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PRESENTED TO

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Comments on Civil Liberties Concerns Created by Proposed Amendments to FARA's Regulations

These comments are provided on behalf of the International Center for Not-for-Profit Law (ICNL) in response to the Notice of Proposed Rulemaking (NPRM) from the Justice Department to solicit comments on proposed amendments to the implementing regulations of the Foreign Agents Registration Act (FARA).

The U.S. government has a clear interest in regulating foreign government intervention in U.S. domestic politics, such as around electioneering, lobbying, or espionage. However, the U.S. government must do so in a targeted and proportionate manner that does not infringe First Amendment rights or place undue burdens on civil society. Currently FARA, originally enacted in 1938 to combat disinformation, takes an outdated and overbroad approach to this problem. The Act needlessly overregulates cross-border activities and creates confusion for the nonprofit sector and the broader U.S. public while infringing on protected First Amendment speech and conduct. Seemingly recognizing the overbroad nature of the Act, Attorney General Bondi in an enforcement memo from February 2025 directed the Department to use FARA's criminal charges only for "conduct similar to more traditional espionage by foreign government actors". She warned in the same paragraph about how the use of laws like FARA can lead to "weaponization and abuses of prosecutorial discretion."

The Justice Department's proposed regulations, however, would exacerbate many of FARA's constitutional infirmities, heighten the already significant regulatory confusion created by the Act, and increase the chances of its politicized abuse. Any new FARA regulations must comply with the First Amendment. These proposed regulations do not even attempt to address the First Amendment concerns created by the Act and instead make them worse. They should either be withdrawn or substantially revised.

Key takeaways from these comments:

- ***The Department should reject the proposed "domestic interest" test***. The proposed regulations would create a new two-part test to determine when FARA's "domestic interest" exemption applies. This proposed test is not

grounded in the text of the Act, would unduly narrow the exemption, and lays out a vague and "non-exhaustive" list of factors to determine when it applies. This failure to provide bright line rules will create confusion and provide the Department overbroad discretion to decide when – or when not - to apply the exemption. This proposed two-part test should be rejected.

- ***The Department should use regulations to clarify key terms in the Act.*** By declining to clarify the definition of an "agent of a foreign principal" and instead asking potential registrants to rely on the advisory opinion process, the Department further cements into its interpretation of the Act an unconstitutional degree of arbitrary discretion for deciding how it applies. This systematic deferral of interpretation of FARA to the advisory opinion process creates an unconstitutional form of censorship and "prior restraint" on expressive activity. Further, by declining to clarify the definition of the covered activity of "political consultant", the Department threatens to restrict constitutionally protected speech and association in a manner that is not narrowly tailored to address a compelling government interest. Instead, the Department should use regulations to clarify these overbroad terms in a manner that is consistent with the First Amendment.
- ***The "domestic interest" exemption applies to noncommercial actors.*** While ICNL opposes the adoption of the proposed two-part test of the "domestic interest" exemption and disagrees with the Department's decision to not further clarify key definitions in the Act, we agree with the Department that the "domestic interest" exemption applies equally to commercial and noncommercial actors and that this understanding should be solidified in regulation.
- ***The Act should be interpreted to minimize unnecessary regulation that can burden expressive rights.*** As is discussed in this comment, the Department should interpret the attorney exemption broadly (in line with the text of the Act). Further, it should not impose new, burdensome requirements to receive advisory opinions from the Department.

Brief Background on Challenges FARA Creates for Civil Society

An Overbroad and Vague Act

FARA is an overbroad regulatory scheme, poorly tailored to addressing actual threats to U.S. national security. On its face, the Act makes no distinction between whether one is the agent of a foreign government, a foreign company, a foreign nonprofit, a foreign individual, or just an American domiciled abroad – treating all equally as a "foreign principal".

The definition of "agent of a foreign principal" is broad and vague, seemingly capturing those who merely act at the "request" of a foreign principal. And covered

activities in the U.S. under the Act include a broad range of conduct from "solicit[ing]" or "dispers[ing]" funds for a foreign principal; "informing . . . any other person with reference to the domestic or foreign policies of the United States"; or attempting to influence "any section of the public within the United States with reference to formulating, adopting or changing the domestic or foreign policies of the United States."

As a result of this overbreadth, the Act ends up using the same regulatory approach whether one is a paid lobbyist for the Chinese government attempting to influence Congress on the most sensitive aspects of U.S. military policy or one is a volunteer distributing a small amount of funds collected from Canadian citizens for Hurricane relief in Florida.

FARA would seemingly require a person in the U.S. to register under the Act for soliciting funding from Americans at the "request" of an Indian nonprofit building houses in a slum in Mumbai; providing information at the "request" of a nonprofit in another country about U.S. policy on preventing illegal opioids from entering the country; setting up a public talk in Pittsburgh at the "request" of a visiting human rights activist from Myanmar; or acting at the "request" of Afghans one served with in Afghanistan to contact one's Congressperson in an attempt to ensure they get to safety.

This overbroad reading is not mere speculation. While the Justice Department's enforcement priorities have been in more limited areas, like foreign government lobbying, the Department has not shied away from reading the Act broadly. For example, the Justice Department required that a Pennsylvania church register for printing out signs at the "request" of congregants from Europe coming to the March for Life Rally in Washington DC. The Department claimed the church was a "publicity agent" under the Act because they published "visual" or "pictorial" information at the request of the foreign congregants.

Regulatory Compliance Burden

Registration under FARA comes with significant burdens, chilling First Amendment protected speech. While FARA is often simply called a transparency statute, these burdens from FARA registration are multi-faceted and often stop nonprofits from engaging in registrable, and First Amendment protected, activity at all. A non-exhaustive list of these burdens include:

- **Onerous registration requirements**. Registering under FARA requires that nonprofits, and impacted staff, file numerous forms and paperwork with the Justice Department, which require continuous updating, or both the organization and covered staff can face serious criminal penalties. This information, which is then posted publicly on the Department's website, can frequently include sensitive information, including home addresses of the

nonprofit's staff. Organizations that register must also retain records and open up their books to a periodic audit by the Justice Department. Many groups who have registered have had to retain outside legal counsel to guide them through the process, train staff on recordkeeping and compliance, and have discussions with their board of directors and key partners about the potential of registering. These are significant regulatory costs that can either stop or significantly hinder engagement in registrable activity under the Act.

- **Stigma**. Many nonprofits are wary of registering under FARA because of the significant stigma it brings. Most nonprofits pride themselves on being independent and acting solely in furtherance of their mission. Registering under FARA as an "agent of a foreign principal" implies that not only are they acting under the control of others, but that they are acting as some sort of nefarious "foreign hand" that requires providing continuous details of the nonprofit's activities to the National Security Division of the U.S. Department of Justice. FARA's requirements that covered materials be labeled as being disseminated on behalf of a foreign principal and that more information is available at the Justice Department only further amplify this stigma. The stigma of registering can lead to negative media attention and other reputational harms.
- **Threat of politicized prosecution**. Since its beginning, FARA has had a history of politicized enforcement. For example, W.E.B. DuBois was prosecuted during the McCarthy era for circulating an anti-nuclear petition at the "request" of a French nonprofit. In the 118th Congress a number of nonprofits were targeted by members of Congress for potential FARA investigations – these members of Congress frequently did not agree with the position of these nonprofits on policy issues. Fear of aggressive enforcement of the Act, often in a politicized manner, will often deter nonprofits from engaging in conduct that could be potentially considered registrable – even if it is not – for fear that it will draw politicized enforcement scrutiny.
- **Loss of Funding.** If a nonprofit is forced to register under FARA for receiving foreign funding, it can deter funders from providing the organization funding in the future. For example, one nonprofit in its comments for the Justice Department's Advanced Notice of Public Rulemaking (ANPRM) on proposed FARA regulations noted that registering "had the foreseeable consequence of impeding future grant making" from foreign funders to the organization limiting their "first amendment rights". This experience is representational of a nonprofit sector where donors frequently will decline to fund a project rather than have to

navigate the complexities of an act like FARA. Some organizations have decided to not pursue any potential funding from donors living outside the United States because of fear and uncertainty around FARA enforcement.

- **Negatively impacts nonprofit employees**. When an organization engages in registrable conduct, senior management of organizations frequently have to negotiate with staff engaged in this conduct, who are required to submit a short form registration under FARA. These covered staff understandably fear that personally registering will bring stigma, an invasion of their privacy, and impact their future employment prospects. Indeed, employees can be so adamant that they do not want to register that the organization may have to abandon a project that is in line with the organization's mission. Alternatively, some staff may leave an organization rather than register causing disruption to the organization's functioning.
- **Loss of U.S. government benefits**. Congress has tied access to government benefits to not being registered under FARA, meaning that nonprofits that do register can potentially lose access to critical government programs and funding. For example, in December 2020 Congress enacted the Economic Aid Act. Under the Act a person or entity was ineligible for the Paycheck Protection Program (PPP), a close to $1 trillion government initiative, if they registered under FARA.

The Justice Department's Proposed Regulations

The "Domestic Interest" Exemption

22 U.S.C. 613(d)(2) of FARA provides an exemption from registering under FARA for any person "engaging or agreeing to engage only . . . in other activities not serving predominantly a foreign interest". This so-called "domestic interest" exemption is relied on by nonprofits and others for not registering for common activities that few in the public would consider registrable under the Act.

The Justice Department's proposed regulations would make two significant changes to current interpretation. First, it would "make clear that this exemption applies to commercial and non-commercial entities alike, so long as the predominant interest being served is not foreign. This change is consistent with the statutory language, which draws no distinction between commercial and noncommercial entities . . ." At ICNL, we agree with this interpretation, which is already embraced by the Justice Department in advisory opinions, and would welcome regulatory affirmation that the "domestic interest" exemption applies equally to both commercial and noncommercial actors, including nonprofits.

The second proposed change would lay out a two-part test to determine when the domestic interest exemption does or does not apply. However, this test both unduly

narrows the exemption and creates a confusing set of standards for its application. As a result, if adopted this two-part test would provide the Justice Department overbroad discretion in when to apply it and significantly – and unnecessarily – chill First Amendment protected speech and conduct.

The first part of the two-part test proposed by the Justice Department would involve when the "domestic interest" exemption would not apply. The NPRM states:

> *"Under the proposal, an agent would be categorically precluded from obtaining the exemption if (1) the intent or purpose of the activities is to benefit the political or public interests of the foreign government or political party; (2) a foreign government or political party influences the activities; (3) the principal beneficiary is a foreign government or political party; or (4) the activities are undertaken on behalf of an entity that is directed or supervised by a foreign government or political party (such as a state-owned enterprise) and promote the political or public interests of that foreign government or political party."*

However, this proposed change would seem to make the exemption unavailable for relatively common First Amendment protected activity. Consider these two examples:

1. The president of a U.S. nonprofit is on a public panel in Detroit about how best to address unlawful migration to the U.S. and Canada. A Canadian government official is also on the panel. During the discussion the Canadian official responds to a question and then follows his response by asking the U.S. nonprofit leader to explain the U.S. government's policy on the topic to better illustrate the official's point. As absurd as it may sound, under FARA, if the President of the nonprofit responded to the government official they may be engaged in covered activity as they are acting at the "request" of a foreign government official to provide information about a U.S. policy (which may qualify them as a "political consultant" under FARA). Further, by responding they may also help emphasize the Canadian government official's point in front of a U.S. audience thereby swaying US public opinion on a policy issue, and so they may also be engaged in "political activities" under the Act. While in the past, the nonprofit leader may have relied on the "domestic interest" exemption in FARA, since answering the question is clearly in the interest of the US nonprofit, under the proposed regulations they have reason to believe it may not apply. Under the proposed regulations the domestic interest exemption does not apply if "a foreign government or political party influences the activities". In this

situation, the Canadian government official clearly "influences" the U.S. nonprofit leader's response – after all, the nonprofit President would not be responding at all if the government official had not asked their question. The U.S. nonprofit leader has no time, in this situation, to seek an advisory opinion from the Justice Department for clarity. The fact that this exchange between a Canadian government official and a U.S. nonprofit leader is happening transparently in public does not seem to factor into the analysis because whether the relationship is apparent to the public only factors into part two of the Justice Department's proposed two-part test for the "domestic interest" exemption (described in detail below). As a result, the nonprofit leader may have to decline to respond to this innocuous question or risk potentially having to register under FARA, thereby chilling their First Amendment rights and effectively censoring their speech.

2. A US nonprofit has as its mission to highlight human rights abuses in other countries. At the "request" of a nonprofit in the United Kingdom, it decides to jointly release a report on human rights abuses in Myanmar that is distributed online globally, including in the United States. The report calls for the unconditional release of the Nobel Peace Prize winning political leader Aung San Suu Kyi. Aung San Suu Kyi's political party, the National League of Democracy, has also called for her unconditional release. The US nonprofit could be considered to be engaged in registrable conduct because at the "request" of the UK nonprofit it engaged in "political activities" in the United States (i.e. attempting to influence public opinion on a foreign policy issue). In the past, it may have assumed it qualifies for the "domestic interest" exemption as the report is clearly in the interest of the US nonprofit and in line with its mission. That said, under the proposed regulations the domestic interest exemption is unavailable if "the principal beneficiary [of the covered activities] is a foreign government or political party." Under these proposed regulations, the nonprofit may be concerned that since the report would seem to echo the talking points of the National League of Democracy (i.e. that Aung San Suu Kyi should be released), that the principal beneficiary of the activities may be interpreted as the National League of Democracy (a foreign political party). This is true despite the fact the nonprofit is acting completely independently of the National League of Democracy. This confusion may stop them from publishing the report or may cause them to seek an advisory opinion which could delay the publication of important and timely information for the U.S. public.

After laying out when the domestic interest exemption does not apply in the first part of the proposed test, in the second part of the test the Justice Department describes factors to help determine when it does apply. In its proposed regulations, the Department states that it:

> *"has identified a non-exhaustive list of factors to determine whether, given the totality of the circumstances, the predominant interest being served is domestic rather than foreign, such that the exemption should apply. These non-exhaustive factors include, but are not limited to: (1) whether the public and relevant government officials already know about the relationship between the agent and the foreign principal; (2) whether the commercial activities further the commercial interests of a foreign commercial entity more than those of a domestic commercial entity; (3) the degree of influence (including through financing) that foreign sources have over domestic non-commercial entities, such as nonprofits; (4) whether the activities concern U.S. laws and policies applicable to domestic or foreign interests; and (5) the extent to which any foreign principal influences the activities. While in many instances several factors may prove significant, in other instances a single factor may be dispositive; further, depending on the circumstances, the factors may overlap to various degrees (and sometimes completely). The Department expects that advisory opinions and enforcement actions will clarify how these factors apply to a range of activities."*

By proposing a "non-exhaustive list of factors" to determine when the domestic interest exemption applies rather than bright line rules the Department sows further confusion about its applicability and provides itself undue discretion to apply it – or not apply it – when it so chooses.

These factors also appear on their face to be discriminatory against non-commercial entities such as nonprofits. For example, Factor (5) is "the extent to which any foreign principal influences the activities". Factor (5) applies to both commercial and non-commercial entities. Factor (3) is "the degree of influence (including through financing) that foreign sources have over domestic non-commercial entities, such as nonprofits". Factor (3) only applies to non-commercial entities. Factors (5) and (3) would, at first, seem to be redundant factors as they both concern the degree of influence of a foreign principal. However, factor (3) is about influence of the foreign principal over the entity, while factor (5) is about influence of the foreign principal over the activity. It is not clear why non-commercial entities should face an additional burden of weighing the degree of influence of the foreign principal over the entity when compared to commercial entities which only have to weigh the influence over the specific activity. As such, this proposed regulation appears on its face to be discriminatory against non-commercial entities.

This "non-exhaustive" multi-factor test is likely to cause considerable confusion and chill important and constitutionally protected activity. Consider the following examples:

(1) A U.S. nonprofit, which includes former members of the U.S. military, is working to help those in danger in Afghanistan get out of the country as the Taliban takes over in 2021. Members of the nonprofit work at the "request" of Afghans to contact members of Congress and other U.S. government officials to try to ensure their safe travel, including passing along documentation about their former Afghan partners to members of Congress. Under FARA, members of this nonprofit could be engaged in registrable conduct as they are arguably engaging in "political activities" (attempting to sway the opinion of government officials on a policy issue) and as a "publicity agent" (disseminating information) at the "request" of a foreign principal. While members of this nonprofit are doing so out of their own humanitarian beliefs, it is not clear that the "domestic interest" exemption would apply under the Justice Department's proposed regulations. Under the above list of factors, factor (1) – "whether the public and relevant government officials already know about the relationship between the agent and the foreign principal" – would seem to weigh in favor of applying the exemption. In this case, it would be apparent to government officials that the nonprofit is working on behalf of specific Afghans. However, factor (5) - "the extent to which any foreign principal influences the activities" – would seem to weigh against applying the exemption as the nonprofit is clearly working on behalf of foreign principals. The Justice Department suggests that "advisory opinions and enforcement actions" will clarify how the "domestic interest" exemption applies, but in situations like this where every moment counts, the Justice Department's approach endangers lives. Members of this nonprofit will be placed in the difficult position of deciding whether (1) not to register and risk facing felony penalties; (2) they request an advisory opinion and have the resulting delay risk lives; or (3) they register and risk the lives of those they are working with by both the delays it takes to register and then being concerned that this information will be made public on the Justice Department's website endangering those with which they work. Instead of adopting bright line rules in its proposed regulation that could provide clear comfort for those working to save lives in this situation, the Department opts for a "totality of the circumstances" test that only the Department seems to be in a position to determine.

(2) A Montana based nonprofit that operates in both the U.S. and Canada promotes responsible hunting and publicly promotes policies to ensure

> hunting is part of government conservation efforts. The nonprofit receives donations from both Americans and Canadians. One of the factors in the second part of the proposed "domestic interest" exemption test is "(3) the degree of influence (including through financing) that foreign sources have over domestic non-commercial entities, such as nonprofits". However, neither the Act nor this proposed regulatory factor is clear about what degree of foreign financing, or its nature, might make one ineligible for the domestic interest exemption. For example, would it matter if 20% of the nonprofit's funding came from Canadians? What types of "influence" from a funder might trigger registration – a mere suggestion from a Canadian donor? The proposed regulation provides no bright line rules, but instead leaves it to the discretion of the Department to determine on a case-by-case basis. This will likely chill many nonprofits from seeking resources from across borders for their work.

The factors described in the two-part test for the "domestic interest" exemption proposed by the Justice Department are not seemingly derived from the text of FARA. As such, they are likely to be challenged under *Loperbright Enterprises v. Raimondo* (2024). Under this standard, courts will closely scrutinize agency interpretation of statutes without the level of *Chevron* deference historically provided. A *Loperbright* challenge has a significant likelihood of success if these regulations are adopted. As such, nonprofits and others would face significant uncertainty if this test for the "domestic interest" exemption is adopted, not only because it is vague, but because of the likelihood it will be struck down as unconstitutional.

Currently, the Justice Department has a limited, and partial, regulation for the "domestic interest" exemption at 28 CFR 5.304(c). It states that the exemption applies even if a person is "engaged in political activities on behalf of a foreign corporation" – even one owned by a foreign government – and even if the political activities are in furtherance of the foreign commercial entity, as long as the political activities are "not directed by a foreign government or foreign political party" and "the political activities do not directly promote the public or political interests of a foreign government or of a foreign political party." This regulatory reading of the exemption should apply in other contexts of covered activity as well. As such, any regulations should make clear that under FARA covered activities meet the "domestic interest" exemption as long as they are "not directed by a foreign government or foreign political party". The additional standard that the activities "do not directly promote the public or political interests of a foreign government or of a foreign political party" should be dropped as it is too ambiguous.

Declining to address the vagueness of FARA's agency definition

Despite indicating in the ANPRM on FARA in 2021 that it might provide greater clarity about the definition of an "agent of a foreign principal" in any proposed regulations, the Justice Department declined to do so in the NPRM. In the NPRM it claimed that determining the exact nature of who is an agent under the Act is a "fact-intensive exercise better suited to the advisory-opinion process, where persons who are unclear as to the applicability of the Act can seek and receive definitive guidance as to whether they have a registration obligation."

This approach is likely to continue to cause confusion and chill First Amendment protected speech and conduct. In many situations, organizations do not have time or resources to request an advisory opinion. Waiting for an advisory opinion before taking an action can so delay the action or speech that its meaning is then lost – chilling First Amendment protected rights. Or such a delay can even potentially cost lives, as the example above shows regarding former members of the U.S. military assisting Afghans fleeing the Taliban.

Under FARA an "agent of a foreign principal" means "(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person" engages in a covered activity.

This is one of the most confusing agency definitions in U.S. law. To take just one example, it is unclear what it means to act at another's "request". The Justice Department has issued over 80 advisory opinions on an "agent of a foreign principal". These opinions are difficult for any ordinary person to understand. Indeed, lawyers that specialize in FARA are frequently confused by them. For example, one recent advisory opinion (March 25, 2024) found that one can be an agent of a foreign principal even if one does not act at the request, direction, or control of a foreign principal, but merely because one acts in "coordination" with them. "Coordination" appears nowhere in the Act or regulations and raises clear First Amendment concerns. For example, if an anti-sex trafficking nonprofit has interactions with and shares common advocacy goals with a foreign organization working on stopping sex-trafficking it might be viewed as acting in "coordination" even if it is entirely independent and does not act at the "request" of the foreign organization. Or consider another recent advisory opinion (December 21, 2023) that found that a nonprofit working on atrocity crimes needed to register for engaging in outreach to the U.S. government even though it did so entirely independently of a foreign principal overseas. This is because the Justice Department found that the nonprofit had an agency relationship with a foreign principal for activities it engaged in abroad. The Department claims this agency

relationship then carries over to the nonprofit's activities within the United States even though it did not show that the U.S. activity was undertaken at the direction or request of the foreign principal. It is unclear the textual basis in the Act for this determination by the Department.

These and other opinions do not seem grounded in the Act and make it difficult for a nonprofit to know when they might be an agent of a foreign principal. The Justice Department should instead interpret the definition of an "agent of a foreign principal" in a tailored and clear manner, applying the traditional principal-agent relationship as defined in the Restatement of Agency. The Restatement definition requires that to create an agency relationship that the agent act at the control of the principal with the consent of both parties. This more targeted approach builds on other Justice Department guidance that finds an agency relationship is created under the Act if the registrant is "acting as an agent or alter ego of the foreign principal". Any broader reading of the agency provision would capture a wide swath of First Amendment protected speech and conduct as well as continue to generate confusion, chilling First Amendment rights. By declining to adopt this more traditional definition of agency in regulations the Department continues confusion around this key definition in the Act.

Declining to address vagueness of FARA's definition of political consultant

One of the broadest covered activities in FARA is that of "political consultant" which is defined as "any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or a foreign political party." In the ANPRM, the Justice Department suggested it would provide additional clarity in regulations for this covered activity. However, in its proposed regulations it ultimately declined to do so.

In not doing so, the proposed regulations fail to appropriately target a key covered activity. For example, as described in the example above concerning a public panel discussion on immigration, a person could be considered a "political consultant", and have to register under FARA, for simply responding to a factual question from a foreign government official during a public panel. This broad interpretation of political consultant does not seem to further any compelling government interest in the described example, but does significantly stifle First Amendment protected speech.

The Justice Department has a history of reading down key parts of the Act so as to limit overbreadth and confusion and should do so in the case of "political consultant". For example, in a July 2021 Advisory Opinion the Justice Department read down the term "political consultant" in the Act, limiting its reach to those who are also engaged in "political activities" (as defined in 22 U.S.C. 611(o)) behalf of a foreign principal. It is important that the Justice Department undertake targeted

readings of the Act to address constitutional infirmities in the Act wherever possible.

The Attorney Exemption

Under FARA there is an exemption to registering under 22 U.S.C. 613(g) for attorneys providing "legal representation" for their clients. In these proposed regulations, the Department proposes to define the statutory term "legal representation . . . clarifying that it includes activities commonly considered part of client representation in the underlying proceeding so long as they do not constitute political activities; for example, making statements outside of the courtroom or agency hearing room could qualify."

This regulatory change is in line with recent Justice Department interpretation and preferred over more restrictive readings of the statute. That said, the Department's interpretation of the exemption should be broadened to include "political activities" that are considered part of representing a client before a judicial or other forum in the United States. For example, if a lawyer claims on the courthouse steps that her client is being wrongly charged for a crime because a prosecutor is taking politicized actions that statement by the lawyer could be understood to be "political activities" as it is attempting to influence US public opinion on a policy issue (i.e. the politicization of prosecutors). Yet, making such a declaration to the public is highly germane to representing their client. There should be a broad exemption for attorney representation. After all it is already clear to observers that an attorney is representing their client and so registration would not seem to serve any purpose. However, having to navigate the broad category of "political activities" under the Act is burdensome and could undermine an attorney's ability to zealously represent their client.

This broader interpretation also seems to better conform to a plain reading of the statute – which does not limit the exemption in the case of "political activities". The exemption under 613(g) states that a person engaged in the following activity does not have to register:

> *Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: Provided, That for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.*

Here the exemption is categorical. An attorney representing their client in official proceedings does not have to register – even if they are engaged in "political

activities". The only caveat in the exemption is to make clear that the exemption does not apply to a lawyer lobbying public officials outside of official proceedings. The Justice Department should follow this reading of the text of the Act in its regulations, making clear the exemption also applies when a lawyer engages in "political activities" as long as it occurs in the course of legal representation and these activities are not an explicit attempt to influence "personnel or officials" outside of a proceeding (such as through direct lobbying).

New Burdensome Changes to the Advisory Opinion Process

The Department proposes changing the process for receiving an advisory opinion, creating new burdens on those who wish to determine if they need to register. The NPRM states that:

> *"To provide the Department with the context necessary to assess the request, the proposed rule would also expand the information to be provided with each request to include, where applicable, a list of partners, officers, or directors or persons performing the functions of an officer or director, and relevant and material information regarding current or past affiliation(s) with a foreign government or foreign political party. Further, to clarify the required elements of a request for an advisory opinion, the Department is proposing dividing the subparagraphs in the regulation by transferring to its own subparagraph the requirement that all submissions be certified to be true, correct, and complete."*

These added burdens to receive an advisory opinion are unnecessary. This would require nonprofits to list all officers and board members to receive an advisory opinion for a situation that does not involve any of them. It will often, therefore, require a nonprofit to go to their board for permission before requesting an advisory opinion. This will cause delay in receiving a timely advisory opinion.

It is also unclear what "relevant and material information regarding current or past "affiliation(s)" of an organization with a foreign government of foreign political party means. This is likely to create significant costs. For example, a large international nonprofit may feel that it needs to do an audit of past connections with foreign governments in its global operations before it can request an advisory opinion. This may include looking back over decades on when staff appeared on panels with foreign government officials, had met with government officials, etc. Similarly, if any past affiliations of officers and board members of an organization are required to be provided it will require extensive requests within the organization to determine if there have been any past affiliations with government officials. For example, perhaps a board member once served on a human rights advisory panel for a government. This fact might not be obvious even within the organization and so would require extensive due diligence before even requesting an advisory opinion, even though it is unlikely to change the analysis of the advisory opinion.

Creating these additional burdens to the advisory opinion process is unnecessary. Advisory opinions are already based on the facts shared by the potential registrant. If additional relevant facts are learned by the Department, it can then change its opinion. However, having to decide what potential relationships might be "relevant and material" is time consuming and will chill organizations from seeking advisory opinions. Since the Department indicates in its NPRM that it will rely heavily on advisory opinions in its enforcement strategy, additional burdens to receive advisory opinions will mean many organizations may simply not engage in potentially registrable conduct (whether or not that activity actually requires registration).

Constitutional Challenges to FARA and the Proposed Regulations

The federal government in its regulations is required to interpret the law wherever possible in a manner that does not violate the constitution. As President Trump stated in his Executive Order on Restoring Freedom of Speech (Jan. 20, 2025) it is U.S. government policy to "secure the right of the American people to engage in constitutionally protected speech." In a separate Executive Order (February 19, 2025) President Trump requires agency heads to identify for elimination "unconstitutional regulations and regulations that raise serious constitutional difficulties, such as exceeding the scope of the power vested in the Federal Government by the Constitution."

However, in its proposed regulatory changes the Justice Department does not even recognize the constitutional challenges created by FARA and so does not attempt to show that its proposed regulations are appropriately tailored so as to not unduly infringe First Amendment protected speech or conduct or other constitutional rights.[1]

There are a number of arguments against the constitutionality of key provisions of FARA and the Justice Department's proposed regulations. These arguments need to be fully addressed in the regulatory process. A non-exhaustive list of these arguments includes:

1. **Vagueness**. The U.S. Supreme Court has found that a criminal law, like FARA, must define offenses with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson* (1983) These

[1] There has been relatively little caselaw on the constitutionality of FARA. The one significant Supreme Court judgment on the Act, Meese v. Keene, 481 US. 465 (1987), was a narrow ruling from a divided Court that held that a no longer present requirement that agents label their covered material "political propaganda" was not unconstitutional. However, the Supreme Court explicitly did not address the constitutionality of the underlying scope of the Act. Further, First Amendment jurisprudence has shifted substantially since the ruling, making clear that key parts of the Act – and any accompanying regulation – would face significant First Amendment scrutiny.

concerns are amplified in the First Amendment context where a vague statute can "inhibit the exercise" of the right as it can cause the public to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford* (1972) FARA, and these proposed regulations, fail this standard. Indeed, through these proposed regulations the Justice Department admits that the standard for being an "agent of a foreign principal" is so vague and context specific that defining it is "better suited to the advisory-opinion process". In other words, the public cannot clearly apprehend the standard by simply reading the statute. Similarly, the Justice Department's proposed two-part test for the "domestic interest" exemption with its "non-exhaustive" set of criteria appears to be unconstitutionally vague as it would seem not to have "sufficient definiteness that ordinary people can understand what conduct is prohibited".

2. **Disproportionate burdens on expressive activity**. Laws, like FARA, that "impose a disproportionate burden" upon those engaged in expressive activity are subject to heightened scrutiny under the First Amendment. *Arcara v. Cloud Books, Inc.* (1986). Under FARA, individuals and entities must register with the Justice Department, provide regular updates of detailed information about their activities, and place stigmatizing labels on their covered material. Any such burden on expressive activity must be carefully tailored to a significant government interest. FARA, and these regulations, are not so tailored. Indeed, the Department in its regulatory proposal does not even identify the government's interest being furthered or how its approach is appropriately tailored to avoid violating the First Amendment. Given the law and Trump's recent executive orders, the Department must undertake this constitutional analysis before adopting any new proposed regulations.

3. **Prior restraint on expressive activity**. The Justice Department indicates in its proposed regulations that potential registrants will frequently be unable to determine whether they need to register by simply reading FARA and its regulations, but instead must turn to the advisory system process. In relying so heavily on the advisory opinion process, the Justice Department in its proposed regulations exacerbates a system of prior restraint on expressive activity created by FARA. As the Supreme Court has stated "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan* (1963) A potentially sweeping swath of expressive activity is covered by FARA. The Department's proposed regulations for the "domestic interest" exemption can be used to significantly narrow this covered activity. However, the Department's "non-exhaustive" list of criteria for determining when the exemption applies is so vague and confusing that many would have to first ask the Department if the domestic interest exemption applies before engaging in the activity or risk being required to register under

FARA.[2] As such, the Department proposes to expand the advisory opinion system in a way that represents an even more significant prior restraint on expressive activity than current law.

4. **Compelled disclosure.** In *Americans for Prosperity Foundation v. Bonta* (2021) the U.S. Supreme Court found that when compelled disclosure laws impact the freedom of association of an organization that the underlying law must meet exacting scrutiny, and potentially strict scrutiny. FARA, like the law in question in *Bonta*, compels groups to disclose a wide variety of potentially sensitive information that can undermine their associational rights. As such, any potential regulation must be carefully tailored to meet a significant government interest. However, FARA and these proposed regulations are not so tailored.

5. **Compelled speech.** In cases like *National Institute of Family & Life Advocates v. Becerra* (2018), the U.S. Supreme Court has struck down mandatory disclosure requirements that can chill protected speech. In the case of FARA many civil society organizations have refrained from engaging in protected speech covered by FARA because of the Act's stigmatizing labeling requirement that frequently mischaracterizes the relationship between the registrant and the foreign principal and implies they are not acting independently. For example, by labeling registrants an "agent of a foreign principal" even if they are acting merely at a foreign partner's "request" in an activity that is in line with a U.S. organization's mission.

6. **Content-based discrimination.** The U.S. Supreme Court has found that a law that regulates expressive activity is not content neutral if it regulates speech "based on its function or purpose". *Tiktok v. Garland* (2025). To determine whether a law is content-based, the Court has looked to whether the law "single[s] out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC (2022).* FARA regulates only certain types of expressive activities, such as "political activities" or engaging as a "political consultant", but not other expressive activity. It also provides a series of content-based exemptions to register, such as for "academic" or "religious" expression, but not for other content. As such, FARA regulates expressive activity based on content. Regulations on expressive activity that are not content neutral demand strict scrutiny under Supreme Court jurisprudence. *Barr v. Am. Assoc. of Pol. Consultants, Inc. (2020)* Any such law according to the U.S. Supreme Court is "presumptively unconstitutional". *Reed v. Town of Gilbert (2015).* While this standard applies to FARA, it also applies to the Justice Department's proposed regulations. For example, the proposed regulations

[2] The problem of FARA as a prior restraint on expressive activity is particularly acute for federal government employees. Under 18 USC 219 US public officials are barred from engaging in registrable activity. As such, before engaging in any potentially covered activity, such as printing out a sign for a foreign congregant at their church on the weekend, US government employees must first be provided approval by the Justice Department that such activity is does not require registration or risk committing a crime punishable by up to two years in jail.

single out as a factor for consideration for the "domestic interest" exemption "whether the activities concern U.S. laws and policies applicable to domestic or foreign interests". This is seemingly a content-based restriction.

7. **Discrimination against speakers**. In *Citizens United v. FEC* (2010), the U.S. Supreme Court found that in the context of political speech the government cannot "impose restrictions on certain disfavored speakers" and explicitly left open the question of whether the federal government could specifically regulate foreign speakers.[3] Under FARA, the speech of "agents of foreign principals" are significantly burdened in an untailored manner, meaning that FARA would likely face significant scrutiny by the Court if challenged for discriminating against certain speakers. This is also true of the Department's proposed regulations in its list of factors for determining whether the "domestic interest" exemption applies. For example, factor (3) is "the degree of influence (including through financing) that foreign sources have over domestic non-commercial entities, such as nonprofits". On its face, it is discriminatory that this factor applies to non-commercial actors, but not commercial actors, even if they are engaged in identical activity. As such, it should be rejected as being unconstitutionally discriminatory.

Conclusion

FARA raises clear First Amendment concerns, many of which cannot be fixed through regulations. However, instead of attempting to mitigate these constitutional concerns, the Department fails to even try to address them and many of its proposed regulations would instead exacerbate them.

The Justice Department should reject the proposed regulations or substantially rewrite them. Instead, if the Department is to adopt regulations it should adopt clear bright line rules that are protective of Americans' First Amendment and other constitutional rights. In narrowing when FARA can be used for prosecutions in her February 2025 enforcement memo, Attorney General Bondi has recognized FARA's overbreadth problems. The Department should use this opportunity to proactively engage with Congress to reform the Act to address its First Amendment infirmities so that going forward it can enforce an Act that is better targeted to the country's interests and that is on solid constitutional footing.

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[3] Citizens United v. FEC, 558 U.S. 310, 341 (2010). The Court held off on deciding "whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process", and, if so, what standard of tailoring would apply. *Id.* at 362.