



**TESTIMONY OF
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HEARING ON S. 1, THE FOR THE PEOPLE ACT

**THE COMMITTEE ON RULES & ADMINISTRATION
U.S. SENATE**

March 24, 2021

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

Thank you for the opportunity to testify in strong support of the For the People Act (S. 1).¹ This landmark legislation would repair and revitalize our democracy. It would be the most significant democracy reform in at least a half century. It would powerfully restore trust in government. It is the next great civil rights bill, a critical response to the call for racial justice. It should become law.

The For the People Act would markedly improve the workings of American democracy, modernizing it, opening access, and restoring public trust. The legislation:

- sets national standards to ensure that all eligible citizens can cast a ballot—guaranteeing access to vote by mail and early voting, and extending automatic voter registration nationwide;
- bans partisan gerrymandering and sets clear rules for the drawing of congressional districts;
- curbs the corrosive role of big money in politics, requiring disclosure and enforcement, and enacting a system of voluntary small donor matching funds;
- strengthens rules to ensure ethical conduct by executive and judicial branch officials; and
- restores the right to vote for people with past criminal convictions, and commits to strengthening the Voting Rights Act.

Each of these bold reforms meets an urgent need. Each has been found to work at the national, state, or local level. They work together to advance our system of self-government.

The Senate considers S. 1 at a time of crisis for our democracy. Legislatures across the country are moving to enact curbs on voting, an assault on voting rights that targets people of color. This legislation would stop the new wave of voter suppression, cold.² Congress has the power to do so—legally and constitutionally. We urge the Senate to meet this moment and act.

I. THE STAKES FOR DEMOCRACY

In 2020, despite the pandemic, voter suppression, and lies about the election, our nation saw the highest voter turnout since 1900.³ Fully 101 million people voted early or by mail. The federal government’s experts confirmed it was the most secure election in history. We should celebrate this achievement.

¹ The Brennan Center for Justice at NYU Law is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice so they work for all Americans. Michael Waldman, president of the Center since 2005, is the author of *The Fight to Vote* (Simon & Schuster: 2016). Brennan Center experts and staff contributed to the preparation of this written testimony: Wendy Weiser, Daniel Weiner, Martha Kinsella, Kirstin Dunham, Gareth Fowler, Julia Boland, Katherine Scotnicki, Michael Li, Lawrence Norden, William Wilder, Eliza Sweren-Becker, Derek Tisler, Gowri Ramachandran, Dominique Erney, Harold Ekeh, and Alan Beard. Thank you also to Taylor Larson, Khrystan Policarpio, and Jenna Pearlson for their drafting assistance.

² See Gareth Fowler et al., “Congress Could Change Everything,” Brennan Center for Justice, March 16, 2021, <https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything>.

³ Kevin Schaul, Kate Rabinowitz, and Ted Mellnik, “2020 Turnout Is the Highest in over a Century,” *Washington Post*, November 5, 2020, <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

Instead, our nation endured months of the Big Lie pushed by the defeated president who insisted that the election was stolen and our democracy illegitimate. These relentless attacks culminated in the violent January 6 insurrection at the Capitol, a sobering low point in our nation's history.

Now, in the first weeks of 2021, we see a new and fierce assault on the vote. Legislators are rushing to enact a wave of voting restrictions, in what would be the most significant cutback since the Jim Crow era. As of our February 19 count, 253 proposed laws in 43 states would curb the vote, seven times more than just two years ago.⁴ The number is now well over 300. They amount to a real time attack on our democracy.

Consider the measures before the legislature in Georgia. Some proposals would have effectively ended no-excuse vote by mail, but preserved it for older voters, who tend to be white and Republican. Another proposal would have repealed automatic voter registration, which had been put in place by the Republican governor. Another proposal would have ended early voting on the Sunday before Election Day—the day used by Black churches for “souls to the polls.” And now the legislature is still considering proposals allowing for mass challenges and making it a crime to give a bottle of water to someone waiting on line to vote. After a sustained public outcry, in recent days, sponsors have begun to make changes, but egregious proposals continue to move through the legislature.

Georgia is not an anomaly. In Arizona, lawmakers pre-emptively proposed banning automatic and Election Day voter registration (they do not have either now), and are actively trying to: make it harder to vote by mail, push for aggressive purges of voters off of the vote-by-mail list, and require new onerous ID requirements for when voting by mail. In Texas, legislators have proposed requiring voters to prove their citizenship status if it can't be verified by the secretary of state, and prohibiting voters from submitting absentee ballots in person. The governor of Iowa already signed into law a bill cutting back on early voting.

These proposals all disproportionately affect, and often target, voters of color.⁵ If enacted, they would result in large-scale disenfranchisement of eligible voters. As more and more people are admitting, that is precisely their purpose. Recently an Arizona legislator, defending that state's proposed voter suppression laws, explained that while some wanted to make sure that everyone could vote, “everybody shouldn't be voting.” He added: “Quantity is important, but we have to look at the quality of votes, as well.”⁶ That ugly sentiment animates too many of these proposed state laws.

Congress can—and must—stop this legislative campaign across the country to suppress the vote. The Brennan Center has analyzed each of the restrictive voting bills pending in the

⁴ Brennan Center for Justice, “Voting Laws Roundup: February 2021,” last modified February 8, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021>.

⁵ Kevin Morris, “Georgia's Proposed Voting Restrictions Will Harm Black Voters Most,” Brennan Center for Justice, March 6, 2021, <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁶ Timothy Bella, “A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight Out of Jim Crow,’” *Washington Post*, March 13, 2021, <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanagh/>.

states and concludes that The For the People Act would thwart virtually every one. A chart attached to this testimony as an appendix spells out how its provisions would block or override these egregious proposals ([Attachment](#)).⁷ Some proposed laws would cut back who can vote by mail; S. 1 would require no-excuse absentee balloting. Some proposals would restrict the use of secure drop-boxes, frequently used to vote absentee; S. 1 would ensure that voters can vote securely and conveniently. Some proposals would eliminate same day or automatic registration; S. 1 would protect them. Some proposals would end early voting on Sundays; S. 1 would require 14 days of consecutive early voting.

Within months, too, the redistricting process to draw congressional district lines will begin. Unchecked state legislative majorities will likely use the opportunity to gerrymander, to discriminate, to deny communities a voice and voters meaningful choice. The states with the fastest growing populations—growth that came overwhelmingly from people of color—face the highest risk of racial and partisan gerrymandering that would deny those emerging communities representation. This will be the first redistricting cycle in a half century without the full protections of the Voting Rights Act, which the U.S. Supreme Court gravely weakened in the *Shelby County v. Holder* decision in 2013.⁸

This legislation comes, as well, one decade after *Citizens United* ushered in a new era of big money domination of American politics—a role for big donors not seen since the Gilded Age a century ago. Fully \$14.4 billion was spent on the 2020 election, roughly double the amount just four years before. And even with a historic level of participation by small donors—in excess of 20 million during the last election cycle—the power of big donors continues unabated.⁹ Indeed, the amount spent by the top 100 individual donors last cycle rivalled the amount spent by more than 20 million small donors combined.¹⁰ Effectively, money in politics has been largely deregulated. Super PACs, dark money, and a frenetic chase for funds have come to dominate.

It comes after four years in which President Trump smashed through ethical norms and longstanding practices designed to prevent abuse of power.

These converging crises demand a full response to the challenges facing American democracy. A key strength of this legislation, in contrast to earlier and narrower reform proposals, is that it links voting and redistricting and campaign finance and ethics. All are essential to the strength of American democracy. All are at or near a crisis point. All combine to

⁷ Fowler et al., “Congress Could Change Everything.”

⁸ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁹ The small donor estimate was calculated by dividing the total contributions from small donors, which according to OpenSecrets.org was \$4,065,263,514, by the average small donation, which based on evidence from prior years is \$200. Karl Evers-Hillstrom, “Most Expensive Ever: 2020 Election Cost \$14.4 Billion,” Center for Responsive Politics, February 11, 2021, <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16>.

¹⁰ Center for Responsive Politics, “Who Are the Biggest Donors?” accessed March 22, 2021, <https://www.opensecrets.org/elections-overview/biggest-donors>; Center for Responsive Politics, “Michael Bloomberg’s 2020 Presidential Election Fundraising—Summary,” accessed March 22, 2021, <https://www.opensecrets.org/2020-presidential-race/michael-bloomberg/candidate?id=N00029349>; Center for Responsive Politics, “Tom Steyer’s 2020 Presidential Election Fundraising—Summary,” accessed March 22, 2021, <https://www.opensecrets.org/2020-presidential-race/tom-steyer/candidate?id=N00044966>; and Karl Evers-Hillstrom, “Most Expensive Ever.”

dampen the voices of millions of Americans—working people, people of color, women, young people, and people with disabilities.

S. 1 emphatically reflects the Constitution’s vision of the appropriate role for the federal government. The Constitution’s Elections Clause, in particular, gives Congress authority to set the “times, places and manner” of federal elections.¹¹ At the Constitutional Convention, James Madison insisted on the provision because of the risk that state legislatures would enact manipulative election laws. “It was impossible to foresee all the abuses that might be made of the discretionary power,” Madison warned. He sketched out an array of ways to manipulate voting rules: “Whenever the State Legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed.”¹² The Supreme Court repeatedly has reaffirmed Congress’s power to enact national laws to govern federal elections. Indeed, in 2019, an opinion written by Chief Justice John Roberts pointed to this very legislation as proof that “the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”¹³

Throughout, this legislation would set a national standard. Access to our electoral system should be the same regardless of where a citizen lives. Of note, every measure in this bill has been drawn from successful policies at the national, state, and local level. Every one has been honed by election officials over the years. Every one has been supported or used by both parties. They are widely popular with the public, and with voters of all political persuasions.

While Congress sets national standards, states could still innovate and to innovate beyond them. Where states have already met the legislation’s goals (such as by implementing automatic voter registration), in many cases they would be exempt from its provisions.

Taken together, the reforms in the For the People Act represent a powerful response to the demand for racial justice heard so passionately throughout the country. Our voting system, politically manipulated gerrymandering, and a dollar-driven campaign finance system all combine to stifle the voices of communities of color. Recent proposed electoral changes in the states would markedly shrink the electorate, again in a manner that would hit those voters hardest. If we are to build a thriving multiracial democracy that reflects a changing country, we have no choice but to modernize our electoral systems and prevent abuse.

Finally, this legislation emphatically repudiates the Big Lie put forward by President Trump and his supporters: that American elections are riddled with misconduct. Voter fraud in the United States is vanishingly rare. You are more likely to be struck by lightning than to commit voter fraud.¹⁴ In 2016, in an election he won, Trump insisted there were three to five million illegal votes. He established a commission to prove his claim. It collapsed without

¹¹ “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. Const. art. I, § 4, cl. 1.

¹² Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), vol. 2, 241.

¹³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–7 (2019).

¹⁴ Brennan Center for Justice, “The Myth of Voter Fraud,” accessed March 20, 2021, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud>.

finding any evidence. In 2020, the election was confirmed to be smoothly run and extraordinarily secure. The Department of Homeland Security declared that the 2020 election was the “most secure in history.”¹⁵ (Trump responded by firing the country’s key official who protected elections from cyber threats.¹⁶) In the frenzy of lawsuits brought to overturn the election, 60 courts considered claims, and rejected them. Trump’s attorneys, under oath, were forced to confess repeatedly they could press no charges of fraud. Federal Judge Stephen Bilbas, appointed by President Trump, ruled definitively on behalf of a three-judge appeals court panel: “Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”¹⁷ Attorney General William Barr confirmed that there was no widespread election fraud.¹⁸ Privately to the president, he used a more colorful barnyard epithet.¹⁹

Trump relied on these debunked claims to justify bid to cut out, in effect, the votes of cities variously including Atlanta, Philadelphia, Detroit, and Milwaukee. The ugly racial subtext is barely disguised. Unfortunately, the Big Lie has been embraced by millions of Americans. This legislation can help to push back against it by focusing on the true threats to election integrity—which include cybersecurity risks and foreign interference. (Indeed, last week the intelligence community released its report alleging that Russia and Iran sought to interfere in last year’s election, albeit backing different candidates.²⁰)

Were it to become law, the For the People Act would mark a major and hopeful turn in the American story. Our history has been marked over two centuries by the drive toward the democratic ideal. At the start, we were anything but what we would regard today as a democracy. Only white men who owned property could vote. Even so, James Madison set out an aspiration for our Constitution in *Federalist 57*. He asked: “Who are to be the electors of the federal representatives?”

Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and

¹⁵ Cybersecurity and Infrastructure Security Agency, Department of Homeland Security, *Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, November 12, 2020, <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

¹⁶ David E. Sanger and Nicole Perlroth, “Trump Fires a Cybersecurity Official Who Called the Election ‘the Most Secure in American History,’” *New York Times*, updated December 8, 2020, <https://www.nytimes.com/2020/11/18/us/politics/trump-fires-a-cybersecurity-official-who-called-the-election-the-most-secure-in-american-history.html>.

¹⁷ Aaron Blake, “The Most Remarkable Rebukes of Trump’s Legal Case: From the Judges He Hand-Picked,” *Washington Post*, December 14, 2020, <https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked/>.

¹⁸ Michael Balsamo, “Disputing Trump, Barr Says No Widespread Election Fraud,” *Associated Press*, December 1, 2020, <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

¹⁹ Jonathan Swan, “Trump Turns on Barr,” *Axios*, January 18, 2021, <https://www.axios.com/trump-barr-relationship-off-the-rails-b33b3788-e7e9-47fa-84c5-3a0016559eb5.html>.

²⁰ National Intelligence Council, Intelligence Community Estimate, *Foreign Threats to the 2020 U.S. Federal Elections*, 2021, <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>.

*unpropitious fortune. The electors are to be the great body of the people of the United States.*²¹

This legislation reflects that drive toward the most basic of American ideals. In the following sections, this testimony describes its provisions in greater detail.

II. VOTING RIGHTS

The right to vote is at the heart of effective self-government. It is, as the Supreme Court has noted, “preservative of all other rights.”²² Over two centuries and more, we have worked toward that ideal. Many Americans gave their lives for it. S. 1 would expand and protect this most fundamental right and bring voting into the 21st century.

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

One of the most important parts of S. 1 is a package to modernize voter registration. The centerpiece of that proposal is a plan for automatic voter registration (AVR). This bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy. It is now the law in 19 states and the District of Columbia.²³ It should be the law of the land.

Outdated Voter Registration Systems. More than many realize, an outdated registration system poses an obstacle to free and fair elections. One in five eligible Americans is not registered to vote.²⁴ This quiet disenfranchisement is partly due to an out-of-date, and in some places ramshackle, voter registration system. The United States is the only major democracy that requires individual citizens to shoulder the onus of registering to vote (and re-registering when they move).²⁵ In much of the country, voter registration still largely relies on error-prone pen and paper. In 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.²⁶

These problems have long contributed to low voter turnout.²⁷ Each Election Day,

²¹ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Lawrence Goldman (New York: Oxford University Press, 2008), 282.

²² *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²³ Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; three states (Colorado, Connecticut, and Georgia) adopted it administratively. See Brennan Center for Justice, “History of AVR & Implementation Dates,” last modified December 22, 2020, <https://www.brennancenter.org/analysis/history-avr-implementation-dates>.

²⁴ Pew Charitable Trusts, *Why Are Millions of Citizens Not Registered to Vote?*, 2017, 1, https://www.pewtrusts.org/-/media/assets/2017/06/ei_why_are_millions_of_citizens_not_registered_to_vote.pdf.

²⁵ Jennifer S. Rosenberg, *Expanding Democracy: Voter Registration Around the World*, Brennan Center for Justice, 2009, 23, <https://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world>.

²⁶ Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012, https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.

²⁷ According to a 2001 commission chaired by former Presidents Ford and Carter, “[t]he registration laws in the United States are among the most demanding in the democratic world . . . [and are] one reason why voter turnout in

millions of Americans go to the polls only to have trouble voting because of registration flaws.²⁸ Some find their names wrongly deleted from the rolls.²⁹ Others fall out of the system when they move.³⁰ One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.³¹ Election Protection, the nonpartisan voter assistance hotline, reported that registration issues were the second most common problem voters faced in both the 2018 and 2016 elections.³² Registration errors affect more than those voters who are not on the rolls. As the bipartisan Presidential Commission on Election Administration found in 2014, registration problems cause delays at the polls and are a principal cause of long lines.³³

Outdated registration systems also undermine election integrity. Incomplete and error-laden voter lists create opportunities for malefactors to defraud the system or disenfranchise eligible citizens. And they are far more expensive to maintain than more modern systems. Officials with partisan motives can remove voters from the rolls because of minor discrepancies, such as spelling mistakes, incomplete addresses, or other missing information. These systems are also far more expensive to maintain than more modern systems. Arizona's Maricopa County, for

the United States is near the bottom of the developed world." See Jimmy Carter, Gerald Ford, et al., *Reports of the Task Force on the Federal Election System*, National Commission on Election Reform, 2001, 1–3, http://web1.millercenter.org/commissions/comm_2001_taskforce.pdf. In too many parts of America, this is still true.

²⁸ A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. See R. Michael Alvarez, Stephen Ansolabehere, et al., *2008 Survey of the Performance of American Elections*, 2009, 59, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; see also Stephen Ansolabehere, *Testimony before the U.S. Senate Rules Committee*, 19, March 11, 2009. Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, 2013, 70, <http://dvn.iq.harvard.edu/dvn/dv/measuringelections>.

²⁹ Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Stewart III, *2012 Survey of the Performance of American Elections*, ii; and U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8–10, <https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Stewart found 2.8 percent of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5 percent voted in person on Election Day (56.5 percent) or early (9 percent). 65.5 percent of 131,590,825 voters multiplied by the 2.8 percent figure from Stewart's study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election.

³⁰ Thomas Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Vintage Books, 2002), 178.

³¹ Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

³² Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers' Committee for Civil Rights Under Law, 2018, 4, <https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf>; see also Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEMOCRACY_FINAL.pdf; and Walter Shapiro, "Election Day Registration Could Cut Through Many of the Arguments in the Voting Wars," Brennan Center for Justice, last modified October 16, 2018, <https://www.brennancenter.org/blog/election-day-registration-could-cut-through-many-arguments-voting-wars>.

³³ Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

example, found that processing a paper registration cost 83 cents, compared to 3 cents for applications processed electronically.³⁴

The Covid-19 pandemic put outdated registration systems under even greater stress. Quarantines, illnesses, and social distancing reduced access to government offices, voter registration drives were curbed, and the post service was disrupted in the lead-up to the election. The result was a dramatic reduction in voter registration rates in many states.³⁵

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

Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. As noted above, 19 states and the District of Columbia have AVR.³⁶ If adopted nationwide, it could add as many as 50 million new eligible voters to the rolls.³⁷

AVR shifts registration from an “opt-in” to an “opt-out” approach. When eligible citizens give information to the government—for example, to get a driver’s license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline. This reflects how the human brain works; behavioral scientists have shown that we are hard-wired to choose the default option presented to us.³⁸

The policy also requires that voter registration information be electronically transferred to election officials, rejecting paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.³⁹

³⁴ Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, 2010, 12, <https://www.brennancenter.org/publication/voter-registration-digital-age>.

³⁵ Peter Miller, “Voter Registration Has Plummeted in 2020,” Brennan Center for Justice, September 21, 2020, <https://www.brennancenter.org/our-work/research-reports/voter-registration-has-plummeted-2020>.

³⁶ Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively; and one state (Connecticut) adopted it as an agreement between the state secretary of state and state DMV officials. See Brennan Center for Justice, “History of AVR.”

³⁷ Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.

³⁸ Brennan Center for Justice, *Case for Automatic Voter Registration*, 6–7. Opt-out systems have led to increased program-participation rates across a variety of fields. See, e.g., Alberto Abadie and Sebastian Gay, “The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study,” *Journal of Health Economics* 25 (2006): 599–620, <http://www.sciencedirect.com/science/article/pii/S016762960600004X> (25–30 percent higher participation in organ donation programs); and James J. Choi et al., “Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance,” *Tax Policy and the Economy* 16 (2002): 67–114, <http://www.nber.org/papers/w8655.pdf> (401(k) participation over 30 percentage points higher with automatic enrollment).

³⁹ Brennan Center for Justice, *Case for Automatic Voter Registration*, 11.

AVR Works. Oregon and California became the first states to adopt AVR in 2015.⁴⁰ Since then, 17 more states and the District of Columbia have followed—many with strong bipartisan support.⁴¹ In Illinois, for example, the state legislature passed AVR unanimously, and a Republican governor signed it into law.

The new system has increased registration rates in nearly every state where it has been implemented. In Vermont, for example, DMV registrations went up by 60 percent after it adopted AVR, and in Georgia, they increased 94 percent.⁴² In eight jurisdictions that implemented AVR for the 2018 election, 2.2 million people were registered to vote through AVR, and up to 6 million people had their registration information updated.⁴³

There is strong reason to believe that the reform also boosts turnout.⁴⁴ When citizens are automatically registered, they are relieved of an obstacle to voting, thus increasing the likelihood they will cast a ballot. Automatic registration also exposes more voters to direct outreach from election officials, political parties, candidates, and others.⁴⁵ Indeed, Oregon saw the nation’s largest turnout increase in the 2016 election after it adopted AVR in 2015. It had no competitive statewide races, yet the state’s turnout increased by 4 percent in 2016—2.5 percentage points higher than the national average.⁴⁶ According to a 2018 analysis of registration and turnout statistics in eight jurisdictions by the website FiveThirtyEight, AVR resulted in hundreds of thousands of new voters at the polls.⁴⁷ Other reforms that make it easier to register have also increased turnout, such as permitting registrants who move anywhere within a state to transfer their registration and vote on Election Day at their new polling place.⁴⁸ These measures send a

⁴⁰ Brennan Center for Justice, “History of AVR.”

⁴¹ Brennan Center for Justice, “Automatic Voter Registration, a Summary,” last modified February 16, 2021, <https://www.brennancenter.org/analysis/automatic-voter-registration>.

⁴² Christopher Famighetti, “First Look Shows Automatic Voter Registration Was a Success in Vermont,” Brennan Center for Justice, last modified August 17, 2017, <https://www.brennancenter.org/blog/first-look-shows-automatic-voter-registration-was-success-vermont>.

⁴³ Kevin Morris and Peter Dunphy, *AVR Impact on State Voter Registration*, Brennan Center for Justice, 2019, https://www.brennancenter.org/sites/default/files/publications/2019_04_AVR_Report_Final_0.pdf; and Nathaniel Rakich, “What Happened When 2.2 Million People Were Automatically Registered To Vote,” *FiveThirtyEight*, October 10, 2019, <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/>.

⁴⁴ Wendy Weiser, “Automatic Voter Registration Boosts Political Participation,” *Stanford Social Innovation Review*, January 28, 2016, https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#.

⁴⁵ Weiser, “Automatic Voter Registration Boosts”; and Donald Green et al., “Field Experiments and the Study of Voter Turnout,” *Journal of Elections, Public Opinion and Parties* 23 (2013): 27–48, https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout.

⁴⁶ Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, Center for American Progress, 2017, <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/>; United States Elections Project, “2016 November General Election Turnout Rates,” last modified September 5, 2018, <http://www.electproject.org/2016g>; and United States Election Project, “2012 November General Election Turnout Rates,” last modified September 3, 2014, <http://www.electproject.org/2012g>.

⁴⁷ Rakich, “2.2 Million People Were Automatically Registered To Vote.”

⁴⁸ For example, one study found that simply making registration portable can boost turnout by more than 2 percent. Michael McDonald, “Portable Voter Registration,” *Political Behavior* 30 (2008): 491–501, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents.

strong message that all eligible citizens are welcome and encouraged to participate in our democracy.

Many election officials support AVR because it improves administration and saves money. Virtually every state to have transitioned to electronic transfer of registration information has reported substantial savings from reduced staff hours processing paper, and lower printing and mailing expenses.⁴⁹ Eliminating paper forms improves accuracy, reduces voter complaints about registration problems, and reduces the need for the use of provisional ballots.⁵⁰

Voters strongly support the reform. According to recent polling, 69 percent of Americans favor it.⁵¹ Michigan and Nevada adopted AVR in 2018 by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.⁵² Alaska voters passed AVR in 2016 with nearly 64 percent of the vote.⁵³

AVR Should be the National Standard. S. 1 sensibly makes AVR a national standard, building on past federal reforms to the voter registration system.⁵⁴ Critically, the Act requires states to put AVR in place at a wide variety of government agencies beyond state motor vehicle agencies, including those that administer Social Security or provide social services, as well as higher education institutions. It also requires a one-time “look back” at agency records to register individuals who have previously interacted with government agencies while protecting voters’ sensitive information from public disclosure.

AVR also includes multiple safeguards to ensure that ineligible voters are not registered and to prevent people from being punished for innocent mistakes. The government agencies designated for AVR regularly collect information about individuals’ citizenship status and age, and they are already required to obtain an affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility

⁴⁹ Brennan Center for Justice, *Case for Automatic Voter Registration*, 11.

⁵⁰ Brennan Center for Justice, *Case for Automatic Voter Registration*, 10–11.

⁵¹ Pew Research Center, “Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by Covid-19,” last modified April 28, 2020, <https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/>.

⁵² New York Times, “Michigan Election Results,” last modified May 15, 2019, <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html>; and New York Times, “Nevada Election Results,” last modified May 15, 2019, <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html>.

⁵³ New York Times, “Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved,” last modified August 1, 2017, <https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg>.

⁵⁴ The National Voter Registration Act of 1993 required states to offer voter registration at their motor vehicle, public assistance, and disabilities agencies, among other things. 52 U.S.C. §§ 20504-20506. S. 1’s AVR provisions build on this by expanding the agencies that offer voter registration and by making the registration process paperless at those agencies. The Help America Vote Act of 2002 pushed states into the digital age, by requiring them to create a centralized, computerized voter registration list. 52 U.S.C. § 21083. S. 1 extends the benefits of that legislation by seamlessly transmitting voter information between registration agencies and the election officials that control the computerized voter list.

requirements, the penalties for illegal registration, and offer them the opportunity to opt out of registration. Election officials too are required to send individuals a follow up notice by mail. In light of these checks, there is no basis for critics' alarmist speculation that AVR would result in an increase in the registration of ineligible persons. Indeed, election officials report that AVR's elimination of paper forms *enhances* the accuracy of the rolls.⁵⁵ As a precaution, S. 1 also includes protections in the unlikely event that an ineligible person is inadvertently registered, to ensure that they are not harmed as a result.

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

S. 1 would boost voter participation further by establishing same-day registration (SDR), which allows eligible citizens to register and vote on the same day. It is a strong complement to AVR, available to those eligible voters who have not interacted with government agencies or whose information has changed since they did. Because it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.

SDR has been used successfully in several states since the 1970s. Today, 21 states and the District of Columbia offer some form of same-day registration, either on Election Day, during early voting, or both.⁵⁶ At least 18 additional states had introduced bills to implement same-day registration during the current legislative session.⁵⁷ Studies indicate that SDR boosts voter turnout by 5 to 7 percent.⁵⁸ And it is highly popular. In 2018, supermajorities of voters in Michigan and Maryland passed ballot measures that, respectively, implemented and expanded same-day registration. According to recent polls, more than 60 percent of Americans support SDR.⁵⁹ As part of the full package of reforms, SDR's use would be limited, since AVR would capture the vast majority of voters well before Election Day. Taken together, AVR and SDR would ensure that no eligible voter is left out.

⁵⁵ Brennan Center for Justice, *Case for Automatic Voter Registration*, 10–11

⁵⁶ National Conference of State Legislatures, "Same Day Voter Registration," last modified October 6, 2020, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

⁵⁷ Brennan Center for Justice, "Voting Laws Roundup: February 2021" (AK, AZ, DE, FL, GA, IN, KY, MS, MO, NJ, NY, OR, PA, SC, TX); and Brennan Center for Justice, "State Voting Bills Tracker 2021," February 24, 2021, <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>.

⁵⁸ McDonald, "Portable Voter Registration," 491–511; see also Jacob R. Neisheisel and Barry C. Burden, "The Impact of Election Day Registration On Voter Turnout and Election Outcomes," *American Politics Research* 40 (2012): 636, 638–39 (citing studies finding that same-day registration increases turnout by 3 to 6 percent, and by as much as 14 percent). In the 2016 election, voter turnout was, on average, 7 percent higher in states with SDR than in those without. See George Pillsbury and Julian Johannesen, *America Goes to the Polls 2016: A Report on Voter Turnout in the 2016 Election*, Nonprofit Vote, 2016, <https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf>; and Mijin Cha and Liz Kennedy, *Millions to the Polls: Same Day Registration*, Dēmos, 2014, <https://www.demos.org/sites/default/files/publications/Millions%20to%20the%20Polls.pdf>.

⁵⁹ Pew Research Center, "Elections in America"; The Atlantic and Public Religion Research Institute, "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, <https://www.prrri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf>.

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

Online registration also increases voter participation by eliminating cumbersome paperwork and waiting periods. S. 1 requires states to offer secure and accessible online registration. At a time when many Americans do everything from banking to reviewing medical records online, voters want this convenient method of registration. The online registration provisions in S. 1 would let all voters register, update registration information, and check registrations online. This option has been especially critical during the Covid-19 pandemic, when voters were prevented from registering by other means. The Act would also ensure that these benefits are available to citizens who do not have driver's licenses.

In addition to convenience and safety, online registration saves money and improves voter roll accuracy. Processing electronic applications is a fraction of the cost of processing paper applications. Washington State reported savings of 25 cents with each online registration (for a total of about \$176,000 in savings) in the first two years of the program, and its local officials save between 50 cents and two dollars per online transaction.⁶⁰ Election officials also report that letting voters enter their own information significantly reduces the likelihood of incomplete applications and mistakes.⁶¹

It is not surprising, therefore, that online registration is incredibly popular and has spread rapidly. In 2010, only six states offered online voter registration. Now, 40 states and the District of Columbia do.⁶² Taken together, AVR, SDR, and online registration would ensure that no eligible voter is left out of our democratic process.

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

Modernizing our system means not only registering all eligible voters, but also making sure they stay on the rolls. Voter purges—the large-scale deletion of voters' names from the rolls, often using flawed data—are on the rise.⁶³ In 2018, they were a key form of vote suppression used by election officials around the country.⁶⁴ In 2020, as the Covid-19 pandemic created new voting challenges, improper purges made it difficult for states such as Iowa to

⁶⁰ See Holly Maluk et al., *Voter Registration in a Digital Age: 2015 Update*, Brennan Center for Justice, 2015, 6, https://www.brennancenter.org/sites/default/files/publications/Voter_Registration_Digital_Age_2015.pdf.

⁶¹ Maluk et al., *Voter Registration in a Digital Age*, 8.

⁶² Brennan Center for Justice, "VRM in the States: Online Registration," last modified February 1, 2021, <https://www.brennancenter.org/analysis/vrm-states-online-registration>.

⁶³ Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," Brennan Center for Justice, last modified August 21, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>; Myrna Pérez, "How the Midterm Elections May Be Compromised," *New York Times*, July 19, 2018, <https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html>; see also Kevin Morris and Myrna Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates," Brennan Center for Justice, last modified October 1, 2018, <https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates>.

⁶⁴ Pérez, "Midterm Elections May Be Compromised"; see also Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters."

distribute mail ballot request forms to many eligible voters.⁶⁵ In the aftermath of the 2020 election, bills have been introduced in 17 states that would expand voter roll purges or adopt flawed practices that would create a risk of improper purges.⁶⁶ S. 1 addresses this growing threat by curbing improper efforts to remove eligible voters.

Purges soared in those states with a history of discrimination in voting that once had been subject to federal oversight under the Voting Rights Act before *Shelby County*.⁶⁷ The Brennan Center has calculated that more than 17 million voters were purged from the rolls nationwide between 2016 and 2018.⁶⁸ Over the same period, the median purge rate in jurisdictions previously covered by the VRA was 40 percent higher than the purge rate elsewhere.⁶⁹ Georgia, for example, purged twice as many voters—1.5 million voters—between the 2012 and 2016 elections as it did between 2008 and 2012. The state also saw most of its counties purge *more than 10 percent* of their voters between 2016 and 2018.⁷⁰ Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010.⁷¹ We ultimately found that *2 million fewer voters* would have been purged between 2012 and 2016, and 1.1 million fewer between 2016 and 2018, if jurisdictions previously subject to preclearance had purged at the same rate as other jurisdictions.⁷²

Incorrect purges disenfranchise legitimate voters and cause confusion and delay at the polls. In 2019, for example, the Texas secretary of state sent lists of approximately 95,000 alleged non-citizens to county officials for purging, but within days, it became clear the tallies were rife with inaccuracies.⁷³ In 2016, New York election officials erroneously deleted hundreds of thousands from the rolls, with no public warning and little notice to those who had been purged.⁷⁴ The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists that were used were highly inaccurate and included many voters who had never committed a felony or had had their voting rights restored.⁷⁵

⁶⁵ Rebecca Ayala, “With Mail Ballots More Important During Covid-19, Improper Voter Purges Can Do Even More Damage,” Brennan Center for Justice, last modified May 8, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/mail-ballots-more-important-during-covid-19-improper-voter-purges-can-do>.

⁶⁶ Brennan Center for Justice, “Voting Laws Roundup: February 2021” (AK, AZ, DE, FL, GA, IN, KY, MS, MO, NJ, NY, OR, PA, SC, TX); and Brennan Center for Justice, “State Voting Bills Tracker 2021.”

⁶⁷ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, 3–5, <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>.

⁶⁸ Morris, “Purge Rates Remain High.”

⁶⁹ Morris, “Purge Rates Remain High,” 1.

⁷⁰ Morris and Pérez, “Florida, Georgia, North Carolina Still Purging Voters.”

⁷¹ Brater et al., *Purges: A Growing Threat*, 1.

⁷² Brater et al., *Purges: A Growing Threat*, 1–5; and Kevin Morris, “How Purges Threaten to Disenfranchise Voters Under the Radar,” Brennan Center for Justice, last modified July 20, 2018, <https://www.brennancenter.org/blog/how-purges-threaten-disenfranchise-voters-under-radar>.

⁷³ Sean Morales-Doyle and Rebecca Ayala, “There’s Good Reason to Question Texas’ Voter Fraud Claims,” Brennan Center for Justice, last modified January 29, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/theres-good-reason-question-texas-voter-fraud-claims>.

⁷⁴ Brater et al., *Purges: A Growing Threat*, 5–6.

⁷⁵ Brater et al., *Purges: A Growing Threat*, 5.

Purges can be carried out in discriminatory ways that disproportionately affect minority voters.⁷⁶ In particular, when voter lists are matched with other government databases to ferret out ineligible people, it can generate discriminatory results if done without adequate safeguards. Black, Asian American, and Latino voters are much more likely than white voters to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.⁷⁷

S. 1 puts strong protections in place to prevent improper purges. It puts new guardrails on the use of inter-state databases (such as the now defunct and much maligned Crosscheck system) that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. It prohibits election officials from relying on a citizen's failure to vote in an election as a reason to remove them from the rolls. And it requires election officials to provide timely notice to removed voters, as well as an opportunity to remedy their registration before an election.

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

As recent experiences with purges and other vote suppression tactics make clear, Congress must restore the full protections of the Voting Rights Act, which the U.S. Supreme Court hobbled in 2013 in *Shelby County*. While the Act's affirmative voting standards would negate many of the abusive proposals now being advanced in states,⁷⁸ a fully functional VRA is also a check against future discriminatory efforts to restrict voting.

The VRA is widely regarded as the single most effective piece of civil rights legislation in our nation's history.⁷⁹ As recently as 2006 it won reauthorization with overwhelming bipartisan support.⁸⁰ For nearly five decades, the linchpin of the VRA's success was the Section 5 preclearance provision, which required certain states with a history of discriminatory voting practices to obtain advance approval from the federal government for voting rules changes. Section 5 deterred and prevented discriminatory changes to voting rules right up until the time the Supreme Court halted its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (13 in the final 18 months before the *Shelby County* ruling), caused

⁷⁶ Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 2008, 31–32, <https://www.brennancenter.org/publication/voter-purges>.

⁷⁷ Brater et al., *Purges: A Growing Threat*, 7.

⁷⁸ Fowler et al., “Congress Could Change Everything.”

⁷⁹ See U.S. Department of Justice, “The Effect of the Voting Rights Act,” last modified June 19, 2009, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

⁸⁰ The vote was unanimous in the Senate and 390–33 in the House. See U.S. Senate, “H.R.9 Vote Summary,” July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; and U.S. House of Representatives, “Final Vote Results for Roll Call 374,” July 13, 2006, <http://clerk.house.gov/evs/2006/roll374.xml>. The reauthorization was signed into law by President George W. Bush. See The White House, Press Release, “Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006,” July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

hundreds more to be withdrawn after a Justice Department inquiry, and prevented still more from being put forward because policymakers knew they would not pass muster.⁸¹

Shelby County eviscerated Section 5 by striking down the “coverage formula” that determined which states were subject to preclearance. That resulted in a predictable flood of discriminatory voting rules, contributing to a now decade-long trend in the states of restrictive voting laws, which the Brennan Center has documented extensively.⁸² Within hours of the Court’s decision, Texas announced that it would implement what was then the nation’s strictest voter identification law—a law that had previously been denied preclearance because of its discriminatory impact. Ultimately a federal court found, after an extensive trial, that more than 608,000 Texas voters lacked the necessary ID.⁸³ Shortly afterward, Alabama, Arizona, Florida, Mississippi, North Carolina, and Virginia also moved ahead with restrictive voting laws or practices that previously would have been subject to preclearance.⁸⁴ In the years since, federal courts have repeatedly found that new laws passed after *Shelby* made it harder for minorities to vote, some intentionally so.⁸⁵ Our research regarding last year’s election confirmed the persistence of voter suppression and the willingness of too many state officials to continue developing new tactics to keep people from voting.⁸⁶

Section 2 of the VRA—which prohibits discriminatory voting practices nationwide and permits private parties and the Justice Department to challenge those practices in court—remains an important bulwark against discrimination. But Section 2 lawsuits are not a substitute for preclearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.⁸⁷ Our case against Texas’s 2011 voter ID law illustrates this point.⁸⁸ The law initially did not go into effect because a three-judge

⁸¹ Tomas Lopez, *Shelby County: One Year Later*, Brennan Center for Justice, 2014, <https://www.brennancenter.org/analysis/shelby-county-one-year-later>.

⁸² Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018, <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>; Brennan Center for Justice, “New Voting Restrictions in America,” last modified November 19, 2019, <https://www.brennancenter.org/new-voting-restrictions-america>; Brennan Center for Justice, “Voting Laws Roundup: February 2021”; and Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, <http://www.brennancenter.org/publication/voting-law-changes-2012>.

⁸³ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

⁸⁴ Lopez, *Shelby County*.

⁸⁵ Danielle Lang and J. Gerald Hebert, “A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation,” *Yale Law Journal Forum* 127 (2017–2018): 780 n. 4. For example, the Fourth Circuit Court of Appeals found that a 2013 voting law passed by North Carolina targeted Black voters with “surgical precision.” *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁸⁶ Brennan Center for Justice, “State Voting Bills Tracker 2021”; Michael Waldman, “The Big Lie and the Push to Restrict Voting,” last modified February 2, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/big-lie-and-push-restrict-voting>; Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most”; and Eliza Sweren-Becker and Hannah Klain, “The Fight for Voting Rights in 2021,” Brennan Center for Justice, February 24, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/fight-voting-rights-2021>.

⁸⁷ Lopez, *Shelby County*.

⁸⁸ The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers’ Committee for Civil Rights

federal court refused to preclear it under Section 5. But that decision was vacated after *Shelby County*, spurring multi-year litigation under Section 2. Despite the fact that every court that has considered the law found it discriminatory (and a federal district court found it intentionally so), the law remained in effect until a temporary remedy was ordered for the November 2016 election. In the interim, Texans voted in 3 federal and 4 statewide elections and numerous local elections under discriminatory rules.

Congress has the power to address these problems, by updating the VRA’s coverage formula, examining its coverage, and restoring the VRA to its full power. As this Committee recognizes, any new coverage formula must be supported by a thorough legislative record. We commend the commitment to restoring the VRA reflected in S. 1. VRA restoration is accomplished through separate legislation, the John Lewis Voting Rights Advancement Act, which passed the last Congress as H.R. 4.⁸⁹ The bill, which will soon be reintroduced, updates the VRA’s coverage formula to restore the act’s full force. It will be backed by a thorough legislative record documenting the recent history of voter suppression in U.S. elections. This crucial legislation must become law in order to fortify the right to vote and the integrity of our elections. We urge Congress to make passage of a renewed VRA a top priority.

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

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

Holding elections on a single workday in early November is a relic of the nineteenth century; it was done for the convenience of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot.⁹⁰ This no longer works for many Americans, who must find time to cast a ballot between jobs, childcare, and the everyday obligations of modern life. Sometimes, even after making the time and the journey, long lines cause them to turn away.

Early voting works well. Forty-five states and the District of Columbia offered some opportunity to vote in person before Election Day in 2020, which was crucial during the pandemic.⁹¹ More than a dozen of those states offer early voting for a period comparable to or

Under Law and other co-counsel. The case was consolidated with several others. For more information, see Brennan Center for Justice, “Texas NAACP v. Steen (consolidated with Veasey v. Abbott),” September 21, 2018, <https://www.brennancenter.org/legal-work/naACP-v-steen>.

⁸⁹ The Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/4>.

⁹⁰ Kevin J. Coleman, Joseph E. Cantor, and Thomas H. Neale, *Presidential Elections in the United States: A Primer*, CRS No. RL30527 (Washington, DC: Congressional Research Service, 2000), 38.

⁹¹ Brennan Center for Justice, “Preparing Your State for an Election Under Pandemic Conditions,” last modified February 1, 2021, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions>; National Conference of State Legislatures, “State Laws Governing Early Voting,” last modified October 22, 2020, <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>; National Conference of State Legislatures, “Voting Outside the Polling Place: Absentee, All-Mail

greater than the two-week period leading to Election Day required by S. 1.⁹² It was widely used where available even before the 2020 election. In 2016, 24 million Americans cast their ballot via in-person early voting.⁹³

Despite the popularity of early voting, the absence of a national standard means that some states have few or inconsistent early voting hours, and others have been able to engage in politicized cutbacks to early voting.⁹⁴ Over the past decade, multiple states have reduced early voting days or sites used disproportionately by Black voters (such as the elimination of early voting on the Sunday before Election Day), and federal courts have struck down early voting cutbacks in North Carolina and Wisconsin because they were intentionally discriminatory.⁹⁵ As of February 19, 2021, 15 bills restricting early voting had been introduced in state legislatures during the current legislative session.⁹⁶ At least some of these bills would have a racially disparate impact on voters, such as a bill in Georgia that would tightly restrict early voting on Sundays, which have historically been important turnout days for Black Americans.⁹⁷

S. 1 will make voting more manageable by requiring that states provide two weeks of early voting and equitable geographic distribution of early voting sites. A guaranteed early voting period will reduce long lines at the polls⁹⁸ and ease the pressure on election officials and poll workers on Election Day, by spreading out the days on which people cast their ballots. For this reason, it was one of the principal recommendations of the bipartisan Presidential Commission of Election Administration for reducing long lines.⁹⁹ It will also make it easier for election officials to spot and solve problems like registration errors or voting machine glitches before they impact most voters.¹⁰⁰ For these reasons, election officials report high satisfaction with early voting. The Brennan Center’s research indicates that two weeks is an effective minimum time period for generating the benefits of early voting.¹⁰¹

and Other Voting at Home Options,” last modified September 24, 2020, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>; and Hannah Klain, “Six Ways for Election Officials to Prepare for High Voter Turnout in 2020,” Brennan Center for Justice, November 12, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/six-ways-election-officials-prepare-high-voter-turnout-2020>.

⁹² National Conference of State Legislatures, “State Laws Governing Early Voting.”

⁹³ U.S. Election Assistance Commission, “EAVS Deep Dive: Early, Absentee and Mail Voting,” October 17, 2017, <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview>.

⁹⁴ Brennan Center for Justice, “New Voting Restrictions in America.”

⁹⁵ *North Carolina State Conference of NAACP*, 831 F.3d at 204, 219; and *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).

⁹⁶ Brennan Center for Justice, “State Voting Bills Tracker 2021.”

⁹⁷ Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most.”

⁹⁸ See Hannah Klain, Kevin Morris, and Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, Brennan Center for Justice, 2020, https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

⁹⁹ Presidential Commission on Election Administration, *The American Voting Experience*.

¹⁰⁰ Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice, 2013, 5–6, <https://www.brennancenter.org/publication/early-voting-what-works>.

¹⁰¹ Kasdan, *Early Voting*, 12.

Early voting is popular with voters, too, with study after study showing a significant positive effect on voter satisfaction.¹⁰² It is a critical element of a convenient and modern voting system. A national standard is long overdue.

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

S. 1 would restore federal voting rights to citizens with past criminal convictions living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

Harms of Current Disenfranchisement Laws. A confusing patchwork of discriminatory disenfranchisement laws causes profound harm across the country. Nationally, state laws deny more than 4.5 million citizens the right to vote because of a criminal conviction¹⁰³—3.2 million of whom are no longer incarcerated and live in our communities, work, pay taxes, and raise families.¹⁰⁴

Disenfranchisement laws vary dramatically from state to state. In states like Vermont and Maine, there is no disenfranchisement—people currently in prison are allowed to vote. Other states distinguish between different types of felonies, while others treat repeat offenders differently. Jurisdictions also have varying rules on what parts of a sentence must be completed before rights are restored, such as paying off debt or other legal financial obligations.¹⁰⁵ Navigating this patchwork of state laws causes confusion for everyone—including election officials and prospective voters—about who is eligible to vote. The real-world result is large-

¹⁰² Kasdan, *Early Voting*, 7–8.

¹⁰³ Scholars previously estimated that about 6.1 million citizens were disenfranchised nationwide. See Christopher Uggen et al., *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement*, The Sentencing Project, 2016, 4. Florida accounted for approximately 1.5 million of these because its constitution permanently disenfranchised everyone convicted of a felony. See Uggen et al., *6 Million Lost Voters*, 4. Since then, in November 2018, Florida voters approved the Voting Restoration Amendment, which restores voting rights to anyone who has completed all terms of their sentence. See Fl. Const. Art. VI, § 4 (2019). And Kentucky, New Jersey, Iowa, and Virginia have restored rights to various groups of formerly incarcerated people. Michael Wines, “Kentucky Gives Voting Rights to Some 140,000 Former Felons,” *New York Times*, December 12, 2019, <https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html>; Vanessa Romo, “New Jersey Governor Signs Bills Restoring Voting Rights to More Than 80,000 People,” *NPR*, December 18, 2019, <https://www.npr.org/2019/12/18/789538148/new-jersey-governor-signs-bills-restoring-voting-rights-to-more-than-80-000-peop>; Katarina Sostaric, “Governor Acts to Restore Voting Rights to Iowans with Felony Convictions,” *NPR*, August 5, 2020, <https://www.npr.org/2020/08/05/899284703/governor-acts-to-restore-voting-rights-to-iowans-with-past-felony-convictions>; and Gregory S. Schneider, “Northam Restores Voting Rights for 69,000 with Felony Convictions,” *Washington Post*, March 16, 2021, https://www.washingtonpost.com/local/virginia-politics/virginia-voting-felons-northam/2021/03/16/b171271e-868d-11eb-82bc-e58213caa38e_story.html. Unless otherwise noted, all numbers cited in this testimony adjust for these changes. Brennan Center for Justice, “Restoring Voting Rights,” <https://www.brennancenter.org/issues/restoring-voting-rights>.

¹⁰⁴ Brennan Center for Justice, “Restoring Voting Rights.”

¹⁰⁵ Brennan Center for Justice, “Criminal Disenfranchisement Laws Across the United States,” last modified March 16, 2021, <https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

scale disenfranchisement not only of ineligible persons, but also of potential voters who are eligible to register but wrongly believe they are barred from doing so by a prior conviction.¹⁰⁶

Regardless of these particulars, disenfranchisement laws are discriminatory and especially impact Black voters. In 2016, one in 13 voting-age Black citizens could not vote, a disenfranchisement rate more than 4 times that of all other Americans.¹⁰⁷ In three states, the ratio was one in five.¹⁰⁸ This unequal impact is no accident—many states’ criminal disenfranchisement laws are rooted in nineteenth-century attempts to evade the Fifteenth Amendment’s mandate that Black men be given the right to vote.¹⁰⁹

This disproportionate impact on people of color means that all too often entire communities are shut out of our democracy. Disenfranchisement laws have a negative ripple effect beyond those people within their direct reach. Research suggest that these laws may affect turnout in neighborhoods with high incarceration rates, even among citizens who are eligible to vote.¹¹⁰ This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other’s political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

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

These changes would have a profoundly positive impact on affected citizens and society. We all benefit from the successful reentry of formerly incarcerated citizens into our communities. Restoring their voting rights sends the message that they are truly welcome to participate and are entitled to the respect, dignity and responsibility of full citizenship. That

¹⁰⁶ Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice, 2008, <http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf>. The ACLU found that many elections officials misunderstand their state’s felony disenfranchisement laws, meaning that “untold hundreds of thousands of eligible, would-be voters throughout the country” may be getting turned away by misinformation.

¹⁰⁷ Uggen et al., *6 Million Lost Voters*, 3.

¹⁰⁸ Uggen et al., *6 Million Lost Voters*, 3. These states are Kentucky, Tennessee, and Virginia. The ratio in Florida was one in five as well but has likely improved as a result of the passage of the Voting Restoration Amendment, notwithstanding the subsequent passage of a law prohibits returning citizens from voting unless they pay off all legal financial obligations (LFOs) imposed by a court pursuant to a felony conviction, including LFOs converted to civil obligations, even if they cannot afford to pay. Brennan Center for Justice, “Litigation to Protect Amendment 4 in Florida,” last modified September 11, 2020, <https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida>.

¹⁰⁹ Erin Kelley, *Racism and Felony Disenfranchisement*, Brennan Center for Justice, 2017, 2, <https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history>.

¹¹⁰ Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice, 2009, 12, <https://www.brennancenter.org/publication/restoring-right-vote>.

message pays concrete dividends. One study found “consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior.”¹¹¹ For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.¹¹²

Voting rights restoration also benefits the electoral process, by reducing confusion and easing the burdens on elections officials to determine who is eligible to vote. If every citizen living in the community can vote, officials have a bright line rule to apply. This clear rule also eliminates one of the principal bases for erroneous purges of eligible citizens from the voting rolls.¹¹³ In past elections, states have botched attempts to remove Americans with past criminal convictions from the rolls, improperly removing many eligible citizens. For example, in 2016 thousands of Arkansans were purged because of supposed felony convictions—but the lists used were highly inaccurate, and included many who had never committed a felony, or who had had their voting rights restored.¹¹⁴

For these reasons, rights restoration is immensely popular among Americans of all political stripes. In November 2018, for example, 65 percent of Florida voters passed a ballot initiative restoring voting rights to 1.4 million of their fellow residents, with a massive groundswell of bipartisan support.¹¹⁵ Unfortunately, the state legislature significantly undercut the will of the people by conditioning rights restoration on the payment of criminal justice fees and fines, a move that was later upheld by a federal court of appeals—demonstrating why congressional action is necessary.

Since Florida’s historic vote, other states have followed. Louisiana, through bipartisan legislation, restored voting rights to nearly 36,000 people convicted of felonies. In December of 2019, newly elected Governor Andy Beshear signed an executive order restoring the vote to some 140,000 Kentuckians. Shortly after, the New Jersey legislature restored voting rights to

¹¹¹ Christopher Uggen & Jeff Manza, “Voting and Subsequent Crime and Arrest: Evidence from a Community Sample,” *Columbia Human Rights Law Review* 36 (2004): 193.

¹¹² See, e.g., American Probation and Parole Association, *Resolution Supporting Restoration of Voting Rights Released*, 2007, https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65; and Association of Paroling Authorities International, *Resolution on Restoring Voting Rights*, 2008, <http://www.apaintl.org/resolutions.html>.

¹¹³ Angela Caputo, “In the South, an Aggressive Effort to Purge Former Felons from Voting Rolls,” *Pacific Standard*, November 6, 2018, <https://psmag.com/social-justice/former-confederate-states-have-purged-a-growing-number-of-felons-from-voting-lists>.

¹¹⁴ Brater et al., *Purges*, 5–6.

¹¹⁵ See, e.g., Brennan Center for Justice, “Voting Rights Restoration Efforts in Florida,” last modified September 11, 2020, <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida>; Kevin Morris, “A Transformative Step for Democracy in Florida,” Brennan Center for Justice, last modified November 7, 2018, <https://www.brennancenter.org/blog/transformative-step-democracy-florida>; Myrna Pérez, “What Victory in Florida Means to Me,” Brennan Center for Justice, last modified November 7, 2018, <https://www.brennancenter.org/blog/what-victory-florida-means-me>; and Ballotpedia, “Florida Amendment 4, Voting Rights Restoration for Felon Initiative (2018),” accessed March 12, 2021, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)).

80,000 people on parole or probation. Governor Kim Reynolds, Republican of Iowa, recently signed an executive order that restores voting rights to Iowans who have completed their sentences, and has supported a constitutional amendment to codify the process,¹¹⁶ and Governor Ralph Northam of Virginia recently restored voting rights to an estimated 69,000 people on probation or parole via executive order.¹¹⁷ The Washington State House recently approved a bill that would automatically restore voting rights to more than 20,000 individuals who are on parole and probation in the state.¹¹⁸ New York’s legislature is poised to codify and improve a 2018 executive action to restore voting rights to New Yorkers on parole by passing S.830B.¹¹⁹ Overall in the past two decades, 18 states have restored voting rights to segments of the population.¹²⁰

Congress has the authority to act. The Supreme Court has previously upheld congressional expansion of the pool of voters qualified for federal elections when Congress lowered the voting age to 18.¹²¹ Here, there are three sources of congressional power: the Elections Clause of Article I, section 4, the Fourteenth Amendment, and the Fifteenth Amendment. As detailed below, Congress has very broad powers to regulate federal elections under the Elections Clause.¹²² Because many state criminal disenfranchisement laws were enacted with a racially discriminatory intent and have a racially discriminatory impact, Congress can also act under its powers to enforce the Fourteenth and Fifteenth Amendments, which guarantee equal protection of the laws and prohibit denial of the right to vote on the basis of race, respectively. The Supreme Court has described this enforcement power as “a broad power indeed,” one that gives Congress a “wide berth” to devise appropriate remedial and preventative measures for discriminatory actions.¹²³

¹¹⁶ Brennan Center for Justice, “Voting Rights Restoration Efforts in Iowa,” last modified August 5, 2020, <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-iowa>.

¹¹⁷ Vanessa Romo, “Virginia Governor Clears Path for Ex-Convicts to Regain Voting Rights,” *NPR*, March 16, 2021, <https://www.npr.org/2021/03/16/978009022/virginia-governor-clears-path-for-ex-convicts-to-regain-voting-rights>.

¹¹⁸ Brennan Center for Justice, “Brennan Center Statement on Washington State House Voting to Restore Voting Rights to People on Probation and Parole,” February 24, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-statement-washington-state-house-voting-restore-voting>.

¹¹⁹ Brennan Center for Justice, “Voting Rights Restoration in New York,” last modified February 24, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york>.

¹²⁰ See, e.g., Brennan Center for Justice, “Voting Rights Restoration Efforts in Florida”; Kevin Morris, “A Transformative Step for Democracy in Florida”; Myrna Pérez, “What Victory in Florida Means to Me”; Ballotpedia, “Florida Senate Bill 7066 (2019),” accessed March 12, 2021, [https://ballotpedia.org/Florida_Senate_Bill_7066_\(2019\)](https://ballotpedia.org/Florida_Senate_Bill_7066_(2019)); Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project, 2018, 3; Wines, “Kentucky Gives Voting Rights”; Reid Wilson, “New Jersey Governor Signs Voting Rights Restoration Bill,” *The Hill*, December 18, 2019, <https://thehill.com/homenews/state-watch/475101-new-jersey-governor-signs-voting-rights-restoration-bill>; Office of the Governor of Iowa Kim Reynolds, “Gov. Reynolds Signs Executive Order to Restore Voting Rights of Felons Who Have Completed Their Sentence,” August 5, 2020, <https://governor.iowa.gov/press-release/gov-reynolds-signs-executive-order-to-restore-voting-rights-of-felons-who-have>; and Rosemary Westwood, “The Battle for Voting Rights in the Age of Mass Incarceration,” *Vox*, November 15, 2019, <https://www.vox.com/the-highlight/2019/11/8/20953476/louisiana-election-voting-rights-ex-prisoners-felons-florida>.

¹²¹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹²² See Part VII.

¹²³ *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

E. Voting by Mail (Title I, Subtitle I)

S. 1 would create a baseline standard for access to mail voting in federal elections. The 2020 election season, which took place during a global pandemic, made clear that Americans need different options for how to vote to accommodate the needs of a diverse electorate. More than 65 million Americans successfully and securely voted by mail,¹²⁴ contributing to the surge in participation in the 2020 elections, which reached 66.7 percent of the voting-eligible population (over 159 million people), the highest rate in over a century.¹²⁵ Even before the pandemic, mail voting was popular with voters. Roughly one-quarter of American voters cast mail ballots in the 2014, 2016, and 2018 presidential elections.¹²⁶ Additionally, mail voting lightens the administrative burden on our in-person voting systems.¹²⁷ Election officials and experts also agree that mail voting is highly secure. All mail ballots are marked by hand, which means there is a paper trail to enable effective post-election audits.¹²⁸

This surge in mail voting was enabled by significant expansions of access to mail voting in many states. These reforms included broadening the scope of who could vote by mail; automatically mailing ballot applications or ballots to eligible voters; implementing better processes for voters to receive notice of and cure defective mail ballots; and extending ballot return deadlines, among other critical reforms.¹²⁹

Unfortunately, although the 2020 election demonstrated the value of mail voting, it also exposed the deficiencies and inequities of mail voting systems in many states. First, many of the changes that increased access to mail voting were made through temporary legislation or timebound executive orders that expired after the 2020 general election. Second, even in the face of the pandemic, a number of states continued to place unreasonable restrictions on the ability to vote by mail. For example, five states continued to require voters to provide an excuse for not

¹²⁴ United States Elections Project, “2016 November General Election Early Voting,” accessed January 27, 2021, http://www.electproject.org/early_2016.

¹²⁵ United States Elections Project, “2020 General Election Turnout Rates,” last modified December 7, 2020, <http://www.electproject.org/2020g>; Schaul, et al, “2020 Turnout Is the Highest.”

¹²⁶ United States Elections Project, “2020 General Election Early Vote Statistics,” last modified November 23, 2020, <https://electproject.github.io/Early-Vote-2020G/index.html>; U.S. Election Assistance Commission, *Election Administration and Voting Survey, 2018 Comprehensive Report, A Report to the 116th Congress*, June 2019, 11, https://eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

¹²⁷ Wendy Weiser and Dominique Erney, *Bipartisan Support for Expanded Mail Voting for 2020 Elections*, Brennan Center for Justice, April 15, 2020, <https://www.brennancenter.org/our-work/research-reports/bipartisan-support-expanded-mail-voting-2020-elections>; and Amy Gardner, Elise Viebeck, and Joseph Marks, “Election Officials in Both Parties Call for Emergency Funding to Expand Voting by Mail Before November,” *Washington Post*, March 24, 2020, https://www.washingtonpost.com/politics/election-officials-in-both-parties-call-for-emergency-funding-to-expand-voting-by-mail-before-november/2020/03/23/7d619400-6d24-11ea-aa80-c2470c6b2034_story.html.

¹²⁸ Danetz, *Mail Ballot Security Features*.

¹²⁹ Wendy Weiser et al, *Mail Voting: What Has Changed in 2020*, Brennan Center for Justice, September 17, 2020, <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020>.

voting in person. That was down from 17 states the previous election cycle, but only 1 of the states that eliminated excuse requirements passed legislation to do so permanently.¹³⁰

In addition, eight states still required voters to obtain a witness signature or notary to cast a mail ballot. And in 28 states, ballots could still be rejected for technical defects unrelated to voter eligibility, without any notice or opportunity to correct the issue after Election Day.¹³¹ Three closely contested states—Iowa, Ohio, and Texas—also limited the use of secure ballot drop boxes for voters to submit their absentee ballots. Similarly, Pennsylvania tossed thousands of votes from eligible voters who did not place their absentee ballots in a so-called “privacy sleeve” (an extra envelope that encases a ballot within a mailing envelope).¹³² Barriers to mail voting had a disproportionately negative impact on voters of color.¹³³ And they would have likely disenfranchised far more people had voter mobilization not been so high.

In the first few months of 2021 alone, at least 125 bills to limit mail voting have been introduced in state legislatures across the country.¹³⁴ Fourteen bills in nine states would make the “excuse” requirement for mail voting more stringent for absentee voting or eliminate “no excuse” mail voting.¹³⁵ Bills have been introduced across the country that would make it harder to obtain ballots, create barriers to completing mail ballots, and place limits on ballot counting, such as stricter ballot receipt deadlines.¹³⁶ As with other recently-introduced voting restrictions, at least some of these new mail voting restrictions would have a racially disparate impact. For instance, the Georgia Senate recently voted to end no-excuse absentee voting for people under 65. While a majority of Georgia voters over the age of 65 who cast mail ballots in 2020 were white, less than half of those younger than 65 who voted by mail that same year were white.¹³⁷

In the face of ongoing efforts to unreasonably limit mail voting options, S. 1 would guarantee all voters reasonable, secure access to this method for casting a ballot. To start, the Act

¹³⁰ United States Elections Project, “2020 General Election Early Vote Statistics”; and Eliza Sweren-Becker, Anne Glatz, and Elisabeth Campbell, “Voting During Covid-19,” Brennan Center for Justice, last modified November 20, 2020, <https://www.brennancenter.org/our-work/research-reports/voting-during-covid-19>.

¹³¹ Brennan Center for Justice, “Preparing Your State.”

¹³² David Montgomery, “The Texas Supreme Court Upholds the Governor’s Order for a Single Ballot Drop Box Per County,” *New York Times*, October 28, 2020, <https://www.nytimes.com/2020/10/28/us/elections/the-texas-supreme-court-upholds-the-governors-order-for-a-single-ballot-drop-box-per-county.html>; NBC, “Dispute over Ohio Mail Ballot Drop Box Limit Ends as Advocates Drop Suit,” October 23, 2020, <https://www.nbcnews.com/politics/2020-election/dispute-over-ohio-mail-ballot-drop-box-limit-ends-advocates-n1244584>; Ryan Foley, “Judge Backs Iowa’s Limits on Absentee Ballot Drop Box Sites,” *Gazette*, October 29, 2020, <https://www.thegazette.com/subject/news/government/iowa-election-absentee-ballot-drop-box-paul-pate-20201029>; and Pat Beall, “Fewer Rejected Ballots Seemed to Be a Win for Voter Access. Trump and Others Disagree,” *USA Today*, December 28, 2020, <https://www.usatoday.com/story/news/investigations/2020/12/28/trump-and-others-not-happy-lower-2020-rejected-ballot-numbers/3964007001/>.

¹³³ Jane Timm, “A White Person and a Black Person Vote by Mail in the Same State. Whose Ballot is More Likely to Be Rejected?” *NBC*, August 9, 2020, <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126>.

¹³⁴ Brennan Center for Justice, “State Voting Bills Tracker 2021.”

¹³⁵ Brennan Center for Justice, “Voting Laws Roundup: February 2021,” n. 1–2.

¹³⁶ Brennan Center for Justice, “Voting Laws Roundup: February 2021.”

¹³⁷ Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most.”

requires states to give every voter the option to vote by mail and specifies that state or local election officials must transmit mail-in ballot applications to all registered voters at least 60 days before Election Day. It also removes key barriers to accessing mail voting by prohibiting notary, witness, and documentary ID requirements and requiring prepaid postage for all election materials, including registration forms and ballot applications. In addition to making it easier to request a mail ballot, the Act simplifies the process of returning ballots by requiring states to provide drop boxes for federal races, as well as by clarifying that all voted mail ballots should be carried free of postage.¹³⁸ It does not, it is worth noting, mail a ballot to any voter unless it has been requested.

S. 1 would also require states to provide voters with a way to track their mail ballot and confirm its receipt. The ability to track a ballot is important for election security, as election officials can locate lost ballots. Likewise, it empowers voters to confirm the arrival of their ballot.¹³⁹ S. 1 lets states access funds allocated in the Help America Vote Act to develop such a program.

Finally, S. 1 would require states to begin processing and scanning ballots cast by mail and during early voting for tabulation at least 14 days prior to the date of the election, which would help prevent delays in the certification of election results.¹⁴⁰

F. Preventing Unreasonable Wait Times at the Polls (Title I, Subtitle N, Part 1)

S. 1 will require states to make voting more accessible by cutting down on long wait times at the polls.

Far too often, voters arrive at their precincts only to find out that they must wait in unreasonably long lines in order to cast a ballot. In the 2020 primary elections, for example, voters in metropolitan areas across the country—from Atlanta to Philadelphia to Milwaukee—were forced to wait in hours-long lines at the polls.¹⁴¹ A Brennan Center study of the 2018

¹³⁸ In states where most or all voters vote by mail, easy access to drop boxes is considered a best practice, as drop boxes are secure and convenient, enabling a speedier ballot delivery than the postal service. In 2016, a majority of voters in Colorado (73 percent), Oregon (59 percent), and Washington (65 percent)—all “vote at home” states—chose to return their ballots to a physical location rather than send them via mail. Lisa Danetz, *Mail Ballot Security Features: A Primer*, Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer>.

¹³⁹ Danetz, *Mail Ballot Security Features*.

¹⁴⁰ Anthony Izaguirre, “Delays in Verifying Mail-In Ballots Will Slow Election Tally,” *AP News*, October 4, 2020, <https://apnews.com/article/virus-outbreak-election-2020-donald-trump-elections-voting-2020-b382942a72809ab70a32d7dc1a93ee40>.

¹⁴¹ Astead W. Herndon and Stephanie Saul, “Major Problems With Voting in Atlanta as 5 States Hold Primaries,” *New York Times*, June 9, 2020, <https://www.nytimes.com/2020/06/09/us/politics/georgia-primary-voting-atlanta.html>; Reid J. Epstein and Nick Corasaniti, “Pandemic, Protests and Police: A Primary Election Like No Other,” *New York Times*, June 2, 2020, <https://www.nytimes.com/2020/06/02/us/politics/june-2-primary-election-day-voting.html>; and Mary Spicuzza, “A Very Sad Situation for Voters: Milwaukeeans Brave Wait Times as Long as 2 1/2 hours, Top Election Official Says,” *Milwaukee Journal Sentinel*, April 7, 2020,

midterm elections estimated that 3 million voters waited longer than half an hour to vote (and many waited much longer).¹⁴² The unconscionably (but all-too-familiar) long lines in the 2012 election prompted President Obama to institute a bipartisan commission to develop recommendations to reduce wait times.¹⁴³ Long lines are inconvenient for all voters, but they are an especially heavy burden for voters with disabilities, those who may be missing work to vote, and those with caregiving responsibilities. For too many, a long line can mean a lost vote.

Long lines do not affect all equally. A growing body of research shows that they disproportionately plague Black and Latino voters.¹⁴⁴ A Brennan Center study of the 2018 midterm elections found that Black and Latino voters waited on average 45 and 46 percent longer than white voters, respectively.¹⁴⁵ These racial disparities persisted in the 2020 primary elections, in which the longest wait times were seen in jurisdictions with the largest concentrations of nonwhite voters.¹⁴⁶

Excessive wait times are an avoidable problem. S. 1 sets a legal standard that no individual shall be required to wait longer than 30 minutes to cast a ballot. (This was the standard recommended by the bipartisan Presidential Commission on Election Administration in 2013.) Additionally, it directs states to equitably allocate voting systems, poll workers, and other election resources to ensure fair and equitable wait times for all voters. And it directs the Election Assistance Commission and the comptroller general to study the places that have struggled the most with long lines to ensure that the most effective practices can be put in place.

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

S. 1 increases protections against, and remedies for, efforts to use deception or intimidation to prevent people from voting or registering to vote. Unfortunately, attempts to suppress votes through deception and intimidation remain all too widespread. Every election cycle, journalists and non-partisan Election Protection volunteers document attempts at voter

<https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001/>

¹⁴² Klain et al., *Waiting to Vote*.

¹⁴³ Brennan Center for Justice, “Bipartisan Presidential Commission Endorses Modernizing Voter Registration,” December 1, 2014, <https://www.brennancenter.org/our-work/research-reports/bipartisan-presidential-commission-endorses-modernizing-voter>.

¹⁴⁴ Michael C. Herron and Daniel A. Smith, “Precinct Closing Times in Florida During the 2012 General Election,” *Election Law Journal* 14.3 (2015): 220–238; Stephen Pettigrew, “The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials,” *Political Science Quarterly* 132 (2017): 527; M. Keith Chen, et al., “Racial Disparities in Voting Wait Times: Evidence from Smartphone Data,” *Review of Economic Statistics* (2019): 1–27; and Stephen Pettigrew, “The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout,” *Electoral Studies* 102188 (2020).

¹⁴⁵ Klain et al., *Waiting to Vote*.

¹⁴⁶ Evan Nicole Brown, “What It’s Been Like to Vote in 2020 So Far,” *New York Times*, July 14, 2020, <https://www.nytimes.com/2020/07/14/us/politics/voting-lines-2020-elections.html>.

deception and intimidation.¹⁴⁷ This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In an analysis for the Brennan Center, for example, University of Wisconsin professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.¹⁴⁸ In 2016, these false statements were extremely prevalent, and not just on the part of domestic actors. Russian operatives also engaged in a concerted disinformation and propaganda campaign over the internet that aimed, in part, to suppress voter turnout, especially among Black voters.¹⁴⁹ These efforts by the Russian government continued, and in many ways became more brazen, in the 2020 election cycle.¹⁵⁰ Congress should increase protections against such efforts.

While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,¹⁵¹ existing laws have not been strong enough to deter misconduct. Moreover, no law specifically targets deceptive practices, nor is there any authority charged with investigating such practices and providing voters with corrected information.

S. 1 protects voters from deception and intimidation in three ways. First, it increases criminal penalties for false and misleading statements and intimidation aimed at impeding or preventing a person from voting or registering to vote. Second, it empowers citizens to go to court to stop voter deception. Third, it blunts the effect of deceptive information by requiring designated government officials to disseminate accurate, corrective information to voters. These

¹⁴⁷ See e.g. Ian Vandewalker, *Digital Disinformation and Vote Suppression*, Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression>; Kristen Clarke, “Voter Intimidation Is Surging in 2020. The Fight for the Right That Begets All Other Rights,” *USA Today*, October 28, 2020, <https://www.usatoday.com/story/opinion/2020/10/27/voter-intimidation-surging-2020-protect-minority-voters-column/6043955002/>; Danny Hakim et al., “Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize,” *New York Times*, September 30, 2020, <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html>; Ayala, “Voting Problems 2018”; Sean Morales-Doyle and Sidni Frederick, “Intentionally Deceiving Voters Should Be a Crime,” *The Hill*, August 8, 2018, <https://thehill.com/opinion/civil-rights/400941-intentionally-deceiving-voters-should-be-a-crime>; Wendy Weiser and Adam Gitlin, *Dangers of “Ballot Security” Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, <https://www.brennancenter.org/analysis/dangers-ballot-security-operations-preventing-intimidation-discrimination-and-disruption>; and Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, <https://www.brennancenter.org/publication/ballot-security-and-voter-suppression>.

¹⁴⁸ Young Mie Kim, “Voter Suppression Has Gone Digital,” Brennan Center for Justice, last modified November 20, 2018, <https://www.brennancenter.org/blog/voter-suppression-has-gone-digital>.

¹⁴⁹ New Knowledge, *SSCI Research Summary: An Assessment of the Internet Research Agency’s U.S.-Directed Activities in 2015–2017 Based on Platform-Provided Data*, 2018, 5, 106, <https://cdn2.hubspot.net/hubfs/4326998/SSCI%20Presentation%20final.pdf>; and Vandewalker, *Digital Disinformation and Voter Suppression*.

¹⁵⁰ Young Mie Kim, “New Evidence Shows How Russia’s Election Interference Has Gotten More Brazen,” Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more>.

¹⁵¹ Weiser and Gitlin, *Dangers of “Ballot Security” Operations*; and Michael German, Elizabeth Goitein, Sean Morales-Doyle, Daniel Weiner, and Wendy Weiser, *Voters Should Not Be Intimidated*, Brennan Center for Justice, 2020, [brennancenter.org/our-work/research-reports/voters-should-not-be-intimidated](https://www.brennancenter.org/our-work/research-reports/voters-should-not-be-intimidated).

provisions will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining our elections. We encourage Congress to enact them.

III. CAMPAIGN FINANCE

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

S. 1 also significantly overhauls federal campaign finance law. The centerpieces of these reforms are a voluntary small-donor matching program for Senate elections (the counterpart to the program for congressional elections passed by the House) and an overhaul of the presidential public financing system, which also includes expanded small donor matching. These changes will give ordinary citizens a louder voice, even in the face of Super PACs and dark money. They are the single best means to counteract the worst effects of the Supreme Court’s decision in *Citizens United* and other misguided cases.

Of note, the reform in S. 1 does not impose minute detailed regulations on campaign contributions or spending. It does not seek to end private money in campaigns. Rather, it would boost the most encouraging trend in campaign fundraising, the rise of small donors.

Big Money Undermines American Democracy. Thanks to *Citizens United* and related cases, a small class of wealthy donors has gained vast new clout in American politics, an imbalance not seen since the Gilded Age¹⁵² That distorts our democracy and undermines the will of American voters. Super PACs, political committees that can raise and spend unlimited funds, have raised more than \$8 billion to spend on influencing elections.¹⁵³ As of 2018, roughly \$1 billion had come from just 11 people.¹⁵⁴ Another \$1.2 billion in campaign ads has come from dark money groups that keep all their donors secret (these groups also give hundreds of millions more to other groups to spend on electoral advocacy).¹⁵⁵ While dark money donors are hidden

¹⁵² Ian Vandewalker, “Since *Citizens United*, a Decade of Super PACs,” Brennan Center for Justice, January 14, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/citizens-united-decade-super-pacs> (showing the influence of super PACs since *Citizens United*); Ian Vandewalker and Lawrence Norden, “Small Donors Still Aren’t as Important as Wealthy Ones,” *The Atlantic*, October 18, 2016, <https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/> (showing the portion of contributions from donors of \$100,000 or more increasing in presidential cycles since 2010); and Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 3, https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf (explaining how *Citizens United* changed the legal landscape for campaign finance).

¹⁵³ See Center for Responsive Politics, “Super PACs,” accessed March 12, 2021, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S>.

¹⁵⁴ Michelle Ye Hee Lee, “Eleven Donors Have Plowed \$1 Billion into Super PACs Since They Were Created,” *Washington Post*, October 26, 2018, https://beta.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.

¹⁵⁵ Center for Responsive Politics, “Political Nonprofits (Dark Money),” accessed March 16, 2021, https://www.opensecrets.org/outsidespending/nonprof_summ.php; Ashley Balcerzak, “How Democrats Use Dark Money – and Win Elections,” *NBC*, February 20, 2018, <https://www.nbcnews.com/politics/congress/how-democrats-use-dark-money-win-elections-n849391>; and Maggie Haberman, “Ad by Pro-Trump Group Attacks the Club for

from public scrutiny, we know that these groups are often funded by many of the same donors who back super PACs.¹⁵⁶ All of these groups are supposed to operate independently of candidates and parties, but many actually have close ties to elected officials, to the point where they basically function as a campaign arm.¹⁵⁷

Recent elections saw a surge in giving by small donors (donors who give \$200 or less),¹⁵⁸ but these funds still account for well under a quarter of the total raised and spent on campaigns.¹⁵⁹ Despite record small donor participation in 2018, the top 100 super PAC donors in that cycle gave almost as much as all the millions of small donors combined, as also happened in 2014.¹⁶⁰ The roughly 3,500 donors who contributed at least \$100,000 in 2018 easily outspent all individual small donors, who numbered at least seven million.¹⁶¹ Even in 2020, which featured

Growth,” *New York Times*, April 18, 2017, <https://www.nytimes.com/2017/04/18/us/politics/attack-ad-sheldon-adelson-club-for-growth.html>. As noted, dark money groups increasingly funnel money into Super PACs or other avenues where donation sources are ostensibly disclosed but are, in practice, impossible to trace to their real origins. Dark money groups contributed an estimated \$430 million to political committees in the 2020 election alone. Anna Massoglia, “‘Dark Money’ Groups Find New Ways to Hide Donors in 2020 Election,” Center for Responsive Politics, October 30, 2020, <https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/>.¹⁵⁶ Soo Rin Kim, “‘Dark Money,’ Used by Both Parties, Featured in \$100 Million Pro-Biden Ad Blitz,” *ABC*, October 28, 2020, <https://abcnews.go.com/Politics/dark-money-parties-featured-100-million-pro-biden/story?id=73863672>; and Michela Tindera, “California Billionaire Gave \$1 Million To Pro-Trump ‘Dark Money’ Group,” *Forbes*, December 3, 2020, <https://www.forbes.com/sites/michelatindera/2020/12/03/california-billionaire-gave-1-million-to-pro-trump-dark-money-group/?sh=1376c8f53d62>.

¹⁵⁷ See generally Ian Vandewalker, “The Rise of Shadow Parties,” Brennan Center for Justice, October 22, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/rise-shadow-parties>; Ian Vandewalker and Eric Petry, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, August 4, 2015, <https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups>; and Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, Election Law @ Moritz, 2014, 76–79, <https://www.seattlelwv.org/uploads/1/1/7/8/117877553/book.pdf> (quoting members of Congress and staff about the influence of outside spending on elected officials).

¹⁵⁸ See Center for Responsive Politics, “Small Donors Give Big Money in 2020 Election Cycle,” accessed March 10, 2021, <https://www.opensecrets.org/news/2020/10/small-donors-give-big-2020-thanks-to-technology/>; Peter Overby, “Democrats Built a Small-Donor Money Machine. Now, Republicans Want Their Own,” *NPR*, November 23, 2018, <https://www.npr.org/2018/11/23/670084581/democrats-built-a-small-donor-money-machine-now-republicans-want-their-own>; Max Greenwood, “Small-dollar Donations Explode in the Trump Era,” *The Hill*, October 19, 2018, <https://thehill.com/homenews/campaign/412231-small-dollar-donations-explode-in-the-trump-era>; and Kenneth P. Vogel and Rachel Shorey, “Eyeing 2020, Trump Fund-Raisers Return to a Familiar Well: Small Donors,” *New York Times*, April 15, 2018, <https://www.nytimes.com/2018/04/15/us/politics/trump-campaign-fec-financial-reports.html>.

¹⁵⁹ The 2020 elections cost a record \$14 billion, of which only about 22 percent came from individual small donors. Center for Responsive Politics, “2020 Election to Cost \$14 billion, Blowing Away Spending Records,” October 28, 2020, <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/>. That 22 percent figure was nonetheless much higher than for other recent elections, as discussed below.

¹⁶⁰ Center for Responsive Politics, “Super PACs: How Many Donors Give,” accessed March 16, 2021, <https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=B>. The 2018 midterms were also notable for how many wealthy self-funders won office. Center for Responsive Politics, “Most Expensive Midterm Ever: Cost of 2018 Election Surpasses \$5.7 billion,” February 6, 2019, <https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/>.

¹⁶¹ Ian Vandewalker, “The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United,” Brennan Center for Justice, January 10, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united>.

truly unprecedented voter engagement, small donors accounted for barely 20 percent of total donations.¹⁶²

The dominance of wealthy donors and special interests directly affects policy. Studies have repeatedly shown that campaign donors wield outsized clout – far more than voters¹⁶³ – which they often use to pursue objectives most Americans do not share.¹⁶⁴ One recent example was the successful push in 2017 for a \$1.5 trillion corporate tax overhaul, an avowedly donor-driven initiative that was consistently unpopular with the general public.¹⁶⁵

The dominance of private big money also tilts the political terrain against broadly popular legislation. For example, although almost 80 percent of Americans support raising the minimum wage to make it a living wage, there is far less support for doing so among those who fund campaigns.¹⁶⁶ Paid sick leave for workers is another overwhelmingly popular policy, with more than 85 percent support according to one survey.¹⁶⁷ Political spending helps to explain why the United States is virtually the only developed country not to guarantee this basic protection, with powerful groups repeatedly killing proposals that have come before Congress.¹⁶⁸

¹⁶² Vandewalker, “2018 Small Donor Boom”; Center for Responsive Politics, “Most Expensive Midterm Ever”; and Center for Responsive Politics, “2020 Election to Cost \$14 Billion.”

¹⁶³ Chris Tausanovitch, “Income, Ideology and Representation,” *Russell Sage Foundation Journal of the Social Sciences* 2 (2016): 33, 49; Martin Gilens and Benjamin I. Page, “Testing Theories of American Politics: Elites, Interest Groups, and American Citizens,” *Perspectives on Politics* 12 (2014): 564, 575; Christopher Ellis, “Social Context and Economic Biases in Representation,” *Journal of Politics* 75 (2013): 773, 779; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), 84; and Larry Bartels, *Unequal Democracy: The Political Economic of the New Gilded Age* (Princeton: Princeton University Press, 2010), 285.

¹⁶⁴ As Connecticut Senator Chris Murphy said of the daily calls he has had to make to wealthy donors: “I talked a lot more about carried interest inside of that call room than I did at the supermarket.” Wealthy donors “have fundamentally different problems than other people...And so you’re hearing a lot about problems that bankers have and not a lot of problems that people who work in the mill in Thomaston, Conn., have.” Paul Blumenthal, “Chris Murphy: ‘Soul-Crushing’ Fundraising Is Bad for Congress,” *HuffPost*, May 7, 2013, https://www.huffpost.com/entry/chris-murphy-fundraising_n_3232143.

¹⁶⁵ See Daniel I. Weiner, “The Tax Overhaul is Proof that Money in Politics Affects All of Us,” Brennan Center for Justice, December 4, 2017, <https://www.brennancenter.org/blog/tax-overhaul-proof-money-politics-affects-all-us>; and Alex Isenstadt and Gabriel Debenedetti, “Angry GOP Donors Close Their Wallets,” *Politico*, October 5, 2017, <https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449>.

¹⁶⁶ David Callahan and J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America*, Dēmos, 2013, 5, https://www.demos.org/sites/default/files/publications/StackedDeck_1.pdf.

¹⁶⁷ Juliana Menasce Horowitz, Kim Parker, Nikki Graf, and Gretchen Livingston, “Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies,” Pew Research Center, March 23, 2017, 5, <https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

¹⁶⁸ Kent Hoover, “Worker Laws on Congress’ Radar,” *Triangle Business Journal*, September 10, 2007, <https://www.bizjournals.com/triangle/stories/2007/09/10/smallb4.html>; Center for Responsive Politics, “US Chamber of Commerce: Contributions,” accessed March 18, 2021, <https://www.opensecrets.org/orgs/us-chamber-of-commerce/totals?id=D000019798> (the U.S. Chamber of Commerce has spent \$116,877,308 in outside spending and spent \$2,871,177 in direct contributions); and Danielle Kurtzleben, “Lots of Other Countries Mandate Paid

The disconnect between elite priorities and those of everyday Americans has profoundly undermined faith in our democracy. Overwhelming majorities across the political spectrum feel that corruption is widespread in the federal government, that people who give large amounts of money to elected officials have more influence than others, that money has too much influence in political campaigns, and that money in politics and wealthy donors are responsible dysfunction is the U.S. political system.¹⁶⁹

The central focus on large campaign donors also forces candidates to spend an inordinate amount of time fundraising. One party fundraising presentation suggested that new representatives spend four hours a day soliciting large contributions.¹⁷⁰ In 2014—when elections were much cheaper than they are now—Republican leadership told sitting House members they needed to raise as much as \$18,000 per day.¹⁷¹

The outsized role of private wealth in our campaigns especially harms communities of color, helping to perpetuate longstanding racial wealth disparities and allowing those who have benefited the most from systemic inequality to translate their affluence into political power. Large donors are overwhelmingly white — white Americans gave 90 percent of reported federal campaign contributions between 1980 and 2012.¹⁷² Major corporate and individual donors have

Leave. Why Not the U.S.?” *NPR*, July 15, 2015,

<https://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us>.

¹⁶⁹ Scott Rasmussen, “Voters Rate Political Corruption as America’s Biggest Crisis,” *RealClearPolitics*, April 25, 2019,

https://www.realclearpolitics.com/articles/2019/04/25/voters_rate_political_corruption_as_americas_biggest_crisis_140156.html;

Bradley Jones, “Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence,” Pew Research Center, May 8, 2018, <https://pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>; New York Times, “Americans’ Views on Money in Politics,” June 2, 2015,

https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0; John Wagner and Scott Clement, “‘It’s Just Messed Up’: Most Think Political Divisions as Bad as Vietnam Era, New Poll Shows,” *Washington Post*, October 28, 2017, <https://www.washingtonpost.com/graphics/2017/national/democracy-poll/>;

Michael W. Traugott, “Americans: Major Donors Sway Congress More Than Constituents,” *Gallup*, July 6, 2016, <https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx>; and Rasmussen Reports, “Voters Say Money, Media Have Too Much Political Clout,” February 16, 2016,

http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout.

¹⁷⁰ Ryan Grim and Sabrina Siddiqui, “Call Time for Congress Shows How Fundraising Dominates Bleak Work Life,” *HuffPost*, last modified December 6, 2017, https://www.huffpost.com/entry/call-time-congressional-fundraising_n_2427291.

¹⁷¹ Norah O’Donnell, “Are Members of Congress Becoming Telemarketers?” *60 Minutes*, April 24, 2016, <https://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/>.

¹⁷² Among elite donors giving more \$5,000, 93 percent were white in 2012 and 94 percent were white in 2014. Sean McElwee, Brian Schaffner, Jesse Rhodes, *Whose Voice, Whose Choice?* Demos, 2016, 2, https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf. Since 2009, only one Black American donor has appeared in the top 100 political spenders list. Lateshia Beachum, “There are Many Rich Minorities. So Why Are There No Black Koch Brothers?” *Center for Public Integrity*, July 23, 2018, [https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers](https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers;);

helped to drive policies that disproportionately hurt communities of color, from opposing paid sick leave and limiting affordable housing to shaping lenient financial regulations for predatory mortgage and student loan lenders.¹⁷³ Barriers related to fundraising also disproportionately keep prospective candidates of color from running, especially women of color, who still face persistent discrimination and are less likely to have wealthy networks they can tap for support.¹⁷⁴ In 2018, Black women running for Congress raised only a third of what other female candidates received from large donors.¹⁷⁵

and Jacob M. Grumbach and Alexander Sahn, “Race and Representation in Campaign Finance,” *American Political Science Review* 114, no. 1 (2019): 213.

¹⁷³ Hazel Millard, “Battle over Paid Sick Days in Covid-19 Response Bill Shows What’s Wrong with Campaign Finance System,” Brennan Center for Justice, April 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/battle-over-paid-sick-days-covid-19-response-bill-shows-whats-wrong>; Julia Kirschenbaum, “Covid-19 Housing Crisis Highlights Racial Inequity of Campaign Finance System,” Brennan Center for Justice, October 14, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-housing-crisis-highlights-racial-inequity-campaign-finance>; Sarah Burd-Sharps and Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, Social Science Research Council, June 2015, 8, https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf; Gillian B. White, “The Recession’s Racial Slant,” *The Atlantic*, June 24, 2015, <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/>; Mark Huelsman, “Betrayers of the Dream,” *American Prospect*, July 12, 2015, <https://prospect.org/labor/betrayers-dream>; Genevieve Bonadies, Joshua Rovenger, Eileen Connor, Brenda Shum, and Toby Merrill, “For-Profit Schools’ Predatory Practices and Students of Color: A Mission to Enroll Rather Than Educate,” *Harvard Law Review Blog*, July 30, 2018, <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/>; and Dyvonne Body, “Worse Off than When They Enrolled: The Consequence of For-Profit Colleges for People of Color,” Aspen Institute, March 19, 2019, <https://www.aspeninstitute.org/blog-posts/worse-off-than-when-they-enrolled-the-consequence-of-for-profit-colleges-for-people-of-color/>.

¹⁷⁴ Women of color are approximately 20 percent of the U.S. population but despite historic gains still make up less than ten percent of the voting membership of the House of Representatives and only four percent of the Senate. Center for American Women and Politics, “Women of Color in Elective Office 2019,” accessed March 12, 2021, <http://cawp.rutgers.edu/women-color-elective-office-2019>. According to one scholar, “[t]he support infrastructure available to women of color has historically not been as strong, particularly when it comes to things like campaign trainings, recruitments, and financial support.” Linda Kramer Jennings, “Women of Color Face Significant Barriers When Running for Office. But They’re Finding Support,” *Yes! Magazine*, July 31, 2018, <https://www.yesmagazine.org/people-power/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support-20180731>. The founder of Collective PAC, which raises money for candidates of color, notes that “especially for black women, raising money is oftentimes a major deterrent to why they don’t get into politics or run for election.” Kate Ackley, “Women – and the Power of the Purse – Will Be Key in 2018,” *Roll Call*, October 26, 2017, <https://www.rollcall.com/news/politics/99810-2>. See also Asha DuMonthier, Chandra Childers, and Jessica Milli, *The Status of Black Women in the United States*, Institute for Women’s Policy Research, 2017, 4–5, https://www.domesticworkers.org/sites/default/files/SOBW_report2017_compressed.pdf (finding that fundraising pressure is disproportionately discouraging to potential candidates who are female, Black, or represent less-affluent districts).

¹⁷⁵ Sarah Bryner and Grace Haley, *Race, Gender, and Money in Politics: Campaign Finance and Federal Candidates in the 2018 Midterms*, working paper, March 15, 2019, 23, <https://www.pgpf.org/sites/default/files/US-2050-Race-Gender-and-Money-in-Politics-Campaign-Finance-and-Federal-Candidates-in-the-2018-Midterms.pdf>; and Nirali Vyas, Chisun Lee, and Gregory Clark, *Small Donor Public Financing Could Advance Race and Gender Equity in Congress*, Brennan Center for Justice, October 15, 2020, <https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-could-advance-race-and-gender-equity>.

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

Title V, Subtitle B, Part 2 of S. 1 establishes a small donor matching system for Senate races. Small donor matching is a transformative solution to the challenge posed by big money politics. The basics of this system are simple. Candidates opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits. Donors who give to participating candidates in small amounts will then see their contributions matched.¹⁷⁶ The Act matches donations of \$1-\$200 to participating Senate candidates at a six-to-one ratio.

Small Donor Matching Works. Public financing has a long and successful history in American elections. It was first proposed more than a century ago by President Theodore Roosevelt.¹⁷⁷ Congress incorporated a one-to-one small donor match for primaries into the presidential public financing system enacted in 1971. The vast majority of major party presidential candidates from 1976 to 2008 used matching funds in their primary campaigns.¹⁷⁸ This was coupled with a grant that paid for the general election campaign of major party candidates.

After Watergate, the public financing system produced presidential campaigns that were far less corrupt and more competitive than before. (In the first five publicly financed presidential elections, challengers defeated incumbents three times.) Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.¹⁷⁹ Two years later, the bipartisan Commission on National Elections concluded that: “Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance.”¹⁸⁰

Small donor matching has also found success at the state level, where it has been adopted in a wide variety of jurisdictions—including most recently in New York State.¹⁸¹ The system

¹⁷⁶ Brennan Center for Justice, “Annotated Guide to the For the People Act of 2021,” last modified March 18, 2021, <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

¹⁷⁷ Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice and Democracy 21, August 22, 2012, 8, https://www.brennancenter.org/sites/default/files/2019-08/Report_Empowering_Small_Donors_Federal_Elections.pdf.

¹⁷⁸ Skaggs and Wertheimer, *Empowering Small Donors*, 10.

¹⁷⁹ Skaggs and Wertheimer, *Empowering Small Donors*, 11.

¹⁸⁰ Skaggs and Wertheimer, *Empowering Small Donors*, 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Timing and Scheduling*, September 30, 2005).

¹⁸¹ See Brennan Center for Justice, “Guide: New York State’s Small Donor Public Financing System,” December 18, 2020, <https://www.brennancenter.org/our-work/research-reports/guide-new-york-states-small-donor-public-financing-system>. A number of other states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera and Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Dēmos, 2017, <https://www.demos.org/research/public-funding-electoral-campaigns-how-27-states-counties-and-municipalities-empower-small>. Comprehensive matching also exists in many other large, diverse municipalities

that has been studied the most is New York City's, which has existed since the 1980s and currently matches donations of up to \$175.¹⁸² The vast majority of city candidates participate.¹⁸³ Studies of the 2009 and 2013 city elections found that participating candidates took in more than 60 percent of their funds from small donors and the public match.¹⁸⁴

New York City's system has improved its politics. Most notably, it has increased the diversity of viewpoints influencing officeholders. Small donors far better reflect city residents than big donors in terms of race, income, education level, and where they live, and officeholders who court these campaign contributions spend more time talking to everyday New Yorkers.¹⁸⁵ The comparison to state races, which do not have small donor matching, is remarkable. A Brennan Center study found that participating city candidates raised money from 90 percent of the city's census blocs, as compared to roughly 30 percent for state assembly candidates running

besides New York City, including Los Angeles; Tucson; Washington, DC; Montgomery County, Maryland; Prince George's County, Maryland; and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austermuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns—And Will Fund It," *WAMU*, March 13, 2018, <https://wamu.org/story/18/03/13/bowser-signs-bill-creating-public-financing-program-political-campaigns-will-fund/#.XFzEYmfsZaQ>; and Rachel Chason, "Prince George's Approves Matching Funds for Local Candidates – Starting in 2026," *Washington Post*, October 24, 2018, https://www.washingtonpost.com/local/md-politics/prince-georges-approves-public-finance-system-for-local-candidates/2018/10/24/47f7b75a-d738-11e8-a10f-b51546b10756_story.html.

¹⁸² New York City Campaign Finance Board, "How It Works," accessed March 12, 2021, <https://www.nyccfb.info/program/how-it-works/>; and Angela Migally, Susan M. Liss, and Frederick A.O. Schwartz, Jr., *Small Donor Matching Funds: The NYC Election Experience*, Brennan Center for Justice, 2010, <https://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience>.

¹⁸³ In 2017, 84 percent of candidates in New York City primaries opted to accept public funds; in 2013 it was 91 percent. New York City Campaign Finance Board, *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, 2018, 45–46, https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf.

¹⁸⁴ Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, February 13, 2013, [http://www.cfinst.org/Press/PReleases/14-02-13/Testimony before the New York City Campaign Finance Board Says Small Donor Matching Funds a Success but the City Should Look at Changes Moving Forward.aspx](http://www.cfinst.org/Press/PReleases/14-02-13/Testimony%20before%20the%20New%20York%20City%20Campaign%20Finance%20Board%20Says%20Small%20Donor%20Matching%20Funds%20a%20Success%20but%20the%20City%20Should%20Look%20at%20Changes%20Moving%20Forward.aspx). Candidates who did not participate in the public financing system raised most of their money from donors of \$1,000 or more. Michael J. Malbin, Peter W. Brusoe, and Brendan Glavin, *What Is and What Could Be: The Potential Impact of Small-Donor Matching Funds in New York State Elections*, Campaign Finance Institute, 2013, 3, http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf.

¹⁸⁵ As New York State Senator (and former City Council Member) Jose Serrano explained: "Imagine if you could spend a little less time [making fundraising calls], and a little more time in someone's living room, listening to conversations that they have, hearing the ideas that they may have. You can become a much more engaged and responsive candidate and hopefully elected official." DeNora Getachew and Ava Mehta, *Breaking Down Barriers: The Faces of Small Donor Public Financing*, Brennan Center for Justice, 2016, 29, https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf. Councilmember Eric Ulrich, a Queens Republican, makes a similar point: "[t]he matching funds program has allowed for the voice of small donors and regular people to have a greater say in outcomes That has helped us transform how we serve our constituents. I have no choice but to listen to and engage the [constituents] in an overall discussion about what direction the city should go." Getachew and Mehta, *Breaking Down Barriers*, 34.

in the same areas.¹⁸⁶ A similar analysis of the 2017 city elections found that participating candidates raised a nine times greater share of their money from small donors than did non-participating candidates, and a 12 times greater share from small donor constituents.¹⁸⁷ The city's system has also helped a more diverse array of candidates run, including the city's first Black mayor and New York State's first female and first Black elected attorney general, who began her career on the city council.¹⁸⁸ Candidates in other jurisdictions with small donor public financing systems report similar benefits.¹⁸⁹

S. 1's small donor matching provisions would allow all candidates to power their campaign with small donations from ordinary Americans. Recent Brennan Center studies of congressional fundraising found that almost all congressional candidates would be able to raise as much or more as they do under the current system, and that the greatest benefits would go to female candidates of color.¹⁹⁰ Based on our experience and past research, we would anticipate a similar result for Senate candidates.

Campaign funds from citizens are a vital counterweight to the often polarizing influence of big money and secretive donors.¹⁹¹ Incumbents know well that today it is often the biggest donors, who can threaten a sudden spending spree in a primary, who exercise the most significant pull to the extremes. Indeed, research shows that states with higher individual

¹⁸⁶ Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, and Brendan Glavin, *Donor Diversity Through Public Matching Funds*, Brennan Center for Justice and Campaign Finance Institute, 2012, 4, www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

¹⁸⁷ Nirali Vyas, Chisun Lee, and Joanna Zdanys, *The Constituent-Engagement Effect of Small Donor Public Financing*, Brennan Center for Justice, 2019, 7, https://www.brennancenter.org/sites/default/files/2019-09/Report_Constituent-Engagement%20Effect_.pdf.

¹⁸⁸ As New York State Attorney General Letitia James put it: "I wouldn't be where I am today if not for public financing... The public financing system in New York City gave me the opportunity to compete and succeed, allowing me to represent individuals whose voices have been historically ignored and who wanted a representative who looked like them, who understood their values, and recognized their struggles." Brennan Center for Justice, "Faces of Small Donor Public Financing 2021," March 11, 2021, <https://www.brennancenter.org/our-work/research-reports/faces-small-donor-public-financing-2021>.

¹⁸⁹ Montgomery County Councilmember Evan Glass noted "The public financing system encourages small intimate gatherings, and it is so refreshing to have one-on-one time with a voter rather than trying to raise money in a back room or a boardroom. It's a better way to campaign and it's a better way to govern. ... In order to successfully participate in public financing, you need solid roots in the community because that's the only way you're going to tap into the large network that you need to be successful." Arizona State Senator Victoria Steele reflected "As a Native American woman—I am Seneca and Mingo—public financing gave me an advantage. It's really hard for anybody to raise money to run for office, but women are generally more disadvantaged in raising money for races. A lot of us are not at the table where the big money is." Brennan Center for Justice, "Faces of Public Financing."

¹⁹⁰ Ian Vandewalker and Kevin Morris, "The Reform Law Needed to Counter Citizens United: H.R. 1," Brennan Center for Justice, January 21, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/reform-law-needed-counter-citizens-united-hr-1>; Nirali Vyas et al., *Public Financing Could Advance Race and Gender Equity*. Although there is currently a dearth of public research, it likely that most Senate candidates would also fare as well or better under the act's small donor matching system as they do now.

¹⁹¹ Ian Vandewalker, "How to Change Incentives for both Politicians and Donors," Brennan Center for Justice, February 4, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/how-change-incentives-both-politicians-and-donors>.

contribution limits have more ideologically extreme legislators.¹⁹² By contrast, many federal lawmakers who raise the most funds from small dollar contributions tend to be moderates, and success at raising campaign funds from small donors is due to factors such as prominence in the news cycle and the competitiveness of a race.¹⁹³

Conserving Taxpayer Funds. It is important to note that all of these changes will be accomplished at no cost to taxpayers. The public match will instead be funded by a small surcharge on criminal and civil penalties against corporate wrongdoers, with an explicit bar on the use of taxpayer funds.¹⁹⁴

Ultimately, political campaigns cost money, which must come from somewhere. Whether the source is a handful of wealthy special-interest donors or millions of everyday Americans is up to Congress.¹⁹⁵ Small donor matching stands on firm constitutional ground.¹⁹⁶ No reform has the potential to be more transformative. The time to pass this system is now.

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

S. 1 also revamps the presidential public financing system, which currently provides matching funds to primary candidates and block grants to general election nominees. Despite its success, that system ultimately failed because it did not afford candidates sufficient funds to compete in light of the dramatic growth in campaign costs.¹⁹⁷ The Act addresses this problem by increasing the primary match to a six-to-one ratio, providing matching funds to party nominees in the general election, and repealing burdensome limits on how much participating candidates can spend. The Brennan Center supports all of these changes.

¹⁹² Vandewalker, “How to Change Incentives.”

¹⁹³ Vandewalker, “How to Change Incentives.”

¹⁹⁴ Gareth Fowler and Dan Weiner, “Small Donor Matching in the ‘For the People Act,’” Brennan Center for Justice, last modified February 11, 2021, <https://www.brennancenter.org/our-work/research-reports/small-donor-for-the-people-act>.

¹⁹⁵ As one political scientist put it: “There are no free lunches. If the public doesn’t foot the cost of political campaigns, wealthy donors and lobbyists will. And they will get something in return. And it will be far more than what they paid in. That’s how the system works. If we enact public financing through a small-donor matching system, the public will also get something in return. And it will be far more than what they paid in. That’s how the system works.” Lee Drutman, “Democrats’ Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers,” *Vox*, January 14, 2019, <https://www.vox.com/polyarchy/2019/1/14/18182579/democrats-hr1-donor-campaign-finance-proposal-taxpayers>.

¹⁹⁶ As the Supreme Court observed in upholding the presidential system: “Public financing is an effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent constitutional values.” *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976).

¹⁹⁷ Skaggs and Wertheimer, *Empowering Small Donors*, 11.

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

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

The Rise of Dark Money. Over the last decade, secret money has become one of the biggest challenges for the campaign finance system. As recently as 2006, almost all federal campaign spending was transparent. But *Citizens United* made it possible for new types of entities to spend limitless funds on electoral advocacy—including 501(c)(4) and (c)(6) nonprofit corporations that are not required to make their sources of funding public.¹⁹⁸ These dark money groups have spent about \$1.2 billion on federal elections since 2010.¹⁹⁹ They have given millions more to super PACs, in a manner that allows those entities (which in theory must disclose their donors) to keep major underlying funders anonymous.²⁰⁰ In total, only about 26 percent of outside spending in the 2020 election was fully disclosed.²⁰¹ Secret spending tends to be concentrated in the closest races. One Brennan Center study of the 2014 midterms, for instance, showed that more than 90 percent of dark money spending in Senate contests was concentrated in the eleven most competitive contests.²⁰²

Dark money deprives voters of critical information needed to make informed decisions.²⁰³ Citizens are entitled to know who is trying influence their votes and what those spenders want from the government. It is donor disclosure, as the *Citizens United* Court itself pointed out, that allows voters to determine whether elected leaders “are in the pocket of so-called ‘moneyed interests.’”²⁰⁴ Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.²⁰⁵ Research shows that the corporate managers who drive this giving sometimes do so for their own

¹⁹⁸ Weiner, *Citizens United Five Years Later*, 7.

¹⁹⁹ Center for Responsive Politics, “Political Nonprofits”; and Ciara Torres-Spelliscy, “Dark Money in the 2020 Election,” Brennan Center for Justice, November 20, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election>. According to Open Secrets and the Wesleyan Media Project, dark money groups spent more than \$750 million in 2020 elections through ad spending and record-breaking contributions to political committees such as super PACs. Massoglia, “‘Dark Money’ Groups.”

²⁰⁰ As discussed previously, dark money groups contributed an estimated \$430 million to political committees in the 2020 election alone. Massoglia, “‘Dark Money’ Groups.”

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

²⁰¹ Center for Responsive Politics, “Outside Spending by Disclosure, Excluding Party Committees,” accessed March 16, 2021, <https://www.opensecrets.org/outsidespending/disclosure.php>.

²⁰² Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since Citizens United*, Brennan Center for Justice, 2015, 4, <https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf>.

²⁰³ *Buckley*, 424 U.S. at 66–67 (explaining voters’ interest in knowing the sources of political money “to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”).

²⁰⁴ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 370 (2010).

²⁰⁵ Weiner, *Citizens United Five Years Later*, 10.

reasons, and not to maximize shareholder value.²⁰⁶ Shareholders need transparency so they can monitor how their money is being spent.²⁰⁷

The Threat of Foreign Interference. More recently, it has come to light that gaps in disclosure rules provide multiple avenues for foreign governments and other entities to manipulate the U.S. electorate. As President Biden wrote in 2018, “The lack of transparency in our campaign finance system combined with extensive foreign money laundering creates a significant vulnerability for our democracy.”²⁰⁸

Foreign-backed disinformation and election interference campaigns have been a feature of the last three election cycles.²⁰⁹ The problem goes well beyond traditional dark money spending. During the 2020 Democratic primary, Russian state media and government-backed social media trolls impersonated candidates, promoted division, and spread false allegations of voter fraud and election rigging.²¹⁰ In 2016, Kremlin operatives also took advantage of weak disclosure rules for paid Internet ads, whose prevalence in U.S. political campaigns increased almost eight-fold between 2012 and 2016.²¹¹

Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.²¹² Moreover, sophisticated micro-targeting tools have given rise to the “dark ad,” which is seen only by a narrow audience,

²⁰⁶ John C. Coates IV, “Corporate Politics, Governance, and Value Before and After Citizens United,” *Journal of Empirical Legal Studies* 9 (2012): 657.

²⁰⁷ David Earley and Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center for Justice, 2012, 5–6, <https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution>; and Ciara Torres-Spelliscy, “How Corporate Law Can Help Democracy Post–Citizens United,” Brennan Center for Justice, January 21, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-corporate-law-can-help-democracy-post-citizens-united>.

²⁰⁸ Joseph Biden and Michael Carpenter, “Foreign Dark Money Is Threatening American Democracy: Here’s How to Put a Stop to It,” *Politico*, November 27, 2018, <https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690/>; see also Josh Rudolph and Thomas Morley, *Covert Foreign Money*, Alliance for Securing Democracy, 2020, 34–35, <https://securingdemocracy.gmfus.org/wp-content/uploads/2020/08/ASD-Covert-Foreign-Money.pdf>.

²⁰⁹ Julian E. Barnes, “Russian Interference in 2020 Included Influencing Trump Associates, Report Says,” *New York Times*, March 16, 2021, <https://www.nytimes.com/2021/03/16/us/politics/election-interference-russia-2020-assessment.html>; Jonathan Landay and Mark Hosenball, “Russia, China, Iran Sought to Influence U.S. 2018 Elections: U.S. Spy Chief,” *Reuters*, December 21, 2018, <https://www.reuters.com/article/us-usa-election-interference/russia-china-iran-sought-to-influence-u-s-2018-elections-u-s-spy-chief-idUSKCN1OK2FS>; Jordan Fabian, “US Warns of ‘Ongoing’ Election Interference by Russia, China, Iran,” *The Hill*, October 19, 2018, <https://thehill.com/policy/national-security/412292-us-warns-of-ongoing-election-interference-by-russia-china-iran>; and Brennan Center for Justice, *The Mueller Report Exposed Weaknesses in U.S. Democratic Institutions that H.R. 1 Would Address*, July 10, 2019, <https://www.brennancenter.org/our-work/research-reports/mueller-report-exposed-weaknesses-us-democratic-institutions-hr-1-would>.

²¹⁰ Vandewalker, *Digital Disinformation and Voter Suppression*; and Kim, “New Evidence Shows.”

²¹¹ Sean J. Miller, “Digital Ad Spending Tops Estimates,” *Campaigns & Elections*, January 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

²¹² Nathaniel Persily, “Can Democracy Survive the Internet?” *Journal of Democracy* 28 (2017): 72.

threatening to remove much of the political debate around elections from public view.²¹³ Russian operatives exploited these capabilities to purchase millions of targeted ads in an attempt to influence and foment discord around the 2016 election.²¹⁴ Moscow's efforts in 2016 served as a blueprint for its own future campaigns and those of other hostile actors.²¹⁵

Common Sense Reforms. S. 1 takes several key steps to deal with these problems. It closes legal loopholes that have allowed dark money groups to refrain from disclosing their donors.²¹⁶ It also expands disclosure and disclaimer requirements for “electioneering communications”²¹⁷—campaign ads that mention a candidate during the time leading up to an election—to include paid Internet or digital communications. And it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.²¹⁸ These changes will make U.S. campaigns significantly more transparent.²¹⁹

²¹³ Christopher S. Elmendorf, Ann Ravel and Abby Wood, “Open Up the Black Box of Political Advertising,” *San Francisco Chronicle*, September 23, 2017, <http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php>. Some platforms, such as Google, have elected to limit the targeting of political ads, but such steps are voluntary and could be reversed at any time. Daisuke Wakabayashi and Shane Goldmacher, “Google Policy Change Upends Online Plans for 2020 Campaigns,” *New York Times*, November 20, 2019, <https://www.nytimes.com/2019/11/20/technology/google-political-ads-targeting.html>.

²¹⁴ For a more complete discussion of Russia's use of Internet ads in 2016, see Ian Vandewalker, *Oversight of Federal Political Advertisement Laws and Regulations: Statement before the Committee on House Oversight and Government Reform, Subcommittee on Information Technology*, Brennan Center for Justice, October 24, 2017, <https://www.brennancenter.org/analysis/oversight-federal-political-advertisement-laws-and-regulations>; see also Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*.

²¹⁵ Mark Scott, “Russia Is Back, Wilier Than Ever—And It's Not Alone,” *Politico*, September 14, 2020, <https://www.politico.com/news/2020/09/14/russia-cyberattacks-election-413757>. As recently publicized by the National Intelligence Council, Putin and a range of Russian government organizations conducted continued influence organizations aimed at denigrating President Biden's campaign and the Democratic Party in 2020, as well as seeking to undermine public confidence in the election, while the Iranian government sought to undercut former President Trump and sow societal divisions. National Intelligence Council, *Foreign Threats*, i.

²¹⁶ The Act amends statutory text that had been interpreted to require dark money groups to disclose only those donors who earmark their contributions to pay for a specific ad, which virtually never happens. It also prevents donors from funneling contributions through front groups to hide their true origin.

²¹⁷ 52 U.S.C. § 30104(f)(3).

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

²¹⁹ Critics have suggested that these provisions will chill Americans' freedom of speech and association. John York, “The ‘For the People Act’ Demonstrates the Flaws of Progressive Campaign Finance Reform,” Heritage Foundation, December 4, 2020, <https://www.heritage.org/progressivism/report/the-the-people-act-demonstrates-the-flaws-progressive-campaign-finance-reform>. But there is little basis for these charges. Disclosure requirements “impose no ceiling on campaign-related activities and do not prevent anyone from speaking.” *Citizens United*, 558 U.S. at 366 (internal quotation marks and citations omitted). Moreover, the vast majority of new transparency rules would apply to the wealthy corporations and individuals who give to dark money groups; there is no evidence that large numbers of ordinary Americans will be impacted. See Derek Willis, “Shedding Some Light on Dark Money Political Donors,” *ProPublica*, September 12, 2018, <https://www.propublica.org/nerds/shedding-some-light-on-dark-money-political-donors>. The Act does require relatively modest purchases of paid Internet ads to be included in platforms' public files, which is necessary because such ads can have a wide impact at relatively low cost. Russia's 2016 ads reached tens of millions of people, at a cost of roughly \$400,000. Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, 7.

Disclosure continues to stand on firm constitutional ground, with the Supreme Court repeatedly affirming that robust transparency is a permissible—and often preferred—means to prevent “abuse of the campaign finance system.”²²⁰ And transparency remains overwhelmingly popular with the general public.²²¹ These are valuable reforms that, like small donor public financing, will help blunt the worst effects of *Citizens United*. Congress should pass them without delay.

C. FEC Overhaul (Title VI, Subtitle A)

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

A Deadlocked and Dysfunctional Commission. The FEC’s mission is to interpret and enforce federal campaign finance laws.²²² Its structure, which dates back to the 1970s, was designed to prevent the agency from taking any decisive action without bipartisan agreement among its commissioners. No more than three of its six members can be affiliated with any one party at the time they are nominated, and at least four votes are required to enact regulations, issue guidance, or even investigate alleged violations of the law.²²³ By longstanding tradition (though not pursuant to any legal requirement), each of the two major parties takes half the FEC’s seats.²²⁴ For much of 2019 and 2020, the Commission did not even have a quorum of commissioners, because only 3 of its 6 seats were occupied.²²⁵

The FEC’s design dates back to a time when disagreements over the government’s role in regulating money in politics did not necessarily overlap with party affiliation. Today, while ordinary Americans of all political stripes still overwhelmingly support strong campaign finance laws, party elites are sharply divided, which has left the Commission gridlocked.²²⁶ Even when it has a quorum, the Commission routinely deadlocks on whether to pursue significant campaign

<https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections>. These provisions only apply to the purchase of paid ads; they do not cover unpaid posting to an individual’s personal website, social media account, or email.

²²⁰ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (plurality opinion).

²²¹ Center for Public Integrity, “Center for Public Integrity/Ipsos Poll: How Should Presidential Campaigns Be Regulated?,” February 18, 2019, <https://publicintegrity.org/politics/elections/center-for-public-integrity-ipsos-poll-elections-2019>; and “A New York Times/CBS News Poll on Money in Politics,” *New York Times*, June 2, 2015, <https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>.

²²² 52 U.S.C. § 30106(b)(1).

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

²²⁴ Thomas E. Mann, “The FEC: Administering and Enforcing Campaign Finance Law,” in Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, and Trevor Potter., eds., *The New Campaign Finance Sourcebook*, Brookings Institute, 2005, 233, <https://www.brookings.edu/book/the-new-campaign-finance-sourcebook/>.

²²⁵ Brian Naylor, “The Federal Election Commission Can Finally Meet Again. And It Has A Big Backlog,” *NPR*, December 24, 2020, <https://www.npr.org/2020/12/24/949672803/the-federal-election-commission-can-finally-meet-again-and-it-has-a-big-backlog>.

²²⁶ Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Center for Justice, 2019, 4, https://www.brennancenter.org/sites/default/files/publications/2019_04_FECV_Final.pdf.

finance violations—often after sitting on allegations for years without even investigating them.²²⁷ Its process for issuing new regulations has virtually ground to a halt.²²⁸ Increasingly, commissioners cannot even agree on how to answer requests for interim guidance they receive through the Commission’s advisory opinion process, leaving candidates, parties, and others to decipher the law for themselves.²²⁹

The Commission is also beset with management problems. It has not had a permanent general counsel (its chief legal officer and one of the two most important staff members) since 2013.²³⁰ Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.²³¹

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,²³² rampant coordination between candidates and supposedly independent

²²⁷ See Office of FEC Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, 2017, 2, 4, <https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf>. In one notorious case, in which a donor admitted that he had formed an LLC solely for the purpose of hiding a \$1 million contribution to a super PAC, the Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law. See Certification (February 23, 2016), MUR 6485 (W Spann LLC et al.), <https://www.fec.gov/files/legal/murs/6485/16044390516.pdf>; Statement of Reasons, Commissioners Walther, Ravel & Weintraub, MUR 6485 (W Spann LLC et al.), <https://www.fec.gov/files/legal/murs/6485/16044391123.pdf>; and Statement of Reasons, Commissioners Petersen, Hunter & Lee, MUR 6485 (W Spann LLC et al.), <http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf>.

²²⁸ Among other things, the Commission has repeatedly deadlocked on proposals for a comprehensive rulemaking to address the effects of *Citizens United*. Minutes of an Open Meeting of the Federal Election Commission, Wednesday June 15, 2011 (approved June 30, 2011 as Agenda Document No. 11-39), https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday December 15, 2011 (approved January 12, 2012 as Agenda Document No. 12-02), https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; and Minutes of an Open Meeting of the Federal Election Commission, Thursday March 7, 2013 (approved April 11, 2013, as Agenda Document No. 13-11), https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See also “Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking,” October 9, 2014, http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

²²⁹ See 52 U.S.C. §§ 30107(a)(7), 30108. Deadlocks on advisory opinion requests have increased exponentially. Weiner, *Fixing the FEC*, 3–5.

²³⁰ Dave Levinthal and Suhauna Hussain, “Five Years Ago, the Federal Election Commission’s Top Lawyer Resigned. No Permanent Replacement Has Yet been Named,” *Center for Public Integrity*, July 4, 2018, <https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent>; and Federal Election Commission, “FEC Offices,” accessed March 10, 2021, <https://www.fec.gov/about/leadership-and-structure/fec-offices/>.

²³¹ Dave Levinthal, “Report: FEC Leaders, Managers Share Blame for Horrid Morale,” *Center for Public Integrity*, July 26, 2016, <https://publicintegrity.org/federal-politics/report-fec-leaders-managers-share-blame-for-horrid-morale/>.

²³² Lawrence Norden, Brent Ferguson, and Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, <https://www.brennancenter.org/publication/five-four>.

outside groups,²³³ and vulnerability to foreign interference in our campaigns.²³⁴ As a bipartisan group of lawmakers wrote in 2018, a dysfunctional FEC “hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity.”²³⁵ If not addressed, the Commission’s problems could stymie implementation of the other ambitious reforms in the Act. Moreover, the agency’s inability to enforce campaign finance laws contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.²³⁶

A Necessary Overhaul. S. 1 addresses the FEC’s main flaws through several targeted changes. It curtails gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with any party (effectively requiring one commissioner to be an independent). It creates clear lines of accountability for management issues by allowing the president to name a real chair to serve as the FEC’s chief administrative officer, with responsibility for the agency’s day-to-day management.²³⁷ It helps ensure that commissioners will have the right temperament and qualifications by establishing a bipartisan blue ribbon advisory commission to publicly vet potential nominees. It ensures that the Commission will periodically have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms (which has likely contributed to the agency’s loss of quorum in recent years).²³⁸ And it helps streamline the enforcement process by giving the Commission’s nonpartisan staff authority to investigate alleged campaign finance

²³³ See Weiner, *Citizens United Five Years Later*, 8.

²³⁴ Jordan Muller, “FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections,” Center for Responsive Politics, May 25, 2018, <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.

²³⁵ “Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately,” press release, February 14, 2018, <https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately>.

²³⁶ Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law & Democracy, 2018, 16, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.

²³⁷ Currently the office rotates annually and is largely symbolic. See 52 U.S.C. § 30106(a)(5).

²³⁸ Before 1997, commissioners could be re-appointed to new terms an unlimited number of times. Congress eliminated reappointment with the goal of ensuring that the agency would periodically have fresh leadership, and to reinforce commissioners’ independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement. Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (October 10, 1997). But allowing indefinite holdovers has created the worst of both worlds. There is still very little turnover, and commissioners whose terms have expired are even more beholden to the president and Congress, who can theoretically replace them at any time. Weiner, *Fixing the FEC*, 7. At the start of President Trump’s tenure, four of the commissioners had been in office since the George W. Bush administration, notwithstanding that they are theoretically limited to one six-year term. Federal Election Commission “All Commissioners,” accessed March 3, 2021, <https://www.fec.gov/about/leadership-and-structure/commissioners/>. The departures of two of these commissioners following other resignations caused the Commission to be without a quorum for most of the period between September 2019 and December 2020. Daniel I. Weiner, “FEC Dormant Heading into 2020 Election,” Brennan Center for Justice, July 29, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/fec-dormant-heading-2020-election>; and Naylor, “Federal Election Commission Can Finally Meet Again.”

violations and dismiss frivolous complaints—subject to overrule by a majority vote of commissioners.²³⁹

These changes are similar to those in a bipartisan bill that has been introduced in the last three Congresses.²⁴⁰ They would bring the FEC’s structure more in line with other independent agencies, but with significantly greater safeguards to prevent either party from weaponizing the agency against its opponents. For instance, S. 1 seeks to ensure partisan balance on the new FEC by providing that nominees to seats on the commission are considered affiliated with a party if they have had any connection to the party—including as a registered voter, employee, consultant, or attorney—within the previous five years. That will minimize the risk of the Senate confirming someone who has disguised their true partisan leanings.²⁴¹ It also creates a new, bipartisan vetting process for nominees. And it provides for more robust judicial oversight of the enforcement process. Ending the ability of commissioners to remain indefinitely past the expiration of their terms will also be a safeguard against excessive partisanship, since holdover commissioners are more subject to pressure from the president and Congress, who have the power to replace them at any time.²⁴²

These measures provide significantly more formal protection than exists under current law. They are part of an overall package of sensible reforms that would help ensure that the campaign finance laws we have on the books will be fairly and effectively enforced.

²³⁹ Under the Commission’s present structure, even those wrongfully accused of violations must sometimes wait years for their names to be cleared. See, e.g., Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas), <https://www.fec.gov/files/legal/murs/6896/15044385209.pdf>; and Notification with General Counsel’s Report, MUR 6904 (Cat Ping for Congress), <https://www.fec.gov/files/legal/murs/6904/16044396706.pdf>.

²⁴⁰ To amend the Federal Election Campaign Act of 1971 to reduce the number of members of the Federal Election Commission from 6 to 5, to revise the method of selection and terms of service of members of the Commission, to distribute the powers of the Commission between the Chair and the remaining members, and for other purposes, H.R. 1414, 117th Cong. (2021); Restoring Integrity to America’s Election Act, H.R. 1272, 116th Cong. (2019); and Restoring Integrity to America’s Election Act, H.R. 2034, 115th Cong. (2017).

²⁴¹ See Daniel Weiner, “FEC’s Status Quo is Hazardous—Proposed Legislation Would Help Fix It,” *The Hill*, February 10, 2019, <https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it>.

²⁴² Weiner, *Fixing the FEC*, 7. Thus, charges from critics that S. 1 would effectuate a partisan takeover of the FEC are completely unfounded. See, e.g., Heritage Foundation, “The Facts about H.R. 1: The ‘For the People Act of 2021,’” February 21, 2021, <https://www.heritage.org/election-integrity/report/the-facts-about-hr-1-the-the-people-act-2021>. As a legal matter, the president already has constitutional authority to nominate whomever they want to serve on the FEC, provided no more than three of the nominees are affiliated with one party at the time they are nominated. *Buckley*, 424 U.S. at 140. The tradition of deferring to party leaders has no force of law. By providing for public bipartisan vetting of nominees, S. 1 actually establishes stronger safeguards than currently exist. Weiner, “FEC’s Status Quo.” The charge by some critics that a presidentially appointed FEC chair would be tantamount to an “election czar,” with vast power to persecute the president’s opponents, is similarly baseless. See, e.g., Eric Wang, “Analysis of H.R. 1 (Part One),” Institute for Free Speech, February 22, 2021, https://www.ifs.org/expert-analysis/analysis-hr1-2021-disclose-honest_ads-disclaimers/. The role of chair envisioned by the Act is identical to that which exists at many other independent agencies, except without a working majority of commissioners from the chair’s own party.

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

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

The Supreme Court has long held that outside campaign expenditures coordinated with a candidate can be “treated as contributions,” because “[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate.”²⁴³ *Citizens United* did nothing to change that. When the Supreme Court struck down limits on how much outside groups could spend in federal elections, it did so on the assumption that these groups would operate independently of candidates. The Court reasoned that the absence of “prearrangement and coordination” would “undermine[] the value of the expenditure to the candidate” and alleviate the danger of quid pro quo corruption or its appearance.²⁴⁴

Whether or not that was a correct assumption,²⁴⁵ in reality, the independence of much outside spending is illusory. In 2016, most presidential candidates had personal super PACs run by top aides or other close associates, whose only purpose was to get the candidate elected and for which the candidate often personally raised funds or even appeared in ads.²⁴⁶ The trend continued in the 2020 election.²⁴⁷ These entities are also becoming increasingly common in Senate and House races, as well.²⁴⁸ Other forms of collaboration are also on the rise, such as the practice of super PACs and other outside groups republishing flattering b-roll footage that campaigns make available online, sharing vendors or staffers with campaigns, and coordinating

²⁴³ *Buckley*, 424 U.S. at 36–37.

²⁴⁴ *Citizens United*, 558 U.S. at 360.

²⁴⁵ There is evidence to suggest it was not. See Lawrence Norden and Iris Zhang, “Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions,” Brennan Center for Justice, January 30, 2017, <https://www.brennancenter.org/analysis/scotus-fact-check>.

²⁴⁶ Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015, 3, <https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016>.

²⁴⁷ Ashley Balcerzak, “Inside Donald Trump’s Army of Super PACS and MAGA Nonprofits,” Center for Public Integrity, February 18, 2019, <https://publicintegrity.org/politics/donald-trump-army-super-pacs-maga-nonprofits/>; Theodor Meyer and Maggie Severns, “Ex-Biden Aide Forms Unite the Country Super Pac,” *Politico*, October 29, 2019, <https://www.politico.com/news/2019/10/29/ex-biden-aide-super-pac-unite-the-country-061096>; Ferguson, *Candidates & Super PACs*, 3; Soo Rin Kim, “Mine, All Mine: Single Candidate Super PACs, Creeping Down-Ballot,” Center for Responsive Politics, November 10, 2016, <https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/>; Kevin Robillard, “How Super PACs Took over The 2020 Democratic Primary,” *HuffPost*, February 20, 2020, https://www.huffpost.com/entry/super-pacs-took-over-2020-democratic-primary_n_5e4efc9fc5b6b82aa65044b7; and Center for Responsive Politics, “2020 Outside Spending by Single-Candidate Super PACs,” accessed March 18, 2021, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=C>.

²⁴⁸ In the 2018 midterm elections, single-candidate super PACs spent \$120 million in support of candidates, compared to only \$50 million in the previous midterm. Center for Responsive Politics, “2018 Outside Spending by Single-Candidate Super PACs.” See also Fred Wertheimer, “The Case for Ending Individual-Candidate Super PACs,” *Democracy 21*, February 26, 2019, <https://democracy21.org/news-press/op-eds/the-case-for-ending-individual-candidate-super-pacs-wertheimer-opinion-piece>; and Kim, “Mine, All Mine.”

advertisements or fundraising.²⁴⁹ Even blatant instances of cooperation, like super PAC ads in which a candidate appears, have been excluded from the definition of “coordinated communication” and thus deemed not to count as contributions under federal rules.²⁵⁰ These developments make it easy to circumvent contribution limits, especially for the class of billionaire mega-donors who have gained unprecedented influence in our elections.

S. 1 shores up federal coordination rules in important respects. It specifies that if a candidate and any outside group or individual collaborate on a communication that promotes, attacks, supports, or opposes that candidate (the so-called PASO standard), the communication will be deemed a contribution. It also clarifies that any reproduction of campaign footage or materials also constitutes a contribution. And it creates a new category of “coordinated spenders,” groups whose actual ties to a candidate are so close that it is simply not plausible to think that the group’s spending in support of the candidate is truly independent.

These changes are plainly constitutional, and in line with regulatory trends in the states.²⁵¹ They are necessary to restore the integrity of campaign contribution limits and we strongly support their passage.

IV. REDISTRICTING REFORM

S. 1 packages together a powerful set of reforms that collectively would be the biggest attack on gerrymandering in the country’s history.

²⁴⁹ Kate Ackley, “Super PACs after 10 Years: Often Maligned but Heavily Used,” *Roll Call*, January 16, 2020, <https://www.rollcall.com/2020/01/16/super-pacs-after-10-years-often-maligned-but-heavily-used/>; Ernest Luning, “FEC Complaint Alleges Republican Super PAC Making Illegal Contributions to Cory Gardner,” *Colorado Politics*, April 10, 2020, https://www.coloradopolitics.com/news/fec-complaint-alleges-republican-super-pac-making-illegal-contributions-to-cory-gardner/article_221da9ea-7b56-11ea-88ae-5b92b7b53ef6.html; Maggie Severns, “Pro-Buttigieg Super PAC Hired Buttigieg Finance Staffer Amid Ad Blitz,” *Politico*, February 21, 2020, <https://www.politico.com/news/2020/02/21/pete-buttigieg-super-pac-staffer-116607>; and Paul Blumenthal, “How Super PACs and Campaigns Are Coordinating in 2016,” *HuffPost*, November 14, 2015, https://www.huffpost.com/entry/super-pac-coordination_n_56463f85e4b045bf3def0273.

²⁵⁰ Adam Wollner and National Journal, “10 Ways Super PACs and Campaigns Coordinate, Even Though They’re Not Allowed To,” *The Atlantic*, September 27, 2015, <https://www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/>; and Comment of Brennan Center for Justice at NYU School of Law (November 15, 2011), AO 2011-23 (American Crossroads), <https://www.fec.gov/files/legal/aos/2011-23/1189190.pdf>.

²⁵¹ *McConnell v. FEC*, 540 U.S. 93, 219–20, 221 (overruled on other grounds by *Citizens United*). See also *O’Keefe v. Chisholm*, 769 F.3d 936, 942 (7th Cir. 2014) (Easterbrook, J.) (“[n]o opinion issued by the Supreme Court, or by any court of appeals, establishes (“clearly” or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups”). For state regulations, see, e.g., Conn. Gen. Stat. § 9-601c (2013), Cal. Code Regs. tit. 2, § 18225.7 (2015); and Chisun Lee, Brent Ferguson, and David Earley, *After Citizens United: The Story in the States*, Brennan Center for Justice, 2014, <https://www.brennancenter.org/publication/after-citizens-united-story-states>.

Key among S. 1’s reforms is a prohibition on extreme partisan gerrymandering in congressional redistricting, which has reached levels unseen in the last 50 years.²⁵² Any map that has the intent or effect of unduly favoring or disfavoring a political party on a statewide basis would be required to be redrawn. To help courts measure effect, the Act sets out an easy-to-apply two-part statistical test that will let courts quickly block maps that are skewed in favor of one party or the other. S. 1 would also standardize rules for drawing congressional districts, strengthen existing protections for communities of color, and require preserving, where possible, towns, neighborhoods, and other communities of interest, where people have shared identities or interests.²⁵³ It also adds enhanced judicial remedies to ensure that discriminatory maps can quickly be challenged in court and fixed and would open the process to public oversight and participation. Finally, it would transfer congressional map drawing authority to independent commissions, starting in 2021 if there is enough time.

The need for reform is urgent. As Brennan Center research has shown, this decade’s skewed maps have consistently given one party (Republicans) 15-17 extra congressional seats over the course of the whole decade.²⁵⁴ Shifts in political winds have virtually no electoral impact in the most heavily gerrymandered states. For example, in 2018—a political tsunami year for Democrats—no districts changed parties in Ohio and North Carolina, two states with extremely biased maps. Despite the fact that Democrats earned nearly half the vote in both states, they won only a quarter of the seats. The overwhelming majority of the seats that did change parties in 2018—72 percent—were drawn by commissions and courts instead of partisan legislatures.²⁵⁵

To be clear, Republicans are not alone in rigging districts to their advantage. A Democratic gerrymander in Maryland was proven to be just as unbreakable in the Republican wave of 2014.²⁵⁶ Redistricting abuse is a bipartisan problem—both parties will draw districts that serve their partisan ends if given the opportunity.

Too often, communities of color bear the brunt of these efforts. When Republican-drawn maps in Virginia, North Carolina, and Texas were successfully challenged on the grounds that they discriminated against minority voters, Republicans defended the maps by arguing that politics, rather than race, had been the driving force behind their maps. Likewise, Democrats in Maryland rejected a congressional map that would have given Black voters additional electoral

²⁵² Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, 2017, 6–13, <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf>.

²⁵³ Shared interests that merit collective representation could be social, cultural, ethnic, economic, religious, or political. Communities of interest are complex, but they are a crucial part of our social fabric, and the For the People Act recognizes their importance by prioritizing their cohesion. See Justin Levitt and Erika Wood, *A Citizen’s Guide to Redistricting*, Brennan Center for Justice, 2010, <https://www.brennancenter.org/sites/default/files/analysis/a-citizens-guide-to-redistricting.pdf>.

²⁵⁴ Royden and Li, *Extreme Maps*, 6–13.

²⁵⁵ Annie Lo, “How Did Democrats Flip the House? Fairer Maps,” Brennan Center for Justice, December 7, 2018, <https://www.brennancenter.org/blog/how-did-democrats-flip-house-fairer-maps>.

²⁵⁶ *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018).

opportunities because that would have created an additional Republican seat.²⁵⁷ Without a rule that makes disadvantaging minority voters for partisan gain illegal, this type of discrimination will persist and grow, particularly as the U.S. population continues to become more racially and ethnically diverse.

Congressional action is necessary to stop partisan gerrymandering and discriminatory line drawing. If not reined in, the problem will only get worse during future cycles. New map drawing tools and ever more powerful data and analytics about voters enable modern line drawers to lock in a durable partisan advantage with shocking accuracy.

The courts alone will not and cannot solve the problem. In 2019, the Supreme Court’s opinion in *Rucho v. Common Cause* held that although partisan gerrymandering is harmful and anti-democratic, it is a political issue that federal courts lack the authority to address.²⁵⁸ When considered alongside the 2013 elimination of Section 5 preclearance requirements for maps drawn by states with a history of racial discrimination in *Shelby County v. Holder*, this means that the legal landscape for challenging unfair maps will become more ominous starting with the current redistricting cycle.²⁵⁹ And even when voters have succeeded in court, they have had to resort to expensive, time-consuming, and complicated litigation in order to obtain a remedy years later. The burden that this places on communities that are the most affected by gerrymandering is unacceptable.

Congress has the authority to fix congressional redistricting.²⁶⁰ As the Supreme Court has recognized, “the Framers provided a remedy” in the Constitution for redistricting abuses through the “power bestowed on Congress to regulate elections, and . . . to restrain the practice of political gerrymandering.”²⁶¹ Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.²⁶²

These reforms are also popular among voters. In 2018, a record-high number of states passed redistricting reform for congressional and/or legislative districts. In Ohio, one proposal

²⁵⁷ Guy-Uriel E. Charles and Luis Fuentes-Rohwer, “Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA,” *William and Mary Law Review* 59, no. 5 (2018): 1559–1600; and Aaron C. Davis, “Redistricting in Md. Has Element of Racial Friction,” *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html.

²⁵⁸ *Rucho*, 139 S. Ct. at 2506–7.

²⁵⁹ Michael Li, *The Redistricting Landscape, 2021–22*, Brennan Center for Justice, 2021, 9–10, <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

²⁶⁰ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

²⁶¹ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

²⁶² 55 Stat. 761 (1941), 2 U.S.C. §2a (Supp. 1950); 54 Stat. 162 (1940); 46 Stat. 21 (1929); 37 Stat. 13 (1911); 31 Stat. 733 (1901); 26 Stat. 735 (1891); 22 Stat. 5 (1882); 17 Stat. 28 (1872); 12 Stat. 353 (1862); 10 Stat. 25 (1852); 9 Stat. 432 (1850); 5 Stat. 491 (1842); 4 Stat. 516 (1832); 3 Stat. 651 (1822); 2 Stat. 669 (1811); 2 Stat. 128 (1802); 1 Stat. 253 (1792). In 1967, for example, Congress required all states to use single member congressional districts to end the drawing of racially discriminatory multimember districts, a practice adopted to defy the call of the Voting Rights Act. See 2 U.S.C. § 2c.

carried every single congressional district in the state by a supermajority.²⁶³ Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.²⁶⁴

S. 1 builds on what has been proven to work. Commissions would contain equal numbers of Republican, Democratic, and unaffiliated and third-party commissioners, with voting rules that ensure that no one group would be able to dominate or hijack the redistricting process. Additionally, all potential commissioners would be subject to a thorough vetting process to ensure that they have the requisite qualifications and community knowledge and are free from conflicts of interest. The experience of states like California and Arizona shows that reforms work. California went from having a congressional map that was one of the least responsive to shifts in voter opinion to one of the most.²⁶⁵ And California's maps did not just improve political fairness—they also kept communities of interest together, increased representation for communities of color, and expanded opportunities for competition.²⁶⁶ Indeed, nearly a quarter of the congressional seats picked up by Republicans in the 2020 election were commission-drawn seats in California. In short, fair maps aren't just good for Democrats, they are good for Republicans—and good for democracy.

S. 1's establishment of a clear set of map drawing rules, listed in the order in which they are to be applied, is another important and ground-breaking change.²⁶⁷ Federal law currently has next to no rules governing how districts are to be drawn.²⁶⁸ Likewise, most states (with a handful of exceptions) have few laws governing congressional redistricting. This has allowed abuses to run rampant. Left unchanged, this is a situation that will only get worse in coming years. The Act's ban on partisan gerrymandering and enhanced protections for communities of color and communities of interest directly address the most egregious abuses of the past decade, like the intentional dilution of political power of communities of color mentioned earlier.

Finally, S. 1 transforms what has historically been an opaque process into one that is transparent and participatory. The business of map drawing would be conducted in open public meetings and subject to oversight. Data would be made available, and all official communications would be subject to disclosure. Community groups and everyday citizens would get a chance to review and comment on proposed maps and submit their own alternatives. States

²⁶³ Peter Miller and Annie Lo, "Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election," Brennan Center for Justice, November 7, 2018, <https://www.brennancenter.org/blog/support-ohio-issue-1-ballot-measure-2018-primary-election>.

²⁶⁴ Peter Miller and Brianna Cea, "Everybody Loves Redistricting Reform," Brennan Center for Justice, December 5, 2018, <https://www.brennancenter.org/blog/everybody-loves-redistricting-reform>.

²⁶⁵ Royden and Li, *Extreme Maps*, 23, 26, 29; and Laura Royden, Michael Li, and Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 2018, 17–19, <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Gerrymandering%204.24.18.pdf>.

²⁶⁶ Royden and Li, *Extreme Maps*, 23, 26, 29; and Royden, Li, and Rudensky, *Extreme Gerrymandering*, 17–19.

²⁶⁷ The criteria are based on best practices as developed by a number of civil rights and good government groups that study redistricting. See "Redistricting Principles for a More Perfect Union," Common Cause, accessed March 10, 2021, <https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#>.

²⁶⁸ There are no federal redistricting-specific regulations beyond the requirement that districts be single member and equally populated. For racial and language minorities, there are also protections available under the Equal Protection Clause and the Voting Rights Act.

would be required to show their work and issue a detailed report before taking a final vote on a plan. In short, redistricting would no longer be done through backroom deals.

These changes would transform congressional representation for all Americans, combining best practices for assuring fair, effective, and accountable representation. Congress plainly has the power to enact these changes and should do so without delay.

Depending on when S. 1 is enacted into law, there may or may not be sufficient time to implement independent commissions for the 2021-22 cycle of redistricting. But there is no reason that S. 1's uniform map drawing rules, ban on partisan gerrymandering, strengthened protections for communities of color, and enhanced judicial remedies could not be made immediately applicable to states regardless of what entity draws this cycle's maps.

V. ELECTION SECURITY

S. 1 would take critical steps to dramatically improve security and reliability of our election infrastructure.

The 2016 election put a spotlight on election infrastructure security, after foreign adversaries and cyber criminals successfully breached state voter registration systems²⁶⁹ and election night results reporting websites.²⁷⁰ Foreign adversaries continue to demonstrate an interest in election interference²⁷¹—including the recent revelation that the Russian government sought to undermine confidence in the electoral process and influence the outcome of the election²⁷²—and recent hacks into software used throughout the federal government show that such attacks have grown increasingly sophisticated.²⁷³

Despite these clear threats, seven states continue to use voting machines that have no paper backup (which security experts have consistently argued is a minimum defense necessary

²⁶⁹ Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," *Chicago Tribune*, August 8, 2018, <https://www.chicagotribune.com/news/local/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html>.

²⁷⁰ Tyler Whetstone, "Knox County Election Night Cyberattack Was Smokescreen For Another Attack," *Knox News*, May 17, 2018, <https://www.knoxnews.com/story/news/local/2018/05/17/knox-county-election-cyberattack-smokescreen-another-attack/620921002/>.

²⁷¹ Cybersecurity & Infrastructure Security Agency "Iranian Advanced Persistent Threat Actor Identified Obtaining Voter Registration Data," last modified November 3, 2020, <https://us-cert.cisa.gov/ncas/alerts/aa20-304a>.

²⁷² National Intelligence Council, *Foreign Threats*, i.

²⁷³ Julian E. Barnes and David E. Sanger, "Iran and Russia Seek to Influence Election in Final Days, U.S. Officials Warn," *New York Times*, October 21, 2020, <https://www.nytimes.com/2020/10/21/us/politics/iran-russia-election-interference.html>; David E. Sanger, Nicole Perlroth, and Eric Schmitt, "Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit," *New York Times*, February 9, 2021, <https://www.nytimes.com/2020/12/14/us/politics/russia-hack-nsa-homeland-security-pentagon.html>.

to detect and recover from cyberattacks).²⁷⁴ Of the states that do use paper ballots, too few conduct sufficient reviews of their paper backups to audit their election results; private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark; and election officials across the country say they lack the resources to implement critical election security measures.²⁷⁵ Unfortunately, our election security is only as strong as our weakest link.

S. 1 would significantly bolster the security and resilience of our nation’s election administration infrastructure. Among the most critical reforms, it requires states to replace unsecure paperless voting systems, promotes robust audits of machine-tabulated election results, and ensures that federal funds may only be used to purchase systems or services from private election system vendors who meet minimum security standards.

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

First and foremost, S. 1 would mandate the replacement of all paperless electronic voting machines with machines that require an individual paper record of each vote. Top security experts—from the National Academies of Sciences, Engineering and Medicine, the national intelligence community, academia, and industry—agree that replacing paperless voting systems is a top priority. This step is critical to improving election security because, as the National Academies put it, paper ballots form “a body of evidence that is not subject to manipulation by faulty hardware or software” and can be used to audit and verify the results of an

²⁷⁴ See Verified Voting, “The Verifier—Polling Place Equipment—November 2020,” accessed March 10, 2021, <https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020>; Lawrence Norden, Derek Tisler, and Lisa Danetz, “Our Election System Is Resilient—But Still Has Room for Improvement,” Brennan Center for Justice, September 22, 2020, <https://www.brennancenter.org/our-work/research-reports/our-election-system-resilient-still-has-room-improvement>; Lawrence Norden and Christopher Famighetti, *America’s Voting Machines at Risk*, Brennan Center for Justice, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; and National Academies of Sciences, Engineering, and Medicine, *Securing the Vote: Protecting American Democracy*, 2018, <https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy>.

²⁷⁵ Andrea Córdova McCadney, Elizabeth Howard, and Lawrence Norden, “Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary,” Brennan Center for Justice, August 13, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary>; Lawrence Norden, Aaron Burstein, Joseph Lorenzo Hall, and Margaret Chen, *Post-Election Audits: Restoring Trust in Elections*, Brennan Center for Justice and Samuelson Law, Technology & Public Policy Clinic, 2007, 3–4, <https://www.brennancenter.org/our-work/research-reports/post-election-audits-restoring-trust-elections>; Lawrence Norden, Gowri Ramachandran, and Christopher Deluzio, *A Framework for Election Vendor Oversight*, Brennan Center for Justice, November 12, 2019, <https://www.brennancenter.org/our-work/policy-solutions/framework-election-vendor-oversight>; Nicole Perlroth, Michael Wines, and Matthew Rosenberg, “Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny,” *New York Times*, September 1, 2017, <https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html>; Norden and Famighetti, *America’s Voting Machines*; and Lawrence Norden and Wilfred U. Codrington III, “America’s Voting Machines at Risk—An Update,” Brennan Center for Justice, March 8, 2018, <https://www.brennancenter.org/our-work/research-reports/americas-voting-machines-risk-update>.

election.²⁷⁶ Without that record and check, software manipulation or a bug could change an election result without detection. Further, as Virginia showed in 2017 when it was forced to replace paperless systems just months before a high-profile gubernatorial election after learning of serious security vulnerabilities in its systems, this transition can easily be accomplished in the timeframe provided in this Act.²⁷⁷ S. 1 provides funding to help facilitate the transition for the remaining states.

B. Promoting Robust Audits of Election Results (Title III, Subtitle A, Part 2)

S. 1 provides funds for states to implement robust audits of election results using statistical models to ensure that a sufficient number of paper ballots are checked to corroborate the tallied outcomes (known as “risk-limiting audits”).²⁷⁸ While paper records alone will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems, risk-limiting audits use these paper records and are designed to detect and correct any election outcomes impacted by such abnormalities. These audits are quickly growing in popularity. Twelve states now require risk-limiting audits, use risk-limiting audits optionally, or piloted the use of these audits in the 2020 election.²⁷⁹

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

Also important, S. 1 would expand the existing voting equipment testing and certification process to include electronic poll books, which are growing in popularity because they are useful for the provision of expanded early voting, vote centers, and pre-Election Day absentee ballot processing.²⁸⁰ Although poll books handle some of our most sensitive information, they have not been subject to even voluntary federal certification standards, and technical failures have been a

²⁷⁶ National Academies, *Securing the Vote*, 94; Lawrence Norden, “The Machinery of Democracy: Protecting Elections In An Electronic World,” Brennan Center for Justice, September 20, 2019, <https://www.brennancenter.org/our-work/research-reports/machinery-democracy-protecting-elections-electronic-world>; U.S. Senate Select Committee on Intelligence, “Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations,” May 8, 2018, <https://www.intelligence.senate.gov/publications/russia-inquiry>; and Olivia Beavers, “DHS Chief Calls on Officials in All 50 States to Have ‘Verifiable’ Ballots by 2020 Election,” *The Hill*, August 22, 2018, <https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-on-election-officials-in-all-50-states-to-have>; see also Norden and Famighetti, *America’s Voting Machines*.

²⁷⁷ Laura Vozzella, “Virginia Scraps Touch-Screen Voting as Election for Governor Looms,” *Washington Post*, Sept. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html.

²⁷⁸ Mark Lindeman and Philip B. Stark, “A Gentle Introduction to Risk-Limiting Audits,” *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, <https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf>.

²⁷⁹ National Conference of State Legislatures, “Risk-Limiting Audits,” February 17, 2020, <https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx>.

²⁸⁰ Andrea Córdova McCadney, “Want a Simple Way to Increase Election Security? Use Paper,” Brennan Center for Justice, October 8, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/want-simple-way-increase-election-security-use-paper>.

cause of significant lines and delays in elections over the past few years.²⁸¹ While some states have tried setting up their own electronic pollbook standards, others may lack the resources and expertise to do so.²⁸² Moreover, a patchwork of state standards cannot effectively guarantee that these systems meet security best practices. The federal government is far better positioned to oversee this increasingly important technology.

D. Increasing Security at Election System Vendors (Title III, Subtitle A, Part 8)

S. 1 provides for greater federal oversight of the private vendors who design and maintain the election systems that store our personal information, tabulate our votes, and communicate important election information to the public. The Brennan Center has documented numerous instances of voting system failures that could have been prevented had vendors notified their clients of previous failures in other jurisdictions using the same voting equipment.²⁸³ Among other things, the Act would require that any vendors who receive payment from grants made under the Act: (1) certify that the infrastructure they sell to local election jurisdictions is developed and maintained in accordance with cybersecurity best practices; (2) certify that their own information technology is maintained in accordance with cybersecurity best practices; (3) ensure that they have personnel policies and practices in place that are consistent with personnel best practices, including cybersecurity training and background checks; and (4) promptly report any suspected cybersecurity incident directed against the goods and services they provide under these grants.

E. Ensuring a Consistent Stream of Federal Funding to Secure our Election Infrastructure (Title III, Subtitle A)

S. 1 provides funds for critical security measures and to cover maintenance and upgrades to voting systems for years to come. These resources are necessary since the race to secure our elections is one without a finish line, and our adversaries will undoubtedly change and advance their methods of attack. The responsibility for funding elections must be shared among local, state, and federal governments, and the Act ensures that the federal government pays its fair share of the ongoing cost of voting systems, with a consistent stream of federal funding for states to procure and maintain secure equipment and implement state-of-the-art security measures to ensure the integrity of our elections.

The election security measures in S. 1 would not only make our election infrastructure more secure but also help reduce the unconscionably long lines that so many voters experience

²⁸¹ See Kim Zetter, “The Election Security Hole Everyone Ignores,” *Politico*, August 31, 2020, <https://www.politico.com/news/2020/08/31/election-security-hole-406471>.

²⁸² See, e.g., Cameron Glenn Sasnett, *Electronic Pollbook Certification: Procedures & System Requirements*, Virginia State Board of Elections Election Administration and Compliance Division, 2015, https://www.eac.gov/sites/default/files/eac_assets/1/28/Virginia%20EPB%20Certification%20Procedures%20and%20System%20Requirements%20REV-05151.pdf; and Ohio Board of Voting Machine Examiners, *Standards Governing the Examination and Certification of Electronic Poll Books in Use in Ohio*, February 6, 2014, <https://www.ohiosos.gov/globalassets/elections/bvme/epollbooks/standards.pdf>.

²⁸³ Norden et al., *Election Vendor Oversight*.

every election. That would go a long way toward restoring Americans' confidence in our elections. We look forward to continuing to work with Congress to ensure sufficient federal resources for state and local election officials and sufficient national standards to ensure that funding is spent effectively.

VI. STRENGTHENING GOVERNMENT ETHICS

S. 1 would establish stronger ethics rules for all three branches of government. It is a strong first step toward strengthening ethics and accountability. The Brennan Center strongly supports all of S. 1's ethics reforms.

The last four years witnessed an increasingly rapid erosion of the ethical guardrails that have in the past prevented self-dealing by public officials.²⁸⁴ Recent transgressions range from senior officials utilizing their official positions for their own personal financial benefit²⁸⁵ to selective or lax enforcement of ethics rules when senior or well-connected officials run afoul of them.²⁸⁶ There have also been many examples of political appointees working on regulatory matters on which they previously lobbied the government for industry.²⁸⁷ Among the most troubling examples, conflicts of interest and other ethics lapses marred the federal government's initial response to the Covid-19 pandemic, hampering its ability to address the crisis effectively.²⁸⁸

A poll published in the fall of 2020 showed only 20 percent of Americans trust their government to "do the right thing" just about always or most of the time.²⁸⁹ In the lead-up to the

²⁸⁴ Bharara, Whitman, et al., *Proposals for Reform*, 2.

²⁸⁵ See, e.g., Lisa Friedman, "Scott Pruitt Sought 'Business Opportunity' with Chik-fil-A While Leading E.P.A.," *New York Times*, June 5, 2018, <https://www.nytimes.com/2018/06/05/climate/pruitt-epa-chick-fil-a.html>; Ana Swanson, "Wilbur Ross Says He Will Sell Stock after Watchdog Warns of Potential for Criminal Violation," *New York Times*, July 13, 2018, <https://www.nytimes.com/2018/07/13/us/politics/wilbur-ross-stocks.html>; and Lisa Friedman, "A Guide to the Ryan Zinke Investigations," *New York Times*, October 31, 2018, updated December 15, 2018, <https://www.nytimes.com/2018/10/31/climate/ryan-zinke-investigations.html>.

²⁸⁶ See, e.g., Richard Pérez-Peña and Rachel Abrams, "Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns," *New York Times*, February 9, 2017, <https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html>; and Michelle Ye Hee Lee, "White House Adviser Kellyanne Conway Violated Hatch Act, Federal Investigator Says," *Washington Post*, March 6, 2018, https://www.washingtonpost.com/politics/white-house-adviser-kellyanne-conway-violated-hatch-act-federal-investigator-says/2018/03/06/28995c06-2162-11e8-94da-ebf9d112159c_story.html.

²⁸⁷ See, e.g., David Pittman, "Former Drug Industry Lobbyist Helps Steer Trump Drug Plan," *Politico*, May 27, 2018, <https://www.politico.com/story/2018/05/27/trump-drug-plan-lobbyist-joe-grogan-609170>; and Laura Peterson, "The Snack Food and Corn Syrup Lobbyist Shaping Trump's Dietary Guidelines for Americans," Project on Government Oversight, August 23, 2018, <https://www.pogo.org/investigation/2018/08/the-snack-food-and-corn-syrup-lobbyist-shaping-trumps-dietary-guidelines-for-americans/>.

²⁸⁸ Kinsella et al., "Trump Administration Abuses Thwart US Pandemic Response," Brennan Center for Justice, last modified January 21, 2021, <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response>.

²⁸⁹ Pew Research Center, "Americans' Views of Government: Low Trust, But Some Positive Performance Ratings," September 14, 2020, <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.

2020 election, political corruption ranked second on the list of voters' top concerns, above the Covid-19 pandemic.²⁹⁰ These statistics show that we are facing a crisis of confidence in American democracy. That is why Congress must help ensure that officials act for the public good rather than private gain.

There is longstanding bipartisan support for ethics reforms. Prohibitions on conflicts of interest by government employees have been in place for more than a century.²⁹¹ In the wake of Watergate, Congress strengthened existing conflict of interest laws by passing the Ethics in Government Act of 1978 (EGA), which mandated a public financial disclosure requirement, the establishment of the Office of Government Ethics to promote and lead the administration of an ethics program in the executive branch, and prohibitions to slow the “revolving door” between public service and private business.²⁹² In 1989, President George H. W. Bush signed into law amendments to strengthen key provisions of the EGA.²⁹³ In 1995, Congress passed the Lobbying Disclosure Act to prevent undue private sector influence over governmental activities, strengthening disclosure requirements and transparency for lobbyists and lobbying firms.²⁹⁴ S. 1 contains the next wave of much-needed ethical reforms, including the following:

A. Supreme Court Ethics (Title VII, Subtitle A)

S. 1 would require a code of ethics for the United States Supreme Court. The Court's nine justices are the only U.S. judges—state or federal—not bound by a written code of ethical conduct.²⁹⁵ All other federal judges are subject to the official Code of Conduct for United States Judges, which requires them to uphold the integrity and independence of the judiciary and governs matters like recusal, financial disclosure, outside employment, partisan political engagement, and gifts. S. 1 would require the Judicial Conference of the United States to issue a code of ethics for the entire federal judiciary, including the justices of the Supreme Court, within one year of enactment.

B. Presidential and Vice Presidential Tax Transparency (Title X)

S. 1 would require sitting presidents, vice presidents, and major-party candidates for those offices to disclose their tax returns. While tax returns do not reveal everything about a

²⁹⁰ Change Research, “Change Research—CNBC ‘State of Play’ Poll, September 4–6, 2020,” 2020, 4, https://changeresearch.com/wp-content/uploads/2020/09/CNBC-CR_National-Toplines_Wave-13_September-4-6-Wave-13_-9_4-6.pdf.

²⁹¹ Olivia B. Waxman, “Questions of Profit in Politics Raised by Trump Administration Are Older than You May Think,” *TIME*, March 10, 2017, <http://time.com/4669729/conflict-of-interest-history/>.

²⁹² S. Rep. No. 95-170 (1977), reprinted in 1978 U.S.C.C.A.N. 4216.

²⁹³ President George H. W. Bush, “Statement on Signing the Ethics Reform Act of 1989,” *Weekly Compilation of Presidential Documents*, vol. 25, no. 48 (November 30, 1989), 1855.

²⁹⁴ 2 U.S.C. § 1603.

²⁹⁵ Johanna Kalb and Alicia Bannon, *Supreme Court Ethics Reform*, Brennan Center for Justice, 2019, 1, https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf.

candidate or officeholder’s personal finances, they can shed light on potential conflicts of interest and confirm that the individual is paying their fair share.²⁹⁶

After President Richard Nixon released his personal tax returns in 1973,²⁹⁷ all major party presidential nominees voluntarily disclosed their returns to the public until 2016,²⁹⁸ when President Trump refused to disclose personal tax information, a practice he continued once elected.²⁹⁹ This raised doubts about his financial ties and whether he was paying his fair share.³⁰⁰ The Act would restore the longstanding norm of tax return disclosure by, among other things, requiring disclosure of personal income tax returns and the returns of any businesses of which the filer is the sole or principal owner, going back ten years.

C. Executive Branch Conflicts of Interest (Title VIII, Subtitle A)

S. 1 would take important steps to address conflicts of interest in the executive branch. It is common for high-level officials to move back and forth between government and the private sector. Ethics rules do not prevent senior government officials from overseeing matters likely to be of interest to past or future employers, leaving government to lobby their former colleagues (following a brief one-year cooling-off period), or even selling goods and services to the government. S. 1 tightens ethics standards by requiring officials to recuse from matters in which they know or should have known that a former employer or client had a financial interest,³⁰¹ imposing restrictions to slow the revolving door, and restricting federal funds from being spent at businesses owned or controlled by the president, vice president, cabinet members, or any of their families.

D. Presidential Conflicts of Interest (Title VIII, Subtitle B)

S. 1 would codify the practice of presidents and vice presidents of complying with conflict of interest law, from which they are exempt. Going back to the 1960s, presidents limited

²⁹⁶ Daniel I. Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Returns*, Brennan Center for Justice, 2017, <https://www.brennancenter.org/our-work/research-reports/presidential-transparency-beyond-tax-returns>; and Bharara, Whitman, et al., *Proposals for Reform*, 7.

²⁹⁷ Revelations that President Nixon had sought to evade his federal income tax obligations in the early 1970s using dubious charitable deductions seriously damaged his credibility with the public and arguably set the stage for his resignation from office. Stephen Mihm, “Nixon’s Failed Effort to Withhold His Tax Returns,” *Bloomberg*, August 2, 2016, <https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns>.

²⁹⁸ See “Presidential Tax Returns,” *Tax History Project*, accessed March 17, 2021, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>.

²⁹⁹ Alan Rappoport, “Donald Trump Breaks With Recent History By Not Releasing Tax Returns,” *New York Times*, May 11, 2016, <https://www.nytimes.com/politics/first-draft/2016/05/11/donald-trump-breaks-with-recent-history-by-not-releasing-tax-returns/>.

³⁰⁰ Kristen Doerer, “Why Do People Want to See Donald Trump’s Tax Returns?” *ProPublica*, July 1, 2020, <https://www.propublica.org/article/why-do-people-want-to-see-donald-trumps-tax-returns>; and Pew Research Center, *Trump Begins Third Year With Low Job Approval and Doubts About His Honesty*, 2019, 4, <https://www.pewresearch.org/politics/2019/01/18/1-views-of-trump-2/> (January 2019 poll showing 64 percent of Americans wanted President Trump to disclose his tax returns).

³⁰¹ Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*, 8.

their personal holdings to assets like cash and treasury bonds, or used a blind trust,³⁰² reinforcing the view that our most senior leaders should only take official action in the public's best interest, without consideration of their own personal financial interest.

President Trump broke with this tradition, maintaining effective ownership and control of his many businesses.³⁰³ According to ethics experts, this created at least an appearance of numerous conflicts of interest, making it hard to discern where the public's interests end and the former president's self-interest began.³⁰⁴ This underscores why Congress must require the president and vice president to divest from any personal financial holdings that could pose a conflict of interest with their official duties.

E. Executive Branch Ethics Enforcement (Title VIII, Subtitle D)

S. 1 would increase the independence and authority of the Office of Government Ethics (OGE), which is responsible for administering executive branch ethics rules, so it is better positioned to prevent ethics violations, investigate allegations, and hold violators accountable.³⁰⁵

Currently, OGE can promulgate regulations, but it has limited investigative and enforcement power, and Trump administration officials questioned whether the agency's rules applied to White House staff.³⁰⁶ OGE also exercises little direct control over agency ethics officials, who typically report to political appointees. And the agency lacks many of the hallmarks of a truly independent watchdog.³⁰⁷ This subtitle would bring OGE more in line with other independent watchdog agencies by: limiting the president's authority to remove OGE's director;³⁰⁸ empowering the director to submit their own budget proposals to Congress;

³⁰² Bharara, Whitman, et al., *Proposals for Reform*.

³⁰³ Numerous situations have arisen where it is hard to discern whether President Trump acted in support of his personal financial interest or the public's interest. See, e.g., Thomas Kaplan, "Trump's Focus on a Washington Building Draws Scrutiny," *New York Times*, October 18, 2018, <https://www.nytimes.com/2018/10/18/us/politics/fbi-headquarters-building-trump.html>; and U.S. General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, U.S. General Services Administration Office of Inspector General, 2019, 4–6, https://www.gsaig.gov/sites/default/files/ipa-reports/JE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20%26%20Administration%20of%20OPO%20Building%20Lease_January%2016%202019_Redacted.pdf.

³⁰⁴ Richard Painter and Norman Eisen, "The White House May Claim Mueller Has Conflicts of Interest. Oh, the Irony." *Washington Post*, May 22, 2017, https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html; Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*, 8.

³⁰⁵ See Daniel I. Weiner, *Strengthening Presidential Ethics Law*, Brennan Center for Justice, 2017, 11–12, <http://www.brennancenter.org/publication/strengthening-presidential-ethics-law>.

³⁰⁶ Stefan C. Passantino to Walter M. Shaub, Jr., U.S. Office of Government Ethics, February 28, 2017, <https://i2.cdn.turner.com/cnn/2017/images/03/01/white-house-letter-office-of-government-ethics-feb28.pdf?iid=EL>.

³⁰⁷ Bharara, Whitman, et al., *Proposals for Reform*, 16.

³⁰⁸ Congress and the courts have recognized the need for the leaders of watchdog agencies to be insulated from political pressure. See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010); and *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 826 (DC Cir. 1993). A recent Supreme

clarifying that OGE ethics regulations and other guidance are binding on all federal employees, including White House staff; and vesting OGE with new authority to, among other things, conduct formal investigations of suspected ethics violations—including through the issuance of subpoenas—and to review and approve conflict of interest and similar determinations by agency ethics officials, as well as waivers of conflict of interest rules.

These are only a few of the critical ethics reforms in S. 1. Collectively, they would help restore the ideal of public service as a public trust and ensure that leaders put the interests of the interests of the American people first. We urge Congress to pass these critical reforms.

VII. CONGRESS'S AUTHORITY TO ACT

Finally, Congress unequivocally has the authority to enact all the democracy reforms set forth in S. 1, especially under Article I, Section 4 of Constitution—known as the Elections Clause. The Elections Clause empowers Congress, “at any time,” to “make or alter” any regulations for federal elections.³⁰⁹ It is one of the most explicit grants of power to override the states anywhere in the Constitution.³¹⁰

The Supreme Court has consistently interpreted the Elections Clause to endow Congress with sweeping power to regulate the time, place, and manner of elections.³¹¹ (The only exception

Court decision struck down the single-director model for the Consumer Financial Protection Bureau, while recognizing the constitutionality of other for-cause removal protections. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

³⁰⁹ The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. Const. art. I, § 4, cl. 1.

³¹⁰ For a history of the drafting of the Elections Clause and the debate over it during ratification, see Michael Waldman, *The Fight to Vote* (New York: Simon & Schuster, 2016), 25–28.

³¹¹ See, e.g., *Inter Tribal Council*, 570 U.S. at 9 (“The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’”) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)); *Ex parte Yarbrough*, 110 U.S. 651, 661–62 (1884) (“it is not doubted” “that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud”); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (“We regard it as . . . unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box.”); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (“It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”); *United States v. Classic*, 313 U.S. 299, 319–20 (1941) (“Unless the constitutional protection of the integrity of ‘elections’ extends to primary elections, Congress is left powerless to effect the constitutional purpose. . . Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of ss 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within

is a 1921 case that has since been overturned.) As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress’s power under the Elections Clause is so broad that it includes “authority to provide a complete code for congressional elections[.]”³¹² Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,³¹³ redistricting,³¹⁴ campaign finance,³¹⁵ and corruption in presidential elections.³¹⁶

In the last two years, several members of the Court have gone out of their way to reaffirm Congress’s broad authority under the Elections Clause. In 2019, for instance, Chief Justice Roberts, writing for the Court, recognized that “the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause[.]” and pointed to the 116th Congress’s version of the For the People Act, H.R. 1, as example of the exercise of that power.³¹⁷ The Chief Justice likewise acknowledged Congress’s wide-ranging and longstanding power under the Elections Clause, noting that Congress had used that power to enact, among other things, a “comprehensive federal statute dealing with elections as a way enforce the Fifteenth Amendment” in 1870 and “a series of laws to protect the right to vote” beginning in the 1950s.³¹⁸ Similarly, Justices Gorsuch and Kavanaugh noted last year that under the Elections Clause, “[i]f state rules need revision, Congress is free to alter them.”³¹⁹

There is thus no question that the Act’s provisions fall squarely within Congress’s authority over federal elections. Some, such as Congress’s power to strengthen the Voting Rights Act and to restore voting rights to individuals with past convictions under Title I, Subtitle E, are also rooted in authority granted to it under the Fourteenth and Fifteenth Amendments.³²⁰

the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.”); *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry v. United States*, 256 U.S. 232 (1921), which had held that the Elections Clause did not apply to primary elections); *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) (“The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts.”); and *Foster v. Love*, 522 U.S. 67, 72 n.2 (1997) (“The [Elections] Clause gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”) (quoting *Smiley*, 285 U.S. at 366).

³¹² *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

³¹³ *Inter Tribal Council*, 570 U.S. at 8–9.

³¹⁴ *Vieth*, 541 U.S. at 275 (stating that the Elections Clause “permit[s] Congress to ‘make or alter’” the “districts for federal elections”); and *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (“Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures . . . and argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people’s right to equality of representation in the House.”) (citations omitted).

³¹⁵ *Buckley*, 424 U.S. at 13 (“The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.”).

³¹⁶ *Buckley*, 424 U.S. at 132 (“This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.”) (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

³¹⁷ *Rucho*, 139 S. Ct. at 2508.

³¹⁸ *Rucho*, 139 S. Ct. at 2495.

³¹⁹ *DNC v. Wisconsin State Legislature*, 592 U.S. ____ (2020) (Gorsuch, J., concurring).

³²⁰ *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); and *Mitchell*, 400 U.S. at 121, 124 (1970).

In fact, the Act embodies the Framers’ central goal in establishing the Elections Clause—ensuring that Congress can override efforts by states to manipulate the federal voting process.³²¹ As they drafted the Constitution, the Framers were concerned that states, left to their own devices, would suppress or skew the vote. Delegates from South Carolina, which was notoriously malapportioned, sought to strike the Clause. Madison insisted that it remain. Without it, he said, “[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.”³²² The Framers therefore designed the Elections Clause to prevent states from manipulating election outcomes and to prevent the development of factions within states that might “entrench themselves or place their interests over those of the electorate.”³²³ As was well understood and reflected at the founding, during state ratification of the Constitution, and throughout decades of congressional debate, Congress’s power to regulate federal elections is comprehensive. The Framers deliberately granted wide-ranging authority under the Elections Clause to ensure that Congress would be able to combat even those state abuses of power that were unforeseeable at the time.³²⁴ Thus, as Justice Scalia recognized, the states’ power to regulate federal elections has always been subject to federal law.³²⁵

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³²¹ Avalon Project: Documents in Law, History and Diplomacy, “Federalist No. 59,” accessed March 11, 2021, http://avalon.law.yale.edu/18th_century/fed57.asp.

³²² Farrand, ed., *Records of the Federal Convention*, vol. 2, 241.

³²³ *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 815 (2015). During the state debates over the ratification of Constitution, ratification supporters and opponents both emphasized the importance of the overriding power that the Clause gives to Congress. (Federalists were pleased; Anti-Federalists aghast.) For example, Theophilus Parsons, later a Massachusetts chief justice, explained that the “controlling [sic] power” of Congress would “preserve and restore to the people their equal and sacred rights of election.” *The Documentary History of the Ratification of the Constitution* (hereinafter “*DHRC*”), vol. VI, Ratification by the States: Massachusetts, No. 3, 1218 (January 16, 1788). Thomas McKean (Pennsylvania’s Chief Justice) likewise noted that it was Congress’s duty to ensure that its members were “fairly chosen” and to do so, “it is proper they should have it in their power to provide that the times, places, and manner of election should be such as to insure free and fair elections.” *DHRC*, vol. II, Ratification by the States: Pennsylvania, 537 (December 10, 1787).

Six states proposed amendments to the Constitution to narrow Congress’s power under the Elections Clause, reflecting that even opponents to the Clause understood it to confer broad authority. Those efforts failed. See Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836) (hereinafter “*Elliot’s Debates*”), vol. 1, 322 (February 7, 1788, Massachusetts), 325 (May 25, 1788, South Carolina), 326 (June 21, 1788, New Hampshire), 329–30 (July 26, 1788, New York); *Elliot’s Debates*, vol. 4, 246 (August 1, 1788, North Carolina); *DHRC*, Vol. XXVI: Rhode Island, No. 3 at 999–1000 (May 29, 1790) (Rhode Island Form of Ratification and Amendments); see also *Elliot’s Debates*, vol. 2, 545 (September 3, 1788, Meeting at Harrisburg, after Pennsylvania had ratified the Constitution). Similarly, in 1789, the First Congress rejected a constitutional amendment that would have let Congress “alter, modify, or interfere in the times, places, or manner” of congressional elections *only* “when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election.” *Annals of Congress*, vol. 1, 767–74 (1789).

³²⁴ At the Constitutional Convention, James Madison explained that the Elections Clause uses “words of great latitude” because “it was impossible to foresee all the abuses that might be made of the [states’] discretionary power.” Farrand, *Records of the Federal Convention*, vol. 2, 240.

³²⁵ *Inter Tribal Council*, 570 U.S. at 14–15 (quoting *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 347 (2001)).

Since the initial passage of the For the People Act by the House in 2019, the need for this legislation has only become more apparent, as underscored by the pandemic, the Big Lie that fueled the January 6 insurrection at the Capitol, and the spate of bills to restrict voting rights at the state level. Now it is up to elected leaders to deliver. S. 1 is a down-payment on the promise of a democracy that works for everyone. We urge its prompt passage.

Thank you.

ATTACHMENT

RESOURCE

Congress Could Change Everything

Forty-three states are trying to enact legislation that could make it harder to vote. The Senate can stop voter suppression by passing the For the People Act, which recently passed the House.

By Gareth Fowler, Wendy Weiser, Will Wilder, Izabela Tringali, and Stuart Baum

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America is facing an overwhelming legislative assault on voting rights.

As of February 19, [more than 253 bills](#) restricting voting access had been carried over, prefiled, or introduced in 43 states, and the number is rising. Already, two of [these bills](#) have passed, and many are moving aggressively through state legislatures. Fueled by the Big Lie of widespread voter fraud and often discriminatory in design, these bills have the potential to dramatically reduce voting access, especially for Black and brown voters.

This [legislative campaign to suppress the vote](#) can — and must — be stopped by Congress. The Brennan Center has analyzed each of the restrictive voting bills pending in the states and concludes that The For the People Act (H.R. 1/S. 1) would thwart virtually every single one. The For the People Act, which passed the United States House of Representatives in early March, is a transformative bill that would expand voting rights and strengthen our democracy.

The landmark legislation would create a national baseline for voting access that every American can rely on, and it would foil state efforts to manipulate voting rules to exclude eligible voters or create [discriminatory outcomes](#). As President Biden [said](#) on the anniversary of Bloody Sunday, the For the People Act is “urgently needed to protect the right to vote, the integrity of our elections, and to repair and strengthen our democracy.” Along with the John Lewis Voting Rights Advancement Act, it includes all of the critical reforms needed to prevent voter suppression. Amidst a withering attack on voting rights in nearly every state, the Senate must now get to work and [pass this bill into law](#).

The table below outlines each of the major themes of the pending state voter suppression bills and explains how the For the People Act would address them.

How the For the People Act Would Thwart State Vote Suppression Legislation

| RESTRICTIVE BILLS INTRODUCED | STATES | DOES THE FOR THE PEOPLE ACT ADDRESS THIS FOR FEDERAL ELECTIONS? |
|--|--|--|
| Limit who can vote by mail | AL, AZ, CO, GA, MN, MO, MS, MT, ND, OK, PA, SC, WA | Yes, it would require national no-excuse voting by mail. |
| Eliminate or reduce permanent absentee or early voting lists | AZ, FL, HI, NJ, NV, PA | Yes, it would require that states, at the option of a voter, treat a vote by mail application as an application to vote by mail in all future federal elections. |
| Eliminate or limit sending absentee ballots to voters who do not specifically request those ballots | AZ, CT, NJ, NY, OK, PA, WA | No. |
| Eliminate or limit sending absentee ballot applications to voters who do not specifically request those applications | CT, GA, IA, IL, ND, SD, TN, TX | Yes, it would require that states transmit absentee ballot applications to all registered voters. |
| Restrict who can assist in returning a voter's ballot | AK, AZ, CT, KS, KY, MD, MN, NY, OK | Yes, it would prohibit states from placing limits on how many absentee ballots a person can return on behalf of others. |
| Tighten witness signature requirements for mail ballots | AK, AZ, CA, MS, SC, VA | Yes, it would prohibit witness signature requirements for absentee ballots. |
| Restrict where and how voters may return absentee ballots | AZ, GA, MO, NH, PA, VA | Yes, it would require that voters be allowed to return absentee ballots by mail, at a polling place, at a tribally designated building, at a drop-box, or at a state or local election office. |
| Tighten signature matching requirements for ballots | CT, PA, SC | Yes, it would require giving voters notice and opportunity to cure signature defects, and that all determinations of a discrepancy be made by two trained election officials. |
| Tighten or impose ballot receipt deadlines | AZ, IA, IL, KS, PA | Yes, it would require that states accept eligible absentee ballots up to 10 days after Election Day. |
| Eliminate or limit early voting | GA, MN, MO, MT, ND, TN, WA | Yes, it would require a minimum of 14 consecutive days of early voting. |



| RESTRICTIVE BILLS INTRODUCED | STATES | DOES THE FOR THE PEOPLE ACT ADDRESS THIS FOR FEDERAL ELECTIONS? |
|--|--|--|
| Tighten or impose voter ID requirements | AK, AR, AZ, CT, FL, GA, ID, MA, ME, MN, MO, MS, NE, NH, NJ, NY, OK, PA, TX, VA, WY | Yes, it would require states to accept a sworn written statement in lieu of documentary ID (except for certain first-time voters). |
| Require documentary proof of citizenship to register to vote | AZ, IN, MI, NY, TX | Yes, it would require that states accept voter registrations that meet the current legal requirements (under the National Voter Registration Act), which do not include citizenship documents. |
| Eliminate or prevent same-day voter registration | AZ, CT, HI, MT, NH, VA | Yes, it would require same-day voter registration. |
| Eliminate or prevent automatic voter registration | AK, AZ, GA, NJ | Yes, it would require automatic voter registration. |
| Expand voter purges | AL, AZ, CA, HI, MI, MO, MS, NH, NJ, PA, SC, SD, TX, UT | Yes, it would: prohibit purges based solely on unreliable evidence like past failure to vote; prohibit voter caging; and limit inaccurate purges based on interstate cross-checks. |

The **John Lewis Voting Rights Advancement Act** [would also address many](#) of these bills to the extent that they are discriminatory. It would modernize the Voting Rights Act and restore the requirement that certain states and localities with a history of voting discrimination get prior federal approval — or “preclearance” — of any changes to their voting rules and practices to make sure that they are

not discriminatory. It would also require all jurisdictions in the country to submit for preclearance any “covered practices,” meaning those practices, such as strict voter ID laws and polling place closures in communities of color, that have typically been implemented for a discriminatory purpose or have had discriminatory effects.

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