



**Statement of Adav Noti  
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**Before the Committee on the Judiciary  
United States House of Representatives  
January 29, 2019**

Chairman Nadler, Ranking Member Collins, and Members of the Committee:

Thank you for the opportunity to testify today regarding HR 1. 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, and in a number of other nonpartisan legal positions within that agency.

HR 1 is a milestone bill. Among its many improvements,<sup>1</sup> the bill would make our system of financing campaigns for federal office more transparent,

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<sup>1</sup> See Paul Smith, *Protecting Voices of All Voters Is Critical to Free and Fair Elections*, THE HILL (Jan. 8, 2019), <https://thehill.com/opinion/judiciary/424381-protecting-voices-of-all-voters-is-critical-to-free-and-fair-elections>.

accountable, and responsive to ordinary Americans by multiplying the power of small donors and requiring greater disclosure of campaign spending.

In this testimony, I will focus on four parts of HR 1 that are within the Committee's jurisdiction: (1) legislative findings regarding the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010); (2) enforcement of the Foreign Agents Registration Act (FARA); (3) closing loopholes in lobbying registration laws; and (4) recusal of Presidential appointees. These provisions independently and collectively advance the right of every American citizen to a government that is responsive and accountable to *voters*. Campaign finance laws protect the First Amendment rights of ordinary citizens by ensuring they can participate in the political process without having their voices drowned out by wealthy corporations and individuals that hold special interests. And disclosure of campaign spending provides the public with essential information about the sources of financial support for candidates seeking public office. Ethics and lobbying disclosure laws promote responsiveness by ensuring that government officials, whether elected or appointed, act in the interests of the public rather than the officials' own private interests. More broadly, disclosure laws in each of these contexts give citizens, journalists, watchdog groups, and law enforcement agencies the information and tools needed to detect and deter governmental misconduct, undue influence, and corruption.

Before turning to these provisions, however, it is critical to note that HR 1's small-dollar matching provisions would broaden the spectrum of Americans who

engage in the political process by increasing average citizens' ability to participate in the funding of campaigns. As federal elections have become increasingly dominated by a handful of wealthy donors,<sup>2</sup> small-dollar matching offers a means to advance the First Amendment right of ordinary citizens to have a voice in the political process. A campaign finance system that meaningfully incorporates small-dollar donors can reorient our elections by reducing opportunities for corruption, encouraging citizens to seek public office, and broadening political participation among the public at large.<sup>3</sup> The funding of elections is an important means of engagement in our democratic process, and small-dollar matching can help make this form of engagement more inclusive and representative of our Nation as a whole.

## **I. Findings Regarding *Citizens United v. FEC***

In addition to provisions that would make democracy more transparent, accessible, and accountable, HR 1 includes key legislative findings regarding one fundamental source of our current democratic dysfunction. The bill accurately describes how the Supreme Court's misguided *Citizens United* decision has

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<sup>2</sup> In 2016, half of all campaign contributions to federal candidates came from only 15,810 individuals. By comparison, in 2000, 73,926 individuals accounted for half of all contributions. See Nathaniel Persily, Robert F. Bauer, & Benjamin L. Ginsberg, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 22, BIPARTISAN POLICY CTR. (Jan. 2018), <https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf>.

<sup>3</sup> For example, in its first election cycle, Seattle's groundbreaking new democracy voucher program generated a record number of city residents contributing to local candidates. See Seattle Ethics & Elections Comm'n, *Democracy Voucher Program Biennial Report 2017* (2018), [http://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20-%20Biennial%20report%20-%202003\\_15\\_2018.pdf](http://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20-%20Biennial%20report%20-%202003_15_2018.pdf).

empowered wealthy corporate entities to dominate election spending, thereby drowning out the voices of ordinary citizens and depriving individual Americans of their constitutional right to participate in the political process. The findings illustrate how *Citizens United* flipped the First Amendment on its head by overruling one hundred years of legislation enacted to protect the constitutional rights of individual citizens, replacing that system with a new regime of unlimited and frequently undisclosed corporate political spending. The findings include jaw-dropping statistics: campaign spending by corporations and other outside groups increased by nearly *900 percent* between the 2008 and 2016 Presidential election years; and well-funded special-interest groups spent over \$5,000,000,000 on the 2018 midterm elections.

“[T]he First Amendment serves to ensure that the individual citizen can *effectively* participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) (emphasis added).<sup>4</sup> What the Court in *Citizens United* failed to recognize is that its embrace of unlimited corporate campaign spending would allow spenders with the deepest pockets to so overwhelm the voices of ordinary voters as to effectively deprive those citizens of the ability to participate in the campaign process in any meaningful way. That result defies the First Amendment’s key purpose of protecting “uninhibited, robust, and wide-open” public debate. *New York*

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<sup>4</sup> Cf. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (explaining that our “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to *full and effective* participation in the political processes of his State’s legislative bodies”) (emphasis added).

*Times v. Sullivan*, 376 U.S. 254, 270 (1964). This, in turn, leads to the problem, recognized in HR 1, of a national political agenda that prioritizes the policy preferences of our Nation’s wealthiest corporations and individuals, whose views on a wide range of issues — such as taxes and healthcare — often depart dramatically from those of average Americans.

*Citizens United* also hinges on two faulty assumptions that reality has proven to be utterly wrong. First, the opinion mistakenly predicted that it would create a new campaign finance system “that pairs corporate campaign spending with effective disclosure,” hypothesizing that “modern technology” would lead to “rapid and informative” campaign finance disclosure. 558 U.S. at 370. In fact, a report just released by the nonpartisan nonprofit organization Issue One found that in the years since *Citizens United*, at least \$960 million in dark money spending — in which corporations and other entities<sup>5</sup> are used to disguise the true sources of the money — has been documented.<sup>6</sup> This tremendous spending was not just stealthy, it was also extremely concentrated: the top 15 dark money groups collectively spent about \$730 million between January 2010 and December 2018, accounting for more

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<sup>5</sup> In March 2010, a few months after the Supreme Court decided *Citizens United*, the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *Speechnow.org v. FEC*, 599 F.3d 686 (2010) (en banc), in which the court relied on *Citizens United* to strike down contribution limits as applied to political committees that make only independent expenditures. The decision opened the door to a new type of political committee — the “super PAC.”

<sup>6</sup> 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* (Jan. 2019), <https://www.issueone.org/wp-content/uploads/2019/01/Post-CU-Dark-Money-Mini-Report.pdf>.

than 75 percent of all dark money spending during that time.<sup>7</sup> And, as explained in a 2017 Campaign Legal Center report, these amounts are almost certainly understated because they omit a substantial amount of secret spending that is *never* reported to the Federal Election Commission.<sup>8</sup> Thus, far from ushering in a system of “effective disclosure,” *Citizens United* created a new mechanism for wealthy donors to hide their massive campaign spending from the public by funneling the money through corporations.

The second faulty assumption that undermines *Citizens United* is its declaration that unlimited corporate campaign spending would pose no threat of corruption or the appearance of corruption because it would be “independent.” In reality, the independence of much of this spending is farcical. The public record is replete with shocking examples of what passes as “independent” spending post-*Citizens United*. One of the most glaring examples occurred in the run-up to the 2016 presidential primaries, when supporters of presidential candidate Carly Fiorina set up a super PAC called “CARLY for America,” a name that was easily confused with that of Fiorina’s authorized campaign committee, “Carly for President.” CARLY for America had an active presence at most of Fiorina’s campaign events and served functions traditionally filled by campaign staff. As the *Atlantic* described:

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<sup>7</sup> *See id.* 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 percent of the \$150 million in dark money spent during the 2018 election cycle. *See id.*

<sup>8</sup> Campaign Legal Ctr., *Dark Money Matters* (June 12, 2017), <https://campaignlegal.org/sites/default/files/Dark%20Money%20Issue%20Brief.pdf>.

At a typical Fiorina campaign stop, a CARLY For America staffer was stationed at a table outside of the event space to sign up attendees for the super PAC's email list. Another staffer handed out CARLY For America stickers to attendees as they arrived. When Fiorina and her staff entered the event, they were usually met by a room covered in red "CARLY" signs and tables covered in pro-Fiorina literature, all produced by CARLY For America.<sup>9</sup>

While this overlap between the campaign and super PAC was brazen, CARLY for America's obvious and unpunished coordination with the candidate that it "independently" supported is not an outlier. This pervasive practice illustrates a central flaw in the *Citizens United* majority's legal analysis, which is premised on the erroneous assumption that the massive spending unleashed by the decision would be truly "independent."

In sum, the *Citizens United* decision consists of an irredeemably flawed constitutional analysis that disregards the fundamental purpose of the First Amendment and relies on mistaken factual assumptions that have compounded the harm that the decision has caused to our democracy. HR 1's legislative findings take an important first step towards addressing this harm, by accurately describing both its causes and effects.

## **II. Enforcement of the Foreign Agents Registration Act**

The Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 *et seq.*, requires that agents of foreign political principals disclose their relationships with, payments from, and activities on behalf of the foreign principals. These disclosures enable

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<sup>9</sup> Emma Roller, *When a Super PAC Acts Like a Campaign*, ATLANTIC (Sept. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/09/when-a-super-pac-acts-like-a-campaign/455679/>.

officials and the American people to evaluate the statements and activities of such individuals in light of their role as foreign agents.

FARA was originally passed in 1938 to address concerns about Nazi propaganda in the years leading up to World War II. Although FARA's importance is not subject to any serious dispute, historically, enforcement of FARA has been rare.<sup>10</sup> In 2016, the Justice Department's Inspector General found that 62 percent of initial FARA registrations were filed between 7 and 343 days late, and 50 percent of FARA registrants filed supplemental statements late.<sup>11</sup> Further, 15 percent of active FARA registrants "had ceased filing altogether or were over six months delinquent."<sup>12</sup> Registered foreign agents, who were presumably familiar with the law, routinely disregarded their reporting obligations — 57 percent of existing foreign agents were late in filing registrations disclosing that they were lobbying for a new client.<sup>13</sup> Despite such rampant noncompliance, only seven criminal FARA cases were brought between 1966 and 2015.<sup>14</sup> Even in cases where registrants appeared to ignore direct requests to file supplemental statements, violators faced no repercussions.<sup>15</sup>

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<sup>10</sup> Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act 21-22* (Sept. 2016), <https://oig.justice.gov/reports/2016/a1624.pdf>.

<sup>11</sup> *Id.* at ii, 13-15.

<sup>12</sup> *Id.* at 13, 14.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> *Id.* at i.

<sup>15</sup> *Id.* at 12.



To be clear, we do not note these statistics to criticize Department of Justice staff. As the Inspector General acknowledged, the Department's FARA Unit has limited resources to handle considerable responsibilities, and may have reasonably elected to focus those resources on encouraging registration rather than prosecuting violations.<sup>16</sup> But the statistics underscore the seriousness of the enforcement problem to which HR 1 is responding.

The bill would enhance FARA enforcement by creating a dedicated home and appropriation for FARA investigation and enforcement within the Department of Justice. This creation and funding of a specific FARA enforcement unit would inevitably improve enforcement.

HR 1 would also allow the Justice Department to pursue civil penalties for FARA violations. While FARA currently allows for civil *injunctive* remedies, the only avenue to pursue penalties for FARA violations under existing law is through *criminal* prosecution. The absence of civil monetary enforcement has proven to be problematic for a number of reasons, including that criminal prosecutions are resource-intensive and require fairly intrusive investigations. It is simply not realistic to pursue felony criminal proceedings over every disclosure violation. HR 1 responds to this problem by establishing a civil penalty mechanism that would allow the Department of Justice to allocate its resources appropriately between violations that can be punished and deterred with civil monetary penalties and those that require more serious criminal action.

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<sup>16</sup> *Id.* at i.

### III. Closing the “Strategic Counseling” Loophole

Another important way that HR 1 promotes transparency and responsiveness is by implementing a bipartisan American Bar Association recommendation to treat the provision of strategic advice in support of lobbyists as lobbying.<sup>17</sup>

Lobbying disclosure requirements ensure that the American people are able to learn who is seeking to influence policymakers and how. But existing disclosure laws contain a loophole: They do not apply to individuals who conduct their lobbying through other people. Specifically, lobbying entities exploit this loophole by hiring outside consultants to provide registered lobbyists with “strategic advice” on how to influence governmental action, and the registered lobbyists then go on to use this “strategic advice” in their direct contacts with government officials. Such outside consultants are therefore simply lobbyists by another name. But because these shadow lobbyists — sometimes known as “strategic counselors,” “policy advisors,” or “government relations professionals” — influence government officials indirectly, through business associates, current law does not require disclosure of their activity.<sup>18</sup>

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<sup>17</sup> See Am. Bar Ass’n Task Force on Fed. Lobbying Laws, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements* 17 (Jan. 3, 2011), [http://www.campaignlegalcenter.org/sites/default/files/ABA\\_Task\\_Force\\_Reprt\\_-\\_Lobbying\\_Law\\_in\\_the\\_Spotlight\\_-\\_Challenges\\_and\\_Proposed\\_Improvements.pdf](http://www.campaignlegalcenter.org/sites/default/files/ABA_Task_Force_Reprt_-_Lobbying_Law_in_the_Spotlight_-_Challenges_and_Proposed_Improvements.pdf) (reporting bipartisan ABA Task Force’s findings and recommendations, including recommendation to define provision of strategic advice as “lobbying support”).

<sup>18</sup> See Lee Fang, Opinion, *Michael Cohen and the Felony Taking Over Washington*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/michael-cohen-shadow-lobbying-trump.html>.

Shadow lobbying allows special interests to avoid disclosing the total amount they actually spend influencing public policy, thereby undermining one of the primary goals of lobbying disclosure. For example, a former Speaker of the House of Representatives was paid \$1.6 million for his work for Freddie Mac; after initially characterizing his services as that of a “historian,” the former Speaker later described his work as “strategic advice.”<sup>19</sup> Such circumvention also allows former members of the legislative and executive branches to evade post-employment revolving door restrictions. For example, former members of Congress and their senior staff are barred for one year from lobbying their former colleagues, and former Senators are subject to a two-year ban. But former public officials can sidestep the ban by acting as shadow lobbyists providing “strategic advice” to paying clients.<sup>20</sup>

These stories are part of a larger pattern. The number of registered lobbyists has steadily declined in recent years,<sup>21</sup> and it appears that shadow lobbyists have taken their place. According to a 2014 report, the number of registered lobbyists in 2013 was 12,281; the actual number of lobbyists, including shadow lobbyists, was

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<sup>19</sup> See *id.*

<sup>20</sup> See Michael Hiltzik, *The Revolving Door Spins Faster: Ex-Congressmen Become ‘Stealth Lobbyists’*, L.A. TIMES (Jan. 06, 2015), <https://www.latimes.com/business/hiltzik/la-fi-mh-the-revolving-door-20150106-column.html>.

<sup>21</sup> See Ctr. for Responsive Politics, *Lobbying Database*, <https://www.opensecrets.org/lobby>.

closer to 100,000.<sup>22</sup> Official spending on lobbying that year was \$3.2 billion; actual spending was closer to \$9 billion.<sup>23</sup>

HR 1 responds to this loophole by appropriately classifying “strategic counseling services” in support of lobbying as lobbying, thereby helping ensure that the public has accurate information about who is actually lobbying and how much is being spent on such efforts.

#### **IV. Recusal of Presidential Appointees**

HR 1’s ethics provisions devote significant attention to the timely detection and prevention of conflicts of interest. Such attention is appropriate because this is one of the most important functions of a successful governmental ethics program. Preventing conflicts of interest is especially vital within the executive branch, where presidential appointees are entrusted with tremendous power and there may be temptations to use that power for personal gain.

The primary criminal conflict-of-interest statute, 18 U.S.C. § 208, prohibits executive branch employees from participating personally and substantially in any particular matters in which they know they have financial interests directly and predictably affected by those matters. This prohibition, its implementing regulations, and equivalent agency-specific rules are important safeguards for preventing conflicts of interest and ensuring that public servants are working for the public’s interests. But as HR 1 recognizes, other types of identifiable conflicts

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<sup>22</sup> See Lee Fang, *Where Have All the Lobbyists Gone?*, NATION (Feb. 19, 2014), <https://www.thenation.com/article/shadow-lobbying-complex>.

<sup>23</sup> See *id.*

exist that could jeopardize the impartiality and integrity of a presidential appointee's government service. These conflicts might not fit neatly under the existing criminal conflict-of-interest law or regulations, but they are too serious to ignore. HR 1 takes important steps toward identifying new categories of conflicts of interest and demanding higher ethical standards from those at the top echelons of our government.

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HR 1 would bring ambitious, comprehensive, and much-needed improvements to our democratic process and governance. Together with the bill's provisions that protect the First Amendment rights of small donors, provide greater disclosure of political spending, improve access to voting, and curb partisan gerrymandering, the four provisions discussed above are critical to a more transparent, responsive, and accountable government. In particular, HR 1's formal recognition of the constitutional and factual deficiencies of the *Citizens United* decision, as well as the harms the decision has caused to our campaign finance system, is a key first step to addressing those harms. Enacting all of these provisions would mark a major step toward achieving a democracy that is transparent, responsive, accountable, and worthy of our great Nation.