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TESTIMONY OF

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S. 1, the For the People Act

BEFORE THE
COMMITTEE ON RULES AND ADMINISTRATION
UNITED STATES SENATE

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee:

On behalf of the Institute for Free Speech,[1] today I wish to express serious concerns about the devastating effect S. 1 would have on Americans' freedom of speech and assembly rights. Labeling this bill the "For the People Act" is Orwellian. In reality, S. 1 would subsidize the speech of politicians while suppressing the speech of the people. In these prepared comments I address only those provisions of the legislation dealing with the bill's assaults on the rights of free speech and association, and turning the historically bipartisan Federal Election Commission into a body under effective partisan control. I do not address those portions of the legislation changing state election administration, although I find many of those provisions to be problematic.

Significant portions of the bill would violate the privacy of advocacy groups and their supporters – including those groups who do nothing more than speak about policy issues before Congress or federal judicial nominees. Other key provisions would limit political speech on the Internet and compel speakers to recite lengthy government-mandated messages in their communications, instead of their own speech.

S. 1 would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public. It would radically transform oversight over the labyrinth of laws that regulate political speech from a historic, purposefully bipartisan system to one under partisan control. The proposal would coerce Americans into funding the campaigns of candidates with which they disagree under a system that research has proven hasn't lived up to its goals elsewhere. As we struggle to emerge from the deaths and economic devastation of the pandemic, it's likely most Americans would prefer to spend precious public funds addressing those harms. These issues represent only a few of the serious impacts on First Amendment freedoms that would be caused by enactment of S. 1.

At over 800 pages, S. 1 contains a hodgepodge of partially related and overlapping campaign finance provisions scattered in a number of different sections. Instead of consolidating and presenting these provisions in an organized, cohesive, and streamlined manner, the bill's provisions are structured in a way that severely frustrates public understanding of legislative language that was already exceedingly vague and complex. This thoughtless, obfuscatory, and expedient approach to legislating, which is convenient only for the politicians pushing the bill, immediately belies its characterization as "For the People."

S. 1's substance further underscores how the bill would help politicians and campaign finance attorneys more than it would benefit the public. The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations and their supporters will be further deterred from speaking or be forced to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers. Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means politicians will be able to act with less accountability to

[1] Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government.

public opinion and criticism. Consequently, citizens who would have otherwise heard their speech will have less information about their government.

My comments concern Division B, Titles IV-VI of S. 1, the provisions in this bill that most directly impact the First Amendment rights of American citizens. While S. 1 contains a multitude of other provisions, those measures generally fall outside the scope of the Institute's mission and, consequently, my comments in this statement. The Institute for Free Speech has produced detailed analyses of individual portions of this lengthy bill as it passed the House as H.R. 1.[2] Those analyses are referenced in this statement, and we ask that they be entered into the hearing record.

Violating Americans' Privacy, Regulating Internet Speech, and Compelling Government-Sponsored Messages

Numerous components of S. 1 – in particular, the so-called "DISCLOSE Act," "Honest Ads Act," and "Stand By Every Ad Act" – are problematic, as both a matter of policy and constitutional law. Specifically, these provisions in S. 1 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a vague, subjective, and dangerously broad standard that asks whether the speech "promotes," "attacks," "supports," or "opposes" ("PASO") the candidate or official. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn't announced their retirement.

- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission ("FEC") if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials to support or oppose policy issues, including legislation like S. 1.

- Compel groups to declare on new, publicly filed "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.

- Force groups to publicly identify certain donors on reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) "campaign" ads in FEC reports and disclaimers, many donors will stop giving to nonprofits, or these groups will self-censor.

[2] Because this 800-plus page legislation was not introduced in the Senate until March 17 and not published at Congress.gov prior to the close of business on March 19, we have not yet produced a detailed analysis specifically referencing the Senate sections by number, although there appear to be no substantive differences. The hurried nature of this hearing and rush to get this far-reaching bill to the floor before it is subject to serious analysis and consideration is further evidence of the cynicism and hypocrisy of those calling it the "For the People Act."

- Subject far more issue ads to lengthy disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.

- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications' message, exacerbating the politics of personal destruction and further coarsening political discourse.

- For the first time, subject groups that sponsor communications about judicial nominees to burdensome campaign finance reporting, donor exposure, and disclaimer requirements without any sound policy justification or recognized constitutional basis for doing so.

- Force organizations that make grants to file reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make so-called "campaign-related disbursements." This new, vague, and subjective standard will greatly increase the legal costs of vetting grants, and many groups will simply end grant-making programs.

- Increase regulation of the online speech of American citizens while purporting (and failing) to address the threat of Russian propaganda.

- Expand the universe of regulated online political speech by Americans beyond paid advertising to include, apparently, communications on groups' or individuals' own websites, social media platforms, and email messages.

- Regulate speech by Americans about legislative issues by expanding the definition of "electioneering communications" – historically, limited to large-scale TV and radio campaigns targeted to the electorate in a campaign for office – to include online advertising, even if the ads are not targeted in any way at a relevant electorate.

- Impose what is effectively a new public reporting requirement on American sponsors of online issue ads by expanding the "public file" requirement for broadcast, cable, and satellite media ads to many online platforms. The public file requirement would compel some of the nation's leading news sources to publish information. A federal appeals court already found a Maryland state law taking this same approach to be unconstitutional.

  Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept in these files, which would increase the costs of online advertising, especially for low-budget, grassroots movements. Some online outlets may decide to discontinue accepting such ads due to the heavy costs of compliance.

  The "public file" also may subject American organizers of contentious but important political causes like "Black Lives Matter" to harassment by opponents or hostile government officials monitoring the content, distribution, and sponsorship of their activities.

- Inflict liability on broadcast, cable, satellite, and Internet media platforms, if they mistakenly allow political advertising by prohibited speakers, thereby driving up the cost of political advertising, especially for online ads where compliance costs are relatively high.

- Impose inflexible disclaimer requirements on online ads from American speakers that may make many forms of small, popular, and cost-effective ads advocating government policy changes or the election or defeat of candidates effectively impossible.

These provisions are discussed in greater detail in "*Analysis of H.R. 1 (Part One): 'For the People Act' Is Replete with Provisions for the Politicians*" from the Institute for Free Speech.[3]

Targeting Speech by All Groups Under the Guise of "Stopping Super PAC-Candidate Coordination"

Subtitle B of Title VI is inaccurately titled, "Stopping Super PAC-Candidate Coordination." This short title is shamefully misleading. Subtitle B applies not only to super PACs, but to literally *any* American or group of Americans who seek to speak about candidates or public affairs. None of the new restrictions in Subtitle B are limited in their application to "super PACs."

The language of this provision would place sweeping new limitations on speech about campaigns and public policy. It would criminalize huge amounts of speech that have either never before been illegal in America or, more precisely, not been illegal since the brief and reprehensible reign of the Alien and Sedition Acts. Further, it does so in a very complex, vague, and unintuitive manner. The provisions are so complicated and open to so many possible interpretations that my comments may understate the chill this portion of the legislation would place on speech. For advocacy groups, unions, and trade associations, several of the limits proposed in this portion of S. 1 would operate as a total ban on speech.

The goal of this provision seems to be to limit discussion of candidates to the candidates and parties themselves, at the expense of the public at large. However, even candidates would be likely to find their speech severely restricted under this section if S. 1 were to become law. In summary, Subtitle B of Title VI of S. 1 raises the following concerns:

- Although this portion of S. 1 purports to be targeted at "Stopping Super PAC-Candidate Coordination," it is important to reiterate that the changes it would make to the law create regulations and penalties that would apply to *every group* engaged in public discussion of issues and elections, not just super PACs.

- Under this portion of S. 1, speakers will be silenced both literally – through direct prohibitions on speaking – and also indirectly through fear of violating the law. Many routine communications by advocacy groups about legislation would be illegal under S. 1.

[3] *See* Eric Wang, *Analysis of H.R. 1 (Part One): "For the People Act" Is Replete with Provisions for the Politicians*, Institute for Free Speech (Feb. 22, 2021), *at* https://www.ifs.org/wp-content/uploads/2021/02/2021-02-22_IFS-Analysis_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf. The H.R. 1 provisions discussed in this analysis are substantively identical to those contained in S. 1.

The vast majority of these communications will likely have nothing to do with election campaigns. Rather, groups will be silenced when trying to participate in public debate on important policy issues.

- Under existing law, if a civic group, trade association, union, nonprofit, or any other type of organization wants to spend money to discuss candidates and issues, it is regulated as a coordinated expenditure only if it meets both "content" and "conduct" standards. The "content" standards are intended to allow groups to communicate with the public about issues of concern without fear of triggering federal investigations. The "conduct" standards are meant to ensure that groups are not held liable for later expenditures merely because they have general conversations with candidates and officeholders about legislative priorities and issues. S. 1 attacks both standards.

- The radical new coordination standard proposed in S. 1 would be interpreted and enforced by a restructured FEC (more on these changes in the section below), which would be under partisan control of the president for the first time. If the FEC decides that certain communications are "coordinated," the agency could impose hefty fines on a speaker.

- The "promote, attack, support, oppose" (PASO) standard that applies year-round to the content of coordinated communications invites the government and even private litigants to impose huge legal costs on almost any group's effort to communicate about politics and issues – except through the speech of candidates and parties themselves.

- S. 1 would replace carefully defined rules about what conduct constitutes "coordination" with a sweeping definition that would subject even minimal and mundane communications with members of Congress on legislation to investigation and possible punishment.

- Using virtually any publicly available information that communicates a candidate's suggestions on the type of message his or her campaign seeks to convey would trigger the conduct standard for coordination. Likewise, any public information regarding the campaign's strategy would fall into the same trap. If taken literally, S. 1 would require potential speakers to not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone to avoid possible coordination.

- S. 1 would define many groups as "coordinated spenders," even if they never actually "coordinate" anything and speak entirely independently of any candidate or party. Incorporated nonprofits defined as "coordinated spenders" would be banned from spending money on speech. This provision is directly contrary to Supreme Court precedent. In *Colorado Republican Federal Campaign Committee v. FEC*, the Supreme Court held that the FEC could not simply presume coordination – rather, coordination had to actually be proven to exist in order to be regulated.[4] The Court's rationale was that these types of restrictions on speech are only permissible to prevent quid pro quo corruption. If an organization is not actually coordinating its activity with a candidate or officeholder, the danger of that corruption doesn't exist.

[4] 518 U.S. 604 (1996) (plurality opinion by Breyer, J.).

- This portion of S. 1 is also likely to be found unconstitutional due to its overbreadth and vagueness. It requires spending to be "*entirely* independent[] of the candidate," a standard which it says is not met if there is "*any* general or particular understanding" between the spender and the candidate, or "*any* communication with[][MN1] the candidate, committee, or agents about the payment or communication."[5] Even discussions of purely legislative or policy matters would be covered and subject to coordination restrictions unless there was "*no* communication … regarding the candidate's or committee's campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or other campaign activities."[6]

  Federal courts have emphatically rejected the idea that mere knowledge of a campaign's plans and strategies is sufficient to find coordination, even when the information was not public. Rather, "coordination" necessitates candidate control over the expenditures or, at a minimum, "substantial discussion or negotiation." That means the campaign and the spender had to discuss such things as the content, timing, location, means, or intended audience for the communication – the standards since captured in the existing law that S. 1 seeks to repeal and replace. "Coordination" is found only where "the candidate and spender emerge as partners or joint venturers."[7]

- Title VI, Subtitle B of S. 1 also imposes unconstitutionally overbroad and vague descriptions of the type of speech that government can prohibit. The Supreme Court has long held that, to the extent government can regulate independent campaign speech at all, it must do so in a manner that is neither overly broad nor excessively vague in its language. In particular, to be regulated, such speech must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[8]

- Like current law, S. 1 would make republication of campaign material a coordinated activity. However, current law provides several sensible exceptions, which S. 1 repeals. Failure to include such exceptions would suppress publication of useful information.

- S. 1 eliminates the "safe harbor" for firewalls that allow for use, in certain circumstances, of a common vendor. In effect, it will be harder for smaller groups to hire good professional help. More specifically, this restriction will negatively impact new and smaller grassroots organizations at the expense of established, bigger spending actors.

Subtitle B responds to a concern that, in certain particular cases, super PACs are working closely with individual candidates, by imposing vast new restrictions on political speech by American citizens. It cannot be said too often: Nothing in this Title restricts its provisions to super

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[5] Please note that § 6102 of S. 1 includes under subsection (b) a new § 327. Accordingly, all citations to §6102(b) include a reference to this proposed § 327. *See*, *e.g.*, S. 1 § 6102(b) (*i.e.*, § 327(b)(1)) (emphasis added).
[6] *Id*. (*i.e.*, § 327(b)(2)) (emphasis added).
[7] *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) ("joint venturers" standard); *see also Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997) (standard finding "coordination" where there was "any" oral communication between spender and candidate was unconstitutionally overbroad). *See generally* Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603, 621-626 (2013).
[8] *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

PACs. Rather than narrowly target and respond to that specific concern, this portion of S. 1 will effectively silence all groups that speak about campaigns and public affairs. Consequently, many portions of Subtitle B are clearly unconstitutional under existing Supreme Court precedent.

The Institute for Free Speech analyzed these (and other) problems with this portion of H.R. 1 in 2019 in "*Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of 'Stopping Super PAC-Candidate Coordination*.'"[9] The language in the version of H.R. 1 introduced and passed by the U.S. House of Representatives in 2019 for this provision is nearly identical to the text of the 2021 version of H.R. 1 and S. 1.[10]

Creating a Campaign Speech Czar and Enabling Partisan Enforcement of Campaign Finance Law

If you're a Democrat, would you have wanted Donald Trump to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you're a Republican, would you have wanted those rules enforced by a partisan Democrat?

Of course not. That's why, for over 45 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency – the Federal Election Commission. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.

As the late Sen. Alan Cranston (D-Ca.) warned during debate on legislation creating the agency, "We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission. That concern led to Congressional adoption of the present method of selecting Commission members."[11]

Those concerns also motivated Congress to purposefully structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 45 years, Republicans and Democrats on the FEC were able to succeed. Throwing this system away is reckless and presents an enormous threat to the First Amendment.

As nine former members of the Federal Election Commission, myself included, with a combined six plus decades of service warned in a recent letter to Congress, S. 1's attempt at

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[9] *See* Bradley A. Smith, *Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of "Stopping Super PAC-Candidate Coordination*," Institute for Free Speech (Feb. 5, 2019), *at* https://www.ifs.org/wp-content/uploads/2019/02/2019-02-03_Smith-Analysis_US_HR-1_Coordination-Restrictions.pdf.

[10] *Compare* H.R. 1 §§ 6101-6103 (as Introduced in House) (116th Cong.) *and* H.R. 1 §§ 6101-6103 (as Placed on Calendar Senate) (116th Cong.) *with* H.R 1 §§ 6101-6103 (as Engrossed in House) (117th Cong.) *and* S. 1 §§ 6101-6103 (as Introduced in Senate) (117th Cong.).

[11] *Legislative History of Federal Election Campaign Act Amendments of 1976*, Federal Election Commission, *at* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

"shifting the Commission from a bipartisan, six-member body to a five-member body subject to partisan control[] would be highly detrimental to the agency's credibility. It would lead to more partisanship in enforcement and in regulatory matters, shattering public confidence in the decisions of the FEC. The Commission depends on bipartisan support and universal regard for the fairness of its actions. [S. 1] frustrates these goals with likely ruinous effect on our political system."[12]

In a nutshell, S. 1 does away with the FEC's existing bipartisan structure to allow for partisan control of the regulation of campaigns and enable partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants. Specifically, Title VI, Subtitle A of S. 1 would:

- Transform the Federal Election Commission from a bipartisan, six-member agency to a partisan, five-member agency under the control of the president. This change will likely have the effect of decreasing the Commission's legitimacy by significantly increasing the probability that the agency's decisions will be made with an eye towards benefiting one political party, or, at best, be perceived that way by the public.

- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto "Speech Czar." In particular, the Chair would become the Chief Administrative Officer of the Commission with the sole power to, among other things, appoint (and remove) the Commission's Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.

- Dispose of the requirement in existing law that the Commission's Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, S. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply refusing to take a vote and letting the General Counsel's recommendation take effect.

  S. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute. But if the respondent wins at the Commission, no deference will be

[12] *See* Thomas J. Josefiak et al., *Letter from Nine Former FEC Commissioners Expressing Concerns with H.R. 1 and S. 1*, (Feb. 9, 2021), *at* https://www.ifs.org/wp-content/uploads/2021/02/2021-02-09_Former-FEC-Commissioners-Letter_Concerns-With-HR-1-And-S-1.pdf at 4.

given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.

- Hamstring the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

- Establish a non-binding "Blue Ribbon Advisory Panel" to assist the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act. This effectively creates an elite committee to plot in secret, on the public's dime, and with the imprimatur of the government, whom the president should appoint to the agency.

All these changes are said to be necessary to "restore integrity" to the regulation of campaigns. In fact, nothing would more rapidly damage the FEC's integrity than S. 1's proposed restructuring. Supporters of the out party would have no confidence in the agency's decisions, a surefire way to increase skepticism among Americans that our elections are fair and unbiased.

The Institute for Free Speech analyzed this portion of H.R. 1 in 2019 in "*Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights*." This resource provides a more detailed explanation of why Title VI, Subtitle A of S. 1, wrongly dubbed the "Restoring Integrity to America's Elections Act," would accomplish the opposite.[13] The language in the version of H.R. 1 introduced and passed by the House in 2019 for this provision is substantively similar to the text of S. 1.[14] [MN2]

Public Subsidies for Politicians: Compelling Americans to Subsidize Views They Oppose

Finally, in addition to the litany of issues in S. 1 discussed already, the bill dramatically expands an existing program for the government to finance election campaigns.[15] S. 1 would provide for taxpayer dollars to match contributions to politicians' campaigns with $6 in public funds for every $1 contribution, up to the first $200 of a contribution.[16] In some cases, the match can reach 9 to 1: nine dollars in public funds for every dollar donated.

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[13] *See* Bradley A. Smith, *Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights*, Institute for Free Speech (Jan. 31, 2019), *at* https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31_IFS-Analysis_US_HR-1_Creating-A-Partisan-FEC.pdf.

[14] *Compare* H.R. 1 §§ 6001-6007 (as Introduced in House) (116th Cong.) *and* H.R. 1 §§ 6001-6010 (as Placed on Calendar Senate) (116th Cong.) *with* H.R 1 §§ 6001-6011 (as Engrossed in House) (117th Cong.) *and* S. 1 §§ 6001-6010 (as Introduced in Senate) (117th Cong.). In the 116th Congress, several amendments to Title VI, Subtitle A of H.R. 1 were approved by the House, but those amendments have no effect on the portions of Title VI, Subtitle A discussed in the Institute's analysis.

[15] For a comprehensive examination of government-financed campaign programs and their record of failure at achieving goals set by their proponents, *see Taxpayer-Financed Campaigns: A Costly and Failed Policy*, Institute for Free Speech (Jul. 16, 2014), *at* https://www.ifs.org/wp-content/uploads/2014/07/2014-07-16_IFS-Policy-Primer_Taxpayer-Financed-Campaigns.pdf.

[16] The bill cynically claims that "[i]t is the sense of the Senate that no taxpayer funds should be used in funding" the public financing program. So, where will the money come from? Why, from "fines, penalties, and settlements... and the sale or redemption of [government assets]." *See* new § 502(b) created by § 5111 of S. 1. Of course, public funds are public funds – it's all taxpayer money. Thus, in these comments, I will not hesitate to call these "taxpayer funds," with the full understanding that S. 1 tries to hide that fact.

As a matter of first principles, it is morally wrong to force a donor who contributes $1 to Jane Doe's campaign to help finance $6 or even $9 in public money to support the opposing candidate. The other candidate may even use racist themes and hateful messages as part of his campaign, but public dollars would still need to be distributed to fund such speech. But beyond these first principles, this subsidy scheme has other enormous problems.

Candidates with close ties to advocacy or labor groups that have large canvassing operations will likely benefit from S. 1. If the bill becomes law, it's a safe bet that these canvassing operations will be made available for hire to favored candidates. For a measure touted as insulating candidates from so-called "special interests," that's a major oversight.

Another likely winner under S.1's taxpayer-financed campaigns will be candidates who take extreme positions that appeal to small, concentrated groups of voters.[17] Rather than appealing to the middle of the electorate, a viable strategy may be to "play to the base" where supporters are more passionate – and partisan.[18] Given low turnout in party primaries, taking extreme positions to appeal to a candidate's base may become an even more important strategy, thus driving already high levels of polarization even higher.

Traditionally in American politics, political parties have been instrumental in candidate selection and have served as a moderating force. Parties have a large incentive to win and therefore want to nominate candidates who appeal to broad swaths of the American public and can win over swing voters. Political parties have used their fundraising apparatuses to favor candidates who fit this mold. Meanwhile, candidates who were viewed as extreme often received little support or funding from the party. While party support (or the lack thereof) didn't always prevent more extreme candidates from winning elections, the parties' gatekeeping mechanism certainly provided a moderating function on the types of candidates who were nominated. This form of government-financing of campaigns threatens to provide a final crushing blow to this important party role.

Look no further than the last election cycle, where some of the best small dollar fundraisers were Democrats Alexandria Ocasio-Cortez and Bernie Sanders and Republicans Duncan Hunter and Matt Gaetz.[19] In the presidential race, Donald Trump vastly outraised Joe Biden with small donors.[20] Whatever one thinks of these candidates and their policies, programs that turbocharge small dollar candidate fundraising and relegate the parties to the sidelines, like the proposal[MN3] in S. 1, will lead to more polarization.

Consider how much more difficult it would be for political parties to raise money under the proposed system. What sensible donor would give $50 to a political party if she could give the same $50 to a candidate of that party and have taxpayer dollars foot the bill for $300 or more to

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[17] *See* David Keating, *H.R. 1's Tax-Financing Program Could Increase Political Polarization*, Institute for Free Speech (Jan. 17, 2019), *at* https://www.ifs.org/blog/h-r-1s-tax-financing-program-could-increase-political-polarization/.

[18] *See* Andrew B. Hall, *How The Public Funding Of Elections Increases Candidate Polarization*, Harvard University (Aug. 13, 2014), *at* http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf.

[19] *See Large Versus Small Individual Donations: Members of the 116th Congress, 2020 Cycle*, Center for Responsive Politics (Dec. 31, 2020), *at* https://www.opensecrets.org/elections-overview/large-vs-small-donations.

[20] Karl Evers-Hillstrom, *Most expensive ever: 2020 election cost $14.4 billion*, Center for Responsive Politics (Feb. 11, 2021), *at* https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/.

match it? The subsidy will most likely drive donors away from the moderating forces exerted by parties and toward individual candidates. This will likely have the effect of further starving parties that were already hit hard by changes to campaign finance law in 2003.

The potential for government-financing programs to incentivize polarizing and extreme candidates isn't merely conjecture. The example of Thomas Lopez-Pierre's campaign for New York City Council is instructive. In 2017, Lopez-Pierre campaigned for a City Council seat on a platform of making "greedy Jewish Landlords" pay.[21] Ultimately, Lopez-Pierre qualified for $99,000 in public dollars to help spread his hateful message.[22] New Yorkers, including those on the City Council, were rightly appalled by Lopez-Pierre's anti-Semitic message. Then-Council Speaker Melissa Mark-Viverito lamented that "someone be[ing] able to spend [the public's money] to put forth that kind of a message is despicable."[23] But under New York City's matching fund system, there was nothing the City could do. The First Amendment prohibits laws from discriminating against individuals based on the content of their message. Consequently, if S. 1 is enacted, public dollars will be constitutionally required to fund the speech of all candidates that meet the qualifications for matching government funding – including those with racist, anti-Semitic, sexist, homophobic, transphobic, or otherwise hateful messages. As Lopez-Pierre's campaign proves, this concern isn't unfounded.

Supporters of government-financed campaign programs often argue that these programs will prevent corruption, but the record suggests otherwise. For a more comprehensive review of corruption in Arizona, Maine, and New York City's tax-financed programs, please consult the Institute for Free Speech report, "*Clean Elections and Scandal: Case Studies from Maine, Arizona and New York City*."[24] The Institute's study found that between 2001 and 2013, more than $19.2 million in taxpayer dollars was distributed to participating candidates in New York City's so-called "clean elections" program, who were then investigated for – and, in many cases, convicted of – abuse, fraud, and other forms of public corruption.[25] The same issues are true in other localities with these programs, such as Los Angeles.[26] Whether it's embezzlement, fraud, bribery, personal use, forgery, or straw donor schemes, for any number of abuses, government-financing programs have a history of corrupt actors exploiting the system for personal gain at the expense of the hardworking American public. In general, wherever government-financing has been enacted, abuse of these programs – and, by extension, public funds – have followed.

It's perhaps unsurprising that government-financing programs have a history of corruption in every jurisdiction in which they exist. In reality, these programs *create* new incentives for corrupt candidates – or corrupt staffers and campaign consultants – to cheat and defraud the public.

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[21] Editorial Board, *Taxpayer-funded hate, thanks to the city campaign-finance system*, NEW YORK POST (Mar. 3, 2017), *at* http://nypost.com/2017/03/03/taxpayer-funded-hate-thanks-to-the-city-campaign-finance-system/.
[22] Josh Nathan-Kazis, *Candidate Who Condemned 'Greedy Jewish Landlords' Faces Uphill Election Bid*, FORWARD (Sept. 12, 2017), *at* https://forward.com/news/382466/candidate-who-condemned-greedy-jewish-landlords-faces-uphill-election-bid/.
[23] *See* note 21, *supra*.
[24] Matt Nese and Tom Swanson, *Clean Elections and Scandal: Case Studies from Maine, Arizona and New York City*, Institute for Free Speech (Aug. 14, 2013), *at* http://www.ifs.org/wp-content/uploads/2013/08/2013-08-05_Issue-Review_Swanson_Clean-Elections-Scandal-Case-Studies-From-Maine-Arizona-And-New-York-City.pdf.
[25] *Id*. at 36-37.
[26] *See* Matt Nese, *Oregon H.B. 4076; Taxpayer-Financed Campaigns – A Failed and Costly Policy*, Institute for Free Speech (Feb. 8, 2018), *at* https://www.ifs.org/wp-content/uploads/2018/02/2018-02-08_IFS-House-Rules-Committee-Comments_OR_HB-4076_Tax-Financing-Policy-Issues.pdf.

As just one example, Seattle's government-financing program saw allegations of fraud in the city's first go-around with its experimental "Democracy Vouchers" program in 2017. A candidate for City Council was accused by her campaign manager of contributing her own money to the campaign and claiming it came instead from small donors.[27] This would have entitled her to $100,000 in public financing had she not been turned in by her former campaign manager and defeated in the primary. Regardless of the outcome, the structure of the matching component of Seattle's program incentivized that individual to commit fraud. As we've seen in Arizona, Maine, New York City, and elsewhere, Seattle is not an outlier.

Finally, the Institute for Free Speech has examined and debunked a number of proponents' claims about government-financing programs using evidence from existing programs around the country:

- Legislative voting behavior is unchanged when elected officials participate in tax-financed programs;[28]
- Taxpayer financing fails to reduce lobbyist or so-called "special interest" influence in government;[29]
- The diversity of occupational backgrounds of state legislators does not increase after implementing taxpayer financing,[30] nor does the percentage of women legislators;[31]
- Giving money to politicians does not save public dollars in the long term;[32]
- Voter turnout fails to increase when states institute government financing;[33] and
- Political competition against incumbent lawmakers does not improve in states with taxpayer financing.[34]

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Few bills are more antithetical to the text of and principles underlying the First Amendment than S. 1. The numerous, overlapping, and interrelated provisions in this legislation combine to

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[27] Bob Young, *Seattle candidate accused of defrauding first-in-nation democracy-voucher program*, THE SEATTLE TIMES (Aug. 17, 2017), *at* https://www.seattletimes.com/seattle-news/times-watchdog/seattle-candidate-accused-of-defrauding-democracy-voucher-program/.

[28] Jason Farrell, Sean Parnell, & Brett Sullivan, *Meet the New Legislature, Same as the Old Legislature: A quantitative analysis of the Connecticut Citizens' Election Program*, Institute for Free Speech (Oct. 22, 2012), *at* http://www.ifs.org/wp-content/uploads/2012/11/Connecticut-Clean-Elections.pdf.

[29] Matt Nese and Luke Wachob, *Issue Analysis No. 1: Do Taxpayer-Funded Campaigns Reduce Lobbyist and Special Interest Influence?*, Institute for Free Speech (Aug. 14, 2013), *at* http://www.ifs.org/wp-content/uploads/2013/08/Issue-Analysis-1.pdf.

[30] Alexandra Cordell, *Issue Analysis No. 2: Legislator Occupations – Change or Status Quo After Tax-Funded Campaigns?*, Institute for Free Speech (Jun. 28, 2017), *at* http://www.ifs.org/wp-content/uploads/2013/08/2017-06-28_Issue-Analysis-2_Cordell_Legislator-Occupations-Change-Or-Status-Quo-After-Tax-Funded-Campaigns.pdf.

[31] Alexandra Cordell, *Issue Analysis No. 3: Do Tax-Funded Campaigns Increase the Percentage of Women in State Legislatures?*, Institute for Free Speech (Jul. 11, 2017), *at* http://www.ifs.org/wp-content/uploads/2013/08/2017-07-11_Issue-Analysis-3_Cordell_Do-Tax-Funded-Campaigns-Increase-The-Percentage-Of-Women-In-State-Legislatures.pdf.

[32] Matt Nese and Luke Wachob, *Issue Analysis No. 4: Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?*, Institute for Free Speech (Nov. 1, 2013), *at* https://www.ifs.org/wp-content/uploads/2013/11/2013-11-19_Issue-Analysis-4_Do-Taxpayer-Funded-Campaign-Actually-Save-Taxpayer-Dollars.pdf.

[33] Luke Wachob, *Issue Analysis No. 8: Do Taxpayer-Funded Campaigns Increase Voter Turnout?*, Institute for Free Speech (Dec. 11, 2013), *at* http://www.ifs.org/wp-content/uploads/2013/12/2013-12-03_Issue-Analysis-8_Do-Taxpayer-Funded-Campaign-Increase-Voter-Turnout.pdf.

[34] Joe Albanese, *Issue Analysis No. 10: Do Taxpayer-Funded Campaigns Increase Political Competitiveness?*, Institute for Free Speech (Jun. 7, 2017), *at* http://www.ifs.org/wp-content/uploads/2017/06/2017-06-05_Issue-Analysis-10_Albanese_Do-Taxpayer-Funded-Campaigns-Increase-Political-Competitiveness.pdf.

impose and tighten severe government controls on speech about candidates, judicial nominees, and policy issues in truly shocking ways. Any American lacking expertise in campaign finance law would have little or no hope of understanding this bill or the voluminous restrictions it proposes on political speech and association. The sad result will be a political discourse dominated by Washington, DC insiders. Far from being "For the People," S. 1 is truly "For the Politicians."

At a minimum, Division B of S. 1 needs an overhaul to ensure it does not infringe on the First Amendment rights of all Americans, allows the unfettered exchange of political information by U.S. citizens, and maintains the benefits of bipartisan campaign enforcement.