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March 3, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
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Washington, D.C. 20515

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, DC 20510

Dear Madame Speaker, Minority Leader McCarthy, Majority Leader Schumer, and Minority Leader McConnell:

As the chief legal officers of our states, we write regarding H.R.1, the *For the People Act of 2021* (the “Act”) and any companion Senate bill. As introduced, the Act betrays several Constitutional deficiencies and alarming mandates that, if passed, would federalize state elections and impose burdensome costs and regulations on state and local officials. Under both the Elections Clause of Article I of the Constitution and the Electors Clause of Article II, States have principal—and with presidential elections, *exclusive*—responsibility to safeguard the manner of holding elections. The Act would invert that constitutional structure, commandeer state resources, confuse and muddle elections procedures, and erode faith in our elections and systems of governance. Accordingly, Members of Congress may wish to consider the Act’s constitutional vulnerabilities as well as the policy critiques of state officials.

First, the Act regulates “election for Federal office,” defined to include “election for the office of President or Vice President.”¹ The Act therefore implicates the Electors Clause, which expressly affords “Each State” the power to “appoint, in such Manner as the Legislature thereof may direct,” the state’s

¹ Sec. 1932

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allotment of presidential electors, and separately affords Congress only the more limited power to “determine the Time of choosing the Electors.”² That exclusive division of power for setting the “manner” and “time” of choosing presidential electors differs markedly from the collocated powers of the Article I Elections Clause, which says that both States and Congress have the power to regulate the “time, place, and manner” of congressional elections. That distinction is not an accident of drafting. After extensive debate, the Constitution’s Framers deliberately excluded Congress from deciding how presidential electors would be chosen in order to avoid presidential dependence on Congress for position and authority.³ Accordingly, the Supreme Court, in upholding a Michigan statute apportioning presidential electors by district, observed that the Electors Clause “convey[s] the broadest power of determination” and “leaves it to the [state] legislature *exclusively* to define the method” of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). The exclusivity of state power to “define the method” of choosing presidential electors means that Congress may not force states to permit presidential voting by mail or curbside voting, for example.

Additionally, the Act’s regulation of congressional elections, including by mandating mail-in voting, requiring states to accept late ballots, overriding state voter identification (“ID”) laws, and mandating that states conduct redistricting through unelected commissions, also faces severe constitutional hurdles. As Chief Justice Roberts noted with respect to congressional elections, the Framers “assign[ed] the issue to the state legislatures, expressly checked and balanced by the Federal Congress.” *Rucho v. Common Cause* 139 S.Ct. 2484, 2496 (2019). Here, Congress is not acting as a check, but is instead overreaching by seizing the role of principal election regulator. And, under the proportionality doctrine announced in *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), no other power bestowed by the Constitution permits Congress to confer voting rights disproportionate to what the Constitution itself already protects, which the Act does by, for example, imposing rights to mail-in voting, curbside voting, etc. What is more, where the Act requires state officials to carry out new federal rights it violates the principle that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997).

Unfortunately, these constitutional deficiencies are only the beginning of the Act’s problems. As a matter of election administration policy, it is difficult to imagine a legislative proposal more threatening to election integrity and voter confidence.

² U.S. Const. Art. II, § 1, cls. 2, 4

³ See 2 Records of the Federal Convention of 1787 109 (M. Farrand ed. 1911)

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Perhaps most egregious is the Act's limitations on voter ID laws. Fairly considered, requiring government-issued photo identification at the polls represents nothing more than a best practice for election administration. Government-issued photo identification has been the global standard for documentary identification for decades. Nearly twenty years ago, in the Help America Vote Act, Congress required first-time voters who register by mail without proof of identification to present identification either to the county voter-registration office or at the polls. 42 U.S.C. § 15483(b). It thereby acknowledged the existence of voter fraud and the capacity of documentary identification to prevent it. 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country."). Then, in 2005, a bi-partisan commission headed by former President Jimmy Carter and Secretary of State James Baker recognized the existence of in-person voter fraud and endorsed a photo-identification requirement. In the wake of these endorsements, states began passing voter ID laws, and over a decade ago the Supreme Court upheld Indiana's voter ID law—one of the most robust in the nation. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Voter ID laws remain popular, with thirty-five states requiring some form of documentary personal identification at the polls.⁴ Yet the Act would dismantle meaningful voter ID laws by allowing a statement, as a substitute for prior-issued, document-backed identification, to "attest[] to the individual's identity and . . . that the individual is eligible to vote in the election."⁵ This does little to ensure that voters are who they say they are. Worse, it vitiates the capacity of voter ID requirements to protect against improper interference with voting rights. Before the advent of voter ID laws, partisans stationed at polling places could challenge voters based only on suspicions about identity, a process that prompted concerns about voter intimidation. Robust voter ID laws, however, require *all* voters to present photo identification, *i.e.*, objective, on-the-spot confirmation of the right to vote that immediately refutes bad-faith challenges based on vaguely articulated suspicions. Fair election laws treat all voters equally. By that standard, the Act is not a fair election law.

Adding to the threat of increased voter fraud, the Act would mandate nationwide automatic voter registration and Election Day voter registration. Such systems would provide too many opportunities for non-citizens and others ineligible to vote to register and cast fraudulent ballots before officials can take preventive action. States should determine appropriate methods for voter registration based on their own experiences with voting access and voter fraud.

Exacerbating these problems, the Act would also limit how states maintain voter registration rolls as a means of ensuring election integrity. Unsurprisingly, most citizens are not vigilant about keeping their state and local election boards apprised of changes to residency that may affect the validity of their voter registrations. Consequently, as citizens move about the country, their voter registrations become moribund and transform into seedbeds for voter fraud. As a fraud-prevention measure, states and localities routinely remove the registrations of citizens who (1) have not voted in many consecutive elections, and

⁴ <https://www.politico.com/news/2021/01/24/republicans-voter-id-laws-461707>; Voter Identification Requirements <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>

⁵ Title I Sub N § 1903.

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then (2) fail to respond to multiple efforts to verify current residency. Under the Act, however, States could not use a combination of voter inactivity and unresponsiveness to maintain voter lists but may instead remove illegitimate voter registrations only where officials obtain some other unspecified “objective and reliable evidence that the registrant is ineligible to vote.” Sec. 2502. This attack on reliable methods that states have been using to maintain voters lists without specifying any reasonable permissible alternatives belies any actual interest in preventing voter fraud. The objective, rather, seems to be to prevent meaningful voter list maintenance altogether.

Next, the Act’s mandate that states undertake congressional redistricting by way of so-called “independent” commissions is profoundly misguided. The aim of this provision—to neutralize “political” gerrymandering—proceeds from the incoherent supposition that drawing congressional districts is something other than a political act. As with any legislation, drawing boundary lines for congressional districts requires officials to balance legitimate competing considerations, and in so doing advance some political interests over others. Independent commissions do not somehow negate the need for interest balancing and tradeoffs—they merely avoid accountability for the enterprise. At least when legislatures draw boundary lines voters may punish egregious behavior at the next election; not so with government-by-commission, which trades accountability for mythical expertise and disinterest. The republican form of government inherently rejects the idea that elites have some unique capacity to discern and implement the best policies. The American tradition instead embraces political accountability as the best way to advance the public interest. With respect to political redistricting, no ideal, perfectly balanced congressional boundaries exist, so we should let the people decide, through their elected officials, where to place them.

Even more dismissive of robust political participation is the Act’s requirement that political speakers disclose their donor lists. All speech, whether attributed to an individual or not, facilitates robust political discourse by encouraging speech from a diverse array of viewpoints. The Act reflects an objective to name, shame, and blacklist those with differing or minority viewpoints. In other words, the goal is to censor those with whom the authors of the bill disagree. In the American tradition, the antidote for bad speech is more speech, not less. When people and organizations carry their chosen messages into the public arena, government should not cater to those who would intimidate or disrupt that same speech.

Despite recent calls for political unity, the Act takes a one-sided approach to governing and usurps states’ authority over elections. With confidence in elections at a record low, the country’s focus should be on building trust in the electoral process.⁶ Around the nation, the 2020 general elections generated mass confusion and distrust—problems that the Act would only exacerbate. Should the Act become law, we will seek legal remedies to protect the Constitution, the sovereignty of all states, our elections, and the rights of our citizens.

⁶ Justin McCarthy, *Confidence in Accuracy of U.S. Elections Matches Record Low* <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx> (last visited February 19, 2021).

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Sincerely,



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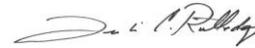
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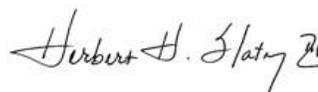
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