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## CONGRESSIONAL TESTIMONY

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Hearing:

“American Confidence in Elections:  
Protecting Political Speech”

Testimony before the Committee on House Administration

United States House of Representatives

May 11, 2023

Joint Testimony of:

***State Senator Jim Rubens***

Board Member, American Promise  
Former Republican State Senator  
in New Hampshire

***State Senator Rick Bennett***

Current Republican State Senator  
in Maine  
Former President of the Maine State Senate

## Introduction

### Former State Senator Jim Rubens (R-NH)

My name is Jim Rubens and I serve on the Board of [American Promise](#). I am a former two-term Republican State Senator in New Hampshire. I served as the chair of the Public Affairs and Education committees in the Senate, as Chair of the NH GOP Platform Committee, and as a GOP candidate for U.S. Senate and Governor. In addition to my work with American Promise, I'm also the New England Chair of [Take Back Our Republic](#), a conservative reform organization.

### State Senator Rick Bennett (R-ME)

My name is Rick Bennett and I currently serve as a State Senator in Maine. I served as the Chair of the Maine Republican Party from 2013-2017, and as President of the Maine State Senate from 2001-2002. Over the course of 15 years of public service in the Maine Senate and House, I've earned a reputation as a staunch advocate for fiscal discipline, balanced budgets, term limits, governmental accountability, and election integrity.

### American Promise

American Promise is a nationwide non-profit organization with a singular mission: ***harnessing and organizing the overwhelming cross-partisan public support throughout our nation to achieve an amendment to the United States Constitution that would secure the free speech interests of all Americans, protect federalism, protect our elections, and enhance republican self-government by ensuring that Congress and the States, within their respective jurisdictions, may reasonably regulate money in our elections.***

Motivated by our deep concern about the corrupting influence of concentrated money on republican principles, free speech, and liberty for all Americans; by our shared belief that representatives must be responsive and accountable to constituents; by our commitment to competitive free enterprise; and by our conviction that, under our system of federalism, states should be able to craft their own policies, we support American Promise and advocate in our states for the For Our Freedom Amendment to the U.S. Constitution. (A draft of this proposed amendment is attached as Appendix A).

In 2018-19, Senator Rubens worked with American Promise and others to help lead the effort to pass a resolution in the New Hampshire legislature to make it the 20th state to formally call on Congress to pass and return to the states for ratification a constitutional amendment for reasonable limits on election spending. Over the past two years, Senator Rubens has represented American Promise at CPAC and American Legislative Exchange Council (ALEC) events, finding near-unanimous concern among conservative activists and state legislators about concentrated sources of out-of-state and foreign campaign money distorting election outcomes and supplanting the preferences of in-state voters.

For the past two years, Senator Bennett has partnered with American Promise and a bipartisan slate of state legislators to support the 80,000+ Maine voters who initiated a bill that would limit the corrupting influence of foreign money in Maine elections and affirm a state policy of official support for an amendment to the Constitution that would empower Congress and the States to regulate money in politics.

The subject of this morning's hearing is "American Confidence in Elections." Through our work with American Promise and other conservatives, we have seen that our deep concern about the troubling influence of money in politics is shared by an overwhelming majority of our fellow citizens across the political spectrum. Hundreds of thousands of Americans throughout the nation have been vocal about what would help to restore their confidence in American elections, and this morning we'd like to share some of what we've learned.

## **I. How to Protect the Free Speech Interests of All Americans**

For decades, the Supreme Court has struggled with how to balance the free speech interests of all Americans in the context of political campaigns and elections. The turning point was in 1976 with *Buckley v. Valeo*.<sup>1</sup> In *Buckley*, the Court rightfully understood that contributing to candidates and spending money in campaigns and elections has implications for the flow of speech and

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<sup>1</sup> 426 U.S. 1 (1976).

ideas in our nation’s politics, and, in turn, our ability to self-govern.<sup>2</sup> But the Court made a grave mistake about how those implications should be managed as a matter of public policy.

With *Buckley*, the Supreme Court invented a constitutional rule that the only interest that can justify any campaign finance regulation is the prevention of *quid pro quo* corruption or its appearance.<sup>3</sup> By prohibiting lawmakers from considering a range of compelling interests – such as equal free speech interests of all Americans, federalism and the role of the states, systemic anti-corruption, election integrity, national security and concern about the influence of global and foreign interests – the Court’s approach has backfired.

What has this looked like in practice? It has meant that all sorts of policy questions about whether and how to regulate money-in-politics have been removed from the normal legislative process and have instead become decisions for the judicial branch. For example:

- Can lawmakers set limits on how much a person or other entity can contribute directly to a candidate? The Court says yes,<sup>4</sup> but only if it agrees with those limits.<sup>5</sup>
- Can lawmakers set limits on how much a person or other entity can spend in an election, separate from contributions to candidates (*i.e.*, “independent expenditures”)? The Court says no.<sup>6</sup>
- When it comes to spending money in elections, can lawmakers treat human beings differently from artificial entities? The Court says no.<sup>7</sup>

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<sup>2</sup> See *Buckley*, 426 U.S. at 14-15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”).

<sup>3</sup> *Id.* at 26. See also *McCutcheon v. FEC*, 572 U.S. 185 (2014) (slip op. at 18) (“This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.”).

<sup>4</sup> See *Buckley*, 424 U.S. at 29 (upholding a \$1,000 ceiling on federal campaign contributions under the Court’s “rigorous standard of review”).

<sup>5</sup> See *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont’s \$200 ceiling on contributions to candidates for statewide office).

<sup>6</sup> See *Buckley*, 424 U.S. at 51 (holding that a \$1,000 ceiling on independent expenditures “is unconstitutional under the First Amendment”).

<sup>7</sup> See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (state legislature cannot treat a corporation’s spending in a ballot referendum campaign differently from a natural person); *Citizens United*

- Can lawmakers try to level the playing field so that the wealthiest in our society don't dominate elections through their contributions and expenditures? The Court says no.<sup>8</sup>
- Can lawmakers legislate based on a concern that donors' disproportionate access and ingratiation with politicians is a form of corruption? The Court says no.<sup>9</sup>
- Can lawmakers enact policies requiring disclosure of the sources of spending in elections and campaigns? The Court says sometimes.<sup>10</sup>
- Can lawmakers distinguish between outside donors and actual constituents when setting guardrails on political spending. The Court says no.<sup>11</sup>

In sum, by framing all issues of campaign finance policy as questions subject to rigid judicial review, the Supreme Court has ended up creating *constitutional* (vs. legislative) rules that permit very little experimentation or exercise of discretion at the federal and state levels. The result of this approach (what some scholars have called the *judicialization of campaign finance*<sup>12</sup>) has been that the Court – and really only the Court – gets to decide what it means to protect the free speech interests of all Americans.

It is beyond question that money plays a role in amplifying speech and enabling campaigns. But a wholly anti-regulatory approach to money-in-politics may or may not be a good way to protect the free speech interests of all Americans as a matter of policy. Perhaps the unelected Justices

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v. *FEC*, 558 U.S. 310 (2010) (corporations must be allowed to spend money from their general treasuries in campaigns and elections).

<sup>8</sup> See *McCutcheon v. FEC*, 572 U.S. 185 (2014) (slip op. at 18) (lawmakers are not allowed to try to “level the playing field” or “level electoral opportunities”).

<sup>9</sup> See *McCutcheon v. FEC*, 572 U.S. 185 (2014) (slip op. at 2) (“Ingratiation and access . . . are not corruption. They embody a central feature of democracy[.]”) (internal citation and quotation marks omitted).

<sup>10</sup> See *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2372 (2021) (slip op. at 12) (“[E]xacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes.”) (internal citations and quotation marks omitted).

<sup>11</sup> See *Thompson v. Hebdon*, 909 F.3d 1027, 1042 (9th Cir. 2018) (“The dissent makes a cogent case for the view that states should be able to limit who may directly influence the outcome of an election by making financial contributions. But that debate is over. The Supreme Court has expressly considered and rejected those arguments.”) (internal citation and quotation marks omitted).

<sup>12</sup> See generally Richard Briffault, [On Dejudicializing American Campaign Finance Law](#), 27 Ga. St. U. L. Rev. 887 (2011) (“Unlike many other Western democracies, which impose monetary limits on campaign spending, the United States does not do so because the Court has said that is unconstitutional.”)

on the Supreme Court are correct, as a policy matter, that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”<sup>13</sup> And perhaps they are correct that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>14</sup> But perhaps they’re wrong . . .

***Based on our experience as citizens and conservative state legislators, we firmly believe that the best way to protect the free speech interests of all Americans is to enable lawmakers to consider the range of compelling interests that are implicated by money-in-politics.*** Our country’s policymakers

should reasonably be able to debate on the merits and conclude that extreme amounts of money, money concentrated in very few hands, or money from certain sources (e.g., foreign governments), can impair the ability of ordinary Americans to have their voices heard.

Policymakers should reasonably be able to legislate based on real-world experience with how flows of money in our elections can undermine the connection between officials and their constituents, thereby corrupting the very notion of representative self-government.

Policymakers should reasonably be able to enact campaign finance laws designed to strengthen ordinary Americans’ confidence in our elections without being second-guessed by an unelected and politically unaccountable judicial branch.

## **II. Americans Share Deep Concerns About Money-in-Politics**

In 2018 – less than a decade after the Supreme Court asserted that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy”<sup>15</sup> – a Pew Research report was showing just the opposite. According to the report, “[a] large majority of Americans (76%) say the government is run by a few big interests looking out for themselves; fewer than a quarter (21%) say it is run for the benefit of all the people.”<sup>16</sup>

According to a 2022 national survey, 72% of Americans understand that democracy and the rule of law are under threat.<sup>17</sup> Among Republicans who believe democracy is threatened, 86% cite the “influence of money in politics” as the chief threat. And among Democrats who believe

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<sup>13</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010) (slip op. at 44).

<sup>14</sup> *Id.* (slip op. at 42).

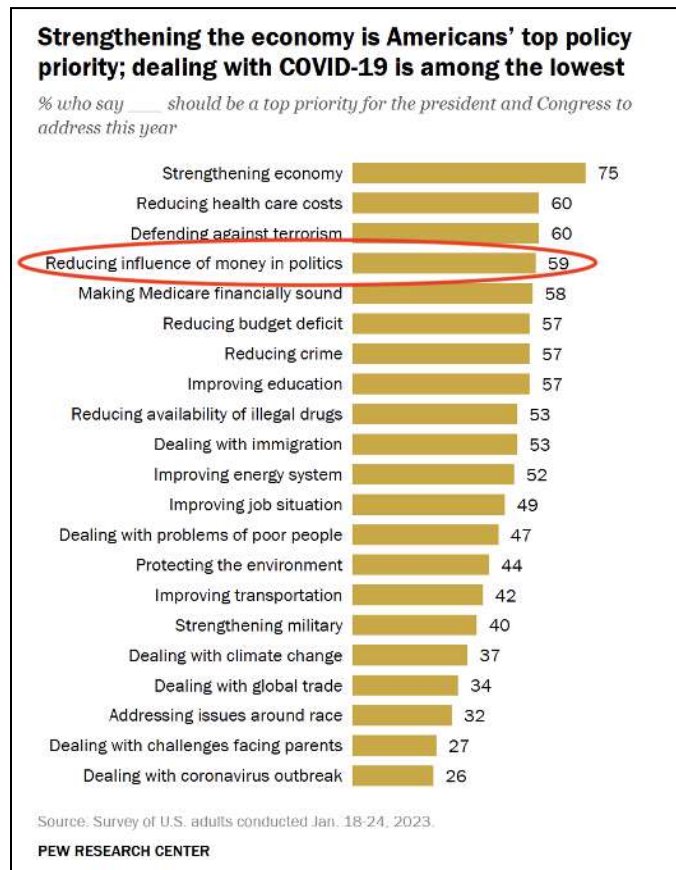
<sup>15</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010) (slip op. at 44).

<sup>16</sup> <https://www.pewresearch.org/politics/2018/04/26/6-quality-and-responsiveness-of-elected-officials/>

<sup>17</sup> <https://www.cbsnews.com/news/cbs-news-poll-americans-democracy-is-under-threat-opinion-poll-2022-09-01/>

democracy is threatened, the same share (86%) also say that the “influence of money in politics” is their top concern. At a time when bipartisan consensus can be hard to come by, there is broad and deep agreement that the influence of money in our elections can undermine Americans’ confidence in our system of government.

The perceived threat to our sovereignty is so salient that “reducing influence of money in politics” now ranks as the *fourth-most important policy priority* for Americans, and they want to see action from Congress and the President this year:



These recent indicators of national public opinion are consistent with what we have been seeing on the ground in states and municipalities across the country. To provide just a few examples:

- **Wisconsin:** Over the past several years, Wisconsin has seen 170 local votes or resolutions expressing support for a constitutional amendment to address the influence of money in politics. In December 2022, the Brown County Board of Supervisors voted (92%) in favor

of a [resolution](#) expressing “its desire to have the U.S. Constitution amended in a manner that would enable Congress and the States to reasonably regulate campaign finance.” Bear in mind that Brown County residents voted in favor of Donald Trump in 2020 (53%), Donald Trump in 2016 (52%), and Mitt Romney in 2012 (50%). And just last month, the citizens of the City of Viroqua [voted](#) (91%) in favor of a referendum question that called for a constitutional amendment to address campaign finance.

- **Maine:** In 2013, the Maine legislature passed a resolution in support of a constitutional amendment that would allow states to set reasonable limits on campaign raising and spending. In 2021, Maine voters initiated a bill to affirm that support and to charge the Maine Ethics Commission with reporting annually on the progress made by Maine’s Congressional delegation on advancing such an amendment. The initiated bill would also prohibit foreign governments and entities they control from spending in Maine referendum campaigns. In 2022, over 400 volunteers helped to collect the signatures of over 80,000 Mainers to initiate this legislation. The Secretary of State subsequently certified the petitions and now the state legislature has the opportunity to pass the bill outright or send it to the November 2023 ballot. Strong public support for the bill is based on residents’ experience with out-of-control spending. Just ask David Trahan, former Republican State Senator and Executive Director of the Maine Sportsman’s Alliance. Reflecting on the 2020 U.S. Senate race – at \$200 million, the most expensive in Maine’s history – Trahan lamented the amount of outside money that came pouring into the state: “[Mainers] were 20 feet under snow in an avalanche, and no one could hear us.” (A copy of American Promise’s Report, *Under the Avalanche*, is attached as Appendix B.)
- **Pennsylvania:** Just last week, Republican State Senator Doug Mastriano [announced his intention](#) to introduce a resolution calling on Congress to officially propose the “For Our Freedom Amendment” (see Section II below) and return it to the states for ratification. According to Senator Mastriano, “The only proper remedy to this Constitutional problem is a Constitutional solution. The ‘For Our Freedom’ amendment is the solution because it doesn’t prescribe a specific remedy or enshrine any specific regulation into the Constitution. Rather, it simply states that elected officials have the authority to regulate this money as they see fit in their respective jurisdictions.”



- **Virginia:** Virginia has seen a number of municipal resolutions in favor of a constitutional amendment, and, in 2021, both chambers of the state legislature passed a [resolution](#) commending efforts “to uphold the ideals of the Virginia Declaration of Rights and protect the free speech and liberty of all Virginians by supporting the passage of a new amendment to the Constitution of the United States.” The resolution specifically recognized that “money is property and not speech, and the United States Congress, state legislatures, and local legislative bodies should have the authority to regulate political contributions and expenditures to ensure power is vested in and derived solely from the people.”
- **Texas:** Tom Leppert, a prominent businessman and the former Republican Mayor of Dallas, recently co-authored an [op-ed](#) in the Dallas Morning News calling for a constitutional amendment to address money-in-politics. As Leppert explained: “With this amendment, we’ll be able to decide for ourselves how to appropriately protect our voters, our elections and our future from out-of-control money influence from all sources, including foreign governments. We’ll be able to stop the shell game of dark money and require disclosure of sources of funding for the deluge of campaign and election attacks. At the very least, we ought to know who’s trying to call the shots over our politicians and government.”

### **III. The Solution: The For Our Freedom Amendment**

Based on our experience as citizens, business owners, and state legislators, we strongly support the amendment being championed by American Promise – the [For Our Freedom Amendment](#) – as the best constitutional solution to repair the yawning trust deficit between the American people and their elected officials.

In a nutshell, the amendment would empower Congress and the States to pass campaign finance laws without being second-guessed at every turn by the Supreme Court. The amendment recognizes what everyday Americans already know: that issues of campaign finance and election spending are really *policy* questions that should be decided by the people and their representatives – not by the courts through specious, anti-factual interpretations of the Constitution.

## A. The Amendment Empowers *Policymakers* to Make Policy

Let us be clear about what this amendment would and would not do. It would empower Congress and the States to debate and create policy on money-in-politics, but it would not dictate or require any particular policy. It would empower Congress and the States to distinguish between natural persons (human beings) and artificial entities (unions, corporations, artificial intelligences) when creating campaign finance policy, but it would not require them to do so. Fundamentally, the amendment is about putting campaign finance policy back into the hands of the policymaking branches of government.

The For Our Freedom Amendment respects the principle of separation-of-powers by getting the judiciary out of the business of writing campaign finance laws.<sup>18</sup> To someone who opposes a particular campaign finance policy, the amendment says: Don't race to the courts to have it struck down. Instead, come to legislative forums – like this very Committee hearing – and have a policy debate on the merits. To people concerned about how new technologies (*e.g.*, artificial intelligence) might affect our campaigns and elections, this amendment says: At least we won't have to worry that the Supreme Court will construe the Constitution to mean that AIs have a *constitutional right* to influence our elections.

## B. The Amendment Celebrates Self-Government and Federalism

In addition to advancing separation-of-powers principles, the text of the For Our Freedom Amendment also recognizes “representative self-government” and “federalism” as “compelling sovereign interests.” Grounded in the Founders’ original vision of republican self-government, the amendment recognizes that “the scheme of representation”<sup>19</sup> is a structural device that is meant to produce alignment between elected officials and their constituents. In our precious system, government is meant to derive its “[just Powers from the Consent of the Governed](#)” – and representation, obtained through regular elections, is the primary way such consent is given and received.

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<sup>18</sup> To be sure, if you happen to like a particular policy contained in a prior Supreme Court case, there is nothing to stop you from making that policy the law through the normal legislative process. It's just that the policy would be neither required nor prohibited by the Constitution.

<sup>19</sup> The Federalist No. 10, 76 (James Madison) (2003 ed.).

Like representation, federalism is another structural device that was key to the framers' constitutional design. By preserving substantial lawmaking power at the state and local levels, federalism helps to produce a meaningful experience of self-government in a large, diverse nation like ours. Federalism gives breathing room for different policy preferences to take legal shape in varying ways throughout the land. In America, where difference is both celebrated and inevitable, federalism is meant to give voice to preferences at the state and local levels so that citizens can experience the blessings of self-government in tangible ways. The framers had an overarching concern, taken from the lessons of history, that concentrated power leads to corruption and ultimately tyranny – and this led them to divide and check power by incorporating federalism into the design of our government.

### C. The Amendment Protects the Free Speech Interests of All

Opponents of this proposed amendment may seek to score easy rhetorical points by saying something like: “What about the First Amendment? Sounds like you’re just trying to amend the First Amendment.” Nothing could be further from the truth.

The Supreme Court’s *interpretations* of the First Amendment (or any other constitutional text) are *not the same thing as* the First Amendment (or any other text). The Supreme Court sometimes gets it wrong.<sup>20</sup>

For those who consider themselves constitutional originalists (as we do), it is worth remembering that the original public meaning of the phrase “[the freedom of speech](#)” doesn’t actually supply *any* of the specific campaign finance rules that the Supreme Court has set down as purported constitutional requirements over the past 50 years, going all the way back to *Buckley v. Valeo*. As Professor Jud Campbell has explained: “[W]hile the Founders viewed well-intentioned statements of one’s thoughts as shielded from regulation, there is no indication that this principle would have extended to, say, donations to a political candidate. Even assuming that giving money to a campaign is expressive, or is an exercise of the natural right to freedom of association, this activity was among the countless aspects of natural liberty subject to regulations that promote the general welfare.”<sup>21</sup>

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<sup>20</sup> E.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (denying citizenship to enslaved African Americans).

<sup>21</sup> See Jud Campbell, [Natural Rights and the First Amendment](#), 127 Yale L. J. 246, 313-314 (2017).

But even more to the point, the For Our Freedom Amendment is designed to *protect and advance* the free speech interests of *all* Americans. The amendment recognizes, of course, that money interacts with free speech interests: money can subsidize the creation of political speech, it can amplify political speech, and it can purchase access to listeners. But money is not *equivalent* to political speech; it is a form of property and a form of power. Large sums of campaign money, often sourced from a handful of large players outside the actual constituency,<sup>22</sup> translates into an anti-representative power to drown out the voices of local voters.

The Supreme Court disagrees with what we wrote in that last paragraph – but the Supreme Court is not the final expositor of what the Constitution means. ***The American people are.*** It is “We the People of the United States” who “ordain and establish” the Constitution and – through the mechanisms of Article V – We the People have the power to amend it.

The next time you meet with your constituents (who may or may not be donors), please ask them: “Do you believe that money is speech?” Regardless of party, we guarantee they will say “No.” Then ask, “Do you believe that lawmakers should be empowered to regulate money in our elections?” Again, regardless of party, they will say “Yes.”

Just think about it. The median household income in the United States (in 2021 dollars) is \$69,021.<sup>23</sup> Is it plausible to believe that ordinary Americans feel that their free speech interests are being served by unfettered flows of money in our campaigns and elections? Most Americans can’t afford to make a \$100 contribution to a candidate, let alone spend millions of dollars on so-called “independent expenditures” to flood the airwaves with their political ads, often in all-but-official coordination with the candidates.<sup>24</sup> But according to the Supreme Court, the First Amendment *requires* that this be our national campaign finance policy.

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<sup>22</sup> See, e.g., David Fontana, [The Geography of Campaign Finance Law](#), 90 So. Cal. L. Rev. 1247, 1248-1249 (2017) (“A few places in the United States control congressional elections in the rest of the country. A handful of metropolitan areas now feature the wealthiest Americans who contribute at substantially greater rates and in substantially greater amounts to congressional campaigns.”).

<sup>23</sup> <https://www.census.gov/quickfacts/fact/table/US/SEX255221>

<sup>24</sup> See Kaveri Sharma, [Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections](#), 130 Yale L. J. 1898 (2021) (detailing a signaling system that candidates and parties can use to communicate with super PACs that – as a matter of *constitutional right*, according to the Supreme Court – can raise and spend unlimited funds in federal elections).

To repeat, money is property and power – not speech. We and our fellow Americans know that money-in-politics should be subject to regulation through the normal legislative process, instead of insulated from regulation by an unelected and politically unaccountable judiciary.

## **Conclusion**

Ordinary Americans – those who don't have millions to spend to amplify their ideas – have been trying to get their voices heard as best they can. They are meeting with their local and state officials, persuading them to support a constitutional amendment that would restore the power of Congress and the States to regulate campaign and election spending as they see fit within their respective jurisdictions. We fervently hope that you, their duly elected representatives in Congress, will join those of us at the state and local level in hearing their voices and supporting the For Our Freedom Amendment.

## APPENDIX A

### Text of the For Our Freedom Amendment<sup>25</sup>

**Section 1.** We the People have compelling sovereign interests in representative self-government, federalism, the integrity of the electoral process, and the political equality of natural persons.

**Section 2.** Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.

**Section 3.** Congress and the States shall have the power to implement and enforce this article by appropriate legislation and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.

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<sup>25</sup> Analysis of the proposed text is available at:

<https://americanpromise.net/for-our-freedom-amendment/amendment-analysis/>