



Testimony of  
Democracy 21 President Fred Wertheimer  
In Support of S. 1  
Before the Senate Rules Committee  
March 24, 2021

Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Committee, I would like to thank you for the opportunity to appear before the Committee today to testify in support of [S. 1, the For the People Act of 2021](#).

Democracy 21 applauds and thanks Senate Majority Leader Schumer, Chairwoman Klobuchar, and lead sponsor Senator Merkley for the national leadership they are providing on behalf of S. 1.

We also greatly appreciate the role Senator Schumer played as the original sponsor of the DISCLOSE Act to end dark money in federal elections, which in 2010 came within one vote of breaking a filibuster to be enacted in the Senate. We also greatly appreciate the role Chairwoman Klobuchar has played as the lead sponsor of the Honest Ads Act, and of many other campaign finance reform proposals in S. 1, and the roles played by other Democratic Senators on the Committee who have sponsored other important campaign finance reform bills in S. 1.

Democracy 21 strongly supports S. 1 and urges the Committee to report the bill promptly and to oppose any amendments that weaken or undermine the legislation.

S. 1 recognizes that our political system is broken and responds to fundamental problems facing our democracy.

The legislation also responds to the efforts being pursued in a number of state legislatures across the country [to enact voting restrictions](#) that would result in voter suppression and disenfranchisement, particularly for voters of color.

These voter suppression efforts are being undertaken despite the record voter turnout that took place in the 2020 elections without any evidence of meaningful voter fraud, notwithstanding former President Trump's repeated false claims to the contrary. The ongoing efforts in many states to limit early voting and the use of no excuse, mail-in ballots will make it harder for eligible citizens to vote, without any justification.

The Constitution and Supreme Court decisions make clear that Congress has the power to set the voting rules for federal elections and to override state laws that conflict with federal law. In a 7-

to- 2 decision in [\*Arizona v. Inter Tribal Council of Arizona\*](#) (2013), Supreme Court Justice Antonin Scalia, writing for the majority, reaffirmed that: "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and ... the regulations effected supersede those of the State which are inconsistent therewith.'"

S. 1 represents a holistic approach to repairing our democracy. The legislation includes reforms that deal with voting rights, campaign finance, redistricting, government ethics, election security and foreign interference. [Polls show](#) broad support for the For the People Act.

My testimony today is focused on the fundamental problems caused by the role of influence-seeking, big money funders in American politics and on the reforms in S. 1 that address these problems.

The campaign finance reforms include measures to provide a voluntary, alternative way for federal candidates to finance their campaigns, to close the disclosure loopholes both for groups that spend unlimited, secret contributions in federal elections and for groups running campaign-related ads on the internet, to reform the failed Federal Election Commission and to strengthen the rules defining coordination between candidates and outside spending groups.

S. 1 also addresses the need to expose the foreign interests behind the kind of anonymous internet ads that were run by Russian operatives in the 2016 presidential election, to close the loopholes that allow foreign governments to run campaign-related ads to influence U.S. elections and to require officials of outside spending groups to appear in and “stand by” their ads, as candidates are now required to do.

### **The need for an alternative way for federal candidates to finance their campaigns**

I first testified before the Senate Rules Committee on campaign finance reforms in 1973 in support of legislation that became the Federal Election Campaign Act Amendments of 1974 (FECA).

Campaign finance reform issues have been before the Senate on numerous occasions in the decades that followed. For example, campaign finance legislation was on the floor of the Senate in 1987, 1988, 1990, 1991, 1992, 1993 and 1994, with no legislation being enacted into law.

There is nothing new about the campaign finance reform proposals in S. 1.

I testified before the Senate Rules Committee in 2012 in support of the DISCLOSE Act. This legislation has been blocked in the Senate for the past decade either by refusals to schedule it for floor consideration or by filibusters starting in 2010.

Proposals for a new small donor-based financing system for federal candidates, for reforming the Federal Election Commission and for strengthening the rules that prohibit coordination between outside spending groups and the candidates they support have been pending in the Senate since 2017. These proposals also did not receive any floor consideration and did not receive any hearings.

I testified on H.R. 1 in the House in 2019. I would have been happy to testify in the Senate on its companion bill, but no hearings were held on the legislation nor was it considered on the Senate floor.

In 1973, as I was waiting my turn to testify before this Committee on campaign finance reform proposals, Senator Joe Biden, who had been newly elected in 1972, appeared before the Committee.

Senator Biden [urged Congress to enact public financing for federal elections](#), stating that the reform "would allow candidates -- incumbents and challengers alike -- to compete more on the basis of merit than on the size of the pocketbook -- free from ... special interest backers."

Senator Biden described this reform as "the swiftest and surest way to purge our elections system of the corruption that, whatever the safeguards, money inevitably brings."

In response to the Watergate campaign finance scandals, Congress created the presidential public financing system in 1974 as part of FECA. It had the support of Democrats and [Republicans](#) and

[passed the Senate](#) after 20 Republican Senators joined Democratic Senators to break a filibuster against the bill.

The new presidential financing system worked well for the country and for presidential candidates for decades. Almost every major party candidate participated in the voluntary system for seven presidential elections. The system was used by Republicans and Democrats, conservatives and liberals, incumbents and challengers, frontrunners and long-shots.

Every president elected from 1976 to 2004 participated in the public financing system, including three Republicans and two Democrats. This included Presidents Jimmy Carter, Ronald Reagan (twice), George H.W. Bush, Bill Clinton (twice) and George W. Bush (twice).

President Reagan benefited more than any other candidate from the public financing system, using it to finance his three presidential campaigns and two victories. He won the presidency in 1984 “without holding a single campaign fundraiser.”

In addition, for more than three decades, the Republican and Democratic National Committees used the public financing system to help pay for their national conventions.

In every case, the presidential candidates and national party committees voluntarily requested and accepted public funds to spend on their campaign-related activities.

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

The system broke down in the 2000s only when dramatic growth in the costs of presidential campaigns greatly outstripped the funding provided to participating candidates and greatly exceeded the spending limits of the presidential system, and Congress failed to modernize the system in response. This made it impractical for candidates to participate in the system and run competitive races.

Following the enactment of the presidential financing system, Senator Biden continued to lead on campaign finance reform during his Senate career, introducing bills to create a similar system for congressional races.

In 2001, Senator Biden said about the value of [public financing of elections](#), “Either all of America decides who runs for office or only a few people. It's as simple as that.”

In 2016, Vice President Biden said about [this reform](#), “If you want to change overnight, instantaneously, the electoral process in America and the way we handle issues, have public financing. I guarantee you it would change overnight.”

The Supreme Court in 1976 upheld the constitutionality of the presidential public financing system in *Buckley v. Valeo*.

The Court stated that public financing of elections furthers “the general welfare” by serving “to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.”

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

The *Buckley* conclusion was reaffirmed forty-five years later in 2011 in *Arizona Free Enterprise v. Bennett*, in an opinion written by Chief Justice Roberts. While the decision struck one element of the Arizona public financing system, the Chief Justice’s opinion upheld the principle of public financing, stating: “We have said that a voluntary system of ‘public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.’”

Under the principles set forth by the Supreme Court in *Buckley* and reaffirmed in *Arizona Free Enterprise*, and applied by the lower courts in numerous cases since *Buckley*, the proposed small donor, matching funds system in S. 1 does not present any constitutional problems.

**S. 1 creates a voluntary small donor, public matching funds system for presidential and congressional candidates**

Campaign spending in the 2020 national elections shattered previous records with [\\$14.4 billion spent](#) on the presidential and congressional elections, more than twice as much as was spent in the 2016 national elections.

The campaign finance system today is flooded with funds coming from influence-seeking billionaires, millionaires, lobbyists, bundlers, business executives, dark money groups, Super PACs and special interest PACs.

As a result of Supreme Court decisions in [Citizens United v. FEC \(2010\)](#) and [McCutcheon v. FEC \(2014\)](#), the American people have been treated to the [spectacle](#) of the top donor in the 2020 election and his spouse by themselves giving \$218 million to influence the 2020 federal elections. The next leading individual donors provided \$153 million, \$72 million, \$68 million and \$67 million respectively.

The [national median family income](#) in the United States in FY2020 was \$78,500.

The top 100 individual and organizational donors during the 2020 national elections [gave \\$2.1 billion to Super PACs](#), evenly divided between liberal and conservative Super PACs.

This system may benefit the interests of the donors, the Super PACs, and the candidates they are supporting. But it certainly does not benefit the interests of the American people who have good reason to believe that big money interests drown out their voices in our elections and obtain influence over policy results in return for their giving.

The current system traps Members of Congress who have no alternative to this funding system and who end up obligated to big money funders.

S. 1 address this fundamental problem by creating an alternative financing system that allows federal candidates to finance their campaigns with small non-influence buying contributions up to \$200 which are matched by public funds at a 6 to 1 ratio.

The new system is entirely voluntary. It leaves in place the existing system for financing federal campaigns for those candidates who choose the status quo, while giving candidates an option to participate voluntarily in the new system.

There is one basic difference between the presidential public financing system enacted in 1974 and the proposed new small donor, matching funds system.

The presidential system was financed with tax revenues. The new system *prohibits* the use of taxpayer revenues to finance the matching funds payments. Instead, the new system is financed *entirely* by a small surcharge on civil and criminal penalties, and civil settlements, paid to the government by corporations, corporate executives, and wealthy tax cheats.

Anyone who claims that the new system is paid for with tax revenues is not being truthful.

There is another key difference: unlike the presidential system that took effect in 1976, there are no spending limits on candidates who participate in the new system. The participating candidates do have to agree, however, to limit the size of private contributions they accept to \$1,000 per donor, per election.

The growing ability to raise small contributions on the internet combined with the new matching funds system would allow candidates to run competitive races without being dependent on or obligated to influence-seeking funders.

The new, small donor-based system serves multiple public interests. It is important to

- ordinary Americans who believe their interests are being overwhelmed by the interests of big money funders.
- millions of small donors who believe their participation in the political process is seriously undercut by influence-seeking, monied interests.



- [women and people of color](#) who are repeatedly shortchanged in raising the money needed to run for Congress.
- Members of Congress who do not want to be obligated to big money funders.
- Members of Congress who want to spend more time serving their constituents and less time raising campaign money.

In recent years, states and localities have taken the lead in adopting publicly funded systems for their elections. This followed a landmark system enacted for state executive and legislative races in Connecticut in 2005. Numerous lower court decisions have rejected challenges to these systems.

Without a new alternative-funding system for federal elections, however, we cannot solve the problem of big money funders having undue influence on congressional policies. The problem will only grow worse in the years ahead as special interest, influence-seeking money in federal elections will continue to grow.

This growth is due mainly to the explosive growth of Super PACs and the new role of dark money nonprofits that followed the Supreme Court decision in *Citizen United* (2010). That decision opened the floodgates to allow massive amounts of unlimited contributions and unlimited secret contributions back into federal elections.

These are the same kind of contributions that led to the Watergate campaign finance scandals of the 1970s and to the “soft money” scandals of the 1990s.

As long as *Citizens United* remains the law of the land, we are not going to be able to stop unlimited contributions from being spent by Super PACs and non-profit groups in federal elections. What we can do, however, is what S. 1 does: provide federal candidates with an alternative way to finance their campaigns that will allow them run for office free from the need for and influence of big money funders.

## **The DISCLOSE Act incorporated into S. 1 closes a major loophole in the disclosure laws**

In 2000, Congress passed legislation to close a major loophole in the campaign finance disclosure laws that had resulted in Section 527 “political organizations” spending secret contributions to influence federal elections. The support for the legislation was overwhelmingly bipartisan with the [Senate voting 92 to 6](#) to pass the disclosure bill. Senate Republicans voted 48 to 6 for the legislation.

Ten years later, however, another major loophole in the disclosure laws was created when the *Citizens United* decision opened the door for nonprofits groups to spend secret contributions, or dark money, to influence federal elections. Legislation to close this new disclosure loophole, the DISCLOSE Act, passed the House and came within one vote of the 60 votes needed to break a filibuster in the Senate. This time, however, the disclosure bill [received](#) no votes from Senate Republicans.

In ten years, Senate Republicans had switched from 87 percent support for closing a disclosure loophole to zero support for closing a new disclosure loophole.

The DISCLOSE Act provisions in S. 1 are new disclosure requirements for corporations, labor unions, trade associations and non-profit advocacy groups that make “independent” campaign-related expenditures on ads to influence federal elections. The provisions establish reporting requirements only on organizations, not on individuals.

The general approach to disclosure in the DISCLOSE Act is modeled after disclosure provisions in the Bipartisan Campaign Reform Act of 2002 (BCRA), which were upheld as constitutional by the Supreme Court in 2003 in *McConnell v. FEC*.

Secret, unlimited, contributions spent by nonprofits to influence federal elections [exceeded \\$1 billion](#) in the 2020 elections.

These secret contributions are dangerous. Since the source and amount of the money are secret, there is no way to hold the donors who provide this money and the members of Congress who politically benefit from the money accountable for any corrupting influence the large contributions may exert on public policy decisions.

The DISCLOSE Act requires nonprofits that spend \$10,000 or more on campaign-related expenditures to disclose their donors of \$10,000 or more that help pay for the expenditures. The Act has anti-circumvention provisions that will capture the disclosure information even if efforts are made to hide the donors by passing money from one nonprofit group to another, or through a Super PAC.

The bill has two important safeguards to focus disclosure on contributions being used for campaign-related spending.

First, if a reporting organization makes its campaign-related expenditures using only funds in a segregated bank account, the organization only has to disclose its donors who made contributions of \$10,000 or more into that account and does not have to disclose any other donors to the organization.

Second, any donor to an organization may restrict that donation from being used for campaign-related expenditures, in which case that donor is not disclosed.

The Act also has an explicit safe harbor provision that exempts from disclosure any donor who may be subject to “serious threats, harassment or reprisals.” Under this provision, and as spelled out in Supreme Court decisions, disclosure will not be required in specific cases where a group can show a “reasonable probability” that disclosing the names of contributors would “subject them to threats, harassment or reprisals” from either government officials or private persons.

The Supreme Court in *Citizens United* made clear, however, that disclosure requirements are not invalid because of a generalized or theoretical concern about “public harassment.”

### **The DISCLOSE Act Is Constitutional**

In a 2010 case about disclosure of the names of petition signers (*Doe v. Reed*), Justice Scalia wrote:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . hidden from public

scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Since *Buckley v. Valeo* (1976), the Supreme Court has upheld the constitutionality of provisions enacted by Congress to require disclosure of money contributed or spent to influence federal elections. These disclosure requirements, the Court said, are an important bulwark against corruption and the appearance of corruption in government and provide the public with information to which voters should have access. The Court in *Buckley* stated, “The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions.”

The Court also said, “Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions.”

The Supreme Court in *Citizens United* applied its disclosure approach to independent spending in federal elections by nonprofits and other outside groups.

The Court in an 8 to 1 decision upheld the disclosure requirements for nonprofit groups making campaign-related expenditures to influence federal elections. The Court in *Citizens United* reaffirmed that disclosure requirements for campaign-related expenditures “do not prevent anyone from speaking,” and serve governmental interests in “providing the electorate with information” about the sources of money spent to influence elections so that voters can “make informed choices in the political marketplace.”

The Court noted that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.” Importantly, the Court noted the problems that result when groups run ads “while hiding behind dubious and misleading names,” thus concealing the true source of the funds being used to make campaign expenditures.

There are no legitimate privacy and associational concerns with the disclosure requirements in the DISCLOSE Act. Opponents to the legislation cite the Supreme Court’s decision in *NAACP v. Alabama* (1958), which protected the associational interests of a civil rights group against

disclosure of the group's membership lists when the group was under attack from government officials in the 1950s South.

The Supreme Court, however, in both *Buckley* and *McConnell*, rejected the analogy between campaign finance disclosure and the disclosure of membership lists struck down in the *NAACP* case. The Court said in *McConnell*, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure."

The Court in *Citizens United* also specifically rejected the argument that disclosure requirements can constitutionally apply only to ads which contain express advocacy or its functional equivalent, stating, "We reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."

The Court opinion in *Citizens United* stated, "And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (Congress 'has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose')."

Even for the ads that were at issue in *Citizens United*, "which only attempt to persuade viewers to see the film," and that "only pertain to a commercial transaction," the Court found there was a sufficient "informational interest" to justify a requirement to disclose the spending behind the ads because they referred to a candidate in the pre-election period.

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

The DISCLOSE Act defines as a campaign related expenditure covered by the disclosure requirements any ad that promotes, supports, attacks, or opposes (PASO) a candidate for office. The PASO test, which was also used in the Bipartisan Campaign Reform Act of 2002, was

upheld by the Supreme Court in *McConnell* as a constitutional way to define campaign-related activities.

The Court in *McConnell* rejected a First Amendment vagueness challenge to the PASO test, saying “the “words ‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ clearly set forth the confines within which potential party speakers must act to avoid triggering the provision.” The Court stated that the PASO words “‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”

The Court further stated that “any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating. The record on this score could scarcely be more abundant.”

### **The Honest Ads Act in S. 1 ensures disclosure of online campaign-related spending**

The campaign finance disclosure laws were largely written in the 1970s before the advent of the personal computer and well before the introduction of the internet. Thus, they do not take account of political spending online and do not ensure that such spending is disclosed and subject to an appropriate disclaimer requirement.

The Honest Ads Act, which is incorporated into S. 1, addresses those problems by modernizing the disclosure and disclaimer requirements as they apply to online spending.

This is particularly important since online spending was a principal means by which agents of the Russian government and other foreign actors were able to spend money to interfere with the 2016 presidential election. The foreign spending was largely hidden from public view because the online spending was not covered by existing disclosure requirements.

As the Brennan Center [noted in a report](#) on this matter:

Facebook posts by agents of the Kremlin disguised to come across as Americans, promoted by paid advertising and shared by unsuspecting Americans, reached a total of 126 million Facebook users leading up to the 2016 election. The operatives also posted more than 131,000 messages on Twitter and more than 1,000 videos on YouTube.

Across those three platforms, Russian groups spent at least \$400,000 on political advertising.

The Honest Ads Act closes a major loophole in the disclosure law by applying to internet ads the same disclosure and disclaimer rules that currently apply to “electioneering communications” that are broadcast on TV and radio. This provision would thus expand disclosure rules to include any paid online ads that mention a candidate, not just the ones that contain express advocacy. This will prevent online advertisers from avoiding disclosure requirements by using sham “issue ads” to praise or attack a candidate without expressly calling for a vote for or against them.

The Act also requires large online ad platforms, including social media platforms like Facebook, to maintain public databases of all online political advertisements, whether or not they mention specific candidates. This also will greatly increase transparency of political advertising by providing information about online ads, including the identity of the spender, the amount spent, the targeting and the timing of the payments. This database requirement for online ads is comparable to a current requirement for TV and radio companies, which already are required to maintain public databases of spending for political ads.

Finally, the Act would require online advertisers to include a disclaimer that discloses the identity of the spender, so that viewers and listeners of the ad will have information about the source of money behind the ad. This will, as the Supreme Court has noted in upholding such disclaimer requirements for TV and radio ads, give viewers and listeners the information they need to evaluate the ad. But the Act also includes provisions that tailor the size and content of disclaimers to the unique circumstances of small online political advertising to ensure that disclaimer requirements can feasibly be met in online ads.

### **Reform of the Failed Federal Election Commission**

The Federal Election Commission is a failed agency.

In recent history, it has often been unable to act at all on key issues because of partisan and ideological deadlock. It also recently lacked a quorum to act for months and therefore could not even muster itself to reach a deadlock.

Either way, campaigns know they can operate with virtual impunity and without consequences for potential campaign finance violations.

This has created the modern political equivalent of the Wild West without a sheriff. It also means that if the FEC is not reformed, any new campaign finance laws that are enacted will be undermined by an enforcement agency that rarely takes enforcement actions.

As far back as 2009, [a \*Washington Post\* editorial](#) described the problems with the FEC as follows:

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

Since then, the FEC even more so has become an agency that does not act.

S. 1 incorporates the Restoring Integrity to America's Elections Act to reform the FEC.

These reforms modify the structure of the current FEC by decreasing the number of its members from six to five, consisting of a chairman and four other members, all of whom are to be appointed by the President, with the advice and consent of the Senate.

The bill requires the President to appoint a Blue Ribbon Bipartisan Advisory Panel to recommend to the President up to three nominees for each seat on the agency, though the President is not required to select a nominee from the list of recommendations. The list of recommendations will be made public when the President submits his nominee to the Senate.

The Bipartisan Blue Ribbon Advisory Panel will include individuals representing each major political party and individuals who are independent of a political party. The panel will consist of an odd number of individuals selected by the President from retired federal judges, former law enforcement officials, or individuals with experience in election law. The President may not select any individual to serve on the panel who holds any public office at the time of selection



and shall also make reasonable efforts to encourage racial, ethnic, and gender diversity on the panel.

The members of the FEC will each serve six-year terms. No more than two members of the agency can be members of the same political party. This means that agency actions will require at least one vote to act from either an independent or minority party member, or a member of an opposite party. Members of the FEC are not eligible for reappointment (unless originally appointed to fill vacancy for less than half of an unexpired term).

The FEC chairman will have broad powers to manage the agency, including the power to appoint or remove the staff director and general counsel and to prepare agency budgets.

The reform provisions make important modifications to the existing enforcement process. Upon the filing of an enforcement complaint or on the basis of information known to the agency, the general counsel will make a recommendation as to whether there is “reason to believe” a violation has occurred.

The FEC will have 30 days to overrule the general counsel’s recommendation by an affirmative vote of at least three of its members. If not overruled, the general counsel’s recommendation will take effect, and if the recommendation is to find “reason to believe” a violation has occurred, an investigation will take place.

After an investigation, the general counsel will make a recommendation as to whether to find “probable cause” that a violation occurred. The Commissioners have 30 days to approve or disapprove the recommendation by majority vote.

Prior to initiating an enforcement action, the FEC must give any person under investigation notice and opportunity to make the case that there are no reasonable grounds to believe a violation has occurred or is about to occur.

Any person aggrieved by an agency decision to dismiss or fail to act on a complaint can seek judicial review in the District Court for the District of Columbia. The court will determine whether the agency’s decision is contrary to law, and in cases where the potential penalty is \$50,000 or more, will disregard any agency defense based on a claim of prosecutorial discretion.

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

Critics contend that shifting to an odd number of members will necessarily make the agency function on a partisan basis.

There are a number of responses to this charge. First, this criticism ignores the fact that no more than two members of the agency can be from the same political party, thus preventing any party from obtaining a partisan majority of the agency. Critics respond that this is an insufficient protection, arguing that a nominally independent member could choose to align with the members of one party or the other.

This ignores the important role in the appointment process that will be played by the Blue Ribbon Advisory Panel which, in recommending a short list of nominees to the President, will be charged with identifying credibly non-partisan candidates for the seat to be held by the independent member. Senate confirmation of any nominee will be a further check to ensure that the independent seat is filled by a member who has the requisite credentials and credibility to serve public interests and not narrow partisan ones.

### **Strengthening the rules that prevent coordinated spending between outside groups and candidates**

S. 1 also incorporates the Stop Super PAC-Candidate Coordination Act.

The current coordination regulations as administered by the FEC have rendered almost nonexistent the statutory prohibition on outside spenders coordinating with the candidates they are supporting.

In 1974, Congress enacted limits on contributions to candidates. These limits were held constitutional by the Supreme Court in *Buckley* as necessary to prevent corruption and the appearance of corruption. The Court agreed that "while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system

permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.”

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

After the Supreme Court’s *Citizens United* decision in 2010 opened the door for the explosion of Super PACs, it did not take long for a particularly insidious variant of the Super PAC to enter the system: the single-candidate Super PAC.

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

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

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

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

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

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

Both the candidate and the donor know, for example, that a \$1 million contribution to the single-candidate Super PAC is the same as giving that money directly to benefit the candidate, in circumvention of the candidate contribution limit.

Single-candidate Super PACs surfaced in the 2012 presidential campaign. Almost every presidential candidate, including President Obama and Republican nominee Romney, had a Super PAC focused only on their candidacy. Democracy 21 [filed a complaint](#) and requested a Justice Department investigation of the legality of the single-candidate PACs supporting Obama and Romney.

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

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

Contributors who could only give \$2,500 per donor to the Obama and Romney presidential campaigns gave six- and seven-figure contributions to Priorities USA Action and Restore Our Future. And Obama and Romney were no doubt aware of their generous benefactors.

Single-candidate Super PACs spread quickly to congressional elections, and [by the 2018 elections cycle, 256 individual-candidate Super PACs raised over \\$175 million](#) in unlimited contributions, according to the Center for Responsive Politics (CRP). This included many single-candidate Super PACs that were run by the candidate's former political aides and close associates or were financed by the candidate's relatives or by single donors.

Rapid growth continued during [the 2020 election cycle](#) when 324 single-candidate Super PACs raised \$802 million and spent \$647 million dollars in unlimited contributions.

Although we cannot end all Super PACs as long as the *Citizens United* decision stands, we can strengthen and improve the coordination rules to eliminate the de facto coordination between single-candidate Super PACs and the candidate they support. We can address the reality that single-candidate Super PACs are almost always coordinated with the candidate they support.

In so doing, the expenditures of these individual-candidate Super PACs would become in-kind contributions and would be limited to \$5,000 per year.

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

S. 1 embodies two complementary approaches to establish a legislative definition of “coordination.” First, it strengthens the general statutory definition of coordination and overrides current ineffectual FEC regulations, by using the Supreme Court’s own terms about what constitutes “independent spending” and when a spender is “coordinated.” Second, the bill deals directly with defining coordination in the case of single-candidate Super PACs.

The Supreme Court in a number of decisions stated what it had in mind when it said outside spending had to be independent from candidates.

The Court said that independent spending must be done “totally independently,” *Buckley* (1976); “not pursuant to any general or particular understanding with a candidate,” *Colorado Republican Federal Campaign Committee* (1996) (“*Colorado I*”); “without any candidate’s approval (or wink or nod),” *Colorado Republican Federal Campaign Committee* (2001) (“*Colorado II*”); and must be “truly independent,” *id.* at 465.

The bill defines a “coordinated expenditure” to include a payment which is made “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate or a candidate’s campaign committee and defines “cooperation, consultation or concert with” to include any payment or communication by a person “which is not made entirely independently” of a candidate or his or her authorized committee.

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

These definitions, which are adapted from language in the relevant Supreme Court decisions, establish a general rule by defining coordination between any outside spender (including Super PACs and non-profit section 501(c) organizations), and a candidate or campaign,

The rule applies to any kind of campaign-related expenditure, including expenditures for public communications, voter mobilization and other campaign activities on behalf of a candidate. The bill does not apply to spending by a political party on behalf of the candidates of the party.

S. 1 exempts from the coordination rules any discussions with a candidate that are solely for purposes of lobbying the candidate on a policy matter, provided there are no discussions between the outside spender and the candidate that relate to the candidate’s campaign.

The bill separately addresses single-candidate Super PACs by listing criteria that establishes when a PAC is coordinated with the candidate, such as the PAC being established at the suggestion or request of the candidate or being managed by former employees, consultants or by close relatives of the candidate.

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

### **Voting Rights Provisions**

While our panel does not deal with voting rights, I want to state that Democracy 21 strongly supports the voting rights provisions in S. 1 and believes they are essential to prevent the voter restrictions that are being pursued in state legislatures across the country. The purpose of voting rules should be to make it easy, not difficult, to vote safely and securely.

Trump’s Big Lie that there was massive voter fraud in the 2020 elections is flatly contradicted by the reality that [no meaningful fraud has been found](#) to have taken place in the 2020 elections. Yet

under the guise of “protecting the integrity” of elections, laws are being pursued in state legislatures to make it as hard as possible for millions of Americans to vote in federal elections.

This cannot be allowed to stand.

Many of the voting provisions in S. 1 come from the Voter Empowerment Act, introduced for years by the late American icon, Representative John Lewis. They include provisions for voting by mail, for early in-person voting, for automatic, online and same day voter registration, and other requirements that are designed to enable eligible citizens to vote safely and securely.

These voting provisions must be enacted to stop the effort to return the country to the days of the Jim Crow laws.

In addition to the voting rights provisions of S. 1, Democracy 21 strongly supports the other Titles in the legislation which address many other crucial problems facing our democracy.

### **Extreme Partisan Gerrymandering**

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

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

### **Strengthening Ethics Rules**

The bill responds to recent executive branch conflict of interest abuses by adopting new requirements for the President and Vice President and strengthening ethics requirements for executive branch employees.

Former President Trump became the first President since President Nixon to fail to disclose his income tax returns as a candidate and as a President. Trump also refused to divest ownership of business interests that were rife with conflicts of interest and self-dealing abuses.

S. 1 requires the President and Vice President, and general election candidates for President and Vice President, to submit their tax returns for the 10 most recent years to the FEC and requires the FEC to make them public. The legislation also requires the President and Vice President to divest ownership of their financial interests that pose potential conflicts of interest.

The legislation also requires the Judicial Conference to issue a Code of Conduct for Supreme Court Justices as it does for lower federal court judges. This makes common sense and does not interfere with the independence of the judiciary as it leaves it to the Judicial Conference to establish the ethics code. But there is no reason that justifies the judiciary being exempt from having these kinds of basic ethics standards.

The bill strengthens the conflict of interest and revolving door provisions for executive branch officials and codifies the Ethics Executive Order pledge that President Biden required for executive branch appointees.

Importantly, it provides increased authority for the Director of the Office of Government Ethics and improves that Office's ability to enforce executive branch ethics laws.

S. 1 closes a major loophole in the Lobbying Disclosure Act by ensuring that individuals who provide behind-the-scenes political and strategic consulting services in support of lobbying activities are subject to reporting and disclosure requirements.

The legislation also provides for improvements to congressional ethics rules, including a prohibition on Members from serving on boards of for-profit entities and from using their official position to introduce or pass legislation that has a principal purpose to further their pecuniary



interest. The legislation would also require campaign finance disclosure reports to identify donors who are registered lobbyists.

### **Conclusion**

S. 1 incorporates reforms that are essential to repairing our political system, campaign finance system and democracy. These reforms have been developed over a number of years and are not being placed before the Senate for the first time.

Democracy 21 urges the Senate Rules Committee to report S. 1 promptly and further urges the Senate to pass the bill promptly and demonstrate to the American people that Congress is committed to our representative system of government working for all eligible voters and working for the American people, not just for monied interests.