours processing paper, and

²⁰ Brennan Center for Justice, *Automatic Voter Registration*, last updated Nov. 7, 2018, <https://www.brennancenter.org/analysis/automatic-voter-registration>.

²¹ Jonathan Brater, Brennan Center for Justice, "Update: Oregon Keeps Adding New Voters at Torrid Pace," last modified Aug. 19, 2016, <https://www.brennancenter.org/analysis/update-oregon-keeps-adding-new-voters-torrid-pace>.

²² Christopher Famighetti, Brennan Center for Justice, "First Look Shows Automatic Voter Registration Was a Success in Vermont," last updated Aug. 17, 2017, <https://www.brennancenter.org/blog/first-look-shows-automatic-voter-registration-was-success-vermont>.

²³ Furthermore, this programming error was completely unrelated to the state's AVR policy. Rather, it resulted from the rollout of the state's new internal electronic interface. The state is engaging in ongoing audits of its system to make sure there are no further problems.

²⁴ Wendy Weiser, "Automatic Voter Registration Boosts Political Participation," *Stanford Social Innovation Review*, Jan. 28, 2016, https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#.

²⁵ Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, Center for American Progress, 2017, <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration>.

²⁶ United States Elections Project, "2016 November General Election Turnout Rates," last accessed Apr. 23, 2018, <http://www.electproject.org/2016g>; United States Election Project, "2012 November General Election Turnout Rates," last modified September 3, 2014, <http://www.electproject.org/2012g>.

²⁷ For example, one study found that simply making registration portable can boost turnout by more than 2 percent. Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 491-501, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents.

²⁸ Donald Green et al., "Field Experiments and the Study of Voter Turnout," *Journal of Elections Public Opinion and Parties* 23 (2013): 27-48, https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout.

lower printing and mailing expenses.²⁹ Eliminating paper forms improves accuracy, reduces voter complaints about registration problems, and reduces the need for the use of provisional ballots.³⁰

Voters strongly support the reform. According to recent polling, 65 percent of Americans favor it.³¹ Michigan and Nevada adopted AVR this past election by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.³² Alaska voters passed AVR in 2016 with nearly 64 percent of the vote—at the same time they voted to put Donald Trump in the White House.

AVR Should be the National Standard. H.R. 1 sensibly makes AVR a national standard, building on past federal reforms to the voter registration system.³³ Critically, the Act requires states to put AVR in place at a wide variety of government agencies beyond state motor vehicle agencies, including those that administer Social Security or provide social services, as well as higher education institutions. It also requires a one-time “look back” at agency records to register individuals who have previously interacted with government agencies. And it protects voters’ sensitive information from public disclosure.

The Act includes multiple safeguards to ensure that ineligible voters are not registered. The government agencies designated for AVR regularly collect information about individuals’ citizenship and age, and they must obtain an additional affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility requirements and the penalties for illegal registration and offer them the opportunity to opt out. Election officials too are required to send individuals a follow up notice by mail. In light of these checks, there is no basis for critics’ alarmist speculation that AVR would result in an increase in the registration of ineligible persons. Indeed, election officials report that AVR’s elimination of paper forms *enhances* the accuracy of the rolls. As a precaution, H.R.1 also includes protections in the unlikely event that an ineligible person is inadvertently registered, to ensure that they are not harmed as a result. We strongly urge Congress to pass AVR.

²⁹ Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

³⁰ *Id.* 10-11.

³¹ Pew Research Center, “Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting,” last modified Oct. 29, 2018, <http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/>

³² New York Times, “Michigan Election Results,” last modified Jan. 28, 2019, <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html>; New York Times “Nevada Election Results,” last modified Jan. 29, 2019, <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html>; New York Times “Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved,” last modified Aug. 1, 2017, <https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg>.

³³ The National Voter Registration Act of 1993 required states to offer voter registration at their motor vehicle, public assistance, and disabilities agencies, among other things. 52 U.S.C. §§ 20504-20506. H.R.1’s AVR provisions build on this by expanding the agencies that offer voter registration and by making the registration process paperless at those agencies. The Help America Vote Act of 2002 pushed states into the digital age, by requiring them to create a centralized, computerized voter registration list. 52 U.S.C. § 21083. H.R.1 extends the benefits of that legislation by seamlessly transmitting voter information between registration agencies and the election officials that control the computerized voter list.

2. Same-Day Registration (Title I, Subtitle A, Part 3)

Same-day registration (SDR) allows eligible citizens to register and vote on the same day. It is a strong complement to AVR, available to those eligible voters who have not interacted with government agencies or whose information has changed since they did. Because it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.

SDR has been used successfully in several states since the 1970s. Today, seventeen states and the District of Columbia offer some form of same day registration, either on election day, during early voting, or both.³⁴ Studies indicate that SDR boosts voter turnout by 5 to 7 percent.³⁵ And it is highly popular with voters. This past November, supermajorities of voters in Michigan and Maryland passed ballot measures that, respectively, implemented and expanded same day registration. According to recent polls, more than 60 percent of Americans support SDR.³⁶ As part of the full package of reforms, SDR's use would be limited, since AVR would capture the vast majority of voters well before Election Day. Taken together, AVR and SDR would ensure that no eligible voter is left out.

3. Online Registration (Title I, Subtitle A, Part 1)

H.R.1 also requires states to offer secure and accessible online registration. At a time when many Americans do everything from banking to reviewing medical records online, voters want this convenient method of registration. The online registration provisions in H.R. 1 would let all voters register, update registration information, and check registrations online. They also would ensure that these benefits are available to citizens who do not have driver's licenses.

In addition to offering voter convenience, online registration saves money and improves voter roll accuracy. Washington State reported savings of 25 cents with each online registration (for a total of about \$176,000 in savings) in the first two years of the program, and its local officials save between 50 cents and two dollars per online transaction.³⁷ Election officials also

³⁴ National Conference of State Legislatures, "Same Day Voter Registration," last modified Jan. 25, 2019, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

³⁵ Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 499, 495-96, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents; see also Jacob R. Neisheisel and Barry C. Burden, "The Impact of Election Day Registration On Voter Turnout and Election Outcomes," *American Politics Research* 40 (2012): 636, 638-39 (citing studies finding that same-day registration increases turnout by 3 to 6 percent, and by as much as 14 percent). In the 2016 election, voter turnout was, on average, 7 percent higher in states with SDR than in those without. See George Pillsbury and Julian Johannesen, *America Goes to the Polls 2016: A Report on Voter Turnout in the 2016 Election*, Nonprofit Vote, 2016, available at <https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf>; Mijin Cha and Liz Kennedy, *Millions to the Polls: Same Day Registration*, Demos, 2014.

³⁶ Pew Research Center, "Elections in America", "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, https://www.prri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf?utm_source=Democracy+Collaborative+at+ReThink+Media&utm_campaign=774f203b91-EMAIL_CAMPAIGN_2019_02_01_09_27&utm_medium=email&utm_term=0_3e305aa083-774f203b91-391816881.

³⁷ See Holly Maluk et al., *Voter Registration in a Digital Age: 2015 Update*, Brennan Center for Justice, 2015, 6.

report that letting voters enter their own information significantly reduces the likelihood of incomplete applications and mistakes.³⁸

It is not surprising, therefore, that online registration is incredibly popular and has spread rapidly. In 2010, only six states offered online voter registration. Now, thirty-eight states do.³⁹ It is time to bring the reform to the whole country.

4. Voter Purge Protections (Title I, Subtitle A; Title II, Subtitle F)

The Act curbs illegal efforts to purge eligible voters from the rolls, addressing one of the biggest problems we saw in the last election.

Voter purges—the large-scale deletion of voters’ names from the rolls—are on the rise.⁴⁰ The Brennan Center has calculated that almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.⁴¹ Purge activity has increased at a substantially greater rate in states that were subject to federal oversight under the Voting Rights Act prior to the Supreme Court’s decision in *Shelby County v. Holder*.⁴² Georgia, for example, purged 1.5 million voters between the 2012 and 2016 elections—double its rate between 2008 and 2012. Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010. We found that 2 million fewer voters would have been purged between 2012 and 2016 if jurisdictions previously subject to pre-clearance had purged at the same rate as other jurisdictions.⁴³

Purges that are implemented incorrectly disenfranchise legitimate voters and cause confusion and delay at the polls. Last month, for example, the Texas Secretary of State sent lists of approximately 95,000 alleged non-citizens to county officials for purging—but within days, the state was forced to retreat, once it became clear that the lists were rife with inaccuracies.⁴⁴ In 2016, New York election officials erroneously deleted hundreds of thousands from the voter rolls, with no public warning and little notice to those who had been purged.⁴⁵ The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists

³⁸ *Id.* 8.

³⁹ Brennan Center for Justice, “VRM in the States: Online Registration,” last modified Feb. 3, 2017, <https://www.brennancenter.org/analysis/vrm-states-online-registration>.

⁴⁰ Myrna Pérez, “How the Midterm Elections May Be Compromised,” *New York Times*, July 19, 2018, <https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html>; see also Kevin Morris and Myrna Pérez, Brennan Center for Justice, “Florida, Georgia, North Carolina Still Purging Voters at High Rates,” last modified Oct. 1, 2018, <https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates>.

⁴¹ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, 3, available at <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>; see also Kevin Morris, Brennan Center for Justice, “How Purges Threaten to Disenfranchise Voters Under the Radar,” last modified July 20, 2018, <https://www.brennancenter.org/blog/how-purges-threaten-disenfranchise-voters-under-radar>.

⁴² Brater et al., *Purges*, 3-5.

⁴³ *Id.* 1.

⁴⁴ Sean Morales-Doyle and Rebecca Ayala, Brennan Center for Justice, “There’s Good Reason to Question Texas’ Voter Fraud Claims,” last modified Jan. 29, 2019, <https://www.brennancenter.org/blog/theres-good-reason-question-texas-voter-fraud-claims>.

⁴⁵ Brater et al., *Purges*, 5-6.

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that were used were highly inaccurate, and included many voters who had never committed a felony or had had their voting rights restored.⁴⁶

Purge practices can be applied in a discriminatory manner that disproportionately affects minority voters.⁴⁷ In particular, matching voter lists with other government databases to ferret out ineligible voters can generate discriminatory results if the matching is done without adequate safeguards. African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.⁴⁸

The Act puts strong protections in place to prevent improper purges. First, it puts new guardrails on the use of inter-state databases that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. Second, it prohibits election officials from relying on a citizen's failure to vote in an election as evidence of ineligibility to vote. The Brennan Center supports these protections and urges states to provide additional notice to voters prior to purging them so eligible voters can intervene before they are removed from the rolls.

B. Commitment to Restore the Voting Rights Act (Title II, Subtitle A)

As recent experience makes clear, Congress must restore the full protections of the Voting Rights Act of 1965 ("VRA"), which the U.S. Supreme Court hobbled in 2013 in *Shelby County*.⁴⁹ Thanks in part to *Shelby County*, the recent midterm elections were marred by some of the worst voter suppression of the modern era,⁵⁰ including large-scale voter purges;⁵¹ polling place and early voting site closures, especially in minority neighborhoods; burdensome voter ID requirements that excluded IDs possessed by minority citizens;⁵² unnecessarily strict registration rules like Georgia's "exact match" policy, under which 53,000 voter registrations—the overwhelming majority of which belonged to African-Americans, Latinos, and Asian-Americans—were put on hold;⁵³ and suspicious rejections of absentee ballots;⁵⁴ among other

⁴⁶ *Id.* 5.

⁴⁷ Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 2008, 31-32, available at <https://www.brennancenter.org/publication/voter-purges>.

⁴⁸ Brater et al., *Purges*, 7.

⁴⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵⁰ Zachary Roth and Wendy Weiser, Brennan Center for Justice, "This Is the Worst Voter Suppression We've Seen in the Modern Era," last modified Nov. 2, 2018, <http://www.brennancenter.org/blog/worst-voter-suppression-weve-seen-modern-era>; see also Rebecca Ayala, Brennan Center for Justice "Voting Problems 2018," Brennan Center for Justice, last modified Nov. 5, 2018, <https://www.brennancenter.org/blog/voting-problems-2018>.

⁵¹ Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates"; Brater et al., *Purges*, 3-5; Ayala, "Voting Problems 2018."

⁵² Perhaps the most striking example was a North Dakota law that required voters to show IDs with a residential street address, despite the fact that the state's Native American communities often do not have such addresses. Although this requirement was briefly halted by a federal district court, the Eighth Circuit Court of Appeals ultimately upheld the requirement for the 2018 election. See *Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018).

⁵³ Jonathan Brater and Rebecca Ayala, Brennan Center for Justice, "What's the Matter with Georgia?," Oct. 12, 2018, <https://www.brennancenter.org/blog/whats-matter-georgia>.

⁵⁴ Christopher Ingraham, "Signature Mismatches, Missing Birthdays and Errant Spouses: Why Thousands of Absentee Ballots Were Tossed Out in Georgia," *Washington Post*, Nov. 16, 2018,

things.⁵⁵ We are therefore pleased that H.R. 1 affirms a strong commitment to restore the full protections of the Voting Rights Act.

The VRA is widely regarded as the single most effective piece of civil rights legislation in our nation's history.⁵⁶ As recently as 2006 it won reauthorization with overwhelming bipartisan support.⁵⁷ For nearly five decades, the linchpin of the VRA's success was the Section 5 pre-clearance provision, which required certain states with a history of discriminatory voting practices to obtain approval from the federal government for any voting rules changes before putting them into effect. Section 5 deterred and prevented discriminatory changes to voting rules right up until the time the Supreme Court halted its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (13 in the final 18 months before the *Shelby County* ruling), caused hundreds more to be withdrawn after Justice Department inquiry, and prevented still more from being put forward because policymakers knew they would not pass muster.⁵⁸

Shelby County eviscerated Section 5 by striking down the "coverage formula" that determined which states were subject to pre-clearance. That resulted in a predictable flood of discriminatory voting rules, contributing to a now decade-long trend in the states of restrictive voting laws, which the Brennan Center has documented extensively.⁵⁹ Within hours of the Court's decision, Texas announced that it would implement what was then the nation's strictest voter identification law—a law that had previously been denied preclearance because of its discriminatory impact. Shortly afterward, Alabama, Arizona, Florida, Mississippi, North Carolina, and Virginia also moved ahead with restrictive voting laws or practices that previously would have been subject to pre-clearance.⁶⁰ In the years since, federal courts have repeatedly found that new laws passed after *Shelby* made it harder for minorities to vote, some intentionally so.⁶¹ Our research regarding last year's election confirmed the persistence of voter suppression

https://www.washingtonpost.com/business/2018/11/16/signature-mismatches-missing-birthdays-errant-spouses-why-thousands-absentee-ballots-were-tossed-out-georgia/?utm_term=.e43b354ee61b.

⁵⁵ Ayala, "Voting Problems 2018"; see also Peter Dunphy, Brennan Center for Justice, "When It Comes to Voter Suppression, Don't Forget About Alabama," Nov. 5, 2018, <https://www.brennancenter.org/blog/when-it-comes-voter-suppression-dont-forget-about-alabama>.

⁵⁶ See U.S. Dep't of Justice, "The Effect of the Voting Rights Act," last updated June 19, 2009, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

⁵⁷ The vote was unanimous in the Senate and 390-33 in the House. See U.S. Senate, "H.R.9 Vote Summary," July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, "Final Vote Results for Roll Call 374," July 13, 2006, <http://clerk.house.gov/evs/2006/roll374.xml>. The reauthorization was signed into law by President George W. Bush. See The White House, Press Release, "Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006," July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

⁵⁸ Tomas Lopez, *Shelby County: One Year Later*, Brennan Center for Justice, 2014, <https://www.brennancenter.org/analysis/shelby-county-one-year-later>.

⁵⁹ Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018; Brennan Center for Justice, "New Voting Restrictions in America," accessed Jan. 1, 2019, <https://www.brennancenter.org/new-voting-restrictions-america>; Brennan Center for Justice, "Voting Laws Roundup 2019," last modified Jan. 23, 2019, <https://www.brennancenter.org/analysis/voting-laws-roundup-2019>; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, <http://www.brennancenter.org/publication/voting-law-changes-2012>.

⁶⁰ Lopez, *Shelby County*.

⁶¹ Danielle Lang and J. Gerald Hebert, "A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation," *Yale Law Journal Forum* 127 (2017–2018): 780 n.4. For example, the Fourth Circuit Court of Appeals

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and the willingness of too many state officials to continue developing new tactics to keep people from voting.⁶²

Section 2 of the VRA—which prohibits discriminatory voting practices nationwide and permits private parties and the Justice Department to challenge those practices in court—remains an important bulwark against discrimination. But Section 2 lawsuits are not a substitute for preclearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.⁶³ Our case against Texas’s 2011 voter ID law illustrates this point.⁶⁴ The law initially did not go into effect because a three-judge federal court refused to preclear it under Section 5. But that decision was vacated after *Shelby County*, spurring multi-year litigation under Section 2. Despite the fact that every court that has considered the law found it discriminatory (and a federal district court found it intentionally so), the law remained in effect until a temporary remedy was ordered for the November 2016 election. In the interim, Texans voted in 3 federal and 4 statewide elections and numerous local elections under discriminatory rules.

Congress has the power to address these problems, by updating the VRA’s coverage formula, examining its coverage, and restoring the VRA to its full power. As this Committee recognizes, any new coverage formula must be supported by a thorough legislative record. We commend the commitment to restoring the VRA reflected in H.R.1, and we urge Congress to make development of this record and passage of a renewed VRA a top priority.

C. Nationwide Early Voting (Title I, Subtitle H)

H.R.1 also provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote.

Holding elections on a single workday in mid-November is a relic of the nineteenth century; it was done for the convenience of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot.⁶⁵ This no longer works for many Americans, who must find time to cast a ballot between jobs, childcare, and the everyday obligations of modern life.

found that a 2013 voting law passed by North Carolina targeted African-American voters with “surgical precision.” *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁶² Roth and Weiser, “This Is the Worst Voter Suppression We’ve Seen in the Modern Era”; Ayala, “Voting Problems 2018”; Makeda Yohannes, Brennan Center for Justice, “New Hampshire’s New Voting Law Threatens Student Voters,” last modified July 18, 2018, <https://www.brennancenter.org/blog/new-hampshires-new-voting-law-threatens-student-voters>; Brater and Ayala, “What’s the Matter with Georgia?”.

⁶³ Lopez, *Shelby County*.

⁶⁴ The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers’ Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others. For more information, see <https://www.brennancenter.org/legal-work/naacp-v-steen>.

⁶⁵ Weiser and Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, 7.

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Early voting works well. Thirty-nine states offer some opportunity to vote in person before Election Day.⁶⁶ And more than a dozen of those states offer early voting for a period comparable to or greater than the two-week period leading to Election Day required by H.R. 1.⁶⁷

Despite the popularity of early voting, the absence of a national standard means that some states have few or inconsistent early voting hours, and others have been able to engage in politicized cutbacks to early voting.⁶⁸ Over the past decade, multiple states have reduced early voting days or sites used disproportionately by African-American voters (such as the elimination of early voting on the Sunday before Election Day), and federal courts have struck down early voting cutbacks in North Carolina and Wisconsin because they were intentionally discriminatory.⁶⁹

H.R.1 will make voting more manageable by requiring that states provide two weeks of early voting and equitable geographic distribution of early voting sites. A guaranteed early voting period will reduce long lines at the polls and ease the pressure on election officials and poll workers on Election Day, by spreading out the days on which people cast their ballots. For this reason, it was one of the principal recommendations of the bipartisan Presidential Commission of Election Administration for reducing long lines.⁷⁰ It will also make it easier for election officials to spot and solve problems like registration errors or voting machine glitches before they impact most voters.⁷¹ For these reasons, election officials report high satisfaction with early voting. The Brennan Center's research indicates that two weeks is an effective minimum time period for generating the benefits of early voting.⁷²

Early voting is popular with voters too, with study after study showing a significant positive effect on voter satisfaction.⁷³ It is a critical element of a convenient and modern voting system.

D. Voting Rights Restoration (Title I, Subtitle E)

The Democracy Restoration Act in Title I, Subtitle E of H.R. 1 would restore federal voting rights to citizens with past criminal convictions living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

⁶⁶ National Conference of State Legislatures, "Early and Absentee Voting," last modified Jan. 25, 2019, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

⁶⁷ National Conference of State Legislatures, "State Laws Governing Early Voting," last modified Jan. 25, 2019, <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

⁶⁸ Brennan Center for Justice, "New Voting Restrictions in America."

⁶⁹ NC State Conference of NAACP v. McCrory, 831 F.3d 204, 219; One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).

⁷⁰ *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

⁷¹ Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice, 2013, 5-6, available at <https://www.brennancenter.org/publication/early-voting-what-works>.

⁷² *Id.* 12

⁷³ *Id.* 7-8.

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This disproportionate impact on people of color means that all too often entire communities are shut out of our democracy. Disenfranchisement laws have a negative ripple effect beyond those people within their direct reach. Research suggest that these laws may affect turnout in neighborhoods with high incarceration rates, even among citizens who are eligible to vote.⁸¹ This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other's political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

The Promise of Voting Rights Restoration. H.R. 1 adopts a simple and fair rule: if you are out of prison and living in the community, you get to vote in federal elections. It also requires states to provide written notice to individuals with criminal convictions when their voting rights are restored.

These changes would have a profoundly positive impact on affected citizens and society. We all benefit from the successful reentry of formerly incarcerated citizens into our communities. Restoring their voting rights sends the message that they are truly welcome to participate and are entitled to the respect, dignity and responsibility of full citizenship. That message pays concrete dividends. One study found "consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior."⁸² For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.⁸³

Voting rights restoration also benefits the electoral process, by reducing confusion and easing the burdens on elections officials to determine who is eligible to vote. If every citizen living in the community can vote, officials have a bright line rule to apply. This clear rule also eliminates one of the principal bases for erroneous purges of eligible citizens from the voting rolls.

For these reasons, rights restoration is immensely popular among Americans of all political stripes. This past November, 65 percent of Florida voters passed a ballot initiative restoring voting rights to 1.4 million of their fellow residents, with a massive groundswell of bipartisan support.⁸⁴ Governor Kim Reynolds, Republican of Iowa, recently endorsed a similar

⁸¹ Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice, 2009, 12, available at <https://www.brennancenter.org/publication/restoring-right-vote>.

⁸² Christopher Uggen & Jeff Manza, "Voting and Subsequent Crime and Arrest: Evidence from a Community Sample," *Columbia Human Rights Law Review* 36 (2004): 193.

⁸³ See, e.g., *Resolution Supporting Restoration of Voting Rights Released*, American Probation and Parole Association, 2007, https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65; Resolution on Restoring Voting Rights, Association of Paroling Authorities International, 2008, <http://www.apaintl.org/about/resolutions.html>.

⁸⁴ See, e.g., "Voting Rights Restoration Efforts in Florida," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida>; Kevin Morris, "A Transformative Step for Democracy in Florida," Brennan Center for Justice, last modified November 6, 2018, accessed February 8, 2019, <https://www.brennancenter.org/blog/transformative-step-democracy-florida>; Myrna Pérez, "What Victory in Florida Means to Me," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, <https://www.brennancenter.org/blog/what-victory-florida-means-me>; "Florida

constitutional amendment in her state.⁸⁵ And over the past two decades, fourteen states have restored voting rights to segments of the population.⁸⁶

Congress has the authority to act. The Supreme Court has previously upheld congressional expansion of the pool of voters qualified for federal elections when Congress lowered the voting age to 18.⁸⁷ Here, there are three sources of congressional power: the Elections Clause of Article I, section 4, the Fourteenth Amendment, and the Fifteenth Amendment. As detailed below, Congress has very broad powers to regulate federal elections under the Elections Clause.⁸⁸ Because many state criminal disenfranchisement laws were enacted with a racially discriminatory intent and have a racially discriminatory impact, Congress can also act under its powers to enforce the Fourteenth and Fifteenth Amendments, which guarantee equal protection of the laws and prohibit denial of the right to vote on the basis of race, respectively. The Supreme Court has described this enforcement power as “a broad power indeed,” one that gives Congress a “wide berth” to devise appropriate remedial and preventative measures for discriminatory actions.⁸⁹

E. Prohibiting Deceptive Practices (Title I, Subtitle D)

The Act increases protections against, and remedies for, efforts to use deception or intimidation to prevent people from voting or registering to vote. Unfortunately, attempts to suppress votes through deception and intimidation remain all too widespread. Every election cycle, journalists and non-partisan Election Protection volunteers document attempts at voter deception and intimidation.⁹⁰ This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In a recent analysis for the Brennan Center, for example, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.⁹¹

Amendment 4, Voting Rights Restoration for Felon Initiative (2018),” Ballotpedia, accessed February 8, 2019, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)).

⁸⁵ “Reynolds Releases Bill to Restore Felon Voting Rights,” *Associated Press*, January 22, 2019,

<https://www.apnews.com/c2e817c35d6e48a1b7d678c6f5c69843>.

⁸⁶ Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project, 2018, 3.

⁸⁷ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁸⁸ See Part VI.

⁸⁹ *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

⁹⁰ See e.g. Ayala, “Voting Problems 2018”; Sean Morales-Doyle and Sidni Frederick, “Intentionally Deceiving Voters Should Be a Crime,” *The Hill*, Aug. 8, 2018, <https://thehill.com/opinion/civil-rights/400941-intentionally-deceiving-voters-should-be-a-crime>; Wendy Weiser and Adam Gitlin, *Dangers of “Ballot Security” Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, available at <https://www.brennancenter.org/analysis/dangers-ballot-security-operations-preventing-intimidation-discrimination-and-disruption>. Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, available at <https://www.brennancenter.org/publication/ballot-security-and-voter-suppression>.

⁹¹ Young Mie Kim, Brennan Center for Justice, “Voter Suppression Has Gone Digital,” last modified Nov. 20, 2018, <https://www.brennancenter.org/blog/voter-suppression-has-gone-digital>.

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While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,⁹² existing laws have not been strong enough to deter misconduct. Moreover, no law specifically targets deceptive practices, nor is there any authority charged with investigating such practices and providing voters with corrected information.

H.R.1 protects voters from deception and intimidation in three ways. First, it increases criminal penalties for false and misleading statements and intimidation aimed at impeding or preventing a person from voting or registering to vote. Second, it empowers citizens to go to court to stop voter deception. Third, it blunts the effect of deceptive information by requiring designated government officials to disseminate accurate, corrective information to voters. These provisions will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining our elections. We encourage Congress to enact them.

II. Campaign Finance

A. Small Donor Public Financing (Title V, Subtitles B and C)

H.R.1 also dramatically overhauls federal campaign finance law. The centerpiece of these reforms is small-donor public financing, which has the potential to fundamentally transform political campaigns and counteract the worst effects of the Supreme Court's now-infamous decision in *Citizens United*.⁹³

Big Money Undermines American Democracy. Thanks to *Citizens United* and related cases, a small class of wealthy donors has achieved unprecedented clout in American politics.⁹⁴ Super PACs, political committees that can raise and spend unlimited funds, poured more than \$3 billion into federal elections last year; of that total, roughly a third can come from a mere 11 donors.⁹⁵ Another \$1 billion has come from dark money groups that keep their donors secret, but which we know are funded by many of the same donors who back super PACs.⁹⁶ While all of these groups are supposed to operate independently of candidates and parties, many actually

⁹² Weiser and Gitlin, *Dangers of "Ballot Security Operations*.

⁹³ See Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice, 2012, available at <https://www.brennancenter.org/publication/empowering-small-donors-federal-elections>.

⁹⁴ Ian Vandewalker and Lawrence Norden, "Small Donors Still Aren't as Important as Wealthy Ones," *The Atlantic*, Oct. 18, 2016, <https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/> (showing the portion of contributions from donors of \$100,000 or more increasing in presidential cycles since 2010); Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 3 (explaining how *Citizens United* changed the legal landscape for campaign finance), available at https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf.

⁹⁵ Michelle Ye Hee Lee, "Eleven donors have plowed \$1 billion into super PACs since they were created," *Washington Post*, Oct. 26, 2018, https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.

⁹⁶ Center for Responsive Politics, "Dark Money Basics," <https://www.opensecrets.org/dark-money/basics>; Ashley Balcerzak, "How Democrats Use Dark Money – and Win Elections," *NBC*, Feb. 20, 2018, <https://www.nbcnews.com/politics/congress/how-democrats-use-dark-money-win-elections-n849391>; Maggie Haberman, "Ad by Pro-Trump Group Attacks the Club for Growth," *New York Times*, Apr. 18, 2017, <https://www.nytimes.com/2017/04/18/us/politics/attack-ad-sheldon-adelson-club-for-growth.html>.

have close ties to elected officials, to the point where they basically function as a campaign arm.⁹⁷ This creates an unacceptable risk of corruption and its appearance.

Recent election cycles have also seen a surge in giving by small donors (donors who give \$200 or less),⁹⁸ but they still account for less than a fifth of the total raised and spent on campaigns.⁹⁹ In the two most recent midterm election cycles, the top 100 super PAC donors gave almost as much as all the millions of small donors combined.¹⁰⁰ In 2018, the top five individuals or couples who gave to super PACs alone contributed almost \$350 million.¹⁰¹

The dominance of wealthy elites and special interests has a direct impact on policy. Studies have repeatedly shown that campaign donors have far more clout than voters,¹⁰² which they often use to pursue objectives most Americans do not share.¹⁰³ The last Congress, for

⁹⁷ See generally Ian Vandewalker, Brennan Center for Justice, “The Rise of Shadow Parties,” Oct. 22, 2018, <https://www.brennancenter.org/blog/rise-shadow-parties>; Ian Vandewalker, Eric Petry, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, 2015, available at <https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups>; Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, Election Law @ Moritz, 2014, 76-79 (quoting members of Congress and staff about the influence of outside spending on elected officials), available at <https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.

⁹⁸ See Peter Overby, “Democrats Built a Small-Donor Money Machine. Now, Republicans Want Their Own,” *NPR*, Nov. 23, 2018, <https://www.npr.org/2018/11/23/670084581/democrats-built-a-small-donor-money-machine-now-republicans-want-their-own>; Max Greenwood, “Small-dollar Donations Explode in the Trump Era,” *The Hill*, Oct. 19, 2018, <https://thehill.com/homenews/campaign/412231-small-dollar-donations-explode-in-the-trump-era>; Kenneth P. Vogel and Rachel Shorey, “Eyeing 2020, Trump Fund-Raisers Return to a Familiar Well: Small Donors,” *New York Times*, Apr. 15, 2018, <https://www.nytimes.com/2018/04/15/us/politics/trump-campaign-fec-financial-reports.html>.

⁹⁹ The total price tag for the 2018 midterms was roughly \$5.7 billion. Roughly \$1.1 billion of that total came from small donors. Center for Responsive Politics, “Most Expensive Midterm Ever: Cost of 2018 Election Surpasses \$5.7 Billion,” Feb. 6, 2019, <https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil>. That was a substantial increase relative to the 2014 midterm, but comparable to other types of donations. *Id.*

¹⁰⁰ Center for Responsive Politics, “2018 Super PACs: How Many Donors Give,” last updated Feb. 1, 2019, <https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=B>; Center for Responsive Politics, “2014 Super PACs: How Many Donors Give,” last updated Mar. 9, 2015, <https://www.opensecrets.org/outside-spending/donor-stats?cycle=2014&type=B>. The 2018 midterms were also notable for how many wealthy self-funders won office. “Most expensive midterm ever: Cost of 2018 election surpasses \$5.7 billion,” Center for Responsive Politics, “Most Expensive Midterm Ever.”

¹⁰¹ Center for Responsive Politics, “2018 Top Donors to Outside Spending Groups,” last updated Feb. 1, 2019, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=S>.

¹⁰² Chris Tausanovitch, “Income, Ideology and Representation,” *Russell Sage Foundation Journal of the Social Sciences* 2 (2016): 33, 49; Martin Gilens and Benjamin I. Page, “Testing Theories of American Politics: Elites, Interest Groups, and American Citizens,” *Perspectives on Politics* 12 (2014): 564, 575; Christopher Ellis, “Social Context and Economic Biases in Representation,” *Journal of Politics* 75 (2013): 773, 779; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), 84; Larry Bartels, *Unequal Democracy: The Political Economic of the New Gilded Age* (Princeton: Princeton University Press, 2010), 285.

¹⁰³ As Connecticut Senator Chris Murphy said of the daily calls he has had to make to wealthy donors: “I talked a lot more about carried interest inside of that call room than I did at the supermarket.” Wealthy donors “have fundamentally different problems than other people... And so you’re hearing a lot about problems that bankers have and not a lot of problems that people who work in the mill in Thomaston, Conn., have.” Paul Blumenthal, “Chris Murphy: ‘Soul-Crushing’ Fundraising Is Bad for Congress,” *Huffington Post*, May 7, 2013, https://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html.

example, was dominated by the push for Obamacare repeal and a \$1.5 trillion tax overhaul, avowedly donor-driven initiatives that were consistently unpopular with the general public.¹⁰⁴ The disconnect between elite priorities and those of everyday Americans has profoundly undermined faith in our democracy. Overwhelming majorities across the political spectrum feel their voices are not being heard because of our dysfunctional campaign finance system.¹⁰⁵

Big money politics especially harms people of color. The donor class has long been overwhelmingly white.¹⁰⁶ Major corporate and individual donors have helped to drive policies that disproportionately hurt poor and minority communities, from mass incarceration to the failure to rein in subprime lending.¹⁰⁷ Barriers related to fundraising also disproportionately keep people of color from running, especially women, who still face persistent discrimination and are less likely to have wealthy networks they can tap for support.¹⁰⁸

¹⁰⁴ See Daniel I. Weiner, Brennan Center for Justice, “The Tax Overhaul is Proof that Money in Politics Affects All of Us,” Dec. 4, 2017, <https://www.brennancenter.org/blog/tax-overhaul-proof-money-politics-affects-all-us>; Carl Hulse, “Behind New Obamacare Repeal Vote: ‘Furious’ G.O.P. Donors,” *New York Times*, Sept. 22, 2017, <https://www.nytimes.com/2017/09/22/us/politics/republican-donors-obamacare-repeal.html>; Alex Isanstadt and Gabriel Debenedetti, “Angry GOP Donors Close Their Wallets,” *Politico*, Oct. 5, 2017, <https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449>;

¹⁰⁵ Bradley Jones, “Most Americans want to limit campaign spending, say big donors have greater political influence,” *Pew Research Center*, May 8, 2018, <http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>; Michael W. Traugott, “Americans: Major Donors Sway Congress More Than Constituents,” *Gallup*, Jul. 6, 2016, <https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx>; “Voters Say Money, Media Have Too Much Political Clout,” *Rasmussen Reports*, Feb. 16, 2016, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout.

¹⁰⁶ Among elite donors giving more \$5,000, 93 percent were white in 2012 and 94 percent were white in 2014. Sean McElwee, Brian Schaffner, Jesse Rhodes, *Whose Voice, Whose Choice?* Demos, 2016, 2, available at https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf. Since 2009, only one Black American donor has appeared in the top 100 political spenders list. Lateshia Beachum, “There are Many Rich Minorities. So Why Are There No Black Koch Brothers?” *Center for Public Integrity*, Jul. 23, 2018, <https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers>.

¹⁰⁷ Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and our Economy*, Demos, 2013, 43, 51, available at https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.

¹⁰⁸ Women of color are approximately 20 percent of the U.S. population but despite historic gains still make up less than ten percent of the voting membership of the House of Representatives and only four percent of the Senate. “Women of Color in Elective Office 2019,” Center for American Women and Politics, last accessed Feb. 12, 2019, <http://cawp.rutgers.edu/women-color-elective-office-2019>. According to one scholar, “[t]he support infrastructure available to women of color has historically not been as strong, particularly when it comes to things like campaign trainings, recruitments, and financial support.” Linda Kramer Jennings, “Women of Color Face Significant Barriers When Running for Office. But They’re Finding Support,” *Yes! Magazine*, Jul. 31, 2018, <https://www.yesmagazine.org/people-power/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support-20180731>. The founder of Collective PAC, which raises money for candidates of color, notes that “especially for black women, raising money is oftentimes a major deterrent to why they don’t get into politics or run for election.” Kate Ackley, “Women – and the Power of the Purse – Will Be Key in 2018,” *Roll Call*, Oct. 26, 2017, <https://www.rollcall.com/news/politics/99810-2>. See also Asha DuMonthier, Chandra Childers, Jessica Milli, *The Status of Black Women in the United States*, Institute for Women’s Policy Research, 2017, 4-5, available at https://www.domesticworkers.org/sites/default/files/SOBW_report2017_compressed.pdf (finding that fundraising pressure is disproportionately discouraging to potential candidates who are female, African American, or represent less-affluent districts).

1. Small-Donor Matching for Congressional Races (Title V, Subtitle B, Part 2)

The Government by the People Act of 2019 in Title V, Subtitle B, Part 2 of H.R.1 establishes a small donor matching system for congressional races. Small donor matching is a transformative solution to the problem of big money. While its potential may be profound, the basics of this system are simple. Candidates opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits. Donors who give to participating candidates in small amounts will then see their contributions matched by public money.¹⁰⁹ The Act matches donations of \$1-\$200 to participating congressional candidates at a six-to-one ratio, the same ratio used until recently in New York City's highly successful program.¹¹⁰

Small Donor Matching is a Tried and True Solution. Small donor matching has a long and successful history in American elections. It was first proposed more than a century ago by President Theodore Roosevelt.¹¹¹ Congress incorporated a one-to-one small donor match for primaries into the presidential public financing system enacted in 1971. The vast majority of major party presidential candidates from 1976 to 2008 used matching funds in their primary campaigns.¹¹² Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.¹¹³ Two years later, the bipartisan Commission on National Elections concluded that: "Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance."¹¹⁴

Small donor matching has also found success at the state level, where it has been adopted in a wide variety of jurisdictions.¹¹⁵ The system that has been studied the most is New York

¹⁰⁹ Brent Ferguson, *State Options for Reform*, Brennan Center for Justice, 2015, 1, available at https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf.

¹¹⁰ Last year the city voted overwhelmingly to raise the match to an 8-to-1 ratio.

¹¹¹ Skaggs and Wertheimer, *Empowering Small Donors*, 8.

¹¹² *Id.* 10.

¹¹³ *Id.* 11.

¹¹⁴ *Id.* 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Timing and Scheduling*, Sept. 30, 2005).

¹¹⁵ A number of states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera, Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Demos, 2017, available at [https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA\[5\].pdf](https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA[5].pdf). New York State is poised to pass small donor matching for all state races this year. Andrea Sears, "2019 Could Be the Year for NY Election Reform," *Public News Service*, Jan. 14, 2019, <https://www.publicnewsservice.org/2019-01-14/civic-engagement/2019-could-be-the-year-for-ny-election-reform/a65199-1>. Comprehensive matching already exists in many other large, diverse municipalities besides New York City, including Los Angeles, Tucson, Washington, D.C., Montgomery County, Maryland, Prince George's County, Maryland, and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austermuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns – And Will Fund It," *WAMU*, Mar. 13, 2018, <https://wamu.org/storv/18/03/13/bowser-signs-bill-creating-public-financing-program-political-campaigns-will-fund/#.XFzEYmfsZaQ>; Rachel Chason, "Prince George's Approves Matching Funds for Local Candidates – Starting in 2026," *Washington Post*, Oct. 24, 2018, https://www.washingtonpost.com/local/md-politics/prince-georges-approves-public-finance-system-for-local-candidates/2018-10-24/47f7b75a-d738-11e8-a10f-b51546b10756_story.html.

City's, which has existed since the 1980s and currently matches donations of up to \$175.¹¹⁶ The vast majority of city candidates participate.¹¹⁷ Studies of the 2009 and 2013 city elections found that participating candidates took in more than 60 percent of their funds from small donors and the public match.¹¹⁸

The central role small donors play in funding New York City campaigns has many benefits. Most notably, the system has increased the diversity of viewpoints influencing officeholders. Small donors are far more representative of the real makeup of New York than big donors in terms of race, income, education level, and where they live, and officeholders who court these campaign contributions spend more time talking to everyday New Yorkers.¹¹⁹ The comparison to state races that do not have small donor matching is remarkable. One study the Brennan Center conducted found that participating city candidates raised money from 90 percent of the city's census blocs, as compared to roughly 30 percent for state assembly candidates (who do not receive public matching dollars) running in the same areas.¹²⁰ The city's system has also helped more diverse candidates run, including the city's first African-American mayor and New York State's first female and first African-American elected attorney general, who began her career on the city council.¹²¹

¹¹⁶ "How It Works," New York City Campaign Finance Board, last accessed Feb. 11, 2019, <https://www.nycfcfb.info/program/how-it-works/>; Angela Migally, Susan M. Liss, Frederick A.O. Schwartz, Jr., *Small Donor Matching Funds: The NYC Election Experience*, Brennan Center for Justice, 2010, available at <https://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience>.

¹¹⁷ In 2017, 84 percent of candidates in New York City primaries opted to accept public funds; in 2013 it was 91 percent. *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, New York City Campaign Finance Board, 2018, 45-46, available at https://www.nycfcfb.info/pdf/2017_Post-Election_Report_2.pdf.

¹¹⁸ Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, Feb. 13, 2013, http://www.cfinst.org/Press/PReleases/14-02-13/Testimony_before_the_New_York_City_Campaign_Finance_Board_Says_Small_Donor_Matching_Funds_a_Success_but_the_City_Should_Look_at_Changes_Moving_Forward.aspx. Candidates who did not participate in the public financing system raised most of their money from donors of \$1,000 or more. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *What Is and What Could Be: The Potential Impact of Small-Donor Matching Funds in New York State Elections*, Campaign Finance Institute, 2013, 3, available at http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf.

¹¹⁹ As New York State Senator (and former City Council Member) Jose Serrano explained: "Imagine if you could spend a little less time [making fundraising calls], and a little more time in someone's living room, listening to conversations that they have, hearing the ideas that they may have. You can become a much more engaged and responsive candidate and hopefully elected official." DeNora Getachew and Ava Mehta, eds., *Breaking Down Barriers: The Faces of Small Donor Public Financing*, Brennan Center for Justice, 2016, 29, https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf. Councilmember Eric Ulrich, a Queens Republican, makes a similar point: "[t]he matching funds program has allowed for the voice of small donors and regular people to have a greater say in outcomes That has helped us transform how we serve our constituents. I have no choice but to listen to and engage the [constituents] in an overall discussion about what direction the city should go." *Id.* at 34.

¹²⁰ Elisabeth Genn, Michael J. Malbin, Sundee Iyer, Brendan Glavin, *Donor Diversity Through Public Matching Funds*, Brennan Center for Justice and Campaign Finance Institute, 2012, 4, available at www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

¹²¹ As New York State Attorney General Letitia James put it after being elected New York City Public Advocate: "The public financing system in New York City gave me the opportunity to compete and succeed, allowing me to represent individuals whose voices are historically ignored." Getachew and Mehta, *Breaking Down Barriers*, 7.

Conserving Taxpayer Funds. Small donor matching for congressional races would transform how they are funded in a cost-effective manner. While critics claim this reform will squeeze taxpayers,¹²² the actual price tag is modest. A reasonable estimate for congressional races comes out to less than \$1 per citizen per year over a ten year period.¹²³ There are many ways to come up with this sum that do not necessitate an increased burden on taxpayers.¹²⁴ There are also numerous safeguards in the Act against waste or other misuse of taxpayer funds, including detailed reporting obligations, a requirement that candidates spend available privately-raised funds at the same rate as they spend public funds, and a requirement that candidates remit unused public funds to the program.¹²⁵

Ultimately, *someone* pays for candidates to run for office. Whether those sponsors are a handful of wealthy special-interest donors or everyday Americans boosted by public dollars is up to Congress.¹²⁶ Small donor matching stands on firm constitutional ground.¹²⁷ No reform has the potential to be more transformative. The time to pass this system is now.

2. My Voice Vouchers (Title V, Subtitle B, Part 1)

H.R.1 also creates a pilot program to provide eligible donors with \$25 in “my voice vouchers” to give to congressional candidates of their choice in increments of \$5. While less common, vouchers are another promising type of small donor public financing, one that is

¹²² Mitch McConnell, “Behold the Democrat Politician Protection Act,” *Washington Post*, Jan. 17, 2019, https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-e5fed1b7a081_story.html.

¹²³ Lee Drutman, “Democrats’ Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers,” *Vox*, Jan. 14, 2019, <https://www.vox.com/polyarchy/2019/1/14/18182579/democrats-hr1-donor-campaign-finance-proposal-taxpayers>.

¹²⁴ See Skaggs and Wertheimer, *Empowering Small Donors*, 23; see generally *Public Financing of Elections: Where to Get the Money?* Center for Governmental Studies, 2003, available at www.policyarchive.org/handle/10207/bitstreams/232.pdf.

¹²⁵ One witness before a hearing conducted last week by the Committee on Oversight and Reform suggested that public financing programs “have a history of corrupt actors exploiting the system for personal gain” at taxpayers’ expense. Bradley A. Smith, *Testimony of Bradley A. Smith Before the U.S. House Oversight and Reform Committee: H.R. 1: Strengthening Ethics Rules of the Executive Branch*, Institute for Free Speech, Feb. 6, 2019, 11, available at <https://www.ifs.org/expert-analysis/testimony-of-bradley-a-smith-before-the-u-s-house-oversight-and-reform-committee/> (“Smith Testimony”). This is simply false. In New York City, for example, most instances of “corruption” that critics have tried to link to the small donor matching system involved no misuse of public matching funds or an attempted violation that was caught. Lawrence Norden, Brennan Center for Justice, “New York Senate Committee Denies Testimony from Campaign Finance Experts,” May 7, 2013, <https://www.brennancenter.org/analysis/ny-senate-committee-denies-testimony-campaign-finance-experts>. Ultimately, bad actors exist in every system. The key question is whether a public financing program is well-run, with good enforcement mechanisms that will find and stop misuse of public funds. The Act contains extensive provisions to do exactly that.

¹²⁶ As one political scientist recently put it: “There are no free lunches. If the public doesn’t foot the cost of political campaigns, wealthy donors and lobbyists will. And they will get something in return. And it will be far more than what they paid in. That’s how the system works. If we enact public financing through a small-donor matching system, the public will also get something in return. And it will be far more than what they paid in. That’s how the system works.” Drutman, “Democrats’ Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers.”

¹²⁷ As the Supreme Court observed in upholding the presidential system: “Public financing is an effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent constitutional values.” *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

especially beneficial for less wealthy Americans who cannot afford to make even small donations. Voters in the city of Seattle overwhelmingly passed a voucher program in 2015. In the first election where they were used, 18,000 Seattle residents contributed nearly 70,000 vouchers—more than double the total number of contributors in the 2013 election. Most of these donors had not contributed to any candidate in the two previous election cycles.¹²⁸ Voucher donors were much more representative of the city’s population, including women, people of color, younger residents, and less affluent residents.¹²⁹ The Brennan Center strongly supports piloting vouchers for federal elections.

3. Presidential Public Financing (Title V, Subtitle C)

Finally, H.R.1 revamps the presidential public financing system, which provides matching funds to primary candidates and block grants to general election nominees. Despite its success, that system ultimately failed because it did not afford candidates sufficient funds to compete in light of the dramatic growth in campaign costs.¹³⁰ The Act addresses this problem by increasing the primary match to a six-to-one ratio, increasing the block grant for nominees in the general election, and repealing burdensome limits on how much participating candidates can spend. The Brennan Center supports all of these changes.

B. Improving Federal Disclosure Law (Title IV, Subtitles B and C)

H.R. 1 also updates federal campaign disclosure rules, including by closing the main loopholes in federal disclosure law that have given rise to dark money and extending basic transparency requirements to online political ads.

The Rise of Dark Money. Over the last decade, the prevalence of secret money has become one of the biggest challenges for our campaign finance system. As recently as 2006, almost all federal campaign spending was transparent. But *Citizens United* made it possible for new types of entities to spend limitless funds on electoral advocacy—including 501(c)(4) and (c)(6) nonprofit corporations that are not required to make their sources of funding public.¹³¹ These dark money groups have spent almost \$1 billion on federal elections since 2010.¹³² And they have given millions more to super PACs, in a manner that allows those entities (which in theory do have to disclose their donors) to keep major underlying funders anonymous.¹³³ All of this secret spending tends to be concentrated in the closest races. One Brennan Center study of

¹²⁸ *First Look: Seattle’s Democracy Voucher Program*, Win Win Network and Every Voice Center, 2017, 2, available at <https://everyvoice.org/wp-content/uploads/2018/08/2017-11-15-Seattle-Post-Election-Report-FINAL.pdf>.

¹²⁹ *Id.* 3-5.

¹³⁰ Skaggs and Wertheimer, *Empowering Small Donors*, 11.

¹³¹ Weiner, *Citizens United Five Years Later*, 7.

¹³² Center for Responsive Politics, “Political Nonprofits (Dark Money),” last visited Jan. 24, 2019, https://www.opensecrets.org/outsidespending/nonprof_summ.php.

¹³³ Chisun Lee and Douglas Keith, “How Semi-Secret Spending Took Over Politics,” *The Atlantic*, Jun. 28, 2016, <https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/>.

the 2014 midterms, for instance, showed that more than 90 percent of dark money spending in Senate contests was concentrated in the eleven most competitive contests.¹³⁴

Dark money deprives voters of critical information needed to make informed decisions.¹³⁵ Voters are entitled to know who is trying influence them, and what those spenders want from the government. It is donor disclosure, as the *Citizens United* court itself pointed out, that allows voters to determine whether elected leaders “are in the pocket of so-called ‘moneyed interests.’”¹³⁶ Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.¹³⁷ Researchers have shown that the corporate managers who drive this giving sometimes do so for their own reasons, and not to maximize shareholder value.¹³⁸ Shareholders need transparency so they can monitor how their money is being spent.¹³⁹

The New Threat of Foreign Interference. More recently, it has come to light that lack of transparency is also providing multiple avenues for foreign governments and nationals to meddle in the American political system. In 2016, for example, the Russian government donated millions to the National Rifle Association, a 501(c)(4) nonprofit that does not disclose its donors. This money was allegedly intended to influence the presidential race.¹⁴⁰

Russia’s efforts to inject money into the 2016 election did not stop with dark money. Russian operatives also took advantage of weak disclosure rules for paid Internet ads. Overall, political advertisers spent \$1.4 billion online in the 2016 election, almost eight times what they spent in 2012.¹⁴¹ Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.¹⁴² Moreover, sophisticated micro-targeting tools have given rise to the “dark ad,” which is seen only by a narrowly targeted audience, threatening to remove much of the political debate around elections from public view.¹⁴³ Russian operatives exploited these capabilities to purchase millions of

¹³⁴ Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since Citizens United*, Brennan Center for Justice, 2015, 4, available at <https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf>.

¹³⁵ *Buckley*, 424 U.S. at 66-67 (explaining voters’ interest in knowing the sources of political money “to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”).

¹³⁶ 558 U.S. at 370.

¹³⁷ Weiner, *Citizens United Five Years Later*, 10.

¹³⁸ John C. Coates IV, “Corporate Politics, Governance, and Value Before and After *Citizens United*,” *Journal of Empirical Legal Studies* 9 (2012): 657.

¹³⁹ David Earley and Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center for Justice, 2012, 5-6, available at <https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution>.

¹⁴⁰ Peter Stone and Greg Gordon, “FBI Investigating Whether Russian Money Went to NRA to Help Trump,” *McClatchy*, Jan. 18, 2018, <https://www.mcclatchydc.com/news/nation-world/national/article195231139.html>.

¹⁴¹ Sean J. Miller, “Digital Ad Spending Tops Estimates,” *Campaigns & Elections*, Jan. 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

¹⁴² Nathaniel Persily, “Can Democracy Survive the Internet?” *Journal of Democracy* 28 (2017): 72.

¹⁴³ Christopher S. Elmendorf, Ann Ravel and Abby Wood, “Open up the black box of political advertising,” *San Francisco Chronicle*, Sept. 22, 2017, <http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php>.

targeted ads in an attempt to influence and foment discord around the 2016 election.¹⁴⁴ And Moscow's efforts in 2016 may serve as a blueprint for other malefactors. As former Homeland Security Secretary Jeh Johnson put it, "the Russians will be back, and possibly other state actors, and possibly other bad cyber actors."¹⁴⁵

Common Sense Reforms. H.R. 1 takes several key steps to deal with these problems. The DISCLOSE Act in Title IV, Subtitle B closes legal loopholes that have allowed dark money groups to refrain from disclosing their donors.¹⁴⁶ The Honest Ads Act in Title IV, Subtitle C expands disclosure and disclaimer requirements for "electioneering communications"¹⁴⁷—campaign ads that mention a candidate during the time leading up to an election—to include paid Internet or digital communications. And it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.¹⁴⁸

These changes will make U.S. campaigns significantly more transparent. But critics have charged they will require large numbers of Americans to disclose their political activities to the government.¹⁴⁹ That is not true. The Act places no additional requirements on individual contributors. Moreover, research has shown that dark money campaign spending is funded almost entirely by wealthy corporations and individuals; there is no evidence that large numbers of small donors will be impacted.¹⁵⁰

The Act does require relatively modest purchases of paid Internet ads to be included in platforms' public files, which is necessary because such ads can have a wide impact at relatively low cost. Russia's 2016 ads reached tens of millions of people, at a cost of roughly \$400,000.¹⁵¹ But these provisions are limited to those who purchase paid ads; the Act does not (as critics have wrongly implied)¹⁵² cover unpaid postings to an individual's personal website, social media account, or email.

Disclosure continues to stand on firm constitutional ground, with the Supreme Court repeatedly affirming that robust transparency is a permissible—and often preferred—means to

¹⁴⁴ For a more complete discussion of Russia's use of Internet ads in 2016, see Ian Vandewalker, *Oversight of Federal Political Advertisement Laws and Regulations: Statement before the Committee on House Oversight and Government Reform, Subcommittee on Information Technology*, Brennan Center for Justice, Oct. 24, 2017, available at <https://www.brennancenter.org/analysis/oversight-federal-political-advertisement-laws-and-regulations>.

¹⁴⁵ Andrew Rafferty, "Former DHS Chief Warns Russians Will Continue to Target U.S. Elections," *NBC News*, June 21, 2017, <https://www.nbcnews.com/politics/politics-news/former-dhs-chief-warns-russians-will-continue-target-u-s-n775116>.

¹⁴⁶ The Act amends statutory text that had been interpreted to require dark money groups to disclose only those donors who earmark their contributions to pay for a specific ad, which virtually never happens. It also prevents donors from funneling contributions through front groups to hide their true origin.

¹⁴⁷ 52 U.S.C. § 30104(f)(3).

¹⁴⁸ 47 C.F.R. 73.3526(e)(6), 73.3527(e)(5).

¹⁴⁹ *Smith Testimony*, 8; McConnell, "Behold the Democrat Politician Protection Plan."

¹⁵⁰ Derek Willis, "Shedding Some Light on Dark Money Political Donors," *ProPublica*, Sept. 12, 2018, <https://www.propublica.org/nerds/shedding-some-light-on-dark-money-political-donors>.

¹⁵¹ Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, 7, <https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections>.

¹⁵² *Smith Testimony*, 8.

prevent “abuse of the campaign finance system.”¹⁵³ And while transparency has become a subject of heated debate inside the Beltway, it remains overwhelmingly popular with the general public.¹⁵⁴ These are valuable reforms that, like small donor public financing, will help blunt the worst effects of *Citizens United*. Congress should pass these reforms without delay.

C. FEC Overhaul (Title VI, Subtitle A)

H.R.1 also overhauls the dysfunctional Federal Election Commission, which has failed to meaningfully enforce existing rules and would almost certainly struggle to implement the other campaign finance reforms in the Act.

A Deadlocked and Dysfunctional Commission. The FEC’s mission is to interpret and enforce federal campaign finance laws.¹⁵⁵ No more than three of its six members can be affiliated with any one party, and at least four votes are required to enact regulations, issue guidance, or even investigate alleged violations of the law.¹⁵⁶ By longstanding tradition, each of the two major parties takes half the FEC’s seats.¹⁵⁷ This has resulted in pervasive gridlock. The Commission routinely deadlocks on whether to pursue significant campaign finance violations—often after sitting on allegations for years without even investigating them.¹⁵⁸ Its process for issuing new regulations has virtually ground to a halt.¹⁵⁹ Increasingly, commissioners cannot

¹⁵³ *McCutcheon v. FEC*, 134 S.Ct. 1434, 1459 (2014) (plurality opinion)

¹⁵⁴ “A New York Times/CBS News Poll on Money in Politics,” *New York Times*, Jun. 2, 2015, <https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>.

¹⁵⁵ 52 U.S.C. § 30106(b)(1).

¹⁵⁶ 52 U.S.C. §§ 30106(c), 30106(f), 30107.

¹⁵⁷ Thomas E. Mann, “The FEC: Administering and Enforcing Campaign Finance Law,” in Anthony Corrado, et al., eds., *The New Campaign Finance Sourcebook*, Brookings Institute, 2005, 233, available at <https://www.brookings.edu/book/the-new-campaign-finance-sourcebook/>.

¹⁵⁸ See *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Office of FEC Commissioner Ann M. Ravel, 2017, 2, 4, available at https://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf. In one notorious case, in which a donor admitted that he had formed an LLC solely for the purpose of hiding a \$1 million contribution to a super PAC, the Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law. See Certification (Feb. 23, 2016), MUR 6485 (W Spann LLC et al.), available at <https://www.fec.gov/files/legal/murs/6485/16044390516.pdf>; Statement of Reasons, Comm’rs. Walther, Ravel & Weintraub, MUR 6485 (W Spann LLC, et al.), available at <https://www.fec.gov/files/legal/murs/6485/16044391123.pdf>; Statement of Reasons, Comm’rs. Petersen, Hunter & Lee, MUR 6485 (W Spann LLC, et al.), available at <http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf>.

¹⁵⁹ Among other things, the Commission has repeatedly deadlocked on proposals for a comprehensive rulemaking to address the effects of *Citizens United*. Minutes of an Open Meeting of the Federal Election Commission, Wednesday Jun. 15, 2011 (approved Jun. 30, 2011 as Agenda Document No. 11-39), available at https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Dec. 15, 2011 (approved Jan. 12, 2012 as Agenda Document No. 12-02), available at https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Mar. 7, 2013 (approved Apr. 11, 2013 as Agenda Document No. 13-11), available at https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See also Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking, Oct. 9, 2014, available at http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

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even agree on how to answer requests for interim guidance they receive through the Commission's advisory opinion process.¹⁶⁰

The Commission is also beset with management problems. It has not had a permanent general counsel (its chief legal officer and one of the two most important staff members) in more than five years.¹⁶¹ Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.¹⁶²

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,¹⁶³ rampant coordination between candidates and outside groups,¹⁶⁴ and vulnerability to foreign interference in our campaigns.¹⁶⁵ As a bipartisan group of lawmakers wrote President Trump last year, a dysfunctional FEC "hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity."¹⁶⁶ If not addressed, the Commission's problems could stymie implementation of the other ambitious reforms in the Act. Moreover, the agency's inability to enforce campaign finance laws contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.¹⁶⁷

A Necessary Overhaul. The Act addresses the FEC's main flaws through several targeted changes. It curtails gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with any party (effectively requiring one commissioner to be an independent). It creates clear lines of accountability for management issues by allowing the president to name a real chair¹⁶⁸ to serve as the FEC's chief administrative officer, with responsibility for the agency's day-to-day management. It helps ensure that commissioners will have the right temperament and qualifications by establishing a bipartisan blue ribbon advisory commission to publicly vet potential nominees. It ensures that the Commission will periodically

¹⁶⁰ See 52 U.S.C. §§ 30107(a)(7), 30108. Deadlocks on advisory opinion requests have increased exponentially, as detailed in a forthcoming Brennan Center white paper. See Daniel I. Weiner, *How to Fix the FEC*, Brennan Center for Justice, forthcoming 2019.

¹⁶¹ Dave Levinthal and Suhauna Hussain, "Five Years Ago, the Federal Election Commission's Top Lawyer Resigned. No Permanent Replacement Has et been Named," *Center for Public Integrity*, Jul. 4, 2018, <https://www.pri.org/stories/2018-07-04-five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent>.

¹⁶² Dave Levinthal, "Report: FEC Leaders, Managers Share Blame for Horrid Morale," *Center for Public Integrity*, Jul. 26, 2016 (updated Feb. 11, 2019), <https://publicintegrity.org/federal-politics/report-fec-leaders-managers-share-blame-for-horrid-morale/>.

¹⁶³ Lawrence Norden, Brent Ferguson, Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, available at <https://www.brennancenter.org/publication/five-four>.

¹⁶⁴ See Weiner, *Citizens United Five Years Later*, 8.

¹⁶⁵ Jordan Muller, "FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections," *OpenSecrets.org*, May 25, 2018, <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.

¹⁶⁶ Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately, 2018, <https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately>.

¹⁶⁷ Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 16, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.

¹⁶⁸ Currently the office rotates annually and is largely symbolic. See 52 U.S.C. § 30106(a)(5).

have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms.¹⁶⁹ And it helps streamline the enforcement process by giving the Commission's nonpartisan staff authority to investigate alleged campaign finance violations and dismiss frivolous complaints—subject to overrule by a majority vote of commissioners.¹⁷⁰

These changes would bring the FEC's structure more in line with other independent agencies, but with significantly greater safeguards to prevent either party from weaponizing the agency against its opponents. Critics nevertheless charge that H.R.1 would effectuate a partisan takeover of the FEC.¹⁷¹ They argue that, although the president could only nominate two of five commissioners from their own party, the FEC's new structure would allow presidents to install secret partisans in the third seat reserved for an independent.¹⁷² But as a legal matter, the president already has constitutional authority to nominate whomever they want to serve on the FEC, provided no more than three of the nominees are affiliated with one party at the time they are nominated.¹⁷³ The tradition of deferring to party leaders has no force of law.¹⁷⁴ By providing for public bipartisan vetting of nominees, H.R.1 actually establishes stronger safeguards than currently exist. In a similar vein, critics suggest that a presidentially-appointed FEC chair would be tantamount to an "election czar," with vast power to persecute the president's opponents.¹⁷⁵ But the role of chair envisioned by the Act is identical to that which exists at many other independent agencies, except without a working majority of commissioners from the chair's own party.¹⁷⁶

¹⁶⁹ All four of the current commissioners (there are two vacancies) have been in office since the George W. Bush administration, notwithstanding that they are theoretically limited to one six-year term. "All Commissioners," Federal Election Commission, accessed Oct. 18, 2018, <https://www.fec.gov/about/leadership-and-structure/commissioners/>. Before 1997, commissioners could be re-appointed to new terms an unlimited number of times. Congress eliminated reappointment with the goal of ensuring that the agency would periodically have fresh leadership, and to reinforce commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement. Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (Oct. 10, 1997). But allowing indefinite holdovers has created the worst of both worlds. There is still very little turnover, and commissioners whose terms have expired are even more beholden to the president and Congress, who can replace them at any time. Weiner, *How to Fix the FEC*.

¹⁷⁰ Under the Commission's present structure, even those wrongfully accused of violations must sometimes wait years for their names to be cleared. See, e.g., Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas), available at <https://www.fec.gov/files/legal/murs/6896/15044385209.pdf>; Notification with General Counsel's Report, MUR 6904 (Cat Ping for Congress), available at <https://www.fec.gov/files/legal/murs/6904/16044396706.pdf>.

¹⁷¹ *Smith Testimony*, 2; McConnell, "Behold the Democrat Politician Protection Plan."

¹⁷² *Smith Testimony*, 2.

¹⁷³ *Buckley*, 424 U.S. at 140.

¹⁷⁴ Daniel I. Weiner, "FEC's Status Quo is Hazardous—Proposed Legislation Would Help Fix It," *The Hill*, February 10, 2019, <https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it>.

¹⁷⁵ *Smith Testimony*, 3.

¹⁷⁶ That being said, any concerns about partisan domination of a restructured FEC can easily be addressed through minor changes to Act. For example, the Act could specify that any nominee who has been affiliated with a party at any time in the last five years (including registering as a member of the party or working for or representing the party or its candidates or officeholders) will be deemed affiliated with the party for purposes of determining partisan balance on the Commission. Model language can be found in legislation proposed in the last Congress. See H.R. 3953, 115th Congress (2017).

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Ultimately, no government institution functions independently from background norms that restrain excessive partisanship and other abuses of power. To insist that any reforms eliminate such risks entirely is to set an impossible standard. The Act makes sensible changes to the FEC's structure that deserve immediate passage.

D. Reforming Coordination Rules (Title V, Subtitle B)

H.R.1 also tightens restrictions on coordination between candidates and outside groups like super PACs that can raise unlimited funds, another important reform.

The Supreme Court has long held that outside campaign expenditures coordinated with a candidate can be “treated as contributions,” because “[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate.”¹⁷⁷ *Citizens United* did nothing to change that. When the Supreme Court struck down limits on how much outside groups could spend in federal elections, it did so on the assumption that these groups would operate independently of candidates. The Court reasoned that the absence of “prearrangement and coordination” would “undermine[] the value of the expenditure to the candidate” and alleviate the danger of quid pro quo corruption or its appearance.¹⁷⁸

Whether or not that was a correct assumption,¹⁷⁹ in reality the independence of much outside spending is illusory. In 2016, most presidential candidates had personal super PACs run by top aides or other close associates, whose only purpose was to get the candidate elected and for which the candidate often personally raised funds or even appeared in ads.¹⁸⁰ These entities are also becoming increasingly common in Senate and House races.¹⁸¹ Other forms of collaboration are also on the rise, such as the practice of super PACs and other outside groups republishing flattering b-roll footage that campaigns make available online.¹⁸² Even blatant instances of cooperation, like super PAC ads in which a candidate appears, have been excluded from the definition of “coordinated communication” and thus deemed not to count as contributions under federal rules.¹⁸³ These developments make it easy to circumvent contribution limits, especially for the class of billionaire mega-donors who have gained unprecedented influence in our elections.

H.R. 1 shores up federal coordination rules in important respects. It specifies that if a candidate and any outside group or individual collaborate on a communication that promotes,

¹⁷⁷ *Buckley*, 424 U.S. at 36-37.

¹⁷⁸ *Citizens United*, 558 U.S. at 360.

¹⁷⁹ There is evidence to suggest it was not. See Lawrence Norden and Iris Zhang, Brennan Center for Justice, “Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions,” Jan. 30, 2017, <https://www.brennancenter.org/analysis/scotus-fact-check>.

¹⁸⁰ Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015, 3, available at <https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016>.

¹⁸¹ Soo Rin Kim, Center for Responsive Politics, “Mine, All Mine: Single Candidate Super PACs, Creeping Down-Ballot,” Nov. 10, 2016, <https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/>.

¹⁸² Paul Blumenthal, “How Super PACs And Campaigns Are Coordinating In 2016,” *Huffington Post*, Nov. 14, 2015, https://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273.

¹⁸³ Comment of Brennan Center for Justice at NYU School of Law (Nov. 15, 2011), AO 2011-23 (American Crossroads), available at <https://www.fec.gov/data/legal/advisory-opinions/2011-23/>.

attacks, supports, or opposes that candidate (the so-called PASO standard), the communication will be deemed a contribution. It also clarifies that any reproduction of campaign footage or materials also constitutes a contribution. And it creates a new category of “coordinated spenders,” groups whose actual ties to a candidate are so close that it is simply not plausible to think that the group’s spending in support of the candidate is truly independent.

Critics have attacked the constitutionality of these provisions on a number of grounds that do not withstanding scrutiny.¹⁸⁴ Far from being unconstitutional, the Act’s strengthening of federal coordination rules is in line with regulatory trends in the states.¹⁸⁵ These changes are necessary to restore the integrity of campaign contribution limits and we strongly support their passage.

E. Helping Diverse Candidates Run (Title V, Subtitle D)

Finally, the Help America Run Act in Title V, Subtitle D of H.R.1 establishes an innovative reform to help middle- and working-class candidates run for office. Campaigning for federal office is a demanding job, one that can require successful candidates to take months or even years away from paid work or full-time care of loved ones. That is simply not an option for many middle- and working-class Americans.¹⁸⁶ FEC regulations allow non-incumbents to pay themselves a salary out of campaign funds, but doing so is relatively rare, and can open a candidate up to criticism.¹⁸⁷ The Act provides a new option for non-wealthy candidates who do

¹⁸⁴ For, example, the Supreme Court has never held that strong coordination rules may only be applied to political committees. See *Smith Testimony*, 5. Doing so would create an enormous loophole given how active non-PAC dark money groups are in federal races. See Part II(B). Equally unfounded are criticisms of the PASO (promote support attack oppose) standard the Act uses to determine which communications can be coordinated. See *Smith Testimony*, 5. As the Supreme Court noted when it upheld the standard in *McConnell v. FEC*, “[p]ublic communications’ that promote or attack a candidate for federal office ... undoubtedly have a dramatic effect on federal elections.” *McConnell v. FEC*, 540 U.S. 93, 169-70 (2003). The Court has repeatedly declined to revisit this aspect of *McConnell*, most recently in 2017. See *Republican Party of Louisiana v. FEC*, 137 S.Ct. 2178 (2017). In light of this benefit, when such communications are made in collaboration with a candidate it is entirely reasonable to treat them as contributions. Finally, designating certain groups as “coordinated spenders” does not impermissibly presume coordination based solely on a group’s identity, as the Supreme Court has disallowed. See *Smith Testimony*, 5; *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996). The case cited by opponents of the Act, rejected an absolute presumption of coordination for party communications based on the supposed nature of political parties. *Colorado Republican*, 518 U.S. at 621 (Breyer, J., lead op.). The Act, in contrast, provides that groups will be deemed “coordinated spenders” based on specific facts that make any assertion of independence implausible.

¹⁸⁵ See, e.g., Conn. Gen. Stat. § 9-601c (2013), Cal. Code Regs. tit. 2, § 18225.7 (2015); Chisun Lee, et al., *After Citizens United: The Story in the States*, Brennan Center for Justice, 2014, available at <https://www.brennancenter.org/publication/after-citizens-united-story-states>.

¹⁸⁶ Geoff Williams, “Can You Afford to Be a Politician?,” *U.S. News*, July 16, 2013, <https://money.usnews.com/money/personal-finance/articles/2013/07/16/can-you-afford-to-be-a-politician>

¹⁸⁷ See Ashley Balcerzak, “You’re Young and Broke. Here’s How to Still Win a Congressional Seat,” *Center for Public Integrity*, Dec. 10, 2018, <https://publicintegrity.org/federal-politics/young-broke-money-win-congress-election/> (“Most candidates [for federal office] don’t take advantage of this provision [allowing them to draw a salary. At least 22 candidates running in the 2017-2018 election cycle that together paid themselves about \$155,000 from campaign funds. None of the candidates the Center for Public Integrity identified this cycle appeared to collect a \$174,000 salary.”); Sam Janesch, “Jess King is the only Pennsylvania candidate for Congress drawing a salary from her campaign,” *Lancaster Online*, Jul. 20, 2018, https://lancasteronline.com/news/politics/jess-king-is-the-only-pennsylvania-candidate-for-congress-drawing/article_86c5de3c-8b96-11e8-bc8f-3f9a023379f9.html; Michelle

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not want to pay themselves a salary, allowing them to instead use campaign funds to cover specific expenses like child, elder, or other dependent care, health insurance premiums, and professional dues. Giving non-wealthy candidates more ways to make ends meet so they can run for office is another step towards truly representative government, one that we strongly support.

III. Redistricting Reform (Title II, Subtitle E)

The Redistricting Reform Act of 2019 in Title II, Subtitle E of H.R. 1 would end extreme partisan gerrymandering by requiring states to use independent citizen commissions for congressional redistricting, in a way that respects the Voting Rights Act and preserves communities of interest.

The need for reform is urgent. Extreme gerrymandering has reached levels unseen in the last 50 years. As Brennan Center research has shown, this decade's skewed maps have consistently given Republicans 15-17 extra congressional seats over the course of the whole decade.¹⁸⁸ Shifts in political winds have virtually no electoral impact in gerrymandered states. In 2018, for example, a political tsunami year for Democrats, no districts changed parties in Ohio and North Carolina, two states with extremely biased maps. Despite the fact that Democrats earned nearly half the vote in both states, they won only a quarter of the seats. The overwhelming majority of the seats that did change parties in 2018—72 percent—were drawn by commissions and courts.¹⁸⁹

To be clear, Republicans are not alone in rigging districts to their advantage. A Democratic gerrymander in Maryland was proven to be just as unbreakable in the Republican wave of 2014.¹⁹⁰ Both parties are more than capable and willing to draw districts that primarily serve their partisan ends if given the opportunity, and both have done so this decade with devastating consequences for American democracy.

Many of this decade's redistricting abuses have come at the expense of communities of color. When Republican-drawn maps in Virginia, North Carolina, and Texas were successfully challenged on the grounds that they discriminated against minority voters, the states defended the maps by arguing that politics, rather than race, had been the driving force behind their maps.¹⁹¹ Democrats in Maryland, likewise, rejected a congressional map that would have given African-Americans additional electoral opportunities because that would have created an additional

Tsai, "Take the Money and Run?" *Slate*, Dec. 20, 2007, <https://slate.com/news-and-politics/2007/12/do-presidential-candidates-receive-a-salary.html> ("[I]t's almost considered bad form for someone seeking the presidency [to accept a salary]").

¹⁸⁸ Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, 2017, 6-13, available at <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf>.

¹⁸⁹ Annie Lo, "How Did Democrats Flip the House? Fairer Maps," *Brennan Center for Justice*, Dec. 7, 2018, <https://www.brennancenter.org/blog/how-did-democrats-flip-house-fairer-maps>.

¹⁹⁰ *Benisek v. Lamone*, ___ F. Supp. 3d ___ (2018).

¹⁹¹ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, "Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA," *William and Mary Law Review* 59, no. 5 (2018): 1559-1600.

Republican seat.¹⁹² Without a rule that makes disadvantaging minority voters for partisan gain illegal, this type of discrimination will continue and grow.

Congressional action is necessary to stop partisan and racial gerrymandering. If not reined in, the problem will only get worse next cycle. Increasingly sophisticated technologies and voter data enable modern line-drawers to lock in a durable partisan advantage with shocking accuracy. And in light of the successful gerrymanders of this past decade, political operatives will have a strong incentive (and little disincentive) to manipulate these tools for their advantage.

The courts alone will not and cannot solve the problem. Even if the United States Supreme Court develops a manageable standard for partisan gerrymandering, judicial intervention would likely be limited to the most egregious cases. It will also require aggrieved voters to resort to expensive, time-consuming, and complicated litigation in order to obtain a remedy years later. Maps drawn in 2011 are still being challenged in nearly half a dozen states even though the next round of redistricting is only two years away. The burden that this places on communities that are the most affected by gerrymandering is unacceptable.

Congress has the authority to fix congressional redistricting.¹⁹³ As the Supreme Court has recognized, “the Framers provided a remedy” in the Constitution for redistricting abuses through the “power bestowed on Congress to regulate elections, and . . . to restrain the practice of political gerrymandering.”¹⁹⁴ Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.¹⁹⁵ In 1967, for example, Congress required all states to use single member congressional districts to end the drawing of racially discriminatory multimember districts, a practice adopted to defy the call of the Voting Rights Act.¹⁹⁶

H.R. 1 Offers Bold Solutions for Congressional Redistricting. These abuses require strong solutions. The Redistricting Reform Act would be the boldest and most comprehensive exercise of this congressional authority. It would require states to use independent redistricting commissions to draw congressional maps and impose a uniform set of rules for how districts should be drawn, prioritizing criteria like keeping communities together, and expressly ban partisan gerrymandering. It would also open the process to public oversight and participation.

The experience of states like California and Arizona show that independent commissions work. California went from having a congressional map that was one of the least responsive to electoral changes in the nation to one of the most.¹⁹⁷ California’s maps did not just improve

¹⁹² Aaron C. Davis, “Redistricting in Md. has element of racial friction,” *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html?utm_term=.b84f2191878d.

¹⁹³ *Arizona v. Intertribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

¹⁹⁴ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹⁹⁵ 55 STAT. 761 (1941); 2 U.S.C. §2a (Supp. 1950); 54 STAT. 162 (1940); 46 STAT. 21 (1929); 37 STAT. 13 (1911); 31 STAT. 733 (1901); 26 STAT. 735 (1891); 22 STAT. 5 (1882); 17 STAT. 28 (1872); 12 STAT. 353 (1862); 10 STAT. 25 (1852); 9 STAT. 432 (1850); 5 STAT. 491 (1842); 4 STAT. 516 (1832); 3 STAT. 651 (1822); 2 STAT. 669 (1811); 2 STAT. 128 (1802); 1 STAT. 253 (1792).

¹⁹⁶ 2 U.S.C. § 2c

¹⁹⁷ Royden and Li, *Extreme Maps*, 23, 26, 29; Laura Royden, Michael Li, and Yuri Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice (2018), 17-19, available at <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Gerrymandering%204.24.18.pdf>.

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political fairness. They also kept communities of interest together, increased representation for communities of color, and enhanced the opportunity for competition.¹⁹⁸

It is little wonder that independent commissions are popular among voters. Last year, a record five states passed redistricting reform for congressional and/or legislative districts. The Ohio proposal carried every single congressional district in the state by a supermajority.¹⁹⁹ Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.²⁰⁰

H.R. 1 builds on what has been proven to work. Commissions would contain equal numbers of Republican, Democratic, and unaffiliated commissioners, with voting rules that ensure that no one party would be able to dominate the redistricting process. Additionally, all potential commissioners would be screened for conflicts of interest to ensure that they do not have a personal stake in the outcome.

The Act's establishment of a clear set of mapdrawing rules, listed in the order in which they are to be applied,²⁰¹ is an important and ground-breaking change. Federal law currently has next to no rules governing how districts are to be drawn.²⁰² Likewise, most states, with a handful of exceptions, have few rules governing congressional redistricting. This has allowed abuses to run rampant. Left unchanged, this is a situation that will only get worse in coming years. The Act's ban on partisan gerrymandering and enhanced protections for communities of color and communities of interest would further stem the kinds of abuses we saw this decade.

Finally, the Act would transform what has historically been an opaque process into one that is transparent and participatory. Commission business would be done in open public meetings and subject to oversight. Data and other information would be made available and all official communications would be subject to disclosure. Community groups and members would get a say through testimony and other feedback mechanisms. Each commission would be required to show its work and assure fairness by issuing a detailed report before taking a final vote on a plan. In short, redistricting would no longer be done in backroom deals.

These changes would dramatically improve congressional representation for all Americans, combining best practices for assuring fair, effective, and accountable representation. We urge Congress to enact them.

¹⁹⁸ Royden and Li, *Extreme Maps*, 23, 26, 29; Royden, Li, and Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, 17-19.

¹⁹⁹ Peter Miller and Annie Lo, "Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election," *Brennan Center for Justice*, Nov. 7, 2018, <https://www.brennancenter.org/blog/support-ohio-issue-1-ballot-measure-2018-primary-election>.

²⁰⁰ Peter Miller and Brianna Cea, Brennan Center for Justice, "Everybody Loves Redistricting Reform," Dec. 5, 2018, <https://www.brennancenter.org/blog/everybody-loves-redistricting-reform>.

²⁰¹ The criteria are based on best practices as developed by a number of civil rights and good government groups that study redistricting. See "Redistricting Principles for a More Perfect Union," Common Cause, accessed Feb. 12, 2019, <https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#>.

²⁰² There are no federal redistricting-specific regulations beyond the requirement that districts be single member and equally populated. For racial and language minorities, there are also protections available under the Equal Protection Clause and the Voting Rights Act.

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IV. Election Security

The Elections Security Act, in Titles I and III of H.R. 1, would take critical steps to dramatically improve security and reliability of our election infrastructure.

In the last two years, we learned disturbing details about attacks against American election infrastructure. Foreign adversaries and cyber criminals are alleged to have successfully breached state voter registration systems²⁰³ and election night results reporting websites.²⁰⁴ Attacks against election systems across the globe give us reason to fear this could be the tip of the iceberg, and that we must guard against even more ambitious efforts in the future.²⁰⁵ Our intelligence community continues to warn that “numerous actors are regularly targeting election infrastructure.”²⁰⁶ Although we may have escaped a serious cyber breach in the 2018 midterms, as Christopher Krebs of the Department of Homeland Security put it, “the big game we think for the adversaries is probably 2020.”²⁰⁷

Despite these clear threats, thirteen states continue to use voting machines that have no paper backup (which security experts have consistently argued is a minimum defense necessary to detect and recover from cyberattacks);²⁰⁸ few states regularly review their paper backups to audit their election results;²⁰⁹ private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark;²¹⁰ and election officials across the country say they lack the resources to implement critical election

²⁰³ Rick Pearson, “State Officials Say Russian Hackers Stole 76k Illinois Voters’ Info in 2016, not 500K,” *Chicago Tribune*, August 8, 2018, <https://www.chicagotribune.com/news/local/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html>.

²⁰⁴ Tyler Whetstone, “Knox County election night cyberattack was smokescreen for another attack,” *Knox News*, May 17, 2018, <https://www.knoxnews.com/story/news/local/2018/05/17/knox-county-election-cyberattack-smokescreen-another-attack/620921002/>.

²⁰⁵ Lawrence Norden and Ian Vandewalker, *Securing Elections from Foreign Interference*, Brennan Center for Justice, 2017, 7, available at <https://www.brennancenter.org/publication/securing-elections-foreign-interference>.

²⁰⁶ Pete Williams and Pete Dilanian, “DHS Finds Increasing Attempts to Hack U.S. Election Systems Ahead of Midterms,” *NBC News*, Oct. 15, 2018, <https://www.nbcnews.com/politics/national-security/dhs-finds-increasing-attempts-hack-u-s-election-systems-ahead-n920336>.

²⁰⁷ Colleen Long and Michael Balsamo, “Cybersecurity Officials Start Focusing on the 2020 elections,” *Associated Press*, November 8, 2018, <https://www.apnews.com/cfaa16f6a86349bebc16e0633d6214dd>.

²⁰⁸ Lawrence Norden and Wilfred U. Codrington III, Brennan Center for Justice, “America’s Voting Machines at Risk – An Update,” Mar. 8, 2018, <https://www.brennancenter.org/analysis/americas-voting-machines-risk-an-update>; see also Dustin Volz and Patricia Zengerle, “Inability to Audit U.S. elections a ‘National security Concern’: Homeland Chief,” *Reuters*, Mar. 21, 2018, <https://www.reuters.com/article/us-usa-trump-russia-security/inability-to-audit-u-s-elections-a-national-security-concern-homeland-chief-idUSKBN1GX20Q>; see also *Securing the Vote: Protecting American Democracy*, National Academies of Sciences, Engineering, and Medicine, 2018.

²⁰⁹ Chris Deluzio, Brennan Center for Justice, “A Smart and Effective Way to Safeguard Elections,” last modified July 25, 2018, <https://www.brennancenter.org/blog/smart-and-effective-way-safeguard-elections>; Lawrence Norden, Aaron Burstein, Joseph Lorenzo Hall, and Margaret Chen, *Post-Election Audits: Restoring Trust in Elections*, Brennan Center for Justice and Samuelson Law, Technology & Public Policy Clinic, 2007, available at <https://www.brennancenter.org/publication/post-election-audits-restoring-trust-elections>.

²¹⁰ Nicole Perloth, Michael Wines and Matthew Rosenberg, “Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny,” *New York Times*, Sept. 1, 2017, <https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html>.

security measures.²¹¹ Unfortunately, our election security is only as strong as our weakest link.

This Act would dramatically improve the security and resilience of our nation's election administration infrastructure by replacing paperless voting systems; promoting the use of risk-limiting audits; adding electronic poll books to the list of voting systems subject to security standards; regulating election system vendors; and ensuring a consistent stream of dedicated election security funding.

A. Replacing Paperless Voting Systems (Title I, Subtitle F)

First and foremost, the Act would mandate the replacement of all paperless electronic voting machines with machines that require an individual paper record of each vote. Top security experts—from the National Academies of Sciences, Engineering and Medicine, the national intelligence community, academia and industry—agree that replacing paperless voting systems is a top priority.²¹² This step is critical to improving election security because, as the National Academies put it, “[p]aper ballots form a body of evidence that is not subject to manipulation by faulty software or hardware and ... can be used to audit and verify the results of an election.” Without that record and check, software manipulation or a bug could change an election result without detection. Further, as Virginia showed in 2017 when it was forced to replace paperless systems just months before a high-profile gubernatorial election after learning of serious security vulnerabilities in its systems, this transition can easily be accomplished in the timeframe provided in this Act.²¹³

B. Supporting Risk Limiting Audits (Title III, Part 2)

The Act would also provide funds for states to implement risk-limiting audits of their elections. Risk-limiting audits are considered the “gold standard” of post-election audits because they efficiently provide a high level of statistical confidence in the reported election outcome.²¹⁴ While paper records will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems, risk-limiting audits use these paper records and are

²¹¹ Lawrence Norden and Christopher Famighetti, *America's Voting Machines at Risk*, Brennan Center for Justice, 2015, 5, available at <https://www.brennancenter.org/publication/americas-voting-machines-risk>.

²¹² *Securing the Vote: Protecting American Democracy*, 5; Lawrence Norden, *The Machinery of Democracy: Protecting Elections In An Electronic World*, Brennan Center for Justice, 2006, available at <https://www.brennancenter.org/publication/machinery-democracy-protecting-elections-electronic-world-0>; *Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations*, U.S. Senate Select Committee on Intelligence, 2018; Olivia Beavers, “DHS Chief Calls on Officials in all 50 States to Have ‘Verifiable’ Ballots by 2020 Election,” *The Hill*, August 22, 2018, <https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-on-election-officials-in-all-50-states-to-have>; see also Norden and Famighetti, *America's Voting Machines at Risk*.

²¹³ Jenny Portnoy, “Va. Board of Elections Votes to Decertify Some Voting Machines,” *Washington Post*, April 14, 2015, https://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e_story.html?utm_term=.7e6be4bfcc0a; Laura Vozzella, “Virginia Scraps Touch-screen Voting as Election for Governor Looms,” *Washington Post*, Sept. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html.

²¹⁴ Mark Lindeman and Philip B. Stark, “A Gentle Introduction to Risk-Limiting Audits,” *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, available at <https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf>.

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designed to detect and correct any election outcomes impacted by such abnormalities. They are quickly growing in popularity. Two states already mandate them for use in the 2020 election,²¹⁵ and election officials in over a dozen jurisdictions across the country have either piloted them in the last year or will do so in 2019.²¹⁶

C. Expanding Definition of Voting Systems to Include Electronic Poll Books (Title III, Part 3)

Also important, the Act would expand the existing voting equipment testing and certification process to include electronic poll books. Although poll books handle some of our most sensitive information, they have not been subject to even voluntary federal certification standards. As multiple states with substantive election IT divisions already have state electronic pollbook certification standards,²¹⁷ a voluntary federal certification standard is sorely needed.

D. Regulating Election System Vendors (Title III, Part 8)

Currently, there is almost no federal oversight of private vendors that design and maintain the election systems that store our personal information, tabulate our votes, and communicate important election information to the public. The Brennan Center has documented numerous instances of voting system failures that could have been prevented had vendors notified their clients of previous failures in other jurisdictions using the same voting equipment.²¹⁸ Among other things, the Act would require that any vendors who receive payment from grants made under the Act (1) certify that the infrastructure they sell to local election jurisdictions is developed and maintained in accordance with cybersecurity best practices, (2) certify that their own information technology is maintained in accordance with cybersecurity best practices, and (3) promptly report any suspected cybersecurity incident directed against the goods and services they provide under these grants.

E. Ensuring a Consistent Stream of Federal Funding to Secure our Election Infrastructure.

The Act provides funds for critical security measures, both to secure our elections ahead of 2020, and also to cover maintenance and upgrades to voting systems for years to come. These resources are necessary since the race to secure our elections is one without a finish line, and our

²¹⁵ *Securing the Nation's Voting Machines A Toolkit for Advocates and Election Officials*, Brennan Center for Justice, available at <https://www.brennancenter.org/sites/default/files/publications/Securing%20the%20Nation%27s%20Voting%20Machines.pdf>.

²¹⁶ Making Every Vote Count: A Practical Guide to Risk-Limiting Audits, https://youtu.be/gMbz0_dizoA.

²¹⁷ See, e.g., Cameron Glenn Sasnett, *Electronic Pollbook Certification Procedures & System Requirements*, Virginia State Board of Elections Election Administration and Compliance Division, 2015, available at <https://www.eac.gov/assets/1/28/Virginia%20EPB%20Certification%20Procedures%20and%20System%20Requirements%20REV-05151.pdf>; *Standards Governing the Examination and Certification of Electronic Poll Books in Use in Ohio*, Ohio Board of Voting Machine Examiners, Feb. 6, 2014, <https://www.eac.gov/assets/1/28/Final%20-%20Standards%20for%20the%20Examination%20and%20Certification%20of%20Electronic%20Pollbooks%20for%20Use%20in%20Ohio%20Elections1.pdf>.

²¹⁸ Lawrence Norden, *Voting System Failures: A Database Solution*, Brennan Center for Justice, 2010, available at <https://www.brennancenter.org/publication/voting-system-failures-database-solution>.

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adversaries will undoubtedly change and advance their methods of attack. The responsibility for funding elections must be shared among local, state, and federal governments, and the Act ensures that the federal government pays its fair share of the ongoing cost of voting systems, with a consistent stream of federal funding for states to procure and maintain secure equipment and implement state-of-the-art security measures to ensure the integrity of our elections.

The election security measures in H.R. 1 would not only make our election infrastructure more secure, but it would also help reduce the unconscionably long lines that so many voters experience every election. That would go a long way toward restoring Americans' confidence in our elections. We look forward to continuing to work with Congress to ensure sufficient federal resources for state and local election officials and sufficient national standards to ensure that funding is spent effectively.

V. Ethics (Titles VII-X)

H.R. 1 would establish stronger ethics rules for all three branches of government. Its policies are essential first steps toward strengthening ethics and accountability. The values that undergird our system of representative government are being tested like never before. Ethical constraints on self-dealing at the highest levels of government are eroding.²¹⁹ To reverse this process, it is vital that Congress put forward bold reforms to help ensure that officials act for the public good rather than private gain.

As detailed in the testimony of Brennan Center Senior Counsel and Spitzer Fellow Rudy Mehrbani before the House Committee on Oversight and Reform, the Brennan Center strongly supports all the Act's ethics reforms, especially its measures to increase the independence and authority of the Office of Government Ethics, provide better transparency for top officials, and slow the "revolving door" between government and industry. These are especially valuable changes.²²⁰ We also strongly support the Act's requirement that the Judicial Conference of the United States develop a code of conduct that includes Supreme Court justices, as explained in more detail in a letter my colleagues and I sent to the House Judiciary Committee on January 29, 2019.²²¹ We look forward to continuing to work with Congress on other much-needed reforms.²²²

VI. Authority of Congress

Finally, Congress unequivocally has the authority to enact all the democracy reforms set forth in Act, especially under Article I, Section 4 of Constitution—known as the Elections

²¹⁹ Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 2.

²²⁰ Rudy Mehrbani, *For the People Act of 2019: Hearing on H.R. 1, "Strengthening Ethics Rules for the Executive Branch," Before the House Comm. On Oversight and Reform*, Feb. 6, 2019, available at <https://www.brennancenter.org/analysis/testimony-support-people-act> ("Mehrbani Testimony").

²²¹ H.R. 1, *The For the People Act: Letter to the Committee on the Judiciary*, 116th Cong. (2019) (letter from Wendy R. Weiser, Myrna Pérez, Daniel I. Weiner, Max Feldman), available at <https://www.brennancenter.org/analysis/letter-house-judiciary-committee-support-hr-1-people-act>.

²²² *Mehrbani Testimony*, 14-15.

Clause. The Elections Clause empowers Congress, “at any time,” to “make or alter” any regulations for federal elections.²²³

With the exception of a 1921 case that has since been overturned, the Supreme Court has consistently interpreted the Elections Clause to endow Congress with sweeping power to regulate the time, place, and manner of elections.²²⁴ As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress’s power under the Elections Clause is so broad that it includes “authority to provide a complete code for congressional elections[.]”²²⁵ Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,²²⁶ redistricting,²²⁷ campaign finance,²²⁸ and corruption in presidential elections.²²⁹

²²³ The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing [sic] Senators.” U.S. Const. art. I, § 4, cl. 1.

²²⁴ See, e.g., *Inter Tribal Council*, 570 U.S. at 9 (“The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’”) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)); *Ex parte Yarbrough*, 110 U.S. 651, 661–62 (1884) (“it is not doubted” “that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud”); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (“We regard it as . . . unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box.”); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (“It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”); *United States v. Classic*, 313 U.S. 299, 319–20 (1941) (“Unless the constitutional protection of the integrity of ‘elections’ extends to primary elections, Congress is left powerless to effect the constitutional purpose. . . . Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of ss 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.”); *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry v. United States*, 256 U.S. 232 (1921), which had held that the Elections Clause did not apply to primary elections); *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) (“The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts.”); *Foster v. Love*, 522 U.S. 67, 72 n.2 (1997) (“The [Elections] Clause gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”) (quoting *Smiley*, 285 U.S. at 366).

²²⁵ *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

²²⁶ *Id.*

²²⁷ *Vieth*, 541 U.S. at 275 (stating that the Elections Clause “permit[s] Congress to ‘make or alter’” the “districts for federal elections”); *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (“Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures . . . and argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people’s right to equality of representation in the House.”) (citations omitted).

²²⁸ *Buckley*, 424 U.S. at 13 (“The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.”).

²²⁹ *Id.* 132 (“This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.”) (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

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There is thus no question that most of the Act's provisions fall squarely within Congress's authority over federal elections. Some, such as Congress's power to strengthen the Voting Rights Act and to restore voting rights to individuals with past convictions under Title I, Subtitle E, are also rooted in authority granted to it under the Fourteenth and Fifteenth Amendments.²³⁰

In fact, the Act embodies the Framers' central goal in establishing the Elections Clause—ensuring that Congress can override efforts by states to manipulate the federal voting process.²³¹ As they drafted the Constitution, the Framers were concerned that states, left to their own devices, would suppress or skew the vote. For example, at the Constitutional Convention, James Madison urged that, without the Elections Clause, “[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.”²³² The Framers therefore designed the Elections Clause to prevent states from manipulating election outcomes and to prevent the development of factions within states that might “entrench themselves or place their interests over those of the electorate.”²³³ The Framers deliberately granted wide-ranging authority under the Elections Clause to ensure that Congress would be able to combat even those state abuses of power that were unforeseeable at the time.²³⁴ Thus, as Justice Scalia recognized, the states' power to regulate federal elections has always been subject to federal law.²³⁵

* * *

Voters sent a clear message in 2018: they want to see Congress tackle these problems with bold solutions to ensure that all Americans can participate in the political process and have their voices heard in the halls of government. Now it is up to elected leaders to deliver. H.R. 1 is a down-payment on the promise of a democracy that works for everyone. We urge its prompt passage.

Thank you.

²³⁰ *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Mitchell*, 400 U.S. at 121, 124 (1970).

²³¹ The Avalon Project: Documents in Law, History and Diplomacy, “Federalist No. 59,” accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.

²³² Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2:241.

²³³ *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2672 (2015).

²³⁴ At the Constitutional Convention, James Madison explained that the Elections Clause uses “words of great latitude” because “it was impossible to foresee all the abuses that might be made of the [states'] discretionary power.” Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2: 240.

²³⁵ *Inter Tribal Council*, 570 U.S. at 14–15 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)).

The CHAIRPERSON. Thank you very much.
Mr. Wertheimer.

STATEMENT OF FRED WERTHEIMER

Mr. WERTHEIMER. Thank you, Chairperson Lofgren.

Chairperson Lofgren, Ranking Member Davis, members of the Committee, I appreciate the opportunity to testify today on behalf of Democracy 21. We would like to recognize and thank Representative Sarbanes and House Speaker Pelosi for their outstanding leadership on H.R. 1. I would also like to express Democracy 21's support for your legislation, Chairperson Lofgren, that addresses the problem of extreme partisan gerrymandering in this country.

H.R. 1 contains a number of campaign finance reforms, which we address in our written testimony. My remarks today will focus on the legislation sponsored by Representative Sarbanes that is incorporated in H.R. 1 and provides for an alternative way to finance campaigns.

An NBC-Wall Street Journal poll last fall found that 77 percent of registered voters said reducing the influence of special interests and corruption in Washington is the most important or a very important issue facing the country.

We need to be clear about this: Influence, money, corruption in Washington, and the appearance of such corruption, will not stop until a new way is found for Federal candidates to finance such their campaigns.

The new financing system in H.R. 1 would allow candidates to run for office without being dependent on or obligated to big money or special interest funders. It would empower ordinary Americans by making their small contributions more important and valuable to candidates. It would greatly reduce the power and influence of big money funders by freeing candidates who voluntarily choose this system to run competitive races for office without the need for their financial support. And it would create opportunities for new candidates to enter the political process and run for office.

In the last four elections super-PACs that sprang up in the wake of Citizens United raised nearly \$5 billion in unlimited contributions to spend in Federal elections. During this period the top 10 individual donors alone contributed \$1 billion to super-PACs. That is an average of \$100 million per donor. That is not how our democracy is supposed to work.

The success of the Presidential public financing system for more than two decades provides a compelling case for the small-donor matching funds system in H.R. 1.

We do not know yet how H.R. 1's system is going to be paid for, but we do have a track record on a public financing system that was paid for by taxpayers. Every Republican nominee for President from 1976 to 2008 used that system. Every Democratic nominee used it until 2004.

Presidents Ford, Carter, Reagan, George H.W. Bush, Clinton, and George W. Bush, all used the Presidential public financing system. They used taxpayer money to become President. Ronald Reagan used it three times and used it twice to win the Presidency.

The Democratic and the Republican Party used taxpayer funds to pay for their conventions from 1976 to 2012.

Now, those candidates and the parties never expressed concern when they applied for and accepted taxpayer funding.

The Supreme Court has upheld the constitutionality of public financing in *Buckley v. Valeo* and again in an opinion in 2011 written by Chief Justice Roberts. The system broke down because the costs of campaigns, Presidential campaigns, rose dramatically and Congress never adjusted the system. H.R. 1 will now modernize the system.

On the point made about H.R. 1 restricting free speech, *Buckley v. Valeo*, *McConnell*, and *Citizens United* have all held the kind of disclosure set forth in H.R. 1.

Thank you.

[The statement of Mr. Wertheimer follows:]

Testimony of Democracy 21 President Fred Wertheimer

In Support of H.R. 1

Before the House Administration Committee

February 14, 2018

Chair Lofgren, Ranking Member Davis and members of the Committee, I would like to thank you for the opportunity to appear before the Committee today to testify in support of H.R. 1, the For the People Act of 2019.

Democracy 21 applauds Speaker Pelosi and Rep. Sarbanes for their leadership on H.R. 1, an historic effort to repair the rules of our democracy.

We would also like to extend our praise and appreciation to Chair Lofgren, Rep. Lewis, Rep. Price, Rep. Cicilline and the other important House reform leaders whose bills are incorporated into this comprehensive democracy reform legislation.

I also would like to express Democracy 21's support for your bill, Chair Lofgren, to address partisan gerrymandering, which is incorporated into H.R. 1 and which would end the extreme gerrymandering that is doing great damage to our system of representative government.

Our country today has a broken political system and a corrupt campaign finance system.

The American people know this and they know it must be fixed.

An NBC News/Wall Street Journal [poll](#) last fall, for example, found that 77 percent of registered voters said "reducing the influence of special interests and corruption in Washington" is "the most important or a very important issue facing the country."

Today, our campaign finance system allows big money funders to buy corrupting influence over government decisions. Our voting system has serious barriers that make it hard, not easy, for citizens to exercise their inalienable right to vote. Our redistricting system empowers officeholders to choose their voters rather than voters choosing their representatives. Our government ethics rules allow the President to misuse his public office for private gain, and contain major flaws regarding all three branches of government.

H.R. 1 represents a holistic approach to repairing our democracy. The legislation includes campaign finance, voting rights and redistricting reforms, and Executive Branch, Congressional and Judicial Branch ethics reforms.

Democracy 21 strongly supports H.R. 1 and opposes any efforts to weaken or undermine the provisions of the legislation. Our testimony today is focused on the dangerous problems for democracy caused by big money in American politics and on the reforms needed to address these problems.

These reforms include the need to provide an alternative way for federal candidates to finance their campaigns, to close the gaping disclosure loopholes for groups that spend unlimited, secret contributions in federal elections, to strengthen the rules prohibiting coordination between candidates and outside spending groups, including individual-candidate Super PACs, and to reform the dysfunctional, feckless Federal Election Commission.

H.R. 1 also addresses other campaign finance problems, including the need to expose the foreign interests behind the kind of anonymous internet ads that were run by Russian operatives in the 2016 presidential election and to require officials of outside spending groups to appear in and “stand by” their ads, as candidates are now required to do.

A Small Donor, Matching Funds System for Federal Candidates is Essential to Stop Washington Influence-Money Corruption

H.R. 1 provides an alternative system for presidential and congressional candidates to finance their campaigns by creating a small donor, public matching funds system.

We should be clear about this.

Influence-money corruption in Washington will not stop – it will only grow worse – without a new way for federal candidates to finance campaigns.

Without an alternative way to finance their campaigns, federal officeholders and candidates will remain trapped in the existing influence-money system dominated by wealthy donors, lobbyists, bundlers and special interests.

The new financing system provided by H.R. 1 would:

- Allow candidates to run for office without being dependent on or obligated to big money or special interest funders;
- Empower ordinary Americans by making their small contributions more important and valuable to candidates;
- Greatly reduce the power and influence of big money funders by freeing candidates to run competitive races for office without the need for their financial support; and
- Create opportunities for new candidates to enter the political process and run competitive races.

The Problem

The Supreme Court decision in *Citizen United* (2010) set the stage for the explosive growth of Super PACs and opened the floodgates to allow massive amounts of unlimited, influence-seeking contributions back into federal elections. These are the same kind of contributions that led to the Watergate campaign finance scandals of the 1970s and the “soft money” scandals of the 1990s.

In the last four elections, Super PACs that sprang up in the wake of *Citizens United* raised \$4.88 billion in unlimited contributions to spend in federal elections. During this period, the top 10 individual donors alone contributed \$1 billion to Super PACs, an average of \$100 million per donor.

Here is one example of the Supreme Court’s campaign finance system in action.

Multibillionaire Sheldon Adelson and his wife Miriam Adelson have given a total of \$297 million to Super PACs in the last four elections to support Republican candidates – making them the top Super PAC donors during this period. This included \$20 million that went to an individual-candidate Super PAC backing Donald Trump in the 2016 presidential election.

In the 2018 congressional elections alone, the Adelsons gave a total of \$122 million to Super PACs to support Republican candidates and groups. This included \$10 million to America First Action, a pro-Trump Super PAC.

Casino mogul Sheldon Adelson is strongly opposed to online gambling, which provides competition for his gambling empire. During the Obama administration, the Justice Department issued an opinion that said online gambling was legal. In January 2018, Trump's Justice Department reversed that earlier opinion and held that online gambling was prohibited by law. According to published reports, the new Justice Department position closely followed the legal arguments made by Adelson's lobbyists.

According to a Washington Post article, "The change was long sought by Adelson, a major Republican donor who spent more than \$20 million to back Donald Trump's campaign in 2016."

According to a Wall Street Journal article, "In addition to his advocacy to curb online gambling, Mr. Adelson spent tens of millions in the 2016 election backing President Trump and has emerged as one of the most powerful and influential donors in GOP politics."

These circumstances at a minimum create the appearance that Adelson's huge campaign contributions to support Trump and Republican candidates have had an undue influence on the government's decision.

Here is another example of the impact of the *Citizen United* decision.

Billionaire Tom Steyer was the number one Super PAC donor in the 2016 election cycle with total donations of \$89 million, and the number three donor in the 2018 cycle with total donations of \$72 million, for an overall two-cycle total of \$161 million.

Steyer wants President Trump impeached and he is currently threatening to use his Super PAC, Need to Impeach PAC, to attack House Democrats for failing to begin impeachment proceedings. According to Politico, "Kevin Mack, Steyer's lead strategist on Need to Impeach, said the PAC has virtually unlimited resources to spend in targeted districts."

Steyer is attempting to use his great wealth, in essence, to buy a result in Congress he wants – the impeachment of President Trump.

Ordinary Americans today have good reason for believing that the extraordinary wealth of relatively few Americans drowns out their voices in our elections and buys influence over government decisions.

The small donor financing system in H.R. 1 would empower ordinary Americans to counter the influence of political money from billionaires and millionaires unleashed by *Citizens United*.

The Impact of Citizens United

Retired conservative Court of Appeals Judge Richard Posner has said about the impact of *Citizens United*, “Our political system is pervasively corrupt due to our Supreme Court taking away campaign contribution restrictions on the basis of the First Amendment.”

Judge Posner has written, “[I]t is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint.” According to Judge Posner, the donors to a Super PAC are known, so “it is unclear why they should expect less quid pro quo from their favored candidate if he’s successful than a direct donor to the candidate’s campaign would be.”

Before his retirement, Judge Posner was widely seen as the country’s most influential judge not on the Supreme Court.

As long as *Citizens United* remains the law of the land, we cannot stop unlimited contributions from flowing into federal elections through Super PACs and non-profit groups. What we can do, however, is provide federal candidates with an alternative way to finance their campaigns that will allow them run for office free from dependency on or obligations to influence-seeking, big money funders. This essential alternative campaign financing system is provided in H.R. 1.

Public Financing is Constitutional

In 1974, Congress enacted a system of public financing for presidential primary and general elections in response to the Watergate campaign finance scandals.

The Supreme Court in *Buckley v. Valeo* (1976) upheld the constitutionality of public financing including the small donor, matching funds system provided for presidential primaries and the grant of public funds provided for the general election. The Court found that “Congress was legislating for the ‘general welfare.’”

The Court held in *Buckley* that the presidential public financing system “is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” The Court found that public financing “furthers, not abridges, pertinent First Amendment values.”

In 2011, the Supreme Court reaffirmed the *Buckley* holding that public financing of elections is constitutional. In *Arizona Free Enterprise v. Bennett*, which struck a “trigger funds” provision of the Arizona public financing system (which is not part of the public financing system in H.R. 1), Chief Justice Roberts quoted *Buckley* and wrote for the majority:

We have said that governments ‘may engage in public financing of election campaigns’ and that doing so can further ‘significant governmental interest[s]’ such as the state interest in preventing corruption.

The Presidential Public Financing System Worked Well for More than Two Decades

The success of the presidential public financing system for more than two decades makes a powerful case for enacting the small donor, matching funds system in H.R. 1.

The presidential financing system began to break down only when dramatic growth in the costs of presidential campaigns outstripped the funding and spending limits of the presidential system.

Congress never updated and modernized the presidential system. H.R. 1 will revitalize the presidential public financing system, which remains on the books as law.

The presidential public financing system was established in 1974 in response to the Watergate campaign finance scandals in the 1972 presidential election. The system was used by Republicans and Democrats, conservatives and liberals, incumbents and challengers, front-runners and long-shots.

In the first six elections run under the presidential public financing system (1976 to 1996), each major party nominee used the public financing system to finance their primary and general election campaigns. During this period, all but four major party candidates also used the system to finance their presidential primary campaigns.

President Ronald Reagan benefited more than any other candidate from the system, using it to finance his three presidential campaigns, including two successful runs for the presidency.

The impact of the presidential financing system can be seen in the fact that in the 1984 presidential campaign, President Reagan ran “without holding a single campaign fundraiser,” according to The Washington Post. In contrast, President Obama, who did not accept public financing for his 2012 presidential campaign, had held 160 fundraisers by June 2012, with many more to come after that.

In the six presidential elections run under the presidential public financing system from 1976 to 1996, Democrats and Republicans each won three times and challengers beat incumbents three out of six times. The system had neither partisan nor incumbency bias.

From 1976 to 2008 every Republican nominee for President used the public financing system for their general election campaign. Every Democratic presidential nominee used it from 1976 to 2004.

Presidents Carter (D), Reagan (R), H.W. Bush (R), Clinton (D) and W. Bush (R) all used the public financing system to run for president.

Losing major party nominees Ford (R), Carter (D), Mondale (D), Dukakis (D), H.W. Bush (R), Dole (R), Gore (D), and Kerry (D) all used the public financing system to run for president.

In addition, for more than three decades the Republican and Democratic National Committees used public funds to help pay for their national conventions. Apparently, the Republican and Democratic parties had no problems in using public money for their political activities.

All of these presidential candidates and the national party committees voluntarily requested and accepted public funds to spend on their campaign-related activities.

The early success of the presidential system was documented in 1986 by the bipartisan Commission on National Elections, headed by former Republican Representative and Defense Secretary Melvin Laird and former Democratic Party Chairman Robert Strauss.

The Commission concluded, “Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance.”

Twenty years later in 2006, Washington Post columnist E.J. Dionne wrote that “public financing of presidential campaigns, instituted in response to the Watergate scandals of the early 1970s, was that rare reform that accomplished exactly what it was supposed to achieve.”

As noted earlier, the system broke down only after the costs of presidential campaigns skyrocketed and made it impractical to run competitive races using the presidential system, which had never been modernized. The presidential system was also undermined in the 1990s by the rise of unlimited “soft money” contributions to the political parties, but soft money was ended by the enactment of the Bipartisan Campaign Reform Act of 2002.

Public Financing Today

The explosion of outside spending in federal elections has resulted in a revised public financing model being developed for presidential and congressional races. The new approach empowers small donors by providing multiple matching funds for their small contributions in both the primary and general elections.

Under H.R. 1, House candidates who voluntarily participate in the system and who raise the threshold amount of small contributions to qualify will receive public matching funds at a 6 to 1 ratio for contributions of \$200 or less per donor, per election. In return, participating candidates will agree to limit the contributions they receive to \$1,000 per donor, per election, almost three times below the current limit of \$2,800 per donor, per election.

There are no overall spending limits in the bill. Candidates, however, must agree to limit the personal wealth they use in their campaigns to \$50,000. There is also a cap, set by formula, on the total amount of public funds a candidate can receive.

In recent years, states and local communities have taken the lead in adopting public financing systems for their elections. This followed a landmark public financing system enacted for state and legislative races in Connecticut in 2005.

According to Common Cause, public financing systems have been created in recent years in Berkeley, CA, Portland, OR, Denver, CO, Baltimore, MD, Montgomery County, MD, Howard County, MD, Prince George's County, MD, Suffolk County, NY and Seattle, WA, (voucher system). Existing public financing systems have been updated in New York City, NY, Los Angeles, CA and Maine. And California has lifted an existing ban on cities and localities from creating public financing systems.

In addition, the following states and cities are exploring the creation of new public financing systems for their elections: New York, Oregon, Philadelphia, PA, Austin, TX and Albuquerque, NM (voucher system).

These actions reflect the understanding of citizens around the country that their interests are far better served by citizen-funded elections than they are by elections dominated by wealthy and special interest funders.

Conclusion on Public Financing

The American people have made clear they are fed up with Washington corruption and the rigged political system that benefits the wealthy and powerful special interest at their expense.

President Trump saw this development and it resulted in his “commitment” during the 2016 presidential campaign to “drain the swamp” in Washington. Once elected, however, Trump did absolutely nothing to carry out his campaign commitment. Instead, President Trump and his administration have engaged in continuous ethics abuses that have made the Washington “swamp” far worse.

New candidates in the 2018 congressional elections saw this development as well. As a result, 107 Democratic challengers sent a letter to Congress making their own commitment:

We share the American people's impatience and frustration over the lack of reforms and transparency and the role of money in our politics. We hear day in and day out that special interests are drowning out the voices of everyday citizens – to the point where many Americans no longer believe their votes even count.

Restoring faith in our elections and in the integrity of our elected officials should be a top priority that all members of Congress can agree upon.

The letter went on to discuss the need for democracy reforms:

[T]hese reforms must be sweeping, and they must be bold. They must be the very first item Congress addresses. We must not yield on this demand, the American public is counting on us.

Many of the signers of this letter are now Members of Congress.

H.R. 1 is responsive to the concerns expressed in this letter and to the deep concerns of the American people about corruption and special interest influence in Washington. This problem is a major reason for the very low job approval for Congress, which averages in the teens.

Washington corruption caused by influence-seeking big money funders will not be curbed until federal candidates are given an alternative financing system that allows them to run for office free from being dependent on and obligated to big money funders.

The new financing system in H.R. 1 provides this essential alternative system. We strongly urge the Committee to support the new financing system created in H.R. 1 and to oppose any and all efforts to weaken or undermine the system.

The DISCLOSE Act Provisions in H.R. 1

The DISCLOSE Act provisions in H.R. 1 are comprehensive new disclosure requirements for corporations, labor unions, trade associations and non-profit advocacy groups that make “independent” campaign-related expenditures on ads to influence federal elections. The provisions impose reporting requirements only on organizations, not on individuals. The general disclosure approach is modeled after disclosure provisions in the Bipartisan Campaign Reform Act of 2002 (BCRA), which were upheld as constitutional by the Supreme Court in the *McConnell* case.

The provisions close gaping disclosure loopholes by which wealthy donors and special interests in the last four elections have given more than \$800 million to non-profit groups in secret, unlimited contributions that were spent to influence federal elections.

Unlimited, secret contributions made to groups which spend money to influence federal elections are a particularly dangerous means for corrupting government decisions. Without disclosure of these contributions, there is no way for the public to hold donors and Members of Congress accountable for the corrupting influence those large contributions may exert on government decisions.

In the aftermath of the 2010 *Citizens United* decision, a flood of secret contributions or “dark money” in federal elections has seriously undermined the integrity of our elections and created widespread opportunities for influence buying. These secret funds deny citizens the information they have a right to know about who is providing money to influence their votes and government decisions.

National polls in the past have shown that citizens overwhelmingly favor disclosure by outside groups of the donors financing their campaign expenditures.

H.R. 1 defines corporations, unions, trade associations, non-profit advocacy groups, section 527 groups and Super PACs as “covered organizations” that are required to report their campaign-related spending and the large donors who fund that spending.

The legislation defines “campaign-related” spending to include independent expenditures, electioneering communications and ads that promote, attack, support or oppose (“PASO”) candidates.

The PASO test, which was used in BCRA, has been upheld by the Supreme Court as a constitutional way to define campaign-related activities. The Court in *McConnell* rejected a First Amendment vagueness challenge to the PASO test, saying “the ‘words ‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.” The Court stated that the PASO words “‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”

Independent expenditures are defined to include public communications containing express advocacy as well as those containing “the functional equivalent of express advocacy” – a term used by the Supreme Court to mean any ad which can be understood by a reasonable person only as advocating the election or defeat of a candidate.

A “covered organization” that makes “campaign-related” expenditures has the option of setting up a separate bank account to be used for the purpose of making all of its campaign-related expenditures. If the separate bank account is used, then a covered organization discloses only its large donors of \$10,000 or more to that account. If a covered organization does not set up a separate account and makes campaign-related expenditures from its general treasury funds, it discloses all of its large donors of \$10,000 or more to the organization.

It is important to note that any donor to a reporting organization can avoid disclosure simply by reaching an agreement with the organization that the donation will not be used for campaign-related expenditures.

The legislation requires disclosure of transfers made by a covered organization to another person for the purpose of making campaign-related expenditures, or where the transfers are deemed to have been made for such purpose. In those circumstances, the transfers are treated as if they were themselves campaign-related expenditures made by the transferor, and the transferor organization is then subject to the applicable reporting requirements set forth above, including disclosure of its large donors. The legislation provides standards for when a transfer is “deemed” to be made for the purpose of making campaign-related expenditures.

These provisions are essential in order to ensure that the original sources of funds that are used to make campaign-related expenditures are not kept secret by transferring the funds through one or more conduits. Without this protection, a reporting organization that has to disclose its donors would disclose only the conduit and not the original source of the funds.

For nearly forty years, campaign finance disclosure requirements have been consistently upheld as constitutional by the Supreme Court – starting with the Court’s landmark *Buckley* decision in 1976 and continuing as recently as the Court’s *Citizens United* decision in 2010.

In *Buckley*, the Supreme Court held that the federal campaign finance disclosure laws were

constitutional because they provide “the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office.”

The Court in *Buckley* also upheld the disclosure laws on the grounds that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”

The Supreme Court in the *Citizens United* case upheld by an 8 to 1 vote the constitutionality of disclosure requirements for outside groups making expenditures to influence federal elections.

The Court stated:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

The Court further said that with disclosure, “Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called moneyed interests.”

The Court also repeated what it had previously said in *Buckley* and *McConnell*: disclosure requirements “impose no ceiling on campaign-related activities” and “do not prevent anyone from speaking.”

Notwithstanding the Supreme Court’s consistent support for campaign finance disclosure requirements, opponents of the DISCLOSE Act have used fallacious constitutional arguments in an attempt to defend the continued flow of secret money into federal elections.

The Court in *Citizens United*, for example, specifically rejected the argument that disclosure requirements can apply only to ads which contain express advocacy or its functional equivalent.

The Court has also rejected the argument that disclosure requirements are unconstitutional because of theoretical concerns about harassment. The Court has said that threats and harassment must create an actual—not speculative—burden on a group’s freedom to associate in order to warrant an exemption from disclosure laws.

As Justice Scalia said in a concurring opinion in the *Doe* case, upholding disclosure requirements for ballot petition signers, “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”

The Court has also flatly rejected the argument that its 1958 *NAACP* case is a precedent for striking down campaign finance disclosure requirements. The *NAACP* case involved an attempt by the State of Alabama to subpoena the NAACP’s membership lists at a time when the organization was fighting for civil rights and when its members were the targets of murders,

violence and serious physical harassment. Under those dramatic circumstances, the Court held that the NAACP was entitled to anonymity for its members.

The Supreme Court was fully aware of its *NAACP* decision when it upheld campaign finance disclosure requirements in its 1976 *Buckley* decision. In fact, the Court in *Buckley* cited and distinguished *NAACP* and rejected the argument that campaign finance disclosure was unconstitutional as analogous to the situation in *NAACP*.

In 2003, the Supreme Court in the *McConnell* case again rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists struck down in the *NAACP* case. The Court wrote, “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 disclosures.”

Absent a showing by a specific organization of “a reasonable probability that the group’s members could face threats, harassment, or reprisals if their names were disclosed,” the Court has held that campaign finance disclosure requirements are constitutional.

And even if such a showing is made by a specific organization, it *only exempts that specific organization from disclosure*. The disclosure requirements remain constitutional for all other organizations that cannot make such a showing.

Secret money in federal elections breeds corruption and scandal. The DISCLOSE Act provisions in H.R. 1 comprehensively address the secret money problem and close the existing loopholes that are being used to pour secret money into federal elections.

Shutting Down Individual Super PACs

In 1974, Congress enacted limits on contributions to candidates. These limits were held constitutional by the Supreme Court in *Buckley* as necessary to prevent corruption and the appearance of corruption.

Today, these contribution limits are being eviscerated by individual-candidate Super PACs – Super PACs that raise and spend unlimited contributions to support one candidate.

The Supreme Court’s *Citizens United* decision in 2010 opened the door for the explosion of Super PACs into the political system. It did not take long thereafter for a particularly insidious variant of the Super PAC to enter the system: the individual-candidate Super PAC.

Super PACs raise unlimited contributions from wealthy individuals, corporations and other special interests. Under applicable court decisions, they can spend the funds to influence federal elections, but only if they do so independently from the federal candidates they are supporting.

If they do not operate independently of the candidate they support, their expenditures are treated by campaign finance laws as in-kind contributions to the candidate. They are then subject to spending no more than the \$5,000 per year limit on PAC contributions to candidates.

Individual-candidate Super PACs differ from other Super PACs in two important ways: first, they support only one candidate, and second, they are generally set up and run by close political or personal associates or family members of that candidate.

While individual-candidate Super PACs claim to be independent from the individual candidates they support, their supposed “independence” is an illusion. In reality, individual-candidate Super PACs are closely tied to the candidate and function as an operating arm of the candidate’s campaign.

As such, the real purpose of an individual-candidate Super PAC is to circumvent and eviscerate candidate contribution limits.

Candidates and donors use these individual-candidate Super PACs as vehicles to make unlimited contributions to directly support the candidate backed by the Super PAC, the kind of contributions that the Supreme Court has said can corrupt and create the appearance of corruption.

Thus, in practical effect, these individual-candidate Super PACs operate as a dedicated “soft money” account of a candidate’s campaign, rendering meaningless the limits on contributions to the candidate.

Both the candidate and the donor know, for example, that a \$1 million contribution to the candidate’s Super PAC is the same as giving it directly to the candidate.

Individual-candidate Super PACs surfaced in the 2012 presidential campaign. Almost every presidential candidate, including President Obama and Republican nominee Romney, had a Super PAC focused only on their candidacy.

For example, two White House officials left the Obama Administration and shortly thereafter created Priorities USA Action to support the Obama reelection campaign. The Super PAC spent more than \$65 million in unlimited contributions in the 2012 presidential campaign to support President Obama.

Three former top officials of the Romney 2008 presidential campaign created Restore Our Future to support the 2012 Romney presidential campaign. This individual-candidate Super PAC spent \$142 million in unlimited contributions to support Romney – the most spent by *any* Super PAC in the 2012 elections.

Contributors who could only give \$2,500 per donor to the Obama and Romney campaigns gave six- and seven-figure contributions to Priorities USA Action and Restore Our Future. And Obama and Romney were certainly aware of their generous benefactors.

Individual-candidate Super PACs spread quickly to congressional elections, and by the 2018 elections cycle, 259 individual-candidate Super PACs raised \$175 million in unlimited contributions, according to the Center for Responsive Politics (CRP). This included many single-

candidate Super PACs run by the candidate's former political aides and close associates, or financed by the candidate's relatives or by single donors.

While we cannot end all Super PACs as long as the *Citizens United* decision stands, we can shut down individual-candidate Super PACs by legally recognizing the reality that they are coordinated with the candidate they support. In so doing, the expenditures of these individual-candidate-Super PACs would become in-kind contributions and would be limited to \$5,000 per year.

The Supreme Court requires outside spending groups to be independent from the candidates they support, but the Court left it to Congress to statutorily define what constitutes "coordination" for purposes of determining whether outside spenders are independent or coordinated.

The coordination provisions of H.R. 1 address this problem. The bill embodies two complementary approaches to set a legislative definition of "coordination" that comprehensively and realistically governs the activities involved.

First, the bill sets forth a general definition of coordination that is based on the broad concepts and language used by the Supreme Court in a number of decisions to explain what the Court had in mind for independent spending.

In those decisions, the Court has said that independent spending must be done "totally independently," *Buckley v. Valeo*, 424 U.S. 1, 47 (1976); "not pursuant to any general or particular understanding with a candidate," *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614 (1996) ("*Colorado I*"); "without any candidate's approval (or wink or nod)," *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 442 (2001) ("*Colorado II*"); and must be "truly independent," *id.* at 465.

These are the descriptions used by the Supreme Court to provide standards for the separation between candidates and outside spenders that is required for spending to be considered "independent" for constitutional purposes.

The bill adds to the existing definition of the term "contribution" a new subsection that defines a contribution to include "any payment made by any person . . . for a coordinated expenditure." As a contribution, a "coordinated expenditure" is subject to any contribution limits and other contribution restrictions that exist (such as a ban on contributions by corporations and labor unions).

The bill defines a "coordinated expenditure" to include a payment for a "covered communication" which is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or a candidate's campaign committee. This part of the definition is based on the longstanding federal law general standard for a coordinated expenditure. *See* 52 U.S.C. § 30116(a)(7)(B)(i).

The bill then defines "cooperation, consultation or concert with" to include any payment or communication by a person "which is not made entirely independently" of a candidate or his or

her authorized committee. The bill further provides that “a payment or communication not made entirely independently of the candidate or committee includes any payment or communication made pursuant to any general or particular understanding with, or pursuant to any communication with, the candidate, committee, or agents about the payment or communication.”

These definitions, which are adapted from language in the relevant Supreme Court decisions, establish a general rule for defining coordinated spending between any outside spender, including Super PACs and non-profit section 501(c) organizations, and a candidate. The rule applies to any kind of campaign-related expenditure, including expenditures for public communications, voter mobilization and other campaign activities on behalf of a candidate. The bill does not apply to spending by a political party on behalf of the candidates of the party.

The bill exempts from the coordination rules any discussions with a candidate that are solely for purposes of lobbying the candidate on a policy matter, provided there are no discussions between the outside spender and the candidate that relate to the candidate’s campaign. The bill also prohibits a group from using an internal firewall as the basis for avoiding the application of the coordination provisions.

The bill separately addresses the special case of spending by a “coordinated spender.” Once a Super PAC or other group meets the definition of a “coordinated spender,” any future expenditure for a covered communication regarding the group’s coordinated candidate is a “coordinated expenditure” with the candidate, and thus an in-kind contribution and subject to the contribution limits.

The definition of “coordinated spender” is based on the relationship between the outside spender and the candidate. A “coordinated spender” is defined as any outside spending group which meets any one of the following five standards:

- (A) any person who is directly or indirectly established at the request or suggestion of a candidate or his campaign;
- (B) any person for whom the candidate solicits funds or appears at a fundraising event;
- (C) any person established or managed by the candidate or by any person who has been employed by the candidate or retained as a consultant by the candidate;
- (D) any person who within the past two years has used a common vendor for campaign services with the candidate; or
- (E) any person who is established or managed by, or has had more than incidental discussions about the campaign with, a member of the candidate’s immediate family.

These provisions address the reality that individual-candidate Super PACs are inherently coordinated with the candidates they support and should not be permitted to serve as vehicles for eviscerating candidate contribution limits.

Critics of the coordination provisions of the bill choose to ignore the real problems that the “coordinated spender” language is intended to address. The FEC’s failure to develop and enforce meaningful coordination standards has allowed the rapid development and growth of individual-candidate Super PACs which function as extensions of a candidate’s campaign precisely because of the close relationship between the candidate and the Super PAC. This is in direct contradiction to the meaning and language of Supreme Court decisions

When a donor gives a \$1 million contribution to an individual-candidate Super PAC, it is a fiction to contend that he is not giving the money to the candidate himself, where the Super PAC is a group set up by the candidate, funded by solicitations made by the candidate, run by the candidate’s former close advisers or staff or family, or using the same campaign vendors as the candidate to design and buy ads.

Critics note that the coordination provisions in the bill do not apply just to Super PACs but also to non-profit groups and other outside spenders as well. This is true, and an important feature of the bill. The Supreme Court has always held that any outside spender, not just political committees, must be totally independent of a candidate in order to make independent expenditures, and the Court specifically held this in its *Citizen United* decision allowing corporations to make independent expenditures.

Following *Citizens United*, which allowed non-profit section 501(c)(4) corporations to make independent expenditures, such groups have been used, along with Super PACs, to run parallel shadow campaigns for candidates using secret, unlimited donations.

If these non-profit groups have the same close relationships to the candidates they support as individual-candidate Super PACs—if they are set up and funded by the candidate, or staffed by the close associates of the candidate—it is appropriate to use the same coordination standards to cover them. Of course, if an outside non-profit group is set up and operated wholly independently of a candidate, it will not be treated as coordinated and it will accordingly be free to raise and spend unlimited amounts for campaign ads to support a candidate. The contributions it uses to pay for campaign ads, however, will be subject to disclosure under the DISCLOSE Act provisions of H.R. 1.

Critics charge that the use of these coordination standards will impinge on legislative and policy discussions between officeholders and outside groups. But, as noted above, the bill contains an express exemption from the coordination standard for any discussion by a person with a candidate or his agents regarding a legislative or policy matter, “including urging the candidate or committee to adopt that person’s position,” so long as there is no discussion about the candidate’s campaign advertising, strategy or activities.

Critics also point out that a “covered communication” subject to the coordination rules is defined to include not only independent expenditures, or ads that refer to a candidate in the 60-day pre-primary or 120-day pre-general election periods, but also to a communication that promotes, supports, attacks or opposes a candidate (the so-called “PASO test”). They criticize this test as vague and overbroad.

What they fail to recognize, as we also noted above, is that the same PASO standard was used in the 2002 BCRA legislation, and that in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court upheld the constitutionality of the PASO test. The Court stated that “any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating.” As noted earlier, the Court also explained that the PASO words “‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”

Thus, the PASO test has already been held to be sufficiently tailored to constitutionally define a category of campaign-related spending, and to be sufficiently clear and explicit to satisfy vagueness concerns.

FEC Reform

The Federal Election Commission is a failed, dysfunctional agency that does not enforce or properly interpret the nation’s campaign finance laws.

As a result, campaigns, political operatives, parties and independent spenders know they can operate with virtual impunity, and without consequences for potential campaign finance violations. This has created the modern political equivalent of the Wild West without a sheriff. It also means that if the FEC is not reformed, any new campaign finance laws that are enacted will face the same problem as prior campaign finance reform efforts: they will be undermined by the FEC’s lack of enforcement and failure to properly interpret the laws.

Ten years ago, in 2009, a *Washington Post* editorial described the problems with the FEC as follows:

The commission was designed to have power shared equally between the two parties, so that neither would have the upper hand in taking potentially politically inspired action against the other. This unusual setup has often produced 3-3 splits between Republican and Democratic appointees. But those deadlocks have tended to arise sporadically, and in ideologically or politically charged cases, not in run-of-the-mill enforcement actions.

That’s no longer true. The three Republican appointees are turning the commission into The Little Agency That Wouldn’t: wouldn’t launch investigations, wouldn’t bring cases, wouldn’t even accept settlements that the staff had already negotiated. This is not a matter of partisan politics. These commissioners simply appear not to believe in the law they have been entrusted with enforcing.

The problems at the FEC described by the *Washington Post* in 2009 have only gotten worse since then.

The FEC reform provisions of H.R. 1 create a new framework for properly enforcing and interpreting the campaign finance laws. This section of the bill modifies the agency’s structure and operation in a small number of key ways in order to deal with a chronic and fundamental problem for campaign finance laws.

The Act would address the inherent structural problems of the current FEC by reducing the membership of the agency from six to five, consisting of a chairman and four other members, all of whom are to be appointed by the President with the advice and consent of the Senate. No more than two members of the agency can be from the same political party, to prevent partisan control of agency actions.

The legislation would also establish a blue-ribbon advisory panel to recommend to the President at least one but not more than 3 individuals for appointment to each vacancy on the agency. The panel would consist of individuals selected by the President from retired federal judges, former law enforcement officials, or individuals with experience in election law.

The bill would also provide for a strong chairman to administer the agency, and would enhance the authority of the general counsel to make enforcement recommendations on whether to pursue investigations of possible violations of the campaign finance laws. Those general counsel recommendations would take effect unless affirmatively overridden by a majority vote of the Commission within 30 days. Finally, the bill would improve judicial review of agency decisions to dismiss complaints, or an agency failure to timely act on complaints, by authorizing courts to review agency actions or inactions on a de novo basis, instead of deferring to the agency's interpretation of the law. The bill would also restrict the agency's ability to invoke "prosecutorial discretion" as a basis for failing to enforce the law in cases where potentially significant violations are involved.

We believe that these targeted but important changes to the FEC's structure and operations would substantially improve the agency's performance and efficacy.

Critics aim a number of objections to this necessary but limited reform of the agency structure and operations. First, they contend that shifting to an odd number of members will necessarily make the agency function on a partisan basis and, further, they contend that it will become a political weapon wielded by the President.

There are a number of responses to this charge. First, this criticism ignores the fact that no more than two members of the agency can be from the same political party, thus preventing any party from obtaining a partisan majority of the agency. Critics contend this is an insufficient protection because, they argue, a nominally independent member could choose to align with the members of one party or the other. This ignores the important role in the appointment process that will be played by the Blue Ribbon advisory group which, in recommending a short list of nominees to the President, will be charged with identifying credibly non-partisan candidates for the seat to be held by the independent member. The Senate, which must confirm any nominee, will be a further check to ensure that the independent seat is filled by a member who has the requisite credentials and credibility.

But even granting the most hyperbolic scenarios imagined by critics, this would result in an agency with a majority of members identifying with one major party or the other. Assuming that the members are chosen by the President from the lists suggested by the Blue Ribbon Commission, those members will have "a demonstrated record of integrity, impartiality and good judgment." And even in the worst case, the result will be little different from other federal

agencies with law enforcement responsibilities—including the Department of Justice, which has criminal jurisdiction to enforce the campaign finance laws—which have either a single member or an odd number of members and are appointed by the President.

What the reform will do, however, is provide a mechanism to break the repeated deadlocks that have rendered the existing six-member agency almost completely paralyzed and dysfunctional in important matters.

The charge by critics that the FEC chairman will become an “election czar” is similarly baseless. Under the legislation, the chairman is given powers typically exercised by the chairs of other independent agencies—to prepare a budget, hire a staff director and be “the chief administrative officer” of the Commission. There is nothing extraordinary or unusual about that. While the chair is also given the power to issue subpoenas and require testimony, the Commission can exercise the same power by majority vote, thereby serving as a check on the chairman.

Support for Other Provisions in H.R. 1

Democracy 21 strongly supports the other Titles in the legislation which address many other crucial problems facing our democracy.

The Voting Rights provisions address the barriers to voting today that are standing in the way of citizens exercising the fundamental right in our democracy to vote and have your vote counted.

The Election Access provisions in Title I modernize the nation’s voter registration process to ensure that the gateway to voting is fair and easily accessible. Automatic Voter Registration simplifies the registration process and will result in millions of Americans becoming eligible to vote through their interactions with state and federal agencies. The bill also requires states to provide for same-day registration of eligible voters, and prohibits the practice of “voter caging.” All of these provisions will serve to counter shameful efforts in some states to suppress voter participation.

The Election Integrity provisions in Title II would directly address the problem of extreme partisan gerrymandering which eliminates competition and distorts our elections by allowing legislatures to craft districts tailor-made for control by one political party or the other. These provisions reform the congressional redistricting process by requiring states to establish independent redistricting commissions to redistrict congressional seats, and setting standards and procedures by which such commissions will carry out congressional redistricting.

The legislation also establishes criteria for congressional redistricting plans, and provides for a court-ordered plan to be drawn by a three-judge court in the event that a commission fails to timely promulgate a plan. This vital reform of the redistricting process would help ensure that congressional districts are drawn to serve the interest of voters in fair elections, and not the interests of politicians in maximizing partisan gains and being insulated from competitive races.

Title VII requires a judicial code of conduct for the Justices of the Supreme Court as well as for other federal judges. It also strengthens enforcement of the Foreign Agents Registration Act by

requiring the Attorney General to create a separate unit within the Department of Justice to enforce that law. It closes a major loophole in the Lobbying Disclosure Act by ensuring that individuals who provide behind-the-scenes political and strategic consulting services in support of lobbying activities are themselves treated as lobbyists subject to registration and disclosure.

Similarly, Title VIII of H.R. 1 contains a series of important ethics reform measures for executive branch employees. These provisions are aimed at strengthening conflict of interest laws and their enforcement. Importantly, the legislation would provide increased authority for the Director of the Office of Government Ethics and improve that Office's ability to enforce the ethics laws.

Title IX of the legislation provides for a number of improvements to congressional ethics rules, including a prohibition on Members from serving on boards of for-profit entities and using their official position to introduce or pass legislation that has a principal purpose to further their pecuniary interest. The legislation would also require campaign finance disclosure reports to identify donors who are registered lobbyists.

Finally, Title X requires the President and Vice President, and general election candidates for President and Vice President, to submit their tax returns for the 10 most recent years to the FEC, which shall make them publicly available. Until the current president, Presidents and presidential candidates in modern times adhered to the norm of voluntarily disclosing their tax returns. President Trump chose to ignore this well-settled past practice and so a statutory requirement is needed in order to guarantee that this important transparency protection is observed.

Conclusion

H.R. 1 tackles fundamental problems that are dangerously undermining our democracy and our constitutional system of representative government. The faith of the American people in their government and officeholders is dangerously low. We are at a moment in history when these problems must be addressed and solved.

Those who may think this is an impossible task should keep in mind the words of Nelson Mandela, who said: "It always seems impossible, until it's done." Mandela knew from what he spoke.

The health and integrity of our democracy is on the line. The fight for H.R. 1 is a fight that must be won.

The CHAIRPERSON. Thank you very much.
And finally we turn to Secretary Wyman.
Welcome. You are recognized for 5 minutes.

STATEMENT OF KIM WYMAN

Ms. WYMAN. Thank you, Chairperson Lofgren, Ranking Member Davis, and the Committee, for inviting me to testify today on the election access integrity and security sections of H.R. 1.

For the record, I am Washington Secretary of State Kim Wyman, and I am proud to serve as the chief elections officer for a State which currently meets most of the election requirements proposed in H.R. 1.

Washington State conducts all elections by mail with an 18-day voting window, allows voters to cast provisional ballots anywhere in the State, convenes an independent redistricting commission, passed a motor voter law 3 years before the National Voter Registration Act was signed into law by President Clinton, is the second State in the country to provide online voter registration, uses voter-verified permanent paper ballots in all elections, has mandatory pre- and post-election audits and recounts, and we are implementing risk-limiting audits, automatic voter registration, the future voter preregistration program, and election day registration for the 2019 elections.

Based on 26 years of experience leading the implementation of some of the country's most innovative policies and election administration, I am testifying with strong concerns on the election sections of H.R. 1.

The greatest strength of American elections in our system is our decentralized nature. There are over 9,000 independently elected and appointed election officers, like me, who take an oath to uphold the U.S. Constitution and the constitution and laws of their States to administer elections.

While Democratic, Republican, and nonpartisan election officials across the country share the goal of making elections more accessible and secure, H.R. 1 could hinder that progress that Washington and other States have achieved. This bill could stifle innovation in States now and for decades to come.

H.R. 1 would enact prescriptive and specific Federal regulations on election administration by mandating and essentially freezing these 2019 policies and procedures in place. It will dramatically increase the cost of conducting elections and simply repeat history.

Passage of the NVRA in 1993 and the Help America Vote Act in 2002 marked a tectonic shift in the administration of voter registration and elections. Congress narrowly and specifically defined how election officers at the State and local levels could manage elections. The inherent problem was that both these acts rigidly mandated specifically defined processes.

While these acts were well meaning at the time of their passage, they could not contemplate the evolution and application of technology.

Here are two examples.

First, in 1993, the NVRA intended to increase access to voter registration and defined how registration lists could be maintained. The act specified paper-based methods for adding or removing vot-

ers using an innovative tool at the time, the U.S. Postal Service National Change of Address system. NVRA could not anticipate the impact of the internet or smart phones on voter access to information as neither had yet arrived.

Second, following the 2000 Presidential election, testimony in Congressional hearings demonstrated that problems occurred with lever machines and punch card voting equipment. HAVA eliminated their use in U.S. elections, and Congress provided Federal grants to purchase equipment.

While many election officials chose to update voting equipment with paper ballot systems, other jurisdictions opted for the newest solution at the time, touch screen voting machines.

Now, 19 years later, State and local election officials have aging equipment with no Federal replacement funds. Election officials must rely on the State and local legislative bodies to provide funding for their equipment and operational costs. We are facing the greatest security threat in history from cyber criminals, and H.R. 1 adds new costly requirements with no identified funds to implement them.

Ultimately the election administrator's job is to instill confidence in the public that every eligible person has the opportunity to register and vote and that those votes are counted in an accurate, fair, and secure manner. As you move H.R. 1 forward, I encourage you not to limit States' authority, rather empower them to improve election administration.

The greatest threat to our election system is partisanship. The lasting solutions to removing barriers in elections have come from bipartisan efforts that balance access and security in our processes.

H.R. 1 is a good start. My State and local election colleagues and I want to work with you to make H.R. 1 bipartisan legislation that improves elections for everyone.

Thank you.

[The statement of Ms. Wyman follows:]

For the People: Our American Democracy Hearing
 Thursday, February 14, 2019
 House Administration Committee
 10:00 a.m. Room 1310 of the Longworth House Office Building
 Secretary of State Kim Wyman Testimony on HR1

I want to thank Chairman Lofgren, Ranking Member Davis and the committee for inviting me to testify today on the Election Access, Integrity and Security sections of HR 1 (Division A, Titles I, II and III). For the record, I am Washington Secretary of State Kim Wyman, and I am proud to serve as the chief elections officer for a state which currently meets most of the election requirements proposed in HR 1. Washington state:

- Conducts all elections by mail with an 18-day voting period
- Allows voters to cast a provisional ballot anywhere in the state
- Convenes an independent Redistricting Commission
- Passed a state Motor Voter law three years before the National Voter Registration Act (NVRA) was signed by President Clinton
- Is the second state in the country to provide online voter registration
- Uses voter-verified, permanent paper ballots in all elections
- Has mandatory pre and post-election audits and recounts
- Is implementing risk-limiting audits, automatic voter registration, the Future Voter pre-registration program, and election day registration for the 2019 elections.

Based on 26 years of experience leading the implementation of some of the most innovative policies in election administration in the country, I am testifying with strong concerns on the election sections of HR1.

The greatest strength of the American election system is its decentralized structure. There are over 9,000 independently elected or appointed election officers, like me, who take an oath to uphold the U.S. Constitution and the Constitution and laws of their states to administer elections. We are accountable to the people who live in our states.

While Democratic, Republican, and nonpartisan election officials across the country share the goal of making elections more accessible and secure, HR 1 could hinder the progress that Washington and other states have achieved, now and for decades to come.

HR 1 would enact prescriptive and specific federal regulations on election administration by mandating and essentially freezing these 2019 policies and procedures in place. It will dramatically increase the cost of conducting elections, and simply repeat history.

Passage of the NVRA in 1993 and the Help America Vote Act (HAVA) in 2002 marked a tectonic shift in the administration of voter registration and elections. Congress narrowly and specifically defined how election officers at the state and local levels could manage elections.

The inherent problem was both Acts defined processes that could not contemplate the evolution and application of technology. Here are two examples:

First, in 1993, the NVRA intended to increase access to voter registration and defined how registration lists could be maintained. The Act specified paper-based methods for adding or removing voters using an innovative tool of the time: the U.S. Postal Service National Change of Address system. NVRA could not anticipate the impact of the Internet or smart phones on voter access to information, as neither had yet arrived.

Second, following the 2000 Presidential Election, testimony in Congressional hearings demonstrated that problems occurred with lever machine and punch card voting equipment. HAVA eliminated their use in U.S. elections, and Congress provided federal grants to purchase new equipment.

While many election officials chose to update voting equipment with paper ballot systems, other jurisdictions opted for the newest solution at the time: touch screen voting machines.

Now, nineteen years later, state and local election officials have aging equipment – with no federal replacement funds. Election officials must rely on state and local legislative bodies to provide funding for their equipment and operational costs. We are facing the greatest security threat in history from cyber-criminals, and HR 1 adds new, costly requirements with no identified funds to implement.

Ultimately, our job is to instill public confidence that every eligible person has the opportunity to register and vote, and that those votes are counted in an accurate, fair and secure manner. As you move HR 1 forward, I encourage you not to limit states' authority, rather empower them to improve election administration.

The greatest threat to our elections system is partisanship. The lasting solutions to removing barriers in elections have come from bipartisan efforts that balance access and security in our processes. HR 1 is a good place to start. My state and local election colleagues and I want to work with you to make HR 1 bipartisan legislation that improves elections for everyone.

Thank you.

The CHAIRPERSON. Thank you very much.

Thanks to all the witnesses.

We will now turn to Members of the Committee under the 5-minute rule for any questions they may have. And I will turn first to the Ranking Member, Mr. Davis, for 5 minutes.

Mr. DAVIS of Illinois. Thank you, Madam Chairperson.

And thank you all for your testimony.

Ms. Wyman, I appreciate you. I know you had a long flight out. Thank you for your testimony, and your experience relayed for as the impact on what we do here and how it impacts your State's ability to put free and fair elections in place.

Now, in Washington State you had one of the highest voter turnouts in 2018. What do you attribute that to?

Ms. WYMAN. Well, I think it is a combination of things. I certainly think that vote-by-mail is one of the underpinnings of our turnout numbers that historically are higher than most of the country.

But in this election in particular we had a gun control initiative on the ballot, and we had a very hot Congressional race and other hot races across our State, and I think that really what boosts turnout is what is on the ballot. That is what motivates voters to turn out.

Mr. DAVIS of Illinois. What is on the ballot locally?

Ms. WYMAN. Yes.

Mr. DAVIS of Illinois. What is on the ballot locally. Okay.

Mr. Wertheimer, thank you. I appreciate the context of the Presidential Election Campaign Fund, historical context, but I noticed that major Presidential candidates stopped using them, using those funds in the 2008 election. Was John McCain the last one?

Mr. WERTHEIMER. Yes.

Mr. DAVIS of Illinois. Okay. So Senator McCain, when he ran for President in 2008 decided to use the Presidential matching funds. About \$370 million was in there in the beginning of 2015? Do you know how much sits in the Presidential Election Campaign Fund now?

Mr. WERTHEIMER. No.

Mr. DAVIS of Illinois. Under the current Presidential matching system there is a limit that the candidates who decide to use that fund can spend, right?

Mr. WERTHEIMER. Yes.

Mr. DAVIS of Illinois. Okay. What is that limit now?

Mr. WERTHEIMER. I don't know the number, but the reason candidates stopped using the system—

Mr. DAVIS of Illinois. Well, the reason they stopped using it was because they felt they could raise more without it.

Mr. WERTHEIMER. Well, they felt the system was outmoded.

Mr. DAVIS of Illinois. They felt it was outmoded.

So what your solution is, what the solution of H.R. 1 is, is to allow for \$250 million of Federal taxpayer dollars to be used by any candidate, right?

Mr. WERTHEIMER. That is a maximum amount.

Mr. DAVIS of Illinois. A maximum amount.

Mr. WERTHEIMER. There is no reason to believe all candidates will use that amount.

Mr. DAVIS of Illinois. But there are no limitations on how much spending can be put in place like the campaigns like there is now.

Mr. WERTHEIMER. Well, no, no. The reason is the \$5 billion that was spent by outside spending groups. You can't establish a practical spending limit in a system where outside groups can spend unlimited amounts and, for example, come into your race——

Mr. DAVIS of Illinois. So you want the taxpayers——

Mr. WERTHEIMER [continuing]. And pour \$5 or \$10 million in at the end of the campaign.

Mr. DAVIS of Illinois. I will reclaim my time now, sir.

You are basically saying, okay, any Presidential candidate does not have to make the choice anymore to choose to abide by limitations in spending, and we will now make you eligible for up to \$250 million, and you can still go raise and spend as much as you want, which I thought was the problem.

Mr. WERTHEIMER. No, that is not what you can do. You can't raise as much as you want under existing contribution limits, which are now \$2,800 per person, because you have to abide by a much lower contribution limit of \$1,000.

But we have argued that the major problem in campaign financing is the source of the funding, and the Supreme Court has recognized that large contributions create the potential for corruption and the appearance of corruption.

The issue here is trying to provide candidates with a way to run for office where they don't have to depend on lobbyists, on bundlers, on large contributions——

Mr. DAVIS of Illinois. What is the cost to taxpayers?

Mr. WERTHEIMER [continuing]. But can depend on small contributions.

Mr. DAVIS of Illinois. What is the cost to the taxpayers?

Mr. WERTHEIMER. Of what?

Mr. DAVIS of Illinois. Of this new increased taxpayer dollar——

Mr. WERTHEIMER. We don't have an estimate yet from CBO.

Mr. DAVIS of Illinois. You don't have an estimate yet.

I have got a question for you, Ms. Weiser.

Looking at H.R. 1 on donor reporting, it is very ambiguous and uses some suspect terminology, and I think that could result in a dangerous mix.

I was talking with my team yesterday. I just have a hypothetical that I want to run by you to see if this is a case, as H.R. 1 moves forward, if we can maybe ensure something like this doesn't happen.

Let's suppose a victim of domestic abuse decided to support an organization to educate and assist other victims and donates a few hundred dollars a month or up to a thousand dollars a month to a group like the National Domestic Violence Hotline. Let's say the group runs a short radio ad thanking Speaker Pelosi for renewal of the Violence Against Women Act.

Isn't it true that under the current H.R. 1 provisions this ad promotes or supports Speaker Pelosi and that a donor who funds its activity, including a victim of domestic violence who donated with the expectation that her donation would be confidential, would be faced with having her full name and home address filed and dis-

closed on a government website, and maybe even the ad itself, merely because of the group's endorsement?

Ms. WEISER. It is my understanding that the disclosure requirements applied only to people who give \$10,000 or more.

Mr. DAVIS of Illinois. Well, that would be \$12,000 in a year.

Ms. WEISER. And they can avoid disclosure by specifically specifying that their contribution cannot be used in political ads. So that individual can maintain their confidentiality if they so please. The disclosure requirements are especially placed on the organizations, not on the individuals.

The CHAIRPERSON. The gentleman's time has expired.

Mr. DAVIS of Illinois. Thank you.

The CHAIRPERSON. And I will turn now to gentleman from Maryland. Mr. Raskin is recognized for 5 minutes.

Mr. RASKIN. Madam Chairperson, thank you very much, and thanks for calling this important hearing.

I want to start just by asking a question about gerrymandering. I was quite amazed that when we first took this up in the Judiciary Committee there were people defending gerrymandering on the Committee who said, well, that having politicians draw their own districts keeps the government or keeps representation closer to the people as opposed to having an independent panel.

And I am just wondering, perhaps, Ms. Weiser, you could say something about the importance of having an independent redistricting panel process with criteria that confine the level of discretion so that the politicians aren't drawing their own districts.

Ms. WEISER. Absolutely. We have seen in this past decade that gerrymandering has gotten more extreme and more durable than any other time in the past half century, and that partisans have been able to lock in an advantage that has lasted, an even unbroken advantage, even in tsunami elections like this last—

Mr. RASKIN. Is it fair to say that if politicians are drawing their own districts, that redistricting is gerrymandering, there is really no difference?

Ms. WEISER. By and large. And especially when there is single party control of the redistricting process, we see really extreme gerrymandering. And what that makes is a system that is completely nonresponsive to and not accountable to voters. And that means that as voters try to change their political preferences as their votes change, they do not see changes in who is representing them.

But in contrast we do see in maps that are drawn by independent commissions and by courts, where there isn't the same kind of interest in the outcome, we do not see the same kinds of levels of bias, and we also see better representation for communities of interest and communities of color in the process.

Mr. RASKIN. Very good.

Mr. Wertheimer, you have seen several cycles of political corruption and reform, so you bring great experience and expertise to the task here. I want to ask you about two things.

One is Attorney General Whitaker appeared before the Judiciary Committee the other day, and it turns out that he had received \$1.2 million when he was working as a 501(c)(3) polemicist, essentially, for his political views, but we don't know where the money

came from. There was a pass-through entity, but we don't know where the money originally came from.

Is there anything in H.R. 1 that would allow us to determine on the not-for-profit side where people's money is coming from, what is bankrolling them, before they go into public office?

Mr. WERTHEIMER. Only if the nonprofit is engaged in campaign-related activity. It does not cover other activities, advocacy or any other kinds of activities. The Court has basically—and Congress has focused on disclosure rules that apply to entities that are engaged in campaign activity.

Mr. RASKIN. Okay. Let me ask you a question about *Citizens United*.

I am not seeing too much in H.R. 1 which head-on addresses the *Citizens United* problem. The Supreme Court basically toppled two centuries of precedent to say that corporations were basically assemblages of citizens, and so the CEO could take whatever money he or she wanted directly out of the corporate treasury to spend in political campaigns.

Are you seeing that there is anything in H.R. 1 that fundamentally changes this process? And what do you think about an idea that I have suggested, which I am calling Shareholders United, which would say that the CEOs can't do that without a prior majority vote of the shareholders?

Mr. WERTHEIMER. Well, I do think there are provisions in H.R. 1 that indirectly address *Citizens United*, since you need a Constitutional amendment if you are going to overturn it.

Allowing you to run for office in competitive races free from potential obligation and dependency to the hundreds of millions of dollars, the \$5 billion that go into super-PACs, is one way of addressing *Citizens United* within the current Constitutional restraints.

There are also ways of strengthening the coordination rules to make sure that so-called independent super-PACs are not, in fact, operating in coordination with candidates.

On your point about requiring corporations to get approval from shareholders, we haven't closely examined that question. It is on the table, and we will take a look at it.

The CHAIRPERSON. The gentleman's time has expired.

I would now recognize the gentleman from Georgia for 5 minutes.

Mr. LOUDERMILK. Thank you, Madam Chairperson. I appreciate the opportunity to weigh in on this piece of legislation.

Real quick question. Mr. Bains, how long have you and your organization been working, participating in helping with H.R. 1?

Mr. BAINS. Well, my organization has, when asked, provided technical assistance to the Hill on a variety of pieces of legislation that have made their way into H.R. 1 over time, for example, the Government By the People Act. Another example is the Save Voters Act that would fix the Husted problem that the Supreme Court upheld about Ohio's voter purge.

So there are a number of examples like this over the years that we have provided technical—

Mr. LOUDERMILK. But H.R. 1, how long have you working on that?

Mr. BAINS. H.R. 1 we have been providing technical assistance over the last few months, I would say, as the bill came together.

Mr. LOUDERMILK. Six months, 8 months?

Mr. BAINS. I am not quite sure of the number of months, but 8 months sounds long to me. No, I would say a few months. The bill really came together toward the end of the year, and that is when we started providing technical assistance.

Mr. LOUDERMILK. Thank you.

Ms. WEISER, how long has your organization been working?

Ms. WEISER. The Brennan Center has been working on the issues in H.R. 1 really for more than two decades. We have innovated a lot of these reforms. We have been working on advancing them at the State level, even working with secretaries of state and State legislatures, and working on promoting them at the Federal level as well.

Mr. LOUDERMILK. H.R. 1, how long?

Ms. WEISER. And H.R. 1 is something we have been calling for really since we first heard about it.

Mr. LOUDERMILK. Mr. Wertheimer.

Mr. WERTHEIMER. Yes. Well, there are provisions in H.R. 1, there are bills in H.R. 1 that we have worked on in general for many years. It is a combination of bills. On H.R. 1 itself, since people started talking about it we have been involved.

Mr. LOUDERMILK. Okay. Well, I appreciate that. Mr. Davis and I have been on this Committee now for 3 years, and this is the first time that we have met or heard from any of you, and I am just a little surprised that this is the first time that we have been included in the legislation. So that was why I was just wondering how long that you guys have been working on it.

Mr. WERTHEIMER. Well, we have never been asked to appear before this Committee.

Mr. LOUDERMILK. Well, it is not just before the Committee. Working on legislation, engaging with both parties is important on legislation.

Secretary Wyman, what was the percentage of voter turnout in Washington of registered voters in this last election?

Ms. WYMAN. In the last election? Oh, sure, ask me the one thing I didn't actually look up before I came in.

I don't remember off the top of my head. Very strong, though. It was I want to say high to mid-70s. But I can get back to you on that one. [According to the Secretary of State's website voter turnout as a percentage in 2018 was 71.83 percent. <https://results.vote.wa.gov/results/20181106/Turnout.html>]

Mr. LOUDERMILK. Okay. Do you know what the average is in Washington of registered voters?

Ms. WYMAN. It depends on the type of election. Even year elections, particularly Presidential, are our highest. We typically are in the high 70s, low 80s. In off-year elections, which we have in our State, usually in the 50 to 60 percent range.

Mr. LOUDERMILK. Okay. That seems pretty high from what I have seen from other States, like Georgia. Even with those numbers it doesn't seem that voter registration is the issue because you don't have 100 percent of registered voters coming out.

Ms. WYMAN. Correct.

Mr. LOUDERMILK. Because it was not a really voter registration issue.

Based on your experience, do you see any need that we should federalize the registration and voting practices laws that are currently within the purview of each State?

Ms. WYMAN. No, I really would like to keep that power at the State level and let local election officials and State election officials be able to come up with innovative solutions to move things forward. As I said in my opening remarks, my concern with H.R. 1 is that we are going to lock in very specific requirements that won't give a lot of flexibility to those local elected officials to solve problems.

Mr. LOUDERMILK. Yeah, I mean, from all the elections I have been involved with, in most elections that I have ever run I have been the least funded of all the candidates, and I continually won.

But I can remember days of 30, 40 percent voter turnout, especially in local elections, was considered a high voter turnout. And so when you still have 50, 60, 70 percent of registered voters not turning out to vote, that doesn't seem to be that is the real issue.

Ms. Weiser, in the beginning there was a little engagement between Mr. Aguilar and Mr. Davis joking about campaign donations. And I think Mr. Aguilar said, when Mr. Davis said when he writes a check to Davis' campaign, he said something like, "That won't happen." And I understand that because they disagree politically.

But under this matching program would not we be forcing him to make a contribution to Mr. Davis? Wouldn't we be forcing every citizen regardless of what they believe politically to write a—theoretically spend their taxpayer money for someone they disagree with.

The CHAIRPERSON. The gentleman's time has expired, but we will certainly have the witness answer your question.

Ms. WEISER. Thank you. And I would also like to note for the record that the Brennan Center has reached out to and written to every Member of Congress. We have met with Republican offices. And we would be delighted to work with you on these issues, as well.

In response to your question, H.R. 1—is not about giving money to politicians, it is about boosting the voices of the ordinary Americans who are giving the political contributions. And that is actually a strength of the system, not a weakness, that the public funds are supporting the candidate of choice of the voter and the donor, not of the politicians.

The CHAIRPERSON. Thank you very much.

I am going turn now to the gentlelady from California for 5 minutes.

Mrs. DAVIS of California. Thank you, Madam Chairperson.

And thank you to all of you for joining us today.

I want to talk about an issue of preserving the overall integrity of the election process. You know, it just seems common sense to me that the only allegiance of a State's chief election officer must be to the voters and not to any competing political agenda.

So I think we could agree that an inherent conflict of interest exists when a State's chief election official is responsible for monitoring and certifying the results of a Federal election while actively

participating in the campaign of one of the candidates in that election.

This last election season, multiple secretaries of states captured national attention and incited great controversy because of their political involvement in elections they were responsible for overseeing.

So that is why I have advocated for some time making it impossible for the chief elections official to simultaneously engage in any sort of Federal election activity, and that provision is in H.R. 1.

So I want to ask all of you, we can start with Mr. Bains—and if you could respond quickly, probably doesn't take much to do that—do you think we should continue to allow a secretary of state to be both player and referee? How would you change that if you believe that is true?

Mr. BAINS. Representative Davis, we are strong supporters of the provision that would require that anyone running for office should not be actually running the election. And we saw this in this past election in Ohio, in Georgia and Kansas. There were three examples of secretaries of state who were running for higher office, and it seriously undermined the public's confidence. We can't have that anymore.

Mrs. DAVIS of California. Thank you so much.

I am going to go down the line because of our time.

Ms. WEISER. Yes, we, too, strongly to support the conflict of interest provision.

Mr. WERTHEIMER. Yes, we do, too.

Mrs. DAVIS of California. Thank you.

And, Madam Secretary?

Ms. WYMAN. I have concerns about the right of association that those elected officials have to participate in elections. But their voters hold them accountable, and we certainly saw that in Kansas and I think see it in other parts of the country, too.

Mrs. DAVIS of California. Do you think the State of Washington voters would like it if you were involved really on the major organizing committee for a candidate for Federal office?

Ms. WYMAN. Well, as an independently elected official, I don't usually do that. I have spent my career in election administration. And I do occasionally for friends support their campaigns, never get really involved in them, because I think the optics are bad. And I really think that it is important for me to—

Mrs. DAVIS of California. How would you feel as a voter in Washington State if you had a secretary of state who was involved in a Presidential election, I mean quite visibly?

Ms. WYMAN. I think it is problematic. And, in fact, my last election my opponent had done a fundraiser for one of the Presidential candidates.

Mrs. DAVIS of California. Should we in the legislature here then want to do something about that? Because I appreciate your concerns, and obviously Washington State has allowed their voters great access.

Ms. WYMAN. Yes. It is a balance. It is always striking a balance between access and security, and it is always a balance between that public perception and maintaining the integrity of the process.

Mrs. DAVIS of California. Thank you all for your responses.

I will turn it back.

The CHAIRPERSON. The gentlelady returns her time.

The gentleman from North Carolina, do you wish to be heard?

Mr. BUTTERFIELD. I do. Thank you very much.

The CHAIRPERSON. You are recognized for 5 minutes.

Mr. BUTTERFIELD. I thank the Chairperson for convening this hearing.

Thank you to the four witnesses for traveling to Washington and sharing in this conversation today.

What the Chairperson did not mention a few moments ago is that some of us will be boarding an airplane in a few minutes to go to Congressman Walter Jones' funeral down in North Carolina and then back tonight to vote to keep the government up and running. And so if I leave it is of no disrespect to this panel or to the future panel.

I want to just spend my few minutes, if I can, on the Voting Rights Act of 1965. This is a piece of legislation that I feel very strongly about. House Democrats feel very strongly about it, and we are determined to have full and effective enforcement of the Voting Rights Act.

I had just finished high school in August of 1965 when the Voting Rights Act was signed into law. And then, in 1982, I had the privilege of being in the Senate gallery when the act was reauthorized and the intent standard was removed from the law and the effects standard was replaced, and that was a great day.

And so we have benefitted in the South significantly, particularly in the South, significantly from full enforcement of the Voting Rights Act.

When the Voting Rights Act was first enacted into law there were very few African Americans in the South who were registered to vote. In fact, in Shelby County, Alabama, there were no African Americans, I am told, at least in Selma, Alabama, there were no African Americans registered to vote, but the Voting Rights Act has transformed the political landscape of the South and it is a good piece of legislation.

The problem is that on June 25 of 2013 the Supreme Court in a split decision, 5-4 decision, invalidated section four of the Voting Rights Act but kept in place section five.

And so Chairwoman Fudge's Subcommittee will be traveling the country over the next few weeks and months to hold field hearings to get public input as to what we should do with section four. And so I want to enlist all of you in the process and if you would please keep us informed.

Mr. Wertheimer, I was particularly impressed with your terminology "extreme partisan gerrymandering," I use that as I go around the country talking about redistricting, because since the beginning of the country States have always engaged in partisan gerrymandering.

But we have reached a point now in our history when it has risen to the level of extreme partisan gerrymandering. And it is due in part to political greed. It is due in part to the availability of technology and being able to do predictive modeling when drawing lines. And so I want to thank you for using that terminology.

You and I both know that the Supreme Court is taking up a Maryland case, Mr. Raskin, and a North Carolina case, in a few weeks on this subject, and we don't know what that holding will be. I know what you and I hope it will be. We focused for years on racial gerrymandering, but now we are awaiting the decision on political gerrymandering.

And so I guess my question to you, sir, is section two is still the law of the land under the Voting Rights Act, and that is undisturbed, but section five is not enforceable. Has your organization had any involvement with raising public awareness of the importance of section five? It is a very valuable tool in the voting rights enforcement arena.

Mr. WERTHEIMER. Well, we agree that it is a critical tool. We disagreed with the Supreme Court's decision. This is not an area that we have been active in as such, except as part of supporting H.R. 1, and we will support the efforts of the Voting Rights Restoration Act.

Mr. BUTTERFIELD. Would any of the other, either of the other panelists?

Mr. Bains? Is it Dr. Bains or Mr. Bains?

Mr. BAINS. Mr. Bains. My mother is disappointed I didn't become a doctor.

Mr. BUTTERFIELD. Yes, right.

Mr. BAINS. But, yes, the Voting Rights Act is a priority for Demos. As you pointed out, Representative Butterfield, the Voting Rights Act has been a signal piece of legislation, the most effective civil rights act in our history, that brought people of color into the electorate. It is vital that act be restored by the creation of a coverage formula that goes back into place and puts States like Texas, which we just sued, back under preclearance. They would not have been able to initiate the voter—

Mr. BUTTERFIELD. Section two is still the law of the land.

Mr. BAINS. It is.

Mr. BUTTERFIELD. We can still litigate cases under section two. And I am a former voting rights attorney and so I know the answer to the question, but I want to get it into the record. What is the cost of a section two lawsuit versus the cost of a section five inquiry?

The CHAIRPERSON. The gentleman's time has expired, but the witness can briefly answer.

Mr. BAINS. Thank you, Chairperson.

Section two lawsuits are extremely expensive and resource intensive. I worked at the Justice Department on voting rights issues. They cost millions and millions of dollars and they take years and years to occur. Section five must be restored.

Mr. BUTTERFIELD. The cost of Section five? Zero?

Mr. BAINS. It is not zero because there is staff time that goes into it, but it is minimal by comparison.

Mr. BUTTERFIELD. Thank you. I yield back.

The CHAIRPERSON. We have two more members who may wish to be recognized.

Does the gentlelady from Ohio wish to be recognized for 5 minutes?

Ms. FUDGE. Thank you very much, Madam Chairperson.

Thank you all for being here. I will be brief.

First off, I am from Ohio, so clearly I understand what is going on with our Secretary of State. We would say it a different way. We would say it is the fox watching the hen house. That is the terminology we would use in blue-collar Ohio. And I do believe there has been a systematic and ongoing attempt to disenfranchise voters in the State of Ohio.

Even Justice Roberts said that discrimination still exists, and no one doubts that. So please tell me what provision of H.R. 1 would you think would be effective in alleviating the continued effects of racial discrimination in voting? Mr. Bains, and then Ms. Weiser.

Mr. Bains. Well, clearly, Representative Fudge, the commitment that is in H.R. 1 to restore the Voting Rights Act is paramount, because the Voting Rights Act is the best tool we have to stop racial subordination that occurs in the voting process.

I would also say that the provision that prevents voter purges, like of the sort that occurred in your home State of Ohio and that we sued over, is key, the Save Voters Act. It will prevent States from purging non or infrequent voters, targeting people because they don't vote for a couple of years and putting them on a process to kick them off the rolls.

Those kinds of processes have discriminatory impacts. In Ohio a study was done showing—looking at areas in Cincinnati—people who were purged at over twice the rate from communities that were majority black neighborhoods as from majority white neighborhoods. So that is a key and important provision.

Ms. FUDGE. Thank you.

Ms. Weiser.

Ms. WEISER. Thank you, Representative Fudge.

We do concur that renewing the Voting Rights Act is critical to address race discrimination.

But there is a whole range of other voting rights provisions in H.R. 1 that set minimum Federal standards that actually prevent the kind of shenanigans that have been used in a discriminatory way to restrict access to voting. Things like modernizing voter registration, whether it is by updating the voter purges, putting in place protections for voter purges, or putting in place automatic and same-day voter registration, so that the voter rolls can't be manipulated in order to discriminatorily exclude certain groups of voters.

Early voting, a nationwide standard, in your own home State there were cutbacks, discriminatory cutbacks targeting days where African American voters were much more likely to vote.

So that these minimum standards will also make a big difference.

Ms. FUDGE. Thank you.

Last question, Mr. Wertheimer, we have been talking about gerrymandering. Can you tell me how commissions are put in place such that they take into consideration diversity in gender and in race?

Mr. WERTHEIMER. Well, that depends right now on the State rules that are adopted when they create independent commissions. But I think there is an effort in H.R. 1 to ensure that those kinds of standards are put in place with new independent commissions.

Ms. FUDGE. I yield back, Madam Chairperson.

The CHAIRPERSON. The gentle lady yields back.

Mr. AGUILAR is recognized for 5 minutes.

Mr. AGUILAR. Thank you, Madam Chairperson.

Secretary Wyman, I wanted to ask you specifically, you talked about your mail program. That was instituted in 2011. Is that correct?

Ms. WYMAN. Moving to vote by mail, that is when our entire State became a vote-by-mail State. We have been migrating to it since probably the early 1980s.

Mr. AGUILAR. And you had a hybrid system before then?

Ms. WYMAN. Yes.

Mr. AGUILAR. So you had vote-by-mail, but you also had polling locations. But now it is all vote-by-mail?

Ms. WYMAN. It is all vote-by-mail.

Mr. AGUILAR. Can you talk to me a little bit about the benefits of that program? I want to make sure that we discuss the point briefly about voter participation. And obviously you said there are some other external factors, right, competitive elections and other things that raise that participation rate.

But do you feel that you and your colleagues in other States, that you can do both, increase voter participation levels, as well as increase the number of total registrants? Don't you have to do both, it isn't just an either-or?

Ms. WYMAN. They go hand in hand certainly. Our State, really, our linchpin for our system is the signature verification, and I know that that has been front and center in a number of issues across the country. We base it off the voter registration signature, and we train our local election officials each year with the Washington State Patrol to verify that.

We build a lot of confidence, I think, with the electorate on both sides, that the people that are voting, casting their votes, are the actual people that should be.

Mr. AGUILAR. In the State of Washington is it a partisan issue? Do you see folks on one side or the other say that this is a bad system and this is fraught with issues?

Ms. WYMAN. Of course we do. It is the nature of elections. Yes, I mean. And that is really what our job is, is to make the most progressive Democrat, the most conservative Republican believe the results were accurate, fair, and reflect how people voted.

And one of the things that I like to get on the record is, I really would like to invite all of you to speak to your local election officials, speak to your secretaries of state, to get input on kind of the technical elements of H.R. 1. That is where I think we have been out of the process, and I think it would help you make this very workable at the local level.

Mr. AGUILAR. Thank you. I appreciate that.

I yield back, Madam Chairperson.

The CHAIRPERSON. The gentleman yields back.

Mr. Davis has been asked to be recognized for a 10-second comment.

Mr. DAVIS of Illinois. Thank you.

Ms. Weiser, I appreciate the Brennan Center's willingness to meet with the Republicans, but I checked with my office, as the

Ranking Member and as one of the most senior members on this Committee, I don't have any scheduling requests to meet with you.

I would love to talk to you about redistricting reform. I am from Illinois. We would love to have your support for redistricting reform efforts there.

Thank you.

The CHAIRPERSON. Thank you, Mr. Davis.

I would just note, before we leave for Mr. Dingell's funeral, that although many of us here disagreed with the Supreme Court on the *Citizens United* decision, eight of the nine justices, in reaching that decision, emphasized the importance of disclosure and transparency.

And, in fact, Justice Scalia wrote that—and this is a quote—"Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

I think H.R. 1 would go a long way towards meeting Justice Scalia's advice in that case.

And with that, we will be recessed until 1 o'clock for our next panel.

Thank you very much to the witnesses.

[Recess.]

The CHAIRPERSON. Well, welcome, everyone. The Committee on House Administration is back in session.

First, let me offer my apologies to the witnesses and our colleagues and the audience. Many of us were at the funeral for the late John Dingell. It was a beautiful ceremony, but it was also a lengthy ceremony, and that is why we are somewhat delayed.

However, we are eager to hear from our witnesses. We gave our opening statements this morning, so I am going to go right to the introduction of our witnesses.

First, we have Alejandro Rangel-Lopez, who is a first-generation Mexican American who was born and raised in Dodge City, Kansas. He currently serves as the student council president, National Honor Society vice president, and is the co-plaintiff in *LULAC and Rangel-Lopez v. Cox* lawsuit, which has to do with the voting rights case from last election.

We have also Peter Earle. Peter Earle is a Wisconsin civil rights lawyer. He emigrated to the United States in 1955, graduated from Chicago College of Law with high honors, and has served as a law clerk to the Honorable Myron Gordon of the United States District Court for the Eastern District of Wisconsin.

We have as well Brandon Jessup, who is a data science and information systems professional from Detroit, Michigan. He is the executive director of Michigan Forward, a Michigan-based non-profit organization for data analysis.

Finally, we have Mr. David Keating, who is the president of the Institute for Free Speech. Prior to joining the Institute for Free Speech, he was executive director of the Club for Growth, and prior to that, worked for many years as the executive vice president of the National Taxpayers Union.

We welcome all our witnesses. We are operating under the 5-minute rule. Your full written statement will be made part of the record. So we ask that you summarize your statement. And when your 5 minutes is up, a red light will go on, and we don't cut you

off, but if you could summarize at that point, that would be very helpful.

We will start with you, Mr. Rangel-Lopez.

STATEMENTS OF ALEJANDRO RANGEL-LOPEZ, SENIOR AT DODGE CITY HIGH SCHOOL, DODGE CITY, KANSAS, AND PLAINTIFF IN LULAC & RANGEL-LOPEZ V. COX; PETER EARLE, WISCONSIN CIVIL RIGHTS TRIAL LAWYER; BRANDON A. JESSUP, DATA SCIENCE AND INFORMATION SYSTEMS PROFESSIONAL, EXECUTIVE DIRECTOR, MICHIGAN FORWARD; AND DAVID KEATING, PRESIDENT, INSTITUTE FOR FREE SPEECH

STATEMENT OF ALEJANDRO RANGEL-LOPEZ

Mr. RANGEL-LOPEZ. Thank you, Chairperson Lofgren and members of the Committee, for this opportunity to speak to you today. My name is Alejandro Rangel-Lopez, and I am a senior at Dodge City High School in Dodge City, Kansas. I serve as student council president, National Honor Society vice president. I participated in policy debate for 4 years and was recently chosen as an alternate to represent Kansas for the U.S. Senate Youth Program.

My parents are immigrants from the states of Guerrero and Veracruz, respectively, in Mexico, and they came to the United States for the same reason that everyone else did and continues to do so: to reach for a dream that isn't attainable where they are from. That dream led them to the city that I call home, to work in the two beef-packing plants that fuel the economy of southwest Kansas.

And by no means is this story unique. Thousands of people from every corner of the world have arrived in Dodge City to forge their own path and to create a better future for their children.

Being a first-generation Mexican American, I grew up figuring out what that meant. I celebrated Dia de los Muertos, grew up with the traditions that my parents instilled in me, while also learning English in preschool and the origin of this great Nation. I sang the Kansas State song, "Home on the Range," on Kansas Day, and over many years came to the conclusion that nothing beats a Kansas sunset.

But I can't say there haven't been any issues. For two decades, Dodge City only had one polling place for nearly 13,000 voters. And while that is bad enough to make it one of the most heavily burdened polling sites in the State, it was at the very least centrally located, which can't be said about the location that was chosen for the 2018 midterm elections. It was located south of town, out of city limits, a mile from the closest bus stop.

Worse, the county clerk sent out the wrong address to new voters, sending them to a now-closed polling location. I fully expected to cast my first vote at the Civic Center where I had watched my dad vote every election year that I can remember. But this new site wasn't accessible by public transportation, and that would negatively impact minority and low-income voters the most.

I could not sit idly by as it happened. For a long time, other community members had voiced concerns to the county clerk about having only one polling site, but their words fell on deaf ears.

After years of failed attempts to contact our clerk about finding a resolution before the election, I, along with the League of United Latin American Citizens, became plaintiffs in a lawsuit challenging the clerk's actions and asking for a resolution before midterms.

While we were unsuccessful in finding relief for the midterms, it played a pivotal role in pushing her to open the two new polling sites that are located inside the city limits for future elections.

We rely on our elected officials to make the right choices, and for a county clerk, that job was to make voting as easy as possible in the county that she represents. Unfortunately, that is not what happened, and the issue required national attention and nearly \$100,000 of taxpayer money for legal fees, fighting our efforts to make polling places more accessible.

The story I just described to you is not unique either. People across the country, from Georgia, to North Dakota, to Texas, and my home State, are making it more difficult for citizens to vote, rather than expanding our democracy.

We often think that the biggest threat to the American electoral system is foreign interference, and while those concerns are justified, it is also true that many of the measures undermining voter access are being committed by the officials elected, or selected, to protect people's voting rights.

When people vote, our democracy becomes stronger. That is why I support H.R. 1. If we had the guidance of this legislation where it is recommended that all polling places are accessible by public transit, then we could have avoided what happened in Dodge City. It is a significant step towards a more just system that solves a lot of the issues we see today.

Kansan Dwight D. Eisenhower said, "A people that values its privileges above its principles soon loses both." I choose our principles, which I learned early in my journey as a Kansan guide us toward the stars through difficulties, and I hope you do the same.

Thank you.

[The statement of Mr. Rangel-Lopez follows:]

Oral Testimony

U.S House of Representatives

Committee on House Administration

Thursday, February 14th

Alejandro Rangel-Lopez

Dodge City High School (KS) Student

Thank you, Congresswoman Lofgren and members of the committee, for this opportunity to speak to you today.

My name is Alejandro Rangel-Lopez and I am a senior at Dodge City High School in Dodge City, Kansas. I serve as the Student Council President, National Honor Society Vice President, participated in policy debate for four years, and was recently chosen as an alternate to represent Kansas for the US Senate Youth Program. My parents are immigrants from the states of Guerrero and Veracruz respectively and they came to the United States for the same reason everyone else did and continues to do so – to reach for a dream that isn't attainable where they're from. That dream led them to the city I now call home, to work in the two beef packing plants that fuel Southwest Kansas' economy. Our story isn't unique. Thousands of people from every corner of the world have arrived in Dodge City to forge their own path and to create a better future for their children. Being a first-generation Mexican-American, I've experienced precisely what that means. I celebrated Dia De Los Muertos, grew up with the traditions my parents instilled in me while also learning English in preschool and studying the origin of this great

nation. I sang the Kansas state song, “Home on the Range” on Kansas Day, and over many years, came to the conclusion that nothing beats a Kansas sunset.

But, I can’t say there haven’t been issues. Until a month ago, Dodge City only had one polling place for nearly 13,000 voters and while that’s bad enough to make it one of the most burdened polling places in our state, it was at the very least, centrally located, which can’t be said about the location chosen for the 2018 midterm elections. That new location was south of town, outside the city limits. Worse, the county clerk sent out the wrong location address to new voters. I fully expected to cast my first vote at the Civic Center, where I’d watched my dad vote every election year that I can remember. But this new site wasn’t accessible by public transportation before we raised concerns. We believed these factors would negatively impact minority and low-income voters. I could not sit idly by as it happened. For a long time, other community members had voiced concerns to the county clerk about having only one polling site, but their words fell on deaf ears. After multiple failed attempts to contact our clerk about finding a resolution before the election, I, along with the League of United Latin American Citizens, became plaintiffs in a lawsuit challenging the clerk’s actions and asking for a resolution before midterms. While we were unsuccessful in finding relief for the midterms, it played a pivotal role in pushing her to open the two, new polling sites located inside the city limits.

We rely on our elected officials to make the right choices and for a county clerk, that job was to make voting as easy as possible in the county that she represents. Unfortunately, that’s not what happened. The clerk spent nearly \$100,000 of taxpayer money for legal fees fighting our efforts to make polling places more accessible.

This story is in not unique, either. People across the country from Georgia to North Dakota to Texas and to my home state are making it more difficult for citizens to vote rather than

expanding our democracy. We often think that the biggest threat to the American electoral system is a foreign threat. While those concerns are justified, it's also true that many of the measures undermining voter access are being perpetrated by the very elected officials elected or selected to protect people's voting rights.

When people vote, our democracy becomes stronger. That is why I support HR1. If we had the guidance of this legislation, where it is recommended that all polling places are accessible by public transit, then we could have avoided what happened in Dodge City. It is a significant step towards a more just system that solves a lot of the issues we see today. Kansan Dwight D. Eisenhower said, "A people that values its privileges above its principles soon loses both."

I choose our principles, which I learned early in my journey to becoming a Kansan, guide us toward the stars through difficulties.

Thank you.

The CHAIRPERSON. Thank you very much.
Mr. Earle.

STATEMENT OF PETER EARLE

Mr. EARLE. Thank you, Madam Chairperson, members of the Committee.

I am here to tell you the true story about how a Texas billionaire CEO secretly gave \$750,000 to a dark money group in exchange for legislation that would retroactively block 173 severely lead-poisoned children from holding the company accountable.

The Texas billionaire was Harold Simmons, and his company, NL Industries, formerly known as The National Lead Company, made the Dutch Boy line of paint. The 173 lead-poisoned children are my clients, and I filed their lawsuits in the State and Federal courts of Wisconsin between 2006 and 2011.

The only reason this story is publicly known is because years after the secret six-figure donation and subsequent sweetheart legislation, a trove of previously secret emails and checks were released to The Guardian newspaper by a very valiant whistleblower.

It is a sad day for our democracy when a rich and powerful corporate CEO can deprive innocent victims of lead poisoning their day in court just because he could afford to secretly donate huge sums of money to greedy and ruthless politicians.

This is even more egregious when one considers that these former lead paint companies knowingly caused the single most catastrophic environmental public-health catastrophe affecting children in U.S. history.

Wisconsin's lead poisoning level among children is higher than the National average, and disproportionately affects people of color, children of color. Ten percent of African American children in Wisconsin age 6 and under are lead poisoned, compared to 2.9 percent of White children.

In 2005, the Wisconsin Supreme Court ruled that lead-poisoned children could sue former lead paint manufacturers without having to prove which individual manufacturer made the lead pigment that poisoned the child that was ingested. The legal theory is called risk contribution.

The former lead paint companies were outraged by this very commonsense decision. They took the battle over the constitutionality of risk contribution all the way to the United States Supreme Court, and they lost.

When Republicans swept to power in Wisconsin in the 2010 election, the first thing they did was to try to close the courthouse doors that had been opened to lead-poisoned children 5 years earlier. Governor Scott Walker and the new Republican legislature passed legislation to immunize former lead paint manufacturers from future liability. NL Industries and other lead paint manufacturers spent six figures lobbying in support of that legislation.

But since the legislation only affected future lead poisoning cases, it did not get rid of the pending 173 lawsuits of my clients. NL Industries and Sherwin-Williams pushed the legislature to make the law retroactive.

In January of 2012, the State senate introduced a bill, S.B. 373, to shield NL Industries from accountability to these children. I at-

tended that hearing on that bill, along with about 12 of my clients and their parents. The hearing was very contentious. I demanded that the committee members look into the eyes of my children and explain to them how it is that wealthy corporations can retroactively change the law in their pending lawsuits, midstream, while throwing these children under the bus as if they were human garbage.

An optimist would conclude that the innocent, beautiful faces of these little children must have had an effect on those legislators, because the bill died in committee a few months later. A sober observer might have concluded that the sunshine of public attention on the bill must have had a sanitizing effect. But in reality, neither of those two things happened.

What happened was the lead paint companies retreated one step back as a temporary retreat before striking again. In the predawn hours of June 5, 2013, a legislator very quietly slipped a retroactive immunity provision into the State budget, on page 466 of a 532-page budget, with just four words that said, referring to lawsuits, “whenever filed or accrued,” meaning that the immunity applies to all cases, whenever filed or accrued. That four-word amendment—oh, okay. I will pause and—

The CHAIRPERSON. Well, you can wrap up, but then we have reached our 5 minutes.

Mr. EARLE. This is a horrible story about dark money. And I feel like I am a straggler on a desert, desperately looking for water, and I pray that H.R. 1 is not a mirage.

Had we known about what was going on under the table, had we known about the \$750,000 that bought retroactive legislation, the public would have had an opportunity to say something about it. Those legislators would have been accountable.

Thank you very much.

[The statement of Mr. Earle follows:]

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Committee on House Administration
“H.R. 1, For the People Act”
Written Testimony of
Peter G. Earle
February 14, 2019

Opening Statement

I’m here to tell you the true story about how a Texas billionaire CEO secretly gave \$750,000 to a dark money group in exchange for legislation that would retroactively block 173 severely lead poisoned children from holding his company accountable. The Texas billionaire was Harold Simmons and his company, NL Industries—formerly known as the National Lead Company—made the “Dutch Boy” line of lead paint.

The 173 lead poisoned children are my clients and I filed their lawsuits in the state and federal courts of Wisconsin between 2006 and 2011. The only reason that this story is publicly known is because years after the secret six-figure donation and subsequent sweetheart legislation, a trove of previously secret documents was leaked to *The Guardian* newspaper by a valiant whistleblower.¹

It is indeed a sad day for our democracy when a rich and powerful corporate CEO can deprive innocent victims of lead poisoning their day in court

¹ Ed Pilkington, *Because Scott Walker Asked*, *The Guardian* (Sept. 14, 2016), <https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics> (attached as Exhibit A); see also Mary Bottari, *Scott Walker Backers Defend Lead and Wisconsin’s Poisoned Politics*, Center for Media and Democracy’s PRwatch (Oct. 17, 2016), <https://www.prwatch.org/news/2016/09/13152/scott-walker-lead-pay-to-play>; Pawan Naidu, *Secret cash aided politicians who rewrote Wisconsin law to block claims of lead-poisoned children*, Wisconsin Center for Investigative Journalism (Sept. 2, 2018), <https://www.wisconsinwatch.org/2018/09/secret-cash-aided-politicians-who-rewrote-wisconsin-law-to-block-claims-of-lead-poisoned-children/>.

just because he could afford to secretly donate huge amounts of money to greedy and ruthless politicians. This is even more egregious when one considers that these former lead paint companies knowingly caused the single most catastrophic environmental public health epidemic affecting children in U.S. history.

Wisconsin's lead poisoning level among children is higher than the national average, and disproportionately affects children of color. 10 percent of African American children under age 6 had lead poisoning, compared to 2.9 percent of white children.² In 2005, the Wisconsin Supreme Court ruled that lead poisoned children could sue former lead paint and pigment manufacturers without having to prove which individual manufacturer made the lead pigment that the child actually ingested.³ The former lead paint companies were outraged by this common sense decision. They took the battle over the constitutionality of risk contribution all the way to the United States Supreme Court and lost.⁴

Republicans swept to power in Wisconsin in the 2010 election and the first thing they did was to try to close the courthouse doors that had been opened to lead-poisoned children five years earlier. Governor Scott Walker and the new Republican legislature passed legislation to immunize former lead paint and pigment manufacturers from future lawsuits. NL Industries and other lead paint manufacturers spent six figures lobbying in support of this legislation.⁵

But, since the legislation only affected *future* lead poisoning cases, it did not get rid of the pending lawsuits of the 173 lead-poisoned children. So NL Industries and Sherwin-Williams pushed the legislature to make the law *retroactive*.

In January 2012, the state senate introduced a bill, S.B. 373, to shield NL Industries from accountability to these 173 lead poisoned children.⁶ I

² Ivory Brookins, *Report: Lead Poisoning Rate Among Wisconsin Children Nearly Equal to Flint*, Wisconsin Public Radio (Oct. 27, 2016), <https://www.wpr.org/report-lead-poisoning-rate-among-wisconsin-children-nearly-equal-flint>.

³ *Thomas v. Mallett*, 2005 WI 129, 285 Wis.2d 236.

⁴ *Gibson v. American Cyanamid*, 760 F.3d 600 (7th Cir. 2014), *cert. denied*, 1135 S.Ct. 2311 (2015).

⁵ See Wisconsin Ethics Commission lobbying reports for the Sherwin-Williams Company, NL Industries, Inc., and Atlantic Richfield Company for the 2011–2012 Legislative Session for SB-1, available at the Wisconsin Ethics Commission “Eye of Lobbying” website (<http://lobbying.wi.gov/Home/Welcome>).

⁶ 2011 Senate Bill 373 (Wis. 2012), <https://docs.legis.wisconsin.gov/2011/related/proposals/sb373>.

attended a hearing on the bill along with about 12 of my clients and their parents. The hearing was very contentious. I demanded that the Judiciary Committee members look into the eyes of the lead-poisoned children at the hearing and explain to them how it is that in America, wealthy corporations can retroactively change the law in pending lawsuits to their benefit while throwing the fate of the innocent injured children aside as if they were nothing more than human garbage.

An optimist would conclude that the innocent, beautiful faces of those little children must have had an effect on those legislators because the bill died in committee in March 2012. A sober observer might have concluded that the sunshine of public attention must have had its sanitizing effect. But what really happened was that this was only a temporary retreat.

A little more than one year later, the lead paint companies struck again, this time without public notice and in both literal and figurative darkness.

In the pre-dawn hours of June 5, 2013, a legislator quietly slipped the retroactive immunity provision drafted by NL Industries into a 532-page budget bill.⁷ The retroactive provision had no authors or sponsors and no notice was given to the public that it was under consideration. Public records showed that NL Industries' lobbyist handed the statutory change to top legislators in a memo with "NL language" handwritten on top.⁸ The suggested change was fast tracked through both houses of the legislature and enacted into law on January 27, 2011.

Years later, documents published by *The Guardian* revealed that at the same time that legislators were pushing legislation to benefit Simmons' company, Simmons and his corporation had secretly funneled \$750,000 into a dark money group coordinating with Governor Walker and state Republicans: the Wisconsin Club for Growth ("WiCFG").⁹

During the 2011 and 2012 recall elections, Walker secretly raised millions for WiCFG, which spent \$20 million supporting Walker and senate

⁷ Patrick Marley, *Bail Bondsmen, Lake Michigan Among Special-Interest Items in Budget Plan*, Milwaukee Journal Sentinel (June 3, 2013), <http://archive.jsonline.com/news/statepolitics/bail-bondsmen-lake-michigan-among-special-interest-items-in-budget-plan-b9927006z1-210231371.html>; see also Wisconsin Biennial Budget, 2013 Act 20, page 466.

⁸ Memo from NL Industries lobbyist Eric J. Peterson to Senate Majority Leader Scott Fitzgerald, *RE: Budget Issues*, at 5 (April 29, 2013) (attached as Exhibit B).

⁹ See Exhibit A; see also checks from Harold Simmons and Contran Corporation to Wisconsin Club for Growth (attached as Exhibit C). Contran Corporation is Simmons' holding company.

Republicans.¹⁰ Despite laws limiting coordination between candidates and outside groups, WiCFG was run by Walker's top campaign advisor.¹¹

Notably, it appears that Walker's team directed Simmons to give to WiCFG, where his donation would remain secret, rather than to Walker's own campaign, where it would be disclosed. A 2012 email to Walker from his campaign advisor flagged Simmons as a potential donor, but warned that he would be controversial because he owned NL Industries, "the leading maker of lead pigment paint".¹² Weeks later, Simmons' corporation gave a six-figure check to WiCFG.

The secrecy was a feature, not a bug.

This is why dark money must be brought into the light. To ensure that our democracy lives up to the promise of self-government, voters must have the information they need to hold our elected officials accountable. Citizens can't exercise their right to self-governance if we don't know who is funding our representatives.

When donors remain secret, the public cannot know whether politicians are taking action to advance those donors' interests. Disclosure not only allows the public to track the undue influence of large contributions on elected officials, it can also deter officials from acting on behalf of donors rather than voters. If Simmons' donations had been publicly disclosed, Wisconsin Republicans may not have been so willing to egregiously act on his behalf. The pay to play or its appearance would have been too obvious.

¹⁰ See Exhibit A.

¹¹ *Id.*

¹² Email from Keith Gilkes, campaign advisor, to Scott Walker, *FWD: Donor Research – I will send separate email with thoughts to discuss on these*, at 1, 12-13 (Nov. 14, 2011, 12:35 PM) (attached as Exhibit D).

ADDENDUM TO OPENING STATEMENT

Timeline:

- A 2005 Wisconsin Supreme Court decision allowed affected families to hold lead paint manufacturers accountable, even if they couldn't identify the specific manufacturer that caused the injury. NL Industries—previously “National Lead Company,” which sold Dutch Boy paint—is one company that had been fighting liability for poisoning Wisconsin children. Its CEO was Harold Simmons. (Simmons died in Dec. 2013.)
- Governor Scott Walker and new Republican majorities took office in 2011, and quickly pushed an array of unpopular measures to attack union rights, to attack voting rights, and to block the public's access to the courts. Those measures prompted historic protests and recall elections in August 2011 against state senators, and in June 2012 against Walker and four senators.
- On April 21, 2011, with the senate recalls approaching, Simmons' corporation wrote a \$500,000 corporate check to Wisconsin Club for Growth.¹³
- On November 14, 2011, as Governor Walker looked to his own recall election, a Walker campaign advisor sent Walker an email with the subject line “donor research.”¹⁴ Walker's advisor wrote that he wanted to discuss three potential donors, including Simmons, “so you are aware of what you might need to defend when these are disclosed.”¹⁵ Walker was warned that “one of the most immediate issues was that NL Industries (purchased by Simmons in 1986) was the leading maker of lead pigment paint,” which had avoided having to pay towards medical treatment for child victims of lead poisoning in Milwaukee.¹⁶
- On December 15, 2011, one month after that “donor research” email, Simmons' corporation gave \$100,000 to Wisconsin Club for Growth.¹⁷
- On January 4, 2012, Simmons himself wrote a check for \$150,000 to Wisconsin Club for Growth.¹⁸

¹³ Exhibit C at 1.

¹⁴ Exhibit D at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 12-13.

¹⁷ Exhibit C at 2.

¹⁸ *Id.*

- In January 2012, the same month as Simmons' third check, senate Republicans introduced a bill to make immunity for lead paint manufacturers retroactive.¹⁹ The bill faced public opposition and failed.²⁰
- In June 2013, after Walker and senate Republicans survived the recall elections, GOP senators slipped an amendment into a 603 page budget bill to immunize NL Industries from existing lawsuits.²¹ Records showed that the language was offered by an NL Industries lobbyist.²²
- In November 2014, Walker won reelection.
- A bipartisan group of prosecutors, supported by Wisconsin's nonpartisan elections board, investigated Walker's campaign for unlawfully coordinating with WiCFG during the 2011-12 elections. The targets of the probe challenged the investigation, and after years of litigation, the Wisconsin Supreme Court ended the investigation in 2015 with a widely-criticized and legally dubious decision.²³ (The court's majority was also elected with millions in spending by WiCFG and other groups under investigation in the probe, prompting a recusal petition and serious concerns about conflicts of interest.²⁴)

¹⁹ Steven Elbow, Crime and Courts: Further Fast-Track 'Tort Reform' Would Work Retroactively, Capital Times (Jan. 23, 2012) https://madison.com/ct/news/local/crime_and_courts/blog/crime-and-courts-further-fast-tracked-tort-reform-would-work/article_9f2b6a7e-43ad-11e1-8c91-001871e3ce6c.html#ixzz1kLe2co5G.

²⁰ 2011 Senate Bill 373 (Wis. 2012).

²¹ Marley, *supra* note 7.

²² Exhibit B.

²³ See, e.g. Lynn Adelman, How Big Money Ruined Public Life in Wisconsin, 66 Clev. St. L. Rev. 1 (2017), <https://engagedscholarship.csuohio.edu/clevstlrev/vol66/iss1/5>; see also Brent Ferguson, *A New Threat to the Viability of Campaign Contribution Limits*, 65 Emory L. J. Online 2020 (2016), <http://law.emory.edu/elj/elj-online/volume-65/essays/new-threat-viability-campaign-limits.html>; see also *Indep. Inst. v. Fed. Election Comm'n*, No. 14-CV-1500, 2016 WL 6560396, at *7 (D.D.C. Nov. 3, 2016), *aff'd sub nom. Indep. Inst. v. F.E.C.* (U.S. Feb. 27, 2017) (affirming that the First Amendment does not limit campaign finance regulation to regulating only express advocacy).

²⁴ See Brendan Fischer, *Justices in Walker Criminal Probe Face Conflicts of Interest*, Center for Media and Democracy's PRwatch (Oct. 6, 2014), <https://www.prwatch.org/news/2014/10/12617/justices-walker-criminal-probe-face-conflict-interest>; see also Lincoln Caplan, *Scott Walker's Wisconsin and the End of Campaign Finance Law*, The New Yorker (Jul. 21, 2015), <https://www.newyorker.com/news/news-desk/scott-walkers-wisconsin-and-the-end-of-campaign-finance-law>.

- It wasn't until September 2016 that the public learned that Simmons and his corporation secretly gave \$750,000 to support Walker and Wisconsin Republicans, when *The Guardian* published its report.

The CHAIRPERSON. Thank you, sir.
Mr. Jessup.

STATEMENT OF BRANDON A. JESSUP

Mr. JESSUP. Good afternoon, Chairperson Lofgren and members of the Committee on House Administration. I am Brandon Jessup, resident of the State of Michigan, and for most of my adult life I have worked to improve democracy in the neighborhood and at the ballot box.

This work began on my 20th birthday, September 12, 2001, when I joined the Eastern Michigan University chapter of the NAACP, Youth and College Division. I am sure this may mirror many actions of many of America's youth post-9/11, but I also had some additional inspiration in my life along the way. And that inspiration has guided me to stand on the shoulders of Coleman Alexander Young, Bayard Rustin, Coretta Scott King, and Barack Obama, to bring progress home through our society's challenges.

I am the child of three products of America's Great Migration. My birth parents were too young to participate at the time, yet the influence of big money in politics has shaped their lives and mine far before I was born.

Like in many Southern States, it was a known fact that Louisiana's adoption institutions, or any public institutions for that matter, weren't necessarily kind to little black boys.

Being my mother's second child in as many years, arrangements were made for an informal adoption to secure a good home her incoming baby boy. That good home landed me in Detroit, Michigan.

My upbringing helped me to expand on these values of civil rights, black liberation, and the women's rights movements my parents lived. My father and stepfather pushed forward north to find employment from sharecropping in Tennessee and Kentucky, respectively. They found home in the United Auto Workers and gainful employment.

My mother did the same, coming from Tennessee, moving up, pulling herself up from her bootstraps, earning her nursing degree at a local community college, and then soon joined the Michigan Nurses Association and joining her membership in the church and, of course, the United Auto Workers as well.

These experiences helped me to understand that voting is a service required for the privilege of democracy, and our consistent participation in it improves the entire American experience.

The policies proposed in H.R. 1, the *For the People Act of 2019*, heed citizen-led movements in States across this country for a better democracy that is ethical, efficient, and transparent. Big money in politics has replaced the heavy stick of violence and oppression to deploy voter suppression over broader communities through sophisticated gerrymandering and dark money.

This past decade in Michigan has left great marks across our Nation's application of democracy and on our society. As a response to the Great Recession of 2009, conservative organizations and advocacy groups worked with State institutions to introduce sweeping legislation that would disempower citizens by removing their elected officials with appointed overseers, increasing taxes on seniors

and pensioners, while divesting from public services and infrastructure.

Michigan's new emergency manager law, protected by a gerrymandered State legislature and congressional delegation, caused a chain of events that would lead to the largest municipal bankruptcy in the United States and over 10,000 children in the city of Flint being poisoned with lead.

April 25 will mark the fifth year of the Flint water crisis, 1,825 days of using bottled water to cook, eat, and clean, a sad anniversary that clean water advocates like Nayyirah Shariff, Bishop Bernadine Jefferson, and Ms. Claire McClinton remind me of daily. This injustice continues to be fueled by malfunctions in our democracy that reward corporations over citizens and profits over people. I am asking this Committee to set the course correctly, to put ethics back into our democracy.

In the spring of 2011, a nonpartisan campaign started with people who looked just like me began to push against Michigan's emergency manager law, to repeal that law. This was successful in its effort and gained over 75 of our 83 counties' support.

Unfortunately, due to more dark money in our system, through Michigan's lame duck process, that will of the voters was overturned and replaced with a whole new section of law that would place dictators right back over our democracy.

We also would find that in the dead of night collective bargaining would be taken away from us. And also, over the next 4 years, we would see big money in politics keep the Flint water crisis as a quiet set-aside that no one wants to talk about.

But it is because of that great spirit of fighting and working that Flint Rising and the American Civil Liberties Union of Michigan have remained on the ground fighting for justice.

I want to make sure I keep in my time here and talk about some of the most proactive ways that we can fight this.

Over 40 years ago, Michigan pioneered new techniques to encourage residents to register to vote. This ingenuity led my Michigan's first African American to be elected to the statewide office, Secretary of State Richard Austin, was also the first of its kind in the Nation. It was also the last set of reforms our State would see in almost 40 years.

In November 2008, with a near supermajority of voters, we approved constitutional amendments to end gerrymandering and provide commonsense reforms to make voting accessible to all. I am proud to say that I helped to lead this change to bring over 300,000 new voters to cast ballots in 2020. This is through same-day regulation and no-excuse absentee voting.

It is because of citizen-led efforts like this across this country, in Florida, Ohio, Missouri, and other places, that are pushing democracy to be what it should be in America.

Thank you for your time, and I yield.

[The statement of Mr. Jessup follows:]

February 14, 2019

Congress of the United States House of Representatives
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515-6157

Written Testimony of Brandon A. Jessup, "For the People: Our American Democracy", on House Resolution 1 - For the People Act of 2019

TO: The Honorable Congresswoman Zoe Lofgren of California, Congressman Mr. Rodney Davis of Illinois and the members of the Committee on House Administration

Good morning, chairwoman Lofgren, vice-chair Davis and members of the Committee on House Administration. I am Brandon A. Jessup, resident of the state of Michigan and for most of my adult life I have worked to improve our democracy in the neighborhood and at the ballot box. This work began on my twentieth birthday, September 12, 2001, when I joined the Eastern Michigan University Chapter of the National Association for the Advancement of Colored People, Youth and College Division. I'm sure I mirrored the actions of many of America's youth post 9/11; I also had some additional inspiration in my life along the way. This inspiration has guided me to stand on the shoulders of American greats like Coleman Alexander Young, Bayard Rustin, Coretta Scott King and Barack Obama to bring progress home through our society's challenges.

I am the child of three products of America's "Great Migration"; my birth parents were too young to participate at the time, yet the influence of big money in politics had shaped their lives and mine before I was born. Like many southern states, it was a known fact that Louisiana's adoption institutions or any public institutions for that matter weren't necessarily kind to little black boys. Being my mother's second child in as many years, arrangements were made for an informal adoption to secure a good home for her incoming baby boy. That good home would land me in Detroit, Michigan.

My upbringing helped me to expand on the values from the civil rights, black liberation and women's rights movements my parents lived. My father and step-father pushed northward to find employment in the auto industry as sharecroppers from Kentucky and Tennessee respectively, they soon would find brotherhood in the United Auto Workers. My mother worked through school to become a registered nurse through a local community-college program, an organizer at heart, she would be a proud card-carrying member of the Michigan Nurses Association, her church and later the United Auto Workers as well. My family's experiences and values helped me understand that voting is the service required for the privilege of democracy and our consistent participation in it, improves the entire American experience.

The policies proposed in H.R. 1, For the People Act of 2019, heed citizen-led movements in states across this country for a better democracy that is ethical, efficient and transparent. Big money in politics has replaced the heavy stick of violence and oppression to deploy voter suppression over broader communities through sophisticated gerrymandering and dark money.

The past decade in Michigan has left great marks across our nation's application of democracy in our society. As a response to The Great Recession of 2009, conservative organizations and advocacy groups worked with state institutions such as the Michigan Chamber of Commerce to introduce sweeping

legislation that would disempower citizens by removing their elected officials with appointed overseers, increasing taxes on seniors and pensioners while divesting from public services and infrastructure. Michigan's new emergency manager law protected by a gerrymandered state legislature and congressional delegation caused a chain of events that lead to the largest municipal bankruptcy in the history of the United States and 10,000 children drinking lead contaminated water in the city of Flint. April 25th will mark the 5th year of the Flint Water Crisis or 1,825 days of using bottled water to cook, eat and clean; a sad anniversary clean water advocates like Nayyirah Shariff, Bishop Bernadine Jefferson and Mrs. Claire McClinton remind me of daily. This injustice continues to be fueled by malfunctions in our democracy that reward corporations over citizens, and profits over people. I'm asking this committee to set the course put ethics back into our democracy.

In the spring of 2011, the non-partisan campaign to repeal Michigan's emergency manager law launched and succeeded at the ballot box in November of 2012. However, in the dead of night, lame-duck legislators overturned the will of Michigan voters; replacing their defeated dictatorship bill with a similar version and eliminating the right of workers to collectively bargain in Michigan. The following four years would expose the ugly truth of big money in politics. The Flint Water Crisis remains unresolved, the failure of ethics and accountability in government has eroded the trust of many of the city's residents. Yet, organizations such as Flint Rising, and American Civil Liberties Union of Michigan have remained on the ground fighting for justice.

The spirit found protecting the future of Michigan from poisoned water and smog filled air is also finding proactive ways to restore voting rights with common-sense reforms that improve democracy. Over forty years ago, Michigan pioneered new techniques to encourage residents to register to vote. This ingenuity led by Michigan's first African-American to be elected to statewide office, Secretary of State Richard Austin was also the first of its kind in the nation. It was also the last set of reforms the state would see until November 2018, when a near super-majority of voters, approved constitutional amendments to end gerrymandering in Michigan and provide common-sense reforms to make voting accessible to all. I am proud to say that I helped lead this second charge to protect and improve our democracy; mobilizing a twenty-year record turnout of over 4 million voters.

H.R. 1, For the People Act of 2019, clearly answers to call for a new Voting Rights Act, using the template from states like Michigan, Florida and Missouri for a more accessible Democracy. Michigan's expansion of democracy with no-excuse absentee voting and same-day registration is estimated to deliver an estimated 300,000 new voters, Florida has restored voting rights for all, regardless of criminal history and more states like Colorado and Ohio are creating policy for more fair voting districts. H.R. 1 represents all these ideals and more. I hope that my story here inspires you all, the way so many have inspired me in my life to trust the democratic process; a democratic process built on inclusion and transparency with the ability to empower citizens to empower themselves and their communities.

Brandon A. Jessup
United States Citizen

The CHAIRPERSON. Thank you very much, Mr. Jessup.
Now we welcome hearing from you, Mr. Keating.

STATEMENT OF DAVID KEATING

Mr. KEATING. Thank you, Chairperson Lofgren, Ranking Member Davis and members of the Committee, for inviting me to testify today. I appreciate that very much.

Free speech for all, that is what we stand for, and that is the goal of our First Amendment to the Constitution. I think it is an important reason why America is the best country in the world. Free speech enabled the civil rights movement to be successful, LGBTQ rights, tax reform, and many issues too countless to name here.

But before a nonprofit group speaks out, should we make them spend thousands or tens of thousands of dollars to hire an attorney to find out if it is okay or legal to speak? Should we make them fill out reams of paperwork to file with the Federal Election Commission? Should we make them declare on a government form what candidate they back with their speech, when in fact they are not backing anyone at all? Should we have their podcast ad contain 18 seconds of legalese?

I say we shouldn't. But, unfortunately, H.R. 1 has all these provisions and more. This harms free speech. This hurts the nonprofit groups trying to work for social change and a better America. In fact, there are many provisions in this bill that clearly violate the First Amendment.

It reminds me of a famous case back after the 1971 Federal Election Campaign Act was passed. Back in 1972, three principled elderly people took out an ad in The New York Times. The ad criticized Nixon's secret bombings of Cambodia. It called for Nixon's impeachment and listed an honor roll of Members of Congress who stood up against the bombings.

But you know what? Nixon's Justice Department used this new law to sue these elderly individuals saying they violated the Campaign Finance Act. The Justice Department threatened The New York Times with a criminal prosecution if the ad ran again.

Fortunately, they won in court. The court said this type of restraint on speech was unconstitutional.

But, unfortunately, many of the provisions in that original act that were struck down are quite similar to some of the provisions in H.R. 1. I hope you will listen to people who are counseling you on this and fix that before passing it.

Other sections of the bill would violate the privacy of advocacy groups and their supporters, or stringently regulate speech on the internet, which is, I think, the most accessible place of all for small grassroots groups to speak. It would radically change the interpretation and enforcement of these complex laws, and instead of a bipartisan structure where one party can't go after the other, we would have a FEC headed up by a speech czar and under partisan control.

The proposal would also force Americans to pay for the speech of candidates they don't like. It would inevitably lead to government subsidies for speech by bigots and racists. These are only the tip of the iceberg of some of the issues we see in H.R. 1.

I want to give an example of one of the provisions that we think is unconstitutionally vague. Much of the bill is based on regulating speech that promotes, attacks, supports, or opposes a candidate, but we don't know where that line is. Clearly, if you endorse a candidate, that is covered.

But let's think of some examples here. Let's say a government employees union wants to take out an ad during the government shutdown and says: "Government employees should not be held hostage to Trump's border wall. It is time to end the government shutdown."

Does that attack President Trump, or is it just calling for an end to the shutdown? We don't know. If it is an ad attacking Trump, and the union violated some of the conduct provisions in the bill, which in and of itself are very problematic, the speech would be banned completely; the ad would be illegal.

And then I want to talk about some of the disclaimers. Consider an environmental group running a radio ad calling on President Trump to reduce air pollution. Here is the disclaimer for this fictional group: Paid for by Americans for the Environment, CleanEnvironment.org, not authorized by any candidate or candidates' committee. I am Jane Doe, the president of Americans for the Environment, and Americans for the Environment approves this message. Top two funders are first name, last name, and first name, last name.

I mean, if you have paid for the ad, obviously, you have approved it. Why do we need to say 55 words of legalese instead of the message? I think back to the "I have a Dream" speech and some of the most powerful phrases in that speech were 30 to 35 words.

So we think the best way to give the people a voice and protect democracy is to protect and enhance the right to free speech. Let's make it simpler to speak, not harder.

Thank you.

[The statement of Mr. Keating follows:]



**INSTITUTE FOR
FREE SPEECH**

TESTIMONY OF

**DAVID KEATING
PRESIDENT**

**INSTITUTE FOR FREE SPEECH
124 S. WEST STREET, SUITE 201
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*For the People:
Our American Democracy*

**BEFORE THE
COMMITTEE ON HOUSE ADMINISTRATION
UNITED STATES HOUSE OF REPRESENTATIVES**

FEBRUARY 14, 2019

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

Introduction

Thank you Chairperson Lofgren, Ranking Minority Member Davis, and Members of the House Administration Committee for inviting me to testify today.

As you know, H.R. 1 is a massive piece of legislation, totaling 570 pages in length and altering or uprooting longstanding rules for virtually every piece of U.S. campaign, election, and government ethics law. Of necessity, therefore, I will focus my written statement on just a few portions of the bill. For the benefit of this Committee and members of the public, the Institute for Free Speech has produced detailed analyses on individual portions of this lengthy bill that affect free speech, and I have attached those analyses to these remarks and ask that they be considered part of my prepared testimony.¹

Despite the “For the People” title of H.R. 1, the bill would, in fact, greatly harm the ability of the people to freely speak, publish, and organize into groups to advocate for better government. More appropriately labeled the “For the Politicians Act,” H.R. 1 would make radical changes to the long-held ability of Americans to speak and associate with other Americans on the issues about which they are passionate.

The bill would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public.

Other sections of the bill would violate the privacy of advocacy groups and their supporters, stringently regulate political speech on the Internet, and compel speakers to include lengthy government-mandated messages in their communications.

H.R. 1 would radically transform interpretation and enforcement of the labyrinth of laws that regulate political speech, from its historic bipartisan structure to partisan control.

The proposal would also coerce Americans into funding the campaigns of candidates with which they may disagree in a system that research has proven hasn’t worked elsewhere. It would also inevitably lead to government subsidies for speech by bigots. These issues represent only the tip of the iceberg of what’s included in H.R. 1.

At its core, H.R. 1 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 will be further deterred from speaking or will have 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

¹ These analyses are also available on the Institute for Free Speech’s website. See Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf; Bradley A. Smith, Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights, Institute for Free Speech (Jan. 31, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31_IFS-Analysis_US_HR-1_Creating-A-Partisan-FEC.pdf; and Bradley A. Smith, Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of “Stopping Super PAC-Candidate Coordination,” Institute for Free Speech (Feb. 5, 2019), at https://www.ifs.org/wp-content/uploads/2019/02/2019-02-05_Smith-Analysis_US_HR-1_Coordination-Restrictions.pdf.

unwittingly. The effect will be less speech by private citizens and organizations, allowing politicians to act with less accountability to public opinion and criticism.

One way to understand how H.R. 1 would harm nonprofit civic and advocacy groups is to apply its provisions to common advocacy and operating activities of these organizations. This complex and expansive bill has many provisions that are difficult for even campaign finance attorneys to understand. I will use my testimony to highlight some of these issues and their application to groups engaging in speech about policy issues.

H.R. 1 Would Make it Harder for Groups to Speak About the Federal Government

In addition to greatly expanding the scope of speech regulated by the government, portions of H.R. 1 are written so broadly that they would effectively ban speech by certain organizations under certain conditions. When speech isn't banned, H.R. 1 will often require groups to swear their allegiance to candidates or sitting politicians (even when none exists), impose onerous disclaimers on a multitude of ads that violate the privacy of Americans who give to nonprofit groups, and effectively regulate all manner of online speech – including groups' websites and social media accounts. The inevitable result will be less speech about public affairs and more money for attorneys.

- *More Lawyers' Fees and Government Regulations, Less Speech.* H.R. 1 would vastly increase the legal compliance costs and risk for speaking about federal issues. Assuming groups can even afford to hire an attorney each time they wish to speak, paying more money to lawyers means fewer resources left to work for better government.
 - H.R. 1 would regulate a new category of speech – communications that “promote,” “attack,” “support,” or “oppose” (“PASO”) federal candidates and elected officials. Under this broad and vague standard, groups that merely speak about federal legislation or policy issues could be forced to file Federal Election Commission (FEC) reports that they didn't have to file before.
 - To emphasize the point, the “promote,” “attack,” “support,” or “oppose” language (PASO) applies year-round, even in non-election years. It would give major headaches to any group that speaks on public issues. One huge headache is whether the speech would even be legal under the new coordination provisions in the bill.
 - *Example:* A government employees' union desires to purchase a newspaper ad saying, “Government employees should not be held hostage to a border wall. It's time to end the government shutdown.” Is that a statement “attacking” President Trump, since he is so clearly identified with a border wall? Suppose it referred to “Trump's wall”? If that is a statement attacking Trump and it met the content standard regulating “coordination” in H.R. 1, the union would be banned from making such speech. This standard is discussed in-depth in our analysis of the bill's expansive “coordination” restrictions.²
 - *Example:* Consider another possible ad. A group of Venezuelan émigrés, who are now naturalized U.S. citizens, take out an ad: “President Trump has recognized the new Interim Government of Venezuela. We thank the President for this action and ask all Americans to support the return of democracy to our country of birth.” Would the FEC deem that an ad “promoting” or “supporting” President Trump?

² See Bradley A. Smith, Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of “Stopping Super PAC-Candidate Coordination,” Institute for Free Speech (Feb. 5, 2019), at https://www.ifs.org/wp-content/uploads/2019/02/2019-02-03_Smith-Analysis_US_HR-1_Coordination-Restrictions.pdf.

- Example: An environmental group runs an ad that says the following: “Climate change is real. Call Senator X and urge him to start taking action on climate change.” Attack? How about a business group’s ad: “The Democrats’ tax hike would cost thousands of jobs in our state. Call Senator A, and ask him to vote ‘no’ on the job-killing tax bill.” Is that an attack? Some might deem it one, asking why the group would run the ad if the senator already planned to vote ‘no.’
- Note that the PASO standard applies to any ad that can be seen in a candidate or officeholder’s district on the Internet or any other medium. Not only does it apply year-round, even in non-election years, but despite the deceptive name of the title of the coordination portion of the bill – “Stopping Super PAC-Candidate Coordination” – it applies to trade associations, unions, business groups, and advocacy organizations, such as Planned Parenthood and the National Right to Life Committee. It applies, it turns out, to almost every citizen or group of citizens that might want to comment on public life or candidates with one exception: the organized press. *The Washington Post*, CNN, Fox News Channel, and NPR can coordinate with candidates and spend all they want to speak out on any issue or election campaign. A nonprofit group’s blog, Twitter account, or Facebook page? It can’t.
- *Compulsory Declarations of Allegiance*. H.R. 1 would require groups speaking about legislative and policy issues to file FEC reports for “campaign-related disbursements.” These reports would be due even if the speech would have no impact on any election campaign and was made in a year without an election. Groups would be compelled to declare on those reports whether their speech “supports or opposes” any federal candidate or elected official mentioned in the communication, even if the group is merely supporting, opposing, or is neutral about the issue and takes no position on the candidate or elected official.
 - Example: A pro-choice group spends more than \$10,000 on a radio ad calling on President Trump, Speaker Pelosi, and Senate Majority Leader McConnell to work together to protect abortion rights. Under H.R. 1’s broad and vague PASO standard, this ad may well be deemed a “campaign-related disbursement.” If that occurs, the group must declare on its FEC report whether it “supports” or “opposes” Trump, Pelosi, and McConnell, even if the group does neither.
- *Longer Disclaimers, Less Speech, and Donor Deterrence*. H.R. 1 would decrease the amount of speech that groups can engage in by increasing the length of mandatory government speech in their messages and requiring those messages to identify donors.
 - H.R. 1 would expand the length of the disclaimers for “independent expenditures,” “electioneering communications,” and the new category of regulated speech known as “campaign-related disbursements.” Many of the existing disclaimers in federal law are already too long. H.R. 1 would make this problem even worse.

- H.R. 1 would additionally require groups to identify their top 5 donors of \$10,000 or more in their disclaimers (or top 2 for audio-only ads), even if those donors gave money for purposes other than to fund the ad. This would divert attention away from a group's message and toward its individual donors and members and worsen the politics of personal destruction and harassment. It would also lead many donors to cut off their financial support.
- H.R. 1 would also require an organization's CEO or highest-ranking official to personally appear and identify himself or herself and recite part of the disclaimer in audio and video ads. Again, this would leave less time in the communication for the message the group is trying to convey to the public.
- Example: An environmental group sponsors a 30-second radio ad calling on President Trump to reduce air pollution. If it's deemed a PASO ad, it must include the following 18-second disclaimer (the italicized portion must be read by the group's president):

Paid for by Americans for the Environment, cleanenvironment.org. Not authorized by any candidate or candidate's committee. *I am Jane Doe, the President of Americans for the Environment and Americans for the Environment approves this message. Top two funders are FIRST NAME 1 LAST NAME 1 AND FIRST NAME 2 LAST NAME 2.*
- *Groups' Websites and Facebook and Twitter Accounts May be Regulated by the FEC.* H.R. 1 would regulate any online or social media communication if it is a "paid internet, or paid digital communication." This is a clear departure from the FEC's existing regulation of only paid online advertising.
 - Groups that use paid staff to post unpaid content on their own website or social media pages/feeds/channels could be subject to the disclaimer and reporting requirements discussed above if their content is regulated.
 - Example: Staff at a fiscal responsibility group post content on the group's website and social media pages/feeds/channels about the voting records and positions of members of Congress on the budget deficit and national debt. The content is determined to PASO those members and must include FEC disclaimers. When the total value of the staff time exceeds \$10,000 in a two-year period defined in the bill, the group is required to file the FEC reports discussed above.
- *More Surveillance of Online and Social Media Communications.* H.R. 1 would subject groups that spend as little as \$500 on online ads to additional surveillance by government officials and opponents.
 - Large online platforms would have to maintain a publicly accessible database ("public file") for any online advertising that costs more than \$500 that addresses any "national legislative issue of public importance." The public file must include

a copy of the ad and details about how the ad was targeted and distributed, the rates that were charged, the candidates and issues that were discussed, and contact information and details about the person who ran the ad or the sponsoring group's directors and officers.

- The public file will assist antagonistic government officials and other opponents in keeping tabs on what individuals or civic and advocacy groups are doing online. It would also enable opponents of organizations' views to take retaliatory actions.
- Example: A local LGBTQ rights group in a very conservative state spends \$500 on a small social media campaign urging removal of the ban on qualified transgender people serving in the military. The organization's opponents use information in the public file to attack the group and urge employers of its officers and directors to fire those individuals.
- *Speech Bans*. H.R. 1 would define a large universe of speech as "coordinated" with federal candidates and elected officials, even if the speech is not, in fact, coordinated, and even if elected officials or candidates are not named in the communications. Such so-called "coordinated" speech about national issues would be banned if done by incorporated nonprofit groups or unions.
 - H.R. 1 would treat certain public communications as being "coordinated" with federal candidates or elected officials based on a broad range of conversations that groups may have with candidates, elected officials, or their staff. This includes discussions solely about policy and how to get the public involved.
 - Groups also could be deemed to be coordinating if their staff or vendors have certain prior relationships with candidates or elected officials in the small community of political vendors and consultants. Even a former summer intern who worked four years ago for a person who was later elected to Congress could trigger the ban.
 - As a result of H.R. 1's expansive coordination standard, groups would be effectively prohibited from making many communications that:
 - Urge the election or defeat of candidates;
 - Refer to a candidate or elected official; or
 - Are deemed to "PASO" a candidate or elected official, even if the communication does not mention any candidate or elected official.
 - Directors and officers of groups could be held personally liable for coordination violations, which means many leaders or would-be leaders of nonprofit groups may simply resign or refuse to serve.
 - Example: A group advocating gun control meets with the chief of staff of Rep. Doe, who chairs a subcommittee of the Judiciary Committee, to discuss the Bipartisan

Background Checks Act of 2019. The chief of staff suggests it would be helpful to shore up public and congressional support for the group's agenda if the group ran a national PR campaign. The group retains a PR consultant who, unbeknownst to the group, worked on Rep. Doe's unsuccessful gubernatorial campaign two years ago.

The group runs ads in all of the Committee members' districts asking constituents to either thank their representatives for standing up for common sense gun control or to tell their representatives to support such reforms. The ads in Doe's district cost \$50,000. Under H.R. 1, the ad is deemed to be coordinated and would count as a contribution to Rep. Doe. Because the group is a nonprofit corporation, it may not contribute to any candidate, and the FEC fines the group at least \$25,000 (the agency's typical fine for prohibited contributions). Under the FEC's customary practice, the group or Rep. Doe's campaign committee also may be required to disgorge the \$50,000 at issue to the U.S. Treasury.

H.R. 1 Would Intrude on Groups' Donor and Associational Privacy

H.R. 1 would require many nonprofit groups that simply speak about policy issues to publicly report the names and home addresses of many of their supporters to the government. This information would be stored in a publicly available government database where it would live in perpetuity. In many cases, the exposure of this information will facilitate harassment, threats, and intimidation and trample upon Americans' long-held expectations and right to privacy in association.

- *Violating Privacy in Association and Facilitating Harassment.* H.R. 1 would compel groups to publicly identify certain of their donors on FEC reports if they spend more than \$10,000 during a two-year election cycle on "campaign-related disbursements." Keep in mind that "campaign-related disbursements" often have nothing to do with election campaigns. (This is in addition to the donor identification disclaimer requirements discussed above.)
 - A group's donor list contains sensitive information that has long been protected under the law, except if a group is a PAC with the major purpose of election advocacy, or if donors give specifically to fund election advocacy.
 - Activists have been vilifying donors to policy and political organizations and calling for reprisals against them. If it became law, H.R. 1 would enable more of such activities and lead many donors to cut off their financial support for organizations.
 - Example: A taxpayer group is forced to identify certain of its donors on the group's FEC reports for "campaign-related disbursements." Opponents of the group's policies gather at those donors' homes and businesses, yelling offensive and threatening invectives at those donors and their families and calling for the donors to be fired from their jobs.

H.R. 1 Would Create a Speech Czar and Enable Partisan Enforcement

If you're a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you're a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That's why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency – the Federal Election Commission. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.

As the late Sen. Alan Cranston (D-Cal.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”³ That concern led to Congressional adoption of the present method of selecting Commission members.

- *Turning from Bipartisan Enforcement to Partisan Enforcement.* H.R. 1 would transform the bipartisan, six-commissioner agency into a partisan, five-commissioner agency. It would give the FEC Chair broad powers to issue subpoenas without the support of any other commissioner, expand the agency general counsel's powers to initiate investigations even without a vote of the commissioners, and weaken the rights of the accused.
 - No advocacy group would be safe from politically motivated investigations into federal advocacy activities that have any relation to the FEC's jurisdiction.
 - Example: Opponents file a politically motivated FEC complaint against a civil rights group alleging illegal coordination with elected officials. The existing law establishes a six-member, bipartisan FEC (no party may have more than three commissioners) and requires a majority of commissioners (typically four) to approve investigations. But under H.R. 1, the FEC would be reduced to five members, with one of them being a nominal “independent,” who is likely to support one party over the other. Or the agency could have two vacancies and do anything it wants on a partisan vote. The FEC general counsel also would be able to issue subpoenas for the group's communications and documents when only two of the five commissioners object.

³ Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

Taxpayer-Financed Campaigns: A Record of Failure Forcing Americans to Subsidize Politicians' Campaign Coeffers

Finally, H.R. 1 would also institute an elaborate program through which the government would finance participating politicians' election campaigns.⁴ In particular, the bill would provide for the government to match contributions to politicians' campaigns with \$6 in tax money for every \$1 contribution, up to the first \$200 of a contribution. In some cases, the match can reach 9 to 1: nine dollars in tax money for every dollar donated.

As a matter of first principles, it is morally wrong that, if a donor contributes \$1 to Donald Trump's re-election campaign – or any candidate's campaign – it forces those opposed to that candidate to contribute \$6 or even \$9 in public tax money to support that candidate and his or her dissemination of ideas those taxpayers may find abhorrent. But beyond these first principles, the idea has problems on its own terms.

One likely set of winners under tax-financed campaigns will be candidates who take extreme positions that appeal to small, concentrated groups of voters.⁵ Rather than appealing to the middle of the electorate, a viable strategy may be to "play to the base" where supporters are more passionate – and partisan.⁶

Traditionally in American politics, political parties have been instrumental in candidate selection and have served as a moderating force overall. Parties have a large incentive to win and therefore want to nominate candidates who appeal to broad swaths of the American public and can win over swing voters. Political parties have used their fundraising apparatuses to favor candidates who fit this mold. Meanwhile, candidates who were viewed as extreme often received little support or funding from the party. While party support (or the lack thereof) didn't always prevent these candidates from winning elections, the parties' gatekeeping mechanism certainly provided a moderating function on the types of candidates who were nominated. Taxpayer financing of campaigns threatens to provide a final crushing blow to this important party role.

Consider how much more difficult it would be for political parties to raise money. What sensible donor would give \$50 to a political party if she could give the same \$50 to a candidate of that party and have taxpayers foot the bill for \$300 or more to match it?

The subsidy will most likely drive donors away from the moderating forces exerted by parties and toward individual candidates. This will likely have the effect of further starving parties that were already hit hard by changes to campaign finance law in 2003.

The potential for tax-financing programs to incentivize polarizing and extreme candidates isn't merely conjecture. The example of Thomas Lopez-Pierre's recent campaign for New York

⁴ For a comprehensive examination of taxpayer-financed campaign programs and their record of failure at achieving goals set by their proponents, see *Taxpayer-Financed Campaigns: A Costly and Failed Policy*, Institute for Free Speech (Jul. 16, 2014), at https://www.ifs.org/wp-content/uploads/2014/07/2014-07-16_IFS-Policy-Primer_Taxpayer-Financed-Campaigns.pdf.

⁵ See David Keating, *H.R. 1's Tax-Financing Program Could Increase Political Polarization*, Institute for Free Speech (Jan. 17, 2019), at <https://www.ifs.org/blog/h-r-1s-tax-financing-program-could-increase-political-polarization/>.

⁶ See Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization*, Harvard University (Aug. 13, 2014), at http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf.

City Council is instructive. In 2017, Lopez-Pierre campaigned for a City Council seat on the platform of making “greedy Jewish Landlords” pay.⁷ Ultimately, Lopez-Pierre qualified for \$99,000 in taxpayer dollars to help spread his hateful message.⁸

New Yorkers, including those on the City Council, were rightly appalled by Lopez-Pierre’s anti-Semitic message. Then-Council Speaker Melissa Mark-Viverito said that to “have someone be able to spend [taxpayer dollars] to put forth that kind of a message is despicable.”⁹ But under New York City’s matching fund system, there was nothing the City could do. The First Amendment prohibits laws from discriminating against individuals based on the content of their message. As such, if H.R. 1 is enacted, American taxpayers would be constitutionally required to fund the speech of all candidates that meet the qualifications for matching government funding – including those with racist, anti-Semitic, sexist, homophobic, transphobic, or otherwise hateful messages. As Lopez-Pierre’s campaign proves, this concern isn’t unfounded.

Supporters of taxpayer-financed campaign programs often argue that these programs will prevent corruption, but the record suggests otherwise. For a more comprehensive review of corruption in Arizona, Maine, and New York City’s tax-financing programs, please consult the Institute for Free Speech report, “*Clean Elections and Scandal: Case Studies from Maine, Arizona, and New York City*.”¹⁰ Whether it’s embezzlement, fraud, bribery, personal use, forgery, or straw donor schemes, for any number of abuses, tax-financing programs have a history of corrupt actors exploiting the system for personal gain at the expense of hardworking American taxpayers. In general, wherever tax-financing has been enacted, abuses of these programs – and, by extension, taxpayer dollars – have followed.

It’s perhaps unsurprising tax-financing programs have a history of corruption in every jurisdiction in which they exist. In reality, these programs *create* new incentives for corrupt candidates – or corrupt staffers and campaign consultants – to cheat and defraud the taxpayers.¹¹ As just one example, Seattle, which had its first election with tax-financing in the form of the city’s “Democracy Vouchers” program in 2017, already saw its first allegations of fraud. A candidate for Seattle City Council was accused by her campaign manager of contributing her own money to the campaign and claiming it came instead from small donors.¹² This would have entitled her to \$100,000 in public financing had she not been turned in by her former campaign manager (and defeated in the primary). Regardless of the outcome, the structure of the matching component of Seattle’s program is what incentivized that individual to commit fraud. As we’ve seen in Arizona, Maine, New York City, and elsewhere, Seattle is not an outlier in this regard.

⁷ Editorial Board, Taxpayer-funded hate, thanks to the city campaign-finance system, *NEW YORK POST* (Mar. 3, 2017), at <http://nypost.com/2017/03/03/taxpayer-funded-hate-thanks-to-the-city-campaign-finance-system/>.

⁸ Josh Nathan-Kazis, Candidate Who Condemned ‘Greedy Jewish Landlords’ Faces Uphill Election Bid,” *FORWARD* (Sept. 12, 2017), at <https://forward.com/news/382466/candidate-who-condemned-greedy-jewish-landlords-faces-uphill-election-bid/>.

⁹ See note 7, *supra*.

¹⁰ Matt Nese and Tom Swanson, Issue Review: Clean Elections and Scandal: Case Studies from Maine, Arizona, and New York City, Institute for Free Speech (Aug. 14, 2013), at http://www.ifs.org/wp-content/uploads/2013/08/2013-08-05_Issue-Review_Swanson_Clean-Elections-Scandal-Case-Studies-From-Maine-Arizona-And-New-York-City.pdf.

¹¹ See David Keating, H.R. 1’s Tax-Financing Program Creates New Incentives for Corruption, Institute for Free Speech (Feb. 5, 2019), at <https://www.ifs.org/blog/h-r-1s-tax-financing-program-creates-new-incentives-for-corruption/>.

¹² Bob Young, Seattle candidate accused of defrauding first-in-nation democracy-voucher program, *THE SEATTLE TIMES* (Aug. 17, 2017), at <https://www.seattletimes.com/seattle-news/times-watchdog/seattle-candidate-accused-of-defrauding-democracy-voucher-program/>. H.R. 1 creates a “My Voice” Voucher pilot program modeled after Seattle’s “Democracy Voucher” program. See H.R. 1 § 5101.

Finally, the Institute for Free Speech has examined and debunked a number of theories about how tax-financing programs fail to meet the lofty standards promised by their supporters using evidence from existing programs around the country:

- Legislative voting behavior is unchanged when elected officials participate in tax-financing programs;¹³
- Tax financing fails to reduce lobbyist or special interest influence in government;¹⁴
- The diversity of occupational backgrounds of state legislators does not increase after implementing tax financing,¹⁵ nor does the percentage of women legislators;¹⁶
- Giving money to politicians does not save taxpayer dollars in the long run;¹⁷
- Voter turnout fails to increase when states institute tax financing;¹⁸ and
- Political competition against incumbent lawmakers does not improve in states with tax financing.¹⁹

¹³ Jason Farrell, Sean Parnell, & Brett Sullivan, Issue Review: Meet the New Legislature, Same as the Old Legislature: A quantitative analysis of the Connecticut Citizens' Election Program, Institute for Free Speech (Oct. 22, 2012), at <http://www.ifs.org/wp-content/uploads/2012/11/Connecticut-Clean-Elections.pdf>.

¹⁴ Matt Nese and Luke Wachob, Issue Analysis No. 1: Do Taxpayer-Funded Campaigns Reduce Lobbyist and Special Interest Influence?, Institute for Free Speech (Aug. 14, 2013), at <http://www.ifs.org/wp-content/uploads/2013/08/Issue-Analysis-1.pdf>.

¹⁵ Alex Cordell, Issue Analysis No. 2: Legislator Occupations – Change or Status Quo After Tax-Funded Campaigns?, Institute for Free Speech (Jun. 28, 2017), at http://www.ifs.org/wp-content/uploads/2013/08/2017-06-28_Issue-Analysis-2_Cordell_Legislator-Occupations-Change-Or-Status-Quo-After-Tax-Funded-Campaigns.pdf.

¹⁶ Alex Cordell, Issue Analysis No. 3: Do Tax-Funded Campaigns Increase the Percentage of Women in State Legislatures?, Institute for Free Speech (Jul. 11, 2017), at http://www.ifs.org/wp-content/uploads/2013/08/2017-07-11_Issue-Analysis-3_Cordell_Do-Tax-Funded-Campaigns-Increase-The-Percentage-Of-Women-In-State-Legislatures.pdf.

¹⁷ Matt Nese and Luke Wachob, Issue Analysis No. 4: Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?, Institute for Free Speech (Nov. 1, 2013), at https://www.ifs.org/wp-content/uploads/2013/11/2013-11-19_Issue-Analysis-4_Do-Taxpayer-Funded-Campaign-Actually-Save-Taxpayer-Dollars.pdf.

¹⁸ Luke Wachob, Issue Analysis No. 8: Do Taxpayer-Funded Campaigns Increase Voter Turnout?, Institute for Free Speech (Dec. 11, 2013), at http://www.ifs.org/wp-content/uploads/2013/12/2013-12-03_Issue-Analysis-8_Do-Taxpayer-Funded-Campaign-Increase-Voter-Turnout.pdf.

¹⁹ Joe Albanese, Issue Analysis No. 10: Do Taxpayer-Funded Campaigns Increase Political Competitiveness?, Institute for Free Speech (Jun. 7, 2017), at http://www.ifs.org/wp-content/uploads/2017/06/2017-06-05_Issue-Analysis-10_Albanese_Do-Taxpayer-Funded-Campaigns-Increase-Political-Competitiveness.pdf.

Conclusion

H.R. 1 would institute sweeping new limitations on speech about campaigns and public affairs. It does so in a very complex, vague, and unintuitive manner. The provisions are so complex and open to so many possible interpretations that our analyses of the provisions may well understate the chill this legislation might place on speech.

These limitations would reach far beyond campaign speech to regulate discussion of legislative issues and public affairs. For advocacy groups, unions, and trade associations, several of the limits proposed in H.R. 1 would operate as a total ban on speech.

The first step towards fixing the many flaws in H.R. 1 is to split the bill into its component parts, so that it can be properly considered and amended. At that time, the speech portions of H.R. 1 will demand a significant rewrite that allows unfettered exchange of political information and policy discussion by U.S. citizens, respects the benefits of bipartisan campaign enforcement, and protects the First Amendment rights of all Americans. The best way to give the people a voice and to protect democracy is to protect and enhance the right to free speech guaranteed by the First Amendment.



INSTITUTE FOR
FREE SPEECH

Analysis of H.R. 1 (Part One)

"For the People Act" Replete with Provisions for the Politicians

Eric Wang, Senior Fellow¹

January 2019

Introduction

This analysis examines Title IV, Subtitles B ("DISCLOSE Act"), C ("Honest Ads"), and D ("Stand by Every Ad") of H.R. 1 (116th Congress). The Institute for Free Speech (IFS) previously analyzed earlier versions of these provisions when they were introduced as standalone bills.² Due to the evolving and obscure legislative language, this analysis represents IFS's latest understanding of the legislation and supersedes any prior analyses IFS has released on these measures. As it continues to analyze these and other sections of H.R. 1 that regulate First Amendment rights, IFS expects to release additional analyses of the bill. IFS's written analyses may not address every concern it may have with the proposal, as the 570-page bill's provisions are simply too numerous and complex to be able to effectively discuss the bill's contents in their entirety.

As a preliminary matter, Title IV, Subtitles B, C, and D 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, IFS has created a redlined version of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, to show the changes the bill would make to this statute. The document is available for public consumption on the IFS website.³

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 will be further deterred from speaking or will have 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.

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² See, e.g., Eric Wang, Analysis of the "DISCLOSE Act of 2018" (S. 3150): Newer Bill, Same Old Plan to Crack Down on Speech, Institute for Free Speech, at https://www.ifs.org/wp-content/uploads/2018/12/2018-12-19_Legislative-Brief_Federal_S-3150_DISCLOSE-Act-Of-2018.pdf and Eric Wang, Analysis of Klobuchar-Warner-McCain Internet Ads Legislation (S. 1989, 115th Cong.): So-Called "Honest Ads Act" Is Dishonest About Its Effects, Institute for Free Speech, at https://www.ifs.org/wp-content/uploads/2017/11/2017-11-01_Legislative-Brief_Federal_S-1989_Honest-Ads-Act.pdf.

³ See Institute for Free Speech, Changes to Current Campaign Finance Laws Proposed by H.R. 1, 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 severely vague, subjective, and broad standard that asks whether the speech “promotes,” “attacks,” “opposes,” or “supports” (“PASO”) the candidate or official.
 - 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 on policy issues.
 - Compel groups to declare on these so-called “campaign-related disbursement” reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
 - Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. 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 choose simply not to give to nonprofit groups.
 - Subject far more issue ads to burdensome 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’ substantive message, thereby exacerbating the politics of personal destruction and further coarsening political discourse.
 - Force organizations that make grants to file their own 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 “campaign-related disbursements.” This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.
 - Likely eliminate the ability of many employees to make voluntary contributions through employee-funded PACs, which give employees a voice in the political process with respect to issues that affect their livelihoods.
 - Effectively prohibit many domestic subsidiaries, and perhaps most corporations with even a single foreign shareholder with voting shares, from making independent expenditures, contributions to super PACs, or contributions to candidates for state and local office, thus usurping the laws in more than half of the states that allow such contributions.
- This appears to be a thinly veiled artifice to overturn *Citizens United* and to unconstitutionally accomplish by legislation what congressional Democrats failed to achieve by constitutional amendment in 2014.
- Disproportionately burden the political speech rights of corporations, thereby ending the long-standing parity in the campaign finance law between corporations and unions.
 - Increase regulation of the online speech of American citizens while purporting 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 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, which is likely 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-cost grassroots movements. Some of these online outlets may decide to discontinue accepting such ads due to the expense of complying with the requirements.

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

- Make broadcast, cable, satellite, and Internet media platforms liable 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 that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.

Analysis

- I. H.R. 1 Would Impose Unconstitutionally Overbroad Regulations on Issue Speech and Subject Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment and Deterring Financial Support.

- A) Overbroad Definition of "Campaign-Related Disbursements"

H.R. 1 would regulate three types of speech as "campaign-related disbursements":

- (1) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are the "functional equivalent of express advocacy";
- (2) So-called "electioneering communications" – 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; and
- (3) Any public communications that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the candidate or official.⁴

Of these three categories, the U.S. Supreme Court has only determined that the first – 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 regulation of "electioneering communications" as "campaign-related disbursements."

H.R. 1 goes completely off the rails, however, by regulating any public communication that mentions a federal candidate or elected official – at any time – if the message is deemed to "promote," "support," "attack," or "oppose" the candidate or official. This standard, known to campaign-finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would unconstitutionally regulate a large universe of 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, or six years away for senators.

For example, soon after President Trump took office in 2017, the AARP aired television ads touting Trump's campaign stance on Medicare.⁶ These ads obviously were intended to shore up political support for Medicare, and it is inconceivable that the AARP intended them to "support" Trump's 2020 re-election. However, it is quite conceivable, if not likely, that if this bill had been law then, the AARP would have had to report to the Federal Election Commission ("FEC") that these ads were "campaign-related disbursements" because they "support" a Trump campaign position and therefore AARP's ads must be listed as "support" for Trump's re-election.

Similarly, if an organization were to disseminate public communications highlighting Trump's campaign statements on building a wall on America's southern border and urging him to stick to his promise, such ads very likely would be regulated under H.R. 1 as "supporting" Trump. Conversely, organizations that oppose the Administration's immigration policies very likely would be regulated for "attacking" and "opposing" Trump if their ads mention the President.⁷ As the Supreme Court has noted, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."⁸

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.⁹ 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 *the political parties* are presumed to be in connection with election campaigns."¹⁰

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).

6 See AARP Advocates, Protect Medicare, at <https://www.youtube.com/watch?v=hV0DueXoKFA>.

7 See, e.g., Need to Impeach, at <https://www.needtoimpeach.com/> and Rebel Resist, at <http://rebelresist.com/>.

8 *Buckley*, 424 U.S. at 42.

9 See 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).

10 *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).

However, H.R. 1 would expand the PASO standard to *all* speakers. Unlike political parties, it is *not* reasonable to presume that all of the legislative advocacy activities of groups like the AARP, Planned Parenthood, Sierra Club, NRA, gun control groups, chambers of commerce, trade associations, and unions 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,¹¹ 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.¹² 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, Internet ads, billboards, magazine ads, etc. 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.

B) 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.¹³ Under the 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 involved¹⁴ since, as discussed above, only such communications are unambiguously campaign-related.¹⁵

Given H.R. 1’s overbroad regulation of “campaign-related disbursements,” using the examples from before, the AARP very likely would have to affirmatively and publicly declare to the FEC whether its television ads “support” or “oppose” President Trump. Similarly, groups advocating for or against the construction of a wall on the Mexican border would have to affirmatively and publicly declare whether they “support” or “oppose” President Trump if they so much as mention or depict Trump in their public communications. This type of compelled speech is obnoxious to its core and goes beyond “mere disclosure,” thereby making it especially likely to be held unconstitutional.¹⁶

The ads do not even have to be hard-hitting to trigger regulation or force a group to declare if the communication is in support of or opposition to an elected official. For example, a radio ad in the *Independence Institute v. FEC* case only advocated support for a judicial reform bill. Here is the entire text of the ad:

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, the judges on the three-judge panel ruled “the advertisement could very well be understood by Coloradans as criticizing” Sen. Michael Bennett’s position on the bill.¹⁷ Clearly, a PASO standard is not cabined to hard-hitting ads that are often more effective at persuading lawmakers to change their position.

C) 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,¹⁸ 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 duplicative and confusing reports, and may mislead some into thinking the reports cover different activities.

¹¹ *Id.* at 170 n.64.

¹² *Citizens United*, 558 U.S. at 335.

¹³ H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(C)).

¹⁴ See 52 U.S.C. § 30104(c)(2)(A); compare *id.* with *id.* § 30104(f)(2)(D) (reporting requirement for electioneering communications).

¹⁵ See *Buckley*, 424 U.S. at 80.

¹⁶ See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁷ See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff’d per curiam*, 137 S. Ct. 1204 (2017).

¹⁸ 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.”).

H.R. 1 departs from existing law by imposing additional donor identification requirements on campaign finance reports.¹⁹ Organizations that make “campaign-related disbursements” totaling more than \$10,000 during a two-year “election reporting cycle”²⁰ 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 that donation is 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).²¹ Both of these so-called options are impractical, would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported), and would still put many donors 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.²²

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.²³ This is particularly true when the cause is contentious, such as abortion, gun control, LGBTQ rights, or civil rights, and association with either side on any of these 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 still many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, and a desire to remain out of the public spotlight.²⁴

It is wholly inappropriate, for example, for donors who support a retiree organization’s general activities to have to be publicly identified on campaign finance reports as “supporting” the president if the organization sponsors a television ad about entitlement reform mentioning the president.²⁵ Similarly, donors to an immigration advocacy organization, for example, should not have to be publicly identified on campaign finance reports as “opposing” the president if the organization were to sponsor a radio ad criticizing the president’s immigration policy. Both of these reporting scenarios 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,²⁶ thereby limiting the funds available to finance speech to the detriment of our private civic sector and our public debate.

H.R. 1’s gratuitous reporting requirements also 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 make the same filings and report its own donors, if:

- (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.²⁷

19 The bill could easily expand the existing independent expenditure and electioneering communication reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports for each communication. However, the bill does not take this more streamlined approach.

20 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)).

21 *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).

22 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).

23 *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

24 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.

25 See note 6, *supra*.

26 *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 . . .”).

27 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 the day,” *Citizens United*, 558 U.S. at 324, and the same should hold true for groups providing grants to enable other groups to speak about political issues.

Grant-making institutions that wish to protect their donors' privacy therefore 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 to 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 non-profit 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."²⁸ 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.²⁹

D) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.³⁰ These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.³¹ The Supreme Court specifically has recognized that these disclaimer requirements "burden the ability to speak," and therefore are subject to "exact[ing] scrutiny," which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.³² H.R. 1 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" that are in the form of a public communication.³³ 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, and 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.³⁴ Ads containing video content would have to identify the organization's top five donors of \$10,000 or more during the prior 12 months.³⁵ Ads containing only audio content (including robocalls) would have to identify the organization's top two donors.³⁶

The bill purports to shield certain donors from being identified in the disclaimers, 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.³⁷ However, H.R. 1 also provides that donors may be shielded from public identification on

28 H.R. 1 (to be codified at 52 U.S.C. § 30126(a)(3)(D)).

29 See, e.g., FEC Adv. Op. Request No. 2016-23 (Socialist Workers Party); JCOPE Denies Funding Disclosure Exemptions, THE STATE OF POLITICS (Aug. 2015), at <http://www.mystateofpolitics.com/2015/08/jcope-denies-funding-disclosure-exemptions/>.

30 52 U.S.C. § 30120.

31 See FEC Adv. Op. No. 2007-33 (Club for Growth) (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).

32 *Citizens United*, 558 U.S. at 366.

33 H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(a)).

34 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" this is in reference to. See *id.* (to be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the requirement, while conventional PACs that accept contributions subject to the amount limitations and source prohibitions would be exempt from this requirement. See *id.* § 4111 (to be codified at 52 U.S.C. § 30126(e)(6)).

35 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).

36 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 4303.

37 *Id.* § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).

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.”³⁸

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.³⁹ 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, such a law would often require advertising disclaimers with false information. That will, in turn, lead to real news stories that have false information about who paid for the communications.

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.”⁴⁰ (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.⁴¹ “Campaign-related disbursements” sponsored by individuals would have to include disclaimers featuring the individual.⁴²

It is unclear that any of 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, has any relation – let alone a “substantial relation” – to any important governmental interest, or what the governmental interest even is here.⁴³ Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substantive message itself. One can easily imagine circumstances where the required individual might not want to or not be physically able to deliver such a message, such as during a serious illness, after surgery, or after 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 thereby further contribute to the politics of personal destruction.⁴⁴

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 that contain video and audio content.⁴⁵ Internet advertisers already struggle to fit the FEC disclaimers in their ads. Internet video “pre-roll” ads 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.”⁴⁶ 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 political communication.⁴⁷ One of the requirements for video ads mandates display of a disclaimer for “at least 6 seconds,”⁴⁸ making it illegal to use 5 second video ads.

38 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).

39 *Id.* (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).

40 *Id.* § 4302 (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).

41 *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).

42 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A)).

43 See *Citizens United*, 558 U.S. at 366.

44 In any event, the “stand by your ad” disclaimer requirement has not reduced the amount of negative ads, as it was intended to do. 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>.

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

46 FEC Adv. Op. Request No. 2007-33 (Club for Growth), Comments of Sierra Club.

47 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 if 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 nearly a decade over when disclaimer exemptions should apply to digital ads, see, e.g., FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging), and 2017-12 (Take Back Action Fund), and the DISCLOSE Act fails to give the agency any more legislative clarity on this issue.

48 See note 47, *supra*.

11. H.R. 1 Seeks to Broadly Prohibit Political Engagement by Corporations and Employee-Funded PACs and to Indirectly Overturn *Citizens United* by Legislation.

A) H.R. 1's Foreign National Provisions Could Make It Practically Impossible for *Any* Corporation, Whether Foreign or Domestic, to Speak.

H.R. 1 would treat any corporation as a foreign entity if any foreign national "has the power to direct, dictate, or control the decisionmaking process of the corporation . . . with respect to its interests in the United States."⁴⁹ Such a corporation would be prohibited from making any political contributions or expenditures in connection with U.S. elections.⁵⁰

The owner of even one share of a publicly traded company could have "the power to direct, dictate, or control the decision-making process of the corporation" by means of a shareholder meeting or a proxy vote,⁵¹ and it is likely that every publicly traded American company has at least one foreign national shareholder. H.R. 1 provides no additional gloss on this point and leaves subjective enforcement decisions to unelected bureaucrats.

Few rational corporations would run the risk of an aggressive interpretation of this provision, and thus H.R. 1 could effectively prohibit corporations altogether from making political contributions and expenditures in the U.S. Because the foreign national provision of federal law the bill would amend applies to elections not only for federal office, but also for state and local office,⁵² the bill also would usurp the laws in more than half of the states that permit corporations to make contributions in connection with state and local elections.⁵³

This extreme outcome is not an implausible interpretation of the legislative language. After all, it is an approach FEC Commissioner Ellen L. Weintraub has suggested for essentially overturning the *Citizens United* decision by legislation. As Commissioner Weintraub wrote in a *New York Times* op-ed on countering *Citizens United*, "Arguably . . . for a corporation to make political contributions or expenditures legally, it may not have *any* shareholders who are foreigners or federal contractors."⁵⁴ And if H.R. 1 were enacted, Weintraub could be one of the FEC commissioners interpreting and implementing this provision.

Consider also that this provision of H.R. 1 is derived from the so-called "DISCLOSE Act,"⁵⁵ and 39 of the 40 sponsors of the DISCLOSE Act who were in the Senate in 2014 voted to amend the First Amendment to override *Citizens United*.⁵⁶ Albeit constitutionally proper,⁵⁷ their 2014 effort to amend the First Amendment failed,⁵⁸ and it has been the black-letter law of this land for more than two centuries that Congress may not now attempt to accomplish the same result by mere legislation.⁵⁹

This covert assault on corporations' political speech is also unwarranted and contrary to the public interest. The vast majority of Americans work at a corporation, whether it is a Fortune 500 company or a local pizza joint.⁶⁰ More than half of Americans, including 56 percent of middle-class Americans, have ownership in corporations, whether through stocks or mutual funds.⁶¹ Not surprisingly, then, most Americans believe that it is sensible for corporations to take political action, whether it

49 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)(3)(C)).

50 See existing 52 U.S.C. § 30121(a); see also H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30121(a)(1)(A)).

51 See, e.g., U.S. Securities and Exchange Comm'n, Spotlight on Proxy Matters, at <https://www.sec.gov/spotlight/proxymatters.shtml>.

52 See 52 U.S.C. § 30121(a). Under federal law, corporations may contribute to super PACs in connection with elections for federal office but may not make contributions to candidates for federal office. See *id.* and FEC Adv. Op. No. 2010-11 (Commonsense Ten). However, under existing law, state laws otherwise govern state and local elections (although some municipalities may have their own campaign finance laws).

53 See Nat'l Conference of State Legislatures, Contribution Limits Overview, at <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (noting that 28 states permit corporate contributions).

54 Ellen L. Weintraub, *Taking On Citizens United*, N.Y. TIMES (Mar. 30, 2016) (emphasis added); see also Allen Dickerson, *No, Commissioner Weintraub, the FEC Can't Circumvent Citizens United*, HUFFINGTON POST (Mar. 31, 2016).

55 H.R. 1 § 4100.

56 Compare S. 3150 (115th Cong.) (DISCLOSE Act of 2018) with S.J. Res. 19 (113th Cong., 2nd Sess.), Roll Call Vote No. 261 (Sep. 11, 2014). Sen. Gillibrand, who was a DISCLOSE Act sponsor, did not vote on the 2014 resolution. *Id.* The other DISCLOSE Act sponsors – Senators Catherine Cortez Masto, Tammy Duckworth, Kamala Harris, Maggie Hassan, Doug Jones, Gary Peters, Tina Smith, and Chris Van Hollen – were not in the Senate at the time.

57 See U.S. Const., Art. V.

58 See note 56, *supra*.

59 *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178 (1803) ("Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions").

60 See U.S. Census Bureau, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012* (Feb. 2015), at <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-sush.pdf>.

61 Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, Gallup.com, at <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx>.

is in the form of lobbying or making political contributions.⁶² Based on the largely positive public reaction to the unmistakable political messaging by many corporate advertisers during the 2017 Super Bowl,⁶³ it appears that most Americans also would welcome corporations weighing in more on political issues. Even many progressives who initially opposed *Citizens United* may be coming around to the idea that corporations have a lot to contribute to the nation's political discourse.⁶⁴

B) Even if H.R. 1 Is Not Interpreted to Prohibit Most Corporate Contributions and Expenditures, It Would Still Shut Most Domestic Subsidiaries of Foreign Corporations Out of the Political Process Altogether.

Even if H.R. 1 is not read so broadly as to treat any corporation with a single foreign shareholder as a foreign national, the bill would still subject a corporation in which any foreign national "owns or controls" 20 percent or more of the voting shares to the ban on foreign national contributions and expenditures.⁶⁵ This would likely erode the FEC's existing distinction between domestic subsidiaries and their foreign parents, which allows domestic subsidiaries, regardless of percentage foreign ownership, to make political contributions and expenditures as long as: (1) the funds used are generated exclusively from the subsidiary's U.S. operations; and (2) all decisions on contributions and expenditures are made by U.S. citizens or permanent residents.⁶⁶

Domestic subsidiaries of foreign corporations, such as Anheuser-Busch, Bayer, BMW, Honda, Siemens, etc., employ millions of Americans in congressional districts across the country and contribute to the national and local economies.⁶⁷ We can have a debate about whether this level of foreign investment and ownership in our economy is good for the country. But the campaign finance law is not the proper arena for weighing in on this debate, and the interests of millions of Americans who work at domestic subsidiaries should not be shut out of the political arena because their employer can't speak about candidates.

Putting aside domestic subsidiaries of foreign corporations, many corporations that are thought of as "American" also may be considered foreign under H.R. 1's low 20 percent threshold. For example, almost 17 percent of The New York Times Company is owned by Carlos Slim, a Mexican national.⁶⁸ If he increased his stake by a few more percentage points, the Times may not qualify as an American company under the bill.

C) H.R. 1 Could Drastically Affect Employee-Funded PACs, Either Effectively Prohibiting Them Altogether or Prohibiting Them for Employees of Domestic Subsidiaries of Foreign Corporations.

As discussed above, depending on how broadly the vague language of H.R. 1 is interpreted, the bill could treat any corporation with even one foreign shareholder as a foreign entity. At a minimum, corporations that have 20 percent or more foreign ownership would be treated as foreign entities. This aspect of H.R. 1 could have drastic consequences for employee-funded PACs.

Under existing law and the FEC's implementation, corporations that are considered foreign nationals may not directly establish and administer employee-funded PACs; only the domestic subsidiaries of foreign-national corporations may have PACs.⁶⁹ However, because H.R. 1 could treat substantially all publicly traded corporations as foreign nationals or, at the very least, erase the distinction between domestic subsidiaries and foreign corporations, the bill appears to broadly threaten the continued permissibility of employee-funded corporate PACs in general or, at the very least, for domestic subsidiaries of foreign corporations. While the bill purports to set forth various conditions under which employee-funded PACs may continue to operate, it is not at all clear whether these conditions would override the pre-existing and general rule that foreign-national corporations may not establish and administer employee-funded PACs.⁷⁰

62 Press Release: 2015 Public Affairs Pulse Survey: Most Americans Say it's Smart for Big Companies to Get Political, Public Affairs Council (Sep. 10, 2015), at <https://pac.org/news/general/most-americans-say-its-smart-for-big-companies-to-get-political>.

63 See, e.g., Sapna Maheshwari, *During Breaks in Super Bowl, Advertisers Enter Political Debate*, N.Y. TIMES (Feb. 6, 2017), at <https://www.nytimes.com/2017/02/06/business/super-bowl-ads-politics.html>.

64 See, e.g., Garrett Epps, *When Corporations Are Good Citizens*, THE ATLANTIC (Aug. 17, 2017), at <https://www.theatlantic.com/politics/archive/2017/08/when-corporations-display-good-citizenship/537231/>.

65 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)). For corporations in which a foreign country (which likely includes sovereign wealth funds) or foreign government official holds ownership, the cutoff for foreign ownership would be five percent. *Id.* (to be codified at 52 U.S.C. § 30121(b)(3)(A)(ii)).

66 See, e.g., FEC Adv. Op. No. 2006-15 (TransCanada).

67 See, e.g., Brookings Institution, *FDI in U.S. Metro Areas: The Geography of Jobs in Foreign-Owned Establishments*, at <https://www.brookings.edu/research/fdi-in-u-s-metro-areas-the-geography-of-jobs-in-foreign-owned-establishments/> ("Foreign-owned U.S. affiliates directly employ some 5.6 million workers spread across every sector of the economy").

68 The New York Times Co., 2018 Proxy Statement, at https://s1.q3cdn.com/156149269/files/doc_financials/annual/2017/Final-2018-Proxy-Statement.pdf.

69 See FEC Adv. Op. Nos. 1977-53 (APCAC) and 1982-34 (Sonat).

70 See H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30118(b)(8)). Ironically, the section heading in the bill purports this provision is a "clarification" of the law, but it confuses more than it clarifies.

Just as the positions of the DISCLOSE Act's supporters may shed light on H.R. 1's legislative intent, IFS cannot help but note that H.R. 1 is a bill proposed and supported exclusively by congressional Democrats,⁷¹ many of whom have expressed their categorical opposition to the idea of employee-funded PACs and have rejected PAC contributions.⁷² This assault on PACs is misguided. Employee-funded PACs are comprised entirely of voluntary, after-tax, amount-limited contributions by certain eligible employees who wish to have a voice in the political process with respect to issues that affect their livelihoods.⁷³

Notably, H.R. 1's potential effects on PACs in this respect also would only affect employee-funded PACs that are established and administered by corporations, but would not affect PACs established and administered by labor unions.⁷⁴ This would end the campaign finance law's longstanding equal treatment of corporations and unions.⁷⁵ For example, while the Service Employees International Union ("SEIU") describes itself as "a large international labor organization"⁷⁶ that receives income from foreign sources⁷⁷ and maintains foreign bank accounts,⁷⁸ it is unlikely to have foreign owners that would subject the union to treatment as a foreign-national entity under H.R. 1.

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

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

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, online political speech generally is unregulated unless it is in the form of paid ads. By negating the FEC's carefully considered Internet regulations,⁷⁹ H.R. 1 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."⁸⁰

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 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.⁸¹ However, other forms of online communications, such as mass e-mails; creating, maintaining, or hosting a website; unpaid

71 See, e.g., Peter Overby, *House Democrats Introduce Anti-Corruption Bill As Symbolic 1st Act*, NPR (Jan. 5, 2019), at <https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act>. As a nonpartisan organization, IFS does not support or oppose any political party.

72 See, e.g., Alexi McCammond, *Nearly 200 Democrats are refusing corporate PAC money*, AXIOS (Aug. 7, 2018), at <https://www.axios.com/democrats-refusing-corporate-pac-money-2018-midterms-025c9c71-f63d-4516-971c-c9c7c9a10630.html>.

73 See 11 C.F.R. § 114.5.

74 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)).

75 See 52 U.S.C. § 30118.

76 SEIU, IRS Form 990 (2016), Part III Line 1, at <https://pdf.gueststar.org/PDF/Images/2016/360/852/2016-360852885-0ec457b8-90.pdf>.

77 *Id.* Part IV Line 14b.

78 *Id.* Part V, Line 4a.

79 See FEC, *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

80 *Id.* at 18,590-18,591.

81 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.

Facebook posts; unpaid Twitter tweets; YouTube uploads; or “any other form of communication distributed over the Internet” are not regulated.⁸²

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.”⁸³ 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.⁸⁴ Indeed, 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.”⁸⁵

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.”⁸⁶ Similarly, a group that sends out 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.⁸⁷ In other words, H.R. 1’s “Honest Ads Act” component 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.⁸⁸

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,⁸⁹ and reporting requirements, which apply to regulated communications of as little as \$250.⁹⁰ (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 disclaimer requirements.⁹¹ Violations of the disclaimer and reporting requirements, whether inadvertent or intentional, also subject speakers to monetary penalties (after enduring complaints and investigations).⁹² 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.⁹³ Many speakers, especially smaller groups, would choose silence instead.

⁸² *Id.* § 100.155(b).

⁸³ H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)).

⁸⁴ *See id.* § 4207 (addressing 11 C.F.R. § 110.11(f)(1)(i), (ii)).

⁸⁵ 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 Russell 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)).

⁸⁶ 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 Advisory Opinion 1999-25 (D-Net) (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 for 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.

⁸⁷ *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).

⁸⁸ H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)(1)(B)).

⁸⁹ 11 C.F.R. § 110.11(a)(2).

⁹⁰ 52 U.S.C. § 30104(c)(1).

⁹¹ *Inst. for Free Speech, FEC Complaint: Mayday PAC violated campaign finance laws* (Nov. 20, 2014), at <http://www.ifs.org/2014/11/20/fec-complaint-mayday-pac-violated-campaign-finance-laws/>.

⁹² *See* 52 U.S.C. § 30109(a).

⁹³ *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.”).

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

H.R. 1's "Honest Ads Act" provisions purport to be premised on the unique ability of Internet advertising to micro-target recipients,⁹⁴ 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 not related to any election. For example, an ad asking members of the public to contact their Senators about a criminal justice reform bill pending in Congress has been held to be an "electioneering communication," even though the ad did not praise or criticize the elected officials in any way.⁹⁵ 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."⁹⁶

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.⁹⁷

Like express advocacy communications, "electioneering communications" are subject to complex FEC disclaimer, reporting, and recordkeeping requirements.⁹⁸

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.⁹⁹ Notably and ironically, given the bill's concern about micro-targeting on online platforms,¹⁰⁰ H.R. 1 dispenses with any targeting requirement whatsoever for online "electioneering communications."¹⁰¹

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 Mitch McConnell, who represents Kentucky, 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,¹⁰² 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 facially¹⁰³ and as-applied to "pejorative" ads about then-Senator Hillary Clinton's 2008 bid for the Democratic presidential nomination.¹⁰⁴ But it did so because "the vast majority of [electioneering communication] ads clearly" sought to elect

⁹⁴ H.R. 1 § 4203.

⁹⁵ See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).

⁹⁶ 52 U.S.C. § 30104(f)(3).

⁹⁷ 11 C.F.R. § 100.29.

⁹⁸ 11 C.F.R. §§ 110.11(a)(4), (b)(3), (c)(4); 104.20(d).

⁹⁹ H.R. 1 § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)).

¹⁰⁰ *Id.* § 4203.

¹⁰¹ *Id.* § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A)(i)(III)).

¹⁰² U.S. Const., Art. I § 2(1) and Amend. XVII § 1.

¹⁰³ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003).

¹⁰⁴ *Citizens United*, 558 U.S. at 366-367; 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).

candidates or defeat candidates.¹⁰⁵ The government documented through a record “over 100,000 pages long”¹⁰⁶ that Congress had precisely targeted the type of communication and forms of media required to regulate “candidate advertisements masquerading as issue ads.”¹⁰⁷ 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.”¹⁰⁸

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 that are targeted to recipients ineligible to vote for or against the referenced candidates; and (2) the bill recites no evidence whatsoever that online issue ads are “candidate advertisements masquerading as issue ads.”

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.”¹⁰⁹

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, address, and phone number for the sponsor’s contact person; and a list of the chief executive officers or board members of the sponsor.¹¹⁰

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.¹¹¹ 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 support or opposition for a wall on the U.S.-Mexico border, immigration reform, the “Tea Party,” “Black Lives Matter,” or the “Women’s March,” to targeted supporters, 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 accessible for at least four years after each ad is purchased.¹¹² Penalties could amount to several thousand dollars per violation.¹¹³ (Oddly enough, H.R. 1 also would place these requirements

¹⁰⁵ *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).

¹⁰⁶ *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

¹⁰⁷ *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.”).

¹⁰⁸ *McConnell*, 540 U.S. at 206 n.88.

¹⁰⁹ H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)).

¹¹⁰ *Id.*

¹¹¹ See 47 U.S.C. § 315(e)(1)(B)(iii).

¹¹² H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)(5)).

¹¹³ *Id.* (to be codified at 52 U.S.C. § 30104(j)(6)); see also 52 U.S.C. § 30109(a)(5), (6).

under the campaign finance law, granting enforcement authority to the FEC, even though much of the speech covered by these requirements would have nothing to do with federal elections.¹¹⁴) 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.

Sen. Amy Klobuchar, who sponsored the original “Honest Ads Act” incorporated into H.R. 1,¹¹⁵ mistakenly claimed the proposed requirements would “harmonize[] the rules governing broadcasters, radio, print, on one hand, and online on the other.”¹¹⁶ In fact, advertisers using telephone calls, canvassing, and print (e.g., newspapers, magazines, direct mailers, and pamphlets) are not subject to the “public file” requirement.¹¹⁷ Moreover, broadcasters are subject to the “public file” requirement because they are required to act in the “public interest” due to the scarcity of the portion of the electromagnetic spectrum over which content and data may be transmitted, or, in the case of cable and satellite operators, because their services affect broadcast service.¹¹⁸

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, they are not in any way comparable to the spectrum limitations for broadcasters. 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 that apply 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 a federal court recently issued a preliminary injunction against for likely being unconstitutionally burdensome.¹¹⁹ 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.¹²⁰ 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 the “strict scrutiny” standard of judicial review.¹²¹ As such, the bill may be neither overbroad nor underinclusive in terms of the speech it regulates and fails to regulate.¹²²

H.R. 1 is overbroad in that 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.¹²³ H.R. 1 also is underinclusive in its exclusive focus on paid advertising when most of the Russian propaganda has been in the form of unpaid social media posts.¹²⁴ H.R. 1 also 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.”¹²⁵

Facebook and Twitter have recently announced their own efforts to address foreign propaganda, which contain some similarities to the “public file” requirement that H.R. 1 would impose.¹²⁶ 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 program and changing foreign threats.

114 See *id.*

115 See S. 1989 (115th Cong.).

116 Sens. Warner & Klobuchar Introduce the Honest Ads Act, Youtube.com (Oct. 19, 2017) at <https://www.youtube.com/watch?v=LVEHNLWlk> at 7:00-7:10.

117 See note 111, *supra*.

118 See 47 U.S.C. § 309; FCC, Licensing, at <https://www.fcc.gov/licensing-databases/licensing>; FCC, *In re* Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees (Jan. 28, 2016) ¶¶ 5-7, at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-1A1.pdf; FCC, Public Inspection Files, at <https://publicfiles-demo.fcc.gov/>; FCC, Cable Television, at <https://www.fcc.gov/media/engineering/cable-television>.

119 *Wash. Post v. Manus*, Case No. 1:18-cv-02527-PWG, Memo. Op. (D. Md. Jan. 3, 2019).

120 See *id.*; H.R. 1 § 4203.

121 *Wash. Post*, Memo. Op. at 14-16. Unlike other campaign finance reporting laws, which require filing reports with government agencies, H.R. 1 would impose the reporting requirement with the online platforms and would charge them with publishing the information, and thus the more lenient “exact-ing scrutiny” that typically applies to campaign finance reporting laws would not apply here. See *id.* at 26-29.

122 *Id.* at 38.

123 22 U.S.C. § 611 *et seq.*

124 *Wash. Post*, Memo. Op. at 41-42; New Knowledge, *The Tactics & Tropes of the Internet Research Agency*, at <https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf>; Computational Propaganda Research Project, *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, at <https://comprop.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report-2018.pdf>.

125 *Wash. Post*, Memo. Op. at 47.

126 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>.

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.¹²⁷ 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 relative to, and may exceed,¹²⁸ 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.¹²⁹

This is especially the case since “reasonable efforts” are undefined, and 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,¹³⁰ 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.¹³¹

V. H.R. 1 Would Impose Inflexible and Impractical Disclaimer Requirements

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.¹³² 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.¹³³ 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].”¹³⁴ 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 candidate that appears during the voice-over statement.¹³⁵ TV ads also must contain an on-screen text disclaimer containing “a similar statement” of candidate approval.¹³⁶

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

128 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>.

129 Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, 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/>.

130 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”).

131 See, e.g., Kyle Swenson, *Twitter calls foul on Rep. Marsha Blackburn ad because of ‘baby body parts’ comment*, WASH. POST (Oct. 10, 2017), at https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm_term=.a34e139ad8d0.

132 H.R. 1 § 4207 (to be codified at 52 U.S.C. § 30120(d), (e)).

133 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).

134 11 C.F.R. § 110.11(b)(1).

135 *Id.* § 110.11(c)(3).

136 *Id.*

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 second lengths.¹³⁷ Online video ads also are commonly much shorter than broadcast TV ads.¹³⁸

The FEC's existing disclaimer requirements exempt "small items" and communications where it is "impracticable" to include a disclaimer.¹³⁹ Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.¹⁴⁰

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.¹⁴¹ At a minimum, a digital ad would have to contain on its face the name of the ad's sponsor, and this information could not be displayed by alternative means, such as "clicking through" the ad.¹⁴² 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 may be technically impossible or impractical or if the vendor does not allow for it.¹⁴³ 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.¹⁴⁴ Thus, H.R. 1 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

Conclusion

H.R. 1 is clearly a slapdash legislative vehicle that stitches together prior standalone bills comprised of unworkable and likely unconstitutional provisions that rightfully went nowhere. For this reason, the bill may seem like an unserious political ploy that is unlikely to pass the Senate or to be signed into law. Nonetheless, it should be examined carefully and subjected to critical pushback. As the first bill to be introduced in the House of Representatives for the 116th Congress, H.R. 1 is a disturbing statement of legislative priorities that does not augur well for efforts to protect free speech and associational and donor privacy for the rest of this Congress.

¹³⁷ See *Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), at <http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/> and *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Apr. 9, 2016), at <https://www.cleverism.com/everything-about-podcast-advertising/>.

¹³⁸ See, e.g., Garrett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE.COM (Jul. 26, 2017), at <http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/>.

¹³⁹ 11 C.F.R. § 110.11(f)(1)(i), (ii).

¹⁴⁰ See FEC Adv. Op. No. 2010-19 (Google).

¹⁴¹ H.R. 1 § 4207(b)(2).

¹⁴² *Id.* § 4207 (to be codified at 52 U.S.C. § 30120(e)(1)).

¹⁴³ *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(b)).

¹⁴⁴ *Id.*

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INSTITUTE FOR
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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*

Bradley A. Smith, Chairman

January 2019

Introduction

While most of the attention on H.R. 1 has focused on “hot” issues, such as earmarking government subsidies for political campaigns, gerrymandering, and new restrictions on grassroots organizations that engage in public affairs,¹ twenty pages of the bill are devoted to the unsexy, yet vitally important, issue of the Federal Election Commission’s (FEC) composition and operating procedures.²

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.³

As the late Sen. Alan Cranston (D-Cal.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”⁴ That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats were able to do it. Throwing that away and simply hoping a new agency will side with your preferred party is reckless and an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

¹ See, e.g., Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifsf.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf.

² As the Institute for Free Speech (IFS) continues to analyze this and other sections of H.R. 1 that regulate First Amendment rights, it expects to release additional analyses of the bill. IFS’s written analyses may not address every concern it may have with the proposal, as the 570-page bill’s provisions are simply too numerous and complex to be able to effectively discuss the bill’s contents in their entirety.

³ See Scott Blackburn, Delusions about “Dysfunction”: Understanding the Federal Election Commission, Institute for Free Speech (Oct. 5, 2015), at https://www.ifsf.org/wp-content/uploads/2015/10/2015-10-05_IFS-Issue-Brief_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf.

⁴ Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

Executive Summary

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission's legitimacy by significantly increasing the likelihood that the agency's decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto "Speech Czar." In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission's Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission's Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair's Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.
- Establish a non-binding "Blue Ribbon Advisory Panel" to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstringing the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

Analysis

I. Creating A Partisan FEC

A) Background

Title VI, Subtitle A of H.R. 1, dubbed the “Restoring Integrity to America’s Elections Act,” begins by abolishing the FEC’s historic, bipartisan structure.

Since it was created in 1974, the FEC has been a true bipartisan commission, with each major party effectively controlling 3 of its 6 seats. (Current law says that “[n]o more than 3 members of the [FEC] . . . may be affiliated with the same political party.”)⁵ Under the post-Watergate statute creating the FEC, four votes are needed for the Commission to initiate investigations or to prosecute alleged violations.⁶ As a result, it is impossible for an investigation or prosecution of a Democratic campaign to go forward on the basis of Republican votes alone, and vice versa – there must be at least some bipartisan agreement that an investigation or charges are warranted.

Critics who favor more regulation of political speech have long complained that this bipartisan structure hamstrings FEC enforcement efforts and detracts from the legitimacy of the Commission. With 3 Republicans and 3 Democrats, the Commission, they argue, “frequently deadlocks” and is unable to move forward on enforcement matters.⁷ Effectively, two-thirds of commissioners must agree before the Commission moves forward. This critique, however, is wrong on several fronts.

First, any small commission requires a sizeable supermajority to operate, including commissions with an odd number of members. A five-member body requires a 60% majority; a three-member body requires a two-thirds majority.

But, in fact, tie votes have always been a small percentage of FEC votes. Historically, they have totaled approximately one percent to four percent of Commission votes on enforcement matters.⁸ During the peak years of alleged “gridlock” on the Commission, 2008-2014, they still totaled less than 15 percent of overall votes.⁹

Second, even when deadlocks occur, that does not leave an enforcement matter unresolved. Rather, it means that the FEC will not open an investigation, or will not prosecute an alleged violation, as the case may be. A 3-3 vote on such a motion means the motion fails – there is nothing mysterious or out of the ordinary about it. And since the goal is to assure some degree of bipartisan agreement before proceeding, that is the proper result.

That leads to the third and most important point: Although critics claim that tie-votes sap the FEC’s ability to enforce campaign finance laws, in fact, it is assuredly the opposite. The only reason that the FEC has any legitimacy is its bipartisan makeup. Particularly in the current environment, it is inconceivable that an agency empowered to make prosecutorial decisions about the legality of campaign tactics, communications, funding, and activities on a straight party-line vote would have any legitimacy.

B) Creating a Partisan Commission

1. Abandoning the FEC’s Equal Party Makeup

H.R. 1 does away with the FEC’s historic bipartisan makeup, creating a 5-member Commission and allowing a simple majority vote to launch an investigation or to prosecute an alleged violation.¹⁰

⁵ 52 U.S.C. § 30106(a)(1).

⁶ 52 U.S.C. § 30106(c).

⁷ See, e.g., Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), at <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> and Justin Miller, *Reform Advocates’ Elusive Goal: Fix the FEC*, THE AMERICAN PROSPECT (Mar. 3, 2016), at <https://prospect.org/blog/checks/reform-advocates%2580%99-elusive-goal-fix-fec>.

⁸ See, e.g., Bradley A. Smith, Opening Statement of Bradley A. Smith, Chairman of the Federal Election Commission Before the Senate Committee on Rules and Administration, Federal Election Commission (Jul. 14, 2004), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smithstatement05.pdf>; Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, ELECTION LAW JOURNAL (Vol. 1, No. 2, 2002), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smitharticle01.pdf> at 159.

⁹ See, e.g., Lee E. Goodman, End of Year Statement from Chairman Lee E. Goodman, Federal Election Commission (Dec. 2014), at http://www.fec.gov/members/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf at 2; Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), at <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

¹⁰ H.R. 1 § 6002(a).

The bill attempts to cover this partisan makeup by providing that no more than two of the five commissioners may be members of any one political party. This means that the fifth member would have to be a member of a minor party, or a political independent. This is not, however, a barrier to partisan control. For example, under this criteria, Senator Bernie Sanders, who nearly gained the 2016 Democratic presidential nomination, would not count as a Democrat on the Commission (technically, Sanders remains an “independent”), allowing him to join two other Democrats in a Commission majority. The same would be true for Angus King, the Maine senator elected as an independent, but who caucuses with Democrats.

Indeed, the FEC currently has an independent serving, Commissioner Steven Walther. But Walther was nominated at the behest of former Democratic Senate Majority Leader Harry Reid, having served as Reid’s lead attorney in a 1998 recount election Reid won by just 428 votes.¹¹ Walther holds a “Democratic” seat on the Commission, and is regularly identified as a Democrat.¹² Under H.R. 1, Walther would be the “balance of power.” Does that really sound nonpartisan?

The Pew Research Center has found that roughly two-thirds of self-identified “independents” are reliable supporters of one of the two major parties, and tend to be so because they intensely dislike the other major party.¹³ In short, any president worth his salt would have no trouble finding an “independent,” or perhaps a Green or Libertarian, with views favorable to his or her party’s position, and inclined to particularly distrust the other major party. This is no recipe for nonpartisan enforcement.

What little fig leaf is added by having an “independent” member of the Commission can also be stripped away by the president. Under the current law, there must always be some level of bipartisan support for the Commission to undertake an investigation or prosecution. But H.R. 1 provides that a simple majority of sitting commissioners (but no less than three) constitutes a quorum and can take official action.¹⁴ Thus, merely by refusing to fill vacancies set aside for the opposition party or the nominally independent fifth member, the president can assure that his or her two party appointees – with or without the support of the nominal independent or any member of another party – can enact a partisan enforcement agenda.

It is hard to imagine a better way to spread distrust of federal regulation of campaign speech.

2. A More Powerful, Partisan Chair – A Campaign Speech Czar

Under the FEC’s longstanding structure, the Chair of the Commission is elected by the Commissioners themselves to a one-year term at the start of each year and can only serve as Chair once in a six-year term. The Vice Chair and Chair must be from different parties. The Chair is not devoid of added power, but to a substantial extent, the position is ceremonial, because almost all major decisions, including hiring and firing key staff, issuing subpoenas, initiating enforcement actions, and approving proposed budgets for submission, must be made by a majority Commission vote. Again, the obvious purpose is to legitimize the Commission by assuring that it does not operate as a partisan agency.

H.R. 1 would create a speech czar in the form of a much more powerful Chair, appointed by the president, who would dominate the Commission. Under the legislation, the Chair would become the “Chief Administrative Officer” of the Commission, with the sole power to appoint – and remove – the Commission’s Staff Director, prepare its budget, “require . . . any person to submit, under oath, such written reports and answers to questions as the Chair may prescribe,” issue subpoenas, and compel testimony.¹⁵ The legislation would require the Chair to “consult” with other commissioners on these matters, but, in the end, the Chair would have full authority to act alone.¹⁶

About the only administrative act the Chair cannot do alone is appoint the agency’s General Counsel. The Chair must make the appointment, but at least two other commissioners (again, no required bipartisanship) must concur.¹⁷ Whether a majority of the Commission can appoint or dismiss the General Counsel over the Chair’s objections is not clear, but even if it can, no bipartisanship is required. The General Counsel has enormous influence on the Commission’s enforcement policies, and, as we will see below, H.R. 1 grants him or her even greater powers.

¹¹ See Matt Bewig, Chair of the Federal Election Commission: Who Is Stephen Walther?, AllGov (May 16, 2017), at <http://www.allgov.com/news/top-stories/chair-of-the-federal-election-commission-who-is-steven-walther-179516?news=860181>.

¹² That Commissioner Walther, after 13 years on the Commission, must still regularly make the point that he is not a registered Democrat illustrates that being an “independent” does not strip one of partisan leanings. See Tisha Thompson, et al., Deadlock: FEC Commissioners Say They’re Failing to Investigate Campaign Violations, NBC Washington (Sept. 19, 2016), at <https://www.nbcwashington.com/investigations/Deadlock-FEC-Commissioners-Say-Theyre-Failing-to-Investigate-Campaign-Violations-394014971.html>.

¹³ See Samantha Smith, 5 Facts about America’s political independents, Pew Research Center (Jul. 5, 2016), at <http://www.pewresearch.org/fact-tank/2016/07/05/5-facts-about-americas-political-independents/>.

¹⁴ H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(1)).

¹⁵ *Id.* § 6003 (to be codified at 52 U.S.C. § 30107(a)(1)(A)(i), (iii) and 52 U.S.C. § 30107(a)(1)(B)(ii), (iv)-(v)).

¹⁶ *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(A)).

¹⁷ *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(B)(i)).

The Chair's power to appoint the Staff Director may sound like an innocuous administrative post, but, in fact, this is a powerful position and one that, like the General Counsel, exercises considerable sway in the FEC's enforcement processes as well as administration. That is because the FEC's Audit and Reports Analysis divisions and its Alternative Dispute Resolution Office fall under the direction of the Staff Director. Commission audits are extremely time-consuming for the committees and campaigns that are audited, and may require them to reveal substantial information about their political strategies and tactics. Audits may uncover violations, intentional or inadvertent, leading to fines and penalties. The Reports Analysis Division is responsible for compliance with the law's extensive reporting requirements, and its efforts, too, often identify violations – typically inadvertent, but still leading to penalties and bad publicity. And the Alternative Dispute Resolution Office has been a highly successful program through which the Commission resolves many contested or inadvertent violations. Any of these offices could easily be subverted to partisan use by a presidentially-appointed Chair and his or her hand-picked Staff Director.

Thus, the Chair's sole power to appoint or dismiss the Staff Director is not merely a matter of administration, but a matter of enforcement and enforcement policy. What will be the criteria for selecting campaigns and committees to be audited? What violations will be a priority for the Reports Analysis Division? Once again, current law requires bipartisan agreement to appoint or dismiss the Staff Director, but H.R. 1 subjects the position to partisan control.

Finally, H.R. 1 does away with the provision in existing law that the Vice Chair come from a different party than the Chair.¹⁸ This further allows power to be consolidated within one party.

With the power to craft the agency budget, appoint the Staff Director at their sole discretion, appoint the General Counsel without bipartisan support, issue subpoenas, and compel testimony and reports on their sole authority, the Chair, appointed by the president, will be the single dominant member of the Commission, fully deserving of the speech czar label.

C) The Provision's Timing Is Intended to Ensure Ongoing One-Party Control of the Commission

While most provisions of H.R. 1 take effect in 2020, the provisions regarding FEC appointments take effect in 2021.¹⁹ This means the victor in the 2020 presidential elections will appoint all five commissioners and name the initial Chair of the re-constructed commission. Furthermore, this president will be able to assure that his or her appointees constitute a majority of the Commission through at least 2027, even if he or she is not re-elected in 2024. That president will also have appointed the “independent” commissioner and the powerful Chair's Office through at least 2030.²⁰ That Chair and his or her majority will then name the Staff Director and General Counsel.

That means that all the new regulations required under other provisions of H.R. 1 will be written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel, and can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races. That same group would also respond to Advisory Opinion Requests and approve or disapprove of all enforcement actions.

Working with these potential advantages, if that president is re-elected in 2024, he or she could appoint a Commission majority through 2033.

D) Summary

In sum, under the guise of fixing a non-problem (alleged “gridlock”), H.R. 1 abandons the longstanding idea of a nonpartisan FEC and establishes a five-member commission subject to de facto partisan control. It adds to that partisan structure by giving enormous power to the Chair, acting alone, to establish agency priorities, issue subpoenas, appoint the powerful Staff Director without consent of other commissioners, and appoint the General Counsel.

The end result will be to weaponize the FEC as a potential tool of partisan campaign finance law enforcement, eroding public trust in the legitimacy of the agency and in the fairness of the election process more generally.

II. Enhancing the General Counsel's Power and Eroding Commission Accountability

Historically, as with other FEC decisions, the decision to hire or fire an agency General Counsel has required some degree of bipartisan agreement. As we have seen, H.R. 1 would destroy that bipartisan requirement, allowing the president's appointed Chair to name the General Counsel with the support of any two of the other four commissioners appointed by that same president – and no bipartisan support.

¹⁸ *Id.* (to be codified at 52 U.S.C. § 30106(a)(5)(C)).

¹⁹ *Id.* § 6007(a).

²⁰ *Id.* § 6002 (to be codified at 52 U.S.C. § 30106(a)(2)(A)-(B)).

The General Counsel has always been a powerful voice at the agency, since that office, subject to Commission approval, investigates and prosecutes violations, litigates on behalf of the Commission, and drafts regulations and advisory opinions, among other duties. The FEC budget provides for just one attorney position directly under control of each commissioner (two for the Chair and Vice Chair – who, under the new structure, can both come from the president's party), so commissioners are of necessity heavily reliant on the legal advice and recommendations of the General Counsel and his or her staff.

H.R. 1 enhances the power of the General Counsel in several ways.

First, under current law, the FEC does not launch an investigation without the approval of the Commission²¹ – again, an approval requiring bipartisan agreement. H.R. 1 provides, instead, that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days.²² Not only does this allow investigations to begin without bipartisan support, but it also allows commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

Similarly, once an investigation is begun, H.R. 1 enhances the power of the General Counsel to issue subpoenas on his or her own authority. Under current law, subpoenas must be approved by the Commission. As a matter of efficiency, the FEC often authorizes the General Counsel to engage in broad discovery at the start of an investigation, without seeking approval at each step. But the Commission remains in the saddle. Under H.R. 1, the General Counsel need merely notify the Commission of his or her intent to conduct discovery, and unless a majority of the Commission affirmatively votes against the discovery within 15 days, the Counsel can proceed with whatever discovery is desired.²³ Again, the commissioners are absolved of the responsibility to vote on the matter, and the default option is to proceed with the investigation and subpoenas.

This section does include one of the few good provisions of this portion of H.R. 1 – extending the time for respondents to file briefs challenging the General Counsel's recommendation to find a violation of the Federal Election Campaign Act from 15 to a more realistic 30 days,²⁴ but this minor technical change doesn't even begin to offset the serious problems with the bill.

As with provisions for the appointment of the Commission itself, H.R. 1 is structured so that the party that gains initial control of the Commission will be able to keep its choice of a General Counsel in office through at least 2030 even if, and perhaps especially if, the General Counsel proves to be a rank partisan, and even if the presidency changes parties before then and the new president appoints a Chair from his or her own party.

III. New Standards of Judicial Review Weaken Rights of Respondents

The Federal Election Campaign Act has long included a provision allowing for citizen suits where the Commission has failed to act on a complaint, or the party believes the Commission has wrongfully dismissed the complaint.²⁵ In such cases, the complainant can file suit in the U.S. District Court for the District of Columbia. H.R. 1 appropriately increases the time that the Commission has to act on a complaint from an unrealistic 120 days to a more realistic one year,²⁶ but it's downhill from there.

H.R. 1 provides that any such review into the lawfulness of the FEC's dismissal of a complaint shall be decided under *de novo* review.²⁷ This means the Court gives no deference to any prior finding of the agency, but looks at the issue as if it were deciding the case in the first instance. This is contrary to the so-called *Chevron* doctrine that federal courts normally use when reviewing the decisions of administrative agencies, such as the FEC.

Under *Chevron* doctrine, if a statute is ambiguous, a court will defer to the agency's reading of the law, unless it finds that the agency's interpretation is clearly wrong. This is known as "*Chevron* deference." Under *de novo* review, however, if the statute is ambiguous, the Court gives no deference to the agency's reading of the law, but merely applies its own best reading of the statute. In recent years, *Chevron* doctrine has come under tremendous fire, primarily from conservatives, who have argued that it is the role of the courts to interpret statutes, and giving any special weight to the agency's interpretation is not so much "deference" as "bias" in favor of one of the litigants – the government – on the exact issue in dispute.

We take no position in this analysis on the wisdom or validity of the *Chevron* doctrine. But regardless of how one feels about *Chevron* deference, H.R. 1 takes a curious approach. First, it is a partial, one-time invalidation of the *Chevron* doctrine for

²¹ 52 U.S.C. 30109(a).

²² H.R. 1 § 6004 (to be codified at 52 U.S.C. § 30109(a)(2)(A)).

²³ *Id.* (to be codified at 52 U.S.C. § 30109(a)(2)(B)).

²⁴ *Id.* (to be codified at 52 U.S.C. § 30109(a)(3)(B)).

²⁵ 52 U.S.C. 30109(a)(8).

²⁶ H.R. 1 § 6004 (to be codified at 52 U.S.C. § 30109(a)(8)(B)(i)).

²⁷ *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii), (B)(ii)).

a single agency. While Congress clearly has the power to set standards of judicial review, and thus to overturn the *Chevron* doctrine, H.R. 1 is critical of *Chevron* only to the extent that *Chevron* deference might actually work in favor of respondents at the Federal Election Commission. If a respondent challenges in court a Commission decision finding that it violated the law, the *Chevron* doctrine will apply, and the court will defer to any reasonable interpretation the agency gives to the statute. But if the respondent wins at the Commission – if the Commission determines that the respondent's conduct is not illegal – then the *Chevron* doctrine does not apply, and no deference will be given to the FEC's decision.²⁸ For respondents, it's a "heads I win, tails you lose" approach.

Furthermore, it is not clear if *de novo* review applies only to legal questions, or also to questions of fact. The better reading, we think, is that it applies only to legal questions, but the language is not clear. Historically, of course, courts have always given deference to the determinations of the original fact finder.

The bill also provides that, in any case where the alleged violation might trigger a fine greater than \$50,000, the agency may not rely, even in part, on "prosecutorial discretion" in defending in court its decision not to proceed.²⁹ This runs contrary to longstanding administrative law doctrine that gives agencies the authority to decide what cases they wish to devote resources to. For example, imagine a losing presidential campaign that spent \$600 million, and an allegation that the campaign illegally coordinated just over \$25,000 in expenditures by an outside group – a violation that, if proven, could trigger a penalty over \$50,000.³⁰ The FEC might conclude that, though it believes the law was broken, the law is admittedly murky as to whether the conduct actually was illegal; the facts would be extremely difficult to prove; and the candidate lost and is not in office, nor likely to run again. In such circumstances, the FEC might conclude that it was not worth pursuing a violation for an amount that was less than one one-hundredth of the campaign's total spending, in litigation that could last years and use up hundreds of thousands of taxpayer dollars in time and resources, with a relatively low probability of success. Prosecutorial discretion allows the agency to simply decline to prosecute, so that it can use its resources more effectively on other matters. H.R. 1 requires a zero-tolerance approach that would strip the agency of the discretion to decline to prosecute in order to efficiently manage resources. Eliminating prosecutorial discretion is akin to saying that a cop must ticket everyone going more than 5 miles per hour over the speed limit.

There is no evidence that the FEC has been abusing its discretion by dismissing major violations on the grounds of prosecutorial discretion, and no reason to abolish *Chevron* deference only in cases where the agency has interpreted the law in favor of the respondents.

In summary, H.R. 1 would rig judicial review in favor of punishing those who speak in a campaign context.

IV. Miscellaneous Mischief

Two other provisions of the "Restoring Integrity to America's Elections Act," embedded in the "For the People Act," deserve mention.

First, while the Act leaves it to the president to appoint FEC commissioners – as, constitutionally, it must – it provides for a "Blue Ribbon Advisory Panel" to make non-binding recommendations to the president. The odd-numbered panel will consist of "retired Federal judges, former law enforcement officials, [and] individuals with experience in election law," and will publicly recommend one to three candidates to the president for each seat.³¹ It's not really clear what the purpose of the panel is, since the president is always free to consult whom he or she likes regarding appointments. Rather, it seems to be the hope of those desiring more speech regulations that they will be selected to the "Blue Ribbon Advisory Panel" and then be able to pressure the president to choose from among their preferred candidates for each position.

What is interesting about this provision is that it would exempt this "Blue Ribbon Advisory Panel" from the requirements of the Federal Advisory Committee Act, which exists precisely to assure that such advisory committees operate with transparency.³² It's an interesting way to "restore integrity" to elections – by creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint.

Finally, H.R. 1 also hampers the FEC in its advisory opinion process. Under the law, any party can request an opinion as to whether its proposed activities are legal. If the Commission gives the go-ahead, the requestor cannot later be prosecuted for that behavior, nor can others who operate on the same terms, and in good faith reliance on the Opinion. Advisory Opinion

²⁸ *Id.*

²⁹ *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii)).

³⁰ For reference, Hillary Clinton's 2016 presidential campaign spent \$768 million. See Christopher Ingraham, *Somebody just put a price tag on the 2016 election. It's a doozy*, WASHINGTON POST (Apr. 14, 2017), at https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?hpid=hp_term%3D91558b0ec51d.

³¹ H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(3)(B)(i)-(ii)).

³² *Id.* (to be codified at 52 U.S.C. § 30106(a)(3)(B)(iv)).

Requests are public documents, and anyone can submit comments to the Commission making recommendations on how it should decide the request. The Commission then considers the request at an open, public meeting.

Over a decade ago, the Commission began to allow requestors to appear in person before the Commission. The logic was simple: frequently, as the Commissioners considered a request, new questions about the intended activity, or the requestor, would come to the fore. Typically, the requestor, or its attorney, would be seated in the public audience and could readily answer the question involved, but the Commission had no provision allowing them to testify, even for the limited purpose of answering the question on the spot. Thus, the matter would be delayed, and a written request would go out to the requestor seeking an answer, after which the matter would be re-scheduled for further debate at a later Commission meeting. Allowing the requestor to appear in person at the public hearing to answer such questions while the matter was debated was mere common sense and stopped some needless delays.

H.R. 1 would provide that, if the Commission allows a requestor to appear before it in person, it must also allow "an interested party who submitted written comments ... in response to the request ... to appear before the Commission to present testimony."³³

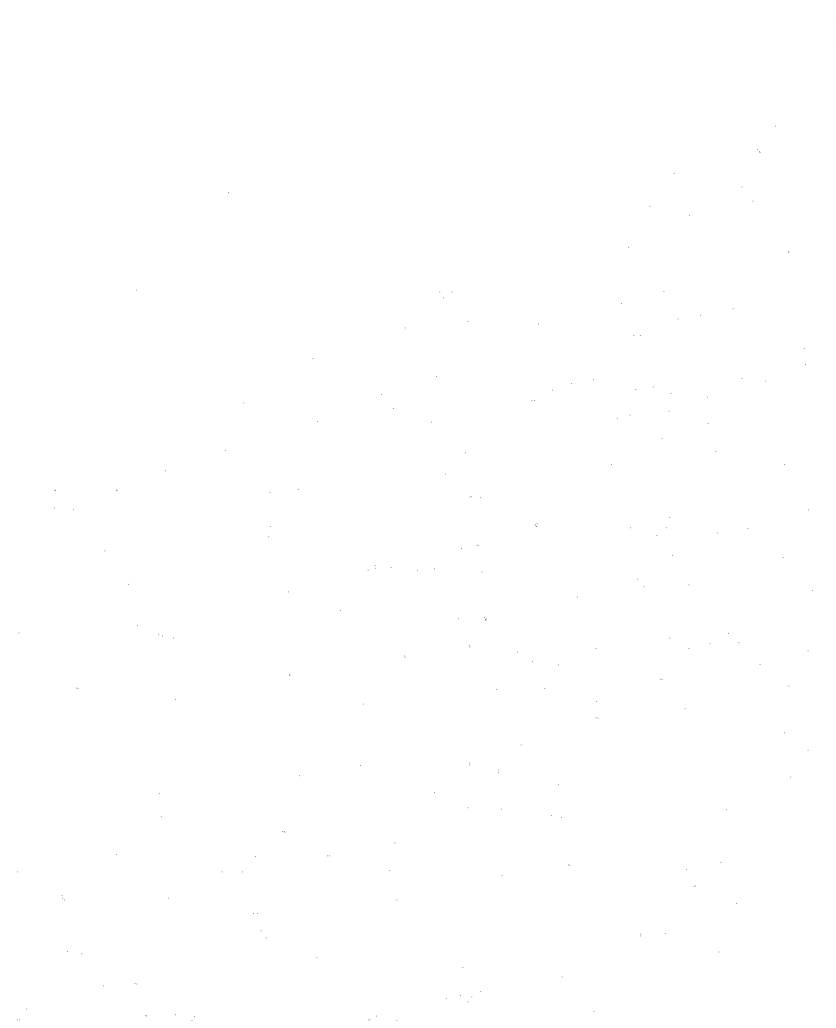
Simply put, there is no real point to this provision, since these "interested parties" cannot answer the types of questions the Commission asks of requestors and have already submitted their views on the legal framework. On certain Advisory Opinion Requests, there may be a dozen or more commenters, pro and con, who would all have to be given an opportunity to appear. Of course, if the Commission felt it would be helpful to hear from such parties, it can alter its procedures to allow for it. But there is no need to tie the Commission's hands with a blanket rule requiring this procedure. It would be a bit like dictating to Congress who has a right to testify in committee hearings. But securing the ability to testify orally on Advisory Opinion Requests has been a pet priority of leading groups that advocate for more speech regulations ever since the FEC began allowing requestors to appear in person.

The impetus for this proposal is well-known to the campaign finance bar – those advocating speech restrictions simply want an opportunity to further lobby the Commission to deny most requests to speak. That such an arcane provision made it into the bill is a clear sign that its contents were written by lobbyists from speech censorship groups.

Conclusion

The FEC "reform" provisions tucked into the "For the People Act" would, if enacted, abolish a bipartisan commission in favor of one under partisan control and beholden to the president, do away with checks and balances within the Commission, attempt to bias judicial proceedings against respondents, and hamstring the efficient operations of the agency. On the basis of this section of H.R. 1 alone, members of Congress and the public would be well-served to carefully scrutinize this legislation.

³³ *Id.* § 6005 (to be codified at 52 U.S.C. 30108(e)).



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Analysis of H.R. 1 (Part Three)

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

Bradley A. Smith, Chairman

February 2019

Introduction

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

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

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

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

Executive Summary

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

Analysis

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷ See note 2, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ *Id.* (i.e. § 326(d)(1)(B)).

¹⁴ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ *Id.* (i.e. § 326(c)(1)(B)).

²⁰ *Id.* (i.e. § 326(e)(2)).

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

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

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

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

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

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

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

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

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

²² 11 C.F.R. 109.21(d)(1)-(5).

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

²⁴ *Id.* (*i.e.* § 326(a)(1)(B)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ 11 C.F.R. 109.21(d)(3).

²⁸ H.R. 1 § 6102(c)(1)(A).

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

³⁰ *Id.* (i.e. § 326(b)(2)).

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

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

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

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

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

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

³¹ *Id.* (i.e. § 326(c)(2)(A)-(E)).

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

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

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

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

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

E) Conduct: Other Absurdities that Suppress Speech

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

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

F) Conduct: No Safe Harbor Firewall Allowed

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

³³ 518 U.S. 604 (1996).

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

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

³⁶ 11 C.F.R. § 109.23(b).

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

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

³⁹ 11 C.F.R. 109.21(h).

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

Conclusion

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

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

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

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

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

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The CHAIRPERSON. Thank you. Thank you very much.

Thank you to all the witnesses.

We will now allow members of the Committee to ask questions, and I will turn first to the ranking member, Mr. Davis, for his time.

Mr. DAVIS of Illinois. Thank you, Chairperson Lofgren.

And thank you again to my new Committee members, and ones who served before, for discussing this very important issue.

Mr. Rangel-Lopez, I have twin boys that are your age, and they got to also, like you, cast their first vote in this election. There were some days they would actually threaten to not vote for me, but I am convinced after a while they did.

I appreciate your story. And we want to get more young people in the political process. And for you to be here, your testimony was very well laid out. And I want to say thank you personally on behalf of all of us here in Congress for your advocacy. We would like to see more of it in your generation in the years to come. So thank you very, very much.

Mr. Keating, I will start with you.

Your organization is a 501(c)(3), correct?

Mr. KEATING. Yes.

Mr. DAVIS of Illinois. Okay. So what is your organization's mission?

Mr. KEATING. It is to protect and enhance free speech rights. We represent clients in court on cases protecting those rights.

Mr. DAVIS of Illinois. As written, would H.R. 1 hinder your mission?

Mr. KEATING. Well, it wouldn't hinder our mission, but a lot of clients that we represent, it would definitely hinder their mission.

Mr. DAVIS of Illinois. Well, in your testimony you mentioned that H.R. 1 would make it harder for groups to speak about the Federal Government. You threw out an example with the unions possibly doing ads against the President. Can you expand on that? What other types of organizations, what other examples may you give?

Mr. KEATING. Well, I would say virtually any organization that has ever contacted your office to talk about a public matter would be affected by this bill. Every single one.

Mr. DAVIS of Illinois. Any small not-for-profit in my district, Food Pantry, for example, who may be advocating for me to support certain programs in the farm bill?

Mr. KEATING. I would think absolutely. In fact, I think the smaller groups would be hurt the most. Because the bill is so complex, and we already have an extremely complex law as it is, but this is so complex that you would be a fool to speak about government policy if you didn't have a lawyer advising you. And the small groups can't afford attorneys.

Mr. DAVIS of Illinois. Do you believe the 30-second ads that we now all see on TV might have to become 60 because of the legalese?

Mr. KEATING. Well, most groups can't afford to buy more airtime.

Mr. DAVIS of Illinois. I am well aware of how much it costs.

Mr. KEATING. Yes. Look, if it says paid for by the group, that should be enough, I think.

Mr. DAVIS of Illinois. All right.

So this bill also, sir, creates an FEC, Federal Election Commission, that would be partisan instead of evenly balanced like our current Franking Commission that exists here in the House of Representatives is 3-3. And I will let you know, my co-chair, Mrs. Davis, in the last Congress we worked to open up provisions in a very bipartisan way.

Now, if this provision were to become law, how do you believe a Presidential partisan appointment of a chairman, who would exert greater control over the commission, with a makeup that requires bipartisan support, how do you think it will become anything less than a political weapon for whatever party holds the White House?

Mr. KEATING. Well, you have to keep in mind, when Congress created the FEC it was in the wake of Watergate. Nixon had an enemies list. He was happy to use the powers of government to punish his political enemies. And that is one reason why the Congress set it up that way, so it couldn't be used in a partisan manner.

And this morning at the hearing, I heard some excellent points about extreme partisan gerrymandering. Fox is guarding the hen house, I think I heard that as well. So there is concern about partisan uses of campaign things.

We don't ever, ever want the Federal Election Commission to be used for partisan reasons. And having it balanced, I think, is something that is a huge bulwark of enforcement so that won't happen.

Imagine what people would think if a President's appointee was using the FEC in a partisan manner. I can't think of anything more that would increase distrust in government more than that.

Mr. DAVIS of Illinois. Well, thank you for your comments there.

And as I mentioned earlier this morning, being from Illinois, redistricting reform is a priority of mine. And it seems many of the issues that we face that are being discussed here today in regards to the Federal level actually exist on the State and local level. You don't have to look too far than the northeast corner of my State and different governmental entities.

Also, last question, H.R. 1 would establish a six-to-one public match for small-dollar contributions under \$200. What are your thoughts on publicly financed elections?

Mr. KEATING. Well, I think this proposal is a huge risk. We don't know what the actual ultimate effects will be.

I think two effects are clear. One, we will see government massive subsidies for speech by hate candidates. Lyndon LaRouche, I just read his obituary. He ran on conspiracy theories, anti-Semitism, homophobia, and racism, and it was all subsidized courtesy of the American taxpayer.

The other thing that I think is very likely to happen is the political parties are going to be more reliant on big contributions. And that is because the average donor is going to want to give to candidates where it is matched six to one, but the parties get no match.

Mr. DAVIS of Illinois. Thank you.

The CHAIRPERSON. Thank you, Mr. Davis.

The gentleman from Maryland is recognized for 5 minutes.

Mr. RASKIN. Madam Chairperson, thank you.

Mr. Earle, you told a grim and fascinating story. As I understand it, there were 173 kids who you allege were injured by lead paint. They all live in Wisconsin. And then you brought a lawsuit, a tort presumably, class action suit on behalf of the kids.

Mr. EARLE. They were individual suits.

Mr. RASKIN. Individuals in the State of Wisconsin.

The out-of-state manufacturer, paint manufacturer, then spent \$750,000 secretly on a dark money group on behalf of certain candidates, and then used the resulting political influence that he got in order to change State law. Is that basically the story you are telling?

Mr. EARLE. Yes. But it is worse than that, Congressman. What happened was the checks were delivered, and within days the activity occurred with regard to the legislation.

Mr. RASKIN. Okay.

Mr. EARLE. These children, by the way, had some of the most severe lead poisoning in the entire country.

Mr. RASKIN. Okay. Well, where does it stand now?

Mr. EARLE. Those lawsuits are pending because, happily, we were able to go back into court, and finally the Seventh Circuit in the Gibson case, *Gibson v. American Cyanamid*, ruled that it is unconstitutional to retroactively deprive a litigant of a vested right.

Mr. RASKIN. It is a due process violation. They nullified the property rights.

Mr. EARLE. Exactly. Substantive due process violation.

Mr. RASKIN. Okay. How would H.R. 1 help prevent situations like that from evolving?

Mr. EARLE. Because we would know what was going on.

Mr. RASKIN. So all you are asking for is disclosure? You are not even saying the Texas billionaire doesn't have the right to pour \$750,000 into this election or that election. You are just saying the public has got a right to know?

Mr. EARLE. The public has a right to know.

Mr. RASKIN. And on your side, of course, you have the language, Justice Kennedy's language in *Citizens United* and Justice Scalia's language in the *Doe v. Kelly* case, I think it was, in 2010, where he said that there is no right to engage in secret speech, politically, if it is leading up to that the enactment of law, if it is in the legal process, right?

Mr. EARLE. Absolutely.

Mr. RASKIN. Okay. So let me then come to you, Mr. Keating. Is it your position that I have got a First Amendment right to spend whatever I want in politics secretly and that the government can never compel me to disclose my expenditure of money?

Mr. KEATING. Well, it depends what you mean by "politics." I think it is clear that if you give money to an organization that is endorsing and running ads, urging people to vote for or against a candidate, then the answer is no.

Mr. RASKIN. So you agree, that can be disclosed, that that can be compulsorily disclosed under the—

Mr. KEATING. It is today, and I think the court is right saying that that is.

But I think there are other. The court drew a line, basically, and the line is advocacy for or against candidates for Congress or other elected offices.

Mr. RASKIN. Well, that certainly wasn't Justice Scalia's line in the *Doe v. Kelly* case, right?

Mr. KEATING. Well, Mr. Raskin, I think you would agree that there are many situations where we want people to have privacy to associate with an organization. We don't have to think very far back. The gay rights movement. Still today the gay rights movement would not want its donors public in some States. I know this for a fact. There are some Western States where these kinds of bills have come up and the gay rights community we have spoken to, they do not want these types of bills forcing massive disclosure.

Mr. RASKIN. Okay. Because corporations, at least as of now, don't have a sexual orientation, would you agree that corporations could always be required to disclose what their expenditures are?

Mr. KEATING. I don't know where the—I am not going to try to opine what the court would decide on this. But I think we have to keep in mind that most advocacy groups in this country are incorporated. They are nonprofit corporations.

Mr. RASKIN. Well, if we look at the *Citizens United* problem, we are talking about for-profit business corporations. So, I mean, I think that is the heart of the problem that Mr. Earle has identified, that certainly there are people who put their money into politics because this is part of the way that we do politics in America, to advance gay rights or to thwart gay rights or what have you.

But when the Supreme Court in 2010 opened the floodgates on corporate treasury money going into politics, it created a problem of a completely different dimension and scale. And even built into the decision was the suggestion that all of this money would be disclosed. But you seem to be saying it shouldn't be disclosed. And I would think that that would be the basic foundation of the discussion, that it should be disclosed.

Mr. KEATING. Well, it is disclosed. When corporations give to super-PACs all that money is disclosed. But I would also point out that very few publicly traded corporations have given any money at all. It is almost small, privately held corporations——

Mr. RASKIN. Given any money where?

Mr. KEATING. To super-PACs.

Mr. RASKIN. Well, a lot of it goes to associations and trade groups, and there are other methods of getting the money in. I presume that is what a lot of H.R. 1 is about, reconstructing the money trail.

Mr. KEATING. Well, I would just encourage you that if you want to reach certain things, write a bill that is tailored and not massive so that it requires people's privacy no matter what kind of group they are joining.

Mr. RASKIN. Okay.

Mr. KEATING. Be more tailored.

Mr. RASKIN. Thank you, Madam Chairperson.

The CHAIRPERSON. Thank you.

The gentleman from Georgia is recognized.

Mr. LOUDERMILK. Thank you, Madam Chairperson.

I appreciate this panel. And, again, as I stated in our first panel, I think it is very important that we have this discussion here.

Let me start off by saying, Mr. Rangel-Lopez, very inspired by your story. What you exhibited is what this Nation is about: the freedom for you to take your grievances and seek action. I applaud you in what you did. That is awesome. I am really inspired by your story. And I am very sorry what happened to you.

The whole time you were talking about Dodge City, I keep thinking of Marshal Dillon. That is part of America's icon and Americans' history.

But I did have just a couple questions about this, because I wasn't clear in your story. So you were denied the right to vote because of moving that polling precinct, is that what I understand, you were not able to vote in the last—the 2018 election?

Mr. RANGEL-LOPEZ. No, I was able to vote.

Mr. LOUDERMILK. Oh, you were able to vote. So you were able to get to the polling place?

Mr. RANGEL-LOPEZ. Yes.

Mr. LOUDERMILK. Okay.

Mr. RANGEL-LOPEZ. What I was trying to get at is just the story in general of the experiences of everybody in my town.

The CHAIRPERSON. Could you turn on your microphone? We are having trouble hearing.

Mr. RANGEL-LOPEZ. I think I just need to move it closer.

The CHAIRPERSON. Much better.

Mr. RANGEL-LOPEZ. Okay, yeah.

Yeah, so I was just referring to the experiences of everybody else in Dodge City.

Mr. LOUDERMILK. Oh, okay.

Mr. RANGEL-LOPEZ. I luckily have a job that allowed me to take some time off on election day to get to the polling place and help after I had voted, help with the election after I voted.

Mr. LOUDERMILK. Okay. Good. I am glad to hear that, because I wasn't certain from your testimony there.

And you had mentioned that the new polling place was outside of public transportation. Did the city do anything to help people get to the polling place?

Mr. RANGEL-LOPEZ. Yeah, they did that after the fact, after we had brought some national attention to this issue. Because at the time when this was announced, there were no plans for public transportation to be provided to take people to and from the polling place.

And with the current public transportation that is in place, the nearest bus stop, like I said, was a mile away, and it would take a combined—it would take, one way, 90 minutes to get there, and then you had to walk. That includes the walk to the polling place. And that would be to and from there, as well as a 45-minute wait, more or less.

Mr. LOUDERMILK. Okay. And I appreciate what you did. I just wanted to make sure I was clear before we went on, especially with the transportation, because I live in a city, and many of the cities that are in my district don't have any type of public transportation. So I am glad to know that Dodge City actually stepped up.

We will move on to some of the others on the panel. One of the things that struck me in the last panel that I kind of hear here is I think the last panel used the term "corrupt Washington, D.C., money," talking about the big dollars going in. I kind of think that is a theme, and I am gravely concerned about that.

And, Mr. Earle, I understand where you are going. I appreciate Mr. Raskin's question, because the first thing that popped into my mind is the ex post facto provisions dealing with civil. And so the courts worked this thing out.

And I understand your concern. And I think you kind of answered some of the concern because what we heard in the first panel was "corrupt Washington, D.C., money." And I wanted to know, do you consider it just the big corporation money or any big dollars that go into these elections?

And let me say something about Georgia. Georgia has been mentioned twice now in both of our panels. I served in the Georgia legislature. I know the secretary of state who is now governor, and he was highly committed to voter integrity as well as access for voters. In fact, this election more people voted in Georgia than ever in the history of Georgia.

And so even though we had tons of billionaires' and millionaires' money coming into Georgia, which was basically coming out of wealthy New Yorkers, wouldn't it make more sense, if we want to eliminate that, just to put a \$100 cap on elections? For any donation a \$100 cap, whether it is to a candidate, whether it is to a party, whether it is to a PAC, \$100, that is it?

Mr. EARLE. Election caps, I mean, contribution caps is an issue that I did not prepare to discuss here today with you. I came here to talk about transparency, the ability of people to know what is going on.

Mr. LOUDERMILK. Well, there would be transparency, you have to report a \$100 cap, and then it is across the board. In fact, if we want to go further, let's just make it you can only accept a donation from your State or your district. Wouldn't that resolve the problem? The problem that you had was \$750,000 going to legislators. Let's just do a \$100 cap for everybody.

Mr. EARLE. A cap on campaign contributions may solve some problems. I don't think it would solve the problem we had in Wisconsin where you had an interested party in litigation facing law that they didn't like and went out and bought a change in that law to their benefit and tried to retroactively disenfranchise the litigants.

These cases were filed in 2006. In some of these cases, we had completed discovery. There had been hundreds of depositions done, transcripts had been acquired. And then say to this child: You cannot have your day in court anymore. We are kicking you out of the courthouse.

That goes against everything that America is about. It is as if we all of a sudden in Wisconsin were in North Korea, facing the tyranny of a despot.

Congressman, I am sorry for my passion and anger about this, but this has to change.

Mr. LOUDERMILK. No. I appreciate your passion.

And I see that the time has expired, but I would like to continue on in our second round of questioning if we have any, Madam Chairperson. Thank you.

The CHAIRPERSON. We can have a second round if members want.

Mrs. Davis of California.

Mrs. DAVIS of California. Thank you, Madam Chairperson.

And thank you to all of you for your patience as well in waiting for the hearing to begin.

Mr. Jessup, I wanted to ask you a little bit about your experience. You mentioned in your testimony that one way that Michigan recently expanded democracy was by allowing no-excuse absentee voting when you passed Measure 3. As the author of national no-excuse absentee voting legislation, I noticed that Michigan had some pretty arbitrary excuses that allowed only some people to vote by mail.

Michigan had six statutory reasons. You had to be over 60, unable to vote without assistance, be in jail awaiting some action, busy with a religious obligation, unable to vote without assistance, or an elections inspector outside your precinct, or expecting to be out of town on election day. Sometimes we don't always know when we are going to be out of town, right, to get that excuse in time.

That was it. If you were going to work, if you were going to school, if you were taking care of children, being sick, not necessarily incapacitated, many things that happen every day to ordinary folks, all of us, below age 60, could keep a registered voter from voting because we know that some people just can't vote on election day. And they are really restricted from voting by mail obviously in these States, 21 States.

More people are more likely to vote if they are able to do that in advance and from their kitchen table, essentially, getting that in to the registrar.

So could you just let us know a little bit about, prior to the passage of Measure 3, do you feel that requiring arbitrary excuses was a form of voter suppression?

Mr. JESSUP. Absolutely. When we think about the process to gain an absentee ballot in Michigan, right, one of those seven options, right, normally for a young person like me, I don't apply to any of those.

And I am thinking about in our effort and the fight to expand voting rights and accessibility for all in the State, there was a young lady named Jasmine Hall. She was a janitor who worked at Detroit Metropolitan Wayne County Airport.

Of course as a janitor you are not in the higher rungs of employment. And Jasmine made it very clear to us that her supervisor would not be understanding if she showed up to work late at 8 a.m., if she decides to go and cast her ballot early. And, unfortunately, she had a 12-hour shift, so she would end her shift at 8 o'clock. So how could she cast her ballot on election day?

Mrs. DAVIS of California. That is quite typical, and I appreciate your response. Do you think that that—talking about Jasmine, or anyone in that situation—that that put them at a disadvantage in national elections? Thirty-two other States could vote by mail for any reason.

Mr. JESSUP. That is right.

Mrs. DAVIS of California. Yeah, okay. Do you feel that requiring excuses did anything at all to ensure election integrity?

Mr. JESSUP. Absolutely. When you think about—they don't—

Mrs. DAVIS of California. Requiring excuses.

Mr. JESSUP. They don't do anything to add any integrity into the process because you are blocking people from the process, from engaging in the first place. That is against the whole part of democracy. We should encourage people to participate by casting their ballot, not just registering.

Mrs. DAVIS of California. Any justification for that, for the random excuses?

Mr. JESSUP. I haven't seen one yet. Matter of fact, I think in almost 65 years of Michigan elections we have had 0.01 percent of voter fraud in our great State. We run elections pretty well in the State.

Mrs. DAVIS of California. Yeah, thank you, I appreciate that. I know because I have spoken to a number of registrars from California, and some of their experiences prior to having no-excuse voting. And usually some of these things are thrown in a drawer, nobody looks at them. And, unfortunately, people feel intimidated by that process and that they are out of it.

Mr. Keating, could you respond, because I know you spoke quite eloquently about privacy issues, about wanting to make it simpler for people to speak. There is nothing more important than having their voice in an election. What is your sense?

Actually, you are from Virginia. Am I correct? You live in Virginia.

Mr. KEATING. Well, our office is in Virginia. I live in Maryland. I am actually a constituent of Mr. Raskin.

Mrs. DAVIS of California. Okay. All right.

Mr. RASKIN. I would have been a lot nicer had I known that.

Mrs. DAVIS of California. Okay. So you are privileged to be—you have that ability to do that.

But what is your general thought about that? Because many of the things that you said lead me to believe that you would be concerned that asking for those excuses really jeopardizes one's privacy. In some States, if you are pregnant, you have to tell them.

Mr. KEATING. I think those are great points.

Mrs. DAVIS of California. Okay. Thank you very much. I appreciate it.

And thank you to all of you again.

Thank you. I yield back.

The CHAIRPERSON. I note that Mr. Butterfield, who was here this morning, would have been here, but he is attending the funeral of our colleague, Walter Jones, which is happening right now in North Carolina. It is no disrespect to you but respect to our deceased colleague.

I would now like to recognize the gentlelady from Ohio.

Ms. FUDGE. Thank you very much, Madam Chairperson.

Thank you all so much for being here.

Mr. Keating, I tend to agree with you about the FEC, because we really would hate for it to mimic the partisanship of the U.S. Supreme Court. So you are absolutely right.

As well as I agree with you that we should just have a single line disclaimer. I am good with that really, as long as that information is readily available in some other place. I know it costs a lot of money to do TV, so I agree with you on that point. But the information still must be available.

I am always struck by the way we try to define what a democracy is in other countries, like we are doing in Venezuela, but we cannot determine what a democracy is in this country. It is just shameful to me that we turn around and we talk about all these little loopholes.

What we ought to be doing is trying to figure out how we engage every single person in this country to exercise their constitutional right to speak, to not disenfranchise people because you don't like how they are going to vote or what they look like. Everyone is guaranteed an unfettered right to vote, and that is what we hope is going to happen out of this.

Mr. Rangel-Lopez, do you think it is reasonable for someone to have to travel 90 minutes to vote?

Mr. RANGEL-LOPEZ. Short answer: Absolutely not. It is an awful situation for anyone to be in. Voting should be easy, it should be accessible, and it should take no more than, maybe max, 30 minutes for you to vote.

Ms. FUDGE. Thank you.

And my colleague asked about providing transportation. They did when they were shamed into doing it, is that not right?

Mr. RANGEL-LOPEZ. That is correct. And it was the response of the city, not the county.

Ms. FUDGE. Thank you.

I happen to have seen you on television a few times, and I was so impressed. But I also know that that is why your people responded by trying not to look as bad and awful as they were by providing some transportation.

Mr. Jessup—who, I have to say, I have known for probably about 10 years, a young man that I knew was going someplace, and now I look up and he is sitting in front of us.

Mr. Jessup, you started to tell us about things you thought might be helpful in changing the way we do things. You want to continue? I think you gave us one. You had three. Would you give us the other two?

Mr. JESSUP. Same-day registration, it is clear that would actually help a lot of young people register and pass their ballots on election day.

When you think about the State of Michigan, where we have seen many of our college campuses' voting precincts either dissolve or just be gerrymandered out of the district, you have seen that almost 200,000 young people a year don't cast a ballot because they don't have a place to vote.

And then, of course, when we do our voter registration drives, right, September comes, new students come, their address changes. Because they at first had their home address due to our motor voter law, now I am at University of Michigan or Eastern Michigan University, which is what happened to me in 2000.

I transferred to Eastern Michigan from Ohio, Defiance, Ohio, and I am scheduled to vote in the 2000 election for President. I arrived

at my polling place at 6:30 that afternoon after class, and I was notified that my voting precinct was back in Redford. I had to drive 45 minutes back home to cast my ballot. I got my first speeding ticket then, and I cast my ballot at 7:52.

So just imagine how many young people in Michigan go through that every year. We had at least, I think, 130 instances at Michigan State within the first hour of this year's election.

So when you think about what happens to young people, that is the biggest egregious piece when you talk about same-day registration and how we can alleviate that hurdle for young folks and get them to the ballot.

Ms. FUDGE. Thank you very much.

And, Mr. Earle, I don't know that there is much we can do about people we elect who are not honest or who are unscrupulous. I don't know that it is money or not money. But I know what might help, and that is being sure that every single person who has a right to vote can, because then they probably will not vote for crooks.

You know, most American people understand who they should vote for. What we don't get is enough of them voting because we make it too difficult.

Madam Chairperson, I yield back.

The CHAIRPERSON. The gentlelady yields back.

I would recognize the gentleman from California, Mr. Aguilar.

Mr. AGUILAR. Thank you, Madam Chairperson.

Mr. Rangel-Lopez, I am a fan of yours as well and have seen you on TV.

Through your experience in Dodge City this past election, do you believe H.R. 1 could affect you? How do you think it could affect you, your family, your friends, your community members in future elections?

Mr. RANGEL-LOPEZ. Absolutely. As stated by Ms. Fudge, it is incredibly important to make it easier for everybody to vote, and that includes the things that are included in H.R. 1, which includes making each polling site accessible by public transit, as well as same-day registration. Just overall, making it an easier election process so everybody benefits, not only minority and low-income voters, but also young people and just everybody in general. And that is what I believe that we should really focus on to expand our democracy to everybody that we can.

Mr. AGUILAR. I am sure you have friends and family, all of you have friends and family, just like I do, who don't—oh, I forgot to vote, I didn't vote this time. What are some of the barriers? What are some of the additional barriers that—and I will stick with you, Mr. Rangel-Lopez and Mr. Jessup—what are some of the barriers that our community members face?

Mr. RANGEL-LOPEZ. So Dodge City is a beef-packing community. Most of the people don't get out of work from the first shift until around, I would say, 3 to 4 p.m. And right after work they go pick up their kids from school. They have dinner. They get some time to rest. And it is not until 5 or 6 o'clock that they get to vote, which is the case for my dad most times.

And the barrier there is there are a lot of factors that we can't control, such as what time you get out of work. Things like mak-

ing—I know this isn't something that is mentioned in H.R. 1, or I don't believe it is mentioned there—making election day a holiday would make it easier for people to vote, allow more people to vote on election day.

Mr. AGUILAR. If your dad was hustling on a day working, what is the earliest time of day he could vote?

Mr. RANGEL-LOPEZ. Well, he goes in before 6 a.m., most people do, and probably the earliest possibly, with everything that he has to do, would be 4:15, a couple speeding tickets probably.

Mr. AGUILAR. Yeah. And probably kids left at school a little longer. But, look, I mean, and that is what we are talking about.

Mr. Jessup, I would like your thoughts. I mean, those types of issues that affect working communities, those continued barriers that we face.

Mr. JESSUP. I am from Michigan, the home of the third shift, right, and I think it is clear that when we had clerks like in Flint and Detroit and Lansing that worked with our secretary of state and other election officials to say, "Okay, yeah, we will open up for no-excuse absentee or early voting on the weekends," I mean, that goes gangbusters in the city of Detroit.

I mean, you can easily have—you will see lines for 2 and 3 hours for people just waiting to vote. It is easier to prepare hospitality lines for early voting and weekend voting as opposed to on election day, because now you are looking at 7 million people possibly turning out to vote.

So I think H.R. 1 gives just the framework for State elections officials and clerks to work under. That was what we were working to do in Michigan, was not to prescribe how our election officials should hold elections, but to give them the freedom to work in a broader sense.

Our State Constitution prior to November, 2018 said you have the right to vote. That is it. So now, with our seven new planks, our Secretary of State Ms. Jocelyn Benson, and other clerks across the State are now looking at ways to legally add on weekend voting, early voting, and how they can work together in a bipartisan fashion to execute no-excuse absentee voting.

If it is a mail program that is fine, but I think our framework in the State has provided a nonpartisan opportunity for us to work together and have a better democracy.

Mr. AGUILAR. I agree. And this goes back to what Chairwoman Fudge said. I mean, if we are serious about giving people an opportunity to vote, that everybody has an opportunity to vote, we have got to be more flexible, whether it is mail-in voting, early voting sites, all of those pieces, weekend voting, same-day registration.

Those are pieces that help disadvantaged communities, working communities, as Ms. Fudge's colleague and mine Tim Ryan says, people who take a shower after work and not before work, to those individuals who are working incredibly hard, we have got to give people an opportunity to get to the polls and to exercise their right to vote.

Thank you, Chairperson.

The CHAIRPERSON. Thank you, Mr. Aguilar.

This has been very helpful to me.

And, Mr. Keating, you have sort of the approach, if I am understanding you right, the concern you have about the burden of disclosure and the online environment. But I was also thinking about just the sheer amount of time it would take for disclosure on a stand-by-your-ad type of situation in a digital environment.

I mean, 10 second ads, it is pretty routine, the disclosure would take 15 seconds or more, so the disclosure would be longer than the ad.

Does that also concern you?

Mr. KEATING. Absolutely. In my statement I only had 5 minutes, but that is definitely a huge problem. And lot of the ads are now appearing on smart phones.

Chairperson LOFGREN. Correct.

Mr. KEATING. And there is that little ad at the bottom of an app. I don't know how you put those disclaimers on. So if you have something that says "paid for," at least people know who paid for it, and then when they click they can see the rest of the disclaimer.

The CHAIRPERSON. Well, I think that is a point well taken, and I am very much in favor of the disclosure, but it has got to work technologically. And it is good that you raised that issue, and it is something that we need to think about how we might improve as we move forward with this bill.

Mr. KEATING. Well, let me just say, we have a lot of experts who are happy to give technical expertise to the Committee if you would like.

The CHAIRPERSON. I appreciate that very much.

Mr. Rangel-Lopez, it was really great to see you here and to read your testimony and to hear your story. You were able to get to the polling place even though it wasn't easy. Do you know people who actually couldn't get there because of the move of the polling place?

Mr. RANGEL-LOPEZ. Yes. Like we mentioned prior, it is a working class community, and the circumstances that I described earlier prevent a lot of people from voting because it is not a neighborhood polling location. You can't vote in a quick 10 minutes.

The CHAIRPERSON. Maybe you don't know this, but did any of those Americans who were prevented from voting lose confidence in the democracy because of that situation?

Mr. RANGEL-LOPEZ. Oh, I am sure, I am sure it does that to everybody that doesn't get a chance to vote and wants to vote. Because I like to say it is one of the most fundamental checks in our system of checks and balances and on our government to vote, and it is a disappointment when people don't get that opportunity to express their feelings through their vote.

The CHAIRPERSON. Mr. Jessup, your testimony was very important. Is it your sense that had the democracy worked and instead of appointed people making decisions you had people accountable to their own voters, that you might have had a different outcome in terms of the poisoning through lead in Flint?

Mr. JESSUP. Yes, ma'am. Absolutely. Absolutely.

Every decision beginning from 2012 regarding the water pipelines breaking from the Detroit Water and Sewerage Department were all done by unappointed, unelected emergency managers. The mayor at that point in time had lost all his power. There was a

brief period where we had actually won the city of Flint its rights back, but that soon eroded away in another court challenge.

So this was around 18 months of fighting, and our ballot initiative actually put that Public Act 4 on hold. So the State honestly had not—they weren't able to operate under that until we had voted.

The CHAIRPERSON. Mr. Earle, you mentioned the \$750,000 contribution and the emails that made that known. Who was the contribution made out to?

Mr. EARLE. The Wisconsin Club for Growth, which is a dark money group that operated in direct coordination with the Scott Walker electoral campaign during his recall election.

So this was about avoiding the caps that existed in Wisconsin. As Mr. Loudermilk mentioned earlier, this was a scheme, a scheme to avoid those caps.

In fact, the Walker staffers were telling the people like Mr. Simmons, Harold Simmons, the owner who is now deceased, the owner of NL Industries, that if they gave money to Wisconsin Club for Growth instead of the Scott Walker campaign, that that money would not be disclosed and that there would be no limits. And then the irony of this is that the same fellows running Scott Walker's campaign were in charge of the Wisconsin Club for Growth.

So this was just a roundabout scheme to basically defraud the public and disable our democracy. Because Congresswoman Fudge is right, people have to be able to vote, and if people can vote things can happen, but people have to be able to vote with the pertinent information. They have to know who is paying who. You know the old song about who pays the Pied Piper, they have to know that.

The CHAIRPERSON. Thank you very much.

My time has expired, and if the witnesses can stay a little bit longer we would like to have a second round of questions. Does that work for all of you? They are all nodding their head, so I will turn to Mr. Davis.

Mr. DAVIS of Illinois. Thank you, Chairperson Lofgren.

Mr. Earle I actually respect your passion. But before I get to your question, I also want to reiterate our colleague Mr. Walker from North Carolina is with Mr. Butterfield at the services for our good friend who is recently deceased, Mr. Jones. So otherwise he would like to get into these questionings, too.

Mr. Earle, you are a supporter of H.R. 1, right.

Mr. EARLE. Yes, I am.

Mr. DAVIS of Illinois. Mr. Jessup, you are a supporter of H.R. 1, right?

Mr. JESSUP. Yes.

Mr. DAVIS of Illinois. Okay. Mr. Jessup, is it true that State and local officials are currently required by law to remove inactive voters from their rolls?

Mr. JESSUP. Are you asking me in a sense of Federal law or in State constitutional, in Michigan's law?

Mr. DAVIS of Illinois. Michigan law, any law.

Mr. JESSUP. I would prefer not to answer that right now. I wasn't prepared to get into that level of questioning.

Mr. DAVIS of Illinois. Okay.

Mr. Earle.

Mr. EARLE. The question, Mr. Davis, is whether laws require the purging of voters from the rolls in some States? Yes, they do, unfortunately, and that is another tragic aspect of our flailing democracy that needs to be addressed.

Mr. DAVIS of Illinois. All right.

Mr. Jessup, do you want to lay out the standard in *Ohio v. Husted* and the procedures used to remove inactive voters from the rolls in the State of Ohio? Do you know?

Mr. JESSUP. Well, sir, I am not a resident of the State of Ohio, so I would not want to speak to that part of it.

Mr. DAVIS of Illinois. I mean, you are part of an organization that operates in Michigan. We are talking about H.R. 1, which would then apply nationwide.

I wanted to ask you, Mr. Earle, do you have any thoughts on the standard that was laid out in *Ohio v. Husted* and the procedures used to remove inactive voters from the rolls?

Mr. EARLE. I followed that news very carefully. I don't have the legal standard in my head as I came here prepared to talk about dark money.

Mr. DAVIS of Illinois. I mean, it was a Supreme Court decision that has led to a 571-page bill that you have all said you support. That is why I asked about the decision.

So we heard in the first panel about the so-called problem with removing voters from registration rolls, and again, you two are here in support of H.R. 1, and I just wanted to get an understanding, because I thought it was my understanding that the Supreme Court was more than fair, and what was happening in Ohio was upheld by the U.S. Supreme Court.

So that is okay. I will go to something that is a little less Ohio based and Supreme Court based.

Mr. Jessup, I appreciate again what you do. My goal is to get more people to the polls, also. As matter of fact, you mentioned Michigan State University. I represent four public institutions in central Illinois, four private institutions, eight community college districts. No gerrymandering occurred in that district, I am sure in Illinois before it happened.

But we also had an issue at the University of Illinois where so many students didn't take advantage of early registration programs that you even put out in Michigan. Therefore that led to the longer lines because we do have same-day registration.

So that is an issue I think as you move forward as an organization, is how do you avoid those long lines, how do you encourage more early registration, because we don't want long lines on Election Day either.

But according to your bio, you are the executive director of Michigan Forward, and according to Michigan State filings you are also a registered agent of Michigan Forward Urban Affairs, the urban affairs group. It is an LLC. And Michigan Forward is a registered nonprofit, right?

Let's say your organizations wanted to weigh in on a Federal campaign. Can you walk us through how H.R. 1 would affect either of your organizations?

Mr. JESSUP. Well, as we know, like, the disclosure pieces are the parts that would be an issue for us. I mean, as a nonprofit it is very hard to raise millions of dollars, to raise any ad money.

But the great part about democracy is that before you get to the electoral part you have to educate the voter, and we have done a very good job in working in a nonelectoral fashion educating voters on the issues that they work on 365 days a year. That is the reason why we had an increase of over 600,000 folks turning out to vote in 2018, because we did the groundwork 2 years prior. What are your issues? It is not about the candidate, it is about the issue.

Mr. DAVIS of Illinois. Okay. I understand that. But do you understand that your organizations would have burdens in these reporting requirements?

Mr. JESSUP. And I am telling you that we have had those burdens before this legislation came forward. We have worked around them, and we have been successful without it.

Mr. DAVIS of Illinois. My time is almost up, and I have got another question for you. I apologize, sir.

In your written testimony you also say H.R. 1, quote, "clearly answers the call for a new Voting Rights Act using the template from States like Michigan, Florida, and Missouri," end quote. Can you tell us what self-imposed restrictions these States have adopted?

Mr. JESSUP. Self-imposed restrictions? One great self-imposed restriction that we have in Michigan was the option to opt out of automatic registration. As I have said earlier in my testimony, we talk about Richard Austin's pioneering effort of his motor voter law. When you came to Michigan, if you were in Michigan, you are 16 years of age, you are ready to get your driver's license, you were encouraged to come and register to vote.

So now we have an appeal that says, hey, if you don't want to do it automatically, if you want to opt out and you have to say to the State, you are getting your driver's license, you don't have to register. That is how we keep our voter rolls clean.

So we were being very conscious about our system of how we can make it better without adding any additional impediments. So our motor voter law actually helps us to alleviate the problems we have on Election Day, and that with same-day registration helps young people really vote in a fluid fashion.

Mr. DAVIS of Illinois. Is that a part of the Voting Rights Act?

Mr. JESSUP. I am sorry?

Mr. DAVIS of Illinois. Was that a part of the Voting Rights Act?

Mr. JESSUP. Having the option to opt out?

Mr. DAVIS of Illinois. What you are explaining.

Mr. JESSUP. I think there should be a new template.

Mr. DAVIS of Illinois. It should be part of the Voting Rights Act?

Mr. JESSUP. Yes, you should have the option to opt out.

Mr. DAVIS of Illinois. Okay. Thank you, sir.

Thank you all.

The CHAIRPERSON. The gentleman's time has expired.

I turn to the gentleman from Maryland.

Mr. RASKIN. Thank you very much.

So I am impressed by the provisions in H.R. 1 that deal with voter registration modernization, automatic voter registration, same-day registration, and so on. But I remain uncertain about all

of the provisions dealing with money just because I understand that *Citizens United* has created some very difficult, seemingly intractable problems in the electoral process.

Now, Mr. Earle says what we need is disclosure. Presumably disclosure in your case would have allowed the public to understand, assuming that the money can't be hidden and concealed through a series of pass-through entities.

But I am looking for something stronger to deal with the problem of *Citizens United*. I know that there are proposed constitutional amendments to reverse *Citizens United* that are out there.

But I wonder if both Mr. Earle and Mr. Keating would comment on the idea of saying that corporations can't put any money into politics without first having a prior majority vote of the shareholders. And the theory being, according to *Citizens United* itself, Justice Kennedy saying that the corporations or the CEOs are doing nothing more than vicariously exercising the free speech rights of the shareholders. But if the shareholders don't know anything about it, if they haven't consented to it, then essentially you are just taking their money and they are being turned into suckers.

So I am wondering if both of you would just comment on that, whether you would agree with the system, which is what operates in the United Kingdom, I found out, which is that corporations can give, but only after there has been a vote of the people who own the wealth of the corporation, the shareholders.

Mr. Keating.

Mr. KEATING. Well, first, we have to keep in mind that many corporations are nonprofit corporations, and their businesses is to advocate for social—

Mr. RASKIN. I am just talking about for-profit business corporations.

Mr. KEATING. Well, I want to make sure that is clear.

Mr. RASKIN. Yes, for-profit business.

Mr. KEATING. Because we are very much opposed to the government regulating how nonprofit groups run—

Mr. RASKIN. And that is protected by the Supreme Court in the *Massachusetts Citizens for Life* case.

Mr. KEATING. Right. Although I would point out the End Citizens United campaign would overturn that decision, as well, if they had their druthers.

In terms of corporations, I would say it very much depends on how it is written and the details of how it is written.

Mr. RASKIN. But in principle do you like the idea?

Mr. KEATING. In principle I think it might be all right, but you would certainly have to look at the details. Because I have seen some of the States—there was a bill in Connecticut that went to the governor, the ACLU opposed it, and the requirements were so burdensome it basically made it very difficult for corporations to give contributions for independent expenditures, for example.

Mr. RASKIN. Okay.

Mr. KEATING. There are rights to do it. You can't make them too burdensome.

Mr. RASKIN. Okay. Mr. Earle, what do you think about saying if corporations are going to be involved that shareholders should be the ones who are driving?

Mr. EARLE. Absolutely, Congressman. That is absolutely essential. Corporations, many people own—millions of people own shares in some of these large corporations that invest tons and tons of money. And to say that the CEO of one of those major corporations vicariously speaks for all of the shareholders is an absurd proposition.

Mr. RASKIN. Without consulting them or even letting them know.

I don't know whether, Mr. Jessup or Mr. Rangel-Lopez, you have any comments on this. No.

Mr. KEATING. Let me also add that, again, I think if anything like this is to help, not harm free speech overly, you want to make it very, very narrowly tailored. So this just covering electoral politics—

Mr. RASKIN. Well, whose free speech rights do you think are at stake when Exxon Mobil spends money? Is it the CEO or is it the shareholders whose free speech interests count?

Mr. KEATING. Well, hold on. I think it is a good thing that we have trade associations. It is a good thing. And if we make it more difficult for corporations to join a trade association that is a bad thing. And so if we make it too cumbersome for these corporations to associate—

Mr. RASKIN. But your group is interested in free speech, right? I am not asking you an unfair question here. Whose free speech interests are at stake when the McDonald's corporation decides to get involved in politics? Is it the CEO, the person who happens to occupy that position, or is it the shareholders of McDonald's?

Mr. KEATING. Look, I think Justice Kennedy was also referring to the fact that shareholders have the right to change the management of the corporation, to pass shareholder resolutions, and things of that nature.

Mr. RASKIN. So you would say the shareholders are the ones whose free speech—

Mr. KEATING. They have that right.

Mr. RASKIN. Well, only if they know about what is taking place.

Mr. KEATING. Again, they have that right already. They can pass a resolution.

Mr. RASKIN. Do you favor disclosure to the shareholders of all political contributions by the CEOs of the company?

Mr. KEATING. I think that should not be the government's call. I think that should be the shareholders call.

The shareholders have the right to propose these resolutions and change the management, bylaws, and so on and so forth; and they can also sell their shares, as well. People don't have to join non-profit corporations as members. If they don't like it they can join another group. If you are a shareholder you can sell your shares.

Mr. RASKIN. I am starting to get the feeling you think it is the CEOs whose free speech rights are really at stake.

Mr. KEATING. No. Look, it is a corporation, so it is everyone who is involved with that corporation, whether they are shareholders or not.

Mr. RASKIN. Are the workers?

Mr. KEATING. The shareholders are ultimately in charge.

Mr. RASKIN. Okay. Well we should pursue it some other time back in the Eighth Congressional District.

Mr. KEATING. Congressman, your place or mine?

Mr. EARLE. Can I add to my answer to your question, Congressman?

Mr. RASKIN. Briefly, sure.

The CHAIRPERSON. The gentleman's time has expired.

Mr. EARLE. One of the salubrious things that happened as a result of The Guardian newspaper disclosing this trove of checks and emails in Wisconsin, we learned that the CEO of Devon Energy Corporation gave money from corporate accounts directly to the Wisconsin Club for Growth that were without any shareholder notification or participation in those decisions.

And in the case of Harold Simmons and the NL Industries Corporation, Harold Simmons gave money from his personal account, and he gave money from the corporate account, as well.

The CHAIRPERSON. Thank you.

The gentleman from Georgia is recognized.

Mr. LOUDERMILK. Thank you, Madam Chairperson.

And sorry we ran out of time before, but I would like to go back to the discussion we were having, Mr. Earle, because from what I am understanding, the issue that you have brought forward, which I understand the concern that you have there, is that was a State legislature issue, right?

Mr. EARLE. Yes.

Mr. LOUDERMILK. That was not a Federal election, it was totally a State election. Because Federal elections we already ban corporate contribution to candidates, we don't allow that to happen.

Being a supporter of H.R. 1, in my understanding H.R. 1 applies only to Federal elections, how would H.R. 1 have solved the situation with the Wisconsin Club for Growth and those aspects of what you are testifying?

Mr. EARLE. Congressman, I think the concern here, I mean, it is not just simply the disclosure component, first of all, okay? The disclosure component is one part of it, but it was accompanied by a coordinating, a coordination in order to avoid caps.

Mr. LOUDERMILK. But that was at a State level. What I am trying to do is draw a correlation. You are bringing up a State issue. These are about Federal elections. How would H.R. 1, anything in this bill, actually resolve that problem you have there?

Mr. EARLE. If H.R. 1 required all—it outlawed across this country dark money, nondisclosed, that would solve a big piece of this problem.

Mr. LOUDERMILK. Let's say we put a \$100 cap on all contributions, even if it was to a PAC or super-PAC, and you disclose all that, that wouldn't take care of the problem?

Mr. EARLE. Congressman, in Wisconsin at the time that this was going on the State law of Wisconsin had caps. And the reason that they went to the dark money donors was so they could avoid the caps, so that that money could be given under the table, and then spent by the dark money group in coordination with the candidate. It is like a cancer on democracy.

Mr. LOUDERMILK. And you are saying H.R. 1 would solve that problem?

Mr. EARLE. What?

Mr. LOUDERMILK. You are saying H.R. 1 would solve that problem?

Mr. EARLE. I think H.R. 1 would move in the direction of solving that problem, yes.

Mr. LOUDERMILK. By disclosing everyone who gives money anywhere?

Mr. EARLE. I think so. I think that is a big part of it, yes.

Mr. LOUDERMILK. That is what I am getting back to. Wouldn't it be more effective if we just cap everybody at \$100? You write a campaign contribution, whether it is to a PAC or whether it is to an individual or anywhere you go, would that not resolve that problem?

Mr. EARLE. So, Mr. Loudermilk, let me understand what you are saying here. What you are saying is that rather than require disclosure, you would rather limit campaign contributions across the country in State and Federal elections to \$100 per donor?

Mr. LOUDERMILK. No, I am just saying this is a proposal. If we want to clean it up wouldn't it be a more effective way just to do the \$100 cap? Because I keep hearing testimony about big dollars and dark money and all this. If that is what we are seeking to do, that would level the playing field across the board.

Mr. RASKIN. Would the gentleman yield? Could you yield for 1 sec?

Mr. LOUDERMILK. Yes.

Mr. RASKIN. Okay. It is an understanding proposition. I think the Supreme Court has foreclosed it both as to contributions and expenditures. I think \$100 limits have been struck down as a First Amendment violation. And on the expenditure side, of course, the Supreme Court said you can't limit—

Mr. LOUDERMILK. We have limits on us right now of \$2,700, correct?

Mr. RASKIN. Correct, from individuals.

Mr. KEATING. I can help with this a bit. Mr. Raskin is correct. The Supreme Court has said clearly that money cannot be limited for independent expenditures or a candidate putting money into his or her own campaign. And also in the State of Vermont, Vermont had contribution limits similar to this \$100 that you are speaking of, and the Court struck that down. It was bipartisan.

Mr. LOUDERMILK. Is it because of the amount?

Mr. KEATING. Yes, it was too little.

Mr. LOUDERMILK. What is the right amount, \$500?

Mr. KEATING. Well, I don't think there should be any caps, and I think the voters are smart enough to decide which candidates to vote for based on who is contributing and leave it at that.

Mr. LOUDERMILK. So anyhow, what I am getting is we are working around issues. And I am already seeing the light change, and I have a couple other questions real quickly.

It was brought up, unfortunately we can't remove voters from rolls. Now, I am interested in not disenfranchising voters like Mr. Rangel-Lopez's father or a lady that I just participated in her citizenship ceremony this last week, 16 years, worked hard to become American citizen, now she has the right to vote.

I actually know people who lived in Georgia, moved to Florida, and they were registered to vote in three different States, and they could have cast a vote in three different States.

It seems to me that the States are better and they are more likely to not disenfranchise voters when they have the ability to purge voter rolls from those who should not be voting.

Mr. Jessup.

Mr. JESSUP. I hear you. In a data management aspect, yes, you need to keep your voter rolls clean. That is the truth.

Now, how States go about identifying if a person is not in their State anymore, we should look at the models that we have like Michigan and Florida, for instance, a driver's license, like, exchanges in that data piece. I think that helps a lot as far as just identifying or flagging a voter as possibly inactive. There should be steps, and many of those steps have been identified in HAVA and also the National Voter Registration Act, about how you clearly can remove a person from the rolls.

Michigan in 2008, with some partners, the ACLU, the United States Student Association, and others, actually filed a lawsuit against illegal voter purging in the State of Michigan because we found that over 5,000 Detroiters had been illegally purged and then issued provisional ballots in 2005 because of illegal voter purging. This was because of bounced mail and things like that.

We came to find out that the State of Michigan was directly liable, and they had to pay restitution back to the United States Student Association and the Michigan ACLU.

So once again, if this is about data management, which we don't do very well in democracy or as a government, I think we should look at that aspect, how we could do it better. But if we try to make voter rolls a political conversation, that is where we fall into the danger of illegally removing people from the vote, and then we create that barrier to access.

The CHAIRPERSON. The gentleman's time has expired.

The gentlelady from California is recognized.

Mrs. DAVIS of California. Thank you, Madam Chairperson.

And I think we need to go back a little bit and just think about in H.R. 1 we are concerned about people who are voting in our national elections, voting for President, the most personal vote that a person takes, and being certain that there is a level playing field so that one State over another State is not further jeopardizing people's right to vote.

As we do that, I think, and you have all testified very eloquently from different perspectives about this, I think we have to be looking at intent. And so that is why I think when the courts have taken a look at this, our ability to be able to really understand and go deep on whether or not there is a legitimate reason for some of that purging.

I wanted to really talk a little bit more just about this general idea of integrity and confidence in the elections. Because on the one hand I think we all recognize that States—and counties, for that matter—have an awful lot to say about elections for any individual depending upon their residence. And that makes some sense because we certainly can't have the Federal Government monitoring every county throughout the country.

But on the other hand, if we are to not allow people to have no-excuse voting and to generate long lines throughout the country in some States, there are people who leave, leave lines when they want to vote for President, because they have to go back to work, they have got to go do something else.

And so some of these issues I think we really have to look hard at, what is the Federal role? And if it is leveling the playing field and creating a kind of disclosure across the board so people understand what they are voting for, then it seems to me that that is a place for us to step in and to look at that.

And so I am interested in where you think it is not just practical, but it is in the cause of democracy that we have an opportunity to do that.

I am reminded, just very quickly, in California I remember one year that we had an environmental bill, a beautiful tape program showing, I don't remember exactly, but the environment being helped. And, in fact, it was a bill by the oil industries that would roll back some regulations that people thought were important.

Under our laws in California people had to disclose who was buying the bulk of that ad, not every donation but the bulk of that ad, where it came from. And that made a difference for people, because they started realizing what it was all about and then they could dig deeper. But absent that, it was easy for people to just be taken in by an ad.

So where do you think that—is there a line in thinking about that? Why do we care about H.R. 1 and doing this?

Mr. EARLE. Congresswoman, if I may, I think the story I have told about Wisconsin is a cautionary tale about how dark money works. These same folks who did that in Wisconsin also did it in California behind an aborted ballot initiative to overturn a decision, public nuisance decision of 10 major jurisdictions in California.

Happily, California law required that that information be made public. The attorney general put that information right on the proposed ballot initiative itself and allowed people to know. So in the end the companies, NL Industries, the Sherwin-Williams Company, and Conagra decided to crawl back into their closet because so much sunshine was put on what they were doing and the public became aware of it and was outraged.

So I think the importance of disclosure is one of the most important features of H.R. 1, and many lessons to be learned from the States.

Mrs. DAVIS of California. Mr. Jessup, did you want to comment?

Mr. JESSUP. In a matter of disclosure, and I would echo everything the person said, I think that we should probably also look at ways that we could more intentionally disclose information.

The internet is not readily accessible for at least a third of Americans. In rural areas it is 40 percent. We need to kind of take that aspect as well—if we just throw it on the web, I am probably still not going to see it. Often a lot of people say, “Well, it is on the internet.” And you go to Detroit and say, “I didn't see it,” because a third of our city uses their wireless phone to connect to the internet.

Mrs. DAVIS of California. Thank you. I am sorry. My time is up.

The CHAIRPERSON. The gentlelady from Ohio is recognized.

Ms. FUDGE. Thank you very much, Madam Chairperson.

And I want to thank all of you. I really just have a comment, because I do have a 3 o'clock meeting. So if you would excuse me.

I just want to say this. You know, it is interesting that when we were in the minority my colleagues would read the Constitution at the beginning of every Congress. It is interesting that people support what is in the Constitution when it is to their benefit. I am sworn to uphold it all of the time.

Now, the Constitution talks about an unabridged right to vote. It doesn't put a time limit on it. It doesn't say: If you didn't vote today you can't vote next year. It doesn't say: If you miss two elections you can't vote the next time.

But this is the same Supreme Court who gutted the VRA, so it doesn't surprise me that they would say: Oh, yes, you want to purge people, go right ahead. It is the same Jon Husted—I am from the State of Ohio—it is the same Jon Husted that believes that it is fair to what he calls treat every county the same. He would believe it is okay to have one early voting site in my county, which has more than a million people, and have only one early voting site in a county that has less than 10,000 people. He thinks that is fair, or at least he wants me to believe he thinks that is fair.

It is important for us to understand that is the same Jon Husted who every single election decides to change the rules—either the days of early voting, the times you can vote, the kind of paper you can use—anything to confuse the voter.

I just think that it is important that if we are going to err, that we err on the side of the voter. What we ought to be doing is trying to make sure that we as Members of Congress provide a service to the people who brought us here and not give them a disservice by stifling their voice.

So the Supreme Court may have ruled. It doesn't make it right. I yield back.

The CHAIRPERSON. The gentlelady yields back.

The gentleman from California.

Mr. AGUILAR. Madam Chairperson, I will yield back. I think we can end on that note for this round.

The CHAIRPERSON. All right. I just want to say a few things.

First, thanks to each one of you. Your testimony has been enlightening and very helpful, and I appreciate it, as does the entire Committee.

There is a lot in H.R. 1. I think you can broadly say it is about disclosure, it is about voter empowerment, voter ballot access, and it is about ethics, and they are all important and we have just touched on a few of them.

But one of the things that matters a lot to me is that Americans across the country get treated fairly and equally no matter where they are. And Article I, section 4 of our Constitution says this: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

We have jurisdiction to set the rules to make sure that if you are an American in California or an American in Kansas you have an equal opportunity to cast your vote and choose your government. And I think that is important in terms of this body and the Members. We each have one vote on the House floor. We should make sure that the people who are choosing us are equivalently armed to access the ballot box.

I wanted to say just a final thing on a measure that we haven't talked too much about, but I think is very important, obviously, since I am the author of the bill, and that is the move to redistricting commissions, citizens commissions, for House races.

This is something that several States are moving to. To be honest, I was a skeptic in California because I thought, why should California change? It is one of the few States where the Democrats are in the majority. Why should we give that up? And that was wrong. The voters chose something else.

And the commission is not allowed to know the voter registration of the districts that they are redistricting. They are not allowed to know where the Members of Congress live. They are supposed to just draw it straight up. And actually it is much better. It is much fairer.

I think to bring that to all the States would help a lot in terms of allowing voters to choose their Representatives instead of the Representatives choosing their voters.

I do think both parties do this. You look at States where—I won't mention any of them—but States where Democrats are in the majority, have done extreme redistricting, and also States with Republicans. So this is not just a partisan issue, it is an empowerment issue for the American people, and I am hopeful that we can adopt it.

I want to thank the Members for being here through these second rounds of questions.

Again, I thank all of you. We will keep the record open for 5 days if there are additional questions that may be sent to you.

And with that and without objection, we are adjourned.

[Whereupon, at 3:08 p.m., the Committee was adjourned.]



Statement of
Asian Americans Advancing Justice
For
Hearing on H.R. 1
“For the People: Our American Democracy”
The Committee on House Administration
U.S. House of Representatives
February 14, 2019

Introduction

Asian Americans Advancing Justice (Advancing Justice) has worked for decades to preserve the voting rights for every eligible American while fighting against voter suppression tactics that impede Asian Americans’ access to the ballot box. Our work is in alignment with the policy stated in H.R. 1, For the People Act of 2019, under Division A that —

“(1) all eligible citizens of the United States should access and exercise their constitutional right to vote in a free, fair, and timely manner; and

(2) the integrity, security, and accountability of the voting process must be vigilantly protected, maintained, and enhanced in order to protect and preserve electoral and participatory democracy in the United States.”¹

We believe this bill has important provisions that will improve voting opportunities for millions of eligible Americans in communities of color, people with disabilities, and those who are limited-English proficient (LEP). At the same time, some provisions raise concerns that must be addressed and/or clarified. We offer this statement today to provide an Asian American perspective on some of the key provisions for our community that have the greatest impact. However, it should not be implied that if a provision from H.R. 1 is not included in this testimony that it is not one of interest or importance to us. There are many issues that must be addressed as the right to vote is the foundation of our democratic system. We stand ready to do all we can to ensure that all Americans have equal access to exercise this fundamental right. We ask that this statement be entered into the record.

¹ For the People Act of 2019, H.R. 1, 116th Congress § 1000 (2019).

Organizational/Affiliation Background

A national affiliation of five independent nonprofit organizations, Advancing Justice actively works to advocate for the civil and human rights of Asian Americans and other underserved communities to promote a fair and equitable society for all. The Advancing Justice affiliation is comprised of our nation's oldest Asian American legal advocacy center located in San Francisco (Advancing Justice – Asian Law Caucus), our nation's largest Asian American advocacy service organization located in Los Angeles (Advancing Justice – Los Angeles), the largest national Asian American policy advocacy organization located in Washington D.C. (Advancing Justice – AAJC), the leading Midwest Asian American advocacy organization (Advancing Justice – Chicago), and the Atlanta-based Asian American advocacy organization that serves one of the largest and most rapidly growing Asian American communities in the South (Advancing Justice – Atlanta). Collectively, Advancing Justice has been working to protect the voting rights of Asian Americans as well as expand access to the ballot box and eradicate barriers to the political process for Asian Americans. This work includes compliance with the Voting Rights Act (VRA) through engagement with local elections officials and poll monitoring, improving election systems at the state and federal level through legislative and administrative means, and providing analysis of Asian American electoral participation.

Asian Americans & Voting Overview

Asian Americans are the fastest growing racial/ethnic group between the 2000 Census and the 2010 Census with a growth rate of 46 percent.² There were over 17.3 million Asian Americans living in the United States, comprising 6 percent of the population in 2010.³ In 2017, there were over 22.1 million Asian Americans, for a growth rate of 27.7 percent since 2010.⁴ Additionally, the 2010 Census saw Asian American communities expanding from states with historically high concentrations of Asian Americans, such as New York and California, to states with more recently-established immigrant populations.⁵ For example, during the last decade, Asian American communities grew most rapidly in Nevada, Arizona, North Carolina, and Georgia, with Nevada's Asian American population more than doubling between 2000 and 2010.⁶

There has been a corresponding increase amongst Asian American voters. In 2016, there were over 10.2 million Asian American citizens over the age of eighteen.⁷ This represented a

² Asian Pacific American Legal Center & Asian American Justice Center, *A Community of Contrasts: Asian Americans in the United States: 2011* 7 (2011) [hereinafter *Community of Contrasts*].

³ *Id.* at 6.

⁴ U.S. Census Bureau, *Table PEPALL5N Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2017*, 2017 Population Estimates.

⁵ *Community of Contrasts* at 8.

⁶ *Id.*

⁷ U.S. Census Bureau, *Table 2 Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2016 (Asian Alone)*, Current Population Survey, November 2016.

record 2 million increase from the 2012 presidential election and a doubling of the growth of Asian American voting-age citizens between the 2008 and 2012 elections.⁸ Additionally, Asian American voters have doubled from about 2 million voters in 2000 to 5 million voters in 2016, representing about 3.7 percent of the total voting population.⁹ Reports have indicated that the Asian American electorate will grow by 107 percent between 2015 and 2040 as well as reach 5 percent of voters by 2025 and 10 percent of voters by 2044 across the nation.¹⁰ There has also been rapid growth in the civic infrastructure for Asian American communities, with the number of Asian American-serving organizations participating in National Voter Registration Day increasing from 154 to over 317 since 2012.¹¹ Finally, Asian Americans have been developing civic and political infrastructures, including a growing base of voters, donors, elected officials, appointees, and public policy advocates. Congressional candidates of Asian American descent increased to 32 in 2018, doubling the number since 2010, and ran for office in 16 different states, up from just 8 in 2014.¹² Additionally, 2018 saw a record number of Asian American candidates running for state legislative offices at 137 across almost half the states.¹³

However, voter discrimination, language barriers, lack of access to voter resources, and unfamiliarity with the voting process challenge Asian Americans' ability to reach their full potential when it comes to civic engagement. We have continually seen depressed voting participation rates for Asian Americans. The 2016 election saw only 56.3 percent of eligible Asian Americans registered compared to 73.9 percent of Whites and only 49 percent of eligible Asian Americans voting compared to 65.3 percent of Whites.¹⁴ This continues the trend of an approximately 15-20 percent gap in participation election after election between Asian Americans and White voters.¹⁵

The language barrier poses a great challenge and leads to depressed voter engagement. About one in three Asian Americans is LEP and has some difficulty with the English language.¹⁶ Over half – 57 percent – the Asian American electorate in 2016 was comprised of naturalized

⁸ See *id.* See also, U.S. Census Bureau, Table 2 Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2012, Current Population Survey, November 2012.

⁹ APIA Vote & AAPI Data, 2018 Asian American Voter Survey 3 (2018), <http://aapidata.com/wp-content/uploads/2018/10/2018-AA-Voter-Survey-report-Oct9.pdf> [hereinafter 2018 Survey].

¹⁰ See *id.* See also, UCLA Center for the Study of Inequality and Asian Pacific American Institute for Congressional Studies, *The Future Of Asian America In 2040: Asian American Electorate to Double* (2015), <http://files.ctcdn.com/7045d04e001/2276066d-6537-49b1-8ab2-c6a24972e04d.pdf>.

¹¹ 2018 Survey.

¹² Sono Shah & Sunny Shao, Here's what you need to know about AAPIs running for Congress in 2018, AAPI Data Blog (Oct. 23, 2018), <http://aapidata.com/blog/aapis-running-2018/>.

¹³ Mai Nguyen Do, In 2018, 70 percent of Asian American candidates won state legislative office, AAPI Data Blog (Dec. 13, 2018), <http://aapidata.com/blog/aa-state-leg-elections-2018/>.

¹⁴ See U.S. Census Bureau, Table 2 Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2016 (Asian Alone), Current Population Survey, November 2016.

¹⁵ U.S. Census Bureau, Table A-1 Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2016; Current Population Survey, November 2016 and earlier years.

¹⁶ U.S. Census Bureau, Table B16005D: Nativity By Language Spoken At Home By Ability To Speak English For The Population 5 Years And Over (Asian Alone), 2017 American Community Survey 1-Year Estimates.

citizens.¹⁷ Voting can be an intimidating and complicated process, even for native English speakers. And for citizens whose first language is not English, the process is even more difficult to navigate. Voting materials such as ballot initiatives and voting booth directions often require at least a high school level education. Even worse, language minority voters are often denied much-needed and federally-required assistance at the polls.

Unfamiliarity with the political process is another obstacle facing Asian American voters, especially those who come from countries that do not have a democratic process or where political participation could lead to harm to the voter and their family. Immigration continues to be a strong driver of the growth of Asian American communities, with about two in three Asian Americans being foreign-born.¹⁸ In polling of likely Asian American voters for the 2014 elections, 67 percent said that they found the political process too complicated, compared to 54 percent of the national population. This is even more drastic when broken down between U.S.- and foreign-born Asian Americans, with 59 percent of U.S.-born and 70 percent of foreign-born Asian Americans feeling the same.¹⁹

Additional barriers to Asian American political participation are erected by voter suppression efforts. These efforts are often grounded in the continuous stereotyping of Asian Americans as “foreigners,” and thus, not worthy of full or equal participation in the electoral process. Discriminatory attitudes toward Asian Americans are prevalent in the political process, as evidenced by verbal attacks levied against Asian American candidates and voters, and political ads using racially discriminatory imagery or perceptions to malign candidates running for office. Efforts to suppress the vote, such as the use of restrictive voter photo ID laws, requiring proof of citizenship for voter registration, and voter purging practices, discourage and/or intimidate our communities from participating in the political process.

Restrictive voter ID provisions in which only a few specified government-issued photo IDs can be used to vote can be problematic for Asian Americans. According to one study, immigrant and minority voters are “consistently less likely to have” the required identification.²⁰ Obtaining the requisite government-issued photo IDs requires both time and some expense. In addition to the time and fees involved in obtaining one of these photo IDs, racial and ethnic minorities, including Asian Americans, do not have the same access to identification as Whites.²¹ According to one study, Asian Americans were over 20 percent less likely to have two forms of identification compared to Whites.²² For example, Asian Americans

¹⁷ U.S. Census Bureau, Table B05003D: Sex By Age By Nativity And Citizenship Status (Asian Alone), 2017 American Community Survey 1-Year Estimates.

¹⁸ *Id.*

¹⁹ APIAVote & Asian Americans Advancing Justice – AAJC, *Left, Right, or Center? Asian American Voters in 2014* (2014), <https://www.advancingequality.org/report/left-right-or-center-asian-american-voters-2014>.

²⁰ Matt A. Barreto, et. al, *Voter Id Requirements and the Disenfranchisements of Latino, Black And Asian Voters 1* (2007), https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse%281%29.pdf.

²¹ *Id.* at 16-17.

²² *Id.*

and immigrants were significantly less likely to have at least a driver's license and one additional form of identification.²³ There are also considerable group differences for forms of *identification* that many considered very basic or accessible.²⁴ For example, Asian Americans were almost 24 percent less likely to have access to a recent bank statement. Additionally, in the case of family and multi-generational households, a living pattern Asian Americans and Pacific Islanders are more likely to engage in, bills may be solely in the name of the male head of household, leaving the other adults without proof of their residency in that house.²⁵ Asian American voters are 18 percent less likely to be able to produce a utility bill and 11 percent less likely to be able to produce a property tax bill that would contain their name.

Proof of citizenship requirements also disproportionately impact Asian Americans due to high rates of immigration and naturalization in the community. Acceptable documents to prove citizenship for this requirement generally include: any driver's or non-driver's ID that includes a notation that the person submitted proof of U.S. citizenship, a U.S. birth certificate, a U.S. passport or U.S. naturalization documents, certain tribal IDs, and other rare documents. The same difficulties noted regarding restrictive photo ID and access to documentation apply in this context. Additionally, foreign-born persons will not have some of these options available to them because of their place of birth. Foreign-born persons also face additional fees to obtaining a replacement Certificate of Naturalization, which currently requires \$555 and takes around 10 to 13 months to process.²⁶ Asian Americans will face greater barriers to registration than White, non-Hispanic voters under these laws as approximately 66.3 percent of Asian Americans are foreign-born and approximately 58 percent of those born outside of the U.S. have naturalized nationwide.²⁷

While not a new voter suppression tactic, voter purges have taken on importance in more recent times as a tool being used more and more often to suppress voters of color. A report by the Brennan Center found that "between the federal elections of 2014 and 2016, almost 4 million more names were purged from the rolls than in 2006-08," with "more than twice the number of counties" purging more than 15 percent of their voters.²⁸ In addition to bad data and bad databases, voter purges have taken on a heightened suppressive impact as an increasing number of states are searching their voter rolls in an effort to identify alleged noncitizens registered to vote, with the "number of states with statutes specifically mandating

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See U.S. Dep't of Homeland Sec., Our Fees Chart, <https://www.uscis.gov/forms/our-fees> (documenting the filing fee); U.S. Citizenship and Immigration Services, Check Case Processing Times, <https://egov.uscis.gov/processing-times/> (check for most current processing time by form).

²⁷ U.S. Census Bureau, Table B05003D: Sex By Age By Nativity And Citizenship Status (Asian Alone), 2017 American Community Survey 1-Year Estimates.

²⁸ Jonathan Brater, Kevin Morris, Myrna Pérez, and Christopher Deluzio, Brennan Center for Justice, Purges: A Growing Threat to the Right to Vote (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.1.pdf.

searching for and removing noncitizens from the rolls [increasing] from two to six since 2008.²⁹ This has been coupled with an effort by several conservative activist groups to sue state and local jurisdictions in recent years to force them to aggressively purge their rolls.³⁰ These practices can have a disparate impact on Asian Americans who have higher rates of being naturalized and lower rates of voter participation.

H.R. 1 – Division A – Voting; Title I – Election Access

Subtitle A – Voter Registration Modernization

*Online Voter Registration (Part 1) and Same Day Voter Registration (Part 3),
Subtitle H – Early Voting, and Subtitle I – Voting by Mail*

These provisions in H.R. 1 are particularly relevant to expanding access to the ballot for Asian American voters. For the 2016 election, of the eligible Asian Americans who did not vote, almost 2 in 5 (38.9%) decided not to for reasons that could be addressed by these provisions, such as being out of town, being too busy, or having a conflicting schedule.³¹ H.R. 1's provisions on same-day voter registration and early voting will help address issues around registration problems, inconvenience of voting on Election Day, and not being available on Election Day. These additional opportunities to register and vote will help address the lack of familiarity with the voting process for many of the newly naturalized voters who are voting for the first time.

Similarly, allowing for people to vote by mail (VBM) will help address not only issues around availability and convenience but can also allow voters that have some difficulty with English to take however long they need to fill out their ballots without making them feel rushed or self-conscious at the polls. It also allows more flexibility for them to ask for help from friends and relatives who may not be able to go with them to the polls. Our study in California found two-thirds (66%) of Asian Americans who voted in the November 2016 election (about 787,000) casted their votes using a VBM ballot, a rate higher than average (58%).³² Vietnamese, Chinese, Japanese, and Korean American voters had the highest rates of VBM mail ballot usage among Asian American ethnic groups.³³ At the same time, the details on VBM implementation are critical. For example, VBM ballots submitted by Asian Americans in California for the 2016 election were more likely to be rejected by county election officials at a rate 15 percent higher than average. Among Asian American ethnic groups, those that had higher LEP rates had higher

²⁹ Georgia, Iowa, Minnesota, and Tennessee join Texas and Virginia over this last decade in passing laws to require the removal of noncitizens from the rolls. Id.

³⁰ Id.

³¹ U.S. Census Bureau, Table 10 Reasons For Not Voting, By Selected Characteristics: November 2016, Current Population Survey, November 2016.

³² Asian Americans Advancing Justice – CA, Asian Americans face higher than average vote-by-mail ballot rejection rates in California, August 17 Issue Brief (2017), <https://www.advancingjustice-alc.org/wp-content/uploads/2017/08/issuebrief-vbm-FINAL.pdf>.

³³ Id.

VBM ballot rejection rates.³⁴ Ensuring policies are enacted to address issues around postage, timeliness, and signature issues will go a long way to ensuring VBM meets its potential.³⁵

Finally, online voter registration that allows for registration and updates can increase access to voting for Asian Americans. Despite the fact that specific Asian American subgroups experience a digital divide, we know that overall the Asian American community is able to get online, with around 93.5 percent of Asian Americans connected at home.³⁶ In addition to the convenience factor of being able to register or update registration information online, online voter registration provides additional opportunities for voters to access language assistance. For example, California decided to offer their online registration application in 9 non-English languages – Spanish, Chinese, Hindi, Japanese, Khmer, Korean, Tagalog, Thai and Vietnamese – in order “to reach more people in the most common languages spoken in California homes.”³⁷ Additionally, as of December 2014, Arizona, Colorado, Connecticut, Illinois, Maryland, Nevada, New York, Oregon, and Washington offer online registration services in at least one other language besides English.³⁸ At a minimum, each state's online voter registration system needs to be available in (at least) every language covered by Section 203 in any county in that state.

Automatic Voter Registration (Part 2)

We recognize that efforts to create an automatic voter registration (AVR) system can result in hundreds of thousands of people being registered to vote and agree that it should be “the responsibility of government at every level to ensure that all eligible citizens are registered to vote.” However, we believe AVR efforts must be approached cautiously to avoid any unintended harm, especially for those who are accidentally caught in the system. By transferring responsibility for voter registration from citizens to government officials, AVR may result in some non-citizens becoming registered to vote without ever having represented themselves as U.S. citizens. For example, many would generally consider U.S. passports to be reliable proof of their holders’ U.S. citizenship, but certain non-citizen nationals – such as American Samoans – may hold valid passports without gaining eligibility to vote in state and federal elections. Another example of how a non-citizen could be accidentally added through AVR would be clerical mistakes that result in, for example, the checking of a box next to “U.S. passport” instead of the box next to “foreign passport.” Such mistakes are inevitable where agency employees process documentation from millions of people annually.

³⁴ *Id.*

³⁵ *See id.* for specific policy recommendations on how to address the issues in CA’s VBM process to ensure Asian Americans no longer face higher rates of rejection of VBM ballots.

³⁶ U.S. Census Bureau, Table B28009D: Presence Of A Computer And Type Of Internet Subscription In Household (Asian Alone), 2017 American Community Survey 1-Year Estimates.

³⁷ Office of the California Secretary of State, “Bowen Upgrades Award-Winning Online Voter Registration Application, Adds 8 More Languages,” news release, April 21, 2014, <http://www.sos.ca.gov/administration/news-releases-and-advisories/2014-news-releasesand-advisories/db14-041>. *See also*, The Pew Charitable Trust, Online Voter Registration: Trends in development and implementation (2015), https://www.pewtrusts.org/~media/assets/2015/05/ovr_2015_brief.pdf [hereinafter Pew OVR Brief].

³⁸ Pew OVR Brief.

Under current law, noncitizens erroneously registered through AVR can incur negative immigration consequences through no fault of their own. Immigration law provides that making a false claim to U.S. citizenship is a federal felony regardless of whether it was done with knowledge that one is not a U.S. citizen and for voting-related purposes, 18 U.S.C. § 1015(f), or done willfully and for any purpose at all, 18 U.S.C. § 911. Furthermore, unauthorized voting is a separate offense under federal and, frequently, state law. Noncitizens are prohibited from voting in federal elections, 18 U.S.C. § 611, where liability is triggered if a person does the targeted act consciously, regardless of whether the person understands that the act is illegal. Immigration status-related consequences can occur both where there is a conviction and where no charges are filed, nor conviction obtained. As a result of erroneous registration through AVR, noncitizens can become ineligible for admittance to the United States, subject to removal once within the United States (i.e. deported), and vulnerable to failing to establish the requisite good moral character for purposes of attaining immigration status.

Because of the potential serious and severe consequences for noncitizens accidentally registered through AVR, we caution against the use of a look back component to a proposed AVR system – that is, a mechanism by which existing databases are used to automatically register voters through the use of a mailer for potential opt outs. The reality is these databases were not designed for this purpose, and the quality of data is likely inconsistent and poor across different databases, including with respect to citizenship and naturalization data. The use of these different databases increases the chance that noncitizens will be added to the rolls. Rather than having a look back and/or using mailers (which are likely not in any Asian languages) to provide notice for an opt out option, we have urged the use of an opt-out option during transactions with relevant agencies.

And while the bill takes steps forward in trying to protect ineligible persons who may accidentally get added to the voter rolls through no fault of their own, we remain concerned that these protections are not strong enough. First, protections should be written directly into immigration law in order to ensure no harm to noncitizens accidentally added to the voter rolls because of AVR. Second, there should be clear protections for anyone who is not eligible to vote but is registered through the AVR process and who votes on reliance of that registration. Any reasonable person would believe that they are eligible to vote if their own government tells them they are registered to vote. They should not be penalized for believing in their government.

At the same time, one positive aspect of the AVR provision in H.R. 1 is the recognition that modernizing is not enough on its own; rather there is a key need for public education to complement an automatic voter registration system in order to ensure success. Despite the persistent gap in voter participation, once properly engaged, Asian Americans vote at rates similar to non-Hispanic White voters. During the 2016 election, 87.2 percent of Asian Americans who were registered turned out to vote, compared to 88.3 percent of non-Hispanic Whites.³⁹

³⁹ See U.S. Census Bureau, Table 2 Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2016, Current Population Survey, November 2016.

This parity is due primarily to the intensive engagement of groups that conduct Get out the Vote (GOTV) and voter mobilization campaigns to convince people to register and vote. Without a public education campaign, many people will be registered automatically without necessarily knowing why it's important to vote, where and when to vote, and what rights they have at the polls. It is also important, particularly for Asian American voters, that this education be done in a manner that is culturally and linguistically appropriate to meet the needs of the most marginalized communities and that encourages them to participate in our democratic process. Thus, there should also be a requirement for the public education and outreach to be culturally and linguistically-appropriate, along with the funds to support it.

*Removal of Registrants based on an Interstate Cross-Check and Similar Programs
(Part 4)*

We support stringent criteria for the removal of registrants from any official list of eligible voters based on information obtained from Interstate Cross-Check or any similar program. Programs that flag voters for removal using loose criteria or low procedural safeguards – such as a program that identifies possible repeat registration using only simply name-matching – would harm minority voters disproportionately. Asian Americans are susceptible for erroneous removals based on interstate cross-checks due to the fact that Asian Americans are significantly more likely than Whites to have a highly common last name. According to the Census Bureau, 13.4 percent of Asian Americans report one of the top 10 most common Asian surnames as compared to just 4.5 percent of Whites reporting one of the top 10 most common non-Hispanic White surnames.⁴⁰ Similarly, just 41 surnames cover a quarter of the Asian American population as compared to 319 surnames needed to cover one-quarter of the non-Hispanic White population.⁴¹ Between 2000 and 2010, Asian American and Native Hawaiians and Pacific Islanders represented 11 of top 15 fastest growing surnames, meaning this issue will only become more pressing in the future.⁴² A stringent set of criteria for evaluating voter registration, using multiple touchpoints, is a must.

Subtitle C – Prohibiting Voter Caging

Voter Challenges

We have seen the rising threat of voter challenges at the polls over the last decade, where it is used as a tool to intimidate and suppress voters of color, including Asian American voters. We have seen candidates calling for their supporters to sign up as observers on Election Day to allegedly help prevent non-existent “voter fraud.” Many state laws allow private individuals to challenge the right of other citizens to vote (often referred to as election observers or poll watchers). At the same time laws are clear that voter intimidation is illegal.

⁴⁰ Joshua Comenetz, “Frequently Occurring Surnames in the 2010 Census,” U.S. Census Bureau, October 2016, <https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf>.

⁴¹ *Id.*

⁴² *Id.* at Table 3.

Thus, poll watchers cannot target groups of voters for confrontation or harassment, “test” for voter competency, hover over voters or violate their right to a private ballot, block lines, or threaten or engage in violence. In addition to requiring personal knowledge documented in writing and subject to an oath under penalty of perjury that the challenger has a good faith factual basis for their challenge of ineligibility, H.R. 1 sets an important standard that challenges based on the race, ethnicity, or national origin (which includes language minority status) of the individual subject to the challenge are never a good faith factual basis for said challenge.

This provision is particularly important for Asian Americans. As new pockets of Asian Americans emerge and grow in new communities across the country, voter challenges are increasingly used against Asian Americans who are being stereotyped as “foreigners” and somehow “un-American” simply for how they look or how they sound. For example, in April 2005 in Washington State, a private citizen challenged the right to vote of more than one thousand people with what he called “foreign-sounding” names. He directed his scrutiny to voters with names that “have no basis in the English language” and “appear to be from outside the United States.” Meanwhile, he eliminated from his challenge the voters with names “that clearly sounded American-born, like John Smith, or Powell,” and ultimately targeted primarily Asian and Hispanic voters.⁴³ In another example from the 2004 primary elections in Bayou La Batre, Alabama, supporters of a white incumbent running against a Vietnamese American candidate intimidated Asian American voters. These supporters challenged the eligibility to vote of only Asian Americans at the polls, falsely accusing them of not being U.S. citizens. The losing incumbent rationalized his targeting because “We figured if they couldn’t speak good English, they possibly weren’t American citizens.” The Department of Justice found these challenges were racially motivated and prohibited those people from interfering in the general election.⁴⁴

H.R. 1 – Division A – Voting; Title 2 – Election Integrity

Subtitle A – Restore the VRA

We support H.R. 1’s acknowledgement of the need to address the problematic decision by the Supreme Court in *Shelby County v. Holder* and agree with the bill’s statement that “racial discrimination in voting is a clear and persistent problem.”⁴⁵ Asian American voters are among those suffering in the wake of the decision and are left particularly vulnerable as the Asian American voter population grows across the country. Previously-covered Section 5 jurisdictions in the South are where the Asian American population is growing particularly rapidly. Georgia and North Carolina are among the three fastest-growing Asian American populations from 2000

⁴³ Terry Ao Minnis & Mee Moua, Asian Americans Advancing Justice – AAJC, 50 Years of the Voting Rights Act: The Asian American Perspective (2015), <https://advancingjustice-aaic.org/sites/default/files/2016-09/50-years-of-VRA.pdf>.

⁴⁴ *Id.*

⁴⁵ For the People Act of 2019, H.R. 1, 116th Congress § 2001(5) (2019).

to 2010.⁴⁶ In fact, five of the states covered in their entirety and another four states covered partially by Section 5 are among the top 20 states with the fastest-growing Asian American populations. The remaining covered states all experienced a growth in their Asian American populations.⁴⁷ When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.⁴⁸ As Asian American populations continue to increase rapidly, particularly in the South, levels of racial tension and discrimination against racial minorities can be expected to increase, including in the voting context.⁴⁹ Such discrimination creates an environment of fear and resentment toward Asian Americans, which jeopardizes Asian Americans' ability to exercise their right to vote free of harassment and discrimination.

The community's population growth will likely lead to increased efforts to undermine the political voice of Asian Americans similar to the recent and ongoing efforts to restrict access to the polls.⁵⁰ This trend has already become evident in relation to the growth of the Latino voting

⁴⁶ See Community of Contrasts.

⁴⁷ *Id.*

⁴⁸ See Gillian Gaynair, Demographic shifts helped fuel anti-immigration policy in Va., *The Capital* (Feb. 26, 2009) (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), http://www.nytimes.com/2009/02/22/nyregion/thecity/22froze.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, Immigrants becoming targets of attacks, *The Philadelphia Inquirer*, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, An Ethnic Shift is in Store, *L.A. Times*, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), <http://articles.latimes.com/2007/apr/12/local/me-chinohills12>.

⁴⁹ In 2011, the growth of immigrant communities and rising anti-immigrant sentiment in Alabama led to the passage of H.B. 56, the toughest immigration enforcement law in the country. Also in 2011, state lawmakers in other southern states, including Georgia and South Carolina, launched efforts to deny the automatic right of citizenship to the U.S.-born children of undocumented immigrants. See Shankar Vedantam, State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship, *Wash. Post*, Jan. 5, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>; see also *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents). At the federal level, Alabama members of the U.S. House of Representatives co-sponsored legislation to enact this restriction. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011). This bill was reintroduced in 2013 and co-sponsored again by Alabama Representatives, as well as legislators from Arizona, Georgia, and Texas. Birthright Citizenship Act of 2013, H.R. 140, 113th Cong., (2013).

⁵⁰ See Ari Berman, Texas Voter ID Law Discriminates Against Women, Students and Minorities, *The Nation* (Oct. 23, 2013), <http://www.thenation.com/blog/176792/texas-voter-id-law-discriminates-against-women-students-and-minorities> (noting that Texas' voter ID law likely would have an extremely disproportionate impact on Hispanic voters); Emily Deruy, Could New Voter ID Laws Really Disenfranchise 10 Million Latinos?, *Fusion* (Sep. 24, 2012) (arguing that recent proof of citizenship and photo identification requirements and voter roll purges had the potential to disenfranchise millions of Latino voters); and Christopher Ingraham, Study finds strong evidence for discriminatory intent behind voter ID laws, *The Washington Post* (Jun. 3, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behind-voter-id-laws/> (finding that state legislators who had supported voter ID laws were less likely to respond to emails sent from voters with Hispanic-sounding names).

population.⁵¹ Asian Americans are potential swing voters⁵² and are becoming numerous enough to make the difference in certain races, and they will be facing new, more aggressive tactics to minimize their political impact. Section 5 protections are needed now more than ever.

Unfortunately, the U.S. Supreme Court weakened the VRA in *Shelby County v. Holder* (“Shelby”). The Court ruled 5-4 that the formula used to determine Section 5 jurisdictions was based on “decades-old data and eradicated practices,” despite the extensive record confirming that these areas continued to commit acts of voting discrimination.⁵³ Thus, while the Court did not invalidate Section 5, it rendered it useless by invalidating the formula that determined what jurisdictions were required to submit voting changes for preclearance. But at the same time, the Court recognized that “no one doubts” that voting discrimination still exists, and invited Congress to pass legislation with a modernized formula.⁵⁴ Since the Court invalidated the key enforcement provision of the Act in 2013, voting discrimination has become harder to stop. In states, counties, and cities across the country, legislators pushed through laws designed to make it harder for minorities to vote. Congress must restore the VRA and we look forward to working with Congress on this effort.

Conclusion

As the fastest growing racial/ethnic group in America, Asian Americans have experienced numerous opportunities for and challenges to political participation and civic engagement. These new Americans often emigrate from countries with very different government systems and traditions of civic engagement, with many facing language as well as cultural barriers. They often lack an adequate understanding of the history and current conditions of race relations in the United States, or of its economic development and divides. Yet they increasingly recognize that there is both a right and responsibility to participate in our democratic system and engage in civic institutions. Too often excluded from the decision-making of government entities at the national, state and local levels, Asian Americans recognize that we have a significant stake in participating in the public dialogue concerning resource allocation decisions, regulations, investments in schools, and economic redevelopment, and must be politically engaged. Components of H.R. 1 would help expand access to the political process and assist Asian Americans in having their voices heard.

⁵¹ Mexican American Legal Defense and Educational Fund, National Association of Latino Elected and Appointed Officials, and National Hispanic Leadership Agenda, *Latinos and the VRA: A Modern Fix for Modern-Day Discrimination 3*, https://www.maldef.org/wp-content/uploads/2019/01/Latinos_and_the_VRA.pdf.

⁵² See 2018 Survey.

⁵³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵⁴ *Id.*



February 13, 2019

The Honorable Zoe Lofgren
Chairperson
Committee on House Administration
United States House of Representatives

The Honorable Rodney Davis
Ranking Member
Committee on House Administration
United States House of Representatives

Statement for the Record in Support of H.R. 1

Dear Chairperson Lofgren and Ranking Member Davis:

The Campaign Legal Center ("CLC") respectfully submits this statement to the Committee in support of H.R. 1, the For the People Act of 2019. CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy across all levels of government. Since the organization's founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, as well as in numerous other federal and state court cases. Our work promotes every citizen's right to participate in the democratic process.

H.R. 1 is a landmark reform bill designed to address the most pressing challenges to our democracy: the influence of money in politics, the erosion of ethical norms, threats to voting rights, and extreme partisan gerrymandering. CLC strongly supports H.R. 1 and this comprehensive effort to make our democracy more accessible, transparent, and responsive to the citizens of our great nation.

In particular, this statement will focus on the small-dollar campaign financing provisions of the bill. As the funding of federal elections has become increasingly dominated by a small and wealthy segment of the U.S. populace,¹

¹ During the 2016 elections, half of all campaign contributions given to federal candidates came from just 15,810 individuals. By comparison, in 2000, nearly 74,000

small-dollar financing can reorient the focus of campaigns and amplify the voices of ordinary Americans in our electoral process. By introducing small-dollar matching for campaign contributions given by individuals, H.R. 1 would broaden public engagement in our democracy and enhance the ability of all citizens to participate meaningfully in congressional and presidential election campaigns.

This statement begins with a summary of H.R. 1's proposal for small-dollar financing in congressional and presidential campaigns. Next, we discuss courts' public financing jurisprudence. In the final section, we highlight empirical and academic research supporting the positive effects of public election financing in states and cities around the country. To provide the Committee with additional information about the development of public financing around the country, we have included as an attachment CLC's recently published report, *Buying Back Democracy: The Evolution of Public Financing in U.S. Elections*.

I. Overview of Small-Dollar Financing in H.R. 1

H.R. 1 would establish a small-dollar matching program for congressional candidates who voluntarily agree to participate in, and qualify for, the program. Under H.R. 1, a participating candidate would be eligible for 6:1 public-to-private matching funds for each "qualified small dollar contribution" of \$200 or less received from an individual. The bill would cap the total amount of matching funds available to each candidate in an election cycle at competitive levels, based on successful campaigns' spending in recent congressional elections. To qualify for small-dollar matching, candidates would have to demonstrate significant public support for their candidacies by collecting at least \$50,000 in qualified small dollar contributions from a minimum of 1,000 individuals during the qualifying period. In exchange for small-dollar matching, candidates also would have to agree to special limits on contributions, restrictions on their use of personal funds for campaign purposes, and other requirements throughout the campaign.

For presidential elections, H.R. 1 would overhaul the current presidential public funding program by providing small-dollar matching during the primaries as well as in the general election campaign. Similar to H.R. 1's small-dollar matching for congressional candidates, the bill would provide participating candidates with 6:1 matching funds for each qualified small dollar contribution of \$200 or less received from an individual donor. Furthermore, H.R. 1 would remedy factors that

individuals provided half of the contributions made to federal candidates. NATHANIEL PERSILY ET AL., BIPARTISAN POL'Y CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 22 (2018), <https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf>. According to the Washington Post, 11 wealthy individuals—including casino magnate Sheldon Adelson and former hedge-fund manager Tom Steyer—collectively contributed over \$1 billion to super PACs between 2010 and 2018, accounting for more than 20% of the total funds donated to super PACs since 2010. Michelle Ye Hee Lee, *Eleven Donors have plowed \$1 billion into super PACs since they were created*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.5bde16e73470.

have contributed to declining participation in the current presidential public financing system over recent elections, including eliminating the program's expenditure limitations and releasing public funds earlier for candidates' use in the primaries.

Additionally, H.R. 1 would establish the My Voice Voucher Pilot Program for operation in three states over two election cycles. This innovative, provisional program would offer a \$25 voucher to each eligible voter in participating states to allocate, in \$5 increments, to qualified congressional candidates of their choosing. Like small-dollar matching, the pilot program presents a meaningful opportunity to involve more Americans in the campaign process and, if successful, could be implemented nationally.

II. Public Financing Jurisprudence

For over forty years, courts have recognized that public financing of elections promotes core principles of our democratic system. In *Buckley v. Valeo*, the U.S. Supreme Court upheld public financing as a constitutional means “to reduce the deleterious influence of large contributions on our political process” and “to facilitate communication by candidates with the electorate.”² The Court expressly recognized public financing’s consistency with the First Amendment, describing the presidential public funding program as “a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, *goals vital to a self-governing people*.”³ Since *Buckley*, federal and state courts have continued to affirm the constitutionality of public financing as a tool to prevent political corruption and to strengthen citizen engagement in elections.⁴

In 2011, the Supreme Court again endorsed the constitutionality of public financing of elections, even as it held that “trigger” provisions giving publicly financed candidates additional funds in direct response to opponents’ spending or

² 424 U.S. 1, 91 (1976) (per curiam).

³ *Id.* at 92-93 (emphasis added).

⁴ See, e.g., *Republican Nat’l Comm. v. Fed. Election Comm’n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980) (“If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign.”), *aff’d.*, 445 U.S. 955 (1980); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (validating government interest in public financing “because such programs . . . tend to combat corruption”); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (recognizing public financing reduces the “possibility for corruption that may arise from large campaign contributions” and diminishes “time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning”); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 230 (2d Cir. 2010) (finding Connecticut program worked to “eliminate improper influence on elected officials”); *Ognibene v. Parkes*, 671 F.3d 174, 193 (2d Cir. 2011) (explaining that public financing system “encourages small, individual contributions, and is consistent with [an] interest in discouraging entrenchment of incumbent candidates”).

independent expenditures were impermissible.⁵ Despite invalidating the trigger mechanism in Arizona’s Citizens’ Clean Elections Act, the Court reiterated that “governments may engage in public financing of election campaigns and that doing so can further significant government interest[s], such as the state interest in preventing corruption.”⁶ Thus, while it foreclosed the release of public funds in *direct response* to private campaign spending, the Court did not “call into question the wisdom of public financing as a means of funding political candidacy” or the constitutionality of these laws in general.⁷

III. Effects of Public Financing in State & Local Elections

In addition to judicial recognition of public financing’s benefits to democracy, the experiences of numerous states and cities around the country demonstrate that public financing reduces opportunities for political corruption, increases electoral competition by encouraging more people to seek public office, and augments political participation among the electorate at large. Today, over three dozen states, counties, and municipalities have enacted some variety of public election financing for candidates and, in a few locales, political parties.⁸ In 2018 alone, three major cities—Baltimore, Denver, and Washington, D.C.—approved legislation creating new public financing programs for local candidates.⁹

The structure and design of existing state and local programs vary considerably, ranging from Seattle’s Democracy Voucher Program to full grant systems in Arizona, Connecticut, and elsewhere. While there is wide variety among public financing systems now in effect, these programs generally share the common objectives of decreasing candidates’ dependence on large contributions, boosting electoral competition, and expanding citizens’ engagement in the electoral process. The effectiveness of public financing in advancing these critical aims is borne out in a substantial body of research assessing existing public financing systems.

a. Reducing Opportunities for Corruption

A central feature of many public financing systems, including small-dollar matching under H.R. 1, is candidates’ voluntary acceptance of lower contribution limits and other restrictions on funding. By design, these controls lessen candidates’ reliance on large contributions, diminishing both the opportunity for corruption and the appearance that elected officials are beholden to major campaign donors.

⁵ *Ariz. Free Enterprise Club’s Freedom PAC v. Bennett*, 546 U.S. 721 (2011).

⁶ *Id.* at 754 (quotations and citations omitted).

⁷ *Id.* at 753.

⁸ See Attachment A, CATHERINE HINCKLEY KELLEY & AUSTIN GRAHAM, CAMPAIGN LEGAL CTR., BUYING BACK DEMOCRACY: THE EVOLUTION OF PUBLIC FINANCING IN U.S. ELECTIONS 19-26 (2018).

⁹ See Austin Graham, *A Year in Review: How Cities and Counties Took On Money in Politics in 2018*, CAMPAIGN LEGAL CTR. (Dec. 20, 2018), <https://campaignlegal.org/update/year-review-how-cities-and-counties-took-money-politics-2018>.

In 1988, New York City established a matching funds program for city candidates, initially providing a 1:1 public-to-private dollar match for city residents' contributions of up to \$1,000; for the 2001 city election, New York City increased the program's matching rate to 4:1 for residents' contributions of \$250 or less.¹⁰ Analysis of New York City's matching funds program found that the city's implementation of multiple matching funds, in 2001, significantly increased both the total number of small contributors, measured as individual donors of \$250 or less, to city candidates, as well as the proportional importance of these small contributors to competitive city council candidates participating in the matching funds program.¹¹ These effects were consistent across challengers, incumbents, and open-seat candidates.¹²

A review of Seattle's municipal election data similarly supports that the city's implementation of the Democracy Voucher Program, in 2017, reduced the importance of large donors in local campaigns. An academic study of contributions made in Seattle's 2013 election, prior to the city's enactment of public financing, determined that "high-dollar donors" of \$500 or more provided nearly 40% of city council candidates' total campaign funding in 2013, even as these donors comprised only 9% of the overall donor pool in city council races.¹³ In Seattle's mayoral election in 2013, the impact of high-dollar donors was even more pronounced, with mayoral candidates raising, on average, 55% of their campaign funds from contributors of \$500 or more.¹⁴

By comparison, Seattle candidates who participated in the Democracy Voucher Program, in 2017, were far less dependent on "high-dollar donors"; as a condition of program participation, candidates were subject to a \$250 limit on monetary contributions.¹⁵ In lieu of high-dollar donations, participating candidates collectively raised 82% of their total campaign funds in contributions of \$199 or less.¹⁶ Moreover, vouchers supplanted other contributions as program participants' principal source of funding in 2017.¹⁷ Over the course of a single election, Democracy Vouchers markedly reduced the primacy of large contributions in Seattle elections—validating the anti-corruption interests the program was intended to serve.

¹⁰ Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 5 (2012), http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf.

¹¹ *Id.* at 9-10.

¹² *Id.*

¹³ Jennifer Heerwig & Brian McCabe, *High-Dollar Donors and Donor-Rich Neighborhoods: Representational Distortion in Financing a Municipal Election in Seattle*, URBAN AFF. REV. 1, 16, 23 (2017).

¹⁴ *Id.* at 18.

¹⁵ SEATTLE ETHICS & ELECTIONS COMM'N ("SEEC"), DEMOCRACY VOUCHER PROGRAM BIENNIAL REPORT 2017, at 18 (2018), https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20-%20Biennial%20report%20-%202003_15_2018.pdf.

¹⁶ SEEC Chart of 2017 City Elections Contributors, sortable by size and type, <http://web6.seattle.gov/ethics/elections/charts.aspx?cycle=2017&n1=contributions&n2=size&n3=groupings&n4=allcategories&n5=allcandidates&n6=number#aChartTop> (last visited Feb. 12, 2019).

¹⁷ *Id.*

b. Increasing Measures of Electoral Competition

Empirical analyses similarly show that public financing emboldens more citizens to run for office and improves measures of electoral competitiveness. Upon taking effect in 2000, the Maine Clean Elections Act immediately increased the number of effective candidates and decreased margins of victory in state senate elections in 2000 and 2002, as compared to state elections in 1994, 1996, and 1998, in districts where a non-incumbent candidate accepted public funding.¹⁸ Connecticut reported a similar uptick in competitiveness after introducing public financing for legislative candidates: the number of unopposed legislative races declined considerably after the initial rollout of the Citizens' Election Program, from 53 unopposed elections in 2008 to 32 in 2010.¹⁹ The drop in uncontested elections was consistent with an overall increase in the number of candidates running for the Connecticut General Assembly in 2010, many of whom cited the availability of public financing as a factor in their decision to seek public office.²⁰

A broader assessment of legislative elections in the states similarly identified a correlation between the availability of public financing and heightened competition in elections. According to an analysis of monetary competitiveness in 47 states' elections between 2013 and 2014, only 18% of legislative races were competitive over that timeframe.²¹ However, a substantially higher percent of races—41%—were monetarily competitive in the five states with public financing available to legislative candidates.²² Further, three of the five *most* monetarily competitive states had established public financing for legislative candidates, while none of the five *least* monetarily competitive states offered public funds to candidates.²³

c. Expanding Citizen Participation in Elections

Perhaps most promisingly, empirical evidence indicates that small-dollar public financing fosters political engagement among a broader and more demographically representative portion of the electorate. By providing candidates with a direct incentive to maximize outreach to every eligible voter as a potential source of matchable contributions, small-dollar matching can galvanize campaigns'

¹⁸ Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POL. & POL'Y Q. 263, 275-77 (2008), <https://web.stanford.edu/%7Eneilm/The%20Impact%20of%20Public%20Financing%20on%20Electoral%20Competition.pdf>.

¹⁹ CONN. STATE ELECTIONS ENFORCEMENT COMM'N, CITIZENS' ELECTION PROGRAM 2010: A NOVEL SYSTEM WITH EXTRAORDINARY RESULTS 6 (2011), http://www.ct.gov/seec/lib/seec/publications/2010_citizens_election_program_report_final.pdf.

²⁰ *Id.* at 6-7.

²¹ Zach Holden, *2013 and 2014: Monetary Competitiveness in State Legislative Races*, NAT'L INST. ON MONEY IN POL. (Mar. 9, 2016), https://www.followthemoney.org/research/institute-reports/2013-and-2014-monetary-competitiveness-in-state-legislative-races#ftnref_4_link.

²² *Id.* tbl.2.

²³ *Id.* tbls.3 & 4. Among the five states with the most monetarily competitive elections, Connecticut, Maine, and Minnesota offer public financing to legislative candidates. *Id.*

engagement of the electorate at large. For example, a study of New York City's matching funds program found that 89% of the city's census-block groups had at least one resident who gave a small-dollar contribution of \$175 or less to a city candidate in the 2009 municipal election.²⁴ By way of comparison, individual contributions of \$175 or less to candidates for the New York State Assembly, which are ineligible for matching funds, came from residents of only 30% of New York City census-block groups in 2010.²⁵

Moreover, the same study determined census-block groups with at least one small donor of \$175 or less to a New York City candidate were statistically less affluent and more diverse than census-block groups with at least one large donor of \$1,000 or more, suggesting small-dollar matching helped to cultivate political participation among groups that are historically underrepresented in the campaign finance system.²⁶ A separate analysis of New York City elections concluded that more than half of the individuals who made a campaign contribution during the 2013 city elections were first-time contributors, and 76% of these first-time donors made a small contribution of \$175 or less.²⁷ Simply put, small-dollar matching incorporates more people into the democratic process.

Vouchers likewise stimulate political engagement. In Seattle's 2017 election, the first following the city's enactment of the Democracy Voucher Program, local participation in the city's campaign finance system reached historic levels. According to analysis of Seattle's election data, a total of 20,727 Seattle residents assigned Democracy Vouchers to city candidates in 2017.²⁸ Altogether, over 25,000 Seattleites provided vouchers or monetary contributions, or both, to city candidates in 2017—more than a 300% increase over the number of local campaign donors in 2013.²⁹ The swell in local participation facilitated by the Democracy Voucher Program was a citywide phenomenon, with residents of each of the city's council districts giving vouchers to candidates in 2017.³⁰

²⁴ ELISABETH GENN ET AL., BRENNAN CTR. FOR JUST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 10 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF, https://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

²⁵ *Id.*

²⁶ *Id.* at 14. See also ADAM LIOZ, DEMOS, STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDERMINES OUR DEMOCRACY AND OUR ECONOMY (2015), https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.

²⁷ N.Y.C. CAMPAIGN FIN. BD., BY THE PEOPLE: THE NEW YORK CITY CAMPAIGN FINANCE PROGRAM IN THE 2013 ELECTIONS 41 (2014), https://www.nyccfb.info/sites/default/files/pressfiles/2013_PER.pdf.

²⁸ JENNIFER HEERWIG & BRIAN MCCABE, UNIV. OF WASH. CTR. FOR STUDIES IN DEMOGRAPHY & ECOLOGY, EXPANDING PARTICIPATION IN MUNICIPAL ELECTIONS: ASSESSING THE IMPACT OF SEATTLE'S DEMOCRACY VOUCHER PROGRAM (2018).

²⁹ *Id.*

³⁰ SEEC, *supra* note 15, at 16.

Beyond increasing the absolute number of local campaign contributors, the Democracy Voucher Program helped to diversify Seattle's donor pool. According to the University of Washington's Center for Studies in Demography & Ecology ("CSDE"), voucher donors were more socioeconomically representative of Seattle's population than monetary contributors, and Seattle residents with an annual income of \$50,000 or less made up a larger percentage of the voucher-donor population compared to the pool of monetary contributors.³¹ CSDE also found that voucher donors were more likely than monetary contributors to reside in low-income neighborhoods.³² Additionally, certain minority communities, including Asians and Hispanics, donated at higher rates through the voucher program than as monetary contributors.³³

Furthermore, the CSDE analysis revealed that Seattle residents who gave vouchers to city campaigns were substantially more likely to vote on Election Day than residents who did not use their vouchers. Almost 90% of voucher donors voted in 2017, while only 43% of Seattle residents who did not use their vouchers cast a vote that year.³⁴ Importantly, the amplified voter turnout was consistent even after controlling for residents' voting history; among city residents who voted in less than half of the prior elections in which they were eligible, voucher donors were four times more likely to vote than city residents who did not return their vouchers.³⁵ These findings strongly suggest that participation in the Democracy Voucher Program prompted greater engagement in the city's electoral process more broadly.

As the findings from New York and Seattle demonstrate, public financing of elections can bring new and diverse donors into the campaign fold. Based on evidence from jurisdictions with public financing systems, it is reasonable to expect that H.R.1's small-dollar matching system, along with the pilot program for vouchers, would have a transformative effect on citizen participation in federal elections.

³¹ HEERWIG & MCCABE, *supra* note 28, fig.8.

³² *Id.* fig.9.

³³ *Id.* fig.7.

³⁴ *Id.* fig.10. Evidence from other jurisdictions also indicates that public financing can reduce voter "roll-off," the phenomenon of voters abstaining from voting in down-ballot races on Election Day. See MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 77 (2013) (finding voter roll-off decreases about 20% in Connecticut elections with a publicly financed candidate).

³⁵ HEERWIG & MCCABE, *supra* note 28, fig.10.

IV. Conclusion

In conclusion, we respectfully urge the Committee to support small-dollar financing in H.R. 1. We appreciate the opportunity to submit this statement in support of this important legislation.

Respectfully submitted,

/s/

Catherine Hinckley Kelley
Director of Policy & State Programs

/s/

Austin Graham
Legal Counsel

Attachment A



Buying Back Democracy: The Evolution of Public Financing in U.S. Elections

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I. Executive Summary: Why Public Financing?

The vast amount of money in our elections has left many Americans feeling excluded from the political process. Increasing reliance of candidates on super PACs, secretive “outside” spending, and big donations from a small segment of the public undermines the U.S. Constitution’s promise of democratic self-governance, which is premised on widespread participation by all citizens in our elections.¹ As special interests and big donors have come to dominate the funding of U.S. elections, recent polling reveals a growing distrust among Americans of government institutions and, to a degree, democracy itself.²

Public financing offers a powerful antidote to these concerns, providing another path to elected office. While there are many important and effective reforms jurisdictions may pursue to make campaigns more transparent and responsive to voters, public financing is a particularly promising way to amplify the voices of all citizens. Public funding programs can reorient our elections by reducing opportunities for corruption, encouraging new and diverse candidates to seek public office, and broadening political participation among the public at large. A well-designed program can create an incentive for candidates to fundraise and connect with the people they seek to represent—including people of modest means. And this translates to a donor base that looks more like the fabric of the community, rather than a handful of wealthy elites.

Public financing has been an important part of our campaign finance system for more than forty years, most notably with the presidential public financing program on the federal level. Although Congress has allowed this once successful program to wither, public financing programs across the country offer a real-world example of what our elections could look like. Since its enactment in the 1980s, New York City’s matching funds program has enjoyed consistently high rates of candidate participation and has become a model for election reform advocates around the country. The program has been credited with encouraging local campaigns to reach out to a broader population of donors, with studies showing that small donors to New York City candidates come from a much more diverse range of neighborhoods than the city’s donors to State Assembly candidates.³ Likewise, Seattle’s groundbreaking Democracy Voucher Program, approved by the city’s voters in 2015, precipitated a record number of city residents contributing to local candidates over the course of a single election cycle.⁴

1 In 2016, half of all campaign contributions to federal candidates came from only 15,810 individuals. By comparison, in 2000, 73,926 individuals accounted for half of all donations. See NATHANIEL PERSLY, ROBERT F. BAUER, AND BENJAMIN L. GINSBERG, BIPARTISAN POLICY CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 22 (Jan. 2018), <https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf>.

2 *Public Trust in Government 1958-2017*, PEW RESEARCH CENTER (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>; Jeffrey Jones et al., *How Americans Perceive Government in 2017*, GALLUP (Nov. 1, 2017), <https://news.gallup.com/opinion/polling-matters/221171/americans-perceive-government-2017.aspx>.

3 See EUSABETH GENN ET. AL., BRENNAN CTR. FOR JUSTICE & CAMPAIGN FIN. INST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 10 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

4 See SEATTLE ETHICS & ELECTIONS COMM’N, DEMOCRACY VOUCHER PROGRAM BIENNIAL REPORT 2017 22 (2018), https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20-%20Biennial%20report%20-%202003_15_2018.pdf.

The experiences of these cities substantiate that public financing programs have the potential both to safeguard the integrity of our democratic institutions and to engage more people—with diverse backgrounds and varied experiences—in our elections. The success of these programs has sparked renewed interest in public financing. In the past three years, six jurisdictions have enacted new programs as lawmakers and concerned citizens across the country have recognized that public financing is one effective path to repairing our broken campaign finance system.

This report begins with an overview of the history of public financing in U.S. elections, focusing on Watergate and the enactment of public funding for presidential elections. Part III highlights the U.S. Supreme Court's public financing jurisprudence and examines trends in the development of public funding laws across the country. Part IV proceeds to detail the different types of public financing systems in existence today, and Part V concludes with recommendations to ensure the success of public financing going forward.

Through this report, we hope to aid democracy advocates, lawmakers, and voters as they seek to build a small-dollar democracy. The funding of elections is an important means of engagement in our democratic process. Public financing can help to make this form of engagement more inclusive and representative of our nation as a whole.

II. The Origins of Public Financing

The American public has long expressed concerns about the outsized role of money in politics and its capacity to distort the democratic process.⁵ Public funding, as an alternative to privately funded campaigns, addresses many of the problems that have undermined democracy since the Gilded Age and continue to be a focus of money-in-politics reform efforts: “secrecy, corporate money, and undue influence.”⁶

Representative William Bourke Cockran of New York introduced the nation's first public financing bill in December 1904, arguing that, through the public funding of elections, “it might be possible for the government of the United States to do away with any excuse for soliciting large subscriptions of money.”⁷ President Theodore Roosevelt shared this belief, and, three years later, advocated for “an appropriation for the proper and legitimate expenses of each of the great national parties.”⁸ While both proposals proved unsuccessful, politicians continued to press for public financing of elections over the next fifty years.

In 1966, Congress enacted the first law authorizing public funding for presidential candidates and political parties.⁹ However, legislation passed the following year halted the program before it could

5 ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW xvii (1988).

6 ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 168 (2014).

7 *Id.* at 35 (quoting *Contributions to Political Committees in Presidential and Other Campaigns: Hearing Before the H. Comm. on Election of President, Vice-President, and Reps.*, 59th Cong. 41 (Mar. 12, 1906)).

8 *Id.* at 36 (quoting 59 CONG. REC. 78 (Dec. 3, 1907)).

9 R. SAM GARRETT, CONG. RESEARCH SERVICE, PUBLIC FINANCING OF PRESIDENTIAL CAMPAIGNS: OVERVIEW AND ANALYSIS 4 (Jan. 29, 2014).

take effect.¹⁰ Congress acted again in 1971, when public pressure led to the enactment of the Federal Election Campaign Act ("FECA").¹¹ Like the 1966 legislation before it, though, the original FECA lacked teeth. Candidates and parties flouted the new law, which did little to control presidential election spending or to mitigate the corrupting influence of private money in politics.¹² Watergate changed all of that.

A. Watergate and the 1974 FECA Amendments

"The modern history of American campaign finance law began in the early morning of darkness of June 17, 1972," when five men broke into the Democratic National Committee headquarters at the Watergate Hotel, launching a series of events that would topple a presidency.¹³ Over the course of the next two years, investigators exposed the extensive corruption of President Nixon's Committee to Reelect the President, which, in 1972 alone, took in \$850,000 in illegal corporate campaign contributions and spent \$67 million, much of which it failed to disclose.¹⁴ There was no denying that the "reprehensible, clandestine political acts connected with Watergate were financed and made possible by an excess of campaign donations, many of them secretly and illicitly obtained."¹⁵

Public outrage over the depths of deviance in the national campaign finance system spurred reform.¹⁶ On August 8, 1974, the day before Nixon resigned the presidency, the U.S. House of Representatives passed sweeping amendments to FECA.¹⁷ Two months later, the Senate approved those amendments, and President Ford signed them into law.¹⁸

The 1974 FECA amendments overhauled the federal campaign finance system and established the structure for presidential public financing that remains in place today. This public financing program represented a powerful tool to combat corruption and expand small donor participation in presidential campaigns.¹⁹

¹⁰ *Id.*

¹¹ Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 798 (2016).

¹² Presidential campaign spending rose from \$44 million in 1968 to \$103 million in 1972. And, in the five weeks before FECA's effective date, President Nixon raised \$11.4 million in secret contributions. *Id.* at 799.

¹³ *Id.* at 793.

¹⁴ *Id.* at 795.

¹⁵ 120 CONG. REC. 9270 (1974) (statement of Sen. John J. Williams).

¹⁶ See 120 CONG. REC. 8209 (statement of Sen. Ted Kennedy) (asserting that campaign finance reform was "the most positive contribution Congress can make to end the crisis over Watergate and restore the people's shattered confidence in the integrity of their Government."); see also Frank J. Sorauf, *INSIDE CAMPAIGN FINANCE: MYTHS & REALITIES*, 2, 7-8 (1992) (noting that campaign reform measures in 1974 were "the immediate consequence of Watergate and the misdeeds of Richard Nixon's Committee to Reelect the President.").

¹⁷ Gaughan, *supra* note 11, at 801-802.

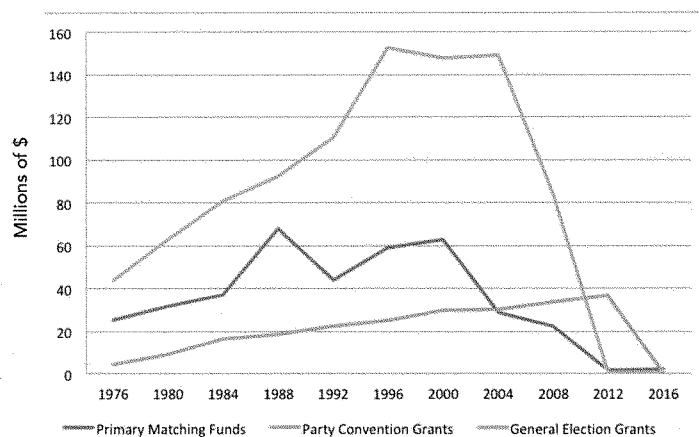
¹⁸ *Id.*

¹⁹ See 120 Cong. Rec. 8209 (statement of Sen. Ted Kennedy) ("[P]ublic financing of elections is the answer to many of the deepest problems facing the Nation, especially the lack of responsiveness of government to the people. Only when all the people pay for elections will all the people be truly represented in their government. At a single stroke, we can drive the money lenders out of the temple of politics. We can end the corrosive and corrupting influence of private money in public life. Once and for all, we can take elections off the auction block, and make elected officials what they ought to be—servants of all the people instead of slaves to a specific few. . . . Through public financing, we can guarantee that the political influence of any citizen is measured only by his voice and vote, not by the thickness of his pocketbook.").

B. The Presidential Public Financing Program

The 1974 FECA amendments established voluntary public funding for three phases of a presidential campaign: the primaries, the party nominating conventions, and the general election. The program is funded entirely through a voluntary checkoff option on the individual federal income tax form, whereby individual taxpayers can designate \$3, or \$6 on a joint return, to the Presidential Election Campaign Fund ("PECF").²⁰ If candidates choose to accept public funds from the PECF, they are subject to the same financial disclosure requirements applicable to other federal candidates.²¹

FIGURE 1: PRESIDENTIAL ELECTION PUBLIC FUNDS DISBURSED OVER TIME



1. Primary Election Matching Funds

To become eligible for public funding in the primaries, presidential candidates must raise more than \$5,000 from residents of twenty or more states, for a total of at least \$100,000;²² only the first \$250 of a resident's contribution is counted toward the \$5,000 threshold in each state.²³ If candidates satisfy these fundraising requirements, they are qualified to receive matching funds on a dollar-for-dollar basis for the first \$250 contributed by each individual donor.²⁴ For example, if an individual donates \$250

20 The original terms of the program allowed individuals to designate \$1 to the PECF, or \$2 if filing jointly. In 1993, Congress increased the amount to \$3 for an individual and \$6 for a joint filer. See Anthony Corrado, *Public Funding of Presidential Campaigns*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 180, 182 (Thomas E. Mann, Daniel R. Ortiz, and Trevor Potter, eds., 2005).

21 *Id.*

22 26 U.S.C. § 9033(b)(2).

23 *Id.* at § 9033(b)(4).

24 *Id.* at § 9034(a). Contributions from PACs or other political committees are not eligible for matching funds. See Corrado, *supra* note 20, at 185.

to a presidential candidate during the primary stage, the candidate will receive an additional \$250 in public funds, raising the contribution's total value to \$500. However, if an individual contributes \$1,000 to a candidate, the candidate still will only receive \$250 in matching funds, for a total of \$1,250.

In exchange for public matching funds, presidential candidates must agree to limit their campaign spending for primary elections in three ways. First, candidates must not spend more than \$50,000 in personal funds on their primary campaigns.²⁵ Second, candidates must limit their aggregate campaign expenditures during the primaries.²⁶ In 2016, the aggregate spending limit for presidential candidates, as indexed for inflation, was \$48.07 million.²⁷ Lastly, candidates must limit their campaign spending in each state to the greater of \$200,000, indexed for inflation, or an amount equal to \$0.16 multiplied by the voting age population in the state.²⁸ In 2016, per-state expenditure limits in the presidential primaries ranged from \$961,400 in Wyoming to \$24,092,100 in California.²⁹

2. Nominating Conventions Grants

Under the 1974 FECA amendments, national party committees were eligible to receive a lump-sum grant of public funds to cover the expense of their presidential nominating conventions.³⁰ Parties that accepted the grants were not allowed to spend more than the grant amount for convention expenses. Under the FECA amendments, each of the two major parties could qualify for grants of \$4 million,³¹ indexed for inflation.³² With inflation adjustments, by 2012, the Democratic and Republican parties each qualified for grants of \$18.2 million.³³

Minor parties³⁴ were also eligible to receive grants, in smaller amounts, for their nominating conventions. The amount of a minor party's grant was based on the ratio of popular votes received by the party's candidate for president in the preceding election compared to the average number of popular votes received by the major parties' presidential candidates in the same election.³⁵ A new political party was able to receive a nominating convention grant, retroactively, if the party's presidential candidate received at least 5 percent of the popular vote in the general election.³⁶

Both major parties accepted grants for their nominating conventions in every presidential election between 1976 and 2012. However, in 2014, President Obama and the 113th Congress repealed public funding for nominating conventions.³⁷

²⁵ 26 U.S.C. § 9035(a).

²⁶ 52 U.S.C. § 30116(b)(1)(A).

²⁷ Fed. Election Comm'n, *Public Funding of Presidential Elections*, <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/> (last visited September 21, 2018).

²⁸ 52 U.S.C. § 30116(b)(1)(A).

²⁹ FEC, *supra* note 27.

³⁰ See 26 U.S.C. § 9008(b).

³¹ In 1974, the amount was set at \$2 million, but that base amount was increased to \$3 million in 1979 and \$4 million in 1984. See Corrado, *supra* note 20, at 190-91.

³² 26 U.S.C. § 9008(b)(1).

³³ Garrett, *supra* note 9, at 7.

³⁴ Defined as "a political party whose candidate for the office of President in the preceding presidential election received . . . 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office."

26 U.S.C. § 9002(7).

³⁵ 26 U.S.C. § 9008(b)(2).

³⁶ A third party received convention funding only once, in 2000, when the Reform Party qualified for \$2.5 million based on Ross Perot's performance in the 1996 election. Corrado, *supra* note 20, at 191.

³⁷ See P.L. 113-94 (H.R. 2019); see also 26 U.S.C. § 9008(i).

3. General Election Grants

In the general election, a presidential candidate may accept public funding even if the candidate did not receive matching funds during the primaries. In exchange for the grant, a candidate must agree to forego all private contributions³⁸ and not to expend more than \$50,000 in personal funds for the general election.³⁹

Under the FECA amendments, major party candidates are automatically qualified for lump-sum grants, which are indexed for inflation.⁴⁰ In 1976, the Republican and Democratic presidential nominees were eligible for grants of \$21.8 million each.⁴¹ By 2008,⁴² the grant amount was adjusted to \$84.1 million per candidate,⁴³ and, for 2016, the grant amount reached \$96.1 million.⁴⁴ Minor party candidates⁴⁵ may also receive partial grants for the general election if the party's candidate earned at least 5 percent of the popular vote at the preceding presidential election,⁴⁶ and the grant amount is based on the ratio of the party's popular vote in the preceding presidential election compared to the average vote of the two major party candidates in that election.⁴⁷ Similarly, a new political party's candidate can become eligible for a partial, retroactive grant if the candidate received at least 5 percent of the popular vote at the general election.

For nearly thirty years, the presidential public financing system was an unqualified success, with every major party nominee accepting public funds in the general election from 1976 through 2004.⁴⁸ In that time span, presidential candidates and national party committees collectively received over \$1.3 billion in public funds.⁴⁹ However, Congress has made few updates to the presidential financing system since the 1974 FECA amendments, and the program's viability has gradually declined.⁵⁰

By the mid-1990s, the percentage of taxpayers making checkoff designations for the PECF had fallen below 15 percent.⁵¹ As a consequence, funding shortfalls occurred in 1996 and 2000, and the FEC was forced to delay payments to candidates in the primaries until the PECF was determined to

38 *Id.* at § 9003(b)(1). This restriction does not apply to minor party candidates, who may raise private contributions to make up the difference between the partial grant they receive and the sum available to publicly funded major party candidates. *Id.* at § 9003(c)(1).

39 *Id.* at § 9004(d).

40 *Id.* at § 9004(a)(1).

41 FEC, *supra* note 27.

42 2008 was the last year that a major party candidate—Republican-nominee John McCain—accepted a general election grant. For more information about candidate participation in the presidential public financing system, see the “Trends Over Time” section below. See Garret, *supra* note 9, at 6.

43 *Id.*

44 *Id.*

45 See FEC, *supra* note 27.

46 26 U.S.C. § 9003(c).

47 See 26 U.S.C. § 9004(a)(2). To qualify for public funding, a minor party candidate must also be certified to appear on the general election ballot in ten or more states. Corrado, *supra* note 20, at 194.

48 Fed. Election Comm’n, *Public funds received by candidates 1976-present*, <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/>. For a discussion of the declining use of the presidential public financing system, see Part V (“Looking Forward: The Future of Public Financing”) below.

49 Corrado, *supra* note 20, at 182.

50 See Garret, *supra* note 9, at 5 (“Congress most recently altered the program in 1993, when it tripled the checkoff designation from \$1 to \$3 for individuals and from \$2 to \$6 for married couples filing jointly.”).

51 *Id.* at 9-10.

be solvent.⁵² The shortfalls were largely attributable to the funding structure of the program, which indexes disbursements to candidates for inflation but has no corresponding increase for the amount of taxpayer checkoffs.⁵³

Most crucially, congressional failure to upgrade the presidential funding program after the 1974 FECA amendments has rendered the system obsolete, as “[t]oday’s campaign process is dramatically different than it was in 1974.”⁵⁴ In particular, the financial demands and front-loaded primary process⁵⁵ of 21st-century presidential campaigns are not compatible with the program’s design—especially its expenditure limits.⁵⁶ Likewise, the unprecedented surge of independent campaign spending, precipitated by the Supreme Court’s 2010 decision in *Citizens United*, has further discouraged participation in the program. Presidential candidates now must try to keep pace not only with their opponents’ fundraising but also with deep-pocketed outside groups capable of spending unlimited sums to influence federal elections; accordingly, the prevalence of independent spending in contemporary elections has reduced presidential candidates’ willingness to agree to the spending restrictions imposed by the program.⁵⁷

Consequently, the presidential system is no longer a viable funding option for candidates. In 2000, President Bush became the first major party candidate to decline public funds in the primary elections, and President Obama was the first to decline any public funding for either the primaries or general election in 2008.⁵⁸ Since John McCain’s acceptance of public funds in the 2008 general election, no major party nominee has opted into the public finance program for a presidential race.⁵⁹

III. The Rise of Public Financing

A. Judicial Approval of Public Financing

After its enactment, the presidential public financing system soon faced legal challenge. In its 1976 landmark decision, *Buckley v. Valeo*, the United States Supreme Court upheld the presidential program as a constitutional means “to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.”⁶⁰ The Court expressly rejected the assertion that public financing violates the First Amendment, explaining that public financing “is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion

52. PUBLIC CITIZEN, FIXING THE VOLUNTARY TAX CHECKOFF PROGRAM TO FUND THE PRESIDENTIAL ELECTIONS, <https://www.citizen.org/fixing-voluntary-tax-checkoff-program-to-fund-presidential-elections>.

53. James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 375 (2013).

54. *Id.* at 376.

55. Over the last two decades, states have increasingly scheduled the dates of their presidential primaries and caucuses earlier in the election year. As a result, presidential candidates must initiate fundraising earlier and solicit money for a more prolonged period to remain financially competitive. See Matthew T. Sanderson, *Two Birds, One Stone: Reversing “Frontloading” by Fixing the Presidential Public Funding System*, 25 J. L. & Pol. 279, 285 (2009).

56. In 2012, major party nominees were eligible for a general election grant of approximately \$91 million; by comparison, Barack Obama raised over \$150 million in private contributions in September 2012 alone. Sample, *supra* note 54, at 376-77.

57. *Id.* at 378-79.

58. Garrett, *supra* note 9, at 1, 12.

59. *Id.* at 12.

60. 424 U.S. 1, 91 (1976) (per curiam).

and participation in the electoral process, goals vital to a self-governing people.”⁶¹ The Court had little difficulty concluding that these aims were “sufficiently important” to uphold the presidential system.⁶²

Since *Buckley*, courts have consistently reaffirmed the constitutionality of public financing laws and recognized that they advance important governmental interests in preventing political corruption and enhancing political participation.⁶³ Moreover, the voluntary nature of candidates’ participation in public financing programs has offset any First Amendment burden imposed by the laws.⁶⁴

In 2011, the Supreme Court again endorsed the overall constitutionality of public financing, even as it held that “trigger” provisions giving publicly financed candidates additional funds in direct response to campaign spending by non-participating candidates or independent expenditures impermissibly burdened political speech.⁶⁵ Despite invalidating the trigger mechanism in Arizona’s Citizens’ Clean Elections Act, the Court reaffirmed that “governments may engage in public financing of election campaigns and that doing so can further significant government interest[s], such as the state interest in preventing corruption.”⁶⁶ Thus, even as it foreclosed the release of public funds in response to private campaign spending, the Court did not “call into question the wisdom of public financing as a means of funding political candidacy” or discredit the constitutionality of these laws in general.⁶⁷

B. The Expansion of Public Financing in the States

Judicial approval of public financing paved the way for the expansion of public financing programs at the state and local levels.⁶⁸ In the wake of *Watergate* and *Buckley*, state legislatures were the primary champions and innovators of public financing. This represented a continuation of an existing trend, as several states had already experimented with public financing before the enactment of the presidential system under the 1974 FECA amendments.⁶⁹ In total, states established seven of the first eight public financing programs in existence.

State efforts continued over the next two decades. Between 1974 and 1998, over a dozen states adopted public financing programs, most of which were enacted through legislative action. Citizen-

⁶¹ *Id.* at 92-93.

⁶² *Id.* at 95-96.

⁶³ See, e.g., *Republican Nat’l Comm. v. Fed. Election Comm’n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980) (“If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign.”), *aff’d*, 445 U.S. 955 (1980); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (validating state’s interest in public financing “because such programs . . . tend to combat corruption”); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (recognizing public financing reduces the “possibility for corruption that may arise from large campaign contributions” and diminishes “time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning”); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 230 (2d Cir. 2010) (finding Connecticut program worked to “eliminate improper influence on elected officials”); *Ognibene v. Parkes*, 671 F.3d 174, 193 (2d Cir. 2011) (explaining that public financing system “encourages small, individual contributions, and is consistent with [an] interest in discouraging entrenchment of incumbent candidates”).

⁶⁴ *Id.* at 284-85.

⁶⁵ *Ariz. Free Enterprise Club’s Freedom PAC v. Bennett*, 564 U.S. 721 (2011).

⁶⁶ *Id.* at 754 (quotations and citations omitted).

⁶⁷ See *id.* at 753.

⁶⁸ To date, over 35 jurisdictions have adopted some form of public financing.

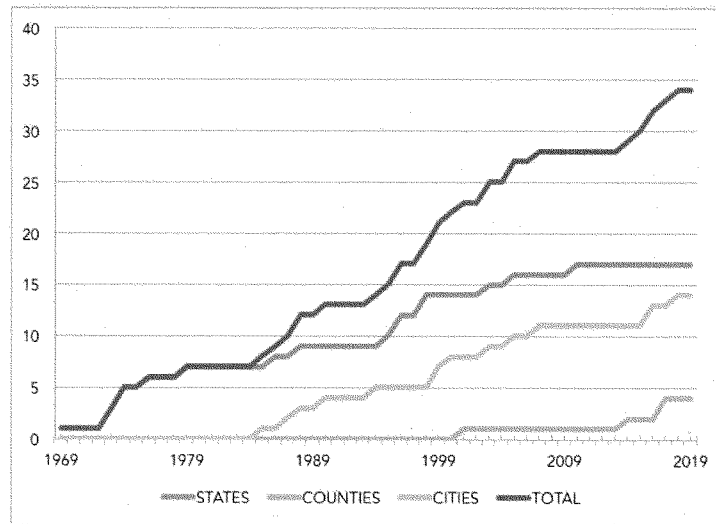
⁶⁹ For example, Oregon created a tax credit for individuals’ contributions to political campaigns in 1969. See Oregon Rev. Stat. § 316.102. Additionally, Colorado attempted to establish public funding for political parties in 1909, though the law was invalidated by the state’s supreme court the following year. BENJAMIN T. BRICKNER & NAOMI MUELLER, EAGLETON INST. OF POLITICS, RUTGERS UNIV., CLEAN ELECTIONS: PUBLIC FINANCING IN SIX STATES, INCLUDING NEW JERSEY’S PILOT PROJECTS 13 (2008).

driven initiatives were the exception rather than the rule, in part because only a limited number of jurisdictions allowed for lawmaking outside of the legislative process.

C. A Shift Towards Local Enactment and Ballot Initiatives

Gradually, local enactment of public financing, in cities and counties around the country, has eclipsed adoption at the state level.⁷⁰ Since 1999, only four states have established public financing programs compared to ten cities and four counties. Indeed, six localities have approved new public financing programs since 2015: Berkeley, CA; Howard County, MD; Portland, OR; Seattle, WA; Suffolk County, NY; and Washington, D.C.⁷¹

FIGURE 2: NUMBER OF PROGRAMS OVER TIME



70 Often, cities and counties with public financing programs for local elections are located within states that have public financing for statewide or legislative offices. For example, Maryland has offered public funds to gubernatorial candidates since 1974; subsequently, two of Maryland's most populous counties, Montgomery County and Howard County, have enacted public financing programs for local office. See Md. Code Ann. Elec. Law §§ 15-101–15-111; Montgomery Cty., Md., Code §§ 16-18–16-28; Howard Cty., Md., Code §§ 10.300–10.311.

71 This shift in innovation, from the state to the local level, reflects a broader trend in American policymaking. Today, cities and counties largely drive policy innovation; municipal governments are at the forefront of experimentation with new models of good governance. See generally BRUCE KATZ & JEREMY NOWAK, *THE NEW LOCALISM: HOW CITIES CAN THRIVE IN THE AGE OF POPULISM* (2017). See also *id.* at 2 ("Today, progress is evident among vanguard cities and metropolitan regions that are inventing new models of growth, governance, and finance. These novel and distinctive models focus intentionally and purposefully on inclusive and sustainable outcomes as measures of market success.").

As local enactment of public financing has accelerated, an increasing number of programs are being created through citizen-led ballot initiatives. Since the mid-1990s, almost an equal number of public financing programs have been established by ballot initiatives as by legislatures. Nonetheless, roughly two-thirds of existing public financing laws were enacted through the legislative process, while around a third were approved through direct democracy.

FIGURE 3: MEANS OF ENACTMENT

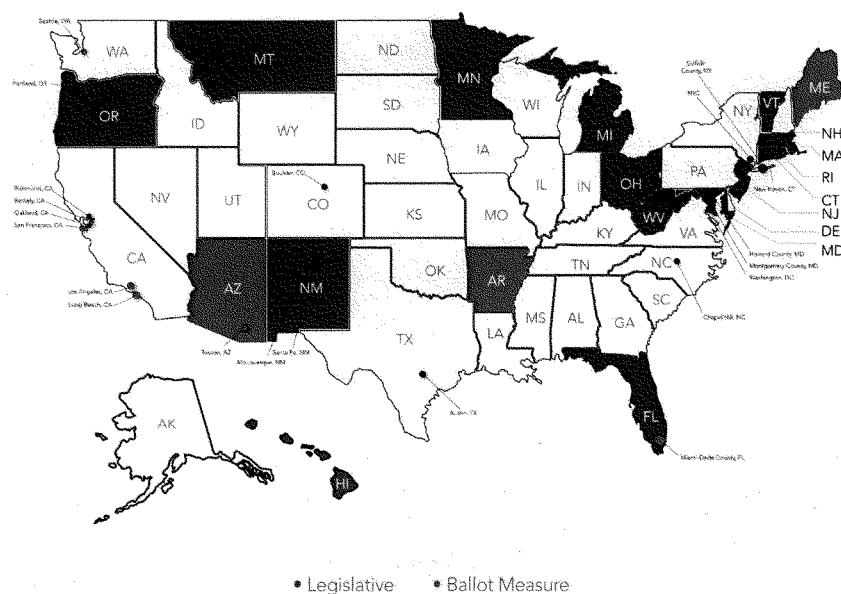
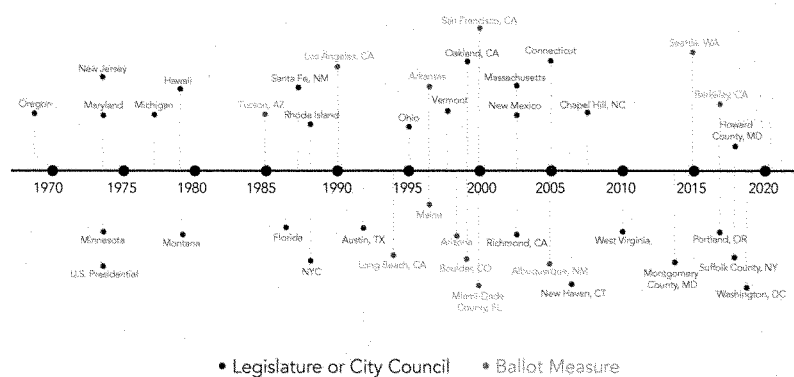


FIGURE 4: MEANS OF ENACTMENT OVER TIME

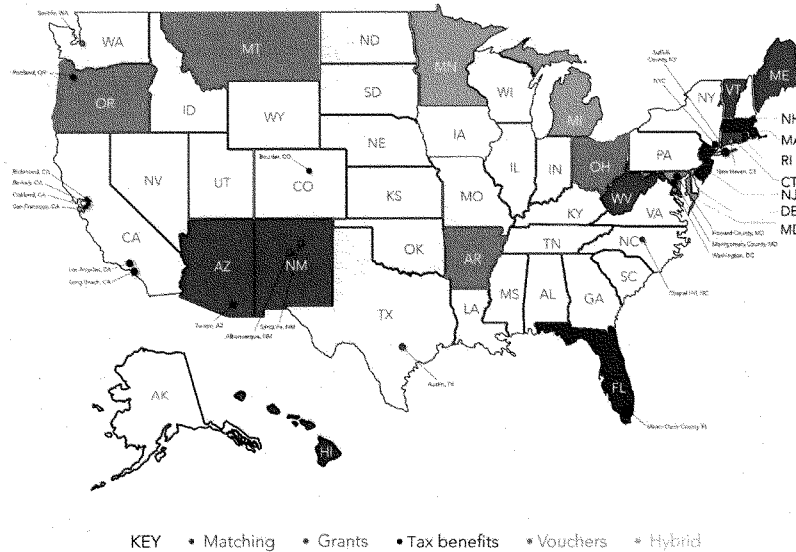


Finally, the motivations behind public financing laws have evolved over time. The creation of many of the earliest programs was spurred by nationwide anxiety over political corruption following the revelations of Watergate; in more recent years, reform often has come as a response to more localized issues. Amidst concerns that Seattle elections were dominated by a few wealthy contributors, over 60 percent of Seattle's voters approved the Democracy Voucher Program, in 2015, as a way to invigorate broader local engagement in campaigns and to encourage fresh faces to run for office.⁷² Increasingly, support for public financing is based not just in concerns over corruption, but in evidence that these programs can expand political participation and change how candidates interact with voters.

⁷² Bob Young, *Democracy vouchers win in Seattle; first in country*, SEATTLE TIMES (Nov. 3, 2015), <https://www.seattletimes.com/seattle-news/politics/democracy-vouchers/>.

IV. The Mechanics of Public Financing: Variations in Program Types

FIGURE 5: PROGRAM TYPE



As the total number of public financing programs has grown, the programs also have diversified in form. There are multiple types of programs in existence today, ranging from “Clean Elections” grant programs to tax benefit systems. With the exception of tax benefit systems, all public financing programs share a basic, three-part framework: qualification requirements, funding, and conditions of program participation.

Qualification. In this stage, candidates seeking public financing must satisfy a number of requirements in order to become eligible for funds. Often, candidates must demonstrate a threshold level of popular support by raising a certain amount of qualifying contributions before they will be able to collect public funds. In New York City, for instance, a city council candidate must raise at least \$5,000 of “matchable contributions,” in amounts between \$10 and \$175, from at least 75 residents of the relevant council district to qualify for public funding.⁷³ In addition, some programs

⁷³ N.Y.C. Admin. Code § 3.703(2)(a).

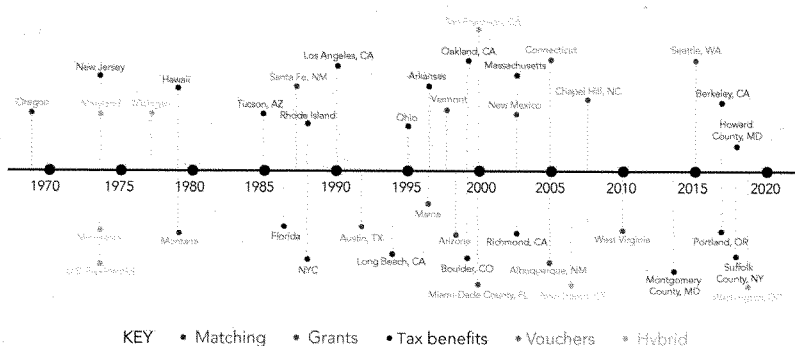


only provide public funds to candidates in a contested election⁷⁴ Lastly, prior to the dispersal of public funds, election administrators typically must certify that a candidate has, in fact, satisfied the qualification requirements by reviewing the candidate's filings for sufficiency.

Funding. After satisfying qualifying requirements, candidates will receive public funds in various forms—grants, matching funds, or vouchers—depending on the program. As detailed in the following sections, different types of programs furnish public funds to candidates through varying methods and at different points throughout the campaign.

Conditions. Once candidates have decided to participate in a public financing program, they are obligated to adhere to certain conditions attached to the disbursement of public funds. These conditions often include specific limits on contributions to a participating candidate, caps on total expenditures by a participating candidate, and requirements to return unused campaign funds after the election. Additionally, publicly financed candidates are often subject to mandatory audits to ensure accountability in the use of program funds.⁷⁵

FIGURE 6: PROGRAM TYPE ENACTMENT OVER TIME



74 See S.F. Campaign & Governmental Conduct Code §§ 1.140(b)(3), (c)(3); N.Y.C. Admin. Code § 3-703(5). Other jurisdictions give partial public funding to unopposed candidates. For example, Santa Fe provides a candidate in an uncontested election with 10 percent of the grant amount available to candidates in a contested race. Santa Fe, N.M., Mun. Code § 9-3.10(A)(4).

75 See, e.g., N.Y.C. Admin. Code § 3-710.

A. Grants

Grant programs provide qualifying candidates with lump-sum payments of public funds to finance their campaigns. The grant amount can be either for the full or partial cost of a campaign, depending on the program. In full grant systems, also called “Clean Elections” programs, participating candidates may only make campaign expenditures with public funds and may not raise private contributions after receipt of the grant; Arizona and Connecticut, among other jurisdictions, have full grant programs available for statewide and legislative candidates. In partial grant systems, participating candidates also receive lump-sum payments of public funds but may also raise some private contributions to use in conjunction with their grant funds.⁷⁶

Grant programs largely relieve participating candidates from the pressures of fundraising during the campaign. However, grant programs require periodic maintenance by legislative and regulatory bodies to ensure their viability and attractiveness to candidates amidst the constantly rising costs of modern campaigns.⁷⁷ The popularity of grant programs has declined in recent years, as the growing amount of independent spending in elections has lessened candidates’ willingness to limit their private fundraising activity.⁷⁸

B. Matching Funds

In matching funds programs, a jurisdiction will match certain private contributions received by a participating candidate with public funds at a set rate. Depending on the jurisdiction, private contributions are matched either dollar for dollar or at some multiple of private-to-public dollars. Generally, these programs limit the size of contributions eligible for a match (e.g., \$250 or less) and will not match contributions from certain sources (e.g., government contractors).

Until the late 1990s, the match ratios in these programs were typically set at one-to-one, with a handful of programs offering a two-to-one match in public-to-private dollars. More recently, however, some localities have opted for larger match rates, such as four-to-one or six-to-one public-to-private dollar ratios.

New York City initially implemented its matching funds program, in 1988, using a match rate of one-to-one. In 1998, the city raised the rate to four-to-one, and, in 2007, the city again increased it to six-to-one.⁷⁹ Other jurisdictions have followed suit. In 2013, Los Angeles increased its matching funds rate from one-to-one to a multiple match.⁸⁰ Many of the recently enacted programs—including Berkeley, CA; Howard County, MD; and Montgomery County, MD—have similarly opted for a multiple match.

⁷⁶ See Mass. Gen. Laws ch. 55C (“Limited Public Financing of Campaigns for Statewide Elective Office”).

⁷⁷ This point is discussed in greater detail in Part V.

⁷⁸ Moreover, many of these programs included trigger provisions like the Arizona provision held unconstitutional by the Supreme Court in 2011. See, e.g., Albuquerque, N.M., Charter art. XVI, § 16. Thus, these programs need updating in order to provide candidates with sufficient flexibility and a way to raise additional funds when faced with a high-spending opponent or substantial independent expenditures.

⁷⁹ For example, New York City will match a \$175 campaign donation from a city resident with \$1,050 in public funds (6 x \$175 = \$1,050), raising the donation’s total value to \$1,225 after the match. N.Y.C. Admin. Code § 3-705(2)(a); N.Y.C. Campaign Fin. Bd., *History of the CFB* (2018), <https://www.nycfb.info/about/history/>.

⁸⁰ See Los Angeles Mun. Code § 49.7.27.

Matching funds programs still require candidates to fundraise from private sources, but that burden—and the dependence on big donors—is substantially reduced. Moreover, the quantity of public funds available to a participating candidate in a matching funds system is linked to the degree of public support for the candidate throughout the campaign.

C. Vouchers

Vouchers are a novel and innovative public funding method, with Seattle being the first and only U.S. jurisdiction using a voucher program today. Under a voucher system, a jurisdiction provides eligible citizens with a credit of public funds (i.e., “vouchers”) to assign to participating candidates of their choosing. In Seattle, city residents receive four \$25 vouchers, worth \$100 in total, each election year. Seattle residents may assign their vouchers to different candidates, or donate them all to the same campaign.⁸¹ Once residents have assigned vouchers to a participating candidate, the candidate can redeem them with the city for public funds to use in their campaign.

A distinctive feature of vouchers is their capacity to promote broad electoral participation by citizens, irrespective of their financial circumstances. As with matching funds, voucher systems still obligate participating candidates to fundraise, but the candidates need only ask for vouchers, rather than private dollars, which eases the toll of fundraising for both candidates and individual contributors.

D. Tax Benefits

Tax benefit systems differ qualitatively from other methods of public financing. Unlike systems that award public funds to qualifying candidates in exchange for special limits on their campaign activities, tax benefit systems simply provide incentives for citizens to make private donations. In these programs, individuals who contribute to candidates or political parties are eligible for a rebate or tax credit, which is typically capped by statute, upon filing their state income taxes.⁸²

Similar to other public financing models, tax benefit systems encourage constituents’ participation in the electoral process. However, these programs give less direct support to candidates and do little to alleviate campaigns’ reliance on large, private contributions.

E. Hybrid Systems

Generally, any of the preceding types of public financing can be combined into a hybrid system. The presidential public financing system is the most prominent example of a hybrid system, offering participating candidates matching funds during the primaries and lump-sum grants for the general election. Several states likewise utilize hybrid systems of public financing in gubernatorial elections.⁸³ Washington, D.C.’s recently enacted program is also a hybrid: Beginning in 2020, participating candidates will receive a lump-sum payment upon qualification followed by a five-to-one match for contributions from D.C. residents.⁸⁴

⁸¹ Seattle Mun. Code § 2.04.620.

⁸² See, e.g., Ark. Code § 7-6-222 (offering credit up to \$50 on an individual’s tax return, or \$100 if joint filing, for contributions to state candidates, political action committees, or political parties).

⁸³ See Md. Code Ann. Elec. Law §§ 15-101–15-111; Mich. Comp. Laws §§ 169.261–169.267.

⁸⁴ D.C. Code § 1-1163 Part C-i.

V. Looking Forward: The Future of Public Financing

Public financing, in its myriad forms, can fundamentally reorient the focus of election campaigns by encouraging new and diverse voices to enter the political fold and reducing the predominance of moneyed interests in modern elections.⁸⁵ However, the appeal of public financing depends on understanding that it is not a silver bullet for all of our democracy's ailments, and these programs are most effective when combined with other structural changes to the campaign process, including greater disclosure and more robust enforcement.

A successful public financing program must be tailored to the locality or state enacting it, and should be complemented by additional reforms that encourage transparency and accountability in the political system. While each jurisdiction must decide which mechanism of public funding is right for its community, a few principles underlie all successful public financing programs.

Maintaining a Viable Program. One critical element of an effective public financing program is its adaptability to changes in election practices. In response to evolving standards in campaigning, lawmakers and regulators must update public financing programs to provide candidates with competitive levels of funding, which encourages participation in the program.

When public funding programs become outmoded, candidate participation declines. The presidential public funding program presents a regrettable illustration of candidate drop-off in a neglected public financing system.⁸⁶ On the other hand, jurisdictions that have made necessary amendments to their programs have maintained high rates of participation. As discussed in Part IV, New York City has periodically increased the match rate available in its public funding program. Between 2001 and 2013, local candidate participation in the city's program was over 91 percent for the primaries and 69 percent in general elections.⁸⁷ Amidst the impressive rates of participation, New York City has experienced positive effects within the larger electoral process, including greater participation by small donors who reflect the city's diverse demographics.⁸⁸ All jurisdictions with public financing should track systematic measurements of participation in their public financing programs in order to gauge a program's viability over time and identify potential weaknesses.

Innovation. Relatedly, lawmakers should embrace innovations within public financing and tailor programs to best fit the needs of their communities. In 2017, Seattle held its first election under the Democracy Voucher Program. Early analyses demonstrate

⁸⁵ For more information on the salutary effects of public financing, see Campaign Legal Center, *Fact Sheet: Public Financing in Elections*, July 27, 2017, <https://campaignlegal.org/document/fact-sheet-public-financing-elections>.

⁸⁶ See *supra* Part II(B)(3).

⁸⁷ N.Y.C. Campaign Fin. Bd., 2013 Post Election Report 46 (2013), https://www.nycffb.info/sites/default/files/pressfiles/2013_PER.pdf.

⁸⁸ ELISABETH GINN ET. AL., BRENNAN CTR. FOR JUSTICE & CAMPAIGN FIN. INST., *DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS* 10 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

that the 2017 donor base in Seattle campaigns was larger and more diverse than in previous elections.⁸⁹ In addition, Seattle residents' participation in the Democracy Voucher Program corresponded with improved voter turnout: Nearly 90 percent of city residents who used their vouchers voted in 2017 compared to only 43 percent of those who did not use their vouchers.⁹⁰

Secure Funding. Another essential element of success for any public financing program is a dependable source of funding. It may seem self-evident, but program administration will suffer and an otherwise well-designed program will become obsolete without sufficient and consistent funds. When possible, codifying a guarantee of funding within the public financing law is one of the best ways to secure financial viability. Moreover, if a program relies upon taxpayer designations for funding, lawmakers should take into account the declining rates of taxpayer participation for both federal and state public finance programs and consider more secure alternatives.

Outreach & Education. A key factor in the implementation of a new public financing program is informing both potential candidates and voters about the program's existence. By offering the public an opportunity to learn about the benefits of public financing, outreach and education efforts help to ensure high rates of participation among candidates as well as community support for the program. After Seattle voters approved the Democracy Voucher Program, the Seattle Ethics and Elections Commission partnered with local groups in conducting a multifaceted outreach campaign that included multi-language focus groups and the targeted distribution of information to minority communities around the city.⁹¹ This outreach helped to drive the record level of local participation in city campaigns in 2017. Additionally, effective outreach and education to candidates can help alleviate concerns about a new program.

Recordkeeping & Auditing. Public finance programs help to ensure transparency and accountability when they entail detailed recordkeeping requirements both for candidates and election administrators. On the candidate side, recordkeeping helps to assure compliance and boosts transparency. For administrators, recordkeeping aids audit and enforcement efforts. Moreover, administrative oversight is essential to maintain a program's integrity, detect any attempts to defraud the program, and preserve the public's confidence in public financing.

Understanding the Objectives. Finally, it is important to stress that the goal of public financing is not to get money out of politics. Political campaigns cost money, and we are living in the post-*Citizens United* universe of unlimited independent spending. Public financing simply provides candidates with a choice: They can continue to

89 JENNIFER HEERWIG & BRIAN MCCABE, CTR. FOR STUDIES IN DEMOGRAPHY & ECOLOGY, UNIV. OF WASH., EXPANDING PARTICIPATION IN MUNICIPAL ELECTIONS: ASSESSING THE IMPACT OF SEATTLE'S DEMOCRACY VOUCHER PROGRAM (2018), https://www.jenheerwig.com/uploads/1/3/2/1/13210230/mccabe_heerwig_seattle_voucher_4.03.pdf.

90 *Id.*

91 See SEATTLE ETHICS & ELECTIONS COMM'N, DEMOCRACY VOUCHER PROGRAM BIENNIAL REPORT 2017-22 (2018), https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20-%20Biennial%20Report%20-%202003_15_2018.pdf.

raise large, private contributions from a small number of big donors, or, through a well-designed system of public financing, they can opt to run a competitive race funded by small-dollar contributions and bolstered by public funds. The concept of public funding further recognizes that citizens' involvement in campaigns is an important means of civic engagement that often precipitates other forms of political participation, like volunteering for campaigns and voting. It is critical that lawmakers understand what public financing can—and cannot—achieve when formulating a program.

Public financing offers a versatile and powerful tool for cities, counties, and states seeking to improve the integrity and accessibility of elections. When public financing systems are well structured and updated as necessary, these programs have proven to be a viable method to advance the U.S. Constitution's promise of democratic self-governance.

VI. Public Financing Program Summaries

Federal

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
U.S. presidential elections; enacted 1974.	Presidential public funding program ⁹² provides 1:1 matching funds up to \$250 for contributions from individuals during primaries, and full grants in general election to participating candidates.	President.	For primaries, candidates must raise threshold amount of at least \$5,000 in at least 20 states from contributions of \$250 or less from individuals. For general election, major party nominees are automatically eligible.	Spending limits ; in primaries, there are per-state limits and aggregate limit.

States & Washington, D.C.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
Arizona; enacted 1998.	Arizona Citizens Clean Elections Act ⁹³ provides full grants to participating candidates.	Governor; Legislature; Mine Inspector; Treasurer; Superintendent of Public Instruction; Corporation Commission; Secretary of State; Attorney General.	Candidates must collect a minimum number of qualifying contributions of \$5.	Spending limit.
Arkansas; enacted 1996.	Arkansas Code ⁹⁴ provides a tax credit up to \$50, or \$100 for joint return, for contributions made to a candidate, political action committee, or political party.	Not applicable.	Not applicable.	Not applicable.
Connecticut; enacted 2005.	Connecticut Citizens' Election Program ⁹⁵ provides	Governor; Lieutenant Governor; Attorney	Candidates must raise minimum number and	Spending limit.

92 26 U.S.C. Subtitle H.

93 Ariz. Rev. Stat. tit. 16, ch. 6, art. 2.

94 Ark. Code Ann. § 7-6-222.

95 Conn. Gen. Stat. tit. 9, ch. 157.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
	full grants to participating candidates in primary and general elections.	General; State Comptroller; State Treasurer; Secretary of State; General Assembly.	threshold amount of contributions from state residents or district residents (legislative).	
Florida; enacted 1986.	Florida Election Campaign Financing Act ⁹⁶ provides matching funds at tiered rates for contributions from state residents.	Governor; Lieutenant Governor; Attorney General; Chief Financial Officer; Commissioner of Agriculture.	Candidates must raise threshold amount of contributions from state residents.	Spending limit.
Hawaii; enacted 1979.	Hawaii ⁹⁷ provides 1:1 matching funds for contributions up to \$100 from state residents.	Governor; Lieutenant Governor; County Mayor; County Prosecutor; State Legislature; Office of Hawaiian Affairs.	Candidates must raise a threshold amount of contributions from state residents.	Spending limit. Public funds cap.
Maine; enacted 1996.	Maine Clean Election Act ⁹⁸ provides full grants to participating candidates.	Governor; Legislature.	Candidates must raise a minimum number of contributions from registered voters in state.	Spending limit.
Maryland; enacted 1974.	Maryland Public Financing Act ⁹⁹ provides 1:1 matching funds in primaries, and full grants in general election.	Governor.	Candidates must raise threshold amount of contributions from state residents.	Spending limit.
Massachusetts; enacted 2003.	Massachusetts public financing program ¹⁰⁰ provides 1:1 matching funds for contributions up to \$250 from individuals.	Governor; Lt. Governor; Attorney General; Secretary of Commonwealth; Treasurer and Receiver General; Auditor.	Candidates must raise threshold amount of contributions from individuals.	Spending limit. Public funds cap.

⁹⁶ Fla. Stat. tit. IX, ch. 106.

⁹⁷ Haw. Rev. Stat. tit. 2, ch. 11, pt. XIII-J.

⁹⁸ Me. Rev. Stat. tit. 21-A, ch. 14.

⁹⁹ Md. Elec. Law Title. 15.

¹⁰⁰ Mass. Gen. Laws ch. 55C.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
Michigan; enacted 1976.	Michigan Campaign Finance Act ¹⁰¹ provides candidates with 2:1 matching funds in primary, and choice of 1:1 matching funds or partial grant in general election.	Governor.	For primary funding, candidates must raise threshold amount of contributions from state residents. For general election funding, major party candidate is automatically eligible for partial grant; matching funds available if candidate raises threshold amount of contributions from state residents.	Spending limit. Public funds cap.
Minnesota; enacted 1974.	Minnesota Public Subsidy Program ¹⁰² provides partial grants to candidates in general election, and offers refunds up to \$50, or \$100 if joint filers, to state residents who make political contributions.	Governor; Lieutenant Governor; Attorney General; Secretary of State; State Auditor; Legislature.	Candidates must raise threshold amount of contributions from state residents.	Spending limit.
Montana; enacted 1979.	Montana Code ¹⁰³ provides itemized tax deduction of \$100, or \$200 for joint return, for political contributions made by state residents.	Not applicable.	Not applicable.	Not applicable.
New Jersey; enacted 1974.	New Jersey's public financing program ¹⁰⁴ provides 2:1 matching funds for a contribution up to \$1,500.	Governor.	Candidates must raise a threshold amount of \$430,000.	Spending limit. Public funds cap. Debates.

101 Mich. Comp. Laws ch. 169.

102 Minn. Stat. ch. 10A.

103 Mont. Code. Ann. § 15-30-2131(1)(d).

104 N.J. Stat. tit. 19, ch. 44A.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
New Mexico; enacted 2003.	New Mexico Voter Action Act ¹⁰⁵ provides full grants to participating candidates.	New Mexico Supreme Court; Court of Appeals; Public Regulation Commission	Candidates must raise a minimum number of \$5 contributions from registered voters in the state, or registered voters in district (Public Regulation Commission).	Spending limit.
Ohio; enacted 1995.	Ohio Code ¹⁰⁶ provides tax credit up to \$50, or \$100 for joint return, for contributions to statewide and legislative candidates.	Not applicable.	Not applicable.	Not applicable.
Oregon; enacted 1969.	Oregon tax law ¹⁰⁷ provides tax credit up to \$50, or \$100 for joint return, for contributions to political parties or federal, state, or local candidates.	Not applicable.	Not applicable.	Not applicable.
Rhode Island; enacted 1988.	Rhode Island's public financing program ¹⁰⁸ provides matching funds at tiered rates for participating candidates.	Governor; Lieutenant Governor; Secretary of State; Attorney General; General Treasurer.	Candidates must raise minimum number and threshold amount of contributions.	Spending limit. Public funds cap.
Vermont; enacted 1997.	Vermont Public Financing Option ¹⁰⁹ provides full grants to participating candidates.	Governor; Lt. Governor.	Candidates must raise a minimum number and threshold amount of contributions of \$50 or less from	Spending limit.

105 N.M. Stat. Ann. ch. 1, art. 19A.

106 Ohio Rev. Code § 5747.29.

107 Oregon Rev. Stat. § 316.102.

108 R.I. Gen. Laws tit. 17, ch. 25.

109 Vt. Stat. Ann. tit. 17, ch. 17, subch. 5.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
			registered voters in state.	
Washington, District of Columbia; enacted 2018.	D.C. Fair Elections Program ¹¹⁰ provides partial grants, and 5:1 matching funds for contributions from city residents.	Mayor; Attorney General; District Council; and State Board of Education.	Candidates must raise a minimum number and threshold amount of threshold of contributions from city residents.	Public funds cap. Debates.
West Virginia; enacted 2010.	West Virginia Public Campaign Financing Fund ¹¹¹ provides full grants to participating candidates.	West Virginia Supreme Court of Appeals.	Candidates must raise threshold amount of contributions from registered voters in state.	Spending limit.

Cities and Counties

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
Albuquerque, New Mexico; enacted 2005.	Albuquerque Open and Ethical Elections Code ¹¹² provides full grants to participating candidates.	Mayor; City Council.	Candidates must collect minimum number of qualifying contributions of \$5 from registered voters in city.	Spending limit.
Austin, Texas; enacted 1992.	Austin Fair Campaign Finance Fund ¹¹³ provides partial grants to participating candidates in runoff election.	Mayor; City Council.	Candidates must sign campaign contract.	Spending limit. Debates.
Berkeley, California; enacted 2016.	Berkeley Fair Elections Act ¹¹⁴ provides 6:1 matching funds for contributions from city residents.	Mayor; City Council.	Candidate must raise a minimum number and threshold amount of contributions from city residents.	Spending limit. Public funds cap.
Boulder, Colorado; enacted 2000.	Boulder public financing system ¹¹⁵ provides 1:1	City Council.	Candidates must raise a minimum number and	Spending limit. Public funds cap.

110 D.C. Mun. Code tit. 1, ch. 11A, subch. III, part C-i.

111 W.V. Code. ch. 3, art. 12.

112 Albuquerque, N.M., City Charter art. XVI.

113 Austin, Tex., Code tit. 2, ch. 2.2, art. 7.

114 Berkeley, Cal., Mun. tit. 2, ch. 2.12, art. 8.

115 Boulder, Colo., Mun. Code tit. 13, ch. 2.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
	matching funds for contributions of \$100 or less.		threshold amount of contributions from individual donors.	
Chapel Hill, North Carolina; enacted 2008.	Chapel Hill Voter-Owned Elections Program ¹¹⁶ provides full grants to participating candidates.	Mayor; Town Council.	Candidates must raise minimum number and threshold amount of contributions from registered voters in Chapel Hill.	Spending limit.
Howard County, Maryland; enacted 2017.	Howard County Citizens' Election Fund ¹¹⁷ provides matching funds at tiered rates for contributions from county residents.	County Executive; County Council.	Candidates must raise minimum number and threshold amount of contributions from county residents.	Spending limit. Public funds cap.
Long Beach, California; enacted in 1994.	Long Beach Campaign Reform Act ¹¹⁸ provides matching funds at 1:2 public-to-private dollar rate.	Mayor; City Council; City Attorney; City Auditor; City Prosecutor.	Candidates must raise threshold amount of contributions.	Spending limit. Public funds cap.
Los Angeles, California; enacted 1990.	Los Angeles Municipal Code ¹¹⁹ provides matching funds at separate rates for primary and general elections.	Mayor; City Council; City Attorney; Controller.	Candidates must raise minimum number and threshold amount of contributions from city residents, or district residents (city council).	Spending limit; limit may be removed on the basis of opponent spending or independent expenditures. Public funds cap.
Miami-Dade, FL; enacted 2000.	Miami-Dade County's Election Campaign Financing Trust Fund ¹²⁰ provides partial grants to qualifying candidates.	Mayor; Board of County Commissioners.	Candidates must raise minimum number and threshold amount of contributions from registered voters in Miami-Dade County.	Spending limit.

116 Chapel Hill, N.C., Code ch. 2, art. V.

117 Howard County, Md., Code tit. 10, subtit. 3.

118 Long Beach, Cal., Mun. Code tit. 2, ch. 2.01, div. IV.

119 Los Angeles Mun. Code ch. IV, art. 9.7.

120 Miami-Dade County Code § 12-22.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
Montgomery County, Maryland; enacted 2014.	Montgomery County Code ¹²¹ provides matching funds at tiered rates for contributions from county residents.	County Executive; County Council.	Candidates must raise minimum number and threshold amount of contributions from county residents.	Public funds cap.
New Haven, Connecticut; enacted 2006.	New Haven Democracy Fund ¹²² provides partial grants, and matching funds at tiered rates for contributions from registered voters in city.	Mayor.	Candidates must raise minimum number of contributions from registered voters in city.	Spending limit; limit may be removed or increased on basis of opponent spending. Public funds cap.
New York City, New York; enacted 1988.	New York City Matching Funds Program ¹²³ provides participating candidates with 6:1 matching funds for contributions from city residents.	Mayor; City Council; Comptroller; Public Advocate; Borough President.	Candidates must collect a minimum number and threshold amount of contributions from city residents.	Spending limit. Public funds cap. Debates.
Oakland, California; enacted 1999.	Oakland Limited Public Financing Act ¹²⁴ provides 1:1 matching funds for contributions from city residents and business.	City Council.	Candidates must raise a threshold amount of contributions from city residents and business, and make a threshold amount of expenditures.	Spending limit. Public funds cap.
Portland, Oregon; enacted 2016.	Portland Open and Accountable Elections Program ¹²⁵ provides 6:1 matching funds for contributions from city residents.	Mayor; Commissioner; Auditor.	Candidates must raise minimum number and threshold amount of contributions from city residents.	Spending limit. Public funds cap.
Richmond, California; enacted	Richmond Municipal Code ¹²⁶ provides	Mayor; City Council.	Candidates must be opposed by at least	Public funds cap.

121 Montgomery County, Md., Code ch. 16, art. IV.

122 New Haven, Conn., Code tit. III, ch. 2, art. XI.

123 New York City Admin. Code tit. 3, ch. 7.

124 Oakland, Cal., Mun. Code tit. 3, ch. 3.13.

125 Portland, Or., City Code tit. 2, ch. 2.16.

126 Richmond, Cal., Mun. Code art. II, ch. 2.43.

Jurisdiction; year of enactment.	Summary	Office Eligible	Qualification Criteria	Program Conditions
2003.	matching funds in \$5,000 increments.		one other candidate for the same office.	
San Francisco, California; enacted 2000.	San Francisco Campaign and Governmental Conduct Code ¹²⁷ provides partial grants, and matching funds at tiered rates for contributions from city residents.	Mayor; Board of Supervisors.	Candidates must raise minimum number and threshold amount of contributions from city residents.	Spending limit; limit may be increased on the basis of opponent spending or independent expenditures. Public funds cap.
Santa Fe, New Mexico; enacted 1987.	Santa Fe Public Campaign Finance Code ¹²⁸ provides full grants to participating candidates.	Mayor; City Council; Municipal Judge.	Candidates must raise minimum number of \$5 contributions from registered voters in city.	Spending limit.
Seattle, Washington; enacted 2015.	Seattle Democracy Voucher Program ¹²⁹ provides city residents with \$100 in vouchers to contribute to participating candidates.	Mayor; City Council; City Attorney.	Candidates must raise minimum number of contributions of at least \$10 from city residents.	Spending limit; limit may be removed on the basis of opponent spending or independent expenditures. Debates.
Suffolk County, New York; enacted 2017.	Suffolk County Fair Elections Matching Fund ¹³⁰ provides 4:1 matching funds for contributions from county residents.	County Executive; County Legislator.	Candidates must raise minimum number and threshold amount of contributions from individuals.	Spending limit. Public funds cap.
Tucson, Arizona; enacted 1985.	Tucson's public financing program ¹³¹ provides 1:1 matching funds for contributions from individuals.	Mayor; City Council.	Candidates must raise a minimum number of contributions of \$10 or less from city residents.	Spending limit.

127 S.F. Campaign & Governmental Conduct Code art. I, ch. 1.

128 Santa Fe, N.M., Mun. Code ch. IX, § 9-3.

129 Seattle Mun. Code tit. 2, ch. 2.04, subtitle VIII.

130 Suffolk County, N.Y., Charter art. XLII.

131 Tucson, Ariz. Charter Ch. XVI, subch. B.



ABOUT CAMPAIGN LEGAL CENTER

Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization based in Washington, D.C. Through litigation, policy analysis, and public education, CLC works to protect and strengthen the U.S. democratic process across all levels of government. CLC is adamantly nonpartisan, holding candidates and government officials accountable regardless of political affiliation.

CLC was founded in 2002 and is a recipient of the prestigious MacArthur Award for Creative and Effective Institutions. Its work today is more critical than ever as it fights the current threats to our democracy in the areas of campaign finance, voting rights, redistricting, and ethics. Most recently, CLC argued *Gill v. Whitford*, the groundbreaking Supreme Court case seeking to end extreme partisan gerrymandering. In addition, CLC plays a leading watchdog role on ethics issues, providing expert analysis and helping journalists uncover ethical violations, and participates in legal proceedings across the country to defend the right to vote.

Statement for the Record

In Support of H.R. 1, For the People Act of 2019

February 14, 2019

Submitted to the Committee on House Administration

Dear Chairperson Lofgren, Ranking Member Davis, and Members of the Committee,

Our organizations represent a diverse set of interests and have differing mandates and areas of focus, but we coalesce together around a shared goal of swiftly advancing the For the People Act, H.R. 1, as a bold and comprehensive package. We welcome the opportunity to offer our support before this committee.

We are members of the Declaration for American Democracy coalition, which seeks fundamental democracy reforms to create a government that is reflective, responsive and accountable. Our organizations applaud the committee for quickly turning its attention to this landmark legislation.

We believe it is essential for the House to act quickly to pass bold democracy reforms and to demonstrate a holistic approach in addressing a series of fundamental problems facing our democracy. We also believe the House must ensure that H.R. 1 is not weakened or divided in the process, and that it pass as a strong, comprehensive package of reforms.

The Declaration for American Democracy coalition believes:

- A strong democracy is one where voting is a fundamental right and a civic responsibility.
- A strong democracy serves the people rather than the private interests of public officials and wealthy political donors.
- A strong democracy is one where our influence is based on the force of ideas, not the size of our wallets.
- A strong democracy is one where people know who is trying to gain influence over our representatives, who is trying to influence our votes, and how and why policy is being made.
- A strong democracy works to respond to the needs of all people and their communities, building trust in governance and equity.

H.R.1 includes reforms essential to fixing our political system, including voting rights, money-in-politics, redistricting and government ethics reforms. These reforms are

interdependent on one another and must be addressed holistically if we are to truly address the threats to democracy.

Further, passing H.R. 1 as a bold and comprehensive package as the first order of business unlocks further potential to advance other legislative items in the session. By demonstrating that creating a democracy that is inclusive of and responsive to every American is the top priority, the House can help to shore up support for subsequent reforms.

A *Wall Street Journal*/NBC News poll¹ in advance of the 2018 midterm elections found that 77 percent of surveyed registered voters agreed that “Reducing the influence of special interests and corruption in Washington” is either the most important or a very important issue facing the country.

This was reflected by the views of 47 newly-elected Members who were among 107 Democratic challengers to write² during the campaign urging that sweeping reforms “be the very first item Congress addresses.” Many successful midterm campaigns centered the importance of bold democracy reforms, and voters who ushered in the new Congress now expect that the House deliver on those promises.

The American people know that Washington is not representing their best interests when millions of eligible voters cannot vote because they are not properly registered, when voting laws are used to disenfranchise millions of Americans, and when citizens are improperly purged from voter rolls. They recognize that specific communities are disproportionately targeted for voter suppression, including young people, communities of color, and LGBTQ+ individuals.

The American people know that Washington is not representing their best interests when wealthy Americans give huge contributions to Super PACs and dark money groups to influence our elections and to buy influence over government policies, at the great expense of ordinary Americans who are not empowered in the political process.

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² <http://endcitizensunited.org/wp-content/uploads/2018/10/A-Letter-for-Reform.pdf>

positions and private interests and when ethics rules are not subject to proper oversight and enforcement.

And the American people know that these problems result in a rigged system in Washington that is blocking substantive policies of great importance to ordinary Americans, such as more affordable healthcare, lower prescription drug prices, a fairer tax system and the like.

We call on you to quickly advance H.R. 1 as a strong and holistic package.

The 116th Congress has a historic opportunity to repair our broken political system and strengthen the integrity of our democracy, and we strongly urge the House to seize this moment.

Sincerely,

20/20 Vision

American Oversight

Blue Future + the Youth Progressive Action Catalyst

Brave New Films

Campaign for Accountability

Center for American Progress

Citizens for Responsibility and Ethics in Washington (CREW)

Clean Elections Texas

Coalition to Preserve, Protect & Defend

Common Cause

Communications Workers of America (CWA)

Democracy 21

Democracy Matters

Democracy Spring

End Citizens United Action Fund

Every Voice

Franciscan Action Network

Free Speech For People

Indivisible

League of Conservation Voters

League of Women Voters

Let America Vote

MAYDAY America

MomsRising

NARAL Pro-Choice America

National Association of Social Workers (NASW)

National Council of Jewish Women

National Redistricting Action Fund

NETWORK Lobby for Catholic Social Justice

Network of Spiritual Progressives

Our Revolution

Patriotic Millionaires

People For the American Way

People's Action Institute

Poligon Education Fund

Progressive Turnout Project

Public Citizen

Sierra Club

Stand Up America

Tikkun

Truman National Security Project

Union of Concerned Scientists

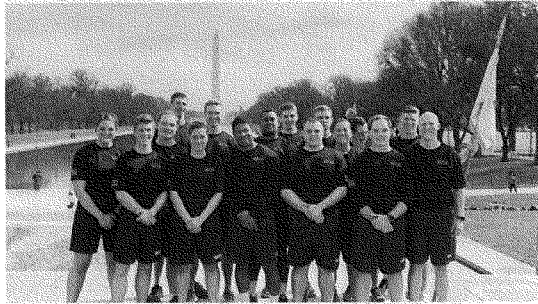
Unitarian Universalist Association

URGE: Unite for Reproductive and Gender Equity

Voices for Progress

Wolf-PAC

FEATURES



MEET THE NEWEST GENERATION OF USCP OFFICERS

With 191 new officers, Fiscal Year 2018 was a record-breaking year for hiring at the United States Capitol Police. In comparison, in Fiscal Year 2015, the Department hired only 62 new recruits. Recruitment numbers have been increasing each year since then. In fact, roughly a quarter of the current sworn workforce was hired in just the past five years.

What's causing this surge in hiring? Primarily, it is due to the increasing security needs of the Capitol Complex.

"About four years ago, the Capitol Police Board, our oversight committees, and congressional leaders identified several additional security initiatives, such as protecting the new O'Neill House Office Building, securing House parking garages, and adding additional layers of screening. They recognized that these initiatives would stretch our existing manpower," said Mr. Richard Braddock, USCP Chief Administrative Officer.

"The Capitol Police Board and Congress decided to provide us with the opportunity to hire more officers by investing more funds in us. That speaks volumes about their respect for our Department and the importance of what our officers do every day to protect the Capitol Complex."

The last time the Department had a hiring surge like this was after the 9/11 terrorist attacks. At that time, the Department hired nearly 500 new employees. Many of those same employees will be approaching their 20-year mark and will be eligible to retire, so the Department's hiring surge addresses potential attrition as well.

"Ten years ago, we only had four or five recruit classes per year. Today, we have one recruit class per month," said Braddock, who says this hiring pace will continue for the foreseeable future.

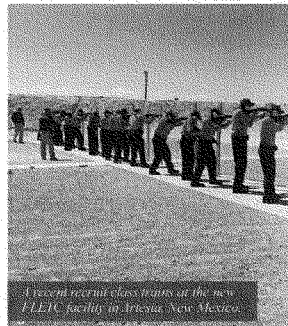
So, who are these new officers? We interviewed 10 of the Department's newest officers who graduated in 2018 to find out why they chose a career with the United States Capitol Police, and how this newest generation of officers may shape the Department in the years ahead.

Here's what we learned:

THEY ARE DIVERSE.

Last year's recruits hailed from 26 different states – with the bulk being from the Mid-Atlantic and Northeast. A quarter of them are female, which attests to the Department's efforts and success in recruiting more female officers than the national average. And while many officers came straight from college, many also came with professional work experience under their belts. We have former football coaches, dispatchers, teachers, fishermen, congressional staffers, corrections officers, athletes, bankers, Civil War re-enactors, local police officers, corporate security personnel, and many more with incredible life experiences. Roughly 17 percent have served in the armed services, representing nearly every branch of the military.

This diverse profile of recent recruits is in line with the Department's strategy, which is to seek quality candidates from underrepresented populations – not necessarily just in terms of race or gender, but in terms of geography, professional backgrounds, and life experiences.



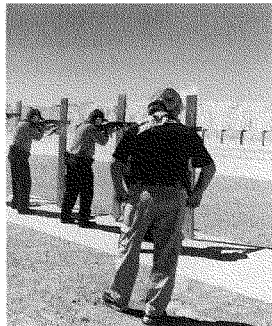
A recent recruit class trains at the new FLETC facility in Artesia, New Mexico.

FEATURES

"Everyone in my recruit class brought something different to the table. We had one person among us who didn't attend college, but worked professionally his whole life, and he was great. It's nice that this Department recognizes that we don't all have to be the same person to be successful here," said Officer Morgan Chase (Senate Division), who studied government and global terrorism, interned at Homeland Security Investigations, and hopes to join the Intelligence Analysis Division one day.

THEY ARE THE "FIRSTS" FOR ARTESIA.

This generation broke ground as the first recruits to complete their recruit officer training at a new Federal Law Enforcement Training Center (FLETC) facility in Artesia, New Mexico. Previously, USCP only sent its recruit classes to the primary FLETC campus located in Glynn, Georgia. Recruit Officer Class #190, which graduated in March 2018, was the first class sent to Artesia for initial training. Since then, four more classes have attended the Uniformed Police Training Program there.



But regardless of where they trained, the recruits unanimously expressed how much they enjoyed their training experience and operating in a team environment. That's what they miss the most about training – spending large amounts of time together and forging strong friendships.

"During the training phase, I formed a lot of bonds with my classmates," said Officer Christopher Wilkerson (Senate Division) who was a teacher at an alternative education school. "We had study groups and we would huddle around and help each other so that we could see each other succeed. I think we're all going to be friends for life."

THEY ARE AMBITIOUS AND READY TO GIVE BACK.

After speaking with these new officers, one thing is very clear: This incoming generation is eager to grow within the Department, be a part of the team, and help to shape the Department's future. In fact, one of the main reasons they were attracted to USCP are the wealth of opportunities to join specialty units and be promoted into leadership positions.

"There is so much opportunity here – between dignitary protection, K-9, special events, recruitment, promotions, and chances to work in other divisions. I always try to look for opportunities and get as much experience as I can," said Officer Sherwood Jones (House Chambers Section), who has a public safety background as a volunteer EMT and firefighter. He worked in the USCP Communications Division as a civilian dispatcher before making the leap over into the sworn workforce.

"I look forward to taking the sergeant exam one day and applying for specialties. I feel like the longer you stay at the Department, the

more doors open up for you. I am just looking forward to seeing what opportunities lay ahead for me," said Officer Dante Price (Senate Division) who is from West Virginia and worked for the National Park Service before following in his parents' footsteps and joining federal law enforcement.

"A lot of the newer officers are hungry to get where they want to go in the Department. We want the responsibility of being sergeants, lieutenants, and captains one day so that we can contribute even more to the Department," said Officer Aaron Davis (Senate Division) who is from Detroit where his dad and uncle were local cops. "I want to do as much as I can, gain as much knowledge as I can, and try out different divisions. I am eager to get involved in a vast array of experiences and specialties."

This generation is also ready to break barriers. Officer Cayla Cerny (House Division), who is a former congressional staffer and originally wanted to be a military para-jumper, is hoping to be the first female to serve on the Containment Emergency Response Team.

Likewise, Officer Aaliyah Paxson (House Division), who is from a small town in Nevada, has always dreamed of serving on a bomb squad, and has her eye on adding more females to the Hazardous Devices Section. "I've been able to meet a lot of seasoned officers so far, hear about their experiences, and learn all the ways I can help the Department."

THEY BRING DIFFERENT PERSPECTIVES.

Roughly 90 percent of last year's recruits are under the age of 30, and the same number have advanced degrees. However, these new recruit classes are much more than their resumes.

"This generation is coming in looking through a very different lens,"

FEATURES

said CAO Richard Braddock. "Their lens is so global and neutral – in a good way. They don't see each other with labels, which has allowed them to embrace diversity and inclusiveness. And I think that's going to continue to change our Department in very positive ways in the long run."

A lot of the recent recruits feel that they can help the Department view things with a fresh set of eyes and think outside of the box when it comes to various challenges – whether it be related to policing practices or leveraging new technologies.

"The Department has been lucky enough to have veteran officers that have served here for 25 to 30 years, and now we have this new wave of officers coming in with different generational skills and perspectives," said Officer Shauni Kerkhoff (Senate Division), who played soccer at Temple University and always wanted to be a first responder.

"I think this combination is really going to help us as a Department, because as an organization, we can better relate to the stakeholders we interact with on the job. If we have varying backgrounds and our workforce is diverse, we can better serve a diverse public."

THEY ENJOY HELPING PEOPLE.

The new recruits are friendly, generous, and enthusiastic. Many expressed how much they enjoy posts that let them help staff and visitors, even with ordinary questions or requests, such as helping people find their way around the Capitol Complex.

"I applied to several federal agencies all at the same time, but I chose USCP over other ones because of the interaction with the public. We get to welcome people into the People's house, and at my post I get to help people every five minutes," said

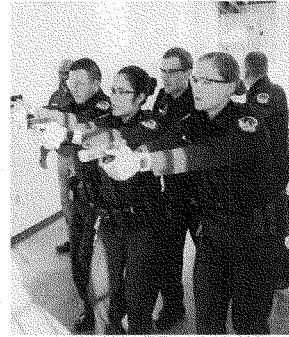
Officer Kerkhoff.

"I grew up in a law enforcement family, so I understand how serious the job is. At some point, you are going to need to help someone – whether it be life-threatening or not," said Officer Davis. "The other day I helped a woman jumpstart her car. Little things like that that make you feel good. And that's the best part of the job for me – helping people."

"Not only are we a law enforcement agency that cares about our government and protecting the Nation's ideals, but we are also a police force that cares a lot about the public and wants to have a positive relationship with them," said Officer Cerny. "The experienced officers I have worked with so far have all been so caring, respectful, and kind to others. It makes me want to help people with that same positivity."

THEY ARE EXCITED TO SERVE HERE.

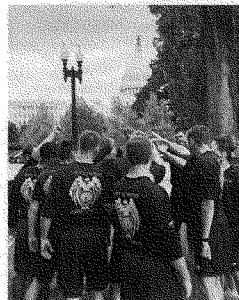
Most recruits came here because they were seeking a career in federal law enforcement. Some grew up in a law enforcement family, whereas others are the first to wear the badge. Regardless of their background or what brought them here, it is clear that they all understand the gravity of their



protective role.

"These new recruits want to be here. What we are finding is that many of these new officers want to have a long career with us. They are not just here for a quick win," said Braddock. "And while they yearn to shape the future of the Department, they also are eager to understand the organization and honor the Department's history and legacy. They have a deep understanding of the importance of our mission, and it's impressive that we are able to recruit people with that level of dedication and caliber."

"The USCP is one of the best choices I have made so far. I am only 22 years old, so I haven't done a lot. But I know that coming to this Department was a great step in my life and for my career," said Officer Gretchen Revering (Capitol Visitor Center), who is from a small town in Minnesota and always felt the call to be in law enforcement. "I have only been here for four months, but I have done so many interesting things already. During the Kavanaugh hearings, I was helping respond to demonstrations. During President



FEATURES

George H.W. Bush's Lying in State, I was helping escort VIPs around the Capitol. There is so much history going on here and we get to be a part of it."

"There were a lot of candidates that applied, and I am so thankful they selected me. Some days it doesn't feel real. I am grateful for this opportunity, and I have not once looked back because this is a great agency to work for — I wouldn't trade it for the world," said Officer Jones.

THEY DIDN'T GET HERE ALONE.

All of this passion and excitement is due in large part to the hard work of the Office of Background Investigations and Credentialing (OBIC), which leads the recruitment efforts of sworn personnel, as well as the Training Services Bureau (TSB) that trains the recruits once hired. The recent recruits give these staffs a lot of credit for their positive experience during the application process and training academy, and so does USCP leadership.

"TSB and OBIC are unsung heroes. They each play a vital role in building the foundation and future of USCP, and they take that responsibility

very seriously," said Braddock, who recognizes the personal sacrifices the staff has made to accommodate the increase in recruit classes. "Our recruiters, background investigators, and training staff are going above and beyond to make sure we hire the right people for this Department — and that they are trained to perform at the highest standards. Both TSB and OBIC not only grabbed the bar, but raised it, and I am very proud of them."

Many recruits commented on how quick the USCP application process was compared to other federal agencies, and they felt the Department was responsive to their questions and transparent about the process.

"Throughout the application process, everyone in OBIC was nice and understood that it was my first time going through something like this, so I appreciated that," said Officer Davis. "My background investigator helped me out a lot."

The recruits also expressed a great deal of admiration and appreciation for their TSB instructors, especially for their willingness to come in early or stay late to help students. Physical fitness training was cited as one of the

recruits' most enjoyable elements of their training experience, largely due to the fun team workout environment the instructors created.

"Getting to know the instructors and hearing their war stories was really fun. If you had any struggles, either physical or academic, the instructors were willing to help you," said Officer Price. "Everyone wants to see you succeed, and everyone wants to help you graduate. Even after the Academy, the instructors continue to help us."

Most notably, we learned that what this generation of USCP officers all have in common is a great appreciation for where they work.

"It is surreal being here where Congress makes decisions and votes," said Officer Lennox Hoyte, Jr. who was a military police officer, served in Afghanistan, and worked at the Federal Reserve Bank before joining USCP. "Every day when I walk to work, I look up at the Dome and it blows my mind. I've done some fun things in my life, but this is definitely at the top of my list."



DID YOU KNOW?

Many recruits applied because they heard about USCP via word-of-mouth. Our employees are the best champions of the Department! If you know someone who would be a good fit for the Department, Encourage them to apply and visit www.USCP.gov.

1828



Employees Leverage Guest Mentors

The day after the Diversity Speakers Panel (previous page), USCP held its annual Speed Mentoring Session. Many of the previous day's speakers, as well as other senior law enforcement executives, were available to meet with USCP employees to provide career advice. During the speed mentoring session, employees were able to speak with several executives and learn from their career experience. For more information about developmental opportunities such as these, contact Natalie.Holder@uscp.gov.

Building Recruitment Partnerships to Advance Diversity at USCP

In late July, Diversity Officer Natalie Holder (far left) and Sergeant Joseph Torreyson (second from left) met with officers from the Philadelphia Police Department to discuss their annual Diversity Law Enforcement Career Fair, which aims to recruit people of different ethnic and social backgrounds into the law enforcement profession. The large fair has been featured on national news and draws over 2,000 attendees and 65 law enforcement agencies each year. The Department's goal is to participate in the fair in the years ahead in order to attract and recruit a diverse workforce.



Statement for the Record

In Support of H.R. 1, For the People Act of 2019

February 14, 2019

Submitted to the Committee on House Administration

Dear Chairperson Lofgren, Ranking Member Davis, and Members of the Committee,

Our organizations represent a diverse set of interests and have differing mandates and areas of focus, but we coalesce together around a shared goal of swiftly advancing the For the People Act, H.R. 1, as a bold and comprehensive package. We welcome the opportunity to offer our support before this committee.

We are members of the Declaration for American Democracy coalition, which seeks fundamental democracy reforms to create a government that is reflective, responsive and accountable. Our organizations applaud the committee for quickly turning its attention to this landmark legislation.

We believe it is essential for the House to act quickly to pass bold democracy reforms and to demonstrate a holistic approach in addressing a series of fundamental problems facing our democracy. We also believe the House must ensure that H.R. 1 is not weakened or divided in the process, and that it pass as a strong, comprehensive package of reforms.

The Declaration for American Democracy coalition believes:

- A strong democracy is one where voting is a fundamental right and a civic responsibility.
- A strong democracy serves the people rather than the private interests of public officials and wealthy political donors.
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Further, passing H.R. 1 as a bold and comprehensive package as the first order of business unlocks further potential to advance other legislative items in the session. By demonstrating that creating a democracy that is inclusive of and responsive to every American is the top priority, the House can help to shore up support for subsequent reforms.

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This was reflected by the views of 47 newly-elected Members who were among 107 Democratic challengers to write² during the campaign urging that sweeping reforms “be the very first item Congress addresses.” Many successful midterm campaigns centered the importance of bold democracy reforms, and voters who ushered in the new Congress now expect that the House deliver on those promises.

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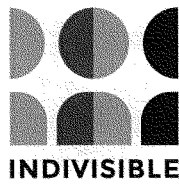
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Voices for Progress

Wolf-PAC



STATEMENT OF THE INDIVISIBLE PROJECT

In support of H.R. 1, For the People Act of 2019

Submitted to the Committee on House Administration

February 14, 2019

Chairperson Lofgren, Ranking Member Davis, and Members of the Committee,

Indivisible is a movement of more than 5,000 local groups across the country organizing locally to resist the Trump agenda. We write in strong support of H.R. 1, and urge you to advance the For the People Act quickly as a bold, comprehensive package.

Our movement emerged out of the chaos and fear surrounding Donald Trump's election in 2016. But even as we continue to organize against Trump's agenda, we turn to an even greater task: defeating the forces that gave rise to Trumpism in the first place.

A healthy democracy would have rejected Trump like a healthy body rejects a virus. But that didn't happen, because the wealthy and powerful have spent decades rigging the system to consolidate their power by discouraging, disempowering and disenfranchising the electorate. And make no mistake: the same communities that are disproportionately affected by these power grabs are the same communities most attacked by the bigotry of the Trump agenda.

But we have a historic opportunity to change course. A mass grassroots movement, including many in the Indivisible movement, built a Blue Wave that carried a new Democratic majority into the House of Representatives. We are a young movement, and are still learning about what excites and sustains our field. But when we surveyed our thousands of groups on policy issues for the first time last fall, we discovered that democracy reform — voting rights, getting big money out of politics, and eliminating corruption from all levels of government — easily topped every other issue.

Perhaps this is why, on Jan. 3, we saw the largest-ever single day of action in our movement thus far. On the first day of the new Congress, our groups all over the country showed up in front of their Representatives' district offices to rally in support of H.R. 1's passage, and to demand that its reforms not be weakened or divided in the process.¹

¹ See e.g.: "Schuylkill Indivisible Holds a Rally for Democracy," *PA Homepage*, Jan. 3, 2019, <https://www.pahomepage.com/news/schuylkill-indivisible-holds-a-rally-for-democracy/1685882152>; "Activists Call on Re. Delgado to Support Democracy Reform," *WAMC*, Jan. 3, 2019, <https://www.wamc.org/post/activists-call-rep-delgado-support-democracy-reform/>; "Nevada Protesters Urge Reform as Congress Begins New Session," *Public News Service*, Jan. 3, 2019, <https://www.publicnewsservice.org/2019-01-03/civic-engagement/nevada-protesters-urge-reform-as-congress-begins-new-session/a6510-1>; "Progressives Rally in Kingston for Democratic Reform Bill," *Mid-Hudson News*, Jan. 3, 2019, http://www.midhudsonnews.com/News/2019/January/04/prog_rally_king-04Jan19.html; "Activists Rally for House Ethics Bill Across the County and In Upstate NY," *Spectrum Local News*, Jan. 3, 2019, <https://spectrumlocalnews.com/nys/binghamton/politics/2019/01/03/hrl-rallies-in-upstate-ny/>; "Coalition Group Calling on Congress to Pass Democracy Reform Bill," *WWLP*, Jan. 3, 2019, <https://www.wwlp.com/news/state-politics/coalition-group-calling-on-new-congress-to-pass-democracy-reform-bill/1685752029>; "Protesters Demand Action from Roseville Congressman as New Lawmakers Sworn In," *Fox 40*, Jan. 3, 2019,

Instinctively, our movement knows that leading with a bold and comprehensive package of democracy reforms is an essential first step in the work ahead. Unless we have a democracy that includes and represents all of us, we cannot secure relief for immigrant families, ensure access to affordable health care, end gun violence, tackle climate change, or accomplish any of our other goals.

Additionally, we must not merely signal a nominal commitment to protecting our democracy, but must use this opportunity to coalesce support behind the boldest solutions imaginable, and advance them as a single vehicle of holistic, interdependent reforms.

We look now to the House to follow through in advancing this landmark legislation. We urge you to move quickly to meet the demand that we have seen clearly from the voters, by keeping H.R. 1 intact and strong. This moment requires bold action to lay the foundation for a democracy that truly includes and represents us all.

Please don't hesitate to reach out to our Associate Policy Director Elizabeth Beavers at elizabeth@indivisible.org if we can offer further support.

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Feb. 13, 2019

The Hon. Zoe Lofgren
The Hon. Rodney Davis
Committee on House Administration
1316 Longworth House Office Bldg.
Washington, D.C. 20515

Public Citizen Statement for the Record in Support of H.R. 1

Dear Members of the Committee:

On behalf of Public Citizen's 500,000 members and supporters, we write to express our wholehearted support for the sweeping ethics, campaign finance and voting rights reforms offered by the For the People Act (H.R. 1), which you are moving through the hearing process in your committee. We also write as a part of the 130 organization-strong Declaration for American Democracy coalition that is supporting H.R. 1.

In November, the American people went to the polls and resoundingly cast their ballots in support of candidates and officeholders committed to cleaning up corruption and holding government accountable. H.R. 1 embodies these principles and constitutes your promise to the nation to ensure that public officials work for the people.

This sweeping legislative package addresses three key buckets of reforms which are essential to make our government work effectively and fairly. The legislation provides:

- Comprehensive campaign finance reforms that would end dark money and reduce the alarming influence of special interest and corporate money over our elections.
- Desperately-needed governmental ethics reforms to slow the revolving door between public service and powerful business interests, and strengthening oversight and enforcement of ethics laws and rules.
- Voting and electoral reforms that would end gerrymandering and reaffirm the principle of one person, one vote.

Within each of these three buckets H.R. 1 proposes numerous critical reforms that get to the heart of the corruption problems and, if implemented, will go a long way toward restoring public confidence in our federal government. Each and every one of these proposals are significant remedies to what ails this nation and are endorsed by Public Citizen.

We want to highlight the significance of just a couple of the many constructive reforms. Today's hearing will focus on voter registration modernization, election security, campaign finance disclosure and reform, protecting the integrity of elections, and fixing broken ethics laws, and we focus our remarks especially on the campaign finance issues, including a dysfunctional Federal Election Commission (FEC), dark money and foreign influence in elections, and small-donor public financing of campaigns

1. Enforcement of Campaign Finance Laws: the Dysfunctional Federal Election Commission.

There is no doubt whatsoever that the Federal Election Commission is broken.

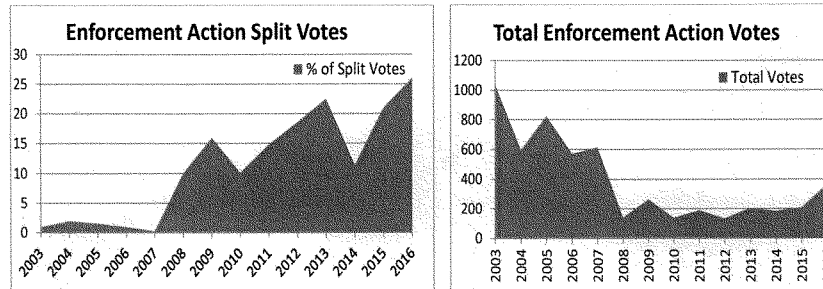
The agency in charge of enforcing our nation's campaign finance laws is moribund by ideological stalemate, leaving the laws largely unenforced. It is broken not because of its staff, which is hardworking and professional. It is broken because of its leadership; the six commissioners – three Democrats and three Republicans – routinely deadlock 3-3 along party lines, resulting in a “no decision” on whether to enforce the law in any particular case. No decision means no enforcement.

In just the last few years, a sharply pervasive partisan split on the Federal Election Commission (FEC) has largely prevented the agency from fulfilling its mission. In both numbers of actions taken and immobilizing deadlocked votes, the FEC is showing a dramatic and uncharacteristic inability to perform its duties more or less in all categories – enforcement, audits, regulations and advisory opinions.

One of the most critical functions of the FEC is to enforce the Federal Election Campaign Act (FECA), nation's campaign finance law, but today's agency is falling desperately short in this mission.

Split Votes on Proposed Enforcement Actions

Year	Split Votes	Total Votes	% of Split Votes
2003	9	1036	0.9
2004	11	594	1.9
2005	12	823	1.5
2006	5	569	0.9
2007	2	612	0.2
2008	14	140	10
2009	42	263	15.9
2010	14	139	10.1
2011	28	189	14.8
2012	25	135	18.5
2013	46	204	22.5
2014	21	185	11.4
2015	42	209	21
2016	95	364	26
Totals	366	5462	6.7%



Simply put, when it comes to money in politics, there is no cop on the beat – and the major political players know that almost anything goes.

H.R. 1 proposes to remedy the dysfunction when it comes to gridlocks by reorganizing the Federal Election Commission into a five-member agency, with no more than two members belonging to the same political party. The selection of the Chair of the Commission goes through special scrutiny to help ensure nonpartisanship. This is precisely the type of restructuring needed to establish and equitable and effective enforcement agency of our campaign finance laws.

2. Enhance Transparency of Money in Politics.

Until fairly recently, the Federal Election Commission (FEC) largely fulfilled its mission of ensuring that campaign spending as well as the sources of funds for those expenditures were disclosed to the public. In terms of both independent expenditures and electioneering communications – the types of campaign expenditures by outside groups – there was nearly full disclosure of the campaign spending and donors behind this spending.

But this disclosure regime quickly began to unravel following the 2007 Wisconsin Right to Life decision, and then collapsed under the weight of the 2010 Citizens United decision. Shortly after Wisconsin Right to Life, which permitted independent groups to broadcast “issue-oriented” messages near elections funded with corporate or union money, the Federal Election Commission (FEC) issued rules requiring disclosure only of donors who contribute funds “for the purpose of furthering electioneering communications.”¹

But the FEC reasoned that since corporations and labor unions could make electioneering communications, they should not be required to disclose the names of everyone who provides them with \$1,000 or more for purposes unrelated to electioneering. The agency added a separate section to that effect, requiring a corporation or labor organization that makes electioneering communications to disclose “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first

¹ 11 CFR 104.20(c)(9).

day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.”

This language has recently been interpreted by a growing number of outside groups to mean that only those donors who specifically “earmark” funds for an electioneering communication need be disclosed. The same “earmarking” loophole was shortly thereafter also applied to independent expenditures by outside groups. Since almost no one earmarks their campaign contributions, a new era of “dark money” was born.

After nearly 100 percent of groups revealed the donors funding their electioneering communications in the 2004 and 2006 election cycles, fewer than 50 percent did so in 2008. A comparable collapse in disclosure of the sources of funds behind independent expenditures soon followed.²

Additionally, loopholes in our campaign finance laws have made it possible for that dark money to come from foreign nationals or even foreign governments that may be looking to disrupt American democracy and tip the scales in their favor. Disclosure of the true sources of outside campaign spending – whether it’s from wealthy individuals, corporations or foreign entities – is essential to a functioning democracy that serves all Americans equally.

H.R. 1 closes many of the current loopholes that allow dark money and foreign influence to remain hidden and brings much-needed transparency to the way in which money flows into our elections. The legislation would require organizations that spend more than a specified threshold on politics to disclose the donors of their political funds. It also would impose stricter disclosure requirements on ads that run near elections and appear to endorse a specific candidate, stop donors from hiding behind shell organizations and forbid corporations that are significantly controlled by a foreign principal or government from spending on U.S. elections, extend the disclosure requirements to social media and repeal policy “riders” placed into appropriations packages preventing the SEC, IRS, and executive branch from dealing with disclosure of public companies, nonprofits, and contractors, respectively.

3. Remove Special Interest Money from Elections.

Without a doubt, the gravest problem to our political system is the corrosive impact of corporate and special interest money in elections. Public officials tend to rely on this money to win elections, and the money frequently comes with strings attached. Those of us who cannot afford to make large campaign contributions – which is nearly all of us – more often than not find ourselves left on the roadside when elected officials pass laws and determine public policy. Public financing of elections is the single most effective legislative remedy against unlimited corporate spending. The public financing plans now under consideration in H.R. 1 have been designed specifically to overcome the barriers imposed by the courts on campaign finance laws, as well as to embrace the new small donor phenomenon spreading across the nation. H.R. 1

² Public Citizen, “Fading Disclosure” (Sep. 15, 2010), available at: <https://www.citizen.org/sites/default/files/disclosure-report-final.pdf>

would create a small-donor public financing system for both presidential and congressional elections with the following features:

- Qualified candidates are provided with ample public funding, giving candidates the resources necessary to respond to attacks from corporate spenders.
- Participating candidates are not bound by aggregate spending ceilings, which enables those who are the targets of excessive corporate spending to continue raising funds in small donations and to spend those funds without limit.
- Small donations are matched multiple times with public dollars, making small donors very important players in financing campaigns.

The public financing programs offered in H.R. 1 comprise the single most important steps that can be taken to clean up politics and make government accountable to the people. The costs associated with these programs are not very significant, yet the benefits are enormous.

Conclusion

Our comments cover just a few of the major improvements offered by H.R. 1 to the broken system of money in politics. The sweeping legislation provides many more sorely-needed reforms, not just in campaign finance but in the areas of governmental ethics and voting rights.

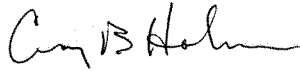
H.R. 1 is the comprehensive government reform that Americans are demanding.

In 2016, many voters believed in the campaign pledge to “drain the swamp,” only to be disappointed by the growing power of wealthy special interests over all levers of government in Washington DC. And voters responded in 2018.

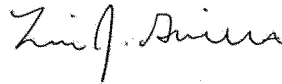
These key issues took front and center of the political dialogue in the last election, and will once again emerge as the most important factors affecting voting choices in the 2020 elections. A new class of representatives has been ushered into the 116th Congress upon the promise of making the federal government accountable and transparent to the public.

Carry through with that promise by doing everything you can to advance H.R. 1 into law.

Sincerely,



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Testimony of Marcia Johnson-Blanco
Co-Director of the Voting Rights Project
Lawyers' Committee for Civil Rights Under Law

Submitted for the Record to the
Committee on House Administration, U.S. House of Representatives
February 22, 2019



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INTRODUCTION

Chairperson Lofgren, Ranking Member Davis and Members of the Committee:

On behalf of the Lawyers' Committee for Civil Rights Under Law, I welcome the opportunity to submit testimony for the record in support of the *For the People Act* ("H.R. 1"). This comprehensive legislation is much needed to address the many barriers to the vote that currently prevent far too many voters from making their voices heard.

The Lawyers' Committee is a nonpartisan nonprofit organization funded in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combatting racial discrimination and the resulting inequity of opportunity. As part of its work on voting rights, the Lawyers' Committee leads Election Protection, the nation's largest nonpartisan voter protection coalition. For more than 17 years, Election Protection – through a suite of hotlines and poll monitoring programs across the country – has provided information and assistance to voters to ensure that they can cast a ballot that counts. In addition to leading Election Protection, the Lawyers' Committee has organized two national commissions to examine the record of voting discrimination: the 2005 National Commission on the Voting Rights Act and the 2014 National Commission on Voting Rights. The data compiled by Election Protection and the record of discrimination uncovered by the two National Commissions support the need for legislation such as H.R. 1, which takes a wide-ranging approach to ensure that citizens can meaningfully engage in the democratic process.

CONTINUED DISCRIMINATION IN VOTING

As lawmakers, you are duty-bound to ensure that all eligible citizens can participate in elections and that elections are conducted in a fair and transparent manner so that all Americans have confidence in the process. Unfortunately, today far too many voters encounter barriers when they attempt to exercise the most fundamental of rights: the right to vote. One significant gap in voting rights protections emerged in 2013, when the United States Supreme Court's *Shelby County v. Holder* decision weakened the transformational Voting Rights Act by holding that the 2006 reauthorization of the formula to determine which jurisdictions had to submit voting changes for pre-clearance by the Department of



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Justice or the U.S. District Court in the District of Columbia was unconstitutional.¹ This despite Chief Justice John Roberts noting that “voting discrimination still exists; no one doubts that.”² Unfortunately, since 2013, far too many jurisdictions have shown the truth of his words, including but not limited to:

- Texas, which implemented a voter ID law that was found to be discriminatory before and after its implementation;³
- North Carolina, where a monster law was found by the 4th Circuit court of appeals to have been drafted with “surgical precision” to discriminate against minority voters;⁴
- Georgia, which enacted an “exact match” process that resulted in the disproportionate placing of minority registrants on a “pending list”;⁵
- Gwinnett County, Georgia, where a federal judge found the County’s mass rejection of absentee ballots based on immaterial birth year errors or omissions unlawful and granted a temporary restraining order that prevented county officials from rejecting ballots in a practice that disproportionately affected African-American and other voters of color.⁶

Despite these discriminatory laws, the Department of Justice has been derelict in its duty to enforce voting rights. Rather than challenge barriers to the vote, it has changed positions in litigation challenging Texas’ voter ID law⁷ and Ohio’s purging of voters for failure to vote.⁸ Additionally, the President’s Advisory Commission on Election Integrity was an attempt to use the false premise of widespread voter fraud to support the creation of barriers to the vote. Fortunately

¹ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

² *Id.* at 536.

³ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928, 133 S. Ct. 2886, 186 L. Ed. 2d 930 (2013); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

⁴ *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁵ *Georgia Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1269 (N.D. Ga. 2018).

⁶ *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1331 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec’y of State of Georgia*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

⁷ Sari Horwitz, “Justice Department Changes its Position in High-Profile Texas Voter-ID Case,” WASHINGTON POST (Feb. 27, 2017), *available at*

https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html.

⁸ Sari Horwitz, “Justice Dept. Sides with Ohio’s Purge of Inactive Voters in Case Headed to Supreme Court,” WASHINGTON POST (Aug. 8, 2017), *available at*

https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f91668ed_story.html.



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litigation by the Lawyers' Committee and other civil rights organizations led to the dissolution of the Commission in January 2018.⁹

While H.R. 1 does not include provisions to fix the Voting Rights Act, as this will be addressed in other legislation, its support of a strong Voting Rights Act restoration is a welcome first start in addressing the current major gap in voting rights enforcement.

HR 1'S RESPONSE TO ELECTION ADMINISTRATION FAILURES

In addition to discriminatory laws, shortcomings in election administration has kept far too many voters from casting ballots that count. The Election Protection program provides a window to the challenges voters encountered. Through our leadership of the national, nonpartisan Election Protection Coalition, the Lawyers' Committee operated the 866-OUR-VOTE hotline for primary elections in 47 states in 2018, as well as for key special elections and during the weeks before and on Election Day. For the midterm elections in November 2018, the program recruited 10,000 volunteers (4,000 legal and 6,000 grassroots), deployed poll monitors in 30 states and provided 25 voter assistance call centers. Election Protection continued to support voters after Election Day as they needed information on how to ensure that their provisional and absentee ballots would count. Overall, in 2018, the suite of Election Protection hotlines covered twelve languages, engaged with over 78,500 voters and responded to over 5,000 calls after Election Day. Throughout the 2018 primaries and mid-term elections, Election Protection helped voters to address a range of barriers to the vote including: long lines and late openings due to under staffing and poor training of poll workers, ballot shortages and machine malfunctions; problems with voter registration; problems with absentee ballots; overuse of provisional ballots; lack of voter assistance and intimidation and deceptive practices.¹⁰ H.R. 1 will address many of the problems reported by voters to Election Protection, including:

Voter registration:

Election Protection received reports from voters who had problems with their registration status, including unprocessed applications and cancelled registrations

⁹ Michael Tackett & Michael Wines, "Trump Disbands Commission on Voter Fraud," NEW YORK TIMES (Jan. 3, 2018), available at <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html>.

¹⁰ Lawyers' Committee for Civil Rights Under Law, *2018 Midterm Elections Preliminary Report* (Dec. 13, 2018), available at <https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf>.



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(e.g. Georgia, Pennsylvania, Texas, Kentucky), voters purged from rolls despite not having moved and having recently voted (e.g. New York City), and thousands of Georgia voter registrations assigned "pending" status due to an onerous "exact-match" law. Another problem frequently reported to Election Protection is confusion or lack of information on updating voter registration. For example, in Georgia, many voters are unaware that if they move to a new county within the state more than thirty days prior to an election, they must register in their new county by the fifth Monday prior to an election in order to be able to cast a ballot that will count as a vote. If they fail to do so, they will be unable to cast a ballot, including in some instances, for the very same federal candidates they would have been able to vote for in their former county.

H.R. 1 would address these problems by making online registration available, instituting automatic voter registration nationwide, clarifying that failure to vote is not grounds for removal from registration rolls, and prohibiting state chief election officials from participating in federal campaigns. The same day voter registration and the portability provisions of HR 1 would go a long way to ensuring that otherwise eligible voters are able to participate in federal elections notwithstanding the fact they have moved within the state to a new county, have been purged from the voter rolls for inactivity, or have been unable to register to vote by the state mandated deadline. The same day registration provisions of the bill would also act as a "fail safe" voting provision for persons who missed the state's voter registration deadline or whose timely applications were rejected for reasons unrelated to their eligibility to vote.

Voter Purges:

As a result of our litigation and Election Protection work, we are aware that large numbers of *eligible voters* are being removed from voter registration rolls as a result of list maintenance purges. The Brennan Center issued a report in 2018 which discusses the growing threat of voter purges and the fact that states formerly covered by Section 5 of the Voting Rights Act have been purging large numbers of voters.¹¹ For example, in 2017 in Georgia alone, more than 670,000 voters were removed from the voter rolls as a result of list maintenance purges employed by the state.¹² Since Georgia law provides that the failure of a voter to

¹¹ Jonathan Brater, Kevin Morris, Myrna Pérez & Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE, (July 20, 2018), available at <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>.

¹² "Suppression: Critics charge Georgia GOP gov candidate purging voters before election", ASSOCIATED PRESS (Oct. 10, 2018), available at



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participate in elections for a period of 3 years can serve as a trigger to send an address confirmation postcard, this process allows for the removal of *eligible voters* from the voter list simply because they failed to exercise their right to vote and failed to return an address confirmation postcard.

While states may have a legitimate state interest in removing ineligible voters from the rolls, eligible voters should not be removed under a “use it or lose it” list maintenance process. If states are precluded through H.R. 1 from using the failure to vote as a trigger to send address confirmation postcards, eligible voters who exercise their right *not to vote* will not be penalized for making that choice.

Long lines and late openings:

Many voters reported wait times of several hours and some had to leave without voting due to work responsibilities or disabilities. Long lines were caused by insufficient numbers of poll workers, ballot shortages, and faulty or not enough voting equipment. H.R. 1 would address these problems by: requiring early voting located near public transportation; facilitating voting by mail; making Election Day a federal holiday; requiring counting of provisional ballots of eligible voters notwithstanding the polling place at which the ballot is cast within the state; calling for states and the Election Assistance Commission (EAC) to assess adequacy of voting systems and to submit a report to Congress on a plan to replace outdated systems; and authorizing funding for voting equipment.

Poor poll-worker training

Poll workers play a vital role in ensuring smooth access to the polls. Unfortunately, Election Protection received many reports of problems with poll workers, such as denial of regular ballots, refusals of requests for provisional ballots, requests for additional forms of identification contrary to state rules, failure to provide or allow language assistance, failure to provide assistance for voters with disabilities, and directing voters to incorrect precincts. H.R. 1 would require the EAC to develop model poll worker training programs and award grants for training, promote the use of sworn written statement to meet ID requirements, and prohibit requiring provisional ballots for those submitting sworn statements.

<https://www.nbcnews.com/politics/elections/suppression-critics-charge-georgia-gop-gov-candidate-purging-voters-election-n918761>; Alan Judd, *Efforts put voters at risk of disenfranchisement, critics say*, ATLANTA J. CONST. (Oct. 27, 2018), available at <https://www.ajc.com/news/state--regional-govt--politics/voter-purge-begs-question-what-the-matter-with-georgia/YAFvuk3Bu95kJMaDiDFqJ/>.



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Faulty and insufficient equipment

Election Protection received numerous reports of problems with voting machines – including broken voter check-in machines or e-poll books, faulty voting equipment (sometimes lacking cords), broken accessibility devices that prevented disabled voters from casting ballots and broken ballot scanners – that often caused long delays and resulted in many being unable to vote. H.R. 1 imposes standards for election vendors and financial support for election infrastructure, and authorizes EAC grants for paper ballot voting systems, for post-election audits, and for infrastructure innovations.

Voter ID problems:

Voters reported poll workers asking for identification not required by law (e.g. In California, Illinois, and Michigan). In Missouri, voters reported poll workers requiring photo ID despite a court decision to allow other forms of ID. Voters in other states reported being turned away on account of strict ID requirements and others had to return multiple times to show additional ID before being allowed to vote. H.R. 1 would permit the use of a sworn written statement to meet ID requirements, and would prohibit states from requiring voters submitting sworn statements to cast provisional ballots.

Overuse and lack of support for provisional ballots:

Many voters had to cast provisional ballots due to aggressive state purges of the rolls. After the November 8th mid-terms, Election Protection received thousands of calls from voters in Georgia and Florida, many of whom were forced to cast provisional ballots and needed assistance to ensure their ballots were counted. H.R. 1 clarifies procedures for maintenance of voting roles by providing that failure to vote is not grounds for removing registered voters from the rolls, limiting use of interstate “cross-check” methods, and imposing other limits. H.R. 1 also provides that each state shall establish uniform and nondiscriminatory standards for issuing and counting provisional ballots.

Absentee ballot problems:

Voters frequently reported problems with absentee ballots, including delays in receipt by voters, ballots not being received by election officials, ballots being rejected for arbitrary reasons like a change in signature style, and difficulty voting in person due to poll worker confusion. H.R. 1 limits state requirements on voting by absentee ballot, specifying parameters regarding signature verification and deadlines, and providing for equal treatment of those with disabilities. H.R. 1 also facilitates the use of absentee ballots by requiring EAC to reimburse states for absentee ballot tracking programs, requires absentee ballots be sent at least 45



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days before election to uniformed service and overseas voters, and creates a voter information hotline in conjunction with the states.

Intimidation and deceptive practices:

Election Protection heard reports of flyers, texts, or robo-calls to voters with materially false information, such as changes to election dates or times, which are intended to disenfranchise voters. Minority voters and those who are not native English speakers reported being asked about citizenship status, race, and length of stay in the US by poll workers and unauthorized loiterers while attempting to vote. Election Protection also tracked misinformation and intimidation on social media. H.R. 1 prohibits providing false information about elections to hinder voting and increases penalties for intimidation. Imposing stiff criminal penalties may deter this conduct in the future and ensuring that voters receive correct information would help to ameliorate the damage done by the circulation of the materially false information.

Restoration of Voting Rights:

Election Protection frequently receives questions from persons who have been convicted of crimes about their eligibility to vote. H.R. 1 would help to clarify the eligibility of returning citizens, pre-trial detainees and persons convicted of crimes that do not implicate their eligibility to vote.

Lack of voter language assistance or for those with physical disabilities:

Voters contacted Election Protection to report lack of translators or printed language materials or denial of right to be assisted by person of choice. Voters with physical disabilities reported barriers such as being forced to wait hours for repair of accessibility devices, delays in curbside voting, inaccessible locations, and long lines. H.R. 1 supplements existing law by requiring states to promote access to registration and voting for persons with disabilities, provides for grants, creates a pilot program to allow persons with disabilities to register and vote from home, creates a voter information hotline, and requires the provision of paper ballot verification mechanisms to ensure voters with disabilities have the same opportunity as any other voter to verify that their ballots were cast correctly.

Improper Challenges

Litigation brought by the Lawyers' Committee against voter caging and other problematic voter challenges in Hancock County Georgia provides an example of



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how the practice is used to target voters.¹³ The scheme sought to disenfranchise Black voters in Sparta, Georgia ahead of the 2015 hotly contested municipal election in which white candidates sought to unseat long-term Black incumbents.¹⁴ Initially, the efforts were led by white members of the Board of Elections and Registration ("BOER"). These efforts included: singling out Black voters for challenges based upon unsubstantiated claims that too many people were registered at a single address; assertions that voters could not be living in residences in this poor rural county that members of the board of elections believed were uninhabitable; rumors that voters had moved away from the addresses associated with their voter registration; unsubstantiated claims that voters were not competent due to mental or physical incapacity; and other unsubstantiated claims that targeted Black voters for removal from the voter rolls. After questions were raised about the fairness of a process by which white members of the BOER were challenging Black voters and then voting as members of the Board of Elections to remove Black voters from the registration list, white BOER members enlisted a white Republican man who had been active in conservative politics to take over the process of filing challenges to Black Sparta voters. These systemic voter efforts resulted in approximately 12 challenge hearings between August and October 2015, in which the eligibility of 174 of the 979 registered voters in Sparta was challenged. Almost 17 percent of all eligible Sparta electors were challenged and at least 53 voters, nearly all of whom are Black, were purged from the voter rolls as a result of these efforts. A settlement was reached between the parties, which included a consent order in which the BOER agreed to remedial relief, including a period of court oversight through monitoring by a court appointed examiner to deter further such activity by the Board.

H.R. 1 would help prevent this type of abuse in Federal elections by requiring that challenges based on list matching without corroboration must be based on specified unique identifiers and that challenges by private parties can only be made based on personal knowledge of ineligibility documented in a sworn statement of a good faith factual basis. However, a challenge based on race, ethnicity, or national origin would not provide a good faith basis.

¹³ *Georgia State Conference of NAACP v. Hancock Cty. Bd. of Elections & Registration*, No. 5:15-CV-00414 (CAR), (M.D. Ga. Mar. 30, 2018).

¹⁴ Michael Wines, "Critics See Efforts by Counties and Towns to Purge Minority Voters From Rolls," *NEW YORK TIMES* (July 31, 2016), available at <https://www.nytimes.com/2016/08/01/us/critics-see-efforts-to-purge-minorities-from-voter-rolls-in-new-elections-rules.html>.



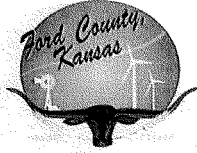
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CONCLUSION

The right to vote is essential for a strong democracy. For too many eligible voters, the maladministration of elections presents a barrier to their ability to exercise that right. Far too often, voters confront an array of obstacles that range from barriers to voter registration, problems receiving absentee ballots and having those ballots count, overuse of provisional ballots that increasingly play a role in election outcomes, the impact of technology problems on election administration, and poorly planned elections. Some of these barriers are suppressive tactics designed to limit access to the ballot, others result from poorly constructed election laws or election administration failures. Given that the barriers facing American voters exist nationwide, this makes the need for HR 1 – a federal solution to improve access to elections – all the more important. As we prepare for the next election cycle that culminates in the 2020 Presidential election, it is more important than ever to address the barriers that undermine confidence in our democracy.



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February 19, 2019

Zoe Lofgren, Chairperson
Rodney Davis, Ranking Member
Committee on House Administration
1316 Longworth House Office Building
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Dear Chairperson Lofgren and Ranking Member Davis:

My name is Deborah Cox and I am the elected Clerk (and chief election official) of Ford County, Kansas, for which Dodge City serves as the county seat. On February 14, 2019, your committee convened a hearing entitled, "For the People: Our American Democracy," at which you invited a series of witnesses to discuss various voting-related issues in connection with the recently proposed H.R. 1 ("For the People Act of 2019"). I offer no comments on the bill itself. But I do think it necessary to correct the record with regard to what can only be described as highly inaccurate testimony about the November 2018 general election in Dodge City.

Despite the fact that Dodge City has maintained the same election-day framework of a single polling place for all voters for more than *two decades*, a week before the election, the ACLU filed suit on behalf of two plaintiffs - LULAC Kansas and Alejandro Rangel-Lopez - demanding the establishment of an additional polling location in the city. The predicate for the last-minute filing was a wildly speculative theory that the temporary relocation of the city's polling place approximately 3.7 miles from its prior site would result in unspecified numbers of voters being unable to access the new venue due to poverty, lack of transportation, or other competing life or work obligations. (I directed this polling site change after being notified in late August 2018 that the usual polling place would be undergoing construction beginning in October 2018.) These claims were utterly baseless and the plaintiffs' complaint was replete with patronizing arguments that are offensive to the residents of Dodge City, particularly its Hispanic community. Ironically, in fact, I recently learned that LULAC Kansas held its 2013 state convention at the same venue it now claims is so inconvenient as to constitute an unconstitutional burden on its constituents' voting rights.

The plaintiffs subsequently dismissed their lawsuit voluntarily. But they are apparently intent on continuing to misrepresent the facts, as evidenced in part by Mr. Rangel-Lopez's farcical testimony before your committee. Based on the ACLU's public comments and editorials, it seems that this case was far less about Dodge City than it was about a highly orchestrated campaign to raise money by agitating the public (via gross

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distortions and omissions of the true facts) and to secure broad voting-related changes that advance the organization's political agenda. Whatever the merits of those changes, though, they would require *legislative enactments*; they are not even within the power of individual county clerks like myself to implement.

Interestingly, in his federal court complaint, Mr. Rangel-Lopez conceded that he would personally have no trouble voting on Election Day because, like so many other similarly-situated Americans, he planned to take time off from his after-school job to go vote. He lamented at the congressional hearing, however, that his father has to get to work before the polls open and does not get off of work until around 4:00 PM. With all due respect, how exactly does this make him (or his father, who, incidentally, was also able to and did vote on Election Day) any different than most other citizens?

We are all busy and have competing life obligations. Sacrifices occasionally have to be made. In Kansas, of course, state law allows voters to take up to two hours off of work in order to vote on Election Day. Moreover, the polls were open until 7:00 PM, and there were ample opportunities to vote early or via mail (as described below). In short, no one faced any sort of unlawful, let alone unconstitutional burden, on his/her right to vote.

An objective view of the actual facts surrounding the November 2018 election reveals just how preposterous the manufactured controversy over Dodge City's polling place is. The reality is that the drive from the previously used polling site – the Dodge City Civic Center – to the temporary location used last November – the Western State Bank Expo Center – is no more than *5-10 minutes*. As for the small number of citizens in this rural community who rely on public transportation, Dodge City offered *free door-to-door* bus service that literally picked up voters at their own homes and took them to the Expo Center on Election Day. (At your hearing, Mr. Rangel-Lopez testified that this free bus service was not introduced until after the filing of his lawsuit. That is totally false. Public announcements of the free bus service began in early October, several weeks *before* the plaintiffs filed their complaint. He also testified that the relocation would cause voters to have to walk up to 90 minutes to get to the polls. Again, patently untrue. No rational person would believe that.)

Dodge City even expanded the free door-to-door public transportation so that it would also take such voters to the Ford County Government Center during the early in-person voting period (which ran for two weeks prior to the November 6 general election and included evening and weekend hours). In a city that is only 7 x 10 miles, the Western State Bank Expo Center was probably one of the easiest places to access in the entire country on Election Day. As for voters who did not want to vote in person, they could always vote by mail under Kansas's no-excuse absentee ballot rules.

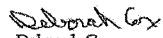
The effect of all these efforts to make voting easy for Dodge City voters could not have been clearer: the November 2018 election saw a *record turnout* for a non-presidential year election, and the most number of early voters in Dodge City *ever*. Meanwhile, the Election Day itself was virtually seamless. Most of the day saw no lines at all, and only in the peak voting period of 5:30 PM did the line to vote very briefly approach 45 minutes. That is hardly unusual or unreasonable.

As a life-long resident of Dodge City and someone who cares deeply about the community, I remain extremely disturbed by the ACLU's efforts to characterize Hispanics and low-income citizens in Dodge City as simply too helpless to cast a ballot in the election. Just because a person works in a meat-packing plant, takes the bus or carpools to work, or earns less than others hardly means that individual is ignorant. Any suggestion to the contrary – as the ACLU asserted for the very foundation of its voting lawsuit in Dodge City – only serves to reinforce some of the worst prejudices imaginable that the poor in general, and Hispanics in particular, are insufficiently sophisticated to adapt to, say, the one-time movement of a polling site *3.7 miles* down the road. In the wake of this case, I cannot begin to tell you how many members of the Hispanic population have approached me to ask, "Why does the ACLU think we're so stupid?" I respond, of course, that it is just politics. But it is still insulting to these fine individuals.

As for future elections, I had publicly committed well before this most recent election that I planned to open at least one additional polling site no later than 2020. I decided to accelerate those efforts to ensure that, notwithstanding its historically extremely low turnouts, there would be a second polling place for the local 2019 elections as well. I also arranged with Dodge City Transit to ensure that there will be (i) bus stops - even if temporary - on Election Day in front of the polling place locations, and (ii) as usual, free door-to-door bus service to the polling places on Election Day.

I am well aware that our society has become increasingly partisan and that our politics have become increasingly toxic. Regrettably, issues related to voting seem to bring out the worst in some people. My job, however, is to administer elections in an apolitical manner. My objective is to encourage as many citizens to vote as possible and to ensure that the electoral process is easy, smooth, safe, and fair. I am prepared to deal with controversy and to make decisions that may be unpopular. But what I was not prepared for, until now, was to endure withering attacks that are completely unmoored from the facts and to watch the media stand by idly, making no effort to report the truth on the ground. I respectfully ask, therefore, that this letter be introduced into the record of your hearing so that the misrepresentations about the November 2018 election in Dodge City will not go unchallenged.

Sincerely,


Deborah Cox
County Clerk/Election Officer
Ford County, Kansas

