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# HOW FAR WILL FARA GO? THE FOREIGN AGENTS REGISTRATION ACT AND THE CRIMINALIZATION OF GLOBAL HUMAN RIGHTS ADVOCACY

Monica Romero\*

*Abstract:* The Foreign Agents Registration Act (FARA) was enacted and enforced during World War II to protect the American public from foreign propaganda, especially from the Nazi party. Following the war, FARA was scarcely used for over half a century. But in the past five years, there has been a significant uptick in FARA enforcement, particularly against major political personalities. The revival of FARA has led many legislators and scholars to advocate for expansions of FARA's scope and enforcement mechanisms in the name of national security. But most have failed to acknowledge the risk and likelihood of politicized enforcement. The United States government is positioned to use FARA to harass organizations critical of the United States—in particular, human rights organizations (HROs) that take politically unpopular positions. The forced association of FARA's registration requirements could jeopardize HROs' ability to engage in advocacy by fostering public distrust and social stigma. Accordingly, politicized FARA enforcement against such organizations violates the First Amendment. This Comment advises human rights organizations that have been subject to a politicized FARA enforcement action on how to best attack it and urges Congress to amend FARA to protect these groups and their interests.

## INTRODUCTION

In 1938, Congress enacted the Foreign Agents Registration Act, more commonly known as “FARA.”<sup>1</sup> The bill was introduced on the recommendation of a special congressional committee tasked with investigating the rise of Nazism and Nazi propaganda in the United States leading up to World War II.<sup>2</sup> Rather than prohibit these activities outright,

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1. *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8021 (1938); *Foreign Agents Registration Act of 1938*, Pub. L. No. 75-583, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–21).

2. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT 2 (2016); *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8021 (“Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups who are supplied by such foreign

Congress opted to rely on the “spotlight of pitiless publicity” as “a deterrent to the spread of pernicious propaganda.”<sup>3</sup> The statute, therefore, was designed to use public shame and social stigma to oust unfavorable speech. FARA operates as a public disclosure statute, requiring certain individuals or organizations working on behalf of foreign governments, entities, or individuals to register with the Department of Justice as “agent[s] of a foreign principal” (foreign agents) and disclose information about themselves as well as their foreign clients, activities, and contract terms.<sup>4</sup> Violations of this disclosure requirement could result in civil and criminal sanctions.<sup>5</sup>

Although it was frequently used after its passage,<sup>6</sup> by the mid-1960s FARA became effectively dormant.<sup>7</sup> In fact, between 1966 and 2015, the Department of Justice brought only seven criminal FARA cases.<sup>8</sup> But since the 2016 election, FARA has taken center stage with prosecutions and investigations of high-profile political actors, including Paul Manafort, Michael Flynn, Richard Gates, Elliot Broidy, and Rudy Giuliani.<sup>9</sup> More than twenty individuals and entities were criminally

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agencies with funds and other materials to foster un-American activities and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.”).

3. *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8022.

4. 22 U.S.C. § 618; *see* discussion *infra* Part I.

5. 22 U.S.C. § 618.

6. U.S. Dep’t of Just., *Just. Manual: Crim. Manual* § 2062 (2018) (noting FARA was used as the basis for twenty-three prosecutions during World War II).

7. OFF. OF THE INSPECTOR GEN., *supra* note 2, at 8 (“During our audit we found that historically there have been hardly any FARA prosecutions. Over the past 50 years, between 1966 and 2015, the Department reported to us that it brought, in total, only seven criminal FARA cases—one resulted in a conviction at trial for conspiracy to violate FARA and other statutes, two pleaded guilty to violating FARA, two others pleaded guilty to non-FARA charges, and the remaining two cases were dismissed.”).

8. *Id.* FARA has both criminal and civil enforcement provisions. Civil enforcement permits the Attorney General to seek an injunction prohibiting an individual believed to be in violation of FARA from continuing to act as an agent of a foreign principal. *See* 22 U.S.C. § 618(f). Of course, violation of this injunction can lead to criminal charges as well. *See id.* Nevertheless, the focus of this Comment is the criminal enforcement provisions and their history.

9. *See Recent FARA Cases*, U.S. DEP’T OF JUST. (Nov. 13, 2019), <https://www.justice.gov/nsd-fara/recent-cases> [<https://perma.cc/HX76-TMLP>]; Letter from Tom Udall, Richard Blumenthal, Sheldon Whitehouse, Elizabeth Warren, Tammy Duckworth, Richard J. Durbin, Jeffrey A. Merkley, U.S. Sens., to Brandon L. Van Grack, Dir., FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of Just. (Sept. 25, 2019), <https://www.documentcloud.org/documents/6429703-FARA-Letter-DOJ-1.html> [<https://perma.cc/QSV9-27WG>]; Kenneth P. Vogel, *Elliot Broidy, a Top Trump Fund-Raiser, Charged in Foreign Influence Case*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/politics/elliott-broidy-trump-fundraiser.html> [<https://perma.cc/XX3U-5Y9G>]. To note, several of the individuals listed here that had been charged with FARA violations were not only connected to the Donald Trump Presidential Campaign and presidency, but were pardoned by Trump

charged with violations involving FARA in 2018 alone.<sup>10</sup> That is more than the total number of charges in all of the prior fifty years.<sup>11</sup> FARA's apparent revival has stimulated a variety of bipartisan legislative proposals to expand FARA's scope and give greater power to its enforcement mechanisms, in the name of national security<sup>12</sup>—but this Comment urges caution.

While FARA may be a valuable public disclosure law for safeguarding elections and other democratic processes, it poses a high danger of weaponized enforcement as presently written and utilized. At particular risk are human rights organizations (HROs). These organizations' loyalties are tied to the advocacy and preservation of human rights, which are largely rooted in treaties and other documents of international law, such as the Universal Declaration of Human Rights (UDHR).<sup>13</sup> HROs often use research, reporting, and advocacy to criticize world leaders and government policies that violate human rights. These leaders and governments may take any opportunity available to discredit allegations of human rights abuses. Therefore, HROs' actual and perceived independence from outside influences is essential to their credibility and effectiveness as neutral third-party, non-governmental actors.

Given the First Amendment's unique doctrine regarding public disclosure laws and FARA's risk of weaponized enforcement, this Comment presents HROs with legal strategies to challenge FARA's constitutionality and calls for congressional intervention. It proceeds in four parts. Part I provides a comprehensive analysis of the text of FARA itself, focusing on the activities it covers as well as the statutory exemptions. Part II describes the tension between public disclosure laws and First Amendment compelled speech and association doctrine. Part III

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near the end of his term. See Jacob Jarvis, *Who Is Elliot Brody? Donald Trump Pardons GOP Fundraiser*, NEWSWEEK (Jan. 20, 2021, 4:31 AM), <https://www.newsweek.com/elliott-broidy-donald-trump-pardon-gop-fundraiser-1562908> [<https://perma.cc/JW2E-EN2V>]; Amanda Macias & Dan Mangan, *Trump Issues 26 More Pardons, Including Paul Manafort, Roger Stone and Charles Kushner*, CNBC (Dec. 24, 2020, 1:27 PM), <https://www.cnbc.com/2020/12/24/trump-issues-26-more-pardons-including-paul-manafort-roger-stone-and-charles-kushner.html> [<https://perma.cc/5XNZ-PHVQ>]; Josh Gerstein & Kyle Cheney, *'Any and All Possible Offenses': Trump Pardon Grants Flynn a Sweeping Reprieve*, POLITICO (Dec. 1, 2020, 2:10 PM), <https://www.politico.com/news/2020/11/30/trump-flynn-pardon-reprieve-441527> [<https://perma.cc/C3TV-RZ3S>].

10. Press Release, U.S. Dep't of Just., Foreign Agents Registration Act Fact Sheet (Sept. 25, 2019), <https://www.justice.gov/opa/press-release/file/1205161/download> [<https://perma.cc/DU5B-9TCS>].

11. *Id.*

12. *Infra* section V.B.

13. G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The thirty-article Declaration sets forth a myriad of universal human rights: prohibitions on slavery and servitude, right to a nationality, an adequate standard of living, etc.

discusses FARA's history of politicized enforcement and how the Government can weaponize it against HROs specifically. Finally, Part IV presents options for HROs to challenge the statute under the First Amendment. It also explores statutory reform options to best protect the work of HROs while balancing the important role FARA plays in safeguarding democratic processes.

## I. OVERVIEW OF THE FOREIGN AGENTS REGISTRATION ACT

FARA is one of several federal public disclosure laws. The purpose of the statute is to curb the spread of foreign propaganda by making publicly available where or from whom certain information originates.<sup>14</sup> FARA requires certain individuals or organizations working on behalf of foreign governments, entities, or people to register with the Department of Justice as "foreign agents" and disclose information about themselves as well as their clients, activities, and contract terms.<sup>15</sup> Although this may sound simple, FARA's statutory language has a broad reach. To understand the breadth of this public disclosure statute, this Part examines FARA's provisions in detail.

### A. *Foreign Principals and Their Agents*

FARA requires "agent[s] of a foreign principal" engaged in the activities described in 22 U.S.C. § 611 ("covered activities") to register with the Department of Justice.<sup>16</sup> A "foreign principal" includes the government of a foreign country, a foreign political party, and any person, association, or other entity outside of the United States.<sup>17</sup> Agents are typically recognized as individuals who agree to act on behalf of another.<sup>18</sup> FARA expands upon this definition, identifying an "agent" of a foreign principal or "foreign agent" as:

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

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14. *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8021 (1938).

15. 22 U.S.C. §§ 611–12.

16. *Id.* § 612(a).

17. *Id.* § 611(b). To note, the "foreign principal" definition does not extend to those who are domiciled in the United States, or entities or associations organized or created under the laws of the United States.

18. See generally RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006) (identifying various agency relationships and agent obligations).

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 the covered activities].<sup>19</sup>

This definition of “foreign agent” and the agent-principal relationship encompasses several possible situations. For example, it could include a non-profit that is fully funded by a private foreign donor or a consulting firm hired by a foreign government. However, not all those involved in an agent-principal relationship must register under FARA. Rather, only those engaged in “covered activities” must submit filings.

### B. *Covered Activities*

There are four “covered activities” that trigger FARA registration requirement. They are: (1) soliciting or disbursing money or “other things of value” for or in the interests of a foreign principal; (2) representing the interests of a foreign principal before any agency or official of the Government of the United States; (3) engaging in “political activities for or in the interests” of a foreign principal; and (4) acting as public relations counsel, information-service employee, or political consultant for or in the interests of a foreign principal.<sup>20</sup>

The latter two categories are the broadest, and often the subjects of dispute in enforcement actions.<sup>21</sup> The third category covers “political activities for or in the interests” of a foreign principal.<sup>22</sup> It encompasses any activity that is intended or “believe[ed]” to influence the United States Government or the American public’s opinion regarding the foreign or domestic policies of the United States.<sup>23</sup> In other words, “political activities” are not limited to lobbying and may include other advocacy activities that influence public opinion on a wide range of both foreign and domestic issues. Likewise, the fourth category—acting in the United States as a public relations counsel, publicity agent, political consultant, or information services employee for or in the interest of a foreign principal—is incredibly broad.<sup>24</sup> For example, the term “information-service employee” covers practically any person providing or disseminating information on behalf of a foreign principal through any

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19. 22 U.S.C. § 611(c)(1).

20. *Id.*

21. *See infra* Part III.

22. 22 U.S.C. § 611(c)(1)(i).

23. *Id.* § 611(o).

24. *Id.* § 611(c)(1)(ii).

form of media or other type of platform.<sup>25</sup>

Importantly, though, for any action to be considered a “covered activity” warranting registration, it must be undertaken “for or in the interests of” a foreign principal.<sup>26</sup> This is reflected in the language of all four “covered activity” categories. But FARA does not actually define this phrase. And because FARA has no de minimis threshold, its registration requirements can be triggered by even the slightest activity that meets any one of the “covered activity” categories.<sup>27</sup> Thus, the phrase “for or in the interest of” is open to interpretation: “It could be [read] narrowly—for instance, the activity has to be explicitly on behalf of the foreign principal—or liberally—the activity merely has to be indirectly beneficial to the foreign principal.”<sup>28</sup>

### C. Registration Requirements and Consequences of Noncompliance

Individuals must register themselves as the foreign agents of their associated foreign principals with the Department of Justice within ten days of engaging in a covered activity.<sup>29</sup> All registration materials, as well as a database of registrants and their foreign principals, are available to the public on the Department of Justice’s website.<sup>30</sup>

Intentional FARA violations may result in monetary fines up to

25. *Id.* § 611(i). Specifically, the term is defined as:

any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country.

*Id.*

26. *Id.* § 611(c)(1)(i)–(iii).

27. COVINGTON & BURLING LLP, *THE FOREIGN AGENTS REGISTRATION ACT (“FARA”): A GUIDE FOR THE PERPLEXED* 4 (2019), [https://www.cov.com/-/media/files/corporate/publications/2018/01/the\\_foreign\\_agents\\_registration\\_act\\_fara\\_a\\_guide\\_for\\_the\\_perplexed.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/01/the_foreign_agents_registration_act_fara_a_guide_for_the_perplexed.pdf) [https://perma.cc/Y369-R25G] (“A single meeting, for example, with a U.S. official by an executive of a company headquartered outside the United States, or by its U.S. subsidiary on behalf of the foreign parent, might satisfy the ‘representation’ trigger. And the mere act of hosting a conference, distributing a policy report, requesting a meeting, or reaching out to opinion leaders on behalf of a foreign principal could satisfy the ‘political activities’ trigger.”).

28. Nick Robinson, “*Foreign Agents*” in *An Interconnected World: FARA and the Weaponization of Transparency*, 69 *DUKE L.J.* 1075, 1099 (2020).

29. 22 U.S.C. § 612(a). Registration statements must include, among other things: the registrant’s name and associated addresses; if the registrant is an organization, all the names and addresses of the directors or officers as well as the articles of incorporation or bylaws; a comprehensive statement of the nature of the registrant’s business and relationship to the foreign principal. *Id.* § 612(a)(1)–(11).

30. *Foreign Agents Registration Act—Browse Filings*, U.S. DEP’T OF JUST., <https://efile.fara.gov/ords/fara/f?p=1381:1:1693047727558:::> [https://perma.cc/7RMF-C9CU] (continuously updated with new filings).

\$10,000 and imprisonment for up to five years.<sup>31</sup> Certain offenses regarding noncompliance, including failure to properly label registration materials or provide adequate disclosure to the Department of Justice, may result in a fine up to \$5,000 or imprisonment for not more than six months, or both.<sup>32</sup> Individuals who unintentionally fail to comply with FARA—either because disclosure materials are incomplete or because they were unaware of their noncompliance status—may be given the opportunity to file an amended registration statement prior to civil or criminal action, at the discretion of the Department of Justice.<sup>33</sup>

#### *D. Exemptions*

There are certain situations where individuals who may trigger FARA’s registration requirements nonetheless do not have to register. The Attorney General of the United States has the discretion to waive FARA registration requirements<sup>34</sup> and there are a handful of statutorily defined exemptions.<sup>35</sup> These exemptions are important to ensure exclusion of activities that would otherwise trigger registration, despite falling outside of FARA’s original purpose of curbing foreign propaganda. However, these exemptions are also ambiguous<sup>36</sup> and, as this Comment argues, could be more extensive in their coverage.

##### *1. Diplomats and Foreign Affairs*

FARA contains a set of statutory exemptions for diplomatic and foreign officials and staff recognized by the Department of State.<sup>37</sup> Additionally, the President may also exempt a foreign agent of a foreign government “the defense of which the President deems vital to the defense of the United States” from registering.<sup>38</sup> However, no country has been so designated since 1946.<sup>39</sup>

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31. 22 U.S.C. § 618(a).

32. *Id.*

33. JACOB R. STRAUS, CONG. RSCH. SERV., FOREIGN AGENTS REGISTRATION ACT: AN OVERVIEW 2 (2019), <https://crsreports.congress.gov/product/pdf/IF/IF10499> [<https://perma.cc/DN8C-6SWX>].

34. 22 U.S.C. § 612(f).

35. *Id.* § 613.

36. This section describes FARA’s exemptions and draws on advisory letters to elucidate the exemptions’ practical operation. However, these advisory letters are heavily redacted.

37. 22 U.S.C. § 613(a)–(c).

38. *Id.* § 613(f).

39. See Letter from Heather H. Hunt, Chief, FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of Just., to [addressee deleted] (May 18, 2012), <https://www.justice.gov/nsd-fara/page/file/1038216/download> [<https://perma.cc/QW4U-8NNL>] (“The national security exemption found in



## 2. *Commercial Activities*

FARA exempts “private and nonpolitical activities in furtherance of the bona fide trade or commerce of [a] foreign principal.”<sup>40</sup> This exemption was expanded by a 2003 regulation, which exempted activities undertaken in furtherance of a foreign corporation’s bona fide commercial, industrial, or financial operations, even if the corporation is owned by a foreign government.<sup>41</sup> In short, the statute and regulation exempt just about any foreign entity or person’s activities that have a legitimate economic underpinning—such as hiring a sales consultant or someone to help negotiate trade deals.

Critically, though, the commercial activities exemption does not apply when the activities “directly promote the public or political interests of” a foreign government or political party.<sup>42</sup> This caveat has blurred the scope of the exemption. For example, in one advisory letter, the Department of Justice found that a public relations firm hired by a foreign government to encourage tourism was required to register as a foreign agent because furthering economic development through tourism could not be construed as a private, nonpolitical activity.<sup>43</sup> Rather, the Department of Justice stated that promoting tourism on behalf of a foreign government creates an influx of capital and a host of jobs for the foreign country, both of which are “obviously in the political and public interests” of the foreign government.<sup>44</sup> In another, more recent, advisory letter, the Department of Justice determined that a company’s activities aimed at developing a foreign state bank’s commercial relationship with domestic financial institutions fell outside the exemption because promoting the bank’s business promotes the public interests of the foreign country, not bona fide private commercial interests.<sup>45</sup>

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22 U.S.C. § 613(f) is not available . . . . It is permitted only if the President has, by publication in the Federal Register, designated for the purpose of Section 3(f) the country or countries deemed ‘vital to the defense of the United States’ . . . . [Foreign country] is not so designated, nor has any country been so designated since September 30, 1946, the date on which the President withdrew from consideration all countries previously designated as entitled to the exemption provided by Section 3(f).” (brackets in original).

40. 22 U.S.C. § 613(d)(1).

41. Administration and Enforcement of Foreign Agents Registration Act of 1938, 68 Fed. Reg. 33,629, 33,630 (June 5, 2003) (codified at 28 C.F.R. § 5.304 (2020)).

42. 28 C.F.R. § 5.304(b) (2020).

43. Letter from Joseph E. Clarkson, Chief, FARA Registration Unit, Internal Sec. Section, U.S. Dep’t of Just., to [addressee deleted] (Jan. 20, 1984), <https://www.justice.gov/nsd-fara/page/file/1046156/download> [<https://perma.cc/QY6E-HQEU>].

44. *Id.*

45. Letter from Heather H. Hunt, Chief, FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of

### 3. *Lawyers and Lobbyists*

FARA contains a statutory exemption for lawyers that represent a foreign principal before any court of law or any United States agency, provided that such representation “does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings [and related inquiries or investigations].”<sup>46</sup> However, if the lawyer engages in any activities that are not covered by the exemption, the lawyer must still register as a foreign agent, even if other activities fall within the exemption. In a recent advisory letter, the Department of Justice informed a law firm representing a foreign embassy that it needed to register as a foreign agent.<sup>47</sup> Some of the law firm’s activities—like evaluating the merits of initiating or defending against particular litigation, or attending meetings with officials to discussing pending extradition requests—fell well within the lawyer exemption.<sup>48</sup> Despite this, the Department of Justice concluded that other actions required registration, such as preparing and sharing a memorandum with the embassy’s public relations firm regarding pending congressional legislation, or drafting potential responses to media inquiries to be delivered by the embassy about ongoing litigation.<sup>49</sup>

FARA contains a similar limited statutory exemption for lobbyists hired by foreign individuals or corporations who have already registered under the Lobbying Disclosure Act (LDA).<sup>50</sup> But Department of Justice regulations clarify that lobbyists hired directly by a foreign government or foreign political party, or where either will be the principal beneficiary of the lobbying activities, must register under FARA, regardless of

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Just., to [addressee deleted] (Feb. 9, 2018), <https://www.justice.gov/nsd-fara/page/file/1068636/download> [<https://perma.cc/3ARJ-AFP3>].

46. 22 U.S.C. § 613(g).

47. Letter from Brandon L. Van Grack, Chief, FARA Registration Unit, U.S. Dep’t of Just., to [addressee deleted] (Apr. 21, 2020), <https://www.justice.gov/nsd-fara/page/file/1287671/download> [<https://perma.cc/K3GH-RB2F>].

48. *Id.*

49. *Id.*

50. 22 U.S.C. § 613(h); *see also* Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–12 & 22 U.S.C. §§ 611, 21). The LDA is another disclosure statute that requires certain lobbyists to identify their clients, the issues on which they lobby, and their compensation. For more on the LDA generally, *see Lobbying Disclosure Act Guidance*, U.S. HOUSE OF REPRESENTATIVES OFF. OF THE CLERK (Jan. 31, 2017), [https://lobbyingdisclosure.house.gov/amended\\_lda\\_guide.html](https://lobbyingdisclosure.house.gov/amended_lda_guide.html) [<https://perma.cc/W6E9-RR9>]. For more information on the intersection of the LDA and FARA, *see* Charles Lawson, *Shining the ‘Spotlight of Pitiless Publicity’ on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT’L L. 1151 (1996).

whether they have also registered under the LDA.<sup>51</sup>

#### 4. *Religious & Academic Pursuits*

“[B]ona fide religious, scholastic, academic, or scientific pursuits or the fine arts” are exempted from FARA registration requirements.<sup>52</sup> But the Department of Justice’s regulations limit the extent of this exemption, stating that it does not cover persons engaged in “political activities.”<sup>53</sup>

For example, in an advisory letter, the Department of Justice told a non-profit chapter in the United States that it had to register under FARA.<sup>54</sup> A foreign individual had established autonomous, international chapters of the non-profit, including the American chapter.<sup>55</sup> The organization was religious in nature and each chapter shared a mission regarding a certain issue.<sup>56</sup> The American chapter wanted to host an event with its international sister chapters that would promote and highlight their work in each chapter’s home country.<sup>57</sup> The United States non-profit was to prepare banners for an event where foreign non-profit members would speak, post about the foreign chapters’ activities on the non-profit’s website, and coordinate meetings for the foreign non-profit members with foreign and United States government officials.<sup>58</sup> Even though this event and the non-profit were designed to address a certain social issue as part of a bona fide religious mission, the Department of Justice concluded that the exemption did not apply because the activities were too political in nature.<sup>59</sup>

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51. 28 C.F.R. § 5.307 (2020).

52. 22 U.S.C. § 613(e).

53. 28 C.F.R. § 5.304(d) (“The exemption provided by [22 U.S.C. § 613(e)] shall not be available to any person described therein if he engages in political activities . . . for or in the interests of his foreign principal.”); 22 U.S.C. § 611(o) (“The term ‘political activities’ means any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or 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 or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.”).

54. Letter from Brandon L. Van Grack, Chief, FARA Registration Unit, U.S. Dep’t of Just., to [addressee deleted] (Nov. 19, 2019), <https://www.justice.gov/nsd-fara/page/file/1232921/download> [<https://perma.cc/6UVJ-VBQK>].

55. *Id.*

56. *Id.* Note that the exact issue is redacted in the letter.

57. *Id.*

58. *Id.*

59. *Id.*

## 5. *Humanitarian Aid*

FARA’s humanitarian aid exemption applies to those “soliciting or collecting of funds and contributions in the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering.”<sup>60</sup> This exemption is notably limited—“[it] does not include the solicitation of funds in the United States meant for other humanitarian purposes, such as for housing or education, or for the *disbursement* of any humanitarian funds in the United States.”<sup>61</sup>

The Department of Justice does not have much information on this exemption, aside from one advisory letter.<sup>62</sup> The opinion discussed a request made by an individual to a foreign embassy, asking if the embassy had any personal protective equipment that it could donate to a certain United States hospital that faced a shortage, due to the COVID-19 pandemic.<sup>63</sup> The Department of Justice concluded that the requesting individual was not a “foreign agent” of the embassy and, for that reason, did not need to register.<sup>64</sup> However, if the Department of Justice did agree that this person was a “foreign agent” of the foreign principal embassy, this type of fact pattern would likely qualify for the humanitarian aid exemption.

## 6. *“Other Activities Not Serving Predominantly a Foreign Interest”*<sup>65</sup>

The final FARA exemption is also the least specific. It extends to persons engaging in “other activities not serving predominantly a foreign interest.”<sup>66</sup> No official interpretation of this exemption exists—no court has appeared to interpret it yet, there are no advisory letters, and even the Department of Justice’s Frequently Asked Questions page fails to detail the exemption.<sup>67</sup>

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60. 22 U.S.C. § 613(d)(3). As an aside, there is effectively no information on how this exemption came about. It first appeared in 1961, but congressional record searches do not show any debate or discussion on the language.

61. Robinson, *supra* note 28, at 1106 (emphasis in original).

62. Letter from Brandon L. Van Grack, Chief, FARA Registration Unit, U.S. Dep’t of Just., to [addressee deleted] (May 18, 2020), <https://www.justice.gov/nsd-fara/page/file/1287626/download> [<https://perma.cc/55G6-3MN2>].

63. *Id.*

64. *Id.*

65. 22 U.S.C. § 613(d)(2).

66. *Id.*

67. FARA *Frequently Asked Questions*, U.S. DEP’T OF JUST., <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions> [<https://perma.cc/F5CD-7D6E>]. Nick Robinson, in his article, “*Foreign Agents*” in *an Interconnected World: FARA and the Weaponization of*

## II. PUBLIC DISCLOSURE LAWS & THE FIRST AMENDMENT

There is a unique tension between public disclosure laws, like FARA, and constitutional protections under the First Amendment: public disclosure laws necessitate transparency, but the First Amendment protects against compelled speech and association.<sup>68</sup> This Part starts by briefly discussing the roots of the First Amendment's anonymous speech and association doctrines. It then describes how courts balance First Amendment protections with competing interests in transparency when faced with facial, overbreadth, and as-applied challenges.

### A. *The Venerable History of the First Amendment*

The First Amendment grants the right of free speech and association.<sup>69</sup> Also flowing from this is the right to be free from compelled speech and association.<sup>70</sup> The First Amendment's recognition of the right to be free from compulsion represents the United States' venerable history of anonymity. For over a century, American colonists used pen names as a means of critiquing the British government, oftentimes when calling for revolution and protest.<sup>71</sup> In response, Britain deployed multiple anti-anonymity laws to unearth the names of these critics, and convict them for treason and similar charges.<sup>72</sup> The Founding Fathers called on this history when drafting the First Amendment, seeking to ensure that all persons would be free to discuss, debate, disseminate information and—of particular importance to this Comment—associate oneself with certain

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*Transparency*, offers one of the few comprehensive analyses of the Other Activities exemption and proposes three possible interpretations. “First, the provision could be read on its face [where,] if any activity otherwise covered under the Act does not serve ‘predominantly a foreign interest,’ [then] one does not have to register.” Robinson, *supra* note 28, at 1108. Second, it

could be interpreted to only apply to those engaged in commerce. [Section 613(d)(2)] states an exemption for “other activities not serving predominantly a foreign interest,” but it is not clear what “other” refers to. Directly [before this provision] is the exemption for private and nonpolitical commercial activity. Structurally, then, § 613(d)(2) should be read as an exemption for “other [commercial] activities not serving predominantly a foreign interest.”

*Id.* Finally, the third way of interpreting § 613(d)(2) by again relying on the legislative history would be to read it as “other activities not serving predominantly [the interest of a foreign government or of a foreign political party.]” *Id.* at 1110. Unlike the second interpretation, this option is not limited to commercial actors, and would thus substantially narrow what activity is exempted from FARA. *Id.*

68. U.S. CONST. amend. I.

69. *Id.*

70. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate.”).

71. Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084–85 (1961).

72. *Id.*

positions and such discourse without fear of government retaliation.<sup>73</sup> This venerable history has continued to guide First Amendment jurisprudence.<sup>74</sup>

### B. *Challenging Statutes that Require Disclosure*

The protection of a speaker's ability to contribute to the "discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster" has been continuously protected and utilized by the public.<sup>75</sup> But there are times that the right to anonymity may be abridged. There are a number of statutes that seek to require disclosure, despite the First Amendment's protections.<sup>76</sup> These statutes, however, can be challenged on multiple grounds: facial, overbreadth, and as-applied.

#### 1. *Facial Challenge*

Facial challenges seek to knock a law down in its entirety.<sup>77</sup> When a law seeks to abridge or compel speech or association—usually because it compels disclosure or registration—and is subjected to a facial challenge, it must survive an exacting scrutiny analysis.<sup>78</sup> In other words, to survive constitutional muster, the law must (1) serve a sufficiently important governmental interest and (2) be substantially related to that interest.<sup>79</sup>

Two broad governmental interests have continually satisfied the sufficient interest requirement when it comes to disclosure laws:

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73. *Id.* at 1085–89. In fact, within the first twenty years after the adoption of the Constitution and the Bill of Rights, at least one Supreme Court Justice, six presidents, and over fifty congressmen published political writings anonymously. *Id.* at 1085.

74. *See generally* *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring).

75. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010).

76. *See, e.g.*, 52 U.S.C. § 30104 (requiring political committees to register with the Federal Election Commission and disclose, among other things, the contributions they receive and the identity of any person who contributes more than \$200 in a calendar year); 2 U.S.C. §§ 1603–04 (requiring certain lobbyists to register and disclose the names of their clients, issues for which they lobby, as well as any related expenses).

77. *See generally* *Citizens United*, 558 U.S. at 310; *Buckley v. Valeo*, 424 U.S. 1 (1976); *Doe v. Reed*, 561 U.S. 186 (2010).

78. *Citizens United*, 558 U.S. at 366–67.

79. *Id.* The Court's "exacting scrutiny" standard operates in a manner closely related to its "strict scrutiny" analysis. However, strict scrutiny requires a compelling government interest that is narrowly tailored. *See generally* *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The Court applies strict scrutiny when a regulation is content-based. *See generally id.*; *Texas v. Johnson*, 491 U.S. 397 (1989). The exacting scrutiny standard applied in disclosure cases is akin to the standard applied to content-neutral regulations of speech. *See generally* *United States v. O'Brien*, 391 U.S. 367 (1968). For more discussion on exacting and strict scrutiny, please reference R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016).

enhancing voters' awareness about a politician's allegiances or interests, and inhibiting corruption.<sup>80</sup> These interests most commonly arise in spaces of electioneering<sup>81</sup> and lobbying<sup>82</sup> where the Government has an unwavering interest in "promoting transparency and accountability . . . which is 'essential to the proper functioning of a democracy.'"<sup>83</sup> Important for this Comment, all of these interests are closely related to issues of national security.

As for the substantial relationship requirement, the Supreme Court rarely, if ever, finds that laws addressing these government interests through disclosure or registration requirements fail the substantial-relation prong.<sup>84</sup> This is because the substantial relationship requirement does not ask for a "least-restrictive . . . means."<sup>85</sup> Thus, even if a law is not the least restrictive of protected speech as it could be, it still may pass exacting scrutiny.

For example, in *Doe v. Reed*,<sup>86</sup> the Supreme Court considered a First Amendment facial challenge to Washington State's Public Records Act (PRA).<sup>87</sup> Washington had enacted a bill that extended certain marriage benefits to same-sex couples, which the plaintiffs sought to challenge by putting the law up to a public vote through a referendum.<sup>88</sup> In order for a referendum to be placed on the ballot, challengers needed to gather signatures of roughly 4% of Washington voters.<sup>89</sup> Moreover, the challengers had to submit the names and addresses of the signers to the

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80. *Buckley*, 424 U.S. at 66–67.

81. *See generally Citizens United*, 558 U.S. at 310 (finding a sufficient interest in requiring disclosure of the source of election ads).

82. *See generally* *United States v. Harriss*, 347 U.S. 612 (1954) (finding a sufficient interest in requiring disclosure of persons' contributions for the purposes of influencing legislation).

83. *Doe v. Reed*, 561 U.S. 186, 198 (2010) (citing Brief for Respondent at 39, *Reed*, 561 U.S. 186 (No. 09-559)).

84. *See Buckley*, 424 U.S. at 66–68; *Doe*, 561 U.S. at 196–97; *Citizens United*, 558 U.S. at 369–70.

85. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation of . . . protected speech [under the exacting scrutiny standard] must be narrowly tailored to serve the government's . . . interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." (citations omitted)).

86. 561 U.S. 186 (2010).

87. *Id.* at 193–94. To note, there was disagreement between the parties as to whether this case presented a facial or an as-applied challenge. *Id.* at 194. Acknowledging that the case had characteristics of both, the Court concluded that it was indeed a facial challenge in "that it [was] not limited to plaintiffs' particular case, but challenge[d] application of the law more broadly to all referendum petitions." *Id.*

88. *Id.* at 191.

89. *Id.* at 190–91.

state government to ensure that only lawful signatures were counted.<sup>90</sup> The PRA authorizes private parties to obtain copies of government documents.<sup>91</sup> Opponents to plaintiffs' efforts sought to the PRA publicly share the names of people who supported the referendum.<sup>92</sup> Plaintiffs objected, asserting that the statute was facially unconstitutional.<sup>93</sup> The Court held that while the compelled disclosure of signatory information on referendum petitions does invoke the First Amendment, the PRA was not facially unconstitutional.<sup>94</sup> It found that the State's interest in "preserving the integrity of the electoral process" was a more than sufficient governmental interest, and that disclosure is substantially related to those interests.<sup>95</sup> Notably, the Court stated that part of the reason why disclosure laws can serve such an important role is because they prevent certain types of fraud "otherwise difficult to detect."<sup>96</sup>

## 2. *Overbreadth Challenge*

An overbreadth challenge is another way a plaintiff can attack a statute that abridges rights to anonymous speech in its entirety. A law is overbroad if, in its attempt to regulate unprotected speech, it ends up also regulating a substantial amount of Constitutionally-protected speech, causing a chilling effect.<sup>97</sup> The "substantial" standard requires more than a showing of *some* impermissible applications; rather, it requires a showing of "a substantial number of . . . applications [that] are unconstitutional, judged in relation to the statute's plainly legitimate sweep"<sup>98</sup> and a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."<sup>99</sup> A party bringing an overbreadth challenge must use evidence of real-world conduct to construct their claim; they cannot rely on "fanciful hypotheticals."<sup>100</sup> Further, the effect of the statute on First

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90. *Id.* at 191.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 202.

95. *Id.* at 198–99.

96. *Id.* at 199.

97. *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

98. *Stevens*, 559 U.S. at 473.

99. *Taxpayers for Vincent*, 466 U.S. at 801.

100. *Stevens*, 559 U.S. at 485 (Alito, J., dissenting).



Amendment protected rights must “not only be real, but substantial.”<sup>101</sup>

One of the most oft-cited examples of a First Amendment overbreadth challenge to a public disclosure law is *Buckley v. Valeo*.<sup>102</sup> The plaintiffs took issue with the Act’s supposed purpose—safeguarding elections—and its required disclosure of names and addresses of persons making contributions in excess of \$10.<sup>103</sup> The plaintiffs argued that this disclosure requirement reached the personal information of people whose contributions were so low that they could not realistically pose a threat to a safe, secure, and accurate election.<sup>104</sup> Accordingly, the plaintiffs argued that it was overbroad.<sup>105</sup> Although the Court acknowledged that the \$10 threshold was low, it agreed with the lower court decision that there was no “substantial ‘inhibitory effect’” on the plaintiffs.<sup>106</sup>

### 3. *As-applied*

While a statute may be facially constitutional because it is substantially related to a sufficiently important government interest, and while it may not be overbroad, the Court has acknowledged that a public disclosure law may be unconstitutional as-applied to the plaintiff, specifically.<sup>107</sup> A plaintiff can succeed on an as-applied challenge if they can show “a reasonable probability that disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties.”<sup>108</sup>

*NAACP v. Alabama ex rel. Patterson*<sup>109</sup> defines what it takes to meet the reasonable probability test. In the height of the Civil Rights Movement, the NAACP brought an as-applied challenge to an Alabama state statute compelling disclosure of the names and addresses of the organization’s membership.<sup>110</sup> Alabama’s exclusive purpose in obtaining

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101. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (holding that the effects of a statute prohibiting political endorsements from state employees acting in their official capacity were not substantial because it did not hinder their ability to engage in political speech as private individuals); see also *United States v. Harriss*, 347 U.S. 612, 626 (1954) (finding chilling effect is not real if arising out of self-censorship).

102. 424 U.S. 1 (1976).

103. See *id.* at 82.

104. *Id.*

105. *Id.*

106. *Id.* at 82–84.

107. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010) (citing *Buckley*, 424 U.S. at 74).

108. *Id.*

109. 357 U.S. 449 (1958).

110. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458 (1958).

the membership lists was to facilitate its evaluation of whether the NAACP was acting in violation of the state's foreign corporation registration statute.<sup>111</sup> The NAACP, on the other hand, outlined the economic retaliation and threats of physical violence its membership would likely face as a result of compliance with the state law.<sup>112</sup> The Court, in unanimously ruling for the NAACP, highlighted the "vital relationship between freedom to associate and privacy in one's associations."<sup>113</sup> It went on to discuss the attenuated relationship between the state's purported interest and the sought-after information, as well as the adverse effect on "the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."<sup>114</sup>

Because the reasonability standard espoused in *NAACP* is high, only the most extreme forms of retaliation will usually satisfy the standard; however, lesser forms of reprisal can as well.<sup>115</sup> For example, in *Shelton v. Tucker*,<sup>116</sup> the Court held that an Arkansas statute requiring all public school teachers to disclose their organizational memberships was unconstitutional, writing: "Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty."<sup>117</sup> Likewise, in *Brown v. Socialist Workers '74 Campaign Committee*,<sup>118</sup> the Court held that an Ohio disclosure requirement was unconstitutional as-applied because the Socialist Workers provided evidence of retaliatory employment discharge, hate mail, and government surveillance.<sup>119</sup> Thus, while *NAACP*'s reasonable probability standard is exacting, plaintiffs may succeed in an as-applied challenge where they can demonstrate risks of harm—physical, economic, privacy, and even reputational—

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111. *See id.* at 464.

112. *See id.* at 462.

113. *Id.*

114. *Id.* at 462–64.

115. *Compare* Buckley v. Valeo, 424 U.S. 1, 69–72 (1976) (concluding that appellants' reliance on "clearly articulated fears of individuals, well experienced in the political process" was not sufficient evidence of a reasonable probability of reprisal), *with* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 100–01 n.20 (1982) (finding reasonable probability of reprisal based on previous government hostility towards the Socialist Workers, including the vandalization of their office), *and* Bates v. City of Little Rock, 361 U.S. 516, 523–24 (1960) (acknowledging a history of "harassment and threats of bodily harm" as well as evidence of economic reprisals was sufficient).

116. 364 U.S. 479 (1960).

117. *Id.* at 480–81, 486–87.

118. 459 U.S. 87 (1982).

119. *Id.* at 99.

to themselves.

C. *FARA's (Limited) Interactions with the First Amendment*

Despite the wealth of First Amendment caselaw on public disclosure laws, very little of it interacts with FARA. There is a small handful of cases that discuss the intersection of FARA and First Amendment protections, but many of them do not deal with the constitutionality of the statute as a whole,<sup>120</sup> and those that do are from a period prior to the Court's robust development of public disclosure jurisprudence.<sup>121</sup>

In fact, the most comprehensive First Amendment analysis of FARA comes from a 1972 case out of the Southern District of New York, titled *Attorney General v. Irish Northern Aid Committee*.<sup>122</sup> The case presented a facial challenge, and the court concluded that the statute satisfied exacting scrutiny.<sup>123</sup> It wrote that FARA "is founded upon the indisputable power of the Government to conduct its foreign relations and to provide for the national defense," which is a sufficient interest, and that the disclosure is substantially related to that interest:<sup>124</sup>

The purpose of the Act is to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature. These disclosures offer the Government and our people the opportunity to be informed and therefore

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120. See generally *Meese v. Keene*, 481 U.S. 465 (1987); *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) ("Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose."). Importantly, no case has ever considered FARA's possible overbreadth.

121. See generally *United States v. McGoff*, 831 F.2d 1071, 1107 n.14 (D.C. Cir. 1987) ("McGoff claims that the Act as applied to him somehow violates the first amendment. He says that the continued threat of prosecution due to his continued failure to register 'chills' his activities as writer and publisher because he must 'worry about being second-guessed on the motivations for his publications and writings literally for the rest of his life.' Brief for Appellee at 43-44. This claim is frivolous. Any 'chill' on McGoff's *present* activities due to the possibility that he might be prosecuted for his failure to disclose his *past* activities as an agent is no different from that of any person who commits a crime and who also happens to be a publisher and writer. It has no first amendment significance."); *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384 (S.D.N.Y. 1972), *aff'd*, 465 F.2d 1405 (2d Cir. 1972); *United States v. Peace Info. Ctr.*, 97 F. Supp. 255 (D.D.C. 1951).

122. 346 F. Supp. 1384 (S.D.N.Y. 1972).

123. *Id.* at 1389.

124. *Id.* at 1390.

enable them to understand the purposes for which they act.<sup>125</sup>

The court never considered the possible overbreadth of FARA, but it did reject an as-applied challenge based on its reading of *NAACP*.<sup>126</sup> The court stated that the plaintiffs in *NAACP* succeeded because disclosure would have little or no bearing on the information that the state was attempting to obtain, whereas in this case, the disclosure had direct connection with the information the Government sought.<sup>127</sup> However, this conclusion is in tension with the Court's decisions in both *Shelton* and *Brown*, which more heavily concerned the risk of reprisal that disclosure could result in, even if the statute was facially valid.<sup>128</sup>

In short, there is very little guidance on FARA's constitutionality, no guidance on its possible overbreadth, and questionable guidance as to whether it can result in a substantial risk of reprisal in some contexts.

### III. POLITICIZED FARA ENFORCEMENT ACTIONS: DISASTROUS EFFECTS, ALARMING USE

Although FARA has a general history of disuse, there are a handful of notable enforcement actions—specifically, this Part presents four politicized enforcement actions that are instructional for this Comment. The first two politicized enforcement actions were against the Peace Information Center and the Palestine Information Office, which took place before FARA's 2016 revival. These cases exemplify the potential lasting effects of politicized FARA enforcement. The other two cases, against the Natural Resource Defense Council and Earthjustice, occurred

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125. *Id.* This court's application of exacting scrutiny is slightly important. This is because scholars have recently argued that FARA does not actually regulate speech, but instead regulates speakers—that is, foreign agents. See Robinson, *supra* note 28, at 1133–34. If that were the case, strict scrutiny would apply, and *Citizens United* might counsel that FARA would be facially unconstitutional. However, there are two problems with this approach, which is why this Comment chose to focus on exacting scrutiny. *Irish Northern Aid*—the most comprehensive First Amendment analysis of FARA—frames the statute as regulating not foreign actors or their agents as speakers, but rather speech that could influence the American public because it is foreign propaganda. Second, foreign nationals do not have First Amendment rights. See *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (concluding that foreign nationals have reduced, and sometimes no First Amendment protections when engaging in political speech). While some foreign agents may be United States citizens who, individually have First Amendment protections, those protections would likely not extend to an agent-principal relationship under FARA. This is because, in those contexts where the foreign agent is acting within the scope of the agent-principal relationship, the foreign agent is effectively the mouthpiece of the foreign principal. One would be hard-pressed to say that foreign nationals have constitutional protections that they otherwise do not, because they proffered their speech through an American third party.

126. *Irish N. Aid Comm.*, 346 F. Supp. at 1390.

127. *Id.*

128. *Supra* section II.B.3.

in just the past few years. These cases represent an alarming trend of enforcement actions being undertaken because of substantive disagreements on policy rather than any alleged national security risk or propaganda threat.

A. *Peace Information Center*

In February 1951, the Department of Justice commenced a FARA investigation and prosecution against the Peace Information Center and its chairman, W.E.B. Du Bois.<sup>129</sup> A staunch opponent of nuclear weapons, Du Bois and the Peace Information Center worked to broadcast the Stockholm Peace Appeal around the United States, asking world governments to ban all nuclear weapons.<sup>130</sup> The Department of Justice accused the Peace Information Center of violating FARA by acting as a “publicity agent” for the Soviet Union’s Committee for the Defense of Peace.<sup>131</sup> The Government argued that the foreign principal need not even be aware of the agent-principal relationship to trigger FARA registration requirements.<sup>132</sup> Rather, the Government pled that it merely had to show that “it was the subjective intent of [the alleged foreign agent] . . . to disseminate information in the United States, propaganda for and on behalf of, and [to] further the propaganda objectives of the European organization.”<sup>133</sup>

The Department of Justice’s case was eventually dismissed because it had failed to establish an agent-principal relationship needed to sustain a conviction for failure to register.<sup>134</sup> But, by this point, the damage was

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129. See Andrew Lanham, *When W.E.B. Du Bois Was Un-American*, BOS. REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american> [<https://perma.cc/B8ZF-2RJY>].

130. *Id.*

131. W.E.B. DU BOIS, IN *BATTLE FOR PEACE: THE STORY OF MY 83RD BIRTHDAY* 34–36, 89 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007).

132. *Id.* at 99.

133. *Id.* Although the Government’s theory of “parallelism” of speech may seem outlandish, it was similar to the argument the Department of Justice had made when successfully prosecuting Nazi media outlets in the U.S. during World War II. See BRETT GARY, *THE NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR I TO THE COLD WAR* 215 (William E. Leuchtenburg & Alan Brinkley eds., 1999).

134. *Criminal Enforcement Summaries*, CAPLIN & DRYSDALE ATT’YS, <https://fara.us/criminal-enforcement-summaries/> [<https://perma.cc/85YV-52SU>]. But notably, the Department of Justice later contended that the trial judge’s decision was in error because it relied on cases prior to the 1942 amendments of FARA. JAMES P. MCGRANERY, ATT’Y GEN., U.S. DEP’T OF JUST., *REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE CALENDAR YEAR 1951*, at 8–9 (1952). The Department of Justice believed that the 1942 amendments substituted the statutory

done—Du Bois and his co-defendants at the Peace Information Center experienced substantial hardship from the trial even years after its conclusion. They had spent substantial time and resources on their legal defense, and at one point were even pushed to hold fundraisers across the country.<sup>135</sup> The Peace Information Center eventually dissolved as a result of this.<sup>136</sup> The Department of State illegally withheld Du Bois’s passport for several years, citing to the FARA investigation as justification.<sup>137</sup> Du Bois wrote in his memoir that “[a]lthough the charge was not treason, it was widely understood and said that the Peace Information Center had been discovered to be [a foreign] agent of Russia.”<sup>138</sup> Du Bois’s reputation never recovered.<sup>139</sup>

### B. *Palestine Information Office*

Since beginning operation in 1978, the Palestinian Information Office (PIO) had registered under FARA as a foreign agent of the Palestinian Liberation Organization (PLO).<sup>140</sup> The PLO is the national representative of the Palestinian people and is tasked with managing the Palestinian territories as geopolitical strife with Israel continues.<sup>141</sup> Though the director of the PIO stated that he did not “seek or receive regular instructions from the PLO on how to perform [his] job or run the office[.]” he added that he did “discuss issues of current importance in the Mideast with the PLO on a periodic basis” and that the PIO was funded by the

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definition for the common law definition of the term “agent,” and thus would be more amenable to the reading the Department argued for. *Id.*

135. DU BOIS, *supra* note 131, at 99.

136. *Id.* at 37.

137. See MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006, at 26–27 (Univ. Press of Miss., 3d ed. 2007) (1984); Letter from W.E.B. Du Bois to Frances G. Knight, Dir., Passport Off., Dep’t of State (July 13, 1955), <https://credo.library.umass.edu/view/pageturn/mums312-b144-i244/#page/1/mode/1up> [<https://perma.cc/6QLP-PPPB>]; Lanham, *supra* note 129. The State Department did eventually return Du Bois’s passport to allow him to travel to Ghana. *See id.* While he was there, the State Department refused to renew his passport so that he could return to the United States, effectively annulling his citizenship. *See id.*

138. DU BOIS, *supra* note 131, at 48.

139. *Id.*

140. *Palestine Info. Off. v. Shultz*, 853 F.2d 932, 935 (D.C. Cir. 1988).

141. Zack Beauchamp, *What Is the Palestinian Liberation Organization? How About Fatah and the Palestinian Authority?*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/2018/11/20/18080054/palestinian-liberation-organization-israel-conflict> [<https://perma.cc/8EWU-F3NP>]. During the time of the *Shultz* case, the PLO’s stated mission was to regain political control of the territories occupied by Israel and establish a Palestinian state. *Id.* This changed in 1993, when the PLO accepted Israel’s right to exist in exchange for Israel recognizing it as the legitimate representative of Palestinians. *Id.* That was the beginning of real peace negotiations between the two sides. *Id.*

League of Arab States, of which the PLO was a member.<sup>142</sup> The PIO's FARA registration stated that the PIO made "[p]ublic appearances and meetings with [the] American public in the hopes of promoting better Palestinian-American understanding[,] . . . bring[ing] the views of the Palestinian people on their problems in the Middle East to the attention of the American people."<sup>143</sup>

In 1987, an off-shoot of the PLO, known as the Palestinian Liberation Front, hijacked the MS Achille Lauro and killed an American national.<sup>144</sup> In retaliation, the Department of State sought to halt the PIO's operations within the United States under the authority of the Foreign Missions Act.<sup>145</sup> To effectuate this, the United States relied on the PIO's FARA registration to show that, by way of its affiliation with the PLO, the PIO posed a threat to the interests of the United States.<sup>146</sup> Ultimately, the court allowed the shutdown of the PIO to proceed.<sup>147</sup>

### C. *Natural Resources Defense Council & Earthjustice*

In the summer and fall of 2018, the Republican-controlled House Committee on Natural Resources launched FARA inquiries against four climate and resource advocacy organizations.<sup>148</sup> Two were particularly

142. *Palestine Info. Off.*, 853 F.2d at 935.

143. *Id.* For whatever reason, PIO seemed to denounce any agent-principal relationship despite registering. See *A Palestinian Office Opens in Washington*, N.Y. TIMES (May 2, 1978), <https://www.nytimes.com/1978/05/02/archives/a-palestinian-office-opens-in-washington.html> [<https://perma.cc/H59P-UF4W>].

144. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT'L L. 103, 103–04 (1988).

145. *Id.* at 103; see also 22 U.S.C. § 4302(a)(4)(B).

146. *Palestine Info. Off.*, 853 F.2d at 936–37 (“[T]he State Department exercised powers granted to it by the Foreign Missions Act. In its official designation, it made the findings required by the statute to designate the PIO as a foreign mission. It found that the PIO was an ‘entity’; that it was ‘substantially owned and/or effectively controlled by the PLO’; that it ‘conduct[ed] its functions on behalf of an organization which has received privileges and immunities under U.S. law’; and that it was involved in ‘other activities’ within the meaning of the statute. Having determined that the PIO was a foreign mission, the State Department then found that it was ‘reasonably necessary to protect the interests of the United States to require that the Palestine Information Office cease operation as a mission representing the Palestine Liberation Organization.’”).

147. *Id.* at 944–45.

148. See generally Letter from Hon. Rob Bishop, Chairman, H. Comm. on Nat. Res., and Hon. Bruce Westerman, Chairman, H. Subcomm. on Oversight & Investigations, to Abigail Dillen, President, Earthjustice (Oct. 1, 2018) [hereinafter *Earthjustice Letter*], [https://republicans-naturalresources.house.gov/uploadedfiles/2018-10-01\\_bishop\\_westerman\\_to\\_dillen\\_earthjustice\\_re\\_fara.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/2018-10-01_bishop_westerman_to_dillen_earthjustice_re_fara.pdf) [<https://perma.cc/M2VT-6V5F>]; Letter from Hon. Rob Bishop, Chairman, H. Comm. on Nat. Res., and Hon. Bruce Westerman, Chairman, H. Subcomm. on Oversight & Investigations, to Andrew Steer, President & CEO, World Res. Inst. (Sept. 5, 2018), <https://republicans-naturalresources.house.gov/uploadedfiles/bishop->

notable: the Natural Resources Defense Council and Earthjustice.

The first inquiry was against the Natural Resources Defense Council (NRDC).<sup>149</sup> The NRDC is a 501(c)(3) non-profit organization that engages the public with the expertise of scientists, lawyers, and policy advocates to “ensure the rights of all people to the air, the water, and the wild.”<sup>150</sup> The NRDC had previously been publicly critical of the chairman of the Committee’s environmental record.<sup>151</sup> In a June 2018 letter to the president of the organization, the Committee remarked that it believed the NRDC was “aiding China’s perception management efforts” related to environmental issues “in ways that may be detrimental to the United States,” and therefore must register as a foreign agent.<sup>152</sup> The Committee alleged that China imposed conditions on American non-profits if they wanted access to financial support, government decisionmakers, and visas—the conditions include the promotion of pro-China viewpoints and discouragement of research or advocacy that would damage the country’s global image.<sup>153</sup> The Committee alleged that the NRDC was subject to such conditions. It wrote that the NRDC “appears to practice self-censorship, issue selection bias, and generally refrains from criticizing Chinese officials” but appears adversarial in its advocacy practices in the United States.<sup>154</sup> The Committee requested that the NRDC produce

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westernman\_to\_steer\_wri\_re\_fara\_09.05.2018.pdf [https://perma.cc/S27G-PZK5]; Letter from Hon. Rob Bishop, Chairman, H. Comm. on Nat. Res., and Hon. Bruce Westerman, Chairman, H. Subcomm. on Oversight & Investigations, to Kierán Suckling, Exec. Dir., Ctr. for Biological Diversity, Inc. (June 20, 2018), [https://republicans-naturalresources.house.gov/uploadedfiles/letter\\_to\\_center\\_bio\\_diversity\\_06.20.18.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/letter_to_center_bio_diversity_06.20.18.pdf) [https://perma.cc/8L3S-J966]; Letter from Hon. Rob Bishop, Chairman, H. Comm. on Nat. Res., and Hon. Bruce Westerman, Chairman, H. Subcomm. on Oversight & Investigations, to Rhea Suh, President, Nat. Res. Def. Council (June 5, 2018) [hereinafter NRDC Letter], [https://republicans-naturalresources.house.gov/uploadedfiles/bishop-westerman\\_to\\_nrdc\\_06.05.18.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/bishop-westerman_to_nrdc_06.05.18.pdf) [https://perma.cc/KMW8-WNWW].

149. NRDC Letter, *supra* note 148.

150. *About Us*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/about> [https://perma.cc/W26A-25KD].

151. *The Trump and Congressional Republican Assault on Our Environment*, Vol. 28, NAT. RES. DEF. COUNCIL: THE REAL LOWDOWN (Oct. 13, 2017), <https://www.nrdc.org/experts/nrdc/real-lowdown-trump-and-congressional-republican-assault-our-environment-vol-28> [https://perma.cc/HB5V-27PW].

152. NRDC Letter, *supra* note 148, at 2.

153. *Id.* at 1–2.

154. *Id.* at 3–4 (“For instance, a widely reported 2016 study by Greenpeace concluded that China’s government subsidized commercial fishing fleet threatens the viability of fisheries around the world. Just months after the Greenpeace study was released, the NRDC praised China’s ‘bold new reforms’ on domestic fisheries emphasizing that ‘China has been the world’s largest producer of wild fish for over two decades.’ Similarly, the NRDC has never condemned, or even mentioned, China’s illegal and environmentally destructive island reclamation campaign that has covered over 3,200 acres of coral reefs with runways, ports, and other military facilities. Of note, the NRDC collaborates with



evidence that they were FARA registered, or register if they had not already.<sup>155</sup>

The second inquiry was launched against Earthjustice, just four months after the inquiry against the NRDC. Earthjustice is a 501(c)(3) non-profit environmental law organization that advances lawsuits and legislative advocacy to protect wildlife, preserve natural lands, and combat climate change.<sup>156</sup> Earthjustice attorneys were representing a coalition of Japanese activists in litigation to stop the relocation of U.S. Marine Corps Air Station Futenma to the island of Okinawa.<sup>157</sup> The activists contended that this move could endanger the dugong, a marine animal.<sup>158</sup> While the Department of Defense eventually prevailed in federal court, an Earthjustice attorney indicated that the organization would continue to block, restrict, and delay the relocation through mechanisms outside of the courtroom.<sup>159</sup> The Committee alleged that Earthjustice and Japanese members of the anti-base coalition had done just that by publicly condemning the bases' relocation and sending open letters to the President of the United States and Japanese Prime Minister.<sup>160</sup> Though the Committee acknowledged that FARA contains an exemption extending to attorneys representing foreign principals, it found that such representation and advocacy is limited only to "the course of judicial proceedings."<sup>161</sup> As with the NRDC, the Committee requested Earthjustice to produce evidence of FARA compliancy or face criminal prosecution.<sup>162</sup>

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Chinese government entities that are deeply involved in Chinese efforts to assert sovereignty over the South China Sea in contravention of international law. By contrast, the NRDC takes an adversarial approach to its advocacy practices in the United States. In fundraising materials, the NRDC claims to have 'sued the [U.S. government] about once every ten days' since President Trump was inaugurated. Over the last two decades, your organization has also sued the U.S. Navy multiple times to stop or drastically limit naval training exercises in the Pacific arguing that naval sonar and anti-submarine warfare drills harm marine life. We are unaware of the NRDC having made similar efforts to curtail naval exercises by the Chinese People's Liberation Army Navy. . . . The disconnect between the NRDC's role as 'thought leader and trusted adviser to our partners in China' and its approach to the environmental advocacy in the United States is disconcerting." (citations omitted)).

155. *Id.* at 5–6.

156. *About Us*, EARTHJUSTICE, <https://earthjustice.org/about> [<https://perma.cc/M8V7-65S8>].

157. Earthjustice Letter, *supra* note 148, at 1–2.

158. *Id.* at 2.

159. *Id.*

160. *Id.* at 2–3.

161. *Id.* at 3–4.

162. Earthjustice eventually complied with the House Committee's demands and registered under FARA. See Press Release, Rob Bishop, Chairman, H. Comm. on Nat. Res., and Bruce Westerman, Chairman, H. Subcomm. on Oversight & Investigations, Bishop, Westerman Congratulate Earthjustice for Finally Complying with Foreign Agent Registration Act: Earthjustice Registers Under FARA Nearly a Year After Republican Inquiries (Sept. 24, 2019),

The inquiries resulted in a flurry of backlash, criticism, and general alarm among both the environmental activism and non-profit communities.<sup>163</sup> The accusations have been described as “specious” and the result of FARA’s “sweeping definitions [that] lead to absurd results.”<sup>164</sup>

#### IV. FARA AS A GROWING THREAT TO HUMAN RIGHTS ORGANIZATIONS

While FARA addresses very real national security threats, it can also be easily politicized. In fact, the politicized enforcement actions are not only growing in number, but are also broadening in scope as well. Importantly, this is happening in tandem with increased attacks and animosity towards HROs.

Globally, there has been a significant uptick in anti-HRO legislation and political attacks;<sup>165</sup> and the United States is not dissimilar. The United States has been accused of “warrantless surveillance, interrogations, invasive searches, travel restrictions, and, in isolated cases, a false arrest and unlawful detention” of HROs and their advocates who have been critical of the United States’ practices.<sup>166</sup> In one survey of twenty-three human rights advocates, ten of them—five activists, three lawyers, a journalist, and clergy member—were included on a government

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naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=409170) [https://perma.cc/WSR9-D93E].

163. See Nick Robinson, *The Foreign Agents Registration Act Is Broken*, FOREIGN POL’Y (July 22, 2019, 11:24 AM), <https://foreignpolicy.com/2019/07/22/the-foreign-agents-registration-act-is-broken/> [https://perma.cc/7PVC-SDTU]; *FARA Used to Attack Environmental Nonprofit*, CHARITY & SEC. NETWORK (June 7, 2018), <https://charityandsecurity.org/news/fara-used-to-attack-environmental-nonprofit/> [https://perma.cc/DQ4Z-GUVW]; Natalie Ross, *The Foreign Agent Registration Act and U.S. Nonprofits Working Internationally*, COUNCIL ON FOUNDS.: AMPLIFY (June 15, 2018), <https://www.cof.org/blogs/re-philanthropy/foreign-agent-registration-act-and-us-nonprofits-working-internationally> [https://perma.cc/Z3RA-X8LA].

164. Robinson, *supra* note 163.

165. See *Global Assault on NGOs Reaches Crisis Point as New Laws Curb Vital Human Rights Work*, AMNESTY INT’L (Feb. 21, 2019, 12:01 AM), <https://www.amnesty.org/en/latest/news/2019/02/global-assault-on-ngos-reaches-crisis-point/> [https://perma.cc/PR5A-DQX8].

166. *USA: Authorities Are Misusing Justice System to Harass Migrant Human Rights Defenders*, AMNESTY INT’L (July 2, 2019, 12:01 PM) [hereinafter *USA: Authorities Are Misusing Justice System*], <https://www.amnesty.org/en/latest/news/2019/07/usa-authorities-misusing-justice-system-harass-migrant-human-rights-defenders/> [https://perma.cc/F2A2-9ESS]; see also Lysa John, *Opinion: Government Attacks on Humanitarian Organizations and Human Rights Rising*, DEVEX (June 6, 2019), <https://www.devex.com/news/opinion-government-attacks-on-humanitarian-organizations-and-human-rights-rising-94961> [https://perma.cc/NVD8-HTRT]; *USA/UK: Snowden Alleges Spy Agencies Have Targeted Human Rights Defenders*, AMNESTY INT’L (Apr. 8, 2014, 12:00 AM), <https://www.amnesty.org/en/latest/news/2014/04/usauk-snowden-alleges-spy-agencies-have-targeted-human-rights-defenders/> [https://perma.cc/7A6K-4KWD].

surveillance watch list.<sup>167</sup> These ten advocates described repeated interrogations by federal agents who sought information on their finances, professional networks, electronic communications, and other material that the advocates believed could be used in criminal cases against them.<sup>168</sup>

One of the most notable examples is the United States' criminal lawsuit against No More Deaths director Scott Warren in 2019.<sup>169</sup> Warren was charged with multiple felony counts for leaving food and water for migrants crossing the US-Mexico border through the desert, and for driving on designated wilderness.<sup>170</sup> The first time Warren was tried, the jury deadlocked.<sup>171</sup> Rather than dropping the case in light of public outcry and the outcome of the first trial, the Department of Justice decided to retry Warren.<sup>172</sup> But the second jury acquitted him.<sup>173</sup> After the trial, the Department of Justice shared what could be summarized as a threatening message to human rights advocates: that the Department of Justice would not be deterred from continuing to prosecute people like Warren, or others with "misguided sense[s] of social justice."<sup>174</sup>

FARA is poised to become the next weapon that the United States may wield against HROs that are critical of the Government or its interests, subjecting them to criminal prosecutions and fostering public distrust in their legitimate work. Moreover, nothing in FARA provides HROs with sufficient protection from politicized enforcement actions.

As an initial matter, HROs, particularly those with global reach, are often engaged in activities that may require FARA registration—or at

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167. USA: *Authorities Are Misusing Justice System*, *supra* note 166.

168. *Id.*

169. Ryan Devereaux, *Bodies in the Borderlands: Scott Warren Worked to Prevent Migrant Deaths in the Arizona Desert. The Government Wants Him in Prison*, INTERCEPT (May 4, 2019, 5:00 AM) [hereinafter *Bodies in the Borderlands*], <https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/> [https://perma.cc/Z7PA-VKXM]; Ryan Devereaux, *Criminalizing Compassion: The Unraveling of the Conspiracy Case Against No More Deaths Volunteer Scott Warren*, INTERCEPT (Aug. 10, 2019, 6:00 AM), <https://theintercept.com/2019/08/10/scott-warren-trial/> [https://perma.cc/F549-W66X].

170. *Bodies in the Borderlands*, *supra* note 169.

171. Bobby Allyn & Michel Marizco, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NAT'L PUB. RADIO (Nov. 21, 2019, 2:59 PM), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona> [https://perma.cc/KC5C-32HP].

172. *Id.*

173. *Id.*

174. *Id.* Since the acquittal, United States federal agents have continued to harass Warren and his associates in hopes of building a new criminal case, including multiple raids on the No More Deaths headquarters within the span of three months. See Rafael Carranza, *Border Patrol Raids No More Deaths Camp Near Arivaca for 2nd Time in 3 Months*, ARIZ. REPUBLIC (Oct. 6, 2020, 4:53 PM), <https://www.azcentral.com/story/news/politics/border-issues/2020/10/06/border-patrol-raids-no-more-deaths-camp-again/5898316002/> [https://perma.cc/6CGG-4RDH].

least that the Department of Justice may determine as requiring registration.<sup>175</sup> For example, Amnesty International is one of the largest HROs globally, and a frequent critic of the United States.<sup>176</sup> Amnesty International is headquartered in London, but has separately incorporated chapters across the globe, including in New York.<sup>177</sup> Although Amnesty International and Amnesty International USA oftentimes engage in different projects, the organization as a whole is structured so that it “speaks with one voice globally about the whole range of human rights themes and situations and their impact on people and communities.”<sup>178</sup> Based on the way Amnesty International describes its relationships with its national chapters, the Department of Justice could argue that Amnesty International USA is working at the direction of Amnesty International, a foreign entity, and is attempting to sway public opinion when it condemns certain United States policies and actions.<sup>179</sup> Such an argument could also apply to other HROs with global reach, or HROs that are growing their international presence.

Moreover, FARA’s statutory exemptions are generally not applicable to or do not provide sufficient coverage to HROs. First and foremost, HROs would rarely, if ever, fall into the diplomatic, commercial, and lawyer exemptions. A well-funded HRO may, on occasion, fall into a lobbyist exemption, assuming it has also registered under the LDA. An

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175. Because FARA and its exemptions detailed above are incredibly broad, the Department of Justice has immense discretion in what actions they bring. See *supra* sections IA–C.

176. See *The United States Is Failing Refugees Under President Trump*, AMNESTY INT’L USA (Oct. 1, 2020), <https://www.amnestyusa.org/press-releases/the-united-states-is-failing-refugees-under-president-trump/> [<https://perma.cc/J9DG-BH3E>]; *President Obama: Halt the Dakota Access Pipeline & Respect the Rights of Indigenous People*, AMNESTY INT’L USA (Dec. 3, 2016), <https://www.amnestyusa.org/president-obama-halt-the-dakota-access-pipeline-respect-the-rights-of-indigenous-people/> [<https://perma.cc/LB6E-YRT4>]; *NGO Letter to House Armed Services Calling for an End to Department of Defense 1033 Program that Transfers Military Surplus Equipment to Police*, AMNESTY INT’L USA (July 1, 2020), <https://www.amnestyusa.org/92-civil-society-organizations-call-on-congress-to-end-department-of-defense-1033-program-and-stop-transfers-of-surplus-military-equipment-to-police/> [<https://perma.cc/ZGS4-7ZWB>]. In fact, the Secretary General at Amnesty International has accused top United States officials of expressing “open hostility towards [HROs] with different opinions to the United States[’].” *Haley’s Hostility Towards Human Rights Organizations a Sad Moment for US*, AMNESTY INT’L (June 21, 2018, 6:19 PM), <https://www.amnesty.org/en/latest/news/2018/06/haleys-hostility-towards-human-rights-organizations-a-sad-moment-for-us/> [<https://perma.cc/V6FY-LH3X>].

177. See *Contact Us*, AMNESTY INT’L, <https://www.amnesty.org/en/about-us/contact/> [<https://perma.cc/M5RA-5GAR>]; *Structure and People*, AMNESTY INT’L, <https://www.amnesty.org/en/about-us/how-were-run/structure-and-people/> [<https://perma.cc/W2TC-K2UT>]; AMNESTY INT’L, STATUTE OF AMNESTY INTERNATIONAL: AS AMENDED BY THE 2019 GLOBAL ASSEMBLY MEETING IN JOHANNESBURG, SOUTH AFRICA, 2–4 AUG. 2019 (2019), <https://www.amnesty.org/download/Documents/POL2010452019ENGLISH.PDF> [<https://perma.cc/8ZYF-YJYH>].

178. *Structure and People*, AMNESTY INT’L, *supra* note 177.

179. See *supra* note 176.

HRO working in religious, academic, or the fine arts spaces could argue for exemption, but because HRO work often challenges political operations, the Department of Justice could easily conclude that the HRO does not qualify. An HRO collecting funds for medical assistance or other humanitarian aid could be exempted, so long as none of that money is disbursed in the United States. Finally, the “other activities” exemption also does not provide HROs with many options, largely due to its lack of clarity. In the exemption’s broadest reading, the question remains whether HRO work that criticizes the United States serves a predominantly foreign interest based on the given agent-principal relationship. In its narrower readings, the exemption does not apply at all because the HROs’ activities are noncommercial.

Thus, in situations where the Department of Justice can make a colorable argument that an agent-principal relationship exists and no exemption applies, it could force an HRO to register. Although in situations like the Amnesty International relationship, the agent-principal relationship might not appear immediately harmful or scandalous, the “foreign agent” label alone might be. Additionally, the Department of Justice could pursue criminal charges against HROs for failure to register. As has happened with other organizations and people subjected to politicized FARA enforcement, like the Peace Information Center,<sup>180</sup> the forced association with the “foreign agent” in conjunction with a criminal prosecution can ruin the public’s trust in the targeted HRO and the legitimacy of their work.

## V. HROS’ OPTIONS FOR ATTACKING FARA & CONGRESSIONAL REFORM

HROs are particularly vulnerable to politicized FARA enforcement. Investigations against the Natural Resources Defense Council and Earthjustice demonstrate the United States’ willingness to use FARA not just as a statute to challenge the dissemination of foreign information, but to challenge groups that take on substantive policy positions contrary to the ones the United States wishes to pursue. Moreover, as seen with the Peace Information Center, the forced association that stems from such enforcement actions can destroy an organization’s ability to engage in advocacy by fostering public distrust and social stigma. Further, the Department of Justice’s use of PIO’s FARA registration to completely shutter the organization likewise demonstrates FARA’s dangerous reach. Accordingly, HROs faced with an investigation or prosecution must

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180. *See supra* section III.A.

utilize creative routes for protection. With this in mind, this Part advises HROs how to best attack FARA through the First Amendment and urges congressional reform.

### A. *Attacking FARA Through the First Amendment*

Aside from attacking the allegations of an unauthorized foreign relationship itself, HROs can bring a First Amendment challenge against FARA. Public disclosure statutes like FARA have a tumultuous relationship with the First Amendment and can be subjected to a series of challenges.<sup>181</sup> Notably, no court has truly grappled with FARA's constitutionality under modern-day First Amendment jurisprudence, likely in large part to its general disuse.<sup>182</sup> In turn, HROs facing politicized FARA enforcement should be quick to consider facial, overbreadth, and as-applied causes of action—although some are more likely to succeed than others.

#### 1. *Facial Challenges Are Likely to Be Unsuccessful*

First, an HRO could mount a facial challenge against FARA in its entirety, asserting that the statute violates the First Amendment. However, this will likely be an uphill battle to effectively argue, let alone win.

The Supreme Court's precedent related to lobbying and campaign finance disclosure laws would support the conclusion that the policy justifications for FARA would constitute a sufficiently important government interest.<sup>183</sup> The purpose of FARA was to combat foreign intervention with regard to the United States' electoral and political processes, as well as safeguard citizens from misleading propaganda.<sup>184</sup> FARA's goals of inhibiting corruption and promoting transparency and accountability are very similar to the reasons why laws like the one in *Reed* were upheld.<sup>185</sup> Thus, an HRO would be hard-pressed to argue that the Government's interest in FARA's disclosure provisions is not sufficiently important. Along similar precedential lines, an HRO would also likely struggle to show that the registration requirements are not substantially related to the Government's interest. Registration requirements are rarely, if ever, not substantially related to the

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181. *See supra* Part II.

182. *See supra* section II.C.

183. *See supra* section I.B.

184. *See supra* section I.

185. *See supra* section II.B.1.

Government's interest for issues touching on national security.<sup>186</sup> This logic, despite being based on more contemporary jurisprudence, is consistent with the court's reasoning in *Irish Northern Aid Committee's* conclusion that FARA is facially valid.<sup>187</sup>

Of course, an HRO could make a creative argument that current registration requirements are not narrow enough and do not directly serve the Government's goals of safeguarding citizens from misleading propaganda. When a foreign agent registers, the Department of Justice merely lists registered foreign agents online, and additional searches are required to find out who or what is the associated foreign principal, and for what reasons the foreign agent had to register. In theory, if a foreign agent did undertake action on behalf of a foreign principal to persuade the public's opinion on some piece of policy or legislation, the public would not know unless they looked up that foreign agent's registration statement. This begs the question of whether the registration requirements as presently accessible serve the Government's interests. A member of the American public will not actually know that information is foreign speech unless they affirmatively look it up; this does little to actively inform them against potentially misleading propaganda.

However, it is questionable whether a court would accept this argument. A court may deem under an exacting scrutiny analysis, unlike a least restrictive means analysis, that the statute does not have be the most narrowly tailored option to survive a facial challenge. Moreover, even if a court did accept this argument, FARA itself does not mandate registration be publicly available on a certain medium. In turn, it is possible that the Department of Justice would change requirements to mandate that registrants disclose their agent-principal relationship in a more conspicuous place for the benefit of the public. This could allow them to eschew facial invalidation altogether.

Ultimately, it will be difficult for an HRO to succeed on a facial challenge. If one does, it is also possible that HROs will not experience long-term reprieve. Thus, while an HRO should not shy away from mounting a facial argument, it should not be the only challenge an HRO relies on.

## 2. *Overbreadth Challenges Should Be Explored, But Will Require Work*

An HRO could also mount an overbreadth challenge—and likely with more success than a facial challenge. In fact, some scholarship already

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186. See *supra* section II.B.1.

187. See *supra* section II.C.

argues that FARA is overbroad.<sup>188</sup> The main issue with an overbreadth challenge is that an HRO will need to show that a *substantial* amount of protected speech is captured by FARA. As seen in *Buckley*, this can be difficult to do in any context, but that difficulty might be compounded in situations such as here where a law has been out of use for decades.<sup>189</sup> Even scholarship that discusses FARA's potential overbreadth does so mostly through hypotheticals and a handful of real-world examples.<sup>190</sup> Mirroring these arguments will not likely persuade a court. Thus, to bring a strong overbreadth challenge an HRO would likely need to gather actual data or testimonials from real-world actors or organizations that feel chilled by FARA. This would obviously be no easy feat, but it is not impossible.

### 3. *As-applied Challenges Are HRO's Strongest Option for Attacking FARA*

FARA might survive facial and overbreadth challenges, but HROs are well-positioned to mount a successful as-applied challenge to FARA's registration requirements. As evidenced by *NAACP*, *Shelton*, and *Brown*, an HRO bringing an as-applied challenge needs to show that registration is reasonably probable to result in physical or economic harm, violations of privacy, or reputational damages.<sup>191</sup> This will not likely be too large of a hurdle for HROs targeted with FARA enforcement. The title of "foreign agent" in the international relations context is too often interpreted as "spy" or "traitor."<sup>192</sup> An HRO could cite to the Peace Information Center case to further support this point. Moreover, the United States' own harassment of HROs absent this label can be used as evidence of continued or increased harassment because of registration.<sup>193</sup> Ultimately, HROs are well-positioned to argue that registering "could make [them] lose access to those in need, make them targets for hostile actors, and place their staff at unnecessary risk" because it jeopardizes their reputation as neutral parties.<sup>194</sup> Of course, these arguments may vary

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188. See generally Robinson, *supra* note 28.

189. *Supra* section II.B.2.

190. See generally Robinson, *supra* note 28.

191. *Supra* section II.B.3.

192. See, e.g., *Russia: Government vs. Rights Groups*, HUM. RTS. WATCH (June 18, 2018, 5:30 AM), <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle> [<https://perma.cc/CB3D-SYEK>] (describing how the Russian public equates the "foreign agent" title to that of a traitor).

193. *Supra* section III.B.

194. Brian Wanko, *The Foreign Agents Registration Act's NGO Impact*, INTERACTION (Mar. 20,



depending on the facts applicable to a given HRO's case, but a First Amendment as-applied challenge is the strongest option HROs have for attacking FARA.

### B. *Congressional Reform*

While an as-applied challenge under the First Amendment may be a successful route in terms of potentially safeguarding HROs from having to register, it should not be considered a fix-all. Assuming HROs have the necessary resources to fight FARA inquiries and enforcement actions, reliance on individual judges considering individual as-applied challenges is a tenuous plan to prevent abuse. For the sake of judicial efficiency and preventing abuses of the statute, Congress should consider reforming FARA to reduce the risk of weaponization against HROs that do not pose serious foreign threats to the United States' democratic processes.

Recently, Congress has considered a multitude of proposed amendments to FARA, but none of them address the issues raised in this Comment. In fact, the majority of those proposed amendments, from Republicans and Democrats alike, actually advocate for more public accessibility of records,<sup>195</sup> greater enforcement ability,<sup>196</sup> and the rollbacks of exemptions.<sup>197</sup> The only proposal that may provide any protection to HROs mention of human rights in any type of FARA amendment appears in a January 2020 House of Representatives bill proposal.<sup>198</sup> The proposal would prevent foreign agents who represent foreign governments which engaged in a pattern of gross human rights violations from invoking registration exemption based on purported scholastic, religious, academic, or scientific pursuits.<sup>199</sup> No proposed amendment provides comprehensive protection for HROs.<sup>200</sup>

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2019), <https://www.interaction.org/blog/the-foreign-agents-registration-acts-ngo-impact/> [<https://perma.cc/ZC85-DJ2T>].

195. H.R. 1566, 116th Cong. (2019).

196. Foreign Agents Disclosure and Registration Enhancement Act, S. 1762, 116th Cong. (2019); Disclosing Foreign Influence Act, H.R. 4170, 115th Cong. (2017).

197. Foreign Influence Transparency Act, H.R. 5336, 115th Cong. (2018); Foreign Influence Transparency Act, S. 2583, 115th Cong. (2018); H.R. 4170.

198. Foreign Influence Registration Modernization Act, H.R. 5733, 116th Cong. (2020).

199. *Id.*

200. The January 2020 House of Representatives bill proposal also amends 22 U.S.C. § 611(b)(3), which may provide some protection for certain HROs. It waives the application of FARA to agents representing enterprises, associations, and organizations not under control or direction of foreign governments or foreign political parties. H.R. 5733. However, it appears to leave the determination of "control or direction of" to the Department of Justice. *Id.* As seen with the Department of Justice's enforcement history, *supra* Part III, even HROs that would appear to benefit from this new exception

As Congress considers increasing FARA's reach and the Department of Justice's ability to enforce the statute, it should be both conscious and cautious of FARA's flaws—FARA is too easily weaponized against organizations doing work that promotes social change and holds governments and other actors accountable. Because FARA does not provide statutory protections for HROs, Congress should create clarifications or new exemptions that specifically encompass the activities of HROs.<sup>201</sup>

Because HROs' work is heavily influenced by international human rights law, Congress should draft and adopt an exemption related to the activities described in the Universal Declaration of Human Rights in order to gap-fill the holes left open by current exemptions.<sup>202</sup> An amendment to FARA should embrace and exempt bona fide operations in these areas. It could read, for example:

Any organization and staff members thereof acting in their official capacity and within the scope of that capacity, whose primary work consists of bona fide research, fund-raising and distribution, and/or advocacy on human rights issues as recognized by international law and the international community is exempted from registration and disclosure requirements.

Reforms like this would help to find a balance between using FARA as a national security mechanism while also preventing it from being politicized and weaponized against groups that advocate for human rights and hold governments, corporations, and individuals accountable.

## CONCLUSION

Greater transparency can serve as a conduit, when wielded appropriately, for good governance, freedom, and democracy.<sup>203</sup> But

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may still face enforcement actions based on attenuated relationships with foreign governments or political parties.

201. It is worthwhile to note that such new exemptions would likely render the present humanitarian exemption useless. “[S]oliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering . . . .” 22 U.S.C. § 613(d)(3). The Act is extremely narrow in its application and represents a small fraction of the work that HROs engage in. Anything created to protect HROs would surely encompass what this exemption already purports to cover.

202. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The United States has not fully adopted the UDHR but, considering FARA has significant international law undertones and HROs' work is generally global, the Declaration can operate as a comprehensive guide to structuring an exemption that is effective in insulating HROs while allowing FARA to continue to operate as a national security tool.

203. See KRISTIN M. LORD, *THE PERILS AND PROMISE OF GLOBAL TRANSPARENCY: WHY THE INFORMATION REVOLUTION MAY NOT LEAD TO SECURITY, DEMOCRACY, OR PEACE* 3 (2006).

transparency is not an unmitigated good.<sup>204</sup> FARA, while generally praised as important national security legislation, represents the exact type of public disclosure law that must be critiqued, scrutinized, and watched for improper application. This Comment has outlined the ways in which FARA can be weaponized against HROs and how the forced association promulgated from a FARA registration can be damaging and destructive. Additionally, it has provided the first comprehensive constitutional analysis of FARA based on modern First Amendment jurisprudence. Finally, it has argued that while HROs may utilize an as-applied challenge as a means of seeking reprieve, FARA ultimately needs to be amended to prevent weaponization against these groups.

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204. *Id.*