

Testimony of

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Hearing on Oversight of the Federal Election Commission
The Committee on House Administration
U.S. House of Representatives

September 25, 2019

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

Thank you for the opportunity to submit testimony on behalf of the Brennan Center for Justice on the challenges faced by the Federal Election Commission.¹ The Brennan Center commends the Committee's exercise of oversight in this area, which is long overdue, and strongly supports efforts to help the FEC become the effective independent regulator America needs.

The FEC's present lack of a quorum is an urgent threat to the integrity of the 2020 election. We are particularly concerned that the Commission's lack of a quorum will prevent it from fulfilling its responsibilities as one of the front-line agencies charged with defending American elections from foreign interference. We hope that this Committee, and all members of Congress, will urge the president and Senate leaders to work together on a bipartisan basis to fill the Commission's vacant seats as soon as possible with commissioners who are committed to robust, even-handed enforcement of the law.

¹ The Brennan Center is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's systems of democracy and justice. The Brennan Center has studied campaign finance issues for more than 20 years, working to develop and advocate for effective, constitutionally sound policies to safeguard the integrity of American elections consistent with core First Amendment values. The Brennan Center previously released a white paper that I authored detailing the FEC's challenges and how to address them. See Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Center for Justice, 2019, <https://www.brennancenter.org/publication/fixing-fec-agenda-reform>. The Brennan Center's white paper is incorporated herein and attached as Appendix A ("App. A"). Prior to joining the Brennan Center, I served as senior counsel to FEC Commissioner Ellen L. Weintraub. That experience also informs my testimony to this Committee.

Over the long term, however, the FEC requires more fundamental reform. For years the agency has been beset by partisan gridlock and pervasive management challenges. FEC dysfunction has exacerbated some of the biggest problems with our campaign finance system, including the proliferation of dark money from undisclosed sources, rampant circumvention of campaign contribution limits, and vulnerability to foreign interference in our campaigns—all while depriving candidates and other participants in the political process of clarity as to their legal obligations.

Fortunately, there are solutions. As indicated in prior testimony, the Brennan Center strongly supports H.R.1, the For the People Act of 2019, including its provisions that would overhaul the FEC, which the House passed in March of this year.² These changes would bring the FEC’s structure more in line with that of other independent regulatory agencies, but with significantly greater safeguards to prevent partisan overreach and other abuses. In addition to these critical reforms, the Brennan Center has developed further recommendations to ensure that the FEC will truly work for all Americans. The Brennan Center’s recommendations (many of which are already part of H.R.1) are set forth in a white paper that I authored that is included with this testimony as Appendix A.³

Of course, restoring the FEC’s quorum must not await adoption of these much-needed reforms. Even with its present flaws, a fully operational FEC is needed to help navigate the challenges of 2020. We look forward to continuing to work with the Committee on this important issue.

I. Restoring the FEC’s Quorum

The FEC’s loss of its quorum of commissioners just as the 2020 election cycle kicks into high gear is an urgent problem. Under the Federal Election Campaign Act (FECA), the Commission cannot exercise its most significant functions without four affirmative votes. With only three sitting commissioners, the agency cannot write new rules, issue advisory opinions, seek penalties, or even investigate alleged violations of the law.⁴ The FEC already faced major challenges; loss of its quorum has made an already troubling situation significantly worse.

This is an especially dangerous time for the FEC to be hobbled given the near certainty that the Russian government and perhaps other foreign rivals will seek to interfere in the 2020

² See For the People Act of 2019, H.R.1, 116th Congress, §§ 6001, *et seq.* (2019); Wendy R. Weiser, *Testimony of Wendy R. Weiser before the House Committee on Administration: Hearing on HR. 1, The For the People Act*, Feb. 14, 2019, available at https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Weiser_testimony_for_House_Administration_hearing_on_HR1_0.pdf. Ms. Weiser’s testimony is incorporated herein and attached as Appendix B (“App. B”).

³ See App. A (*Fixing the FEC*), 6–9.

⁴ See 52 U.S.C §§ 30106(c), 30107.

election.⁵ Kremlin interference in the 2016 election was described by Special Counsel Robert Mueller as “sweeping and systematic,”⁶ but experts (including U.S. law enforcement) warn that future efforts are likely to be even more aggressive and sophisticated.⁷ The FEC is one of the front-line agencies responsible for confronting this challenge.

There are many things the Commission could do to address this problem if it had a quorum.⁸ Even taking into account the significant disagreements among Democratic and Republican commissioners, if a quorum were present the Commission could conceivably accomplish a number of critical actions, including the following:

- *Requiring greater transparency for online campaign ads.* Without a quorum, the FEC cannot finish a long-stalled rulemaking to strengthen its rules governing “paid for” disclaimers and other requirements for online campaign ads. Anonymous online ads were one of the primary tools Russian operatives used to transmit propaganda to the 2016 electorate.⁹ In February 2018, commissioners unanimously approved a notice of proposed rulemaking to begin to address this problem, but have yet to approve a final rule.¹⁰ While the FEC’s rulemaking is no silver bullet,¹¹ it would be a useful first step, one that is long overdue.

⁵ Daniel R. Coats, *Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community*, Office of the Director of National Intelligence, Jan. 29, 2019, 7, available at <https://www.odni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf>.

⁶ Special Counsel Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, vol. 1, U.S. Department of Justice, 2019, 1, available at <https://www.justice.gov/storage/report.pdf>.

⁷ Michael McFaul and Bronte Kass, “Understanding Putin’s Intentions and Actions in the 2016 U.S. Presidential Election,” in *Securing American Elections: Prescriptions for Enhancing the Integrity and Independence of the 2020 U.S. Presidential Election and Beyond*, ed. Michael McFaul, Stanford Cyber Policy Center, June 2019, 15–16, available at <https://stanford.box.com/shared/static/xd35pzvlnl2konx16suee7mqvjvk6nrb.pdf>; Julian E. Barnes and Adam Goldman, “F.B.I. Warns of Russian Interference in 2020 Race and Boosts Counterintelligence Operations,” *New York Times*, Apr. 26, 2019, <https://www.nytimes.com/2019/04/26/us/politics/fbi-russian-election-interference.html> (quoting FBI Director Christopher A. Wray).

⁸ See, e.g., Commissioner Ellen L. Weintraub to The Commission, Sept. 9, 2016, Federal Election Commission, available at https://www.fec.gov/resources/cms-content/documents/2018-05_ELW_Rulemaking_Proposal_to_Combat_Foreign_Election_Influence.pdf.

⁹ Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America’s Elections*, Brennan Center for Justice, 2018, <https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections>.

¹⁰ 83 Federal Register 12864 (Mar. 26, 2018), available at <https://sers.fec.gov/fosers/showpdf.htm?docid=373521>.

¹¹ Under the FECA, the only online ads that are currently required to contain disclaimers are those that “expressly advocate” for or against candidates, which many ads placed by Russian operatives did not do. See Nate Persily and Alex Stamos, “Regulating Online Political Advertising by Foreign Governments and Nationals,” in *Securing American Elections*, 28. Other legislation included in H.R.1, the Honest Ads Act, would expand disclaimer and other transparency rules to a broader array of online ads. See H.R.1, 116th Congress, §§ 4201–4209 (2019); App. B (Weiser Testimony), 24.

- *Facilitating campaign cybersecurity upgrades.* The lack of a quorum also prevents the FEC from issuing further guidance to help campaigns pay for cybersecurity upgrades. The Russian government’s 2016 election interference operation made highly effective use of e-mails and other information hacked from Democratic Party servers and private accounts, which Russian operatives turned over to the organization WikiLeaks.¹² To help prevent future attacks, the FEC has issued a series of advisory opinions greenlighting various proposals to allow campaigns and officeholders to pay for enhanced cybersecurity, often with private sector assistance, providing much-needed legal certainty to requestors that their plans will not violate the FECA.¹³ But these opinions are limited to their specific circumstances and cannot shield future requestors.
- *Clarifying the law on receipt of foreign intelligence by campaigns.* Without a quorum, the FEC also cannot address a troubling misinterpretation of campaign finance law in the Mueller Report. As is well known, the Report documented Russian attempts to directly assist a major presidential campaign, including an offer to provide “dirt” on a rival candidate.¹⁴ But the Special Counsel went on to cast doubt on whether such information could constitute a prohibited “contribution” under the FECA.¹⁵ This analysis was incorrect; it has sown confusion on what had been a relatively straight-forward issue.¹⁶ Absent congressional action (which we strongly support), the FEC is the agency best placed to provide clarity, as requested in a recent rulemaking petition.¹⁷
- *Pursuing violations of the ban on foreign national campaign spending.* Finally, without a quorum the FEC cannot do anything to police even the most clear-cut violations of the ban on campaign spending by foreign nationals. Illegal foreign contributions were a

¹² Mueller, *Report On The Investigation Into Russian Interference*, vol. 1, 44–49.

¹³ See FEC Advisory Opinion No. 2019-12 (Area 1 Security, Inc. II), available at <https://www.fec.gov/files/legal/aos/2019-12/2019-12.pdf>; FEC Advisory Opinion No. 2018-15 (Wyden), available at <https://www.fec.gov/files/legal/aos/2018-15/2018-15.pdf>; FEC Advisory Opinion No. 2018-12 (Defending Digital Campaigns), available at <https://www.fec.gov/files/legal/aos/2018-12/2018-12.pdf>; FEC Advisory Opinion No. 2018-11 (Microsoft), available at <https://www.fec.gov/files/legal/aos/2018-11/2018-11.pdf>.

¹⁴ Mueller, *Report On The Investigation Into Russian Interference*, vol. 1, 86–94.

¹⁵ *Id.* 186–187.

¹⁶ Bob Bauer, “The Failures of the Mueller Report’s Campaign Finance Analysis,” *Just Security*, May 3, 2019, <https://www.justsecurity.org/63920/the-failures-of-the-mueller-report-campaign-finance-analysis/>. A “contribution” under the FECA includes “anything of value.” 52 U.S.C. § 30101(8)(A)(i). That clearly encompasses damaging information about a political rival, for which campaigns often pay substantial amounts of money.

¹⁷ 84 Federal Register 37154 (July 31, 2019), available at <https://sers.fec.gov/fosers/showpdf.htm?docid=408309>.

persistent problem even before 2016.¹⁸ Lately, enforcement of the ban has been one of the few areas where the Commission has occasionally sought and obtained significant (albeit still inadequate) penalties.¹⁹

Restoring the FEC to its full complement of members should be an urgent, bipartisan priority. We hope the Committee will add its voice to those calling for immediate action to resolve this issue.

II. The Need for a Broader Overhaul

While restoring the Commission's quorum is an urgent priority, over the long term the FEC needs a much broader overhaul. The Commission's evenly divided, leaderless structure no longer works; it dates back to a time when Democratic and Republican leaders, and the FEC commissioners they appointed, were far less ideologically polarized over the government's role in regulating money in politics. Today's sharp partisan divisions among party elites (which, it should be noted, are not shared by the general public²⁰) have left the agency mired in permanent gridlock. FEC dysfunction has made our political process less transparent and more susceptible to corruption and foreign interference—with real-life consequences for millions of Americans. It also hurts candidates, party organizations, and others trying to comply in good faith with their legal obligations. And it fosters disrespect for the rule of law more generally. Change is long overdue.

A Polarized and Gridlocked Agency. The FEC's greatest challenge in the last decade has been the partisan stalemate among commissioners. Current law specifies that no more than three commissioners can be affiliated with the same party at the time they are nominated; the longstanding practice has been to divide the Commission's seats evenly between Democratic and Republican appointees, usually selected by congressional leaders.²¹ For most of the Commission's history, commissioners of both parties had a range of views on campaign finance law and policy, and so were usually able to forge compromises notwithstanding the agency's 3-3

¹⁸ See R. Sam Garrett, *Foreign Money and U.S. Campaign Finance Policy*, Congressional Research Service, 2019, <https://fas.org/sfp/crs/misc/IF10697.pdf>.

¹⁹ See App. A (*Fixing the FEC*), 4.

²⁰ Americans across the partisan spectrum still overwhelmingly support strict contribution limits, robust disclosure, and other safeguards. See Bradley Jones, "Most Americans want to limit campaign spending, say big donors have greater political influence," *Pew Research Center*, May 8, 2018, <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>; "Majority of Americans Support Campaign Finance Reform," *Ipsos*, Aug. 31, 2017, <https://www.ipsos.com/en-us/news-polls/center-for-public-integrity-2017-08-31>; Ashley Balcerzak, "Study: Most Americans want to kill 'Citizens United' with constitutional amendment," *The Center for Public Integrity*, May 10, 2018, <https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment>.

²¹ App. A (*Fixing the FEC*), 1. Legally all commissioners must still be nominated by the president and confirmed by the Senate, but presidents have usually deferred to congressional leaders, especially when selecting commissioners of the opposing party. *Id.*

divide. But as party elites have become more polarized on these issues, room for compromise has largely disappeared.²²

The resulting stalemate has affected most aspects of the FEC's operations. Enforcement deadlocks in particular have skyrocketed.²³ The Commission now deadlocks on most significant enforcement cases without even conducting an investigation—often after a year or more of delay.²⁴ The FEC's rulemaking process has also largely ground to a halt, notwithstanding seismic changes in the law, media, and technology, to say nothing of new threats like election meddling by foreign powers.²⁵ Instead of writing new rules, the Commission today addresses novel legal questions primarily through one-off advisory opinions issued under a compressed time frame, with little fact-finding and few opportunities to hear from the public. And even this suboptimal process saw a more than five-fold increase in deadlocks in the last decade compared to earlier periods, according to statistics the Brennan Center has compiled.²⁶

Partisan divisions at the FEC have also fueled serious management challenges. The FEC was designed to have no real leader. The office of chair rotates annually and carries little authority; instead all sitting commissioners share responsibility for managing the agency.²⁷ This fosters a lack of accountability at the top for the agency's many operational failures, like the high number of vacancies among senior staff and persistently low employee morale.²⁸ Moreover, the ability of commissioners to hold over indefinitely in office past the expiration of their terms means that infusions of fresh leadership are rare and hard to predict.²⁹

²² App. A (*Fixing the FEC*), 3.

²³ *Id.* 3–4.

²⁴ *Id.* Several recent deadlocks have involved alleged violations of the ban on campaign spending by foreign nationals, including a purported scheme by Paul Manafort to funnel donations from pro-Russian Ukrainian officials to members of Congress and another involving alleged Russian campaign contributions funneled through the National Rifle Association, a dark money group that does not disclose its donors and that spent approximately \$30 million on the 2016 election. See Certification (May 9, 2019), MUR 7272 (Party of Regions *et al.*), available at <https://www.fec.gov/files/legal/murs/7272/19044468031.pdf>; Statement of Reasons of Chair Ellen L. Weintraub (June 21, 2019), MUR 7272 (Party of Regions *et al.*), available at https://www.fec.gov/files/legal/murs/7272/7272_1.pdf; Certification (July 9, 2019), MUR 7314 (Alexander Torshin *et al.*), available at <https://www.fec.gov/files/legal/murs/7314/19044473675.pdf>; Statement of Reasons of Chair Ellen L. Weintraub (Aug. 16, 2019), MUR 7314 (Alexander Torshin *et al.*), available at https://www.fec.gov/files/legal/murs/7314/7314_1.pdf.

²⁵ App. A (*Fixing the FEC*), 4.

²⁶ *Id.* 5

²⁷ *Id.* 1.

²⁸ *Id.* 4. The FEC has gone more than five years without a permanent general counsel. *Id.* 5. Employee morale is consistently low and was the subject of a scathing 2016 inspector general report. *Id.* Morale has somewhat ticked up recently, but still hovers in the bottom fifth for agencies of comparable size, according to data compiled by the Partnership for Public Service and the Boston Consulting Group. Best Places to Work, “Best Places to Work Agency Rankings,” accessed Sept. 20, 2019, <https://bestplacestowork.org/rankings/overall/small>.

²⁹ See App. A (*Fixing the FEC*), 7.

Undermining Key Safeguards. FEC dysfunction is responsible for some of the biggest gaps in our system of campaign finance regulation. For example, the FEC has played a central role in enabling the proliferation of more than \$1 billion in dark money from undisclosed sources.³⁰ Dark money not only deprives voters of the information they need to make informed choices, it is also a potential vehicle for foreign money to enter the U.S. political system.³¹ Dark money is permissible in significant part because of the Commission’s repeated deadlocks over whether to update disclosure regulations in the wake of *Citizens United*, or whether to even enforce its own standards for which groups must adhere to political committee registration and reporting rules.³²

The Commission’s regulatory and enforcement failures have also undermined campaign contribution limits that are a bulwark against corruption.³³ Earlier this year, for example, commissioners deadlocked on whether to follow staff recommendations to investigate both the Clinton and Trump campaigns for alleged joint fundraising abuses that allowed them to raise tens of millions of dollars above the legal limits.³⁴ Joint fundraising rules became vastly more important in 2014, when the Supreme Court struck down aggregate limits on how much contributors could give in total to candidates, parties, and other political committees in *McCutcheon v. FEC*.³⁵ Unfortunately, the Commission appears to be doing little to enforce these rules, let alone taking any steps to strengthen them.

By its own admission, the Commission also almost never enforces, and has done nothing to update, its rules limiting coordination between campaigns and supposedly independent outside groups like super PACs.³⁶ That failure has permitted these groups to spend billions working

30 Center for Responsive Politics, “Political Nonprofits (Dark Money),” accessed Sept. 20, 2019, https://www.opensecrets.org/outsidespending/nonprof_summ.php.

31 Vandewalker and Norden, *Getting Foreign Funds Out of America’s Elections*, 15–16.

32 Daniel I. Weiner, “The FEC Deadlocks (Again) on Dark Money,” *Brennan Center for Justice*, Aug. 1, 2014, <https://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

33 See *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

34 See Certification (Apr. 25, 2019), MUR 7304 (Hillary Victory Fund *et al.*), available at <https://www.fec.gov/files/legal/murs/7304/19044465984.pdf>; First General Counsel’s Report (Sept. 28, 2018), MUR 7304 (Hillary Victory Fund *et al.*), available at <https://www.fec.gov/files/legal/murs/7304/19044465911.pdf>; Certification (Apr. 25, 2019), MUR 7339 (Trump Victory *et al.*), available at <https://www.fec.gov/files/legal/murs/7339/19044465498.pdf>; First General Counsel’s Report (Feb. 13, 2019), MUR 7339 (Trump Victory *et al.*), available at <https://www.fec.gov/files/legal/murs/7339/19044465466.pdf>.

35 572 U.S. 185, 215 (2014) (reasoning that overall limits are unnecessary because joint fundraising restrictions and similar rules were sufficient to prevent corruption); see also Daniel I. Weiner, “McCutcheon’s Anti-Circumvention Folly,” *Brennan Center for Justice*, Apr. 9, 2014, <https://www.brennancenter.org/blog/mccutcheon-anti-circumvention-folly>.

36 FEC, *Responses to Questions from the Committee on House Administration*, May 1, 2019, 24–25 https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf.

hand-in-glove with presidential and congressional campaigns, further increasing the risk of corruption and its appearance.³⁷

As noted above, the FEC's partisan stalemate has also prevented a more meaningful response to the Russian government's interference in the 2016 presidential election. While certain measures remain on the table, there are many more ambitious actions the Commission could take to head off foreign meddling. Last year the Commission deadlocked on whether to move forward with these proposals,³⁸ and has moved far too slowly even on more modest initiatives where consensus might be achievable.³⁹

Real-World Consequences. These are not abstract concerns. Weak campaign finance rules have a real impact on the lives of everyday Americans. Dark money spending, for example, has helped to shape recent debates on everything from taxes,⁴⁰ to climate change,⁴¹ to whether healthcare consumers should be protected from surprise medical bills.⁴² Earlier this year, this Committee heard the story of how a \$750,000 contribution to a dark money group working closely with candidates in Wisconsin helped shield a lead company from liability for lead poisoning in children.⁴³ The Brennan Center's own research has uncovered many examples of similar tactics—including from payday lenders seeking relief from consumer protection laws in

³⁷ App. A (*Fixing the FEC*), 1; App. B (Weiser Testimony), 28.

³⁸ Jordan Muller, "FEC rejects proposal to consider new rules on foreign spending in US elections," *Center for Responsive Politics*, May 25, 2018, <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>; see also note 8.

³⁹ See Part I.

⁴⁰ Kayla Kitson, "The Koch Brothers' Best Investment," *The American Prospect*, June 28, 2018, <https://prospect.org/article/koch-brothers-best-investment> (Koch-linked dark money network spent \$20 million to promote the passage of the Tax Cuts and Jobs Act, and invested an additional \$20 million to promote the tax cut before the 2018 elections and attack Senators who opposed it).

⁴¹ Douglas Fischer, "'Dark Money' Funds Climate Change Denial Effort," *Scientific American*, Dec. 23, 2013, <https://www.scientificamerican.com/article/dark-money-funds-climate-change-denial-effort/> (\$558 million was funneled into dark money climate denial organizations, while traceable spending by Koch Industries and ExxonMobil stopped).

⁴² Rachel Roubin, "Health groups backed dark money campaign to sink 'surprise' billing fix," *Politico*, Sept. 13, 2019, <https://www.politico.com/story/2019/09/13/health-groups-dark-money-hospital-bills-legislation-1495697> (dark money group called Doctor Patient Unity, reportedly linked to corporate medical firms, has spent \$28 million targeting lawmakers to stop a bill that would protect patients from surprise medical bills).

⁴³ Peter Guyon Earle, *Committee on House Administration "H.R. 1, For the People Act" Written Testimony of Peter G. Earle*, Feb. 14, 2019, available at https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Peter_Earle_testimony_HR1.pdf.

Utah,⁴⁴ power companies looking to drive up the cost of solar energy in Arizona,⁴⁵ and a mining company pushing for less stringent environmental safeguards in Wisconsin.⁴⁶

FEC dysfunction also has practical consequences for candidates and others who are trying to follow the law. They rely on the Commission to provide clear rules that will be consistently applied. The FEC's failure to do its job has, in the words of one election law practitioner, "created risk and uncertainty that doesn't need to be there."⁴⁷ Failure to enforce the rules on the books also contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.⁴⁸

The breakdown of the FEC is, in short, one of our democracy's most pressing challenges. As a bipartisan group of members of Congress wrote to President Trump in February 2018, 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."⁴⁹ This is a problem that should concern all of us. Fortunately, we already have robust solutions on the table.

III. Solutions

Any plan to overhaul the FEC must address three core challenges: pervasive partisan gridlock, the lack of a clear leader to hold accountable for how well the FEC runs, and a civil enforcement process that has always produced long delays, leaving respondents in limbo and undermining the deterrence value of the Commission's penalties.⁵⁰

⁴⁴ Chisun Lee, Katherine Valde, Benjamin T. Brickner, and Douglas Keith, *Secret Spending in the States*, Brennan Center for Justice, 2016, 11–12, https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.

⁴⁵ *Id.* 13.

⁴⁶ *Id.* 12.

⁴⁷ Dave Levinthal, "Politicos Souring on FEC Advice?," *The Center for Public Integrity*, July 22, 2014, <https://publicintegrity.org/federal-politics/politicos-souring-on-fec-advice/> (quoting election lawyer Joe Sandler); see also App. A (*Fixing the FEC*), 2. A recent example of this dynamic was the controversy over presidential candidate Andrew Yang's proposed raffle to promote his "Freedom Dividend" universal basic income plan. Winners of the raffle would receive \$1000 per month for a year from the campaign. Cash payouts of this sort arguably violate FECA's restrictions on how campaign funds may be used, although the relevant provisions likely were not drafted with this particular situation in mind. Without a functional FEC, as one former commissioner notes, "there is no mechanism for deciding the legality" of Yang's program on a timely basis. See Ann Ravel, "Yang's Possibly Illegal Giveaway Shows Why We Need a Working FEC," *Politico Magazine*, Sept. 21, 2019, <https://www.politico.com/magazine/story/2019/09/21/andrew-yang-giveaway-campaign-finance-fec-228150>. This is especially true now with the FEC lacking a quorum. Even when a quorum existed, however, the chance of a deadlock on this sort of hard question would have been high.

⁴⁸ 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.

⁴⁹ 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>.

⁵⁰ App. A (*Fixing the FEC*), 3–4.

H.R.1 addresses each of these problems. It would curtail gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with the same party, effectively requiring one commissioner to be a true independent.⁵¹ It would create clear political accountability for the FEC’s management by allowing the president to name a real chair to serve as its chief administrative officer (this individual would continue to have only one vote on policy and enforcement matters).⁵² It would end the practice of allowing commissioners to continue in office indefinitely past the expiration of their terms.⁵³ And it would take steps to streamline the enforcement process, including 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.⁵⁴

Critically, H.R.1 also contains strong safeguards to protect a revitalized FEC from becoming a tool for partisan overreach. In fact, the structure envisioned by H.R.1 provides for significantly more protections than currently exist.

For instance, H.R.1 seeks to ensure partisan balance on the new FEC by providing that nominees to seats on the Commission will be deemed to be affiliated with a party if they have had any connection to the party as a registered voter, donor, employee, consultant, or attorney within the previous five years.⁵⁵ That will minimize the risk of the Senate confirming a “wolf in sheep’s clothing”—i.e. someone trying to disguise their true partisan leanings.⁵⁶ The Act also creates a new, bipartisan vetting process for nominees.⁵⁷ And it provides for more robust judicial oversight of the enforcement process.⁵⁸ Ending the ability of commissioners to hold over indefinitely past the expiration of their terms will also be a safeguard against excessive partisanship, since holdover commissioners are more subject to pressure from the president and Congress, who have the power to replace them at any time.⁵⁹

These and other sensible changes in H.R.1 will bring the FEC’s structure more in line with that of other successful independent regulators while protecting the political rights of all

⁵¹ H.R.1, 116th Congress (2019), § 6002(a)(1).

⁵² *Id.* § 6003(a)

⁵³ *Id.* § 6002(b)

⁵⁴ *Id.* § 6004.

⁵⁵ *Id.* § 6002(a)(1); App. A (*Fixing the FEC*), 6.

⁵⁶ See Daniel Weiner, “FEC’s status quo is hazardous – proposed legislation would help fix it,” *The Hill*, Feb. 10, 2019, <https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it>.

⁵⁷ H.R.1, 116th Congress (2019), § 6002(b); App. A (*Fixing the FEC*), 6–7.

⁵⁸ H.R.1, 116th Congress (2019), § 6004(b).

⁵⁹ App. A (*Fixing the FEC*), 7.

Americans.⁶⁰ These provisions could potentially be made even stronger by incorporating certain other Brennan Center recommendations, such as our proposals to transfer civil enforcement to a separate division overseen by an independent director, provide respondents as well as complainants the right to sue if the Commission does not act on a complaint within one year, and allow commissioners to be reappointed to one additional term.⁶¹ We also urge the Committee to bear in mind as it moves forward with this work that any overhaul of the FEC will likely require an increase in the Commission's budget to ensure that it has the resources it needs to carry out its politically sensitive responsibilities with professionalism and due regard for the public's interests and those of the candidates and others who come before it.⁶²

If there is one thing that unites both supporters and opponents of campaign finance reform, it is reverence for the First Amendment. The First Amendment protects the right to speak freely on matters of public concern because without that right it is impossible to achieve true representative democracy.⁶³ But democracy also requires an electoral process governed by clear rules in which we can all have confidence. For the last decade, a dysfunctional FEC has stood in the way of that objective, undermining the First Amendment's most cherished goal. Change is long overdue. We enthusiastically support the efforts of this Committee and the House to make the FEC a true guardian of American democracy.

⁶⁰ *Id.* 6 & note 68.

⁶¹ *Id.* 7–8.

⁶² *Id.* 9.

⁶³ See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (“Political speech is indispensable to decisionmaking in a democracy....”).

Appendix A

Fixing the FEC: An Agenda for Reform

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Introduction

The campaign finance system charged with safeguarding our elections has itself become a threat to democracy. This is thanks not only to *Citizens United*, but also to a dysfunctional campaign finance agency in Washington, the Federal Election Commission. Evenly divided and perpetually gridlocked, FEC dysfunction has made it more difficult for candidates trying to follow the law, and easier for those willing to break it. Over the last decade the FEC has abandoned serious allegations of lawbreaking without investigating because its commissioners have divided along party lines. Further, the agency has often failed to provide candidates and other political actors with guidance on key issues and has neglected to update regulations to reflect major changes in the law, media, and technology.

This paper sets forth a new blueprint to make the FEC work again. It proposes reforms to curtail gridlock, foster more accountable agency leadership, and overhaul the Commission's civil enforcement process. A number of these changes are part of H.R. 1, the historic For the People Act of 2019 that recently passed the House of Representatives.¹ They deserve to be a bipartisan priority.

The FEC was created in 1975 to administer and enforce the system of post-Watergate campaign finance rules designed to prevent corruption.² It is composed of six commissioners; no more than three can be from the same party. The Commis-

sion cannot enact regulations, issue guidance, or even investigate alleged violations of the law without four votes.³ While the Commission does have a nominal chair, the office rotates and carries no real power; even purely administrative matters related to budgets, staffing, and other management decisions generally require four commissioners to agree.⁴

Today, that rarely happens on matters of significance. By long-standing practice, FEC commissioners are usually hand-picked by Democratic and Republican leaders in Congress,⁵ who increasingly disagree not only about the need for new reforms but also about how to interpret existing laws.⁶ The evenly split Commission often cannot agree even on personnel and other administrative matters, with critical posts often sitting vacant for years.⁷

Since 2010, the FEC's partisan stalemate has allowed more than \$1 billion in dark money from undisclosed sources to flood into U.S. elections.⁸ Enforcement of rules that limit cooperation between candidates and lightly regulated super PACs has been stymied, making it possible for super PACs to spend billions working hand in glove with campaigns. Presidential candidates too often have become the equivalent of racehorses backed by rival billionaires.⁹ And gridlock has prevented any meaningful FEC response to revelations that Russia sought to manipulate the U.S. electorate in 2016.¹⁰ A requirement for disclaimers on the sorts of online ads that

Russian operatives used to influence American voters has been stalled for more than a year.¹¹ Given this history, if any of the more ambitious reforms in H.R. 1 were to be enacted, it is doubtful that FEC commissioners could effectively carry out a new mandate.

FEC dysfunction thwarts even Commission members who oppose stronger rules. They can block enforcement on an evenly divided FEC, but they do not have the votes to change rules they find irrational or outdated. For instance, a proposal to loosen rules that govern political party fundraising has languished since 2015.¹²

For candidates and others, gridlock at the FEC creates risk and uncertainty that doesn't need to be there. "Most political operatives, whether on the right or the left, want clarity. What can I do and what can I not do," says former Republican commissioner Michael Toner. "They might not always be thrilled with the answers, but they want to know."¹³ Instead, those seeking advisory opinions from the FEC on novel or controversial issues often go away empty-handed.¹⁴ The resulting gray areas can have real consequences: In recent years both Republican and Democratic officeholders have been accused of criminal offenses that might have been avoided with the help of clearer FEC guidance.¹⁵

FEC dysfunction harms candidates and political parties, who are under the brightest spotlight and who have traditionally relied on the Commission to create clear, uniform rules.¹⁶ The lack of clarity is a problem even for supposed beneficiaries of *Citizens United*, like politically active business interests, who put a similar premium on "everyone[] playing by the same rules."¹⁷ Political outsiders without the resources to hire expensive election lawyers to parse ambiguous or out-of-date regulations are particularly disadvantaged. With a paralyzed FEC, something as simple as filling out a form can be fraught, since many of the Commission's forms and accompanying guidance are incomplete and/or out-of-date. For example, more than nine years after *Citizens United*, there is still no FEC form for creating a super PAC. Instead, filers must fill out the form for creating a traditional PAC, and then send the FEC a separate letter. That process is set forth in "interim" guidance the Commission issued more than seven years ago.¹⁸ It also would not be apparent from checking the Commission's official guide for nonconnected PACs, which was last updated in 2008.¹⁹

In short, as a bipartisan group of members of Congress wrote to President Trump in February 2018, 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."²⁰

Congress needs to fix this problem, but in a way that preserves safeguards against partisan abuse of the Commission's power and bureaucratic overreach that could stifle political

expression. In crafting proposals to achieve this balance, the Brennan Center consulted with more than a dozen experts who served as FEC commissioners or high-level staffers, or who have regularly advocated before or studied the agency. On the basis of their input and our own expertise (including that of the author, who worked at the FEC from 2011 to 2014), we recommend the following reforms:

- 1. Change the number of commissioners, with at least one political independent:** To reduce gridlock and allow for decisive policymaking, Congress should change the Commission's structure to give it an odd number of five commissioners, with no more than two from each of the major political parties. Congress should specify that at least one commissioner be a political independent who has neither been affiliated with nor worked for one of the two major parties or their officeholders or candidates in the five years preceding their appointment.
- 2. Establish an inclusive, bipartisan process to vet potential nominees.** As an added safeguard, Congress should require the president to convene a blue-ribbon advisory panel to help vet potential nominees. The panel should have representation from both major parties. Congress should also require reasonable steps consistent with the Constitution to ensure that people of color and other underrepresented communities have a voice in the selection process.
- 3. Give the agency a real leader who is accountable to the president.** To ensure clearer lines of accountability for the Commission's management, Congress should provide that the president will designate one commissioner to serve as the agency's chair during the president's term. The chair would have the power to supervise Commission staff, approve its budget, and otherwise act as the agency's chief administrator, but with sufficient checks to prevent partisan abuse of the office and ensure the Commission's continued independence from the White House.
- 4. End the practice of allowing commissioners to remain in office indefinitely as holdovers.** To ensure that the Commission has regular infusions of fresh leadership with an appropriate degree of independence, Congress should limit commissioners to two statutory terms and end the practice of letting them serve indefinitely past the expiration of their terms until a successor arrives.
- 5. Overhaul the Commission's civil enforcement process:** Finally, Congress should take several steps to make the Commission's civil enforcement process timelier and more effective, while maintaining safeguards to protect the rights of alleged violators. These changes should include:
 - Creating an independent enforcement bureau within the Commission, whose director would be selected by a bipartisan majority of commissioners and have

authority to initiate investigations and issue subpoenas (subject to override by a majority of commissioners);

- Providing an effective legal remedy for both complainants and alleged violators to obtain legal clarity if the Commission fails to act on an enforcement complaint within one year;
- Limiting the Commission's use of prosecutorial discretion to avoid pursuing serious violations;
- Restoring the Commission's authority to conduct random audits of political committees;
- Reinforcing the Commission's system of "traffic ticket" administrative fines for reporting violations by making it permanent and requiring the Commission to expand the program to cover all reports; and
- Increasing the Commission's budget to allow it to hire additional qualified staff to ensure timely, effective resolution of enforcement matters.

These reforms will allow an important federal agency to enforce the law as written and provide much-needed clarity on a host of issues that affect officeholders and others across the political spectrum. How much transparency does the law require for those who engage in campaign spending? How closely may candidates work with like-minded super PACs? When are certain payments — say, those made on President Trump's behalf to the adult film star Stormy Daniels to hide an alleged affair²¹ — considered campaign contributions? How should decades-old statutory law be applied to the internet? A less-gridlocked FEC could provide real answers. And to the extent that those answers do not sit well with the American people, there will be much clearer lines of accountability than the current stalemate affords.

If there is any lesson from the FEC's recent history, it is that while strong checks and balances are essential for any entity that regulates the political process, efforts to insulate the Commission entirely from swings of the political pendulum simply have not worked. The time has come for a different approach.

The FEC in the Age of Partisan Polarization

To fix the FEC, it is important to understand how it got to this point.

The FEC's evenly divided structure was born from political compromise. In the aftermath of Watergate, Congress bowed to the overwhelming public demand for stronger campaign finance laws to protect the integrity of our government. But congressional leaders also worried that an agency specifically

designed to police politics would be weaponized by whichever party was in control.²² No doubt many were also wary of having an aggressive watchdog oversee their own campaigns.²³

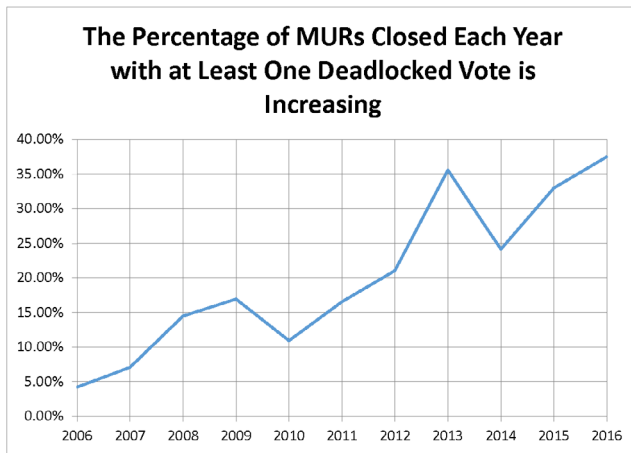
They came up with a six-member commission as the solution. On paper, the agency has significant authority to interpret federal law and pursue civil enforcement.²⁴ But it cannot exercise its most important functions without the assent of a majority of four commissioners, only three of whom can be from one party.²⁵ And while legally all commissioners must be nominated by the president and confirmed by the Senate,²⁶ in practice party leaders handpick who occupies the Commission's seats.²⁷

Historically, the Commission's even divide did not preclude coherent policymaking or completely stymie enforcement because ideological fault lines over the role of money in politics did not closely track party affiliation. Both Republican and Democratic party leaders had a diversity of views on campaign finance regulation, and the commissioners whom they selected were usually able to hammer out compromises across party lines.²⁸ That did not keep reformers from decrying the FEC for promulgating lax rules.²⁹ But whatever the validity of these criticisms, the agency was functional.³⁰

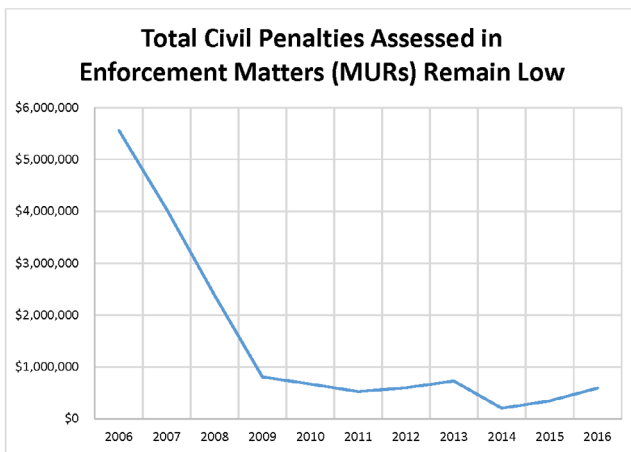
That is no longer the case. While there is still widespread agreement among the public (who generally want stronger campaign finance laws³¹), Beltway insiders are now sharply divided along party lines. Most Democrats support stronger rules, while their Republican counterparts are increasingly opposed.³² The partisan divide over campaign finance is evident even on the Supreme Court; *Citizens United* and other recent deregulatory cases were all decided by majorities composed entirely of Republican appointees, with the Court's Democratic appointees all dissenting.³³ The same disagreement between the two parties on campaign finance regulation that is so evident in other parts of the government has naturally trickled over to the FEC. That has resulted in a sharp rise in party-line deadlocked votes.

ENFORCEMENT

The increasing prevalence of deadlocks is perhaps most evident in the Commission's civil enforcement process. According to data compiled by the office of then commissioner Ann Ravel, the Commission deadlocked on 37.5 percent of regular enforcement cases in 2016, as compared with 4.2 percent in 2006 — a more than seven-fold increase.³⁴ And that statistic significantly understates the problem, since almost all the votes on which commissioners achieved consensus that year involved housekeeping matters, minor violations, or the dismissal of frivolous allegations.³⁵ On most matters of significance, the Commission cannot reach four votes. Penalties have plummeted as a result of these deadlocks. In 2016 the Commission brought in less than \$600,000 in civil penalties in enforcement cases, compared with roughly \$5.5 million a decade earlier.³⁶



Source: Analysis of Vote Certifications in the FEC's Enforcement Query System ("EQS")



Source: Analysis of FEC Enforcement Statistics, Total MUR Civil Penalties, <http://www.fec.gov/press/bkgnd/EnforcementStatistics.shtml>.

Virtually all enforcement deadlocks happen at the so-called “reason to believe” (RTB) stage, which is the preliminary determination commissioners must make that an investigation is warranted.³⁷ RTB is merely the first step toward enforcement.³⁸ But even reaching this point frequently takes more than a year.³⁹ It is not uncommon for an RTB vote to be taken only as the five-year statute of limitations for campaign finance violations approaches. In one notorious case, a donor admitted that he had formed an LLC solely for the purpose of hiding a \$1 million contribution to the super PAC supporting Mitt Romney’s 2012 presidential campaign. 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.⁴⁰ This was but one of a number of high-profile matters from the 2012 election cycle that were not resolved until 2015 or later.⁴¹

Such delays mean that even when the Commission does negotiate a significant penalty, it is likely to have little deterrence value.⁴² Recently, for instance, the FEC fined Jeb Bush’s super PAC almost \$400,000 for accepting an illegal \$1.3 million campaign contribution from a company con-

trolled by a foreign national (the company was fined another \$550,000).⁴³ This was a straightforward violation for which there was direct documentary proof in the form of an email from the candidate’s brother Neil. But it still took the FEC two and a half years to complete its investigation and negotiate a settlement that, while large in absolute terms, was less than a third of the illegal contribution at issue and less than .3 percent of the more than \$120 million the PAC raised for the 2016 election cycle.⁴⁴

Importantly, enforcement delays do not just hurt those who have actually violated the law. Even those wrongfully accused of violations often wait a year or more for their names to be cleared.⁴⁵

The Commission’s enforcement process has never been perfect. As the Commission’s longest-serving member, Ellen Weintraub, acknowledges, “We have always struggled with the reality that enforcement cases take far too long.”⁴⁶ Now, however, most high-profile or novel cases languish at the Commission for years, at which point commissioners usually deadlock.⁴⁷ Federal courts have repeatedly rebuked the Commission for its failure to investigate allegations that, if true, would amount to clear legal violations.⁴⁸ Nevertheless, entire categories of rules, such as those limiting collaboration between candidates and super PACs that can raise unlimited amounts of money, continue to go largely unenforced.⁴⁹ But the same commissioners who vote against enforcement lack the votes actually to change the Commission’s regulations. And so many unenforced rules remain on the books, undermining the rule of law and fostering uncertainty for those trying in good faith to comply.⁵⁰

RULEMAKING AND ADVISORY OPINIONS

Partisan gridlock also impairs the FEC’s ability to provide coherent guidance to political actors on novel legal and policy questions. As noted, its rulemaking process has virtually ground to a halt. Historically, commissioners with different regulatory philosophies were usually able to hammer out compromises on key issues. But now, according to Weintraub, there is “a fear that you will give an inch and the other side will take a mile.”⁵¹ As a result, even as the last decade has seen major changes in the governing law and the emergence of new threats like foreign governments seeking to influence U.S. elections via the internet, the Commission has done hardly anything to update its code of regulations.⁵² More than nine years after *Citizens United*, for instance, the FEC’s regulations still make no mention of super PACs. And its main rules governing transparency for internet ads date back to 2006, when major social media platforms like Facebook and Twitter were in their infancy and nobody would have predicted their use by a major foreign power to meddle in a U.S. presidential election.⁵³

In the absence of a functioning rulemaking process, the main way the FEC provides guidance to candidates, parties,

and other political actors is through the issuance of advisory opinions to individual requesters. Persons planning to engage in political activity can ask for an opinion from the Commission as to the legality of their activity; the Commission is obligated to respond to these requests.⁵⁴ Advisory opinions in theory have limited application beyond the requester but are in practice treated as precedents forming a significant body of law in their own right.⁵⁵

The use of advisory opinions to develop campaign finance law is inherently problematic. As one senior lawyer who headed the Commission’s policy division puts it, advisory opinions are “a very poor substitute for rulemaking.”⁵⁶ Those opinions are issued under a compressed time frame that affords few avenues for fact-finding; there is no opportunity for anyone other than the person who requested the opinion to appear before the Commission to testify; and the entire process tends to be dominated by a small cadre of repeat participants from major Democratic and Republican law firms.⁵⁷

In any event, the advisory opinion process is also increasingly dysfunctional. The Brennan Center reviewed all 1,996 advisory opinion requests that have been submitted to the Commission. Prior to 2008, the Commission deadlocked (i.e., failed to agree on an answer to at least one of the requestor’s questions) on 4.9 percent of requests per year on average; in a number of years there were no deadlocks. Between 2008 and 2017, the deadlock rate jumped to 24.1 percent on average — a more than fivefold increase — almost entirely along party lines. And as the Commission’s reputation for gridlock has spread, the number of advisory opinion requests

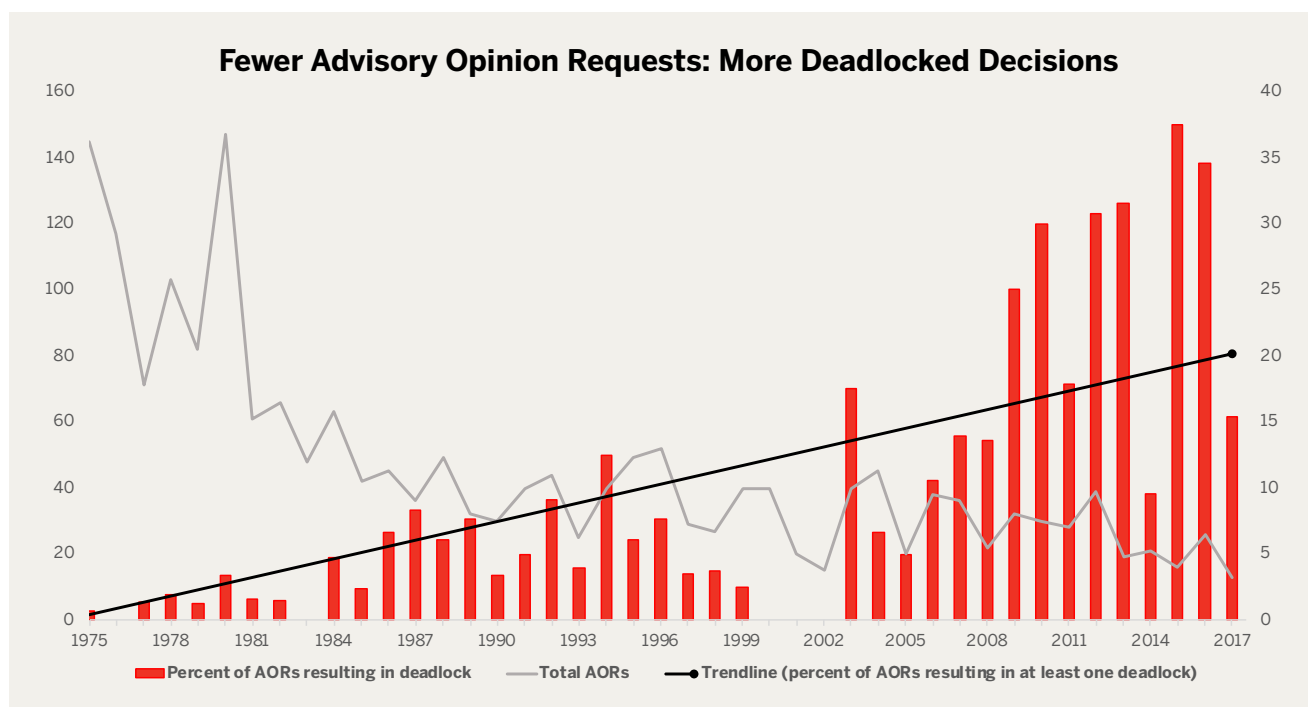
it receives has declined, from a high of 147 in 1980 to a low of 13 in 2017.⁵⁸

Once again, the numbers understate the real problem. Most of the advisory opinions the Commission manages to issue today deal with relatively straightforward matters, like whether candidates can use campaign funds for particular campaign-related purposes⁵⁹ or the circumstances in which a professional association may operate a federal PAC.⁶⁰ On many novel or problematic subjects — everything from candidates appearing in supposedly independent super PAC ads to the rules governing use of Twitter by political committees — commissioners have failed to agree,⁶¹ eliminating a last source of regulatory guidance in hard cases.

MANAGEMENT

The partisan stalemate at the FEC has also taken a toll on the agency as an institution. Senior staff positions routinely go several years without being filled. Most notably, the Commission has not had a permanent general counsel (its chief legal officer, and one of its two top staffers) for more than five years, nor any inspector general (permanent or acting) for more than two years.⁶²

In the meantime, morale among the agency’s rank-and-file staff remains lower than at most other federal agencies of comparable size.⁶³ A scathing inspector general report in 2016 highlighted partisan discord among commissioners as the main cause.⁶⁴ The report also noted the problem of pervasive gridlock. One anonymous survey respondent said they found it “frustrating to see how Commissioners do not act on reports/recommendations for months or years.”⁶⁵ Another



explained that “for me, the biggest cause of low morale is that I spend lots of time working on projects that end up sitting for months or years because the Commission deadlocks or holds over discussion.”⁶⁶ Such complaints inevitably translate into staff attrition and recruitment challenges, making it even harder for the FEC to carry out its mission.

In sum, the FEC, which was always subject to criticism, has in the past decade been overtaken by a polarized political culture to the point that its evenly divided structure simply does not work. Some have called for replacing the current commissioners, all of whom are serving as holdovers.⁶⁷ But FEC dysfunction is ultimately about more than any one group of officials. The best way to restore the agency’s ability to shape coherent regulatory policy and carry out fair and effective civil enforcement is to reform its basic structure.

A Blueprint for Reform

Any plan to fix the FEC must tackle the agency’s problems while preserving meaningful safeguards to protect the political rights of all Americans. The following changes are key:

Reduce the number of commissioners from six to five and reserve one seat for a political independent. To curtail gridlock at the FEC, its structure should be brought more into line with other multimember independent regulators. Most important, that entails giving the agency an odd number of commissioners with the power to approve new rules and advisory opinions by a majority vote.⁶⁸

Currently, the FEC has six commissioners who serve for staggered six-year terms, no more than three of whom can be affiliated with one political party at the time of their appointment.⁶⁹ In theory a president could appoint technocrats or political independents to all or some of the Commission’s seats, but none has ever done so.⁷⁰ Instead, presidents have for the most part continued to nominate party loyalists, which has become the primary driver of gridlock as the parties themselves have become more polarized.

The most sensible fix for this problem is to reduce the number of commissioners from six to five, with three votes required for most major decisions. The major parties should each be limited to two seats on the Commission, with commissioners in those seats continuing to serve for staggered six-year terms.⁷¹ The fifth seat should be reserved for a political independent, which should be defined as someone who has not been affiliated with, donated to, or represented either major party or any of its candidates or officeholders for at least the previous five years.⁷² Ideal candidates would include former judges, law enforcement officials, or even senior members of the Commission’s career staff. Such individuals are less likely to feel beholden to the president or congress-

sional leaders, and more likely to represent the substantial number of Americans who do not affiliate with either of the two major parties.⁷³ The term for this fifth seat should be only four years, to ensure that every new president has the opportunity to nominate a new independent tiebreaker.

Critics of the idea of an odd-numbered commissioner with an independent tiebreaker have charged that the Commission’s independent member would likely be a wolf in sheep’s clothing — I.e., a closet partisan.⁷⁴ But that risk can be mitigated through safeguards like barring nominees who previously worked for one of the major parties and requiring representatives of both major parties to be included in the vetting process, as discussed below. It should be noted, moreover, that partisan overreach is a risk even under the Commission’s current structure. The president already has broad discretion to nominate FEC commissioners, provided no more than three are affiliated with the same party at the time they are nominated.⁷⁵ The tradition of allowing leaders of the opposing party to name half the nominees has no force of law.⁷⁶

Ultimately, no government institution functions independently from background norms that restrain excessive partisanship and other abuses of power. That would be true of a restructured FEC, just as it is true of the current body. But the reforms proposed here would actually increase legal safeguards against partisan overreach relative to the status quo.

To be sure, the presence of an independent commissioner is no guarantee that the Commission’s decisions will never be weighted toward one party’s legal and policy views. It is entirely correct that most presidents are likely to try to appoint independents with whose views they broadly agree. This is not unreasonable. What is not acceptable is for a president to use the Commission as a weapon with which to pursue partisan opponents. Having at least one truly independent commissioner provides an important safeguard against that risk, especially when combined with other checks and balances in the enforcement process.

Establish an inclusive, bipartisan vetting process for potential nominees. To provide an additional safeguard, Congress should establish a blue-ribbon advisory panel composed of election law experts, retired law enforcement, and others with relevant background to recommend potential nominees to the president, as has previously been proposed.⁷⁷ The panel’s recommendations would be published at the time a nomination was transmitted to the Senate, so that the Senate and the public could consider them in evaluating the president’s nominee.⁷⁸

The panel should be required to include representatives of both major parties, ideally to be designated by party leaders in Congress. But it should be diverse in more than just a partisan sense. It is unacceptable that in the more than 40

years it has existed, the Commission has never included a person of color.⁷⁹ Other groups have also been underrepresented.⁸⁰ To begin to address this problem, Congress should direct that the president take reasonable steps consistent with constitutional antidiscrimination protections to ensure the panel includes members of both genders and diverse racial, ethnic, and professional backgrounds.

Give the Commission a real leader. To ensure greater accountability for how the Commission runs, the agency should also have a single, clear leader in the person of a chair designated by the president from among the sitting commissioners (again following the model of other independent agencies).⁸¹

Currently, the office of chair rotates yearly among commissioners and carries little real power.⁸² Appointments of senior staff, budgeting, and even many routine management decisions require four affirmative votes.⁸³ Under this structure, it has long been hard for even experienced observers to understand who is making critical operational decisions at the agency.⁸⁴

Giving the FEC a clear leader would provide the president, Congress, and the public with a single figure to hold accountable for how well the Commission runs. The chair would oversee the Commission's day-to-day management, appoint its senior staff (except the newly created director of enforcement, as discussed below), submit a budget to Congress, and otherwise act as the agency's chief administrative officer. However, the chair would still have only one vote on substantive policy and enforcement matters.⁸⁵ A chair whose party lost the White House would generally be expected to vacate the role, although he or she could continue to serve as a commissioner.

It makes sense for the chair to be named by the president. The president is elected to, among other things, run the executive branch — and ideally is judged by the electorate for how well this task is carried out. A chair affiliated with the president would create a more direct connection between the Commission's management and an elected officeholder whom the voters can hold accountable, even as the other checks and balances set forth in these recommendations would ensure that the president's power to designate the chair would not unduly compromise the Commission's independence from the White House.

Eliminate indefinite holdovers. To ensure periodic infusions of fresh leadership and bolster the Commission's independence from the elected officials it ostensibly regulates, Congress should also eliminate the ability of commissioners to stay in office indefinitely past the expiration of their terms.

During their statutory six-year terms, FEC commissioners can be removed only for cause.⁸⁶ Before 1997, commissioners

could be reappointed to new terms an unlimited number of times. Congress eliminated reappointment with two goals: ensuring that the agency would periodically have fresh leadership, and reinforcing commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement.⁸⁷ But commissioners still had the ability to stay in office indefinitely as holdovers past the expiration of their terms until the arrival of a successor.⁸⁸ Lengthily holdover periods are now the norm; all four current commissioners are holdovers who have served for more than a decade, having first been named during the George W. Bush administration (two seats are vacant).⁸⁹

As former commissioner Toner puts it, this situation represents “the worst of both worlds.”⁹⁰ Letting commissioners stay indefinitely as holdovers means that there is still very little turnover in the Commission's leadership. And commissioners whose terms have expired are even more dependent on the president and Congress, who can replace them at any time. In today's polarized climate, that makes bipartisan compromise even harder and creates a very real risk of commissioners suffering retribution for specific policy decisions.

To be sure, frequent turnover among commissioners also is not ideal, especially if it leads to constant vacancies while Congress and the president wrangle over nominees. The balance drawn at most other multimember agencies is to allow commissioners or board members who serve for a fixed statutory term to be reappointed once, with any holdover after the expiration of a term limited to a period of one to two years.⁹¹ The FEC should follow a similar approach.

Overhaul the Commission's enforcement process. Finally, the Commission's civil enforcement process needs fundamental change. Two hallmarks of effective enforcement are the robust, timely pursuit of credible allegations of misconduct and the expeditious resolution of non-meritorious or otherwise trifling allegations.⁹² As discussed above, the FEC's current process largely fails on both counts. The following changes would help address this problem.

> Create an independent enforcement bureau with investigative power:

The most important change Congress can make is to create an independent enforcement bureau within the Commission that has some measure of autonomy from commissioners. The bureau should be led by an enforcement director appointed by a bipartisan majority of the full Commission (i.e., with at least one vote from both a Republican and a Democratic commissioner) in a public vote on the motion of the Commission's chair. The director's appointment should be subject to renewal every four years.⁹³

The director should have the authority to make initial determinations of whether to investigate or dismiss alleged violations that the Commission learns about from adminis-

trative complaints. Commissioners would retain the power to overrule the director by a majority vote. Under this process, incoming administrative complaints would be routed to the enforcement bureau, which would prepare an analysis for the director, who would then make a preliminary determination on whether to investigate the allegations in the complaint or take no action and close the file. Then both the director's decision and the underlying file would be forwarded to the Commission, which would have two weeks to overrule the director. In such cases, commissioners would be required to state publicly their reasons for doing so within 30 days of the vote.

After commencing an investigation, the director would also have the power to authorize subpoenas to compel production of documents or testimony, with a one-week waiting period during which time the Commission could vote to overrule him or her.

Ultimate authority over whether to bring an enforcement action or pursue settlement should still rest with commissioners. At the conclusion of every investigation, the enforcement director should be required to submit a written recommendation to the Commission. Congress should require the Commission to vote on recommendations within 45 days of their submission.

Where an enforcement action is authorized, the case should return to the enforcement bureau to be litigated.⁹⁴ The law should specify that investigations must remain strictly confidential unless and until the Commission authorizes an enforcement action or the matter is closed.⁹⁵

These changes would bring the Commission's enforcement process more into line with that of other independent watchdog agencies, where agency heads typically do not make initial investigative determinations.⁹⁶ They would not only help ensure pursuit of credible violations but also make it easier to timely dispose of non-meritorious allegations.

> Provide a legal remedy when the Commission fails to act on a complaint:

As an additional safeguard against enforcement delays, Congress should require that the Commission act on administrative complaints (by bringing an enforcement action, opening settlement negotiations, or dismissing) within one year of a complaint's submission, and should provide both complainants and alleged violators with a legal remedy when the Commission fails to do so.

Current law gives complainants, but not alleged violators, the right to sue the Commission if it takes no action within 120 days of receiving a complaint.⁹⁷ But courts typically treat such cases as disputes over the allocation of resources, with respect to which agencies are entitled to heightened deference.⁹⁸ This makes it possible for the Commission to sit on both meritorious and frivolous complaints for years, as discussed above.⁹⁹

The best solution is to extend the 120-day deadline to one year but empower courts to review cases that come before them on the merits and order the agency to take action or dismiss. The law should provide that in the rare case where an ongoing investigation is unusually complex or being held in abeyance for a legitimate reason (like an overlapping criminal prosecution), the Commission should be able to confidentially seek a stay of proceedings.

> Limit the Commission's prosecutorial discretion:

Congress should also limit the Commission's use of prosecutorial discretion as a reason not to pursue serious violations. Unlike a substantive legal interpretation, an agency's exercise of prosecutorial discretion is also entitled to significant deference from courts.¹⁰⁰ Commissioners often cite prosecutorial discretion as an alternative ground for not pursuing enforcement, and the agency's lawyers have argued that this reliance on prosecutorial discretion can shield even legally erroneous determinations from judicial review.¹⁰¹ Congress should specify that any dismissal of an enforcement matter in which the amount in violation exceeds \$50,000 (indexed to inflation) should be treated as a dismissal on the merits subject to full judicial review.

> Restore the Commission's random audit authority:

Congress should also restore the Commission's ability to conduct random financial audits of campaigns, party committees, and other political committees (including super PACs). Random audits are a key means to ensure compliance with the law.¹⁰² But the FEC is currently allowed to conduct audits only for cause, based on errors that are evident on the face of a committee's campaign finance reports.¹⁰³ Instead of major violators, this approach tends to ensnare less sophisticated players who file sloppy reports, often because they have fewer resources to hire expensive compliance consultants. Cash-strapped state and local party committees in particular are frequently audited, while super PACs that can raise unlimited funds are rarely audited.¹⁰⁴

A better approach would be for the Commission to randomly audit a set percentage of committees, making sure to include a proportionate number of campaign and party committees, traditional PACs (which give directly to candidates), and super PACs. This was the Commission's approach when it was first created, before Congress removed its random audit authority in 1979 in reaction to what it perceived as the Commission's overzealous approach in nitpicking small reporting errors.¹⁰⁵

To head off such renewed concerns, the Commission should be required to establish clear materiality thresholds for audits to ensure that they focus on uncovering significant violations.¹⁰⁶ For instance, the Commission could establish that disclosure violations will be deemed immaterial for audit purposes unless the amount in violation exceeds \$10,000. Lower thresholds could be used for more serious offenses,

like the receipt of prohibited contributions from a government contractor or foreign national.

> Permanently reauthorize and expand the Commission's administration fines program:

Congress should also expand and make permanent the Commission's power to assess "traffic ticket" penalties for routine reporting violations like failing to file a report on time, which it does as part of its administrative fines program.¹⁰⁷ The program, first authorized in 2000, establishes an expedited process and set schedule of penalties for routine reporting violations.¹⁰⁸ It helps to ensure that these violations carry predictable and relatively swift consequences without consuming a disproportionate amount of the Commission's time and resources.¹⁰⁹ But the program has never been made permanent. The latest reauthorization of the program, passed in December 2018, provides that it will sunset on December 31, 2023.¹¹⁰ It is time to make the program permanent.

In addition, the program does not currently extend to all types of reports. For instance, although Congress in 2013 authorized the FEC to develop a schedule of penalties for reporting errors by super PACs and others who run independent campaign ads,¹¹¹ the Commission failed to do so.¹¹² Congress should mandate that the program be expanded to cover all such reporting violations.

> Provide more resources:

Finally, the changes discussed above, especially creation of an independent enforcement bureau, are likely to necessitate increasing the FEC's roughly \$71 million annual budget.¹¹³ The best way to ensure that the agency's politically sensitive responsibilities are carried out with professionalism and due regard for both the public's interests and those of elected officials, candidates, and other political actors is to give the agency the resources necessary to bring on high-quality staff in sufficient numbers to carry out prompt enforcement. Even a 50 percent increase in the Commission's budget, which would allow it to significantly expand its enforcement capabilities, would amount to less than a rounding error in the overall federal budget of \$4 trillion.¹¹⁴

Because of the FEC's unique role in regulating incumbent officeholders, Congress should also consider funding the agency through automatic or multiyear appropriations to keep the budget process from being used as leverage over the agency to deter enforcement, as has happened in the past.¹¹⁵

Conclusion

For all the divisions among the political elite, an overwhelming majority of Americans across the partisan spectrum consistently say they want strong campaign finance rules to deter corruption and amplify the voices of ordinary citi-

zens.¹¹⁶ Moreover, while the Supreme Court has taken some measures off the table, many others remain constitutionally viable.¹¹⁷ Skeptics of the entire project of campaign finance reform would do well to recognize this reality. In one form or another, campaign finance laws are here to stay. A dysfunctional FEC that fails to consistently administer and enforce them creates the worst of both worlds, disadvantaging the most conscientious (or least sophisticated) actors and weakening the public's faith in the rule of law.¹¹⁸

But both sides of this debate could benefit from a reality check. Those who favor strict limits and rigorous disclosure must recognize that a functional regulator does not equate to one that will always share their priorities. Campaign finance regulation implicates difficult trade-offs between the need for effective safeguards and the imperative to respect freedom of expression and association.¹¹⁹ These trade-offs are at the heart of philosophical debates over what sort of democracy we want to have.¹²⁰ Democratically accountable leaders in the White House and Congress tend to have strong views on these subjects. The courts too are virtually certain to continue playing an active role in policing the boundaries of acceptable regulation. The FEC will always need to be responsive to these constituencies, as well as to the public, resulting in looser rules than some advocates want.

Ultimately, what we should hope for from a functional FEC is not an agency that always opts for or against strong regulation, but one that enforces duly enacted laws in a timely manner with the utmost fairness and is capable of making hard regulatory choices pursuant to its delegated authority. Creating such a body will not solve all the problems with our campaign finance system, but there is no better place to start.

Endnotes

- 1 H.R. 1, 116th Congress, §§ 6001, et seq. (2019).
- 2 52 U.S.C. § 30106(b)(1). The FEC also administers certain relevant provisions of the Internal Revenue code. *Id.* Although the Commission does not enforce the Federal Election Campaign Act's criminal provisions, Commissioners can vote to report suspected criminal violations to law enforcement authorities. *Id.* § 30107(a)(9). Moreover, the Commission's interpretations of the FECA in regulations and advisory opinions often influence whether violations can be considered "knowing and willful," which is a predicate for criminal liability under the Act. As the acting assistant attorney general for the Criminal Division noted at a 2013 hearing before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism, if the FEC affirmatively declines to act or fails to reach agreement in particular circumstances, it is highly unlikely that evidence of similar circumstances could give rise to proof beyond a reasonable doubt of criminal intent. See statement of Mythili Raman, April 9, 2013, at 3. Available at <http://www.justice.gov/iso/opa/ola/witness/04-09-13-crm-raman-testimony-re-current-issues-in-campaign-finance-law-enforceme.201361129.pdf>.
- 3 See 52 U.S.C. §§ 30106(c), 30106(f), 30107. Staff recommendations in enforcement cases are eventually made public, which does provide staff with an independent voice. A controlling bloc of commissioners who depart from the staff recommendation must state in writing their reasons for doing so. See *DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). The Commission's frequent deadlocks have also forced its staff to act independently in some other contexts, but there are no clear rules governing such circumstances. See, e.g., Matea Gold, "FEC Engulfed in Power Struggle Over Staff Independence," *Washington Post*, July 13, 2013, <http://wapo.st/18gywx3>.
- 4 52 U.S.C. § 30106(a)(5).
- 5 See Julian Salisbury, *U.S. Campaign Finance Regulation: An Examination of the Federal Election Commission Enforcement Process* (2002) 177-186; Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in Anthony Corrado, et al., eds., *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press, 2005), 233.
- 6 Compare, e.g., statement of Chair Bauerly and Commissioner Weintraub, Notice of Proposed *Citizens United* Rulemaking (January 20, 2011). Available at <https://www.fec.gov/resources/about-fec/commissioners/statements/DEMCommissionersCNPRMStatement1-20-11.pdf> (arguing that existing federal law gives FEC authority to impose stronger disclosure rules); and Statement of Vice Chair Caroline Hunter, Comm'r McGahn and Petersen, Notice of Proposed *Citizens United* Rulemaking (January 20, 2011). Available at <https://www.fec.gov/resources/about-fec/commissioners/statements/GOPCommissionersCNPRMStatement1-20-11.pdf> (arguing FEC lacks authority to require additional disclosure). See also Ann M. Ravel, "How Not to Enforce Campaign Finance Laws," *New York Times*, April 2, 2014, <https://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html>; Caroline Hunter, "FEC Enforces the Law as It Is, Not as Some Wish It to Be," *Roll Call*, July 13, 2009, <https://www.rollcall.com/news/-36730-1.html>.
- 7 See Part I.
- 8 "Dark Money Basics," OpenSecrets, accessed Oct. 11, 2018, <https://www.opensecrets.org/dark-money/basics?range=tot#outside-spending>.
- 9 See Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015. Available at http://www.brennancenter.org/sites/default/files/publications/Super_PACs_2016.pdf.
- 10 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/>.
- 11 The Commission released a final notice of proposed rulemaking in March 2018. See Federal Election Commission, Notice of Proposed Rulemaking: Internet Communications Disclaimers and the Definition of "Public Communication," 83 Fed. Reg. 12864 (March 26, 2018). Available at <https://www.fec.gov/updates/nprm-internet-communication-disclaimers-definition-public-communication-2018/>. It has taken no further action to date. Recently, two dozen senators signed a letter to FEC Chair Ellen Weintraub to express "concern regarding the Commission's delay in issuing a final rule." See "Lawmakers Want to Tighten Ad Spending Disclosures," *NJ Today*, March 6, 2019, <http://njtoday.net/2019/03/07/lawmakers-want-to-tighten-ad-spending-disclosures/>.
- 12 Former Republican Commissioner Lee Goodman proposed loosening rules on political party fundraising, but the Commission took no action on his suggestions. See Lee Goodman, "A Time to Revive the Party," *The Exam-*

- iner, Nov. 16, 2015, <https://www.washingtonexaminer.com/a-time-to-revive-the-party>.
- 13 Telephone interview with Michael Toner, former FEC commissioner and partner, Wiley Rein LLP (April 6, 2018) [hereinafter “Toner Interview”]. This is a source of bipartisan frustration. See Dave Levinthal, “Politics Souring on FEC Advice?” The Center for Public Integrity, July 22, 2014, <https://www.publicintegrity.org/2014/07/22/15030/politicos-souring-fec-advice> (quoting longtime Democratic attorney Joe Sandler lamenting FEC dysfunction).
 - 14 See, e.g., FEC Advisory Opinion Request No. 2018-08 (Darrell Issa), <https://www.fec.gov/data/legal/advisory-opinions/2018-08/> (request from retiring congressman on use of campaign funds to repay debt to candidate); FEC Advisory Opinion Request No. 2018-04 (Conservative Primary, LLC), <https://www.fec.gov/data/legal/advisory-opinions/2018-04/> (request for legal guidance on various issues from political startup); FEC Advisory Opinion Request No. 2016-20 (Mlinarchik), <https://www.fec.gov/data/legal/advisory-opinions/2016-20/> (request for guidance on application of ban on contributions from government contractors).
 - 15 See, e.g., Bob Bauer, “Trump Exposes the Holes in Campaign-Finance Laws,” *The Atlantic*, July 26, 2018, <https://www.theatlantic.com/ideas/archive/2018/07/did-trump-break-campaign-finance-laws/566180/>; Megan R. Wilson, “Schock Wants Campaign Finance Charges Dropped,” *The Hill*, April 25, 2017, <https://thehill.com/homenews/house/330395-schock-wants-campaign-finance-charges-dropped>; Matea Gold, “Menendez Indictment Marks First Big Corruption Case Involving a Super PAC,” *Washington Post*, April 2, 2015, https://www.washingtonpost.com/politics/menendez-indictment-marks-first-big-corruption-case-involving-a-super-pac/2015/04/01/f42f4ace-d8d9-11e4-8103-fa84725dbf9d_story.html; Jerry Markon, “John Edwards Indicted on Campaign Finance Charges,” *Washington Post*, June 3, 2011, https://www.washingtonpost.com/politics/john-edwards-indictment-expected-today/2011/06/03/AGQwEuHH_story.html. Of course, to be convicted of a criminal campaign finance violation one must have, at a minimum, actual knowledge that one’s conduct was illegal, which is ultimately a question of fact. See, e.g., *United States v. Danielczyk*, 788 F. Supp. 2d 472, 490 (E.D. Va. 2011). But to even be accused of a criminal violation (and potentially indicted) can impose huge financial and reputational costs on candidates and others, costs that might be avoided if the FEC issued clearer guidance as to what the law requires.
 - 16 This is a point of agreement between both Republican and Democratic practitioners. See Toner Interview; telephone interview with Neil Reiff, founding member, Sandler Reiff Lamb Rosenstein & Birkenstock (April 2, 2018).
 - 17 Telephone interview with Wes Bizzell, senior assistant general counsel and managing director of political law programs, Altria Group (Sept. 26, 2018).
 - 18 See *FEC Statement on Carey v. FEC Reporting Guidance for Political Committees That Maintain a Non-Contribution Account*, 2011, <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.
 - 19 See *Nonconnected Committees* (Washington, D.C.: Federal Election Commission, 2008). Available at <https://www.fec.gov/resources/cms-content/documents/nongui.pdf>.
 - 20 “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>.
 - 21 See, e.g., Charlie Savage and Kenneth P. Vogel, “The Legal Issues Raised by the Stormy Daniels Payment, Explained,” *New York Times*, May 3, 2018, <https://www.nytimes.com/2018/05/03/us/politics/trump-cohen-payment-legal-issues.html>.
 - 22 Scott E. Thomas and Jeffrey H. Bowman, “Obstacles to Effective Enforcement of the Federal Election Campaign Act,” *Administrative Law Review* 52 (2000): 590.
 - 23 *Id.* at 576-77 (“Representative Dawson Mathis warned: ‘We are going to set up a bunch of headhunters down here who are going to spend their full time trying to make a name for themselves persecuting and prosecuting Members of Congress. . . . Members had better watch their heads once the Commission is established.’”)
 - 24 52 U.S.C. § 30107(a).
 - 25 52 U.S.C. § 30106(c).
 - 26 52 U.S.C. § 30106(a). The FEC’s original structure provided for both the president and congressional leaders to name FEC commissioners, but the Supreme Court held that as “principal officers” of the executive branch, commissioners had not been nominated by the president and confirmed by the Senate. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).
 - 27 See note 5. A recent profile of the powerful Senate

- Majority Leader Mitch McConnell noted that Republican FEC commissioners are the only nominees that he makes a point of personally interviewing. See Charles Homans, “Mitch McConnell Got Everything He Wanted, but at What Cost?,” *New York Times Magazine*, Jan. 22, 2019, <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html>.
- 28 Republican presidents signed both the original Federal Election Campaign Act and its 2003 expansion in the McCain-Feingold law (which was pushed by a bipartisan group of sponsors). Seth Gitell, “Making Sense of McCain-Feingold and Campaign-Finance Reform,” *The Atlantic*, July 2003, <https://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/>. Reform-minded Republicans like Missouri Representative Thomas Curtis were some of the staunchest early advocates for a strong FEC. Brooks Jackson, *Broken Promises: Why the Federal Election Commission Failed* (Indianapolis: Priority Press Publications, 1990), 27. Meanwhile, leading Democrats in Congress like the powerful Ways and Means Chairman, Ohio Congressman Wayne Hays, were decisive in limiting the FEC’s independence. See “Eliminating the FEC: The Best Hope for Campaign Finance Regulation?” *Harvard Law Review* 131 (2018): 1424-1425.
 - 29 See generally Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation’s Campaign Finance Laws*, Democracy21, 2002, 59-71. Available at <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>.
 - 30 In 2002, for example, the agency crafted an entire body of new regulations to implement McCain-Feingold in the months following the law’s passage. See, e.g., Explanation and Justification of Regulations on Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928 (Nov. 19, 2002); Explanation and Justification of Regulations on Electioneering Communications, 67 Fed. Reg. 65190 (Oct. 23, 2002); Explanation and Justification of Reorganization of Regulations on Contributions and Expenditures, 67 Fed. Reg. 50582 (Aug. 5, 2002); Explanation and Justification of Regulations on Prohibited and Excessive Contributions; Non-federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002). It then moved fairly quickly to amend many of these same regulations in 2007 following the Supreme Court’s decision in *FEC v. Wisconsin Right to Life*. See Explanation and Justification of Rules on Electioneering Communications, 72 Fed. Reg. 72899 (Dec. 26, 2007). Even with respect to enforcement, the Commission was capable of decisive actions — particularly with respect to corporations and powerful independent interest groups. See, e.g., “Federal Home Mortgage Corporation (‘Freddie Mac’) Pays Largest Fine in FEC History,” April 18, 2006, <https://www.fec.gov/updates/federal-home-loan-mortgage-corporation-freddie-mac-pays-largest-fine-in-fec-history/>; “FEC Collects \$630,000 in Civil Penalties From Three 527 Organizations,” Dec. 13, 2006, <https://www.fec.gov/updates/fec-collects-630000-in-civil-penalties-from-three-527-organizations/>.
 - 31 Daniel Hensel, “New Polls Agree: Americans are Over Money in Politics,” *Issue One*, July 22, 2016, <https://www.issueone.org/new-polls-agree-americans-money-politics/>.
 - 32 This is evident in Congress, where Democrats have made campaign finance reform a centerpiece of their agenda. H.R. 1 passed the Democratic-controlled House without a single Republican vote, and Senate Republican leader Mitch McConnell has said he will not even allow a Senate vote. Kate Ackley, “House Passes H.R. 1 Government Overhaul, Sending It Back to Campaign Trail,” *Roll Call*, March 8, 2019, <https://www.rollcall.com/news/congress/house-passes-hr-1-government-overhaul-sending-it-back-to-campaign-trail>. The last time the Democrats controlled the House, a proposal to overhaul disclosure rules, which used to be an area of bipartisan agreement, died when it failed to garner a single Republican vote to overcome a Senate filibuster. Michael Beckel, “Senate Republicans Again Block DISCLOSE Act, Designed to Reveal Special Interest Spending,” OpenSecrets, Sept. 23, 2010, <https://www.opensecrets.org/news/2010/09/senate-republicans-again-block/>; Meredith Shiner, “GOP Ranks Hold Against Campaign Bill,” *Politico*, July 27, 2010, <https://www.politico.com/story/2010/07/gop-ranks-hold-against-campaign-bill-040289>.
 - 33 Lawrence Norden, Brent Ferguson, and Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 3. Available at https://www.brennancenter.org/sites/default/files/publications/Five_to_Four_Final.pdf. It is true that President Trump, unlike many other Republicans, was critical of *Citizens United* early in the 2016 campaign. Marge Baker, “Trump is Wrong About Basically Everything — Except This,” MSNBC, Aug. 16, 2015, <http://www.msnbc.com/msnbc/trump-wrong-about-basically-everything-except>. But his administration has not acted on these criticisms, which do not appear to be shared by other Republican leaders.
 - 34 *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, February 2017, 2, 4. Available at https://classic.fec.gov/members/ravel/ravelreport_feb2017.

- pdf (hereinafter “Ravel Report”). The data compiled by Commissioner Ravel’s office are consistent with earlier studies. See, e.g., *Roiled in Partisan Deadlock, Federal Election Commission Is Failing*, Public Citizen, Jan. 2013. Available at <https://www.citizen.org/sites/default/files/fec-deadlock-statement-and-chart-january-2013.pdf>.
- 35 Ravel Report at 10 (“[statistics] do not fully account for cases where the Commission takes very limited action because Commissioners who may favor holding a violator fully accountable will have no choice but to agree to finding RTB for a minor infraction, or significantly reduced penalties”).
- 36 *Id.* at 2, 4. These figures exclude routine administrative fines and alternative dispute resolution, with respect to which commissioners’ discretion is limited. The Commission’s penalties ticked up somewhat in 2017, thanks in part to a single large penalty negotiated with the American Conservative Union, but then fell again. See Bob Lenhard and Perrin Cook, *Enforcement Down at the Four-Member FEC, but Risks Remain for the Unwary*, Covington and Burling, July 11, 2018. Available at https://www.cov.com/-/media/files/corporate/publications/2018/07/enforcement_down_at_the_four_member_fec_but_risks_remain_for_the_unwary.pdf?_ga=2.226998685.145627635.1542752907-1037010459.1542752907. Penalties for 2019 are likely to be higher, thanks to \$1 million in penalties negotiated in connection with an illegal foreign contribution to the super PAC that supported Jeb Bush’s presidential campaign in 2016, see note 43, but still well below 2006 levels.
- 37 See 52 U.S.C. § 30109(a)(2).
- 38 See FEC Agency Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (correcting the misconception that RTB findings amount to “definitive determinations that a respondent violated the Act,” as they actually indicate only that “the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred”). See also Statement of Reasons of Commissioner Steven T. Walther in Matter under Review (“MUR”) 6396 at 8-9 (Dec. 30, 2014) (describing the RTB standard as “very low,” lower than the “preponderance of the evidence” standard in civil matters and “far lower” than the “probable cause” and “beyond a reasonable doubt” standards in criminal matters).
- 39 As of September 30, 2017 (the last date for which such information has been made publicly available), more than three dozen matters had been sitting on the Commission’s docket awaiting an RTB determination for at least one year. See Memorandum from Steven T. Walther, Federal Election Commission chairman, to the Commission (Nov. 15, 2017), attachment 1. Available at https://www.fec.gov/resources/cms-content/documents/mtgdoc_17-53-a.pdf.
- 40 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, Commissioners Walther, Ravel, and Weintraub, MUR 6485 (W Spann LLC, *et al.*). Available at <https://www.fec.gov/files/legal/murs/6485/16044391123.pdf>; Statement of Reasons, Commissioners Petersen, Hunter, and Lee, MUR 6485 (W Spann LLC, *et al.*). Available at <https://www.fec.gov/files/legal/murs/6485/16044391107.pdf>; see also Kenneth P. Doyle, “Delayed FEC Cases Match Romney Super PAC Complaints,” *Bloomberg*, July 20, 2015, <https://www.bna.com/delayed-fec-cases-n17179933660/>.
- 41 Ravel Report at 2.
- 42 Kenneth A. Gross, “The Enforcement of Campaign Finance Rules: A System in Search of Reform,” *Yale Law and Policy Review* 9 (1991): 286-287.
- 43 Nihal Krishan, “Election Watchdog Hits Jeb Bush’s Super PAC with Massive Fine for Taking Money from Foreign Nationals,” *Mother Jones*, March 11, 2019, <https://www.motherjones.com/politics/2019/03/jeb-bush-super-pac-fec-fine-neil-right-to-rise-apic-gordon-tang/>.
- 44 *Id.*; see also “Right to Rise USA: Outside Spending Summary 2016,” OpenSecrets, last accessed March 12, 2019, <https://www.opensecrets.org/outsidespending/detail.php?cmte=C00571372&cycle=2016>. Another large penalty the FEC negotiated recently, a \$350,000 fine against a political nonprofit for contributing in the name of another, was announced more than five years after the alleged violation occurred. See Lydia Wheeler, “American Conservative Union Agrees to Pay Fine for Passing Donation to Super PAC,” *The Hill*, Nov. 20, 2017, <https://thehill.com/regulation/361206-american-conservative-union-agrees-to-pay-fine-for-illegally-passing-donation-to>.
- 45 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>.

- 46 Telephone interview with Ellen Weintraub, vice chair, Federal Election Commission (Sept. 20, 2018). Weintraub began a one-year term as chair of the Commission on January 1, 2019 (her third stint in this role).
- 47 Ravel Report at 1.
- 48 See, e.g., *Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (holding that FEC’s failure to pursue complaints at RTB stage was contrary to the FECA and BRCA); *Citizens for Responsibility & Ethics in Washington v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (same); *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (same).
- 49 See, e.g., Soo Rin Kim, “FEC Challenged Again to Find Coordination in Current Campaigns,” Huffington Post, Oct. 7, 2016, https://www.huffingtonpost.com/open-secrets-blog/fec-challenged-again-to-f_b_12386356.html (describing FEC’s failure to enforce rules limiting coordination between candidates and super PACs and other outside groups).
- 50 See Karl-Heinz Nassmacher, “Monitoring, Control, and Enforcement of Political Finance Regulation,” in *IDEA Handbook: Funding of Political Parties and Election Campaigns*, eds. Reginald Austin & Maja Tjernstrom (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 140. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/pan014975.pdf> (discussing danger of unenforced rules).
- 51 Weintraub Interview.
- 52 It took the Commission almost five years just to delete the two regulations invalidated by *Citizens United*. See 79 Fed. Reg. 62797 (Oct. 21, 2014) (revising 11 C.F.R. §§ 104, 114). Available at <http://sers.fec.gov/fosers/showpdf.htm?docid=305685>. During that time, the Commission repeatedly deadlocked on proposals for a more comprehensive rulemaking to address the effects of *Citizens United*. Minutes of FEC Jun. 15, 2011 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of FEC Dec. 15, 2011 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; Minutes of FEC Mar. 7, 2013 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See also Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking, Oct. 9, 2014. Available at http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.
- 53 See Federal Election Commission, Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006). Available at https://transition.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf.
- 54 52 U.S.C. §§ 30107(a)(7), 30108.
- 55 See 52 U.S.C. § 30108(c).
- 56 Telephone interview with Adav Noti, formerly associate general counsel for policy at the FEC and now senior director, trial litigation and chief of staff at the Campaign Legal Center (October 29, 2018).
- 57 *Id.*
- 58 These numbers are derived from the database of advisory opinions available on the Commission’s website. See Federal Election Commission, Advisory Opinions, <https://www.fec.gov/data/legal/advisory-opinions/>.
- 59 FEC Advisory Opinion No. 2018-15 (Wyden). Available at <https://www.fec.gov/files/legal/aos/2018-15/2018-15.pdf>; FEC Advisory Opinion No. 2018-06 (Liuba for Congress). Available at <https://www.fec.gov/files/legal/aos/2018-06/2018-06.pdf>.
- 60 FEC Advisory Opinion No. 2018-02 (Alabama Academy of Radiology and ALRAD PAC). Available at <https://www.fec.gov/files/legal/aos/2018-02/2018-02.pdf>.
- 61 See FEC Advisory Opinion Request No. 2017-05 (Great America PAC and Committee to Defend the President), <https://www.fec.gov/data/legal/advisory-opinions/2017-05/>; FEC Advisory Opinion Request No. 2011-23 (American Crossroads), <https://www.fec.gov/data/legal/advisory-opinions/2011-23/>.
- 62 See Dave Levinthal and Suhauna Hussain, “Five Years Ago, the Federal Election Commission’s Top Lawyer Resigned. No Permanent Replacement Has Yet Been Named,” Public Radio International, July 4, 2018, <https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent>; Dave Levinthal, “At the Federal Election Commission, No Watchdog for the Watchdogs,” Center for Public Integrity, April 3, 2019, <https://publicintegrity.org/federal-politics/fec-elections-watchdog/>. Recent reporting on the IG vacancy has revealed an extreme level of dysfunction in the hiring process, which at one point devolved into open conflict between two agency divisions that commissioners were powerless to resolve. *Id.*
- 63 Dave Levinthal and Ashley Balcerak, “Democrats Plan ‘Aggressive’ Oversight of Federal Election Commission,”

- Center for Public Integrity, Nov. 20, 2018, <https://www.publicintegrity.org/2018/11/20/22499/democrats-plan-aggressive-oversight-federal-election-commission> (noting FEC morale ranked 24th out of 28 comparable agencies for 2017).
- 64 Federal Election Commission Office of Inspector General, *Root Causes of Low Employee Morale Study* (Washington, DC: Federal Election Commission, July 2016), 1, <https://transition.fec.gov/fecig/documents/RootCause-sofLowEmployeeMoraleStudy-FinalReport-OIG-15-06.pdf>.
- 65 *Id.* at 3.
- 66 *Id.* at 4.
- 67 *Appoint FEC Commissioners Committed to Transparency*, Sunlight Foundation, 2013. Available at <http://assets.sunlightfoundation.com.s3.amazonaws.com/policy/papers/One%20Pagers/Money%20in%20Politics/7%20FEC%20commissioners%20.pdf>.
- 68 See, e.g., 15 U.S.C. § 41 (the FTC shall be composed of five commissioners); 15 U.S.C. § 78d(a) (the SEC shall be composed of five commissioners); 47 U.S.C. § 154 (the FCC shall be composed of five commissioners).
- 69 52 U.S.C. §§ 30106(a)(1), 30106(c). When the number of sitting commissioners drops below four the Commission loses its quorum and the ability to perform most of its core responsibilities. See Matthew Mosk, “As Primaries Begin, the FEC Will Shut Down,” *Washington Post*, Dec. 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/21/AR2007122102299.html>.
- 70 *Buckley*, 424 U.S. at 142.
- 71 For the foreseeable future that is likely to be the Democrats and Republicans, but the requirement could be framed in terms of the largest and second-largest parties in Congress. Under a new five-member Commission the quorum number should drop to three, but only where no party occupies more than one seat on the Commission (such that both major parties would be represented).
- 72 These restrictions are analogous to those imposed on the nonpartisan members of the United Kingdom Electoral Commission, which also administers campaign finance requirements. See Political Parties, Elections and Referendums Act, 2000, c. 41, §§ 3A, 4, 4A (Eng.).
- 73 See “Party Identification Trends, 1992-2017,” Pew Research Center, last modified March 20, 2018, accessed Oct. 12, 2018, <http://www.people-press.org/2018/03/20/party-identification-trends-1992-2017/>. Representation for political independents was actually proposed when the FEC was first restructured following *Buckley*. An amendment that would have added two seats on the Commission for political independents passed the Senate but was not included in the final legislation. See “Court Decision Forces New Campaign Law,” in *CQ Almanac 1976* (1977). Available at <https://library.cqpress.com/cqalmanac/document.php?id=cqal76-1186827>.
- 74 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/>
- 75 *Buckley*, 424 U.S. at 140.
- 76 Daniel I. Weiner, “FEC’s Status Quo Is Hazardous—Proposed Legislation Would Help Fix It,” *The Hill*, Feb. 10, 2019, <https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it>.
- 77 See Restoring Integrity to America’s Elections Act, H.R. 2034, 115th Cong., § 2(c) (2017); Federal Election Administration Act of 2017 (FEAA), H.R. 3953, 115th Cong., § 352(b)(3)(B) (2017).
- 78 H.R. 2034, 115th Cong. § 2(c)(3)(B)(iii) (2017); H.R. 3953, 115th Cong. § 352(b)(3)(B)(iii) (2017).
- 79 This is especially unfortunate given the disproportionate impact money in politics so often has on communities of color. See 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.
- 80 Since 2008 women have occupied half the Commission’s seats, but that is a relatively recent development. Only one openly LGBTQ person has ever served on the Commission. Non-lawyers have also made up only a tiny fraction of commissioners. See Federal Election Commission, All Commissioners, <https://www.fec.gov/about/leadership-and-structure/commissioners/>.
- 81 See, e.g., Kirti Datla, “Deconstructing Independent Agencies (and Executive Agencies),” *Cornell Law Review* 98 (2013): 796 (“Chairs... usually hold their position as chair (but not as members of the agency)

- at the will of the President.”). *See, e.g.*, 15 U.S.C. § 41 (2012) (giving the president the power to designate one member of the FTC to serve as chairman); 29 U.S.C. § 153(a)(1) (2006) (same provision for the NLRB). The FEC chair should receive the same salary (Level III on the executive schedule) as the leaders of other independent watchdog agencies like the FCC and FTC chairs. *See* 47 U.S.C. § 154(d) (FCC); 15 U.S.C. § 42 (FTC).
- 82 52 U.S.C. § 30106(a)(5).
- 83 *See* Will Tucker, “No Issue Too Small to Create a Standoff at the FEC,” OpenSecrets, Apr. 8, 2016, <https://www.opensecrets.org/news/2016/04/no-issue-too-small-to-create-a-standoff-at-the-fec/>.
- 84 Amanda LaForge, “The Toothless Tiger: Structural, Political and Legal Barriers to Effective FEC Enforcement,” *Administrative Law Journal of the American University* 10 (Spring 1996): 362 (“The lack of a strong chairperson creates an ambivalent atmosphere at the FEC in which participants in the administrative process never actually know who is in control of the agency’s operations.”).
- 85 As a practical matter, most FEC chairs likely would have some heightened influence relative to other commissioners, especially by virtue of appointing key personnel like the staff director and general counsel (though not the new director of enforcement, as discussed below). But again, it is not unreasonable for the president to have some influence over the FEC, just as she or he has influence over other independent regulators, provided the power to name the chair does not translate into an ability to weaponize the Commission against the president’s political opponents.
- 86 *See* *NRA Political Victory Fund v. FEC*, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994) (recognizing limits on the president’s right to remove FEC commissioners during their terms).
- 87 Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (Oct. 10, 1997).
- 88 *See* 52 U.S.C. § 30106(a)(2)(B).
- 89 “All Commissioners,” Federal Election Commission, accessed Oct. 18, 2018, <https://www.fec.gov/about/leadership-and-structure/commissioners/>.
- 90 Telephone interview with Michael Toner, former FEC commissioner and partner, Wiley Rein LLP (Apr. 6, 2018).
- 91 15 U.S.C. § 41 (limiting FTC commissioner appointments to seven-year terms, with the potential to be held over until a replacement is appointed); 15 U.S.C. § 78d(a) (limiting SEC commissioner appointments to five-year terms, with the potential to be held over until their replacement is appointed, but no longer than the end of the next session of Congress following term expiration); 47 U.S.C. § 154 (limiting FCC commissioner appointments to five-year terms, with the potential to be held over for up to until their replacement is appointed, but no longer than the end of the next session of Congress following term expiration).
- 92 *See* Todd Lochner and Bruce E. Cain, “Equity and Efficacy in the Enforcement of Campaign Finance Laws,” *Texas Law Review* 77 (1998): 1902-1904 (referencing Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982)).
- 93 In the event that commissioners cannot agree on an enforcement director, another staffer from the enforcement bureau should be able to fill the role in an acting capacity.
- 94 Some have urged Congress to authorize the FEC or a successor agency to itself adjudicate enforcement cases using administrative law judges (ALJs). *See* Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation’s Campaign Finance Laws*, Democracy21, 2002, 36. Available at <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>. ALJs are used throughout the federal government, and certainly could be successful at the FEC. *See* Kenneth A. Gross, “The Enforcement of Campaign Finance Rules: A System in Search of Reform,” *Yale Law and Policy Review* 9 (1991): 286-287. On the other hand, there is some evidence that ALJs tend to be “house players” who are disproportionately inclined to rule in the government’s favor. *See* Lucille Gauthier, “Insider Trading: The Problem with the SEC’s In-House ALJs,” *Emory Law Journal* 67 (2017): 134–140. They are also not immune from political interference and lack the life tenure afforded to Article III judges. *See* Eric Yoder, “Trump Moves to Shield Administrative Law Judge Decisions in the Wake of High Court Ruling,” *Washington Post*, July 10, 2018, <https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/>. For all these reasons, it may make more sense for Congress to leave ultimate adjudication of campaign finance enforcement cases in the hands of the judiciary, and focus instead on making the FEC’s process for investigating alleged violations and deciding whether to pursue them more efficient.

- 95 At the conclusion of a matter, commissioners who disagree with the outcome should still be able to issue a statement, as is the current practice.
- 96 See, e.g., Office of Chief Counsel, *Enforcement Manual* (Washington, D.C.: U.S. Securities and Exchange Commission, 2017), §2, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; Federal Trade Commission, *Operating Manual* (Washington, DC: U.S. Federal Trade Commission), ch. 3, https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf; Office of the General Counsel, *Regional Attorneys' Manual* (Washington, D.C.: U.S. Equal Employment Opportunity Commission, 2005), pt. 2 §§ 2, 3, <https://www.eeoc.gov/eeoc/litigation/manual/index.cfm>.
- 97 52 U.S.C. § 30109(a)(8). Complainants aggrieved by the Commission's decision not to pursue allegations in a complaint also have a statutory right to sue, provided they have standing. See 52 U.S.C. § 30109 (a)(8)(C).
- 98 See, e.g., *Democratic Senatorial Campaign Comm. v. FEC*, 1996 U.S. Dist. LEXIS 22849, *14, 1996 WL 34301203 (“In making decisions regarding whether it will accept administrative complaints for investigation, there is little doubt that the FEC is entitled to considerable judicial deference. Resource allocation in general and prosecutorial decisions in particular are areas in which courts are reluctant to intervene in agency operations without substantial justification.”).
- 99 Where the Commission votes affirmatively not to pursue a matter, complainants should continue to have the right to challenge that decision in court. See 52 U.S.C. § 30109(a)(8).
- 100 See *Citizens for Responsibility & Ethics in Washington v. FEC*, 892 F.3d 434, 439 (DC Cir. 2018).
- 101 See, e.g., *Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp.3d 349, 420 (D.D.C. 2018).
- 102 Research shows that audits have a positive impact on compliance. Mihriye Mete, “Bureaucratic Behavior in Strategic Environments: Politicians, Taxpayers, and the IRA,” *The Journal of Politics* 64 (May 2002): 398.
- 103 52 U.S.C. § 30111(b); see FEC Audit Division, *The FEC Audit Process: What to Expect* (Washington, DC: Federal Election Commission, 2012), https://transition.fec.gov/pages/brochures/audit_process.pdf.
- 104 See “Audit Reports,” Federal Election Commission, accessed Oct. 19, 2018, <https://www.fec.gov/legal-resources/enforcement/audit-search/>.
- 105 Lauren Eber, “Waiting for Watergate: The Long Road to FEC Reform,” *Southern California Law Review* 79 (2006): 1168. Available at https://southerncalifornialawreview.com/wp-content/uploads/2018/01/79_1155.pdf.
- 106 See generally International Accounting, Auditing and Ethics Audit and Assurance Faculty, *Materiality in the Audit of Financial Statements*, Institute of Chartered Accountants in England and Wales, 2017, 5.
- 107 52 U.S.C. § 30109(a)(4)(C)(iv). See also 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney) (referring to the administrative fines bill as a “traffic ticket” system).
- 108 Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2000) (codified as amended at 11 C.F.R. §§ 111.30-111.46); Federal Election Commission, Administrative Fine Program, <http://www.fec.gov/af/af.shtml>.
- 109 Steven T. Walther, Caroline C. Hunter, Lee E. Goodman, Matthew S. Petersen, and Ellen L. Weintraub, *Legislative Recommendations of the Federal Election Commission 2017* (Washington, DC: Federal Election Commission, 2017), 11, <https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf>
- 110 Amendment – Federal Election Campaign Act of 1971, Pub. L. No. 115-386, 132 Stat. 5161 (2018).
- 111 52 U.S.C. § 30109(a)(4)(C)(iv); Public Law No. 113-72 (December 26, 2013) (expanding the Administrative Fine Program to include violations for certain independent expenditure reports and other contribution reports).
- 112 A rulemaking that would take up this issue has been pending on the Commission's docket since 2015. See Rulemaking Petition: Administrative Fines Program and Commission Forms, 80 Fed. Reg. 16594 (March 30, 2015) (to be codified at 11 C.F.R. pt. 111). Available at <https://www.gpo.gov/fdsys/pkg/FR-2015-03-30/pdf/2015-07176.pdf>.
- 113 *Fiscal Year 2018 Congressional Budget Justification* (Washington, DC: Federal Election Commission, 2017), https://www.fec.gov/resources/cms-content/documents/FEC_FY_2018_Congressional_Budget_Justification.pdf.
- 114 Leigh Angres and Jorge Salazar, “The Federal Budget in 2017,” Congressional Budget Office, March 2018, <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/graphic/53624-fy17federalbudget.pdf>.

- 115 See Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*, Democracy21, 2002, 22. Available at <http://www.democracy21.org/uploads/%7BBB-4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>. There are also a variety of other minor budgeting changes that should be made, such as permitting the FEC to pay its senior staff more, as the Commission itself has requested of Congress. See Steven T. Walther, Caroline C. Hunter, Lee E. Goodman, Matthew S. Petersen, and Ellen L. Weintraub, *Legislative Recommendations of the Federal Election Commission 2017* (Washington, DC: Federal Election Commission, 2017), 4, <https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf>.
- 116 One recent survey found almost 80 percent support for reasonable limits on campaign spending. See Bradley Jones, “Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence,” Pew Fact Tank, 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/>.
- 117 See Wendy R. Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018. Available at <http://www.brennancenter.org/publication/democracy-election-agenda-2018>.
- 118 Karl-Heinz Nassmacher, “Monitoring, Control, and Enforcement of Political Finance Regulation,” in *IDEA Handbook: Funding of Political Parties and Election Campaigns*, eds. Reginald Austin and Maja Tjernstrom (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 140. Available at <http://unpan1.un.org/intradoc/groups/public/documents/unct/unpan014975.pdf> (unenforced campaign rules inevitably “produce a scandal which will damage people’s trust in democracy ... and in democratically elected leaders who do not live up to their own laws.”); Todd Lochner, “Surveying the Landscape of State Campaign Finance Enforcement: A Preliminary Analysis,” *Election Law Journal* 4 (2005): 329, 331, 339 (“One cannot discount the possibility that candidates or groups who are navigating the waters of campaign finance law for the first time may be sufficiently afraid due to their perception of the consequences of ‘breaking the law’ that they forgo otherwise legitimate campaign strategies.”)
- 119 Even skeptics of the Supreme Court’s equation between spending money in the political arena and literal political speech concede that campaign spending is a form of expressive or associational conduct entitled to heightened First Amendment protection. See Burt Neuborne, *Madison’s Music: On Reading the First Amendment* (New York: The New Press, 2015), 80. Daniel I. Weiner and Benjamin Brickner, “Electoral Integrity in Campaign Finance Law,” *NYU Journal of Legislation and Public Policy* 20 (2017): 101, 133 (noting that constitutional distinction between “pure” speech and other First Amendment-protected conduct is not as clear as many assume).
- 120 Deborah Hellman, “Defining Corruption and Constitutionalizing Democracy,” *Michigan Law Review* 111 (June 2013): 1422.

About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary defend — our country’s systems of democracy and justice. At this critical moment, the Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

About the Brennan Center’s Democracy Program

The Brennan Center’s Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

Acknowledgments

The Brennan Center gratefully acknowledges Carnegie Corporation of New York, Change Happens Foundation, Democracy Alliance Partners, Ford Foundation, Lisa and Douglas Goldman Fund, The William and Flora Hewlett Foundation, The JPB Foundation, The Kohlberg Foundation, The Leo Model Foundation, Mertz Gilmore Foundation, Open Society Foundations, The Overbrook Foundation, Rockefeller Brothers Fund, and The WhyNot Initiative for their generous support of our money in politics work.

Many people assisted with the development of this paper. Brennan Center Democracy Program Director Wendy Weiser and Deputy Director Lawrence Norden supplied valuable guidance and insights at every stage of this project. Other members of the Brennan Center’s Money in Politics team also provided helpful input. Brennan Center Research and Program Associate Natalie Giotta provided outstanding research and technical assistance, with essential support from undergraduate intern Emma Engelman (who, among other things, reviewed all 1,996 advisory opinions the FEC has issued since its inception). The Brennan Center communications team, especially Managing Editor Lorraine Cademartori, National Media Director Stephen Fee, and Senior Media Strategist Alexandra Ringe, supplied valuable substantive and stylistic feedback, and critical assistance in readying this paper for publication.

The author also thanks the distinguished experts whose insights helped shape the analysis and recommendations in this paper, including Robert Bauer, Wes Bizzell, Todd Lochner, Tom Moore, Lawrence Noble, Adav Noti, Dan Petalas, Ann Ravel, Neil Reiff, Don Simon, Stephen Spaulding, Michael Toner, Ellen Weintraub, and Fred Wertheimer. While this paper benefited greatly from each of these individuals, the statements made and views expressed herein are the sole responsibility of the Brennan Center. Any errors are the responsibility of the author.

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Appendix B

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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.

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

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

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

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

I. Voting Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, Harvard Dataverse, 2013, ii, <http://dvn.iq.harvard.edu/dvn/dv/measuringelections>; U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8-10,

<https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Stewart found 2.8% of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5% percent voted in person on election day (56.5%) or early (9%). 65.5% of 131,590,825 voters, multiplied by the 2.8% figure from Stewart’s study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election).

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

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

¹³ Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers’ Committee for Civil Rights Under Law, 2018, 4, <https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf>; see also Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, available at https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINALpdf.pdf; Walter Shapiro, Brennan Center for Justice, “Election Day Registration Could Cut Through many of the Arguments

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

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

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

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

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

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

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

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

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

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

¹⁶ Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, [https://www.brennancenter.org/sites/default/files/publications/Case for Automatic Voter Registration.pdf](https://www.brennancenter.org/sites/default/files/publications/Case%20for%20Automatic%20Voter%20Registration.pdf).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ *Id.* 10-11.

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

³² New York Times, “Michigan Election Results,” last modified Jan. 28, 2019,

<https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html>; New York Times “Nevada Election Results,” last modified Jan. 29, 2019,

<https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html>; New York Times

“Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved,” last modified Aug. 1, 2017, <https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁸ *Id.* 8.

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

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

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

⁴² Brater et al., *Purges*, 3-5.

⁴³ *Id.* 1.

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

⁴⁵ Brater et al., *Purges*, 5-6.

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

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

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

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

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

⁴⁶ *Id.* 5.

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

⁴⁸ Brater et al., *Purges*, 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ Lopez, *Shelby County*.

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

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

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

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

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

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

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

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

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

⁶³ Lopez, *Shelby County*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷² *Id.* 12

⁷³ *Id.* 7-8.

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.⁷⁴ 3.3 million of these citizens are no longer incarcerated; they live in our communities, work, pay taxes, and raise families.⁷⁵

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.⁷⁶ 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.⁷⁷

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.⁷⁸ In three states the ratio was one in five.⁷⁹ 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.⁸⁰

⁷⁴ 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=.b1dbaea9c4a0.

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

⁷⁶ “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>.

⁷⁷ 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.

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

⁷⁹ *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.

⁸⁰ 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.⁸¹ This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other's political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁸ See Part VI.

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

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

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

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

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

II. Campaign Finance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹² *Id.* 10.

¹¹³ *Id.* 11.

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

¹¹⁵ A number of states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera, Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Demos, 2017, available at [https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA\[5\].pdf](https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA[5].pdf). New York State is poised to pass small donor matching for all state races this year. Andrea Sears, “2019 Could Be the Year for NY Election Reform,” *Public News Service*, Jan. 14, 2019, <https://www.publicnewsservice.org/2019-01-14/civic-engagement/2019-could-be-the-year-for-ny-election-reform/a65199-1>. Comprehensive matching already exists in many other large, diverse municipalities besides New York City, including Los Angeles, Tucson, Washington, D.C., Montgomery County, Maryland, Prince George’s County, Maryland, and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austeruhle, “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.

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

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

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

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

¹¹⁸ Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, Feb. 13, 2013, [http://www.cfinst.org/Press/PReleases/14-02-13/Testimony before the New York City Campaign Finance Board Says Small Donor Matching Funds a Success but the City Should Look at Changes Moving Forward.aspx](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.

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

¹²⁰ Elisabeth Genn, Michael J. Malbin, 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.

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

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

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

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

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

¹²² Mitch McConnell, “Behold the Democrat Politician Protection Act,” *Washington Post*, Jan. 17, 2019, https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html.

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁹ *Id.* 3-5.

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

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

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

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

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

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

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

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

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

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

¹³⁶ 558 U.S. at 370.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴⁷ 52 U.S.C. § 30104(f)(3).

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

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

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

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

¹⁵² *Smith Testimony*, 8.

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

C. FEC Overhaul (Title VI, Subtitle A)

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

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

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

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

¹⁵⁵ 52 U.S.C. § 30106(b)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷² *Smith Testimony*, 2.

¹⁷³ *Buckley*, 424 U.S. at 140.

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

¹⁷⁵ *Smith Testimony*, 3.

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

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

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

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

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

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

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

¹⁷⁷ *Buckley*, 424 U.S. at 36-37.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Redistricting Reform (Title II, Subtitle E)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹² Aaron C. Davis, “Redistricting in Md. has element of racial friction,” *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIOAU86MXI_story.html?utm_term=.b84f2191878d.

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

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

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

¹⁹⁶ 2 U.S.C. § 2c

¹⁹⁷ Royden and Li, *Extreme Maps*, 23, 26, 29; Laura Royden, Michael Li, and Yuriy 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.¹⁹⁸

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

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

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

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

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

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

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

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

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

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

IV. Election Security

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

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

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

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

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

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

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

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

²⁰⁸ Lawrence Norden and Wilfred U. Codrington III, Brennan Center for Justice, “America’s Voting Machines at Risk – An Update,” Mar. 8, 2018, <https://www.brennancenter.org/analysis/americas-voting-machines-risk-an-update>; see also Dustin Volz and Patricia Zengerle, “Inability to Audit U.S. elections a ‘National security Concern’: Homeland Chief,” *Reuters*, Mar. 21, 2018, <https://www.reuters.com/article/us-usa-trump-russia-security/inability-to-audit-u-s-elections-a-national-security-concern-homeland-chief-idUSKBN1GX200>; see also *Securing the Vote: Protecting American Democracy*, National Academies of Sciences, Engineering, and Medicine, 2018.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²¹⁵ *Securing the Nation's Voting Machines A Toolkit for Advocates and Election Officials*, Brennan Center for Justice, available at

<https://www.brennancenter.org/sites/default/files/publications/Securing%20the%20Nation%27s%20Voting%20Machines.pdf>.

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

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

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

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

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

V. Ethics (Titles VII-X)

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

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

VI. Authority of Congress

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

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

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

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

²²² *Mehrbani Testimony*, 14-15.

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

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

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

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

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

²²⁶ *Id.*

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

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

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

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

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

* * *

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

Thank you.

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

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

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

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

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

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