

Testimony of Democracy 21 President Fred Wertheimer

In Support of H.R. 1

Before the House Administration Committee

February 14, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We should be clear about this.

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

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

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

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

### **The Problem**

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

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

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

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

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

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

According to a [Washington Post](#) article, “The change was [long sought by Adelson](#), a major Republican donor who spent more than \$20 million to back Donald Trump’s campaign in 2016.”

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

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

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

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

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

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

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

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

### **The Impact of Citizens United**

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

Judge Posner [has written](#), “[It] is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint.” According to Judge Posner, the donors to a Super PAC are known, so “it is unclear why they should expect less quid pro quo from their favored candidate if he’s successful than a direct donor to the candidate’s campaign would be.”

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

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

### **Public Financing is Constitutional**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Public Financing Today**

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

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

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

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

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

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

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

### **Conclusion on Public Financing**

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

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

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

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

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

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

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



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

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

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

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

### **The DISCLOSE Act Provisions in H.R. 1**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court stated:

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

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

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

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

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

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

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

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

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

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

In 2003, the Supreme Court in the *McConnell* case again rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists struck down in the *NAACP* case. The Court [wrote](#), “In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosures.”

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

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

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

### **Shutting Down Individual Super PACs**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

## **FEC Reform**

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

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

Ten years ago, in 2009, a [Washington Post editorial](#) described the problems with the FEC as follows:

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

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

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

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

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

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

The bill would also provide for a strong chairman to administer the agency, and would enhance the authority of the general counsel to make enforcement recommendations on whether to pursue investigations of possible violations of the campaign finance laws. Those general counsel recommendations would take effect unless affirmatively overridden by a majority vote of the Commission within 30 days. Finally, the bill would improve judicial review of agency decisions to dismiss complaints, or an agency failure to timely act on complaints, by authorizing courts to review agency actions or inactions on a de novo basis, instead of deferring to the agency's interpretation of the law. The bill would also restrict the agency's ability to invoke "prosecutorial discretion" as a basis for failing to enforce the law in cases where potentially significant violations are involved.

We believe that these targeted but important changes to the FEC's structure and operations would substantially improve the agency's performance and efficacy.

Critics aim a number of objections to this necessary but limited reform of the agency structure and operations. First, they contend that shifting to an odd number of members will necessarily make the agency function on a partisan basis and, further, they contend that it will become a political weapon wielded by the President.

There are a number of responses to this charge. First, this criticism ignores the fact that no more than two members of the agency can be from the same political party, thus preventing any party from obtaining a partisan majority of the agency. Critics contend this is an insufficient protection because, they argue, a nominally independent member could choose to align with the members of one party or the other. This ignores the important role in the appointment process that will be played by the Blue Ribbon advisory group which, in recommending a short list of nominees to the President, will be charged with identifying credibly non-partisan candidates for the seat to be held by the independent member. The Senate, which must confirm any nominee, will be a further check to ensure that the independent seat is filled by a member who has the requisite credentials and credibility.

But even granting the most hyperbolic scenarios imagined by critics, this would result in an agency with a majority of members identifying with one major party or the other. Assuming that the members are chosen by the President from the lists suggested by the Blue Ribbon Commission, those members will have "a demonstrated record of integrity, impartiality and good judgment." And even in the worst case, the result will be little different from other federal

agencies with law enforcement responsibilities—including the Department of Justice, which has criminal jurisdiction to enforce the campaign finance laws—which have either a single member or an odd number of members and are appointed by the President.

What the reform will do, however, is provide a mechanism to break the repeated deadlocks that have rendered the existing six-member agency almost completely paralyzed and dysfunctional in important matters.

The charge by critics that the FEC chairman will become an “election czar” is similarly baseless. Under the legislation, the chairman is given powers typically exercised by the chairs of other independent agencies—to prepare a budget, hire a staff director and be “the chief administrative officer” of the Commission. There is nothing extraordinary or unusual about that. While the chair is also given the power to issue subpoenas and require testimony, the Commission can exercise the same power by majority vote, thereby serving as a check on the chairman.

### **Support for Other Provisions in H.R. 1**

Democracy 21 strongly supports the other Titles in the legislation which address many other crucial problems facing our democracy.

The Voting Rights provisions address the barriers to voting today that are standing in the way of citizens exercising the fundamental right in our democracy to vote and have your vote counted.

The Election Access provisions in Title I modernize the nation’s voter registration process to ensure that the gateway to voting is fair and easily accessible. Automatic Voter Registration simplifies the registration process and will result in millions of Americans becoming eligible to vote through their interactions with state and federal agencies. The bill also requires states to provide for same-day registration of eligible voters, and prohibits the practice of “voter caging.” All of these provisions will serve to counter shameful efforts in some states to suppress voter participation.

The Election Integrity provisions in Title II would directly address the problem of extreme partisan gerrymandering which eliminates competition and distorts our elections by allowing legislatures to craft districts tailor-made for control by one political party or the other. These provisions reform the congressional redistricting process by requiring states to establish independent redistricting commissions to redistrict congressional seats, and setting standards and procedures by which such commissions will carry out congressional redistricting.

The legislation also establishes criteria for congressional redistricting plans, and provides for a court-ordered plan to be drawn by a three-judge court in the event that a commission fails to timely promulgate a plan. This vital reform of the redistricting process would help ensure that congressional districts are drawn to serve the interest of voters in fair elections, and not the interests of politicians in maximizing partisan gains and being insulated from competitive races.

Title VII requires a judicial code of conduct for the Justices of the Supreme Court as well as for other federal judges. It also strengthens enforcement of the Foreign Agents Registration Act by

requiring the Attorney General to create a separate unit within the Department of Justice to enforce that law. It closes a major loophole in the Lobbying Disclosure Act by ensuring that individuals who provide behind-the-scenes political and strategic consulting services in support of lobbying activities are themselves treated as lobbyists subject to registration and disclosure.

Similarly, Title VIII of H.R. 1 contains a series of important ethics reform measures for executive branch employees. These provisions are aimed at strengthening conflict of interest laws and their enforcement. Importantly, the legislation would provide increased authority for the Director of the Office of Government Ethics and improve that Office's ability to enforce the ethics laws.

Title IX of the legislation provides for a number of improvements to congressional ethics rules, including a prohibition on Members from serving on boards of for-profit entities and using their official position to introduce or pass legislation that has a principal purpose to further their pecuniary interest. The legislation would also require campaign finance disclosure reports to identify donors who are registered lobbyists.

Finally, Title X requires the President and Vice President, and general election candidates for President and Vice President, to submit their tax returns for the 10 most recent years to the FEC, which shall make them publicly available. Until the current president, Presidents and presidential candidates in modern times adhered to the norm of voluntarily disclosing their tax returns. President Trump chose to ignore this well-settled past practice and so a statutory requirement is needed in order to guarantee that this important transparency protection is observed.

## **Conclusion**

H.R. 1 tackles fundamental problems that are dangerously undermining our democracy and our constitutional system of representative government. The faith of the American people in their government and officeholders is dangerously low. We are at a moment in history when these problems must be addressed and solved.

Those who may think this is an impossible task should keep in mind the words of Nelson Mandela, who said: "It always seems impossible, until it's done." Mandela knew from what he spoke.

The health and integrity of our democracy is on the line. The fight for H.R. 1 is a fight that must be won.