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Testimony of

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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.

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<sup>1</sup> 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.

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.<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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

<sup>2</sup> 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>.

<sup>3</sup> 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](http://avalon.law.yale.edu/18th_century/fed57.asp).

<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup> 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.<sup>7</sup>

These problems contribute to low voter turnout.<sup>8</sup> Each Election Day, millions of Americans go to the polls only to have trouble voting because of registration flaws.<sup>9</sup> Some find their names wrongly deleted from the rolls.<sup>10</sup> Others fall out of the system when they move.<sup>11</sup> One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.<sup>12</sup> 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.<sup>13</sup> Registration errors affect more than those voters who are not

<sup>5</sup> 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>.

<sup>6</sup> 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>.

<sup>7</sup> Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012.

<sup>8</sup> 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.

<sup>9</sup> 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](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>.

<sup>10</sup> 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).

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

<sup>12</sup> Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

<sup>13</sup> 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](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.<sup>14</sup>

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.<sup>15</sup>

### 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.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

AVR Works. Oregon and California became the first states to adopt AVR in 2015.<sup>19</sup> Since then, thirteen more states and the District of Columbia followed—many with strong

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

<sup>14</sup> *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>.

<sup>15</sup> 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>.

<sup>16</sup> 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](https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf).

<sup>17</sup> *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).

<sup>18</sup> Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Oregon saw the nation's largest turnout increase after it adopted AVR.<sup>25</sup> 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.<sup>26</sup> Other registration reforms have measurably improved turnout.<sup>27</sup> 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.<sup>28</sup> 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

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

<sup>21</sup> 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>.

<sup>22</sup> 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>.

<sup>23</sup> 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.

<sup>24</sup> 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#](https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#).

<sup>25</sup> 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/>.

<sup>26</sup> 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>.

<sup>27</sup> 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](https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents).

<sup>28</sup> 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](https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout).

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

Voters strongly support the reform. According to recent polling, 65 percent of Americans favor it.<sup>31</sup> Michigan and Nevada adopted AVR this past election by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.<sup>32</sup> 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.<sup>33</sup> 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.

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<sup>29</sup> Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

<sup>30</sup> *Id.* 10-11.

<sup>31</sup> 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/>

<sup>32</sup> 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>.

<sup>33</sup> 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.<sup>34</sup> Studies indicate that SDR boosts voter turnout by 5 to 7 percent.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> Election officials also

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<sup>34</sup> 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>.

<sup>35</sup> Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 499, 495-96, [https://www.jstor.org/stable/40213330?seq=1#page\\_scan\\_tab\\_contents](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.

<sup>36</sup> Pew Research Center, "Elections in America"; "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, [https://www.prrri.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](https://www.prrri.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).

<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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*.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists

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<sup>38</sup> *Id.* 8.

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

<sup>40</sup> 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>.

<sup>41</sup> 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>.

<sup>42</sup> Brater et al., *Purges*, 3-5.

<sup>43</sup> *Id.* 1.

<sup>44</sup> 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>.

<sup>45</sup> Brater et al., *Purges*, 5-6.



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

Purge practices can be applied in a discriminatory manner that disproportionately affects minority voters.<sup>47</sup> 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.<sup>48</sup>

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*.<sup>49</sup> Thanks in part to *Shelby County*, the recent midterm elections were marred by some of the worst voter suppression of the modern era,<sup>50</sup> including large-scale voter purges;<sup>51</sup> polling place and early voting site closures, especially in minority neighborhoods; burdensome voter ID requirements that excluded IDs possessed by minority citizens;<sup>52</sup> 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;<sup>53</sup> and suspicious rejections of absentee ballots;<sup>54</sup> among other

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<sup>46</sup> *Id.*, 5.

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

<sup>48</sup> Brater et al., *Purges*, 7.

<sup>49</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>50</sup> 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>.

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

<sup>52</sup> 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).

<sup>53</sup> 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>.

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> As recently as 2006 it won reauthorization with overwhelming bipartisan support.<sup>57</sup> 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.<sup>58</sup>

*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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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](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).

<sup>55</sup> 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>.

<sup>56</sup> 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>.

<sup>57</sup> 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](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>.

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

<sup>59</sup> 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>.

<sup>60</sup> Lopez, *Shelby County*.

<sup>61</sup> 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

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

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 pre-clearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.<sup>63</sup> Our case against Texas’s 2011 voter ID law illustrates this point.<sup>64</sup> 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.<sup>65</sup> 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.

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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).

<sup>62</sup> 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?”.

<sup>63</sup> Lopez, *Shelby County*.

<sup>64</sup> 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>.

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

Early voting works well. Thirty-nine states offer some opportunity to vote in person before Election Day.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

Early voting is popular with voters too, with study after study showing a significant positive effect on voter satisfaction.<sup>73</sup> 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.

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<sup>66</sup> 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>

<sup>67</sup> 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>.

<sup>68</sup> Brennan Center for Justice, "New Voting Restrictions in America."

<sup>69</sup> 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).

<sup>70</sup> *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>.

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

<sup>72</sup> *Id.* 12

<sup>73</sup> *Id.* 7-8.

Harms of Current Disenfranchisement Laws. A confusing patchwork of discriminatory disenfranchisement laws cause profound harm across the country. Nationally, state laws deny more than 4.7 million citizens the right to vote because of a criminal conviction.<sup>74</sup> 3.3 million of these citizens are no longer incarcerated; they live in our communities, work, pay taxes, and raise families.<sup>75]</sup>

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Disenfranchisement laws vary dramatically from state to state. They range from permanent disenfranchisement for everyone convicted of a felony in Iowa and Kentucky, to no disenfranchisement at all in Vermont and Maine. In between these extremes there are states that distinguish between different types of felonies, states that treat repeat offenders differently, and varying rules on what parts of a sentence must be completed before rights are restored.<sup>76</sup> Navigating this patchwork of state laws causes confusion for everyone—including election officials and prospective voters—about who is eligible to vote. The result is large-scale *de facto* disenfranchisement of voters who are eligible but do not know it.<sup>77</sup>

Regardless of these particulars, disenfranchisement laws are discriminatory and especially impact African Americans. In 2016, one in 13 voting-age Black citizens could not vote, a disenfranchisement rate more than 4 times that of all other Americans.<sup>78</sup> In three states the ratio was one in five.<sup>79</sup> This unequal impact is no accident—many states’ criminal disenfranchisement laws are rooted in nineteenth-century attempts to evade the Fifteenth Amendment’s mandate that Black men be given the right to vote.<sup>80</sup>

<sup>74</sup> Scholars previously estimated that about 6.1 million citizens were disenfranchised nationwide. See Christopher Uggen et al., *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement*, The Sentencing Project, 2016, 4. Florida accounted for approximately 1.5 million of these because its constitution permanently disenfranchised everyone convicted of a felony. See *id.* Since then, in November 2018, Florida voters approved the Voting Restoration Amendment, which restores voting rights to anyone who has completed all terms of their sentence. See Fl. Const. Art. VI, § 4 (2019). Unless otherwise noted, all of the numbers cited in this testimony adjust for the estimated 1.4 million voters whose rights were or should be restored by that change. See Lori Rozsa, “‘A Joyous Day’ Ahead as 1.4 Million Florida Ex-Felons Have Voting Rights Restored,” *Washington Post*, Jan. 5, 2019, [https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2\\_story.html?noredirect=on&utm\\_term=.b1d8aea9c4a0](https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2_story.html?noredirect=on&utm_term=.b1d8aea9c4a0).

<sup>75</sup> Brennan Center for Justice, “Restoring Voting Rights,” <https://www.brennancenter.org/issues/restoring-voting-rights>.

<sup>76</sup> “Criminal Disenfranchisement Laws Across the United States,” Brennan Center for Justice, last modified December 7, 2018, accessed February 8, 2019, <https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

<sup>77</sup> Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice, 2008, <http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf>. The ACLU found that many elections officials misunderstand their state’s felony disenfranchisement laws, meaning that “untold hundreds of thousands of eligible, would-be voters throughout the country” may be getting turned away by misinformation.

<sup>78</sup> Uggen et al., *6 Million Lost Voters*, 3. This number has not been adjusted for the passage of the Voting Restoration Amendment in Florida.

<sup>79</sup> *Id.* These states are Kentucky, Tennessee, and Virginia. The ratio in Florida was one in five as well but has likely improved as a result of the passage of the Voting Restoration Amendment.

<sup>80</sup> Erin Kelley, *Racism and Felony Disenfranchisement*, Brennan Center for Justice, 2017, 2, available at <https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history>.

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.<sup>81</sup> 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."<sup>82</sup> For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.<sup>83</sup>

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.<sup>84</sup> Governor Kim Reynolds, Republican of Iowa, recently endorsed a similar

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

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

<sup>83</sup> 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](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>.

<sup>84</sup> 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.<sup>85</sup> And over the past two decades, fourteen states have restored voting rights to segments of the population.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

#### **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.<sup>90</sup> 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.<sup>91</sup>

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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)).

<sup>85</sup> “Reynolds Releases Bill to Restore Felon Voting Rights,” *Associated Press*, January 22, 2019, <https://www.apnews.com/c2e817c35d6e48a1b7d678c6f5c69843>.

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

<sup>87</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>88</sup> See Part VI.

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

<sup>90</sup> 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>.

<sup>91</sup> 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>.

While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,<sup>92</sup> 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*.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> While all of these groups are supposed to operate independently of candidates and parties, many actually

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<sup>92</sup> Weiser and Gitlin, *Dangers of "Ballot Security Operations*.

<sup>93</sup> 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>.

<sup>94</sup> 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](https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf).

<sup>95</sup> 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](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).

<sup>96</sup> 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.<sup>97</sup> 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),<sup>98</sup> but they still account for less than a fifth of the total raised and spent on campaigns.<sup>99</sup> 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.<sup>100</sup> In 2018, the top five individuals or couples who gave to super PACs alone contributed almost \$350 million.<sup>101</sup>

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,<sup>102</sup> which they often use to pursue objectives most Americans do not share.<sup>103</sup> The last Congress, for

<sup>97</sup> 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>.

<sup>98</sup> 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>.

<sup>99</sup> 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.*

<sup>100</sup> 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.”

<sup>101</sup> 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>.

<sup>102</sup> 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.

<sup>103</sup> 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](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.<sup>104</sup> 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.<sup>105</sup>

Big money politics especially harms people of color. The donor class has long been overwhelmingly white.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

<sup>104</sup> 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>;

<sup>105</sup> 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](http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout).

<sup>106</sup> 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](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>.

<sup>107</sup> 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](https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf).

<sup>108</sup> 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](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.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup> Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.<sup>113</sup> 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."<sup>114</sup>

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

<sup>109</sup> 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](https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf).

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

<sup>111</sup> Skaggs and Wertheimer, *Empowering Small Donors*, 8.

<sup>112</sup> *Id.* 10.

<sup>113</sup> *Id.* 11.

<sup>114</sup> *Id.* 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Riming and Scheduling*, Sept. 30, 2005).

<sup>115</sup> 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 Austerhuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns – And Will Fund It," *WAMU*, Mar. 13, 2018, <https://wamu.org/story/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](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.<sup>116</sup> The vast majority of city candidates participate.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> 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 only 30 percent for state assembly candidates (who do not receive public matching dollars) running in the same areas.<sup>120</sup> According to Brennan Center research on the most recent city and state elections, small donors in one of the city's poorest neighborhoods, the South Bronx, made almost ten times as many contributions in city races as they did in state assembly contests.<sup>121</sup> When matching funds are included, city candidates raised 27 times what state candidates raised from New York's poorest neighborhoods.<sup>122</sup> The city's system has also helped more diverse candidates run, including the city's first African-American

<sup>116</sup> "How It Works," New York City Campaign Finance Board, last accessed Feb. 11, 2019, <https://www.nyccfb.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>.

<sup>117</sup> 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.nyccfb.info/pdf/2017\\_Post-Election\\_Report\\_2.pdf](https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf).

<sup>118</sup> 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](http://www.cfinst.org/Press/PReleases/14-02-13/Testimony%20before%20the%20New%20York%20City%20Campaign%20Finance%20Board%20Says%20Small%20Donor%20Matching%20Funds%20a%20Success%20but%20the%20City%20Should%20Look%20at%20Changes%20Moving%20Forward.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](http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf).

<sup>119</sup> 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](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.

<sup>120</sup> Elisabeth Genn, Michael J. Malbin, Sundeep 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](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF).

<sup>121</sup> Statistics for the South Bronx and other low-income neighborhoods in New York will be released in upcoming Brennan Center publications.

<sup>122</sup> See *The Case for Small Donor Public Financing in New York*, Brennan Center for Justice (forthcoming, 2019).

mayor and New York State's first female and first African-American elected attorney general, who began her career on the city council.<sup>123</sup>

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,<sup>124</sup> 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.<sup>125</sup> There are many ways to come up with this sum that do not necessitate an increased burden on taxpayers.<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> Small donor matching stands on firm constitutional ground.<sup>129</sup> No reform has the potential to be more transformative. The time to pass this system is now.

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<sup>123</sup> 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.

<sup>124</sup> 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-c5fed1b7a081\\_story.html](https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html).

<sup>125</sup> 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>.

<sup>126</sup> 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](http://www.policyarchive.org/handle/10207/bitstreams/232.pdf).

<sup>127</sup> 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.

<sup>128</sup> 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."

<sup>129</sup> 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).

## 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 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.<sup>130</sup> Voucher donors were much more representative of the city’s population, including women, people of color, younger residents, and less affluent residents.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> These dark money groups have spent almost \$1 billion on federal elections since 2010.<sup>134</sup> And they have given millions more to super PACs, in a manner that allows those entities (which in

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<sup>130</sup> *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>.

<sup>131</sup> *Id.* 3-5.

<sup>132</sup> Skaggs and Wertheimer, *Empowering Small Donors*, 11.

<sup>133</sup> Weiner, *Citizens United Five Years Later*, 7.

<sup>134</sup> Center for Responsive Politics, “Political Nonprofits (Dark Money),” last visited Jan. 24, 2019, [https://www.opensecrets.org/outsidespending/nonprof\\_summ.php](https://www.opensecrets.org/outsidespending/nonprof_summ.php).

theory do have to disclose their donors) to keep major underlying funders anonymous.<sup>135</sup> All of this secret spending tends to be concentrated in the closest races. One Brennan Center study of 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.<sup>136</sup>

Dark money deprives voters of critical information needed to make informed decisions.<sup>137</sup> 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.’”<sup>138</sup> Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.<sup>139</sup> Researchers have shown that the corporate managers who drive this giving sometimes do so for their own reasons, and not to maximize shareholder value.<sup>140</sup> Shareholders need transparency so they can monitor how their money is being spent.<sup>141</sup>

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.<sup>142</sup>

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.<sup>143</sup> Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.<sup>144</sup> 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

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<sup>135</sup> 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/>.

<sup>136</sup> 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>.

<sup>137</sup> *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.”).

<sup>138</sup> 558 U.S. at 370.

<sup>139</sup> Weiner, *Citizens United Five Years Later*, 10.

<sup>140</sup> John C. Coates IV, “Corporate Politics, Governance, and Value Before and After Citizens United,” *Journal of Empirical Legal Studies* 9 (2012): 657.

<sup>141</sup> 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>.

<sup>142</sup> 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>.

<sup>143</sup> Sean J. Miller, “Digital Ad Spending Tops Estimates,” *Campaigns & Elections*, Jan. 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

<sup>144</sup> Nathaniel Persily, “Can Democracy Survive the Internet?” *Journal of Democracy* 28 (2017): 72.

from public view.<sup>145</sup> Russian operatives exploited these capabilities to purchase millions of targeted ads in an attempt to influence and foment discord around the 2016 election.<sup>146</sup> 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."<sup>147</sup>

**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.<sup>148</sup> The Honest Ads Act in Title IV, Subtitle C expands disclosure and disclaimer requirements for "electioneering communications"<sup>149</sup>—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.<sup>150</sup>

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.<sup>151</sup> 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.<sup>152</sup>

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.<sup>153</sup> But these provisions are limited to those who purchase paid ads; the Act does not (as critics have wrongly implied)<sup>154</sup> cover unpaid postings to an individual's personal website, social media account, or email.

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<sup>145</sup> 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>.

<sup>146</sup> 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>.

<sup>147</sup> 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>.

<sup>148</sup> 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.

<sup>149</sup> 52 U.S.C. § 30104(f)(3).

<sup>150</sup> 47 C.F.R. 73.3526(e)(6), 73.3527(e)(5).

<sup>151</sup> *Smith Testimony*, 8; McConnell, "Behold the Democrat Politician Protection Plan."

<sup>152</sup> 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>.

<sup>153</sup> 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>.

<sup>154</sup> *Smith Testimony*, 8.



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 prevent “abuse of the campaign finance system.”<sup>155</sup> And while transparency has become a subject of heated debate inside the Beltway, it remains overwhelmingly popular with the general public.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup> By longstanding tradition, each of the two major parties takes half the FEC’s seats.<sup>159</sup> 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.<sup>160</sup> Its process for issuing new regulations has virtually ground to a halt.<sup>161</sup> Increasingly, commissioners cannot even agree on

<sup>155</sup> *McCutcheon v. FEC*, 134 S.Ct. 1434, 1459 (2014) (plurality opinion)

<sup>156</sup> “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>.

<sup>157</sup> 52 U.S.C. § 30106(b)(1).

<sup>158</sup> 52 U.S.C. §§ 30106(c), 30106(f), 30107.

<sup>159</sup> 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/>.

<sup>160</sup> 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](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>.

<sup>161</sup> 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](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](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](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,

how to answer requests for interim guidance they receive through the Commission's advisory opinion process.<sup>162</sup>

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.<sup>163</sup> Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.<sup>164</sup>

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,<sup>165</sup> rampant coordination between candidates and outside groups,<sup>166</sup> and vulnerability to foreign interference in our campaigns.<sup>167</sup> 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.”<sup>168</sup> 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.<sup>169</sup>

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 chair<sup>170</sup> 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

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available at [http://www.fec.gov/members/weintraub/statements/2014-10-09\\_Statement\\_of\\_Commissioner\\_Weintraub\\_on\\_2014\\_CU\\_Rulemaking.pdf](http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf).

<sup>162</sup> 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.

<sup>163</sup> 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>.

<sup>164</sup> 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/>.

<sup>165</sup> Lawrence Norden, Brent Ferguson, Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, available at <https://www.brennancenter.org/publication/five-four>.

<sup>166</sup> See Weiner, *Citizens United Five Years Later*, 8.

<sup>167</sup> 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/>.

<sup>168</sup> 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>.

<sup>169</sup> 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](https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf).

<sup>170</sup> Currently the office rotates annually and is largely symbolic See 52 U.S.C. § 30106(a)(5).

commission to publicly vet potential nominees. It ensures that the Commission will periodically have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> The tradition of deferring to party leaders has no force of law.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

<sup>171</sup> 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*.

<sup>172</sup> 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>.

<sup>173</sup> *Smith Testimony*, 2; McConnell, “Behold the Democrat Politician Protection Plan.”

<sup>174</sup> *Smith Testimony*, 2.

<sup>175</sup> *Buckley*, 424 U.S. at 140.

<sup>176</sup> 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>.

<sup>177</sup> *Smith Testimony*, 3.

<sup>178</sup> 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, 115<sup>th</sup> Congress (2017).

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.”<sup>179</sup> *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.<sup>180</sup>

Whether or not that was a correct assumption,<sup>181</sup> 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.<sup>182</sup> These entities are also becoming increasingly common in Senate and House races.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.

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<sup>179</sup> *Buckley*, 424 U.S. at 36-37.

<sup>180</sup> *Citizens United*, 558 U.S. at 360.

<sup>181</sup> 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>.

<sup>182</sup> 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>.

<sup>183</sup> 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/>.

<sup>184</sup> 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](https://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273).

<sup>185</sup> 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/>.

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, 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.<sup>186</sup> Far from being unconstitutional, the Act’s strengthening of federal coordination rules is in line with regulatory trends in the states.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup> The Act provides a new option for non-wealthy candidates who do

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<sup>186</sup> 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 . . . undoubtably 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.

<sup>187</sup> 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>.

<sup>188</sup> 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>

<sup>189</sup> 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

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.<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup> 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.<sup>193</sup> Democrats in Maryland, likewise, rejected a congressional map that would have given African-Americans additional electoral opportunities because that would have created an additional

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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](https://lancasteronline.com/news/politics/jess-king-is-the-only-pennsylvania-candidate-for-congress-drawing/article_86c5de3c-8b96-11e8-bc8f-3f9a023379f9.html); Michelle 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]").

<sup>190</sup> 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>.

<sup>191</sup> 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>.

<sup>192</sup> *Benisek v. Lamone*, \_\_\_ F. Supp. 3d \_\_\_ (2018).

<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup> Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.<sup>197</sup> 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.<sup>198</sup>

**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.<sup>199</sup> California’s maps did not just improve

<sup>194</sup> 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](https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html?utm_term=.b84f2191878d).

<sup>195</sup> *Arizona v. Intertribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

<sup>196</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>197</sup> 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).

<sup>198</sup> 2 U.S.C. § 2c

<sup>199</sup> 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>.

political fairness. They also kept communities of interest together, increased representation for communities of color, and enhanced the opportunity for competition.<sup>200</sup>

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.<sup>201</sup> Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.<sup>202</sup>

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,<sup>203</sup> is an important and ground-breaking change. Federal law currently has next to no rules governing how districts are to be drawn.<sup>204</sup> 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.

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<sup>200</sup> Royden and Li, *Extreme Maps*, 23, 26, 29; Royden, Li, and Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, 17-19.

<sup>201</sup> 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>.

<sup>202</sup> 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>.

<sup>203</sup> 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/#>.

<sup>204</sup> 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.



#### 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 systems<sup>205</sup> and election night results reporting websites.<sup>206</sup> 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.<sup>207</sup> Our intelligence community continues to warn that “numerous actors are regularly targeting election infrastructure.”<sup>208</sup> 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.”<sup>209</sup>

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);<sup>210</sup> few states regularly review their paper backups to audit their election results;<sup>211</sup> private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark;<sup>212</sup> and election officials across the country say they lack the resources to implement critical election

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<sup>205</sup> 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>.

<sup>206</sup> 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/>.

<sup>207</sup> 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>.

<sup>208</sup> 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>.

<sup>209</sup> Colleen Long and Michael Balsamo, “Cybersecurity Officials Start Focusing on the 2020 elections,” *Associated Press*, November 8, 2018, <https://www.apnews.com/cfaa16f6a86349bebc16e0633d6214dd>.

<sup>210</sup> 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-idUSKBN1GX200>; see also *Securing the Vote: Protecting American Democracy*, National Academies of Sciences, Engineering, and Medicine, 2018.

<sup>211</sup> 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>.

<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup>

#### **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.<sup>216</sup> 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

<sup>213</sup> 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>.

<sup>214</sup> *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*.

<sup>215</sup> 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](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](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).

<sup>216</sup> 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>.

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,<sup>217</sup> 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.<sup>218</sup>

**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,<sup>219</sup> 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.<sup>220</sup> 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

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<sup>217</sup> *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>.

<sup>218</sup> Making Every Vote Count: A Practical Guide to Risk-Limiting Audits, [https://youtu.be/gMbz0\\_dizoA](https://youtu.be/gMbz0_dizoA).

<sup>219</sup> 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%20ElectionsI.pdf>.

<sup>220</sup> 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>.

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.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> We look forward to continuing to work with Congress on other much-needed reforms.<sup>224</sup>

#### **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

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<sup>221</sup> Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 2.

<sup>222</sup> 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").

<sup>223</sup> *H.R. 1, The For the People Act: Letter to the Committee on the Judiciary*, 116<sup>th</sup> 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>.

<sup>224</sup> *Mehrbani Testimony*, 14-15.

Clause. The Elections Clause empowers Congress, “at any time,” to “make or alter” any regulations for federal elections.<sup>225</sup>

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.<sup>226</sup> 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[.]”<sup>227</sup> Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,<sup>228</sup> redistricting,<sup>229</sup> campaign finance,<sup>230</sup> and corruption in presidential elections.<sup>231</sup>

<sup>225</sup> 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 chusing [sic] Senators.” U.S. Const. art. I, § 4, cl. 1

<sup>226</sup> 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 supercede 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).

<sup>227</sup> *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

<sup>228</sup> *Id.*

<sup>229</sup> *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).

<sup>230</sup> *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.”).

<sup>231</sup> *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)).

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.<sup>232</sup>

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.<sup>233</sup> 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.”<sup>234</sup> 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.”<sup>235</sup> 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.<sup>236</sup> Thus, as Justice Scalia recognized, the states’ power to regulate federal elections has always been subject to federal law.<sup>237</sup>

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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.

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<sup>232</sup> *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Mitchell*, 400 U.S. at 121, 124 (1970).

<sup>233</sup> 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](http://avalon.law.yale.edu/18th_century/fed57.asp).

<sup>234</sup> Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2:241.

<sup>235</sup> *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2672 (2015).

<sup>236</sup> 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.

<sup>237</sup> *Inter Tribal Council*, 570 U.S. at 14–15 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)).