SENATE COMMITTEE ON RULES AND ADMINISTRATION
UNITED STATES SENATE

Testimony of
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Chair Klobuchar, Ranking Member Blunt, and Members of the Committee:

Thank you inviting me to speak about S. 1. Although the bill purports to support "the people," it ironically imposes significant burdens on the people's core constitutional right to speak and associate. The most dramatic provisions of S. 1 would not regulate speech about elections, but speech about issues and public policy.

Indeed, S. 1 proposes many restrictions on the right of the American people to speak about issues and politicians, hear ideas, and associate freely. It exposes Americans to an unprecedented system of mandatory public doxing and exposure when they desire to spend as little as $500 to discuss sensitive policy issues. It likewise imposes new civil and criminal liability on American media companies, which will push many media companies to eliminate low-cost online advertising platforms from populist organizations for political messages. Some already have closed their platforms to political advertising. S. 1 would hasten more such closures and de-platforming of populist political speech.

Many of the bill's core provisions are vague and untested. Many of its predicate findings and justifications are outdated or simply incorrect. If enacted many of the bill's provisions would be challenged immediately and likely ruled unconstitutional.

At a time of intense political polarization, when "cancel culture" and "call out tactics" and political polarization and intolerance are at their zenith, this bill exacerbates all of these social problems. At a time when legislators around the country are demanding greater privacy protections by social media companies, this bill goes in the opposite direction and compels public exposure of citizens' speech and associations. At a time when people distrust government, this bill would foment greater distrust about the fairness and bi-partisanship of the FEC.

The bill's approach starts from a false premise. It starts from the erroneous proposition that American democracy is ailing from the Supreme Court's decisions in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *McCutcheon* v. *FEC*, 572 U.S. 185 (2014). S. 1 asserts that these Court decisions "erroneously invalidated even-handed rules about the spending of money in local, State, and Federal elections. . . . These flawed decisions have empowered large corporations, extremely wealthy individuals, and special interests to dominate election

[1] Mr. Goodman served as Chairman (2014) and Commissioner (2013-2018) of the Federal Election Commission. The opinions expressed in his testimony represent his own perspective and do not represent the views of any other organization, employer, client, or person.

spending, corrupt our politics, and degrade our democracy through tidal waves of unlimited and anonymous spending."

Aside from the explicit resistance to the Constitution of the United States and the citizen rights it guarantees, as interpreted by the Supreme Court, this starting premise of S. 1 is fundamentally flawed as a legal and empirical matter. First, S. 1's premise statement overlooks the Supreme Court's rulings in *Buckley v. Valeo* (1976) and *Massachusetts Citizens for Life v. FEC* (1986) that ruled that wealthy individuals have a First Amendment right to spend unlimited personal funds to advocate the election or defeat of candidates (*Buckley*) and to donate their funds in unlimited amounts to non-profit organizations that do the same (*MCFL*).

Second, statistics indicate that spending by non-profit organizations in connection with federal elections consistently constitutes between 3 to 5 percent of all regulated expenditures in the election cycles. *See* Scott Blackburn, *Five Lessons About Spending in the 2016 Election You Might Have Missed,* Institute for Free Speech Blog (Apr. 17, 2017) (https://www.ifs.org/blog/five-lessons-about-spending-in-the-2016-campaign-you-might-have-missed/). Under a recent court decision and FEC guidance, non-profit organizations that fund independent expenditures featuring express advocacy must also disclose their donors. *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F.Supp.3d 349 (D.D.C. 2018). Thus, non-profit spending to advocate the election or defeat of candidates already is subject to a vast amount of public disclosure and our elections can hardly be termed elections awash in "dark money." But the prelude to S. 1 purports this as the bill's animating purpose nonetheless.

Spending by regulated political committees (candidate committees, political parties, PACs) makes up over 95 percent of total regulated and reported political spending. And one study indicated that over 90 percent of Super PAC funds come from individual contributors. The 8 percent of funds that come from corporations is not exclusively from big corporations. *See* Theo Francis, *Despite Citizens United, Corporate Super PAC Contributions Trail Individuals, Study Finds; Companies Donated 8% in the Period Examined; Unions Accounted for 1.9%*, Wall Street Journal (Nov. 2, 2016) (citing study by the Conference Board's Committee for Economic Development conducted by Professor Anthony Corrado of Colby College). Indeed, business corporations have largely been chased out of electoral participation by boycott and cancel campaigns.

Moreover, independent spending by non-profits and Super PACs is evenly distributed on the left and the right of the political spectrum. And all of these funding statistics are dwarfed by the amount of spending on non-regulated political speech by the free press. Thus, the extension of the First Amendment right to business corporations and labor unions in *Citizens United* has had little practical impact on our elections or our democracy.

Most significantly, S. 1 vastly expands FEC compulsory disclosure of speakers to ***ISSUE*** speech. It does this over the objection of many judicial admonitions over decades distinguishing between ISSUE speech and ELECTION-INFLUENCING speech. *Buckley v. Valeo* (1976); *McIntyre v. Ohio* (1995). Even the most speech-restrictive rulings have painted within this organizing dichotomy of issue speech versus electoral speech. *McConnell v. FEC* (2003).

I would like to focus on some examples of S. 1's expansive speech provisions with the widest and most pervasive impacts on the free speech rights of American citizens.

1. Compulsory Exposure of "Covered Organizations" That Sponsor "Campaign-Related Disbursements" Is Likely Unconstitutional.

S. 1 would require any organization that spends $10,000 in an even-numbered calendar year to discuss an incumbent officeholder who also happens to be a "candidate" under the FEC's definition to be publicly exposed. The standard for disclosure is intractably vague: any speech that is deemed to "promote," "support," "attack," or "oppose" a public officeholder who happens also to be a federal candidate – no matter the context or purpose or clear and unmistakable public policy content – triggers a requirement for the speaker to publicly expose the organization's identity and related information.

The "PASO" standard was established by Congress for the very limited purpose of controlling political parties and state political committees from using unregulated funds (also known as "soft money" or funds not subject to federal limits) to circumvent contribution limits to assist federal candidates. 52 U.S.C. §§ 30101(20)(A)(iii); 30125(b)(1) & (f)(1). The PASO standard has not worked even for that limited purpose. It has proved a highly subjective content standard that requires government bureaucrats to parse hair-splitting nuances, contexts and words within the text of advertisements. But it bears observing that the PASO standard was never intended to be wrenched from its narrow use with avowed state political committees, whose speech was presumed to be electoral, to serve as an omnibus speech standard applicable to all issue speech by non-political organizations that desire to speak about public policy while referencing the politicians who are involved with that policy – i.e., issue speakers and issue speech.

Unlike clear standards like "express advocacy" and "electioneering communications," there is no judicial guidance and scant regulatory gloss on the meaning of "PASO" content. The Commission has found the task of divining PASO messages quite difficult. The standard is so vague and practically impossible to apply that the Commission has been known to throw up its hands – i.e., punt – on difficult determinations. One such example was Matter Under Review 6684 where Democratic gubernatorial campaign Gregg for Indiana ran ads featuring original video footage of a Republican U.S. Senate candidate, Robert Murdoch – and without adding any editorial viewpoint about Murdoch or his Senate election. The ad closed with a tag line that focused solely upon the state gubernatorial election. The Commission was unable to determine whether the ad contained PASO and thus dismissed the matter in an exercise of prosecutorial discretion. Two documents about the case are attached. *See* Exhibit 1 (FEC Factual & Legal Analysis, MUR 6684 (Gregg for Indiana)); Exhibit 2 (Commissioner Lee E. Goodman's Concurring Statement of Reasons, MUR 6684 (Gregg for Indiana)).

The Commission's inability to determine whether the Gregg advertisement contained PASO inspired significant commentary by practitioners and academics about the patent difficulty of applying PASO as a regulatory standard. Former White House Counsel for President Obama, Bob Bauer, commented that the Gregg matter illuminated that "(1) the PASO standard is disastrously vague and unworkable, and the Commission's disposition did little to help matters; and (2) it is better that someone challenge this law and have us rid of PASO, because otherwise

the test will limp along in the halls of the Federal Election Commission, without any possibility of legislative action to correct the problem." Bob Bauer, "Of Something Called 'PASO' and the Sound of Dog Whistles," More Hard Money Soft Law (Apr. 2, 2014) (http://www.moresoftmoneyhardlaw.com/2014/04/something-called-paso-sound-dog-whistles/).

S. 1 completely and purposely ignores these demonstrated and intractable problems inherent in the PASO standard and chooses to plow national speech regulation into this "disastrously vague and unworkable" territory.

Committee members should also consider whether the following text would be deemed to PASO an incumbent Senator:

> Senate Bill 1 is great legislation. It will solve everything that ails our democracy. It will empower people and prevent the powerful from drowning out populist voices. It will moderate political speech in America and bring harmony to our people. Senator [FILL IN THE BLANK] has sponsored this great legislation. Senator [FILL IN THE BLANK] needs your help to push this legislation through the Senate. Please lend your support to help make Senate Bill 1 the law of the land.

The language could likewise be flipped to say negative observations about Senate Bill 1 and to urge defeat of the bill. The message could be aired in January of an election year, 10 months before an election, would make no reference to an election or to the Senator as a candidate, and would have the full purpose of altering the course of legislation rather than an election. Either way, this legislative message about a pending bill and a Senator's support for it would likely be viewed as flattering to the named Senator and therefore trigger full disclosure of the organization sponsoring the message. *See, e.g., Citizens for Responsibility and Ethics in Washington v. FEC,* 299 F.Supp.3d 83 (D.D.C. 2018) (making close, subjective calls on issue ads that manifested an "election-related purpose").

Vagueness of the standard is a serious problem. Organizations will not have a clear idea about whether the issue speech crosses the vague line. That in and of itself is a significant First Amendment problem. The drafters apparently understand that expanding the reporting window for "electioneering communications" from 90 days before an election to the entire year of the election would almost assuredly be ruled unconstitutional for its overbreadth. So, the drafters of S. 1 no doubt have attempted to fashion a "middle standard" with all of its inherent vagueness and ambiguities.

Moving beyond the ambiguity problem is the constitutional problem of the right to speak anonymously about public policy and issues. The right to speak about issues anonymously is well-settled in the law. *Watchtower Bible & Tract Society of N.Y. v. Village of Stratton* (2002); *McIntyre v. Ohio Elections Commission* (1995); *Talley v. California* (1960); *NAACP v. Alabama* (1958).

S. 1 would compel even a well-intentioned non-profit organization to surrender its First Amendment right to speak anonymously in order to speak about issues, public policy, and

legislation if it mentions a politician in connection with the policy and government regulators believe the politician was featured favorably or unfavorably. Anonymity might be important to groups that discuss sensitive subjects such as gun control, abortion and life, immigration, climate change, police power, death penalty.

We live in a time of heightened intolerance and social and political polarization. One expert has documented the younger generation's intolerance for viewpoints with which they disagree. April Kelly-Woessner, *The End of the Experiment* (ed. Stanley Rothman) (Rutledge 2017) at 187-200; Greg Lukianoff, *The Coddling of the American Mind* (Penguin Press 2018). Counter campaigns against those who are brave enough to speak are increasingly vicious and costly to speakers. Kimberley Strassel, *The Intimidation Game; How the Left is Silencing Free Speech* (The Hachette Book Group 2016); Kirsten Powers, *The Silencing: How the Left is Killing Free Speech* (Regnery Publishing 2015). One federal court recently struck an expansive compulsory exposure law lamenting "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Americans for Prosperity v. Grewal*, Case No. 3:19-cv-14228, 2019 WL 4855853 *20 (D. N.J. Oct. 2, 2019).

At the core of these culture wars and political strategies – historically and today – has been the tool, the cudgel, of government-compelled exposure of private citizens and organizations that wish to do nothing more than speak about public policy in America. Victor Navasky, *Naming Names* (Viking Press 1980). Compulsory exposure tactics have almost always been justified in the name of national security or good government, whether it was the Red Scare or New Deal attacks on anti-New Deal interest groups. Certainly compulsory exposure was the central tool of McCarthyism's zeal to protect American from communism in the 1940s and 1950s.

S. 1 cannot escape this historical context. From the Red Scare tactics of "naming names" to the modern cancel culture, ever-expanding compulsory exposure laws can be extremely damaging to free speech. And for these reasons S. 1's compulsory exposure requirement for "campaign-related disbursements" – issue speech that has no obvious relation to elections but that even vaguely applaud or criticize the legislative work of politicians – would be headed to the Supreme Court shortly after enactment. The law's fate there might be more predictable that the outcome of ad-by-ad PASO determinations by bureaucrats.

2. The "Honest Ads" Provisions Are Likely Unconstitutional.

S. 1 would require American citizens and American media companies to post disclaimers and publicize extensive information about those who spend as little as $500 to fund advertisements that discuss any issue of national importance. This is a vast expansion of compulsory exposure of issue speakers and issue speech in America.

At the outset, the Senate should be aware that two federal courts have ruled a functionally similar law adopted by Maryland that required online platforms to maintain public files and post sponsor identification to likely violate the First Amendment. *The Washington Post v. McManus*, 355 F.Supp.3d 272 (D. Md. 2019), *aff'd* 944 F.3d 506 (4th Cir. 2019).

The Washington Post Company and other online advertising/media companies challenged a Maryland law, the Maryland Online Electioneering Transparency and Accountability Act, in federal court. The Maryland law required online advertising platforms, such as www.WashingtonPost.com, to collect and post information about all "campaign materials" placed on their platforms for a fee. "Campaign material" was defined to include any text, graphic, or image that vaguely "*relates to* a candidate, a prospective candidate, or the approval or rejection of a [ballot] question or prospective [ballot] question." The media company was required to post on its website the name and contact information of each ad purchaser, the identity of people who control the organization, and the total amount paid by the ad sponsor. Additionally, the media company was required to retain extensive information about the candidate or ballot issue to which the ad related including whether the ad supported or opposed the candidate or issue, the dates on which the ad was published, the "geographic location" where it was disseminated, its target audience, and total screen views of each ad. These provisions should sound familiar to those considering S. 1.

The U.S. District Court in Maryland preliminarily enjoined enforcement of the Maryland law on the basis that it quite likely violated the First Amendment rights of press platforms that sell advertising space for political messages. After the District Court enjoined enforcement of the statute against the *Post* and other plaintiffs, Maryland appealed the District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit affirmed the district court's ruling on the basis that Maryland's imposition of campaign finance disclosure burdens on the online advertising platforms of media companies presents "a compendium of traditional First Amendment infirmities." Among the infirmities, the appeals court found Maryland's law to be a "content-based regulation" that singles out campaign-related speech for unique regulatory treatment. Judge Wilkinson's opinion declared that content-based regulation of political speech is particularly problematic, because political speech is at the core of the First Amendment's protection. The court also found Maryland's law infirm because "the Act compels speech. And it does so in no small measure." As the district court had found, the appeals court ruled that the law's compulsory disclosure and publication provisions improperly "force elements of civil society to speak when they otherwise would have refrained."

The court was particularly concerned with the conscription of press entities to serve as investigative arms of the government. The court distinguished traditional campaign finance regulations requiring disclosures from the Maryland statute on the basis that the latter "burdens platforms rather than political actors." The court was not convinced that government's traditional anti-corruption rationale justifies the regulation and punishment of neutral third-parties' advertising platforms in the same way it might apply to political participants. The court recognized the very real consequence that online advertising platforms would simply close their platforms to political advertising rather than incur the costs and legal risks associated with the regulatory requirements. This, the court found, presented a unique kind of First Amendment problem. The court also distinguished Maryland's compulsory disclosure requirements for online platforms from those that apply to broadcasters under federal communications laws. Broadcast frequencies are publicly owned and scarce, while the internet is private and infinite.

The Fourth Circuit also concluded that "the fact that the Act compels third parties to disclose certain identifying information regarding political speakers implicates protections for anonymous speech." The court cited two lines of First Amendment jurisprudence in support of this protection. First, it cited the newsman's right to resist disclosure of news sources to government recognized in *Branzburg v. Hayes* (1972). Second, it cited the "respected tradition of anonymity in the advocacy of political causes" recognized by *McIntyre v. Ohio* (1995).

In reaching its conclusion, the Fourth Circuit acknowledged "the imperative of some form of heightened judicial scrutiny," although it declined to apply "strict scrutiny," the standard of review that places the heaviest burden on government to justify laws impairing First Amendment rights. Instead, the court applied a high-bar "exacting scrutiny" standard, with the admonition that such a standard of review is decidedly not deferential to government. Under the exacting scrutiny standard, a "disparity between Maryland's chosen means and purported ends" doomed the law.

The Fourth Circuit's opinion has particular relevance to Congress' consideration of the Honest Ads provisions (and other compulsory disclosure provisions) of S. 1. The Honest Ads provisions would impose similar – if not greater – burdens upon large media companies as the Maryland law imposed. The Fourth Circuit's nod to the right of anonymous political speech and *McIntyre* could well signal a revival of sorts for the First Amendment's right of political privacy. Two cases are currently pending before the Supreme Court in associational privacy cases challenging a compulsory disclosure law in California: *Americans for Prosperity Foundation v. Becerra* and *Thomas More Society v. Becerra*. At minimum the Honest Ads provisions of S. 1 would likely be a dead letter in the Fourth Circuit and – depending on the outcome of the California cases – unconstitutional everywhere. Congress should consider whether passing a law likely to be void upon adoption is a responsible way to legislate. There are, of course, less-burdensome alternatives to addressing the foreign meddling concerns purported as a justification for S. 1's Honest Ads provisions.

Turning to the specific justifications and provisions of the Honest Ads provisions in S. 1, meanwhile, shows further how vulnerable they would be when challenged in a court. Early signs of legislative and constitutional weakness appear in the bill's "legislative findings" and "sense of Congress" recitations.

- Sec. 4202 asserts a "national security" purpose for compelling exposure of online speakers. Of course, many domestic speech restrictions on American citizens, including compulsory exposure campaigns, have been justified in the name of "national security." Red Scare subpoenas and the Sedition Act of 1798 come to mind. But even accepting this purpose as honest, I previously critiqued the weakness in the exposure provisions as a tool for getting at Russian meddling in Lee E. Goodman, *Honest Political Ads; Watch Out Drudge, You're Next*, The Hill (Sept. 4, 2019) (https://thehill.com/opinion/cybersecurity/459896-honest-political-ads-watch-out-drudge-youre-next).

- Sec. 4202 also asserts that "disclosure requirements for online political advertisements in order to uphold the Supreme Court's well established standard that the electorate bears

the right to be fully informed." This appears to be an overstatement. The Supreme Court has generally supported disclosure of large expenditures to influence the outcome of elections for the sole public purpose of preventing the corruption of politicians, not to generally inform the public of the identity and home address of fellow citizens speaking online about public policy issues. Even the disclaimer rules at the FCC are not in place for the general purpose of informing an electorate, but rather to police the fair use of the public airwaves.

- Sec. 4203 sets forth several proposed "findings" of Congress in an attempt to justify the compulsory exposure of online advertisers. Several of these findings are flawed or do not indicate the bill's proposed measures. Paragraphs 2 and 3 recite Russian use of social media accounts to spread divisive social or political content. The vast majority of these tactics employed FREE social media posts, not PAID advertisements. FREE posts on the internet are not the subject of S. 1. Nor can they be restricted by the FEC under the doctrine of preventing corruption through the expenditure of money. If they are part of a concerted foreign propaganda campaign, they are better addressed by national security agencies like the National Security Agency, the Federal Bureau of Investigation, and the Department of Justice's FARA Unit.

- Paragraph 4 points to the expenditure of $100,000 by Russia's Internet Research Agency to fund socially divisive messages. Paragraph 11 develops this point further. First, it is not clear that the divisive social messages disseminated by Russians in 2016 would be covered under S. 1's definition of "national legislative issue of public importance." And furthermore, it is worth observing that our national security agencies failed to detect this effort in 2016. And while it is indeed a noble cause to prevent foreign powers from meddling in our domestic political affairs, this finding begs a critical question: if online Russian propaganda is the target of new regulations, then why impinge upon the rights of American citizens and American media companies? The cure proposed in S. 1 is worse than the disease. There is a far more effective mechanism for addressing Russian propaganda: amend the Foreign Agents Registration Act and give the DOJ, FBI, and NSA greater capabilities for rooting out foreign propaganda campaigns. H.R. 4736 (Honest Elections Act, 116th Cong.) proposed a more effective and targeted approach to combatting foreign propaganda without infringing the free speech rights of American citizens. That more narrowly tailored approach illuminates how S. 1's restrictions on the American people and American media platforms are overbroad and untailored. This problem makes the bill vulnerable to constitutional challenge.

- Paragraphs 5, 6 and 7 invoke Congress' approval in the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "McCain-Feingold") of disclosure for "electioneering communications" to justify the expansion of compulsory exposure to online discussion of issues. *We are now sliding down the slippery slope.* When in BCRA Congress expanded compulsory exposure to a narrow band of broadcast ads that clearly reference candidates on the eve of elections under the rubric of "electioneering communications," it touted how narrowly tailored and clear the standard was. The Supreme Court accepted that at least the speech targeted was clear, narrow, and confined to election periods. *McConnell v. FEC* (2003). But S. 1 expands compulsory disclosure far beyond that narrow realm to

online discussion of *public policy and issues, at any time*, that do NOT even mention politicians or public officials.

- Paragraph 8 articulates perhaps the most insidious of purposes underlying S. 1's "Honest Ads" provisions. Paragraph 8 asserts that S. 1 is intended to force speakers to identify themselves in order to empower their ideological and "political opponents" and "fact-checkers." Why a "fact checker" needs to know the identity of a speaker in order to check facts strains logic. Furthermore, paragraph 8 asserts that compulsory exposure of online issue speakers will "create[] strong disincentives" to dissemination of "false," "inflammatory," and "contradictory" messages. Under the First Amendment, government cannot police the truth or falsity of citizen speech. And using compulsory exposure as a tool to moderate citizen speech is a constitutional non-starter.

- Paragraphs 9, 10 and 11 assert that the FEC has somehow left online election advertisements completely unregulated. Paragraph 11 asserts that "The Federal Election Commission, the independent Federal agency charged with protecting the integrity of the Federal campaign finance process by providing transparency and administering campaign finance laws, has failed to take action to address online political advertisements." This is not accurate. FEC regulations expressly require sponsor identification notices on all PAID online advertisements that advocate the election or defeat of candidates. *See* 11 C.F.R. 100.94; 155; Internet Communications, 71 Fed. Reg. 18,589,18,603 (Apr. 12, 2006). The FEC has even clarified that such notices are required on all online that can accommodate them either on the face of the ads (AO 2017-12, Take Back Action Fund) or, in the case of small items, the "click-through" and landing page mechanism (AO 2010-19, Google, Inc.). Because this finding is inaccurate, it cannot justify the draconian compulsory disclosure provisions of S. 1 – especially not speech about issues.

- Sec. 4202 would express the "sense of Congress" that S. 1's Honest Ads provisions advance transparency in "campaign spending by foreign nationals." But the bill goes far beyond "*campaign spending*." It would expand compulsory public exposure to each citizen's discussion, at any time, of *pure issues* devoid of any mention of politicians or campaigns or elections. Thus, the bill's substantive provisions do not honestly follow from the expressed predicate.

- Sec. 4205 is critically important and flawed. It proposes to amend the language of the "Press Exemption" in Sec. 301 (52 U.S.C. § 30101(22)) of the Federal Election Campaign Act. The "Press Exemption" has allowed traditional and new media to publish news articles and editorials free of FEC regulation. The bill's re-definition of the press entitled to exemption is underinclusive. It would not protect the First Amendment press rights of cable, satellite, moving pictures, online streaming services, or books. There have been sharp disagreements within the Commission over the exemption's applicability to documentary films and books, for example. Since S. 1 proposes to change the definition, any omission might be deemed intentional and therefore meaningful.

  Furthermore, S. 1 purports to address foreign meddling, it does not clarify a critically important issue about foreign-owned and operated news organizations. Will S. 1 apply to

foreign-owned news sources such as BBC.com, DailyMail.co.uk, and many other online publications with well in excess of 50 million unique visitors? The New York Times Company is reported to have about 20 percent of foreign ownership – S. 1 does not make clear whether the *New York Times* and its online platform will be exempt.

- S. 1 also imposes upon broadcast, cable and satellite television companies, as well as major online platforms, an affirmative duty to "ensure" that no "foreign national" either "directly or indirectly" purchases any advertising space for electoral or policy speech on their platforms. This is a sweeping imposition of new police responsibility upon American media companies – at the pain of civil and criminal penalties if they fail.

  Significantly, this profound imposition of police responsibility and criminal liability – both are accomplished in one provision – directly contradicts established policy codified in the Foreign Agents Registration Act ("FARA") at 22 U.S.C. § 611 which EXEMPTS American media companies from legal responsibility for foreign propaganda that makes its way into their advertising. Sec. 611(d) of the FARA provides that "[t]he term 'agent of a foreign principal' does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the United States Postal Service information in compliance with section 3611 2 of title 39, published in the United States, solely by virtue of any bona fide news or journalistic activities, **including the solicitation or acceptance of advertisements, subscriptions, or other compensation therefor**, so long as it is at least 80 per centum beneficially owned by, and its officers and directors, if any, are citizens of the United States, and such news or press service or association, newspaper, magazine, periodical, or other publication, is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal defined in subsection (b) of this section, or by any agent of a foreign principal required to register under this subchapter."

  The FARA is America's law that has specifically regulated foreign propaganda in the United States for 80 years. FARA assigns liability to the foreign agents who place or fund advertisements – not American press organizations. Yet S. 1 would, on a separate track, make American press organizations civilly and criminally liable for running an issue advertisement without confirming the nationality of the advertiser.

  In addition to contradicting a parallel law on the books, the S. 1 proposal would change nearly 50 years of precedent at the FEC that has assigned legal responsibility for ad disclaimers to those funding the ads, not media platforms, and there are sound legal and policy reasons underlying that legal treatment. *See* Exhibit 3, Concurring Statement of Commission Lee E. Goodman in MUR 7210 (Chesterland News).

- The bill further makes media companies civilly and criminally liable for displaying sponsor identification on political ads and for "ensuring" that the sponsor notice "will continue to be displayed if a viewer of the advertisement shares the advertisement with others on that platform." Thus the media organization is legally responsible even if an

individual strips a sponsorship notice from an online ad and shares the ad with others. This is fundamentally unfair.

- The bill defines the online media platforms subject to the new legal liabilities as those with "50,000,000 or more unique monthly United States visitors. That covers big platforms like WashingtonPost.com and NewYorkTimes.com, USAToday.com and the two large social media platforms obliquely referenced in S. 1. But media companies – old and new media – should not take any comfort that this law will be limited only to the big platforms for long. There are thousands of highly visited websites that sell advertising and that, collectively, are viewed by hundreds of millions of Americans. Thousands of other online advertising platforms reaching hundreds of millions of Americans would soon be viewed as a "loophole" in the law's coverage. Regulatory avarice, also called "loophole closing," would soon expand regulation to many other highly trafficked platforms and websites. Likewise, the bill does not define if multi-media platforms owned and operated by one media company will be treated as one platform or several platforms for purposes of triggering the 50 million visitor test.

- Finally, the Honest Ads provisions subject media companies and online speakers to the penalties set forth in Sec. 309 of the Act, 52 U.S.C. § 30109. The penalties for non-compliance range from civil fines and injunctions to imprisonment for "knowing and willful" violations.

It should come as no surprise that this extensive degree of regulatory burden and exposure to criminal liability would cause many media platforms to simply close their online platforms to any political advertising. The costs and burdens will simply not be worth the public service or revenues. Some already have done exactly that – sometimes to cheers and sometimes to jeers depending on which side of the ideological debate felt most disadvantaged. Likewise, certain speakers will simply choose not to speak. That is anti-democratic result. American democracy is worse off, not improved, when entire platforms for democratic speech and discourse are de-platformed or speakers choose not to speak because of government compelled disclosure and the attendant regulatory and legal burdens.

In sum, the Honest Ads provisions of S. 1 present numerous intractable policy, practical, and constitutional problems and I submit them to the Committee for its sober consideration.

3. Other Problematic Provisions of S. 1.

Other provisions of S. 1 are problematic:

- Altering the FEC from a six-member Commission to a five-member Commission would have several profound effects. First, it would turn control over the agency to the President. Second, it is intended to supercharge an aggressive enforcement posture against all politicians. Although I have not devoted substantial analysis here, it suffices to observe that S. 1 is intended to diminish vastly the First Amendment sensitivities within the FEC. Even FEC subpoenas that investigate and rummage around the internal affairs of private political organizations can violate profoundly important First

Amendment rights. Courts have so ruled. *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-388 (D.C. Cir. 1981) (quashing FEC subpoena that intruded upon the privacy of political activities outside the agency's jurisdiction). Even subpoenas should have affirmative bi-partisan support. S. 1 removes all protections – not just partisan protections, but prudential and First Amendment protections as well.

Far from instilling confidence in the FEC, S. 1's revisions to the FEC would necessarily excite a newfound distrust in the decisions of the FEC. Currently, when the FEC does pursue enforcement, the agency never is accused of unfair partisanship. That would change were S. 1 enacted. That would not be constructive at any time, but certainly not during the current atmosphere of political polarization.

- Although S. 1 has an admirable goal of encouraging small dollar contributions, its public-funding provisions have been largely eclipsed and rendered less compelling by innovations in Internet fundraising. Small dollar donations have been supercharged by low-cost fundraising technologies and platforms such as ActBlue and WinRed. Technological innovation has made an old idea unnecessary. Unless the goal is to harness some kind of partisan advantage.

  Additionally, S. 1 professes to provide public funding without "taxpayer" funds. It claims to use "civil penalties" paid by one American sector – business corporations for vaguely defined "malfeasance." That appears to be discriminatory and the penalties to be assessed appear to have no relationship to the use to which the funds would be put. But more fundamentally, recall that Justice Roberts opined in upholding the Affordable Care Act that penalties are "taxes" by a different name. *National Federation of Independent Business v. Sebelius* (2012). Thus S. 1 might reconsider its promise that no "taxpayer" funds would be transferred to aspiring officeholders.

- The provisions requiring shareholder notice and board votes on political expenditures might on first blush appear designed to protect shareholders, but as a shareholder of a number of corporations, I understand that the advocates of these provisions do not have the value of my 401k at heart. Instead of protecting my shareholder value, the advocates of these provisions desire to encumber pro-business/pro-capitalism speech, cancel it, and punish corporations that do not adhere to current political orthodoxies on everything from environmental policy to taxes to more sensitive social issues. The compulsory exposure and boycott campaigns aim to use these provisions to **harm shareholder value**, not increase it. It would harm shareholder value in order to achieve political objectives. These provisions should be understood in that light.

4. S. 1 Misses Opportunities to Empower People and Strengthen Democracy.

S. 1 is principally a pro-regulatory approach to speech limitation to achieve what its advocates perceive as better democratic results. I obviously disagree with the speech limitations. But I also see missed opportunities for achieving better democratic results, for example:

- Low cost Internet-based advertising platforms reduce the cost of political speech and activity and can lower the overall cost of competitive issue and electoral campaigning, especially for populist organizations and individuals. But S. 1's provisions close effective Internet-based platforms and deter people from using them. Congress could encourage more populist online political activity by deregulating it.

- Internet fundraising platforms supercharge low dollar fundraising. Congress could free internet fundraising platforms from cumbersome corporate in-kind contribution rules to empower small dollar fundraising through online platforms.

- Political parties are critically important democratic institutions. Congress could strengthen national political parties by, for example, eliminating coordinated spending limits. Allow the parties, which abide by contribution limits, to work with their candidates in constructive ways. The parties are constructive institutions and we need to augment constructive institutions now more than ever.

- State and local political parties harness and empower populist political participation. Congress could strengthen state and local political parties by increasing the $10,000 federal contribution limit and removing the presumption that state and local parties are "affiliated."

Conclusion

The compulsory disclosure and related provisions of S. 1 represent a vast expansion of regulation and restriction of issue speech in America. It is important for the Congress to understand the social costs and constitutional doubts that necessarily are implicated. I am happy to answer any questions.

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