



## Responses to Questions for the Record

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

I respectfully submit the following responses to the questions for the record submitted by Representative Sheila Jackson Lee.

**Q:** *How should we be framing the issue of unchecked and untracked funneling of dark money into politically inclined organizations from hostile foreign actors?*

Perhaps the most troubling aspect of the “dark money” phenomenon that the Supreme Court and the Federal Election Commission have unleashed is that no one — not law enforcement agencies, not journalists, and certainly not voters — truly knows how much foreign money is being funneled into American elections through corporations. There have been reports of Russian nationals attempting to influence elections by routing money through the NRA,<sup>1</sup> Chinese nationals routing money

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<sup>1</sup> See Peter Stone & Greg Gordon, *FBI investigating whether Russian money went to NRA to help Trump*, McClatchy (Jan. 18, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article195231139.html>; see generally Rosalind S. Helderman et al., *Russian agent’s guilty plea intensifies spotlight on relationship with NRA*, Wash. Post (Dec. 13, 2018), [https://www.washingtonpost.com/politics/russian-agents-guilty-plea-intensifies-spotlight-on-relationship-with-nra/2018/12/13/e6569a00-fe26-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/politics/russian-agents-guilty-plea-intensifies-spotlight-on-relationship-with-nra/2018/12/13/e6569a00-fe26-11e8-862a-b6a6f3ce8199_story.html).

through a corporation to a super PAC,<sup>2</sup> and Saudi- and Chinese-owned corporations routing money through trade associations.<sup>3</sup> These examples are, in all likelihood, merely the tip of the iceberg.

Longstanding federal law prohibits foreign nationals from making donations or disbursements in connection with federal, state, and local elections.<sup>4</sup> This prohibition is intended to “exclude foreign citizens from activities intimately related to the process of democratic self-government.”<sup>5</sup> Indeed, the foundational principle of self-government informs multiple constitutional provisions, and thus “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government.”<sup>6</sup> Such limitation “is part of the sovereign’s *obligation* to preserve the basic conception of a political community.”<sup>7</sup>

Thus, the current state of the law — in which foreign money is nominally banned but easily funneled into our elections through willing domestic conduit corporations — stands directly contrary to the government’s obligation to protect American citizens’ First Amendment right to self-governance.

As discussed below, there are concrete measures that Congress can and should take to restore the First Amendment rights of every citizen to meaningfully participate in our election campaigns.

**Q:** *What are the greatest problems presented by the current campaign finance framework? Can you speak to ways we can begin to address and fix those problems?*

The biggest current problem with our campaign finance system is that unlimited corporate election spending violates the First Amendment rights of American citizens to have a meaningful voice in our campaign process. To fulfill the

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<sup>2</sup> See Jon Schwarz & Lee Fang, *The Citizens United Playbook: How a Top GOP Lawyer Guided a Chinese-Owned Company Into U.S. Presidential Politics*, The Intercept (Aug. 3, 2016), <https://theintercept.com/2016/08/03/gop-lawyer-chinese-owned-company-us-presidential-politics/>.

<sup>3</sup> See Lee Fang, *Never Mind Super PACs: How Big Business Is Buying the Election*, The Nation (Aug. 29, 2012), <https://www.thenation.com/article/never-mind-super-pacs-how-big-business-buying-election/>; see also Lee Fang, *Chinese State-Owned Chemical Firm Joins Dark Money Group Pouring Cash Into U.S. Elections*, The Intercept (Feb. 15, 2018), <https://theintercept.com/2018/02/15/chinese-state-owned-chemical-firm-joins-dark-money-group-pouring-cash-into-u-s-elections/>.

<sup>4</sup> See 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20.

<sup>5</sup> See *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (Kavanaugh, J.) (internal quotations omitted), *aff’d mem.*, 132 S. Ct. 1087 (2012).

<sup>6</sup> *Id.* at 288.

<sup>7</sup> *Id.* at 287 (emphasis added).

First Amendment’s promise of self-government, each individual must have the right to fully participate in the process that leads to the selection of federal officeholders.

Effective campaign finance laws directly promote this right by providing voters with information and increasing the chance that a wide variety of voices can be heard. By increasing transparency and limiting the likelihood of lopsided voices in the electoral arena, these laws prevent the distortion that occurs when any one person has too loud an amplifier and drowns out the voices of others. “[L]ike the loud mouth and long talker at the town meeting, untrammelled spending during an election campaign does not serve the values of self-government, nor can it lay claim to First Amendment protection.”<sup>8</sup>

Ultimately, to fully fix this distortion, the Supreme Court will need to revisit its jurisprudence. But even before then, Congress could take highly productive, meaningful steps to protect the voices of voters in our democracy. There are at least six such critical reforms that Congress could enact right now:

- 1) Eliminate dark money;
- 2) Require disclosure of digital electioneering;
- 3) Strengthen the ban on foreign influence on elections;
- 4) Ensure that “independent” spenders are actually independent;
- 5) Restore the voices of ordinary Americans through public financing; and
- 6) Reform the Federal Election Commission.

These reforms are described in more detail below.

## **1) ELIMINATE DARK MONEY**

Under existing law, as interpreted by the FEC, major election spenders can remain anonymous by funneling their money through corporate organizations (usually LLCs or 501(c)(4) nonprofits) that are not required to disclose their donors.

Although the Supreme Court helped create this “dark money” phenomenon by allowing corporations to spend money in elections, the Court has consistently upheld the constitutionality of disclosure laws. Indeed, eight Justices on the *Citizens United*<sup>9</sup> Court—six of whom still serve—endorsed mandatory financial

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<sup>8</sup> J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 638 (1982).

<sup>9</sup> 558 U.S. 310 (2010).

disclosure of the corporate spending enabled by that opinion.<sup>10</sup> The federal courts of appeals have almost universally upheld such disclosure requirements as well.<sup>11</sup>

Legislation like the DISCLOSE Act (which is included in H.R. 1) would largely eliminate dark money. Such legislation would operate by requiring funds passed between multiple entities to be traced back to their original source. Specifically, organizations spending substantial amounts on election activity would be required to track and publicly report all large political contributions. Thus, if an LLC or 501(c)(4) organization makes a large contribution to a super PAC, the LLC or 501(c)(4) would be required to report information about where it obtained the funds to make that contribution.

In addition, some dark money groups evade disclosure by falsely claiming that their political spending is focused on issues, not elections. To foreclose such evasion, effective legislation would mandate disclosure when a group spends substantial funds on communications or related activity—such as polling, research, or data analytics—that promotes, supports, attacks, or opposes a candidate (regardless of whether it expressly advocates the election or defeat of a candidate). The Supreme Court has expressed approval of this “promote or attack” language, and its constitutionality has been upheld by many courts.<sup>12</sup>

Transparency would promote First Amendment interests by improving the functioning of Congress and its responsiveness to the public. As the Supreme Court has acknowledged, disclosure not only allows the public to track the undue influence of large contributions on elected officials,<sup>13</sup> it can also deter officials from improperly acting on behalf of donors rather than voters.<sup>14</sup>

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<sup>10</sup> *Id.* at 366-71.

<sup>11</sup> See, e.g., *Indep. Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016); See *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014); *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec’y of State*, 717 F.3d 1244 (11th Cir. 2013); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013); *Real Truth About Abortion Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *Human Life of Wash.*, 624 F.3d 990 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

<sup>12</sup> See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 170 n.64 (2010).

<sup>13</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (“A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return”); *Citizens United*, 558 U.S. at 370 (with disclosure, “citizens can see whether elected officials are “ ‘in the pocket’ of so-called moneyed interests”).

<sup>14</sup> Citing *Buckley*, Chief Justice John Roberts wrote that disclosure requirements can “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (quoting *Buckley*, 424 U.S. at 67).

## 2) REQUIRE DISCLOSURE OF DIGITAL ELECTIONEERING

As political spending increasingly migrates online, it has become apparent that campaign finance laws have an internet blind spot.

Under existing federal law, a TV ad that identifies a candidate and is run near an election is subject to FEC and FCC reporting requirements and must include an on-ad disclaimer stating who paid for it. Reporting and disclaimer requirements for ads in traditional media have been upheld by courts across the country, including by the Supreme Court in *Citizens United*. But an identical ad run online can escape those same transparency requirements. Additionally, digital ads, unlike most TV or radio ads, are highly targeted and viewable only by the individuals to whom they are targeted. This secrecy can allow false information to circulate uncorrected, and it hinders law enforcement efforts to ensure compliance with campaign finance laws.

Russia famously exploited these digital transparency gaps to interfere in the 2016 elections. Domestic political operatives used similar tactics to sway races in 2017 and 2018.<sup>15</sup> Self-regulatory efforts by platforms like Facebook have been a step in the right direction, but are easily evaded and can change at any time.

Policy solutions are evolving as jurisdictions experiment with different approaches. At the federal level, the bipartisan Honest Ads Act was introduced in 2017 and integrated into H.R. 1 in 2019, and legislation has been enacted in states including New York and Maryland. These bills and laws vary in the responsibilities they impose on advertisers, platforms, and election agencies. But all meaningful digital ad disclosure legislation addresses three major issues:

**Digital political ads must identify their true sponsors on their face.** Given the ease with which political actors can create fake Facebook pages or Twitter accounts, it is critical that recipients know who is actually paying for digital political messages. Legislation must properly incentivize advertisers and/or platforms to ensure the accuracy of on-ad disclaimers.

**Digital political ads must be made available for public review.** In 2018, Facebook, Twitter, and Google each (grudgingly) agreed to address the phenomenon of “dark ads”—i.e., digital ads that are not seen by anyone except small groups of targeted users—by creating public archives of political ads. But smaller platforms may lack the capacity to institute similar archives. Digital ad

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<sup>15</sup> Scott Shane & Alan Blinder, *Democrats Faked Online Push to Outlaw Alcohol in Alabama Race*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/politics/alabama-senate-facebook-roy-moore.html>; Tony Romm et al., *Facebook Is Investigating the Political Pages and Ads of Another Group Backed by Reid Hoffman*, WASH. POST, (Jan. 7, 2019), <https://www.washingtonpost.com/technology/2019/01/07/facebook-is-investigating-political-pages-ads-another-group-backed-by-reid-hoffman/>.

legislation should define the appropriate category of ads that must be made public and specify who is responsible for compiling and maintaining the archive.

**Digital political advertisers must be subject to the same donor disclosure laws as traditional media advertisers.** Outdated federal (and some state) laws require disclosure of donors only to groups that engage in television and radio advertising. Legislation should close this loophole by applying the same requirements to digital advertising.

### **3) ENSURE THAT “INDEPENDENT” SPENDERS ARE ACTUALLY INDEPENDENT**

The Supreme Court in *Buckley* and *Citizens United* established a constitutional framework for campaign finance legislation that permits limiting contributions to candidates and parties, but allows unlimited spending by individuals and corporations for election activity that is independent of candidates and parties.

This constitutional distinction between contributions and independent expenditures, however, rests on an explicit presumption that the spenders are “totally independent[].”<sup>16</sup> Thus, super PACs and dark money groups may raise unlimited amounts and make unlimited expenditures in support of candidates only if they are operating independently of those candidates—but very often, this “independence” is a fiction. Many super PACs and 501(c)(4) organizations are in close contact with the candidates they support, and often are operated by those candidates’ former staff or political allies. Current law is not strong enough to prevent such coordination between candidates and outside spenders.

Legislation to strengthen coordination law, like the “Stop Super PAC Coordination Act” (included in H.R. 1), would close two categories of loopholes. First, legislation would provide that an outside group is not legally “independent” if it has certain types of contacts with a candidate or party that it supports. These contacts would cover scenarios where, for example, a candidate, a candidate’s immediate family member, or a candidate’s former employee creates, manages, or fundraises for a supposedly “independent” organization.

Second, legislation would also expand the kinds of campaign spending covered by the coordination law, to include all ads that reference a candidate within the several months before an election, as well as related expenditures such as partisan voter registration and polling.

When coordination between candidates and super PACs or dark money groups is limited, then the influence of the handful of wealthy donors who fund

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<sup>16</sup> *Buckley*, 424 U.S. at 47.

those groups is limited, too. This frees officeholders from the idiosyncratic policy preferences of wealthy special interests and promotes the First Amendment value of ensuring that officeholders are responsive to their constituents.

#### **4) STRENGTHEN THE BAN ON FOREIGN INFLUENCE ON ELECTIONS**

Longstanding U.S. law prohibits any foreign national from directly or indirectly spending money in connection with U.S. elections at any level of government.<sup>17</sup> 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 *Citizens United* decision, that same Court summarily affirmed a decision authored by then-Judge Brett Kavanaugh upholding the broad foreign national prohibition.<sup>18</sup>

Despite this unquestioned constitutional authority, Congress and the FEC have done nothing to prevent foreign corporations from exploiting the opportunities for corporate spending that *Citizens United* created. Most notably, under FEC interpretations of current law, foreign corporations can sidestep the foreign national ban by making contributions through domestic subsidiaries.

Federal legislation like the REFUSE Act and DISCLOSE Act (elements of which are included in H.R. 1) would close this gap by subjecting a corporation to the foreign national ban if it is 20 percent owned by foreign nationals (or 5 percent owned by a foreign government). Additionally, Congress could, consistent with existing case law, further expand the reach of the law to prohibit foreign nationals from spending money on a broader range of campaign advertisements—for example, all ads that mention candidates—and on ballot measures.

#### **5) RESTORE THE VOICES OF ORDINARY AMERICANS THROUGH PUBLIC FINANCING**

Laws that promote disclosure of political spending, that ensure super PACs and dark money groups are truly independent of candidates, and that close digital-ad loopholes can alleviate the impact of Supreme Court decisions like *Citizens United*. But public financing will go the furthest towards creating a government that looks like, and is responsive to, the country as a whole.

Public financing broadens the donor base by inviting average Americans back into the political process. A well-crafted public financing system can reduce the amount of time spent fundraising and promote more effective policymaking, making

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<sup>17</sup> 52 U.S.C. § 30121(a).

<sup>18</sup> *Bluman*, 800 F. Supp. 2d at 288.

elected officials more responsive to the broad base of community members funding their campaigns, rather than a small handful of wealthy special interests.

Courts have largely affirmed the constitutionality of voluntary public financing programs. In *Buckley*, the Supreme Court upheld the presidential program as a constitutional means “to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.”<sup>19</sup>

In the years since, courts have continued to uphold public financing as a means of preventing corruption and promoting political participation.<sup>20</sup> A 2011 Supreme Court decision struck down Arizona’s “trigger” mechanism that released additional public funds in response to private spending against participating candidates, but the Court reaffirmed the general constitutionality of public financing programs.<sup>21</sup>

These programs can take a variety of forms.

In **matching funds** programs, a jurisdiction will match small private contributions (e.g., \$250 or less) received by a participating candidate with public funds at a set rate. New York City’s program is a model for jurisdictions around the country. It first implemented its matching funds program in 1988 with a one-to-one match; in 1998, the city raised the rate to four-to-one; in 2007, it raised the rate to six-to-one; and in 2018, voters passed a ballot measure raising the matching rate to eight-to-one and lowering the contribution limit.<sup>22</sup>

The program has encouraged candidates to connect with a broader population of donors, with studies showing that small donors to New York City candidates come from a much more diverse range of neighborhoods than the city’s donors to

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<sup>19</sup> 424 U.S. at 91.

<sup>20</sup> See, e.g., *Republican Nat’l Comm. v. FEC*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980) (“If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign.”), *aff’d*, 445 U.S. 955 (1980); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (validating state’s interest in public financing “because such programs . . . tend to combat corruption”); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (recognizing public financing reduces the “possibility for corruption that may arise from large campaign contributions” and diminishes “time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning”); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 230 (2d Cir. 2010) (finding Connecticut program worked to “eliminate improper influence on elected officials”); *Ognibene v. Parkes*, 671 F.3d 174, 193 (2d Cir. 2011) (explaining that public financing system “encourages small, individual contributions, and is consistent with [an] interest in discouraging entrenchment of incumbent candidates”).

<sup>21</sup> *Ariz. Free Enterprise Club’s Freedom PAC v. Bennett*, 564 U.S. 721, 724 (2011).

<sup>22</sup> <https://www.nycffb.info/program/what-s-new-in-the-campaign-finance-program-2/>.

State Assembly candidates. As the *New York Times* recently documented, the city's public financing system means that 2021 mayoral candidates are laying the groundwork for their campaigns with small-dollar fundraising events in living rooms, rather than with high-dollar fundraisers in Wall Street boardrooms.<sup>23</sup>

A “**democracy voucher**” system is a newer innovation, where eligible citizens are given vouchers to assign to participating candidates of their choosing. In contrast with matching funds, vouchers do not require a contributor to use his or her own funds and then obtain a reimbursement and, therefore, can allow economically disadvantaged people to make small contributions to campaigns.

Seattle is the first U.S. jurisdiction to implement a voucher program. Seattle residents receive four \$25 vouchers, worth \$100 in total, each election year. Seattle residents may assign their vouchers to different candidates, or donate them all to the same campaign. Participating candidates can redeem the vouchers they receive for public funds to use in their campaign. The first election after the program took effect precipitated a record number of city residents contributing to local candidates over the course of a single election cycle.<sup>24</sup> Participation in the voucher program corresponded with higher voter turnout.<sup>25</sup>

As with matching funds, voucher systems still obligate participating candidates to fundraise, but the candidates need only ask for vouchers, rather than private dollars, which eases the toll of fundraising for both candidates and individual contributors.

A **flat grant** system fully or partially funds a qualifying candidate who voluntarily participates in the program. Arizona and Connecticut, among other jurisdictions, have “full grant” programs, where participating candidates may only make campaign expenditures with public funds and may not raise private contributions after receipt of the grant. In partial grant systems, participating candidates receive lump-sum payments of public funds but may also raise some private contributions to use in conjunction with their grant funds.

Any of the preceding types of public financing can be combined into a **hybrid system**. The presidential public financing system is one example of a hybrid system, offering participating candidates matching funds during the primaries and lump-sum grants for the general election. The District of Columbia's recently enacted program is also a hybrid: Beginning in 2020, participating candidates will

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<sup>23</sup> <https://www.nytimes.com/2019/01/28/nyregion/corey-johnson-scott-stringer-mayor-nyc.html>.

<sup>24</sup> Jennifer Heerwig & Brian McCabe, Ctr. for Studies in Demography & Ecology, Univ. of Wash., *Expanding Participation in Municipal Elections: Assessing the Impact of Seattle's Democracy Voucher Program* (2018), [https://www.jenheerwig.com/uploads/1/3/2/1/13210230/mccabe\\_heerwig\\_seattle\\_voucher\\_4.03.pdf](https://www.jenheerwig.com/uploads/1/3/2/1/13210230/mccabe_heerwig_seattle_voucher_4.03.pdf).

<sup>25</sup> *Id.*

receive a lump-sum payment upon qualification followed by a five-to-one match for contributions from D.C. residents.

H.R. 1's public financing provisions together create a hybrid system. The bill would create a matching system offering a 6-to-1 match on small dollar contributions up to \$150; candidates who agree to further restrictions—such as a \$1,000 individual contribution limit—will see the match increased by 50 percent. The bill would further incentivize small donations by offering a tax credit of up to \$50 for contributions to House candidates. H.R. 1 would also create democracy voucher pilot programs in three states; voters in those states would be given \$50 vouchers to allocate to federal candidates in \$5 increments.

## **6) REFORM THE FEDERAL ELECTION COMMISSION**

Enacting robust campaign finance reform legislation means little if the laws are not vigorously enforced. For example, the rise of dark money is largely attributable to the FEC's failure to craft robust disclosure rules in the wake of *Citizens United*, and its refusal to enforce the disclosure laws and rules that remain on the books.

The FEC has six Commissioner positions—no more than three of which can be from any single party—and requires four votes to take substantive action: to craft rules, adopt new regulations, or open an investigation into potential violations. This means that three Commissioners of one party can paralyze the agency if they choose. And indeed, this has been the case since at least 2008, with a controlling block of three Commissioners miring the FEC in gridlock and dysfunction and thwarting action on major issues, such as super PAC coordination and digital advertising. These routine deadlocks send a signal to candidates, parties, and independent organizations that they may freely violate the law and the FEC is unlikely do anything about it.

H.R. 1 draws from the bipartisan Restoring Integrity to American Elections Act to restructure the FEC and restore its commitment to nonpartisan election administration. Any FEC reform legislation should be aimed at restructuring the FEC to eliminate deadlocks (by, for example, reducing the number of Commissioners from six to five, and placing certain administrative authorities in a chair), and ensuring that nominees are qualified and committed to the mission of the agency (by, for example, creating a blue ribbon advisory panel to recommend Commissioner nominees).