Dodging Disclosure

How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms

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EXECUTIVE SUMMARY

The 2018 elections were the most expensive midterms in American history. All told, at least $8.9 billion was spent on advertising, according to preliminary estimates from Borrell Associates.[1]

In many ways, the 2018 midterms continued the big money trends that have accelerated over the last decade, as the U.S. Supreme Court has struck down limits on money in politics and the Federal Election Commission ("FEC") has failed to enforce those laws that remain. Hundreds of millions of dollars were spent by super PACs and dark money groups, and a handful of megadonors provided most of their funding.

At the same time, some new big money trends and tactics emerged in the 2018 cycle.

For the first time, nationally focused, party-aligned super PACs surpassed party congressional committees as the top spenders on independent expenditures—and through a variety of dubious tactics, those super PACs sought to pass off significant chunks of that spending as locally sourced.

In the past several midterm elections, party congressional committees like the National Republican Congressional Committee ("NRCC") or the Democratic Congressional Campaign Committee ("DCCC") topped the list of groups spending on independent expenditures, according to the Center for Responsive Politics.[2] But this midterm election, the three groups spending the most on independent expenditures were not party committees; they were super PACs associated with party leaders in Congress.[3]

Congressional Leadership Fund ("CLF"), which is linked to outgoing House Speaker Paul Ryan, topped the list by spending $137.5 million on independent expenditures; the second-highest spender was Senate Majority PAC ("SMP"), which is tied to Senate Minority Leader Chuck Schumer and spent $112.8 million; Senate Leadership Fund ("SLF"), which is associated with Senate Majority Leader Mitch McConnell, came in third, at $95 million.[4] The parties' House Congressional committees came in fourth and fifth.

At the same time that more money was becoming concentrated in a handful of politically connected super PACs, those same super PACs were finding new ways to disguise their spending.

One practice that intensified in the 2018 elections was the pre-election reporting dodge. In several races, mysterious super PACs popped up in the weeks before Election Day, spent five, six, or seven figures on ads, and combined legally dubious accounting tricks with reporting calendar loopholes to keep voters in the dark about the sources of their funding until well after voters cast their ballots. In many cases, these reporting dodges were designed to hide the role of national super PACs.

For example, in West Virginia's Republican U.S. Senate primary, the "Mountain Families PAC" spent $1.3 million, but manipulated FEC reporting schedules to avoid disclosing until after the election that it was mostly bankrolled by the McConnell-tied SLF, and that none of its funding came from West Virginia. The "Duty and Country PAC" also spent around $1.8 million in the Republican primary, and only after the election did it file reports disclosing that it was funded by a handful of major

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Democratic donors.

In the Arizona Republican U.S. Senate primary, a super PAC named Arizonans for Life spent almost $50,000 on digital ads, and similarly gamed FEC reporting schedules to avoid disclosing until a month after Election Day that the group had received all of its funding from SLF.[5]

In the Alabama special election in December 2017, a super PAC called "Highway 31"—named after the major route crossing the state—reported spending $4.1 million in the final weeks before the election. But because it claimed that all of its spending was on credit, Alabama voters did not learn until a month after Election Day that Highway 31's top funders were two national Democratic super PACs, SMP and Priorities USA Action.

All told, more than two dozen super PACs together spent over $8.1 million in primary elections around the country, but did not disclose the sources of those funds until after the elections had passed. Then, in the final weeks of the general election, over $29.3 million was spent by 17 super PACs that were newly created and had reported no contributors, or whose spending exceeded their last-reported cash-on-hand by 500 percent.

Meanwhile, new transparency measures instituted by platforms like Facebook revealed that national super PACs like these were carrying out analogous ventriloquist efforts online.

For example, throughout 2018, the Facebook page "Hoosier Country" ran paid advertisements attacking Indiana's Republican U.S. Senate candidate, Mike Braun. Hoosier Country's unpaid posts give the impression it was a nonpartisan page focused on Indiana issues; its ads in early 2018 stated merely that they were paid for by "Hoosier Country." But in July, Facebook instituted new requirements that political ads must include disclaimers stating who paid for them—which revealed that Hoosier Country's ads were actually paid for by SMP and another top-spending Democratic super PAC, Priorities USA Action.

SMP and Priorities USA Action were behind similar Facebook pages in Missouri, Florida, and Maine that ran ads backing Democratic candidates. Absent these disclaimers and Facebook's new political ad archive, the press and public would have had no idea that national Democratic super PACs were behind these apparently homegrown Facebook pages.

These digital disclosures are genuinely new. For years, thanks in large part to the efforts of companies like Facebook, the FEC has exempted digital political ads from the disclaimer requirements that apply to ads run on any other medium, even as political ad activity moves increasingly online.[6] And Congress has failed to update campaign finance law for the digital age.

As a result, until Facebook began creating the space to include on-ad disclaimers, super PACs could have gotten away with quietly funding ads from a page like "Hoosier Country" without detection.

However, the 2018 midterms also demonstrated self-regulation's limits. Candidates, parties, and PACs are legally required to include disclaimers on digital ads, but dark money groups are not subject to those requirements, unless their online ads expressly advocate for or against candidates. Reporters at the *New York Times* and *Vice* found that Facebook ads can easily be run under names like "Mike Pence" or a "freedom loving American Citizen exercising my natural law right," because it turns out that Facebook allows advertisers simply to fill in the disclaimer field with whatever text they choose.[7]

Because disclaimers are not yet legally required for many digital ads, it is difficult to prevent groups from taking advantage of loopholes like these.[8] Moreover, voluntary transparency measures adopted by platforms like Facebook or Twitter can change at any time—and do not affect any of the other platforms that host political ads.

In the meantime, political ad spending continued migrating online. Borrell Associates estimates that 20 percent of political ad spending in 2018 was on digital ads—an astonishing 2,400 percent increase over the 2014 midterms.[9] As more political money moves to the internet, these digital transparency gaps will only grow wider.

The 2018 election results demonstrated that Americans want a democracy that is transparent and elected officials who are accountable to voters rather than donors. Hundreds of candidates ran against the influence of money in politics and pledged to support reform; hundreds more took the symbolic step of rejecting money from corporate PACs. Voters backed ballot initiatives in cities and states across the country that would create or strengthen anti-corruption measures.

Congress and the FEC have the power to address the problems that emerged this cycle, and a mandate to do so.

Party-aligned super PACs raised most of their funds from megadonors.

Party committees are hardly strapped for cash; an individual can write checks of up to $237,300 each to a party's Senate and House campaign committee.[1] But super PACs can accept unlimited contributions from any source, including corporations.

An overwhelming proportion of the funds raised by the top-spending super PACs came from a handful of wealthy donors giving above the limits that apply to the party committees. According to CLC's analysis of FEC data, CLF raised 90 percent of its funding from donors giving above $237,300. SMP raised 75 percent of its funds from donors giving above $237,300. For SLF, an astonishing 94 percent of its funding came from donors giving above the $237,300 limit that applies to its Senate campaign committee analogue.

As a result, one or two donors can make all the difference. SLF, for example, received 41 percent of its funding disclosed so far in the 2018 cycle from Sheldon and Miriam Adelson. The gap between the $137 million spent on independent expenditures by the GOP's House super PAC, CLF, and the $74 million spent on independent expenditures by its House campaign committee, NRCC, is almost covered by the $50 million that the Adelsons alone gave to CLF.

Those megadonors who gave six-, seven-, or eight-figure contributions to party-aligned super PACs will almost certainly have their policies prioritized in the new Congress.

Outside money hit $1.1 billion, according to the Center for Responsive Politics.[2]

As has been the case in recent cycles, "outside" spending by super PACs and dark money groups tends to cluster in a handful of the most competitive races. Thanks to factors like gerrymandering, the vast majority of Congressional races are not competitive, and big money operatives don't bother spending funds in the many races whose outcome is preordained.

According to the Center for Responsive Politics, outside spending exceeded candidate spending in six of the top ten most expensive Senate races.[3] Of the ten most expensive House races, outside spending in four exceeded candidate spending, and in two races, spending by outside groups and candidates was nearly on par.[4]

As a result, spending by super PACs and dark money groups may appear to be a relatively small percentage of overall costs of elections nationwide, but because this spending is concentrated and targeted, it constituted a substantial amount in key races.

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[1] *Contribution Limits for 2017-2018 Federal Elections*, FED. ELECTION COMM'N, https://transition.fec.gov/info/contriblimitschart1718.pdf. The parties' congressional campaign committees—for Democrats, the DCCC and the Democratic Senatorial Campaign Committee ("DSCC"), and for Republicans, the NRCC and the National Republican Senatorial Campaign Committee ("NRSC")—can accept contributions of up to $33,900 per year for their general accounts, plus $101,700 per year to each of two special accounts for legal proceedings and party headquarters. An individual can therefore contribute up to ($33,900 + $101,700 + $101,700=) $237,300 to the DCCC, DSCC, NRCC, or NRSC. The party national committees—the Democratic National Committee ("DNC") and Republican National Committee ("RNC")—can accept contributions for those same accounts, and additionally accept contributions of up to $101,700 for a third presidential nominating convention account, allowing an individual to contribute up to $339,000 per year to the DNC or RNC.

[2] OpenSecrets, *Outside Spending by Cycle Thru November 26th of election year, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/index.php?type=Y&filter= (last visited Nov. 26, 2018).

[3] OpenSecrets, *2018 Most Expensive Races*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcandsout (last visited Nov. 18, 2018).

[4] *Id.*

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SUPER PAC REPORTING DODGES

In the final weeks of Alabama's hotly contested December 2017 special election for U.S. Senate, a super PAC called Highway 31 emerged and quickly spent $4.1 million on ads supporting Democratic candidate Doug Jones—but told the FEC that it had not raised a single penny.

Instead, Highway 31 claimed, the Washington, D.C.-based vendors that produced and placed its ads extended it millions in credit.[10]

It was not until a month after Election Day that Alabama voters learned that Highway 31's top funders were two national Democratic super PACs: Senate Majority PAC and Priorities USA Action. Highway 31's donors supposedly waited to pour millions into the PAC until just after the close-of-books for the pre-election report.

Alabama is a conservative state, "where out-of-state interference is seen as poisonous by many voters."[11] So Washington, D.C.-based Democratic political operatives likely calculated that Alabama voters would respond more favorably to messages from a group that appeared to have local ties than from a group fronting for national Democratic super PACs and coastal donors.

CLC filed an FEC complaint alleging that Highway 31's scheme violated the law; if vendors do not extend credit in the ordinary course of doing business, then they should be reported as contributors rather than debtors. The complaint is still pending before the FEC.

At the time, CLC predicted that Highway 31's tactics would be replicated by political operatives across the political spectrum.[12] We were right: it was not long before similar secrecy schemes were copied in other key races.

The first examples came in the primaries, when mysterious super PACs popped up, spent millions, and only revealed the sources of most or all of their funding well after the primaries in which they were spending.

CLC counted more than two dozen super PACs that dabbled in these tactics or close variants during the primaries, as the table on the next page shows.[13] Together, these super PACs spent over $8.1 million on primary elections but did not disclose the sources of those funds until after the elections had passed.[14]

Super PAC	Primary Election(s)	"Dark" spending as of the Primary Election
Duty and Country (D)	WV-Senate	$1,851,481
Red and Gold (D)	AZ-Senate	$1,679,710
Mountain Families PAC (R)	WV-Senate	$1,328,756
American Future Fund Political Action (R)	CA-39, CA-48, CA-49	$1,076,775
Ohio First PAC	OH-Senate	$472,130
PA Common Sense (D)	PA-18	$199,297
Defeat Slavery (D)	VA-10	$162,422
Americans Together (R)	Various	$155,561
The Principles Project (D)	MI-9	$131,845
SUNSHINEPAC (D)	IL-6	$127,194
Reinvesting in America (D)	MI-11	$124,153
American Patriots PAC (R)	TX-2	$100,000
Our Conservative Texas Future (R)	TX-5	$90,000
Democracy First (D)	VA-10	$67,500
A New Promise (D)	CT-5	$65,000
Conservative Voices PAC (R)	TX-27	$59,090
Clean Up Congress PAC (R)	CO-5	$56,000
Hold Washington Accountable (R)	SD -1	$51,335
Women Vote Smart (R)	OH-16	$50,167
Arizonans for Life (R)	AZ-Senate	$49,750
Make America Like Texas (R)	TX-21	$46,750
Our American Century (R)	KS-2	$45,329
A Stronger Texas Fund (R)	TX-21	$44,262
Lone Star Values PAC (R)	TX-21	$39,000
Ohioans for Our Future PAC (R)	OH-12	$37,000
Upstate Conservative Victory PAC (R)	SC-4	$25,000
Campaign for Jobs and Opportunity (R)	CO-5	$22,377

Several super PACs pulled off these secrecy schemes by gaming FEC reporting schedules.

Super PACs that file on a quarterly basis must file a pre-primary report, which reflects fundraising and spending as of 20 days before the election.[15] However, shortly before that pre-primary report was due, eight of the above super PACs filed paperwork changing their reporting schedule from quarterly to monthly, so that their next report—the only report that would show the contributions they received in the lead-up to the election—would not be filed until after the election was over.

For example, in the month before Arizona's Republican U.S. Senate primary, a super PAC called Red and Gold spent nearly $1.7 million attacking Rep. Martha McSally. Shortly after its formation, Red and Gold informed the FEC that it would file monthly reports, so its first disclosure "will be due on September 20"—more than three weeks after the August 28 election.[16] It was only after the primary election had passed that Arizona voters learned that this super PAC that had spent seven figures in the Republican primary was actually bankrolled by major Democratic super PACs and donors, including Senate Majority PAC, James Simons, and George Soros.[17]

In West Virginia's Republican primary for U.S. Senate, Mountain Families PAC spent $1.3 million attacking candidate Don Blankenship, and Duty and Country PAC spent $1.9 million attacking Evan Jenkins (and, to a lesser extent, Patrick Morrissey). Both super PACs similarly gamed FEC reporting schedules to delay disclosing their funders until after the primary. Reports filed on May 20, 2018, weeks after the May 8 election, revealed that the Mitch McConnell-aligned Senate Leadership Fund was behind Mountain Families PAC's attacks on Blankenship[18]—who had dubbed McConnell "Cocaine Mitch"—and that a handful of large Democratic donors were behind Duty and Country's efforts to meddle in the GOP primary.[19]

Next door, in Ohio, Ohio First PAC more closely followed the Highway 31 model, but with a few twists. The PAC spent nearly $500,000 boosting Jim Renacci's bid for the Republican U.S. Senate nomination, but claimed that it had not raised any money, and that the vendors that produced and placed its ads did so on credit. Ohio First PAC, however, did not even bother filing reports until after the May 8 election had passed. (Additionally, when Ohio First PAC finally revealed its contributors on reports filed June 29, 2018, Ohio voters didn't learn much: most of the super PAC's funding had come from two nonprofits that keep their donors secret, The Government Integrity Fund and A Public Voice, Inc.[20])

Ohio First PAC spent nearly $500,000 boosting Jim Renacci's bid for the Republican U.S. Senate nomination, but claimed that it had not raised any money.

Then, in the general election, another new super PAC with ties to Ohio First, called MeToo Ohio, spent hundreds of thousands of dollars on ads attacking U.S. Senate candidate Sherrod Brown and—like Highway 31 and Ohio First—claimed that most of that spending was on credit from the same vendor that Ohio First had claimed debt to, Majority Strategies. (CLC filed complaints against both groups.[21])

Elsewhere, several super PACs that had gamed reporting deadlines in the primary reprised these strategies in the general, and other super PACs tried their own versions.

In some cases, super PACs popped up shortly before the general election and proceeded to spend six or seven figures without disclosing any contributors.[22] In other cases, existing super PACs reported some activity during the election, but then spent many times beyond their remaining cash-on-hand in the final weeks of the race. The effect of both approaches was to leave voters in the dark about significant funders behind last-minute spending blitzes.

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For example, Texas Forever formed on October 19, 2018, and in the weeks before the election spent $2.3 million supporting Democrat Beto O'Rourke's U.S. Senate run in Texas. The American Potential Fund was created in early October, but waited until October 26, 2018 to begin spending, when it dropped $186,050 supporting Republican Rick Scott's U.S. Senate bid in Florida. The Visionary Leaders Fund formed in the 2014 cycle, but was dormant throughout the 2016 and 2018 elections—until it spent $62,500 between November 1 and 6, 2018 supporting Republican Kevin Yoder in Kansas' 3rd Congressional District. By delaying their spending until October 17 had passed, none of these groups disclosed their contributors before Election Day.

The sources of $7.42 million of DefendArizona's spending were undisclosed as of Election Day.

DefendArizona had been active throughout Arizona's U.S. Senate race. But on its pre-general report, it disclosed only $296,269 cash on hand; then, after the October 17 close of books, it spent more than 20 times again that amount—$7.71 million—on independent expenditures supporting Republican candidate Martha McSally. This meant that the sources of $7.42 million of DefendArizona's spending were undisclosed as of Election Day.

As the table on the next page shows, PACs from both parties active in races across the country gamed reporting calendars by delaying significant spending until after October 17—with the effect of leaving voters in the dark about the sources of millions in pre-election spending.

The 17 PACs in this table fell into two categories: brand new "pop-up" PACs that reported no contributors before the general election, and existing PACs that reported some contributions or cash on hand on their last reports before the general election, but that proceeded to exceed that last-reported amount by a factor of more than 500 percent.[23]

Super PAC	General Election(s)	“Dark” spending as of Election Day
New Republican PAC (R)	FL-Senate	$12,531,747
DefendArizona (R)	AZ-Senate	$7,416,522
Change Now (D)	Various congressional races	$3,020,683
New American Jobs Fund (D)	AZ, MT, NV, OH, and FL-Senate	$2,819,938
Texas Forever (D)	TX-Senate	$2,300,407
Fair and Balanced PAC (D)	Various congressional races	$218,752
Leadership Alliance (D)	NJ-Senate	$203,543
American Potential Fund (R)	FL-Senate	$186,050
RIMF (R)	RI-Senate	$130,000
Right Now USA (R)	MN-Senate and various MN congressional races	$124,434
Fight for Tomorrow (R)	NY-19	$91,197
Central Valley’s Future (R)	CA-16	$76,804
Visionary Leaders Fund (R)	KS-03	$61,908
Restore Our Healthcare (R)	AZ-Senate	$46,250
Save Our Elections PAC (D)	FL-23	$33,234
Our American Century (R)	FL-Senate	$30,633
PACTION (D)	KS-03 and various FL congressional races	$28,428

These super PACs appear to have gamed FEC reporting schedules in order to keep their donors secret until after voters went to the polls. But even without deliberate gamesmanship, the FEC reporting calendar can have the effect of disguising large super PAC contributions received in the final 20 days of an election—the most costly stretch of the cycle. The news publication *Sludge*, for example, estimated that the gap between the pre-election report and Election Day had the effect of disguising the sources of at least $87 million in super PAC spending over the final weeks of the election.[24]

This scale of undisclosed pre-election spending undermines disclosure during the period that it arguably matters the most. As Justice Anthony Kennedy noted in *Citizens United*, “the public has an interest in knowing who is speaking about a candidate shortly before an election.”[25]

Notably, candidates cannot get away with similar donor secrecy efforts. Under current law, candidate campaign committees must report within 48 hours all contributions or loans over $1,000 received less than 20 days (but more than 48 hours) before an election. That was how we learned that Florida U.S. Senate candidate Rick Scott, for example, dumped another $1.2 million into his campaign in the final days of the election.[26]

If super PACs were subject to this same reporting requirement, voters across the country would have had much more information about where the millions in spending was coming from—and super PACs may have been deterred from engaging in these strategic maneuvers in the first place.

There were also super PACs that ignored reporting requirements altogether.

In the Texas primaries, this took the form of a super PAC called Keep El Paso Honest, which spent tens of thousands of dollars on bill-boards, broadcast ads, and mail pieces attacking a candidate in the Texas 16th U.S. Congressional district primary—but failed to file a single report disclosing this spending or the donors behind it.[1] Another was Principles First, which spent tens of thousands on TV ads expressly advocating against the election of Montana U.S. Senate candidate Matt Rosendale in the weeks before the primary election.[2] It was required to file reports disclosing these independent expenditures within 24 hours—but did not do so until a month after the Montana primary.

Absent serious enforcement action by the FEC, super PACs can potentially write off any fines as a cost of doing business—or as a way of buying donor anonymity.

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[1] Campaign Legal Center, Complaint Against Keep El Paso Honest (Aug. 9, 2018), https://campaignlegal.org/document/clc-complaint-fec-against-keep-el-paso-honest.
[2] Campaign Legal Center, Complaint Against Principles First (Aug. 9, 2018), https://campaignlegal.org/document/clc-complaint-fec-against-principles-first-inc.

DIGITAL AD DISCLAIMER DODGES

Political advertising continued moving online in 2018. Digital political spending hit $1.8 billion, or 20 percent of total ad spending in the 2018 midterms, according to an analysis by Borrell Associates.[27] In the last midterms in 2014, digital ads made up less than 1 percent—or $71 million—of political ad spending.[28]

But the law has failed to keep up. The last major reforms to campaign finance law came in 2002, in the relative infancy of the internet. As a result, current law allows many digital political ads to escape the legal transparency requirements that apply to identical ads run on TV or radio. Additionally, the nature of digital advertising means that highly targeted online ads may never be seen by the broader public; this not only allows misleading or inflammatory messages to circulate without detection, but also makes it difficult to monitor compliance with campaign finance law.

In 2016, we know that Russia exploited those gaps in our campaign finance laws to run wide-ranging digital campaigns to sway voters and sow division ahead of the election.[29] Those efforts continued through the 2018 midterms, according to a criminal complaint unsealed in October 2018.[30] Indeed, shortly before November 6, 2018, Facebook announced that it had blocked 115 accounts on Facebook and Instagram after law enforcement flagged them as linked to foreign entities trying to interfere with U.S. elections.[31]

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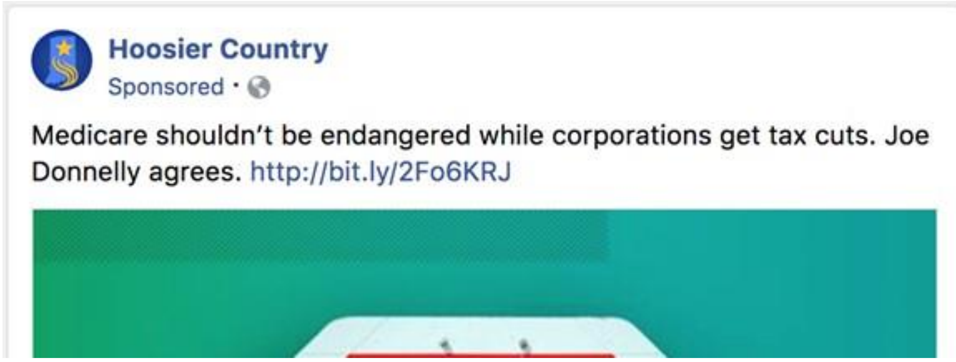
Congress and the FEC failed to adopt new laws or regulations in advance of the 2018 elections—but in the face of growing public and political pressure, Facebook, Twitter, and Google all adopted new transparency measures. These voluntary measures gave the public a fuller view of digital campaigning in 2018 than in any previous cycle.

Perhaps most notably, Facebook's disclaimer requirements and ad archive revealed the ease with which super PACs, candidates, and political operatives have been able to fund digital ads through innocuously named Facebook pages or front groups.

Take, for example, the Facebook page "Hoosier Country." Hoosier Country's "about" page describes it as "a community for anyone who wants to show their Hoosier pride. Join us in celebrating what we love about our state and help us work towards a better future for all Hoosiers."[32] Unpaid posts on Hoosier Country's Facebook page include links to nonpartisan news stories about Indiana, such as an article about a Caterpillar plant adding jobs in Indiana.[33] All of Hoosier Country's *paid* advertisements, however, supported Democratic U.S. Senator Joe Donnelly or attacked his Republican opponent, Mike Braun.

Some of the Hoosier Country Facebook page's early ads preceded Facebook's new disclosure requirements, but were captured by ProPublica's political ad collector.

Ads run in March 2018, for example, only stated that they were paid for by "Hoosier Country":[34]



However, after Facebook instituted its new disclaimer requirements in May 2018, Hoosier Country acknowledged that its ads were paid for by two national Democratic super PACs, Priorities USA Action and Senate Majority PAC ("SMP"):[35]

Entering "Hoosier Country" into OpenSecrets or the FEC website yields no relevant results; searching for the group name on a search engine also provides no information about the entity. The Hoosier Country Facebook page does not suggest any connection to national Democratic super PACs.

Absent this on-ad disclaimer, a viewer would not have known that Hoosier Country's ads were actually paid for by two Democratic super PACs.

"Hoosier Country" was not an isolated example. Facebook's political ad archive revealed that Priorities USA Action and SMP set up similar state-specific Facebook pages to support Democratic candidates in at least three other states: "Missouri's Voice"[36] ran ads boosting Sen. Claire McCaskill or attacking her opponent;[37] "Florida Knows Best" ran ads attacking Republican U.S. senate candidate Rick Scott;[38] "Maine Matters" ran ads attacking GOP gubernatorial candidate Shawn Moody.[39]

Priorities USA Action and SMP were not the only ones playing this game. Disclaimers also revealed that ads from a Facebook page called "Fire Jim Jordan" were paid for by Representative Jordan's OH-04 challenger.[40] Ads from the "Mike Braun Isn't Fooling Indiana" page were paid for by Senator Donnelly's campaign committee.[41]

These examples illustrate the importance of on-ad disclaimers for digital ads, given the opportunities for voter confusion or deception online. Absent these disclaimers and political ad archives, many viewers would not have known the forces behind the ads flooding their Facebook feeds. The political ad archives also served as valuable resources for journalists and watchdogs to tell a more complete story of election spending and identify potential violations of the law.

At the same time, a number of examples this cycle demonstrated the limits of self-regulation. For example, the *New York Times* profiled a Facebook page called "Wacky Wexton Not" that was running ads in Virginia's 10th district's U.S. Congressional race but that merely displayed the message, "Paid for by a freedom loving American Citizen exercising my natural law right, protected by the 1st Amendment and protected by the 2nd Amendment" as its disclaimer.[42]

One super PAC used a combination of digital secrecy and reporting dodges.

Arizonans for Life ("AFL") spent around $50,000[1] on Facebook and other digital ads in the final weeks of Arizona's GOP Senate primary attacking Kelli Ward's anti-abortion bona fides.[2] Because it had delayed reporting any contributions or expenditures until the final pre-election reporting period had passed, voters went to the polls without knowing who was behind these ads.

About a month after the election, FEC reports revealed that AFL was 100% funded by the McConnell-aligned Senate Leadership Fund ("SLF"). SLF transferred $55,000 to AFL on August 7, 2018, and AFL spent just under $50,000 on digital ads the same day.[3] After making the digital ad buy, AFL refunded the remaining funds to SLF.[4] After disclosing these transactions, AFL filed a termination report.[5]

There was nothing preventing SLF from directly running these ads under its own name, but it apparently preferred to launder the money and message through an entity that appeared to have local ties.

This might demonstrate the impact of Facebook's new transparency measures. In the 2016 cycle, ads run on Facebook were only viewable by the individuals to whom they were targeted, and the FEC allowed those ads to omit disclaimers stating who paid for them.

As a result, in past elections SLF might have executed a similar scheme by simply setting up a Facebook page called "Arizonans for Life" and running ads under that page's name. SLF's FEC reports would never have disclosed its connection to the Facebook page; the general public never would have seen the ads; and those viewers who were targeted would not have known that SLF paid for the ads, because they would not have had a disclaimer.

Now that Facebook is making all political ads publicly available and requiring that they include disclaimers, SLF had to shift tactics. Perhaps SLF created this pop-up super PAC and carefully timed its contribution in order to get around Facebook's new transparency requirements.

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[1] Arizonans for Life, 2018 September Monthly, FEC Form 3X, at 9 (filed Sept. 20, 2018), http://docquery.fec.gov/pdf/152/201809209123940152/201809209123940152.pdf.
[2] *See Ads From the Page Arizonans for Life*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids[0]=313070919257246&q=%22arizonans%20for%20life%22 (last visited Nov. 20, 2018).
[3] Arizonans for Life, 2018 September Monthly, *supra* note 48, at 6, 9.
[4] *Id.* at 8.
[5] Arizonans for Life, Termination Report, FEC Form 3X, at 1 (filed Sept. 20, 2018), http://docquery.fec.gov/pdf/229/201809209123940229/201809209123940229.pdf.

Similarly, the week of the election, *Vice* and *ProPublica* co-reported that a mysterious Facebook page called "America Progress Now" was running Facebook ads featuring images of Bernie Sanders and expressly advocating for Green Party candidates in competitive federal races.[43] The accompanying disclaimer read, "Paid for by America Progress Now," yet no record existed of a group called America Progress Now, either in FEC or corporate registration records.[44] Sanders asked Facebook to take down the ads that included his image, but according to *Vice* and *ProPublica*, "Facebook said it had verified that American Process Now is authorized to run ads with 'America Progress Now' in its 'Paid For by' disclosure."[45] Also the week before the election, reporters managed to get Facebook to approve ads that said they were placed by fake Facebook pages like “Cookies for Transparency” and “Paid for by” every sitting U.S. Senator.[46]

In all of these instances, one significant loophole became clear. As the *New York Times* explained:

> Once authorized to pay for political ads, buyers are able to fill the “paid for by” field with whatever text they want, even if it does not match the name of a Facebook user or page, and even if it is not an organization registered with the Federal Election Commission. Facebook does not reveal the identity of authorized ad buyers, or allow users to get more information about them.[47]

Because disclaimers are not yet legally required for many digital ads, there are few ways to prevent groups from taking advantage of loopholes like these.[48]

In part, this is the fault of the FEC. For several years, through regulations and a series of advisory opinions, the FEC has created ambiguity about when disclaimers are required for online ads—meaning that many digital ads have historically not included disclaimers at all. An FEC rulemaking on digital ad disclaimers has been pending since 2011; CLC filed comments on the rulemaking and testified when the agency held a hearing on the proposed rules in July 2018, but the FEC is nowhere close to finalizing regulations.

However, even if the FEC were to clarify how its disclaimer rules apply to digital ads, federal law is such that many ads could still omit disclaimers. Candidates, party committees, and PACs are generally required to include disclaimers on digital ads; other advertisers, like dark money nonprofits, are subject to disclaimer requirements only if their online ads expressly advocate for or against candidates.

In any case, a self-regulatory, fill-in-the-blank approach to disclosure will not alone suffice in a world in which an increasing number of ill-intentioned actors seek to—and are equipped with the funds and technological tools to—covertly influence our elections.

CONCLUSION & SOLUTIONS

There are solutions to the problems that have emerged or intensified this cycle.

First, Congress should extend last-minute major donor reporting requirements to super PACs. Under current law, campaign committees are required to report within 48 hours all contributions of $1,000 or more received in the final 20 days before an election.[49] Creating an analogous requirement for super PACs would thwart the donor disclosure dodges that proliferated this cycle.

If such legislation were enacted, super PACs could no longer evade disclosure by waiting until after a pre-election reporting period had passed to accept contributions; super PACs would be required to report all large, last-minute contributions within 48 hours of receiving them. Particularly in the era of electronic filing, this change would be easy for Congress to pass, easy for the FEC to enforce, and easy for super PACs to comply with.

Second, Congress should extend to digital ads the disclosure and disclaimer requirements that currently only apply to broadcast ads. For example, under current law, "electioneering communications"—ads that name a candidate and are broadcast to the candidates' voters shortly before the election—are subject to reporting and disclosure requirements if more than $10,000 is spent. But the definition of "electioneering communications" includes only television and radio ads, not digital. Extending "electioneering communications" to include paid digital ads would ensure that digital campaign ads are subject to the same reporting requirements and include the same on-ad disclaimers as campaign ads run on any other medium.

The Honest Ads Act, introduced in 2017 with bipartisan support, includes provisions that would do just that.[50] Enacting such legislation would make it harder for political operatives to hide behind misleading names while spending millions on digital ads. These measures, particularly if coupled with more robust disclosure legislation like the DISCLOSE Act,[51] would go a long way towards improving transparency and accountability.

New efforts by platforms like Facebook have helped shine a spotlight on the scope of the problem, but the nation cannot outsource its democratic transparency to private entities whose ultimate responsibility is to their shareholders rather than to American voters.

Third, Congress should reform the FEC—or at least confirm Commissioners who are committed to the mission of the agency. When super PACs, megadonors, and other political actors view the FEC as largely toothless on enforcement matters, not only do they widen longstanding loopholes and weaknesses, but they are also increasingly emboldened to forge new tactics, which metastasize as political committees across the country and political spectrum adopt and adapt them in turn.

For example, because of the FEC's reputation for dysfunction, a group like Highway 31 felt comfortable pushing an aggressive legal theory to keep donors secret by claiming its millions in spending were funded on credit; Ohio First PAC was then inspired to replicate that tactic. Groups like Keep El Paso Honest and Principles First could altogether ignore reporting requirements with the knowledge that the FEC is unlikely to pursue any serious enforcement action; administrative fines can be written off as a cost of doing business and as a way of buying donor anonymity. And most glaringly, for the past seven years the FEC has been unable to adopt rules requiring disclaimers on digital political ads, even after Russian intelligence agencies exploited digital disclosure loopholes to unlawfully interfere with the 2016 elections.

The six-member FEC is now down to four Commissioners, all of whom are serving on expired terms. At a minimum, President Trump should nominate, and the Senate should only confirm, FEC Commissioners who will faithfully administer and enforce the nation's campaign finance laws. Congress should also enact legislation to fix the agency, such as the bipartisan Restoring Integrity to America's Elections Act that, among other things, would create a blue ribbon advisory panel to recommend nominees and reduce the number of Commissioners from six to five to eliminate deadlocks.[52]

If Congress and the FEC do not act, the trends that we saw in 2018 will only return with greater force in 2020 and beyond—and political operatives of both parties will almost certainly find new ways of keeping voters in the dark.

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1 Kip Cassino, *Bracing for Impact: 2018 Political Advertising Set to Break Records*, BORRELL ASSOCIATES, INC. (2018), https://www.borrellassociates.com/industry-papers/papers/fall-update-2018-political-advertising-set-to-break-records-detail.

2 *See* OpenSecrets, *2014 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=A; OpenSecrets, *2010 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=A; OpenSecrets, *2006 Outside Spending, by Group, Center for Responsive Politics*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2006&chrt=V&disp=O&type=A (last visited Nov. 18, 2018).

3 OpenSecrets, *2018 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/summ.php?disp=O (last visited Nov. 18, 2018). Total spending by national party committees, when campaign-related activities other than independent expenditures are taken into account, exceeded the independent expenditure spending by the party-aligned super PACs.

4 *Id.*

5 Arizonans for Life, Committee Filings (2017-18), FEC.GOV, https://www.fec.gov/data/committee/C00681817/?tab=filings (last visited Nov. 9, 2018).

6 *See, e.g.*, Advisory Opinion Request 2011-09 (Facebook); *see also* Sarah Frier & Bill Allison, *Facebook Fought Rules That Could Have Exposed Fake Russian Ads,* BLOOMBERG (Oct. 4, 2017), https://www.bloomberg.com/news/articles/2017-10-04/facebook-fought-for-years-to-avoid-political-ad-disclosure-rules.

7 *See* Kevin Roose, *In Virginia House Race, Anonymous Attack Ads Pop Up on Facebook*, N.Y. TIMES (Oct. 17, 2018), https://www.nytimes.com/2018/10/17/us/politics/virginia-race-comstock-wexton-facebook-attack-ads.html?rref=collection%2Fbyline%2Fkevin-roose; William Turton, *We posed as 100 senators to run ads on Facebook. Facebook approved all of them*, VICE (Oct. 30, 2018), https://news.vice.com/en_us/article/xw9n3q/we-posed-as-100-senators-to-run-ads-on-facebook-facebook-approved-all-of-them.

8 Twitter appears to have adopted a more stringent verification process for political ad-runners, who must provide a tax ID or EIN. *See* https://ads.twitter.com/en/help.

9 Cassino, *supra* note 1.

10 CLC filed an FEC complaint alleging Highway 31's scheme violated the law. *See* Press Release, Campaign Legal Center, Alabama Voters Went to the Polls in December Without Knowing Source of Millions in Spending by Mysterious Democratic Super PAC Highway 31 (Mar. 5, 2018), https://campaignlegal.org/press-releases/alabama-voters-went-polls-december-without-knowing-source-millions-spending.

11 Michael Scherer, *Democratic Group Attacks Roy Moore Without Disclosing Donors,* WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/powerpost/democratic-group-attacks-roy-moore-without-disclosing-donors/2017/12/01/d67c108c-d6a0-11e7-b62d-d9345ced896d_story.html?noredirect=on&utm_term=.b2560d17bbb0; *see also* Justin McCarthy, *Alabama Special Election Takes Place in One of the Reddest States*, GALLUP (Dec. 11, 2017), https://news.gallup.com/opinion/polling-matters/223430/alabama-special-election-takes-place-one-reddest-states.aspx.

12 *See, e.g.*, Eric Garcia, *Campaign Legal Center Files Complaint Against Pro-Doug Jones Super PAC*, ROLL CALL (Mar. 6, 2018), https://www.rollcall.com/news/politics/campaign-legal-center-files-complaint-against-pro-jones-super-pac.

13 *See* Maggie Severns, *'Oh that's cool — do that!': Super PACs use new trick to hide donors*, POLITICO (Aug. 17, 2018), https://www.politico.com/story/2018/08/17/super-pacs-hidden-donors-disclosures-741795.

14 Column 3 figures were calculated by subtracting the super PAC's cash on hand on the last pre-election report, if any, from the sum of the independent expenditures spent after the close-of-books for that report.

15 *See* 52 U.S.C. § 30104(a)(2); 11 CFR § § 104.5(a)(1)(iii) and (a)(2)(i).

16 Red and Gold, Filing Frequency Change Notice, FEC Form 99, at 1 (filed Aug. 3, 2018), http://docquery.fec.gov/pdf/251/201808039119349251/201808039119349251.pdf.

17 Red and Gold, September Monthly, FEC Form 3X, at 6-7 (filed Sept. 20, 2018), http://docquery.fec.gov/pdf/978/201809209124143978/201809209124143978.pdf.

[18] Mountain Families PAC, May Monthly, FEC Form 3X, at 6 (filed May 20, 2018), http://docquery.fec.gov/pdf/835/201805209112172835/201805209112172835.pdf.

[19] Duty and Country, May Monthly, FEC Form 3X, at 6-12 (filed May 20, 2018), http://docquery.fec.gov/pdf/877/201805209112153877/201805209112153877.pdf.

[20] Ohio First PAC was not the only super PAC deriving much of its funding from non-disclosing groups. According to a recent analysis by the Center for Responsive Politics and the Wesleyan Media Project, this phenomenon of "partially-disclosing groups"—e.g., super PACs that nominally disclose their donors but that in fact receive significant funding from groups that in turn do not disclose *their* donors—enjoyed an uptick in the 2018 election cycle. Anna Massoglia, *Millions in masked money funneled into 2018 elections*, CTR. FOR RESPONSIVE POLITICS (Nov. 7, 2018), https://www.opensecrets.org/news/2018/11/millions-in-masked-money-funneled-into-2018-elections/.

[21] Campaign Legal Center, Complaint Against Ohio First PAC (Aug. 9, 2018), https://campaignlegal.org/document/clc-complaint-fec-against-ohio-first-pac-renacci-senate-majority-strategies-llc/; Campaign Legal Center, Complaint Against MeToo Ohio (Nov. 13, 2018), https://campaignlegal.org/document/clc-complaint-against-metoo-ohio-renacci-us-senate-majority-strategies-llc . Both of these complaints also included allegations of coordination with the Renacci for US Senate campaign committee, which was also contracting with Majority Strategies and which ran ads similar in timing, theme, and style to MeToo Ohio's shortly before the general election.

[22] The Center for Public Integrity highlighted some of these examples in a pre-election piece. *See* Ashley Balcerzak, *Pop-up PACs are spending big in Election 2018's final days — but they're hiding their bankrollers*, CTR. FOR PUBLIC INTEGRITY (Nov. 2, 2018), https://www.publicintegrity.org/2018/11/02/22437/pop-pacs-are-spending-big-election-2018-s-final-days-theyre-hiding-their.

[23] Column 3 figures were calculated by subtracting the super PAC's cash on hand on the final report filed before the election from the sum of the independent expenditures spent between the close of books for that last report and the November 6, 2018 general election. If the super PAC reported no contributors before the general election—either because it had not filed any regularly-scheduled reports or because it reported $0 in cash on hand—then the column 3 figure simply equals that super PAC's independent expenditures.

[24] Alex Kotch, *Tens of Millions in Mystery Money Funded Final Weeks of Midterm Ads*, SLUDGE (Nov. 12, 2018), https://readsludge.com/2018/11/12/tens-of-millions-in-mystery-money-funded-final-weeks-of-midterm-ads/.

[25] *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

[26] Rick Scott for Florida, 48-Hour Notice of Contributions/Loans Received, FEC Form 6, at 5 (filed Oct. 31, 2018), http://docquery.fec.gov/pdf/597/201810319133566597/201810319133566597.pdf.

[27] Cassino, *supra* note 1.

[28] *Id.*; *see also* Megan Janetsky, *Low Transparency, Low Regulation Online Political Ads Skyrocket*, OPENSECRETS, (Mar. 7, 2018), https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/

[29] *See generally* CAMPAIGN LEGAL CENTER, EXAMINING FOREIGN INTERFERENCE IN U.S. ELECTIONS (Jan. 31, 2018), https://campaignlegal.org/document/report-examining-foreign-interference-us-elections.

[30] *See, e.g.,* Victoria Clark, Mikhaila Fogel, Susan Hennessey, Quinta Jurecic, Matthew Kahn, & Benjamin Wittes, *Russian Electoral Interference: 2018 Midterms Edition,* LAWFARE *(Oct. 19, 2018), https://www.lawfareblog.com/russian-electoral-interference-2018-midterms-edition.*

[31] Karma Allen*, Facebook Blocks 115 Accounts for Alleged Inauthentic Behavior Ahead of Midterm Elections*, ABC NEWS (Nov. 7, 2018), https://abcnews.go.com/Politics/facebook-blocks-115-accounts-alleged-inauthentic-behavior-ahead/story?id=58991975.

[32] Hoosier Country, *About*, FACEBOOK, https://www.facebook.com/pg/HoosiersFirst/about/ (last visited Nov. 20, 2018).

[33] Hoosier Country, *Posts*, FACEBOOK, https://www.facebook.com/HoosiersFirst/ (last visited Nov. 20, 2018).

[34] Hoosier Country, *Medicare shouldn't be endangered*, ProPublica Facebook Political Ad Collector (first seen Mar. 9, 2018), https://projects.propublica.org/facebook-ads/ad/23842739028120190 (last visited Aug. 7, 2018).

[35] Hoosier Country, *Mike Braun earned millions*, ProPublica Facebook Political Ad Collector (first seen July 15, 2018), https://projects.propublica.org/facebook-ads/ad/23842973630220078 (last visited Nov. 20, 2018).

[36] Missouri's Voice, *Home*, FACEBOOK, https://www.facebook.com/MissourisVoice/ (last visited Nov. 20, 2018).

[37] *Ads from the Page Missouri's Voice*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=all&country=US&view_all_page_id=468405866878945 (last visited Nov. 20, 2018).

[38] *Ads from the Page Florida Knows Best*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=all&country=US&view_all_page_id=246781762546891 (last visited Nov. 20, 2018).

[39] *Ads from the Page Maine Matters*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=all&country=US&view_all_page_id=1583518961754057 (last visited Nov. 20, 2018).

[40] *Ads from the Page Fire Jim Jordan*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids[0]=479436099167883&q=%22fire%20jim%20jordan%22 (last visited Nov. 20, 2018).

[41] *Ads from the Page Mike Braun Isn't Fooling Hoosiers*, FACEBOOK, https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids[0]=285239145377661&q=%22mike%20braun%20isn%27t%20fooling%20hoosiers%22 (last visited Nov. 20, 2018).

[42] Roose, *supra* note 7.

[43] William Turton & Jeremy Merrill, *Mysterious Facebook Group is Using Bernie Sanders' Image to Get Liberals to Vote for the Green Party*, VICE (Nov. 5, 2018), https://news.vice.com/en_us/article/ev3gw4/a-mysterious-facebook-group-is-using-bernie-sanders-image-to-urge-democrats-to-vote-for-the-green-party.

[44] *Id.*

[45] *Id.*

[46] William Turton, *We posed as 100 senators to run ads on Facebook. Facebook approved all of them*, VICE (Oct. 30, 2018), https://news.vice.com/en_us/article/xw9n3q/we-posed-as-100-senators-to-run-ads-on-facebook-facebook-approved-all-of-them.

[47] Roose, *supra* note 7.

[48] Twitter appears to have adopted a more stringent verification process for political ad-runners, who must provide a tax ID or EIN. *See* https://ads.twitter.com/en/help.

[49] *See* 52 U.S.C. § 30104(a)(6)(A). Specifically, candidates must report within 48 hours all contributions over $1,000 received less than 20 days but more than 48 hours before an election. *Id.*

[50] HONEST Ads Act, S. 1989, H.R. 3077, 115th Cong. (2017).

[51] DISCLOSE Act of 2018, S. 3150, H.R. 6239, 115th Cong. (2018).

[52] Restoring Integrity to America's Elections Act, H.R. 2034, 115th Cong. (2017).