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United States House of Representatives
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Chairperson Lofgren, Vice Chairperson Raskin, Ranking Member Davis, and Members of the Committee:

Thank you for the opportunity to testify today regarding oversight of the Federal Election Commission. My name is Adav Noti. I am Senior Director of Trial Litigation and Chief of Staff of the Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. Before joining the Campaign Legal Center, I served as Associate General Counsel of the Federal Election Commission from 2013 to 2017, and prior to that in a number of other nonpartisan legal positions within the agency.

Congress has charged the FEC with the solemn duty of enforcing and implementing our Nation's most important anti-corruption laws. But I have seen first-hand how the FEC is utterly failing at that mission. The failure of the FEC is one of the best-kept secrets in government, and one of the most shameful. This is

not an appropriations issue — the FEC's funding has been adequate in recent years — but rather the slow-motion collapse of an agency whose structural deficiencies have been intentionally leveraged to undermine the laws it is charged with enforcing. And the FEC's failure has real consequences for all Americans, who rely on the agency to keep our elections fair and safe from external intrusion.

In this testimony, I will focus on three specific ways in which the FEC is failing to meet its statutory mandate: (1) the FEC does not enforce the law; (2) the FEC does not explain the law; and (3) the FEC is not protecting our elections from illegal foreign interference. I will note how each of these failings directly harms American voters. Finally, I will discuss how Congress could fix many of the FEC's most pressing problems through simple, commonsense structural reforms.

I. The FEC Does Not Enforce the Law.

Under current statutes, the FEC's nonpartisan career staff cannot investigate enforcement matters without the affirmative votes of four Commissioners.[1] When Commissioners "deadlock" with a 3-3 vote on an enforcement case, the three non-enforcing Commissioners thereby block the investigation in its entirety, preventing any possibility that the FEC will ever punish the alleged wrongdoers.

Increasingly over the last decade, the FEC's law-enforcement activity has been gutted by deadlock after deadlock on critical enforcement matters. The FEC's own enforcement statistics are damning: as the agency admitted to the Committee

[1] 52 U.S.C. § 30109(a)(2).

earlier this year, of the enforcement matters that the Commissioners consider in their official meetings, *a majority* (approximately 50.6% since 2012) have at least one deadlock and fail to reach the four affirmative votes necessary to pursue the matter.[2] In other words, the FEC does not deadlock occasionally or sporadically — it deadlocks *most of the time*. And even this shocking statistic almost certainly understates the true extent of the agency's failure, as many of the matters that the FEC resolves without deadlocked votes are minor and uncontroversial. In enforcement cases involving major violations or high-profile elections, the deadlock rate is even higher.

Not only are deadlocks now the norm in enforcement votes, but Commissioners are also blocking enforcement by voting far less frequently. A study from 2016 found that the FEC held an average of 727 votes per year on enforcement actions between 2003 and 2007.[3] But since 2008, that number has inexplicably and precipitously dropped, to an average of only 183 votes per year.[4]

Even in those rare instances when the FEC votes, finds a violation, and obtains financial penalties, those penalties are trivially small. For example, earlier

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[2] FEC, *Responses to Questions from the Committee on House Administration*, at 20-22 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf; *see also* Ellen L. Weintraub, *Chair Ellen L. Weintraub's Supplemental Responses to Questions from the Committee on House Administration*, at 4 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf. In many cases, these deadlocked votes involve some Commissioners voting to reject the recommendations of the FEC's professional staff attorneys. *Id.*

[3] Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing,* at 1 (July 19, 2016), http://www.citizen.org/documents/FEC%20deadlock%20updated%20July%202016.pdf.

[4] *Id.*

this year, in response to a Campaign Legal Center complaint, the FEC penalized a super PAC for soliciting and accepting an illegal $1.3 million contribution from a Chinese-owned corporation.[5] The super PAC's penalty for illegally soliciting and accepting this $1.3 million was a $390,000 fine, which the FEC allowed the super PAC to pay with its existing funds. Stated differently, the FEC — the agency charged with keeping foreign money out of our elections — affirmatively allowed a group that took $1.3 million in illegal foreign funds to keep $910,000 of it.

Such "enforcement" sends a clear signal that special interests can finance elections illegally without fear of meaningful consequences. And special interests have happily responded in a number of ways — perhaps most notably by hiding the sources of their spending.

The FEC's refusal to impose real penalties for violating disclosure laws has led to a significant increase in secret political spending: at least *$1 billion* in "dark money" since the 2006 election cycle, according to a Center for Responsive Politics analysis.[6] This is despite Congress explicitly mandating disclosure of large donors to groups that spend money influencing elections, and despite the Supreme Court in

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[5] Notification to Campaign Legal Ctr. & Conciliation Agreement, MUR 7122 (Right to Rise USA, et al.) (Mar. 8, 2019), https://www.fec.gov/files/legal/murs/7122/19044461656.pdf.

[6] Anna Massoglia, *State of Money in Politics: Billion-dollar 'dark money' spending is just the tip of the iceberg*, CTR. FOR RESPONSIVE POLITICS (Feb. 21, 2019), https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/. This problem is not unique to any one political party: although conservative dark money groups have historically outspent progressive ones, progressive dark money groups accounted for about 54% of the $150 million in dark money spent during the 2018 election cycle. *See* Michael Beckel, *In 2018 Midterms, Liberal Dark Money Groups Outspent Conservative Ones for the First Time Since Citizens United: Total Dark Money Spending Since Citizens United Nears $1 Billion*, ISSUE ONE (Jan. 2019), https://www.issueone.org/wp-content/uploads/2019/01/Post-CU-Dark-Money-Mini-Report.pdf.

decisions like *Citizens United* endorsing "effective disclosure" that is "rapid and informative" as a constitutional means of "'insur[ing] that the voters are fully informed'" and enabling their "informed choices in the political marketplace."[7]

Commissioners have deadlocked on enforcing disclosure laws in even the most egregious dark money cases. For example, in one case FEC lawyers calculated that more than 68% of a dark money group's $4.5 million total spending went towards influencing elections.[8] Contrary to law and Supreme Court precedent, the Commissioners deadlocked on whether that group was required to disclose its donors.[9] In another case, arising out of the 2012 and 2016 election cycles, several LLCs were used to mask the identities of Democratic and Republican donors who gave contributions to super PACs ranging from $857,000 to over $12 million. Some donors even admitted to the media that they contributed through shell corporate entities to hide their identities from the public. The FEC sat on the matters until 2016, then deadlocked; three Commissioners acknowledged that the contributions violated the law but voted against enforcement anyway.[10]

The FEC-fueled rise of dark money has real consequences for American voters. Dark money groups — whose funders are secret, and therefore

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[7] *Citizens United v. FEC*, 558 U.S. 310, 368-70 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

[8] First General Counsel's Report, at 3, MUR 6872 (New Models) (May 21, 2015), https://www.fec.gov/files/legal/murs/6872/17044432599.pdf.

[9] Certification, at 1, MUR 6872 (New Models) (Nov. 15, 2017), https://www.fec.gov/files/legal/murs/6872/17044432619.pdf.

[10] Statement of Reasons of Commissioners Petersen, Goodman, and Hunter, at 1-2, 8, MURs 6485, 6487 & 6488, 6711, 6930 (W. Spann LLC, *et al.*) (Apr. 1, 2016), https://www.fec.gov/files/legal/murs/6485/16044391107.pdf.

unaccountable — are demonstrably more likely to finance polarizing negative messages.[11] Every election cycle, millions of Americans are subjected to a barrage of such "attack" advertising from non-disclosing groups emboldened by the FEC's enforcement failures.

Dark money also skews public policy in favor of those dark money donors, at the expense of average American families. In Wisconsin, for example, the Texas-based CEO of a lead paint company facing lawsuits from lead-poisoned Wisconsin children gave $750,000 to a dark money group supporting state politicians, and those politicians then rewrote the law to block the children's lawsuits.[12] The ill children and their families could not possibly match the money given by the Texas CEO — and because the money was given in secret, they could not even call out the connection between the money and the legislation.

The secret political spending the FEC has allowed to proliferate also provides an attractive avenue for foreign actors to surreptitiously pour money into our elections. When the FEC allows politically active groups to keep their donors hidden, it is impossible to know whether their money is coming from domestic or

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[11] *See* Frank Bass, *'Dark Money' Groups More Likely to Sponsor Attack Ads*, MAPLIGHT (Aug. 17, 2016), https://maplight.org/story/dark-money-groups-more-likely-to-sponsor-attack-ads/ (finding that 70% of dark money groups' television ads were negative in 2016 presidential primary, compared to 20% of overall ads and 1% of candidate committees' ads); *see also* Issue One, *Dark Money Illuminated* (2018), https://www.issueone.org/dark-money-press-release/.

[12] *See, e.g.*, Pawan Naidu, *Secret Cash Helped Those Who Rewrote Wisconsin Law to Block Claims of Lead-Poisoned Kids*, MILWAUKEE JOURNAL SENTINEL (Sept. 23, 2018), https://www.jsonline.com/story/opinion/contributors/2018/09/23/secret-cash-helped-those-who-rewrote-state-law-block-lead-claims/1405053002/; *see also* Peter Earle, *Senate Must Act to Bring Dark Money to Light,* DAILY KOS (Apr. 30, 2019), https://www.dailykos.com/stories/2019/4/30/1854342/-Senate-Must-Act-to-Bring-Dark-Money-to-Light.

foreign sources. Occasionally, we find out — but not thanks to the FEC. For example, in 2016 the FEC deadlocked on whether even to investigate CLC's complaint about a shell corporation that had given nearly $1 million to a super PAC.[13] A subsequent Department of Justice probe later revealed (embarrassingly for the FEC) that the super PAC contribution had not only been laundered through the shell corporation as alleged, but also that the money had in fact come from a foreign fugitive.[14]

In addition to facilitating dark money, the FEC's non-enforcement has enabled corporations and super PACs to illegally coordinate their spending with candidates. Remarkably, by the FEC's own admission, the agency has *never* found a violation of its coordination rules in the years since *Citizens United*.[15] It is concerning enough when a small handful of ultra-wealthy individuals and corporations give tens or hundreds of millions of dollars to independent super PACs. Such large amounts of money trample the First Amendment rights of average Americans by effectively drowning out their voices in the electoral process. But these practices become even more concerning when the supposedly "independent" groups work directly with candidates. With a super PAC effectively operating as an arm of a campaign, million-dollar super PAC contributions are largely

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[13] Certification, at 1, MUR 6930 (Prakazrel "Pras" Michel, *et al.*) (Feb. 25, 2016), https://www.fec.gov/data/legal/matter-under-review/6930/.

[14] *See* Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel Indictment Exposes How FEC Dysfunction Opens Our Elections to Foreign Meddling,* CAMPAIGN LEGAL CTR. (May 15, 2019), https://campaignlegal.org/update/delay-deadlock-dismiss-pras-michel-indictment-exposes-how-fec-dysfunction-opens-our.

[15] FEC, *Responses*, *supra* n.2, at 24-25; Weintraub, *Supplemental Responses*, *supra* n.2, at 4-5.

indistinguishable from contributions directly to the campaign, and pose the same risk of corruption. Yet despite the Supreme Court cautioning that unlimited spending must be kept "totally independent[ ] of the candidate,"[16] the FEC has allowed these practices to flourish.

I could list dozens of additional cases in which the FEC has let obvious lawbreakers off the hook. In 2016, a presidential campaign repeatedly sent fundraising solicitation emails to foreign government officials — at official foreign government email accounts like @parliament.uk — and continued sending the solicitations even after media reports on the illegal practice. The FEC's career attorneys recommended finding reason to believe that the campaign had violated the ban on soliciting contributions from foreign nationals (which, of course, it had); the FEC's Commissioners deadlocked.[17] The Commissioners also deadlocked on the nonpartisan staff's recommendation to investigate a case in which a corporate CEO put immense pressure on his employees to give money to his preferred candidates and the company PAC, including singling out employees who declined to attend fundraisers and sending letters to employees' homes with suggested contribution amounts.[18]

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16 *See Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

17 First General Counsel's Report, at 2, MURs 7094, 7096, 7098 (Donald J. Trump for President, Inc.) (Feb. 3, 2017), https://www.fec.gov/files/legal/murs/7094/18044451817.pdf; Certification, at 1, MURs 7094, 7096, 7098 (Donald J. Trump for President, Inc.) (Aug. 2, 2018), https://www.fec.gov/files/legal/murs/7094/18044451829.pdf.

18 First General Counsel's Report, at 2, MUR 6661 (Murray Energy) (Feb. 1, 2016), https://www.fec.gov/files/legal/murs/6661/16044394584.pdf; Certification, at 1-2, MUR 6661 (Murray Energy) (Apr. 12, 2016), https://www.fec.gov/files/legal/murs/6661/16044394606.pdf.

The common theme through all these cases is that the FEC is not protecting the rights of American voters. When Americans go to the polls, they have a right to know who is trying to influence their vote, and to know which industries or groups are providing financial support to each candidate. Americans have a right to maintain their personal political beliefs, and to not have their jobs be dependent on giving money to the candidates of their employers' choosing. Americans have a right to be heard in our democracy, and to not have their voices drowned out by a small handful of wealthy special interests.

Congress has enacted laws to protect all of these rights. But because of the FEC's abject failure to fulfill its law-enforcement mission, such protection is currently an illusion.

II. The FEC Does Not Explain the Law.

On its website, the FEC claims that "[a]s part of its role administering campaign finance law, the Commission issues regulations."[19] In reality, the FEC has promulgated a grand total of *one* substantive rule in the past decade. The FEC's failures at explaining the law are so pervasive that Commissioners have spent the last six years unable to agree on how to update its existing rules on "telegrams," typewriters," and "magnetic diskettes." And while the Russian government engages in "systematic and sweeping" digital campaigns to interfere in our elections, the FEC's Commissioners express uncertainty as to whether smartphone apps should be treated as "websites."

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[19] FEC, *Regulations*, https://www.fec.gov/legal-resources/regulations/ (last visited Sept. 22, 2019).

Earlier this year, the Committee asked the FEC to identify each rulemaking the agency has completed since January 1, 2012 (excluding certain nondiscretionary adjustments mandated by Congress). The Commission identified a single substantive rule.[20] Yet the Commission's own response to this Committee confirms that there is no shortage of important FEC rulemakings that have been lingering for an inexcusably long time. Three matters in particular highlight the depth and pervasiveness of the agency's inability to perform one of the most crucial functions assigned to it by Congress.

Internet Communication Disclaimers. When I was named the FEC's Associate General Counsel for Policy in February 2013, the most pressing matter on the agency's policy docket was a draft rulemaking notice that would have explained when and how digital campaign ads must carry disclaimers identifying their sponsors. At the time, that rulemaking was already two years old and had not even reached the stage of a proposed rule.

Today, six and a half years later, the FEC's Commissioners *still* have not agreed on a proposed rule. Thus, for eight years, the FEC has failed to explain the rules for disclaimers on paid political digital advertising. In the meantime, digital political ad spending has skyrocketed: in the 2018 midterm elections, an estimated

[20] FEC, *Responses*, *supra* n.2, at 27, 30-37; *see also* Reporting Multistate Independent Expenditures and Electioneering Communications, 83 Fed. Reg. 66590 (Dec. 27, 2018), https://www.govinfo.gov/content/pkg/FR-2018-12-27/pdf/2018-27800.pdf.

$1.8 billion — 20 percent of total ad spending — was spent on digital political ads.[21] This was up from $71 million — less than one percent — in the 2014 midterms.[22]

In its two most recent campaign finance opinions, the Supreme Court noted approvingly the role "modern technology" could play in making it easier to inform voters about the sources of election-related spending.[23] But in the absence of FEC rules explaining when and how disclaimers must be presented on digital political ads, modern technology has been transformed from a promising method of informing voters into a tool for foreign actors to interfere in our elections.

Special Counsel Robert S. Mueller III found that "[t]he Russian government interfered in the 2016 presidential election in a sweeping and systematic fashion."[24] A key feature of Russia's election meddling involved a social media campaign "designed to provoke and amplify political discord in the United States."[25] This included spending over $100,000 on thousands of Facebook ads, many of which "explicitly supported or opposed a presidential candidate."[26] Beyond Russia's subversive efforts to influence American voters through online ads and social media

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21 Kip Cassino, *Bracing for Impact: 2018 Political Advertising Set to Break Records*, BORRELL ASSOCIATES, INC. (2018), https://www.borrellassociates.com/industry-papers/papers/fall-update-2018-political-advertising-set-to-break-records-detail.

22 *Id.*

23 *Citizens United*, 558 U.S. at 370 (2010); *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014).

24 SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION: VOLUME 1, at 1 (Mar. 2019).

25 *Id*. at 4.

26 *Id*. at 25; *see also* Brendan Fischer, *What Special Counsel Mueller's Report Tells Us About Campaign Finance Law and Foreign Interference,* CAMPAIGN LEGAL CTR. (May 2019), https://campaignlegal.org/sites/default/files/2019-05/05-08-19%20FI%20issue%20brief%201030am.pdf.

posts, Russia's Internet Research Agency also fooled unsuspecting American citizens into showing up at Russian-organized political rallies.[27] Russian-generated political content was even promoted and retweeted by campaign officials.[28]

If effective online disclaimer and disclosure laws had been in place in 2016, the professionals who monitor elections for illegal conduct — including the FBI, journalists, and watchdog groups — would almost certainly have detected Russia's influence campaign sooner. It is of course doubtful that Russia would have fully complied with disclosure requirements, but noncompliant ads would have raised red flags for investigation, and Russia might have been deterred from engaging in the effort in the first place.

Yet three years later, and one year out from the 2020 presidential election, we are no closer to having guidance on the federal transparency requirements for digital political ads. (And as long as the FEC lacks a quorum, progress on that front is impossible.) Meanwhile, digital political ad spending is projected to reach nearly $3 billion next year,[29] and experts are warning that foreign election interference is likely to expand beyond Russia to include other hostile governments

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[27] Emily Birnbaum, *Mueller identified 'dozens' of US rallies organized by Russian troll farm*, THE HILL (Apr. 18, 2019), https://thehill.com/policy/technology/439532-mueller-identified-dozens-of-us-rallies-organized-by-russian-troll-farm.

[28] *Id.* ("Trump campaign officials, including senior adviser Kellyanne Conway and Donald Trump Jr., cited and retweeted content from the troll farm about topics including voter fraud and Clinton's s handling of classified information, according to Mueller.").

[29] *See* Alexandra Bruell, *Political Ad Spending Will Approach $10 Billion in 2020, New Forecast Predicts*, WALL ST. J. (Sept. 20, 2019), https://www.wsj.com/articles/political-ad-spending-will-approach-10-billion-in-2020-new-forecast-predicts-11559642400.

such as China, Iran, and North Korea.[30] With continued inaction by the FEC, some social media platforms have resorted to creating their own transparency measures.[31] But these voluntary systems are insufficient, underenforced, and serve primarily to highlight the FEC's abdication of its congressionally mandated role to determine the proper application of campaign finance laws in the digital era.[32]

Political Party Special Purpose Accounts. In the Consolidated and Further Continuing Appropriations Act of 2015[33] (also known as the "Cromnibus"), Congress allowed the national political parties to accept six-figure contributions from individual donors for certain special-purpose accounts. Specifically, this widely criticized legislation allowed the national parties to raise hundreds of thousands of dollars per contributor for particular uses arising from presidential nominating conventions, party headquarters buildings, and election recounts.[34]

Congress charged the FEC with spelling out the details of the permissible uses and requirements of these new accounts, but the FEC has failed to act. In the

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[30] Craig Timberg & Tony Romm, *It's not just the Russians anymore as Iranians and others turn up disinformation efforts ahead of 2020 vote*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/technology/2019/07/25/its-not-just-russians-anymore-iranians-others-turn-up-disinformation-efforts-ahead-vote/; Darrell M. West, *Foreign campaign intervention may go way beyond Russia to China, Iran, North Korea, and Saudi Arabia*, BROOKINGS INST. (Aug. 9, 2019), https://www.brookings.edu/blog/fixgov/2019/08/09/foreign-campaign-intervention-may-go-way-beyond-russia-to-china-iran-north-korea-and-saudi-arabia/.

[31] Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center's Erin Chlopak*, HEWLETT FOUND. (May 28, 2019), https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/.

[32] *See* Adav Noti, *Where the Patchwork of Digital Regulation Could Lead*, CAMPAIGNS & ELECTIONS (June 10, 2019), https://www.campaignsandelections.com/campaign-insider/where-the-patchwork-of-digital-regulation-could-lead.

[33] Pub. L. 113-235, 128 Stat. 2130, 2772 (2014).

[34] 52 U.S.C. § 30116(a)(9).

more than four years that have passed since the new accounts were established, the FEC has not even *proposed* new rules to govern the accounts.[35] As a result, both of the major political parties have engaged in wide-ranging uses of Cromnibus funds that do not appear to have any real connection to their statutorily identified purposes.[36] Whatever constraints Congress thought it was imposing on the Cromnibus accounts have been rendered a nullity by the FEC's inability to promulgate interpretations of statutes.

Technological Modernization. The Commission's regulatory dysfunction is not limited to major issues like ensuring digital ad transparency and regulating oversized contributions. A borderline comical — but nonetheless telling — example of the FEC's inability to explain the law is the Commissioners' inability to agree on the most basic modernizations of the agency's rules. For example, Commissioners have been unable to reach agreement for the last six years on how to update regulations that refer to such cutting-edge technologies as "telegrams," typewriters," and "magnetic diskettes."[37] Routine deadlocks on simple matters give little hope that the FEC, as currently structured, will be able to make progress on explaining the law in the context of more important and complex issues.

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[35] In a particularly galling example of FEC dysfunction, the Commission voted at a December 2015 meeting to refer to the agency's Regulations Committee further work on a notice of proposed rulemaking drafted by the FEC's Office of General Counsel. The Commission's Regulations Committee did not meet again until 2018. *See* FEC, *Responses*, *supra* n.2, at 36.

[36] *See* Letter from Brendan M. Fischer to Neven F. Stipanovic, Acting Associate General Counsel, Re: REG 2014-10: Party Contribution Limits (May 17, 2019), https://campaignlegal.org/sites/default/files/2019-05/05-17-19%20REG%202014_10%20Cromnibus%20Letter.pdf.

[37] *See* Technological Modernization, 81 Fed. Reg. 76416, 76432, 76433 (Nov. 2, 2016), https://sers.fec.gov/fosers/showpdf.htm?docid=353768.

In the absence of rulemakings, political actors desperate for legal guidance have turned to the FEC's advisory opinion process. But as the Brennan Center's Dan Weiner has explained:

> The use of advisory opinions to develop campaign finance law is inherently problematic . . . [and] a very poor substitute for rulemaking. Those opinions are issued under a compressed time frame that affords few avenues for fact-finding; there is no opportunity for anyone other than the person who requested the opinion to appear before the Commission to testify; and the entire process tends to be dominated by a small cadre of repeat participants from major Democratic and Republican law firms.
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> In any event, the advisory opinion process is also increasingly dysfunctional. . . . Prior to 2008, the Commission deadlocked . . . on 4.9 percent of requests per year on average; in a number of years there were no deadlocks. Between 2008 and 2017, the deadlock rate jumped to 24.1 percent on average — a more than fivefold increase — almost entirely along party lines. And as the Commission's reputation for gridlock has spread, the number of advisory opinion requests it receives has declined, from a high of 147 in 1980 to a low of 13 in 2017.[38]

For example, in 2017 the FEC deadlocked on an advisory opinion asking the uncomplicated question of whether political committees' Twitter pages must comply with the disclaimer statutes that apply to all public communications by political committees.[39] Also in 2017, although the FEC technically issued an opinion regarding disclaimer requirements for Facebook advertising, the Commissioners

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[38] Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform* at 5, BRENNAN CTR. FOR JUSTICE (Apr. 2019), https://www.brennancenter.org/sites/default/files/publications/2019_04_FECV_Final.pdf (internal quotation marks omitted).

[39] FEC Advisory Op. 2017-05 (Great America PAC) (Sept. 20, 2017), https://www.fec.gov/files/legal/aos/2017-05/AO-2017-05.pdf.

deadlocked on all of the key underlying issues about why and when disclaimers are required, rendering the opinion nearly meaningless.[40]

Unable to perform its rulemaking and advisory functions, the FEC has instead developed a habit of issuing nonbinding press releases regarding compliance with court decisions and legislation. Last October, for example, a federal court struck down an FEC disclosure rule because it violated the FEC's statutory mandate to ensure disclosure of the funding of independent expenditures. In response, rather than take official action, the FEC merely issued a press release with "guidance" on how such groups should disclose their donations in the future.[41] But press releases are not law, and many non-disclosing groups unsurprisingly chose to interpret the FEC's legal silence as granting permission to effectively ignore the court's ruling.[42] Similarly, in 2015, the FEC issued a press release regarding disclosure of the national parties' "Cromnibus" accounts (about which, as

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40 *See* FEC Advisory Op. 2017-12 (Take Back Action Fund) (Dec. 15, 2017), https://www.fec.gov/files/legal/aos/2017-12/2017-12.pdf; Concurring Statement of Commissioner Ellen L. Weintraub, FEC Advisory Op. Request 2017-12 (Take Back Action Fund) (Dec. 21, 2017), https://www.fec.gov/files/legal/aos/2017-12/201712S_2.pdf; Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen, Advisory Op. Request 2017-12 (Take Back Action Fund) (Dec. 14, 2017), https://www.fec.gov/files/legal/aos/2017-12/201712S_1.pdf. The FEC also deadlocked on these questions in Advisory Opinion 2011-09 (Facebook).

41 FEC, *FEC provides guidance following U.S. District Court decision in* CREW v. FEC*, 313 F. Supp. 3d 349 (D.D.C. 2018)* (Oct. 4, 2018), https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

42 Brendan Fischer & Maggie Christ, *New Reports Show Why the FEC Needs to Clarify Disclosure Requirements for Dark Money Groups—and Why Congress Should Go Even Further*, CAMPAIGN LEGAL CTR. (Feb. 6, 2019), https://campaignlegal.org/index.php/update/new-reports-show-why-fec-needs-clarify-disclosure-requirements-dark-money-groups-and-why.

noted above, the FEC has never promulgated any regulations).[43] Undeterred by a press release, the national parties' reporting of the special-purpose accounts has been inconsistent and fundamentally non-transparent.[44]

III. The FEC Is Not Protecting Our Elections from Illegal Foreign Interference.

FECA bans foreign nationals from spending money in connection with elections.[45] This prohibition furthers the nation's "compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."[46] Uniquely in all of federal campaign finance law, the foreign national ban applies to every election nationwide — federal, state, and local. Thus, the FEC is charged with protecting the candidates and voters in every single American election from foreign financial intrusion.

Even as courts have struck down other limits on money in elections, they have upheld the foreign national ban. In 2012, two years after the Supreme Court's

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[43] FEC, *FEC Issues Interim Reporting Guidance for National Party Committee Accounts* (Feb. 13, 2015), https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-committee-accounts/.

[44] *See* Campaign Legal Ctr. & Ctr. For Responsive Politics, *Petition to Promulgate Rules on Reporting of "Cromnibus" Accounts* (Aug. 5, 2019), https://sers.fec.gov/fosers/showpdf.htm?docid=408347 ("Even the most basic facts about these accounts — such as their cash-on-hand balances — are not publicly available.").

[45] 52 U.S.C. § 30121.

[46] *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *aff'd mem.*, 565 U.S. 1104 (2012).

Citizens United decision, that same Court summarily affirmed a decision authored by then-Judge Brett Kavanaugh upholding the broad foreign national prohibition.[47]

Despite this unquestioned constitutional authority, the FEC has done nothing to prevent foreign corporations and individuals from exploiting the opportunities for corporate spending that *Citizens United* created. To the contrary, as described above, the FEC's enforcement failures have created the phenomenon of dark money: the secret spending that serves as a tailor-made conduit for illegal foreign funding. Furthermore, although the Supreme Court allowed corporations that are "associations of *citizens*" to pay for election advocacy,[48] the FEC has taken no steps to set rules for corporations owned or controlled by foreigners, or to prevent foreign corporations from making contributions through domestic subsidiaries. As far as the FEC is concerned, a foreign corporation can form a subsidiary LLC in Delaware, and the FEC will presumptively treat that LLC as an American entity for purposes of campaign finance law.

Perhaps most dramatically, the FEC has failed to take even the most basic measures to detect and deter foreign election spending through online advertising. As noted above, the FEC has been "considering" rules for disclosure of digital advertising since 2011. In the intervening eight years, foreign adversaries have taken advantage of the FEC's inaction to finance advertising directly intended to influence our elections — i.e., the exact activity the FEC is charged with preventing.

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47 *Id.*

48 *Citizens United*, 558 U.S. at 356 (emphasis added).

In response, the FEC has not punished a single person, and has changed not a single rule.

Particularly in light of the events of 2016, it is unconscionable that the FEC has done nothing to protect American voters from a repeat scenario in 2020. While the intelligence community, the FBI, and other federal and nonfederal actors are working day and night to keep our elections safe, the FEC fiddles. Every two or three weeks, the FEC's Commissioners gather in a public meeting, give lip service to the importance of preventing foreign interference, and decide they need another two or three weeks to consider how to address such a difficult problem. Then the next meeting comes around, Commissioners say they need more time to think about it, and the cycle repeats itself. This has been going on for years.

History demonstrates that the FEC's continuing failure to implement and enforce the foreign national ban will unquestionably result in real American voters being subjected to foreign-funded advertising in the 2020 election. Citizens in swing states and contested House districts will pull up their Facebook pages, see an ad that viciously attacks one candidate or another, and have no way to know whether that ad was paid for by an American organization or a foreign intelligence agency (or an American organization secretly funded by a foreign intelligence agency[49]). All because the FEC refuses to do what Congress and the Supreme Court have unambiguously empowered it to do: keep foreign money out of our elections.

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[49] *Cf.* Josh Meyer, *NRA got more money from Russia-linked sources than earlier reported*, POLITICO (Apr. 11, 2018), https://www.politico.com/story/2018/04/11/nra-russia-money-guns-516804.

IV. Congress Can Fix Many of the FEC's Failings.

History demonstrates that the FEC is not going to heal itself. The agency's structural deficiencies are significant, and the nomination process for FEC Commissioners has generally produced Commissioners who are unwilling or unable to overcome those deficiencies. Fortunately, there are three simple solutions Congress could adopt to remedy many of the FEC's most troubling failings.

First, the main reason the FEC is failing to enforce the law is that under the current system, less than a majority of Commissioners can block the FEC's professional lawyers and investigators from doing their jobs. It makes no logical or legal sense that three out of six Commissioners can make substantive decisions on behalf of the agency, including the decision to effectively terminate an enforcement matter. Congress should immediately amend the law to provide that a *majority* vote of Commissioners is needed to block investigations and other enforcement actions. In the absence of such a majority vote, the FEC's General Counsel and other nonpartisan, nonpolitical enforcement staff would remain charged with following the rigorous enforcement procedures already established by law, which provide for resolution of allegations of wrongdoing — either through voluntary settlements or by seeking a court order — while protecting the First Amendment and Due Process rights of all parties.

Second, the six-Commissioner structure inhibits accountability: the even number of Commissioners allows those who subvert the agency's mission to hide behind the veil of "tied" votes. When the FEC announces that a particular matter has failed by a vote of 3-3, it is exceedingly difficult for even experienced observers

outside the agency to decipher what that means. I am regularly contacted by journalists, attorneys, and lawmakers seeking guidance on how to interpret FEC "deadlocks." Which side wanted what? Was the vote on approving staff recommendations, or overruling them? Why did Republican Commissioners seemingly vote not to enforce the law against a Democratic candidate (or vice-versa)? When the professionals who are directly responsible for monitoring government action cannot understand it, they cannot explain it to the public. And when the public does not understand what the FEC is doing (or failing to do), there is little consequence for those (in)actions. Anti-enforcement Commissioners have exploited this structural deficiency for many years to avoid scrutiny and accountability for blocking enforcement and regulatory matters.

Congress should change the number of FEC Commissioners to five (or another odd number). Under such a structure, every vote would have a demonstrable majority, and the Commissioners voting in that majority could more readily be held to account for their decisions. If three out of five Commissioners vote to block a particular enforcement matter, there will be no confusion about responsibility for that obstruction, as there is under the current six-Commissioner structure. Similarly, if three Commissioners appear to be pursuing enforcement on inappropriately political grounds, this will be clear from the voting record and more readily subject to public exposure and Congressional oversight. Accordingly, a five-member Commission with a majority-vote requirement would act as a meaningful

check on Commissioners abusing their authority to hinder or advance investigations.

Finally, Congress should do everything within its power to reform the nomination process for FEC Commissioners. While the President has the constitutional authority to nominate Commissioners as he or she sees fit, Congress can impose political and public guardrails to incentivize the selection of highly qualified, non-ideological nominees. Specifically, Congress can create a nonpartisan nominating panel that identifies for each FEC vacancy a set of potential nominees who meet the highest standards of impartiality and ability. And the Senate could make known to the President that it would be disinclined to confirm nominees other than those recommended by the nominating panel. Raising the standards for Commissioner nominees — and creating political consequences for the nomination of inappropriately partisan or ideological candidates — would substantially elevate the functioning of the Commission.

All three of these reforms have been introduced in legislation with bipartisan sponsorship.[50] They were also all passed by the House this Congress in H.R. 1, a landmark bill that I would urge the Senate to approve and the President to sign without further delay.

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I thank the Committee for holding this hearing to shine light on the damage the FEC has wreaked upon our Nation. Legislation to reform the agency's

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50 *E.g.*, Restoring Integrity to America's Elections Act, H.R. 1272, 116th Cong. (2019).

structure, processes, and nominations would take a major step towards restoring the transparent, fair, and well-protected election system to which all Americans are entitled.