

November 13, 2019

The Honorable Lawrence R. Klemin
Chairman

The Honorable Karla Rose Hanson
Vice Chairman

2019-20 Interim Judiciary Committee
North Dakota Legislative Assembly

Re: Statement of North Dakotans for Public Integrity Regarding Legislative Implementation of Article XIV

Dear Chairman Klemin, Vice Chairman Hanson, and Members of the Judiciary Committee:

North Dakotans for Public Integrity (NDPI) respectfully submits this statement regarding the legislative implementation of Article XIV of the North Dakota constitution, which codifies North Dakotans' right to know who is funding elections and spending money to influence government action in our state.

NDPI was formed by a bipartisan group of North Dakota citizens who organized to educate and inform other North Dakotans about the importance of integrity and public accountability by government institutions. NDPI promotes efforts to increase integrity and accountability of North Dakota's government institutions, and advocates for proposals that will increase the people's confidence in the honesty and transparency of our government and public officials. NDPI sponsored North Dakota Measure 1, the ballot measure that North Dakota voters passed in November 2018, which resulted in new Article XIV to the North Dakota Constitution. Consistent with its commitment to transparency and accountability, NDPI has publicly disclosed all contributors who gave an aggregate amount of over \$100 during the election campaign cycle.¹

¹ North Dakotans for Public Integrity, Campaign Finance Reports, 2018 <https://vip.sos.nd.gov/cf/search/showcommittee.aspx?cid=2419&yr=2018>.

Article XIV codifies a constitutional right to know the ultimate and true source of funds spent to influence North Dakota elections and other government action. North Dakota's adoption of Article XIV marks an important step in addressing one of the most significant problems in campaign finance law today: undisclosed, secret political spending to influence voters' decisions at the ballot box. The money used for such election-related spending is often called "dark money" because the source of such money is undisclosed and unknown.² One of the most common ways dark money spending on elections is kept secret is by funneling the money through multiple entities that shield the true source of the funds from public view. Article XIV addresses that problem by codifying a constitutional right to know who is spending money to influence North Dakota elections and other government action, and by mandating legislation that requires the "prompt, electronically accessible, plainly comprehensible, public disclosure of the ultimate and true source" of election-related spending in amounts greater than two hundred dollars.

NDPI submits this statement to provide the legal background and factual context surrounding the transparency requirements codified in Article XIV, and to note some key features that should be included in its implementing legislation. First, we describe the critical role that political disclosure requirements like those mandated by Article XIV play in our representative democracy and explain how transparency laws further the interests underlying the First Amendment to the U.S. Constitution, as the U.S. Supreme Court has repeatedly recognized. Part two describes how gaps in existing federal and state disclosure laws have enabled wealthy individuals and special interests to pursue their preferred electoral and policy outcomes by secretly pouring massive amounts of money into federal, state, and local elections—including in North Dakota—while citizens are left in the dark about the true sources of this money. Part two also notes some key legislative features that are crucial to informing that the public of the ultimate and true sources of election-related spending.

In addition to this background and analysis, NPDI includes for the Committee's consideration the following three Attachments to this statement:

Attachment A: a primer on dark money by the nonpartisan Center for Responsive Politics.

Attachment B: a recent report by the nonpartisan Campaign Legal Center describing dark money spending in the 2018 congressional elections.

Attachment C: a 2016 research report by the nonpartisan Brennan Center for Justice surveying dark money spending in six states between 2006 and 2014.

² See Attachment A, CTR. FOR RESPONSIVE POL., *Dark Money Basics* (Sept. 10, 2019), <https://www.opensecrets.org/dark-money/basics>.

I. Protecting citizens' right to know who is spending money to influence their elections and government is crucial to the proper functioning of our representative democracy.

When North Dakotans voted to adopt Article XIV, they were continuing a long tradition of requiring disclosure of money spent to influence elections. Other states around the country have recognized the crucial importance of requiring greater transparency in election spending, particularly at this moment in our democracy, when “[v]oters are more in the dark than ever about who’s funding political ads.”³

Protecting citizens’ access to information about the sources of money spent to influence elections and government action is foundational to the American democratic system of self-government because it ensures “that government remains responsive to the will of the people.”⁴ The U.S. Supreme Court has explained that “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”⁵ To fully participate in the political process, however, voters need enough information to determine who supports which positions and why. Therefore, “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”⁶

Requiring the disclosure of money spent to influence elections and government action is part of a long tradition in our country and a cornerstone of U.S. lobbying and campaign finance laws. Laws requiring lobbyists to register and disclose their lobbying expenditures date back to the 1946 Legislative Reorganization Act.⁷ In 1954, the Supreme Court upheld

³ CIARA TORRES-SPELLISCY, *The 2018 Elections Have \$100 Million in Dark Money and Counting*, BRENNAN CENTER FOR JUSTICE (Oct. 22, 2018), <https://www.brennancenter.org/blog/2018-elections-dark-money>; see, e.g., Nick Reynolds, *After a primary full of dark money, Wyoming lawmakers weigh new campaign finance rules*, CASPER STAR-TRIBUNE (Sept. 20, 2018), https://trib.com/news/state-and-regional/govt-and-politics/after-a-primary-full-of-dark-money-wyoming-lawmakers-weigh/article_3a7dce51-f4e0-58c9-9f27-1ed36fc29cf5.html; Andrew Brown, *SC lawmakers advance bills on ‘dark money’ despite protests from advocacy groups*, THE POST AND COURIER (APR. 11, 2019), https://www.postandcourier.com/news/sc-lawmakers-advance-bills-on-dark-money-despite-protests-from/article_aee80278-5c65-11e9-b294-d7a8de373ef1.html; ANNA MASSOGLIA, *State of Money in Politics: Billion-dollar ‘dark money’ spending is just the tip of the iceberg*, CTR. FOR RESPONSIVE POL. (Feb. 21, 2019), <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

⁴ *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

⁵ *Reynolds v. Sims*, 337 U.S. 533, 564 (1964).

⁶ *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

⁷ JACOB R. STRAUS, CONG. RESEARCH SERV., RL34377, LOBBYING REGISTRATION AND DISCLOSURE: THE ROLE OF THE CLERK OF THE HOUSE AND THE SECRETARY OF THE SENATE 1, (2017), <https://fas.org/sgp/crs/misc/RL34377.pdf> (citing P.L. 79-601, 60 Stat. 839-842, August 2, 1946 and explaining that Title III of the Legislative Reorganization Act of 1946 was the “Federal Regulation of Lobbying Act”).

those requirements, describing them as appropriately requiring “a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.”⁸ The Court held that lobbyist disclosure requirements were consistent with the First Amendment to the federal Constitution and observed that “full realization of the American ideal of government by elected representatives depends to no small extent” on the ability to properly evaluate “the myriad pressures to which [members of Congress] are regularly subjected. Otherwise, the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.”⁹

In 1995, Congress passed the Lobbying Disclosure Act, which replaced the 1946 law with a more detailed reporting regime for registered lobbyists.¹⁰ And in 2007, Congress amended the law to establish greater disclosure and reporting requirements for lobbyists and lobbying firms.¹¹

The earliest federal and state campaign finance disclosure laws date back to the beginning of the twentieth century,¹² although most of the statutory framework governing contemporary federal elections was enacted as part of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974 and 1976. The early FECA provisions required political actors like candidates, political parties, and political committees (or “PACs”) to file regular reports disclosing their political contributions and expenditures.¹³ The statute also required other groups and individuals that spent over \$100 on expenditures—purchases for communications that explicitly call for the election or defeat of a candidate¹⁴—to disclose

⁸ *United States v. Harriss*, 347 U.S. 612, 625 (1954).

⁹ *Id.* at 625.

¹⁰ STRAUS, *supra* n.7 at 1.

¹¹ *See id.*

¹² Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 400 (2014).

¹³ *Id.* at 412-13.

¹⁴ FECA originally imposed expenditure limits and reporting requirements on independent expenditures “relative to a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (*per curiam*). When the Supreme Court considered the constitutionality of those and other FECA provisions, it adopted a narrowing construction of “expenditure” to avoid vagueness and overbreadth problems. *Id.* at 39-44, 80. After *Buckley*, federal requirements for independent expenditures applied only to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44, 88. That narrow interpretation was subsequently expanded slightly to apply to expenditures for communications that are the “functional equivalent of express advocacy,” *i.e.* a communication that may lack explicit words of advocacy like “vote for” or “defeat,” but which, taken as a whole, could only be interpreted by a reasonable person as advocating for the election or defeat of a clearly identified candidate. *See, e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 n.7 (2007); *McConnell v. FEC*, 540 U.S. 93, 193 (2003); *Free Speech v. FEC*, 720 F.3d 788, 794-95 (10th Cir. 2013); *see also* 11 C.F.R. § 100.22(b).

information about the sources and financing of those expenditures to the newly created Federal Election Commission (FEC).¹⁵

Following a sweeping constitutional challenge to FECA, the U.S. Supreme Court issued its seminal campaign finance decision, *Buckley v. Valeo*, in which it held, among other things, that requiring disclosure of election-related spending is consistent with the First Amendment to the U.S. Constitution.¹⁶ In *Buckley*, the Supreme Court explained that disclosure laws “impose no ceiling on campaign-related activities” and “do not prevent anyone from speaking.”¹⁷ The Court also recognized that disclosure of campaign finance information advances at least three important government interests: (1) providing voters with information necessary to evaluate candidates and make informed decisions on Election Day; (2) helping to deter corruption and the appearance of corruption by shining a light on campaign contributions and spending; and (3) providing information necessary to identify and enforce violations of other campaign finance laws, like contribution limits.¹⁸ *Buckley* was the first in a series of decisions in which the Supreme Court upheld laws requiring disclosure of information about the sources of election-related spending.

In the years that followed, the Supreme Court signaled its support for campaign finance disclosure in other contexts, including state and local ballot measure advocacy. In *First National Bank of Boston v. Bellotti*, the Court endorsed transparency rules in ballot initiative elections, finding that “[i]dentification of the source of advertising” for ballot measures “may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.”¹⁹

Decades later, the Court reaffirmed the constitutionality of political disclosure requirements in the context of federal legislation designed to address the problem of “independent groups [who] were running election-related advertisements ‘while hiding behind dubious and misleading names.’”²⁰ The Bipartisan Campaign Reform Act (BCRA), which Congress passed in 2002, imposes reporting and on-ad disclaimer requirements for certain pre-election ads that mention a candidate and are broadcast where that candidate is running.²¹ The reporting requirements include an obligation to identify those individuals or

¹⁵ Pub. L. No. 93-443, §204(c), 88 STAT. at 1278 (“Every person (other than a political committee or candidate) who makes contributions or expenditures . . . in an aggregate amount in excess of \$100 within a calendar year shall file with the Commission.”).

¹⁶ 424 U.S. 1 (1976) (per curiam).

¹⁷ *Id.* at 64.

¹⁸ *Id.* at 66-68.

¹⁹ 435 U.S. 765, 792 n.32 (1978). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (invalidating limits on permissible amount of contributions to ballot committees and concluding that “[t]he integrity of the political system will be adequately protected if contributors [to ballot measure committees] are identified in a public filing revealing the amounts contributed; if it is thought wise, the legislation can outlaw anonymous contributions”).

²⁰ *McConnell*, 540 U.S. at 197. As the Court explained, before the new law was passed, “the public may not have been fully informed about the sponsorship of so-called issue ads.” *Id.* at 128.

²¹ 52 U.S.C. §§ 30104(f), 30120.

groups who made substantial contributions to the person who paid for the ad.²² In upholding BCRA's disclosure requirements against a constitutional challenge, the Supreme Court, in *McConnell v. FEC*, reaffirmed the constitutional permissibility of laws requiring the public disclosure of the sources of election-related spending and explained that the additional transparency mandated by BCRA would advance First Amendment interests by helping citizens "make informed choices in the political marketplace."²³

More recently, even as the Supreme Court has been willing to revisit other aspects of its campaign finance jurisprudence, it has continued to reaffirm the constitutionality of disclosure requirements for election-related spending. Most notably, the Court's 2010 decision in *Citizens United v. FEC* reaffirmed the constitutionality of election-related disclosure requirements.²⁴ To be sure, *Citizens United* is perhaps best known for holding, by a 5-4 vote, that corporations have a First Amendment right to spend unlimited corporate funds on independent expenditures—that is, spending to influence elections that is not coordinated with any candidate or political party. But in an equally important part of the opinion, eight of the Court's nine Justices reaffirmed the constitutionality of BCRA's disclosure requirements, including as applied to a 10-second ad promoting a film about then-Senator and presidential candidate Hillary Clinton that lacked any candidate advocacy.²⁵ The Court recognized that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election" and explained that election spending "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."²⁶ The Court went so far as to predict that the *Citizens United* decision would create a new "campaign finance system that pairs corporate independent expenditures with effective disclosure," and observed that "modern technology makes disclosure rapid and informative."²⁷ (Unfortunately, and as described below, that prediction has not yet come to fruition in large part because existing disclosure laws are *ineffective*.)

A few years after deciding *Citizens United*, the Supreme Court issued yet another campaign finance decision that emphasized the importance of disclosing sources of election-related spending. In *McCutcheon v. FEC*, the Court invalidated a federal law limiting the total amount an individual could contribute to all candidates and political committees, while stressing the key role disclosure requirements play in "minimiz[ing] the potential for abuse of the campaign finance system," particularly when paired with the ability to easily "arm[] the voting public with information" through the use of modern technology.²⁸

²² 52 U.S.C. § 30104(f)(2)(F).

²³ *McConnell*, 540 U.S. at 197.

²⁴ *Citizens United*, 558 U.S. at 367-68.

²⁵ *Id.* at 367, 369.

²⁶ *Id.* at 369.

²⁷ *Id.* at 370.

²⁸ *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014).

In addition to these Supreme Court decisions, the federal courts of appeals have upheld a wide range of other state and federal political disclosure laws in the nearly ten years since *Citizens United* was decided.²⁹

II. Gaps in existing federal and state disclosure laws allow the true sources of vast amounts of election-related spending to remain concealed.

Despite the broad recognition by courts and legislatures around the country of the value and constitutional permissibility of political disclosure requirements, many federal and state laws have failed to keep up with changes in how money is being spent to influence elections. Corporations and other wealthy interests are spending vast sums to influence federal and state elections while concealing their identity and even affirmatively misleading the public about the true source of that spending. Spenders have devised a number of ways to conceal themselves, one of the most problematic being to channel funds through one or more intermediary entities—most commonly section 501(c)(4) nonprofit organizations that are not subject to federal or state PAC regulations³⁰ and are not required to disclose their donors under federal tax law.³¹ The increasing use of this approach to finance political

²⁹ See, e.g., *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016); *See Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014); *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec’y of State*, 717 F.3d 1244 (11th Cir. 2013); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013); *Real Truth About Abortion Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *Human Life of Wash. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

³⁰ See, e.g., *Buckley*, 424 U.S. at 79; Ariz. Rev. Stat. § 16-905(B) (construing registration requirements to reach political action committee only if it is controlled by candidate or party or has the “primary purpose of influencing the results of an election.”); Minn. Stat. § 10A.01 subd. 27 (“Political committee’ means an association whose major purpose is to influence the nomination or election of one or more candidates or to promote or defeat a ballot question, other than a principal campaign committee or a political party unit.”); Va. Code Ann. § 24.2-945.1 (“Political action committee’ means any organization, person, or group of persons, established or maintained to receive and expend contributions for the primary purpose of expressly advocating the election or defeat of a clearly identified candidate.”).

³¹ See Attachment A, CTR. FOR RESPONSIVE POL., *Dark Money Basics*, <https://www.opensecrets.org/dark-money/basics> (describing different types of section 501(c) nonprofit organizations, none of which are required to publicly identify their donors or sources of money). For-profit corporations largely have avoided directly financing campaign advertising due to public relations concerns. Instead, nonprofit corporations have emerged as the primary corporate vehicle for dark money spending and for-profits do channel money intended for campaign advertising through trade associations and other nonprofit entities in order to avoid disclosure. See MICHAEL BECKEL, *Top U.S. corporations funneled \$173 million to political nonprofits*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-173-million-political-nonprofits> (last updated Jan. 12, 2017).

spending has resulted in voters being left in the dark about the true sources of large amounts of money being spent to influence their votes.

A principal reason for this phenomenon is the outdated nature of federal and many state disclosure laws, which pre-date *Citizens United* and were enacted when corporations were legally prohibited from spending directly in federal campaigns and in many states' elections. In those jurisdictions where corporations could not legally engage in direct election spending, the relevant disclosure laws did not address corporate spending. But even today, nearly a decade after *Citizens United* opened the door to independent corporate spending on elections, federal and state disclosure laws have largely failed to account for that new spending. As a result, for-profit corporations, special interests, and wealthy individuals have channeled millions of dollars through nonprofit groups to finance election-related spending while maintaining anonymity about their role as the original sources of the money.³² As just one example, the section 501(c)(4) nonprofit group Americans for Prosperity ("AFP"), founded by billionaire brothers Charles and David Koch, has been such an active player in U.S. election spending that it has been called "America's third-biggest political party," with its spending on par with that of the two primary American political parties.³³ Unlike the Democratic and Republican parties, however, AFP keeps its donors secret. Our current system allows this to occur because it fails to require disclosure of the ultimate and true source of election-related spending. This bears no resemblance to the Supreme Court's promise of a campaign finance system that pairs corporate independent expenditures with "effective disclosure."³⁴

In some state jurisdictions, including North Dakota, corporations were already permitted to spend independently on state elections before *Citizens United*, but the corresponding disclosure requirements, to the extent they exist, do not require the original source of the funds to be disclosed.³⁵

Even where the law requires the ultimate spender of the donated funds—often a super PAC or a section 501(c)(4) group—to file a report of an independent expenditure, this disclosure means little if the spender is not required to trace the money back to its original source. Yet, many existing disclosure laws effectively allow the donor whose funds actually

³² See Daniel C. Kirby, *The Legal Quagmire of IRC § 501(c)(4) Organizations and the Consequential Rise of Dark Money in Elections*, 90 CHI.-KENT L. REV. 223, 224 (2015) (describing the popularity of using section 501(c)(4) organizations to funnel money into elections after *Citizens United* "because such organizations do not have to publicly disclose the names of their donors").

³³ Philip Bump, *Americans for Prosperity May Be America's Third-Biggest Political Party*, WASH. POST (June 19, 2014), <http://bit.ly/2KTPNCP>; Nicholas Confessore, *Koch Brothers' Budget of \$889 Million for 2016 Is on Par with Both Parties' Spending*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>; Kenneth P. Vogel, *How the Koch Network Rivals the GOP*, POLITICO (Dec. 30, 2015), <http://bit.ly/31HIPbV>.

³⁴ *Citizens United*, 558 U.S. at 370.

³⁵ N.D. CENT. CODE §§ 16.1-08.1-3.3 and 16.1-08.1-03.5 (2009); see generally, *Citizens United and the States*, NAT'L. CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/citizens-united-and-the-states.aspx#laws> (last visited Sept. 3, 2019).

bankroll the expenditure to remain anonymous. For example, at the national level, the Federal Election Commission has narrowly construed reporting obligations for independent expenditures and electioneering communications to require disclosure only of donors who provide contributions earmarked “*for the purpose of furthering*” specific ads.³⁶ Under the those regulations, many spenders are not required to identify any donors—regardless of the size of their contributions—absent evidence of their intent to pay for a particular advertisement.³⁷ That standard has proved comically easy for sophisticated donors to evade, and it contributed to the exponential increase in dark money in federal campaigns. In August 2018, a federal district court invalidated the FEC’s rule, holding that it “impermissibly narrows the mandated disclosure.”³⁸

To effectively implement Article XIV’s transparency mandate, legislation must avoid loopholes that make it easy to avoid disclosure, like the FEC’s narrow rules described above. Some states have implemented legislation that addresses a common loophole: money being passed from one organization to another to mask its original source. In Minnesota, for example, a group not registered with the state campaign finance board that donates money for independent expenditures above certain thresholds must provide a donor disclosure statement to the recipient.³⁹ In Rhode Island, the disclosure law requires that a person who transfers more than \$1,000 in a calendar year for independent expenditures or electioneering communications is required to report the source of the money used for aggregate transfers in excess of \$1,000 to a particular person or group.⁴⁰ Austin, Texas has a similar ordinance that requires reporting of “covered transfers” of funds ultimately used for campaign expenditures.⁴¹

The Century Code, as amended by HB 1521, currently defines “ultimate and true source” as “the person that *knowingly* contributed over two hundred dollars *solely* to influence a statewide election or an election for the legislative assembly,”⁴² or “that *knowingly* contributed over two hundred dollars *solely* to lobby or influence state government action.”⁴³ In both contexts, the “knowingly” and “solely” qualifications will undoubtedly limit the scope of which original sources of election spending are identified, and make it too easy for spenders to try to evade the ultimate and true source disclosure mandated by Article XIV. Those qualifications thus conflict with the public disclosure requirements of Article XIV. They are also contrary to the requirement in section 4 of Article XIV, which provides that Article XIV’s provisions are mandatory, and which prohibits any laws that “hamper, restrict, or impair” its provisions. Even more fundamentally, the “knowingly” and “solely” qualifications are

³⁶ 11 C.F.R. §§ 109.10(e)(1)(vi), 104.20(c)(9) (emphasis added).

³⁷ *See id.*

³⁸ *CREW v. FEC*, 316 F. Supp. 3d 349, 423 (D.D.C. 2018), *appeal docketed*, (D.C. Cir. Aug 30, 2018) (No. 18-5261).

³⁹ MINN. STAT. § 10A.27.

⁴⁰ 17 R.I. GEN. LAWS § 17-25.3-1(b).

⁴¹ AUSTIN, TEX., CODE OF ORDINANCES, ch. 2-2, art. 4, § 2-2-34.

⁴² N.D. CENT. CODE § 16.1.08.1-01.18 (emphases added).

⁴³ *Id.* § 54-66-01.11 (emphases added).

contrary to Article III of the North Dakota Constitution, Section 1 of which provides that “[l]aws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair” the power of the people to adopt constitutional amendments through the initiative process, as the people of North Dakota have done through Article XIV.

To the extent the “solely” and “knowingly” qualifications reflect a concern for individuals who may not want their donations to be used for spending on elections or other state action, NDPI recommends legislative amendments that would both protect the rights of donors to ensure their money is spent in a manner that is consistent with their wishes, while also protecting the basic rights of North Dakotans to know the true sources of money being spent to influence their election decisions and other government actions. In New Mexico, for example, a group making independent expenditures is not required to disclose the identity of a donor if that donor opts her funds out of political spending.⁴⁴ Similarly, Rhode Island allows a group and its donor to agree that the donor’s funds will not be used for political spending; the group then does not have to disclose the donor in its campaign finance reports.⁴⁵

A. Dark Money Spending in Federal Elections

According to an analysis by the Campaign Legal Center, groups that do not disclose their donors spent at least \$769 million on independent expenditures in federal elections between 2010 and 2018.⁴⁶ Meanwhile, an analysis by the Center for Responsive Politics found that direct dark money spending by groups funded entirely by anonymous donors reached nearly \$150 million for the 2018 election cycle.⁴⁷ A report by the Wesleyan Media Project, in partnership with the Center for Responsive Politics, found that more than 240,000 dark money ads aired in federal races between January 1, 2017 and October 25, 2018.⁴⁸ And a USA Today analysis of Kantar Media data found that as of July 2018, “[s]ecret donors financed more than four out of every 10 television ads that outside groups broadcast” to influence the 2018 congressional elections.⁴⁹

North Dakota’s Senate race was among the contests targeted by dark money groups in the 2018 congressional elections. For example, in early 2018, an unidentified group behind

⁴⁴ N.M. STAT. § 1-19-27.3.

⁴⁵ 17 R.I. GEN. LAWS § 17-25.3-3.

⁴⁶ *CLC Analysis: FEC Rule Kept As Much As \$769 Million in Political Spending in the Dark*, CAMPAIGN LEGAL CTR. (Nov. 12, 2018), <https://campaignlegal.org/document/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark>.

⁴⁷ ANNA MASSOGLIA, *State of Money in Politics: Billion-dollar ‘dark money’ spending is just the tip of the iceberg*, CTR. FOR RESPONSIVE POL. (Feb. 21, 2019), <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

⁴⁸ WESLEYAN MEDIA PROJECT, *More Dark Money Ads Than Any of the Past Four Cycles* (Nov. 1, 2018), <http://mediaproject.wesleyan.edu/releases/110118-tv/>.

⁴⁹ Fredreka Schouten, *Exclusive: Secret money funds more than 40 percent of outside congressional ads*, USA TODAY (July 12, 2018), <https://www.usatoday.com/story/news/politics/2018/07/12/secret-money-funds-more-than-40-percent-outside-congressional-tv-ads-midterm-elections/777536002/> (noting, as of

the Facebook page called “The Tax Scam” began running ads targeting North Dakotans that attacked Republican candidates for voting in support of a federal tax bill and praised Democrats for voting against it.⁵⁰ The Tax Scam is not registered as a political committee, nor is there any record of it incorporating in any state or filing reports with the IRS.⁵¹ And its Facebook page provided no details about the group or its funding, merely directing viewers to a now-defunct website RepublicanTaxScams.com.⁵² Some of the group’s ads praised then-Senator Heidi Heitkamp or attacked her opponent Kevin Cramer and ran shortly before the North Dakota primary.⁵³ Only by using ad archive tools created by Pro Publica and Facebook was the nonpartisan watchdog Campaign Legal Center able to identify that the “Tax Scam” ads were actually financed by a major Democratic dark money group, Majority Forward.⁵⁴ Majority Forward could have identified itself as the source of the “Tax Scam” ads, but it likely concluded that the ads would be more persuasive if North Dakotans perceived them to come from an issue-focused group called “the Tax Scam” rather than a national Democratic dark money group that was spending tens of millions of dollars on federal independent expenditures.⁵⁵ Majority Forward was not the only dark money group funneling money into the North Dakota senate race. Conservative dark money groups including Americans for Prosperity and One Nation, a group tied to former George W. Bush aide Karl Rove, also spent substantially on ads to influence 2018 senate races.⁵⁶

Dark money also played a major role in other highly contested electoral contests in 2018, including the senate races in Arizona, Florida, Indiana, Missouri, Montana, Tennessee,

July 2018, that dark money groups accounted for nearly 47,000 of the 107,000 broadcast ads in 2018 House and Senate races).

⁵⁰ See Attachment B, BRENDAN FISCHER & MAGGIE CHRIST, CAMPAIGN LEGAL CTR., DIGITAL DECEPTION: HOW A MAJOR DEMOCRATIC DARK MONEY GROUP EXPLOITED DIGITAL AD LOOPHOLES IN THE 2018 ELECTION, 2 (2019), <https://campaignlegal.org/sites/default/files/2019-03/FINAL%20Majority%20Forward%20Issue%20Brief.pdf>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ See, e.g., Josh Israel, *Karl Rove-linked dark money group smears Democrat, praises Republican who cast same vote*, THINK PROGRESS (July 24, 2018), <https://thinkprogress.org/karl-rove-dark-money-group-smears-a-democrat-praises-a-republican-same-vote-ff80dffee987/>; MICHAEL BATH, *Democratic Senate Reelection Bids in Red States: the Case of Heidi Heitkamp and Outside Group Pressure in North Dakota*, BRENNAN CTR. FOR JUSTICE (Sept. 26, 2018), <https://www.brennancenter.org/blog/democratic-senate-reelection-bids-red-states-case-heidi-heitkamp-and-outside-group-pressure>; Josh Voorhees, *A Vulnerable Senate Democrat is Getting Help from the Unlikeliest of Places*, SLATE (June 4, 2018), <https://slate.com/news-and-politics/2018/06/sen-heidi-heitkamp-is-getting-help-from-the-koch-brothers-americans-for-prosperity.html>; Alana Abramson, *Koch Backed Group Launches Ad Campaign Thanking Vulnerable North Dakota Democrat*, TIME (June 4, 2018), <https://time.com/5298677/koch-brothers-heidi-heitkamp/>.

and Wisconsin.⁵⁷ Majority Forward, for example, spent more than \$8 million on the Tennessee Senate race, \$7 million in Arizona, \$4.2 million on the Montana Senate race, and \$9 million collectively in the Indiana and Florida Senate races.⁵⁸

In many cases, dark money practices have been used not only to hide the true source of political spending but also to misleadingly suggest that the spending is coming from a local grassroots organization. For example, in West Virginia's 2018 Republican U.S. Senate primary, a group called 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 Senate Leadership Fund, a group affiliated with Senate Majority Leader Mitch McConnell.⁵⁹ In fact, *none* of the group's funding came from West Virginia. A group called the "Duty and Country PAC" spent around \$1.8 million in the same Republican primary, similarly deferring until after the election disclosure of the fact that it was funded by a handful of major Democratic donors.⁶⁰

In the final weeks of Alabama's hotly contested December 2017 special election to fill the seat vacated by Senator Jeff Sessions, a super PAC called Highway 31 emerged and quickly spent \$4.1 million on ads supporting Democratic candidate Doug Jones.⁶¹ But by taking advantage of a loophole in the federal disclosure rules, Highway 31 prevented voters from learning until a month after Election Day that its top funders were two national Democratic super PACs: Senate Majority PAC and Priorities USA Action.⁶²

⁵⁷ Schouten, *supra* note 49; Nihal Krishan, *Both Parties Are Addicted to Dark Money. Only One is Trying to Quit*, MOTHER JONES (Mar. 14, 2019), <https://www.motherjones.com/politics/2019/03/dark-money-democrats-republicans-mitch-mcconnell/>.

⁵⁸ MICHAEL BECKEL, *In 2018 Midterms, Liberal Dark Money Groups Outspent Conservative Ones for First Time Since* Citizens United, ISSUE ONE, <http://www.issueone.org/wp-content/uploads/2019/01/Post-CU-Dark-Money-Mini-Report.pdf>; Lukas Mikelionis, Liberal 'dark money' groups outspent conservative ones in 2018, FOX NEWS (Jan. 24, 2019), <https://www.foxnews.com/politics/liberal-dark-money-groups-outspent-conservative-ones-in-2018-elections>.

⁵⁹ BRENDAN FISCHER & MAGGIE CHRIST, CAMPAIGN LEGAL CTR., DODGING DISCLOSURE: HOW SUPER PACS USED REPORTING LOOPHOLES AND DIGITAL DISCLAIMER GAPS TO KEEP VOTERS IN THE DARK, 3 (2018) <https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf>.

⁶⁰ *Id.* at 3-4.

⁶¹ *Id.* at 7.

⁶² Campaign Legal Center filed an FEC complaint alleging Highway 31's scheme violated the law. See Press Release, Campaign Legal Ctr., 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>.

Similarly, in the final weeks of Arizona’s 2018 Republican Senate primary election, a group called Arizonans for Life (“AFL”) spent nearly \$50,000⁶³ on digital ads attacking candidate Kelli Ward.⁶⁴ Like Highway 31, AFL delayed reporting any contributions or expenditures until after the election, forcing voters to go to the polls without knowing that AFL was in fact 100% funded by Senate Leadership Fund. By funneling its money and message through an entity that appeared to have local ties, SLF not only deprived voters of information about who was truly behind its electoral messaging; it likely *misled* voters into believing that its spending was originating from a local group rather than one of the highest spending national super PACs.

These examples of groups manipulating their federal reporting schedules to delay disclosure underscore the importance of requiring *prompt* public disclosure of the ultimate and true sources of election-related spending, as Section 1 of Article XIV requires.

The use of intermediaries and other mechanisms to conceal the true source of election-related spending transcends partisan lines. Since 2010, conservative outfits like the Karl Rove-affiliated Crossroads GPS and Americans for Prosperity have collectively spent hundreds of millions of dollars to boost GOP candidates around the country.⁶⁵ But left-leaning groups have also embraced dark money,⁶⁶ and in the 2018 federal midterm elections, more dark money was spent in support of Democrats running for Congress than to support Republicans.⁶⁷ Most notably, the Democratic dark money group Majority Forward, which spent \$46 million on federal independent expenditures in 2018 congressional races, was responsible for about \$1 out of every \$3 of dark money spending in those elections.⁶⁸ As explained by Nick Penniman, CEO of the cross-partisan political reform group Issue One, “Dark money is the most toxic force in politics” and the problem is a bipartisan one.⁶⁹

⁶³ Arizonans for Life, 2018 September Monthly, FEC Form 3X, at 9 (filed Sept. 20, 2018), <http://docquery.fec.gov/pdf/152/201809209123940152/201809209123940152.pdf>.

⁶⁴ See Ads From the Page Arizonans for Life, FACEBOOK, [https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids\[0\]=313070919257246&q=%22arizonans%20for%20life%22](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids[0]=313070919257246&q=%22arizonans%20for%20life%22) (last visited Sept. 18, 2019).

⁶⁵ See MICHAEL BECKEL, *Dark Money Illuminated* 6, ISSUE ONE (2018), <https://bit.ly/2NHqKGi> (listing 15 largest dark money groups by total spending in federal elections from January 2010 to December 2016); see also, PETER OLSEN-PHILLIPS, *Dark Money Still a Republican Game*, SUNLIGHT FOUND (Oct. 28, 2014), <https://sunlightfoundation.com/2014/10/28/dark-money-still-a-republican-game/>.

⁶⁶ Patriot Majority USA, a 501(c)(4) associated with Democratic leaders in Congress, sponsored over 15,000 attack ads against Republican candidates for U.S. Senate in 2014 alone. MICHAEL BECKEL, *Secret Donors Fuel Democratic Political Powerhouse*, CTR. FOR PUB. INTEGRITY (Nov. 18, 2015), <https://www.publicintegrity.org/2015/11/18/18875/secret-donors-fuel-democratic-political-powerhouse>.

⁶⁷ BECKEL, *supra* note 58, at 1; ANNA MASSOGLIA, *Millions in Masked Money Funnelled into 2018 Elections*, CTR. FOR RESPONSIVE POL. (Nov. 7, 2018), <https://bit.ly/2TPINLX>.

⁶⁸ BECKEL, *supra* note 58, at 1.

⁶⁹ *Id.*

B. Dark Money Spending in State and Local Elections

Dark money has pervaded state and local elections as well. And as explained in a 2016 report by the nonpartisan Brennan Center for Justice (see Attachment C), secret spending at the state and local levels can be especially pernicious, because it often originates from special interests with a direct and immediate economic stake in the outcome of the electoral contest in which they are spending.⁷⁰ These contests include elections for offices like attorney general, local utility boards, and judges—positions that may wield power directly over a particular economic matter that concerns a wealthy special interest.⁷¹ As the Brennan Center report describes, dark money in state elections has been traced to sources such as an out-of-state mining company targeting a Wisconsin state legislator with power over mining permits, payday lenders supporting an attorney general that could limit the extent to which they are regulated, and food companies spending money on a ballot measure concerning labeling requirements.⁷²

Many of the dark money groups that are highly active in federal elections also spent extensively on state candidate elections and ballot measures. According to the National Institute on Money in Politics, of the 15 dark money groups that were most active in federal elections between 2010 and 2016, 11 contributed \$38.9 million to state campaigns during the 2009-2016 period, while 9 spent \$18.3 million independently in 27 states between 2011 and 2016.⁷³ That independent spending included spending that targeted gubernatorial candidates (\$11.7 million), legislative candidates (\$4.3 million), other statewide candidates, including judicial candidates (\$1.5 million), and ballot measure campaigns (\$1.4 million).⁷⁴

In some instances, dark money spending at the state level increased at rates *exceeding* undisclosed spending at the federal level. For example, the Brennan Center’s report notes that in 2014, over \$10.3 million in undisclosed money was spent on Arizona elections—a rate increase that far surpassed the uptick at the federal level that year.⁷⁵ That figure is also 295 times greater than the \$35,005 in undisclosed spending on state elections in 2006.⁷⁶ A former Republican majority whip of the Arizona House of Representatives who is now a lobbyist observed that in his “33 years in Arizona politics and government, dark money is the most

⁷⁰ See Attachment C, CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER, & DOUGLAS KEITH, BRENNAN CTR. FOR JUSTICE, SECRET SPENDING IN THE STATES 3, 10-11 (2016), available at <https://www.brennancenter.org/publication/secret-spending-states>.

⁷¹ *Id.* at 10.

⁷² *Id.* at 11-16.

⁷³ JT STEPLETON, *Darkness on the Edge of Town: National Dark Money Targets States*, NAT’L INST. ON MONEY AND POL. (Nov. 2, 2018), <https://www.followthemoney.org/research/blog/darkness-on-the-edge-of-town-national-dark-money-targets-states>.

⁷⁴ *Id.*

⁷⁵ CHISUN LEE, ET. AL., *supra* note 70, at 7.

⁷⁶ By comparison, dark money spending in the 2014 federal elections was about 34 times greater than in 2006. *Id.*

corrupting influence I have seen.”⁷⁷ Other states likewise have experienced substantial surges in undisclosed campaign spending in recent election cycles.⁷⁸

There are countless examples of dark money spending on state and local races, including in the most recent North Dakota elections. Even North Dakota Measure 1, the ballot measure approved in the 2018 election that led to the adoption of Article XIV, was influenced by undisclosed spending from special interests. By using Facebook’s Political and Issue Ad Archive, NDPI discovered at least one dark money group—Royalty Owners and Producers Educational Coalition, Inc. (“ROPE”), an Oklahoma trade association—that spent thousands of dollars on Facebook ads opposing Measure 1.⁷⁹ According to Facebook’s Ad Library, ROPE spent between \$12,000 and \$60,000 on its dark money ads about Measure 1, and those ads were seen by at least 300,000 viewers and possibly as many as 700,000 viewers,⁸⁰ but ROPE never registered with the North Dakota Secretary of State as a committee or independent expenditure filer. Importantly, even if ROPE had registered and reported its spending to influence Measure 1, North Dakotans would remain in the dark about the true sources of the money that ROPE spent. ROPE’s website reflects clear opposition to ballot measures and candidates in a variety of states that are disfavored by the oil and gas industry, but the absence of requirements to disclose the ultimate source of its election spending means we may never know who is actually behind that spending.

North Dakota Measure 2, another ballot measure approved in 2018, which expressly requires U.S. citizenship as a prerequisite to voting in any North Dakota election, was also influenced by dark money: the vast majority of money spent—over \$259,000 of the approximately \$300,000 spent in support of the measure—was donated by the Liberty Initiative Fund, a section 501(c)(4) nonprofit group that is based in Virginia and is not required to disclose its donors.⁸¹ North Dakotans were prevented from knowing who was truly behind the primary source of financial support for the measure, which passed overwhelmingly in the 2018 election.⁸²

⁷⁷ *Id.* (quoting Chris Herstram).

⁷⁸ The Brennan Center Report concluded that dark-money spending in state elections in 2014 was, on average across the six states surveyed, 38 times greater than in 2006. *Id.*

⁷⁹ Amanda Kubik, *Oil & Gas ‘Dark Money’ Organization spends Thousands in Unreported Money on Ads Against Measure 1*, NORTH DAKOTANS FOR PUB. INTEGRITY (Nov. 1, 2018), https://www.ndintegrity.org/oil_gas_dark_money_organization_spends_thousands_in_unreported_money_on_ads_against_measure_1.

⁸⁰ Facebook Ad Library search results for “Royalty Owners measure 1”, https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=Royalty%20Owners%20measure%201 (last visited September 3, 2019).

⁸¹ Liberty Initiative Fund, Contributions to North Dakotans for Citizen Voting, 2018, <https://vip.sos.nd.gov/cf/search/cfsearch.aspx?srchnm=Liberty+Initiative+Fund&yr=2018> (last visited August 16, 2019).

⁸² North Dakota Secretary of State, 2018 *Statewide Measure Results*, <https://results.sos.nd.gov/resultsSW.aspx?text=BQ&type=SW&map=CTY> (last visited September 2, 2019).

A couple years earlier, in 2016, North Dakotans approved a ballot measure to legalize medical marijuana.⁸³ Of the approximately \$32,000 spent in support of the measure, the majority came from two out-of-state, section 501(c)(4) groups, the New York-based Drug Policy Action and Washington, D.C.-based Marijuana Policy Project, which are not required to disclose their donors and spent a combined \$22,659.⁸⁴

In each of these ballot measure elections, North Dakota voters were deprived of fundamental and essential information about the true sources of substantial amounts of money, often from out-of-state special interests, spent to influence their votes on matters directly affecting their lives.

North Dakota, of course, is far from the only state whose elections have been influenced by dark money.⁸⁵ Among numerous other examples:

In the 2016 elections, Americans for Prosperity was responsible for 97% of the approximately \$609,000 in monetary contributions opposing a South Dakota measure in favor of campaign finance and lobbying transparency, and for 100% of the nearly \$60,000 in in-kind donations opposing the measure.⁸⁶

In a 2014 election to select members of the Arizona Corporation Commission, the Arizona Public Service Company, the state's largest electrical utility, funneled \$10.7 million through dark money groups to influence the election for its own regulators.⁸⁷ The utility company did not admit its role as the true source of that spending until years later and following persistent efforts by regulators to subpoena the information.⁸⁸

In 2010, a Virginia-based 501(c)(4) group called the National Right to Work Committee spent substantial amounts to support 23 Republicans in primary elections for the Montana state legislature. It reportedly sent field operatives to Montana to create campaign materials, crunch voter data, and advise its preferred candidates on how to effectively run

⁸³ North Dakota Secretary of State, 2016 *Statewide Measure Results*, <https://results.sos.nd.gov/ResultsSW.aspx?text=BQ&type=SW&map=CTY&eid=292> (last visited September 3, 2019).

⁸⁴ Contributions to North Dakota Compassionate Care 2016, 2016 <https://vip.sos.nd.gov/cf/search/ShowCommittee.aspx?cid=911&did=4983&yr=2016&dtid=4> (last visited September 3, 2019).

⁸⁵ See, e.g., CHISUN LEE, ETAL., *supra* note 70, at 7.

⁸⁶ See South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016), Ballotpedia, [https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_\(2016\)](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_(2016)).

⁸⁷ Howard Fischer, *APS admits spending millions in 2014 election of energy regulators*, ARIZONA CAPITOL TIMES (Mar. 29, 2019), <https://azcapitoltimes.com/news/2019/03/29/aps-admits-spending-millions-in-2014-election-of-energy-regulators/>.

⁸⁸ *Id.*

for office without disclosing their operations or funding to Montana election officials.⁸⁹ Dark money was also used to secretly influence the outcome of a 2012 election for the Montana state supreme court. A network of 14 people that included billionaire Montana property owners Charles Schwab and James Cox Kennedy used the dark money nonprofit Montana Growth Network to conceal their hundreds of thousands of dollars of spending to support their preferred judicial candidate.⁹⁰ That spending occurred while Kennedy had an active case pending before the court in which he was seeking to restrict public access to waterways that flow through his property, while Schwab had a personal history of similar cases.⁹¹

These are just a handful of the countless examples of how wealthy individuals and special interests have already used nonprofit intermediaries to conceal their efforts to influence the outcome of state and local elections throughout the country, thereby depriving voters of crucial information necessary to make informed electoral decisions. As Professor Richard Hasen, a national expert on election law, has explained, “[b]usy voters rely upon campaign finance information to make decisions about how to vote, especially in initiative campaigns.”⁹² And when voters have access to that information, they use it. As Hasen described, in 2010, California voters rejected a ballot proposition that would have benefited the investor-owned utility company Pacific Gas and Electric (PG&E), which is responsible for providing natural gas and electricity to much of California.⁹³ PG&E contributed nearly all of the \$46 million spent in support of ballot initiative, while less than \$100,000 was spent opposing the measure.⁹⁴ Under California’s disclosure laws, PG&E’s name appeared on every ad supporting the ballot measure, which was ultimately defeated by California voters.⁹⁵

North Dakotans are entitled to know who is trying to influence their elections and government. And our laws should protect that right to know by preventing loopholes from enabling wealthy individuals and special interests to conceal their role in trying to sway citizens’ electoral choices.

⁸⁹ Jimmy Tobias, *Montana’s Dark Money Detective*, PAC. STANDARD (Jan. 9, 2019), <https://psmag.com/magazine/montanas-dark-money-detective-jonathan-motl-election-spending>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & POL. 557, 570 (2012).

⁹³ Richard L. Hasen, *Show Me the Donors: What’s the point of disclosing campaign donations? Let’s review*, SLATE (Oct. 14, 2010), <https://slate.com/news-and-politics/2010/10/what-s-the-point-of-disclosing-campaign-donations-let-s-review.html>.

⁹⁴ *Id.*; see California Proposition 16, Supermajority Vote Required to Create a Community Choice Aggregator (June 2010), Ballotpedia, [https://ballotpedia.org/California_Proposition_16_Supermajority_Vote_Required_to_Create_a_Community_Choice_Aggregator_\(June_2010\)](https://ballotpedia.org/California_Proposition_16_Supermajority_Vote_Required_to_Create_a_Community_Choice_Aggregator_(June_2010)).

⁹⁵ Hasen, *supra* note 93.

CONCLUSION

We appreciate the opportunity to submit this statement to the Committee and welcome the opportunity to meet with the Committee and answer any questions.

Respectfully submitted,

Dina Butcher
Ellen Chaffee
NORTH DAKOTANS FOR PUBLIC INTEGRITY

Erin Chlopak*
Aaron McKean*
CAMPAIGN LEGAL CENTER
**Not admitted to practice law in North
Dakota*

Derrick Braaten
Carey Goetz
BRAATEN LAW FIRM

*Counsel for North Dakotans for Public
Integrity*

Attachment A

DARK MONEY

TOOLKIT



OpenSecrets.org

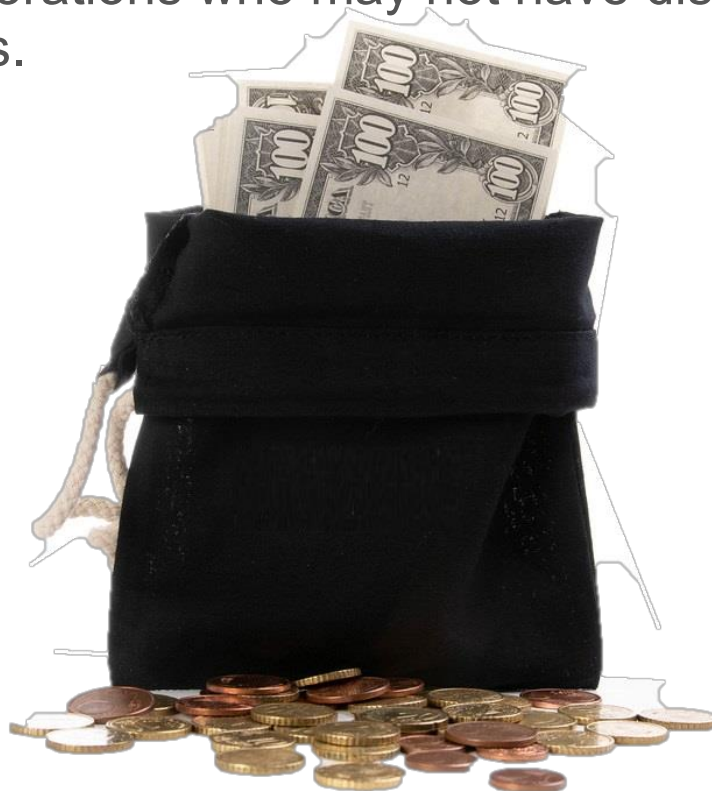
Dark Money Basics

What is Dark Money?

Dark Money is political spending meant to influence the decision of a voter, where the donor is not disclosed and the source of the money is unknown.

Political nonprofits are under no legal obligation to disclose their donors. When they choose not to, they are considered Dark Money groups.

Super PACs can also be considered Dark Money groups in certain situations. While legally required to disclose their donors, super PACs can accept unlimited contributions from political nonprofits and “shell” corporations who may not have disclosed their donors.



Types of Election Spending

Political jargon can get confusing. What you need to know about spending to influence elections is that there are two main types.

Hard money: traditional political spending

Donors must be disclosed, contribution limits apply and organizations are allowed to coordinate their efforts to help elect a candidate.

Examples: candidate committees, political parties, and PACs

Soft money: outside political spending

Political expenditures made by organizations and individuals other than the candidate campaigns themselves. These organizations are not allowed to coordinate their spending with political candidates or parties.

Examples: super PACs and dark money groups



Types of Election Spenders

501(c) Groups / Political Nonprofits

Nonprofit groups organized under section 501(c) of the Internal Revenue Code can engage in varying amounts of political activity. Because they are not technically political organizations, they are not required to disclose their donors to the public.

Whenever money is spent in a political election with the purpose of influencing the decision of a voter and the source of the money is not disclosed, it is Dark Money.

Like super PACs, nonprofits cannot coordinate with political parties or candidates and therefore are allowed to raise unlimited sums of money.

One of the biggest problems with nondisclosure is that citizens may not be able to consider the credibility and possible motives of funders behind those messages.

Types of 501(c) Organizations:

- 💰 **501(c)(3) groups:** operate for religious, charitable, scientific or educational purposes. These groups are not supposed to engage in any political activities, though some voter registration activities are permitted. Donations to these organizations are tax-deductible.
- 💰 **501(c)(4):** “social welfare” organizations may engage in political activities so long as these activities do not become their primary purpose. The IRS has never defined what “primary” means, or how a percentage should be calculated, so the current de facto rule is 49.9 percent of overall expenditures, a limit that some groups have found easy to circumvent. Donations are not tax-deductible.
- 💰 **501(c)(5):** labor and agricultural groups may engage in political activities so long as they adhere to the same general limits as 501(c)(4) organizations.
- 💰 **501(c)(6):** business leagues, chambers of commerce, real estate boards and boards of trade, which may engage in political activity, as long as they adhere to the same general limits as 501(c)(4) organizations.

Super PACs

Technically known as independent expenditure committees, super PACs may raise and spend an unlimited amount of money and accept contributions from companies, nonprofits, unions and individuals.

Since super PACs cannot give money directly to candidates, they are exempt from the limits on fundraising and spending that regular PACs must abide by.

While super PACs are not allowed to coordinate any of their independent expenditures with a candidate's campaign, many are run by people who are personally close to a candidate or formerly associated with a campaign.



Hybrid PACs

A Carey Committee is a hybrid PAC that is not affiliated with a candidate and has the ability to operate both as a traditional PAC, contributing funds to a candidate's committee, and as a super PAC that makes independent expenditures.

To do so, Carey committees must have a separate bank account for each purpose. The committee can collect unlimited contributions from almost any source for its independent expenditure account, but may not use those funds for its traditional PAC contributions.

Limited Liability and Shell Companies

LLCs perform a number of necessary business functions. However, their unique structure can easily be abused or utilized in order to hide less than above-board activity. In politics, LLCs are sometimes established to help disguise the identity of a donor or source of money spent on behalf of a political candidate.

LLCs are governed by state law, but generally, minimal information is necessary to file the required articles of incorporation.

This lack of accountability and transparency can help disguise the source of millions of dollars in political spending each election cycle.

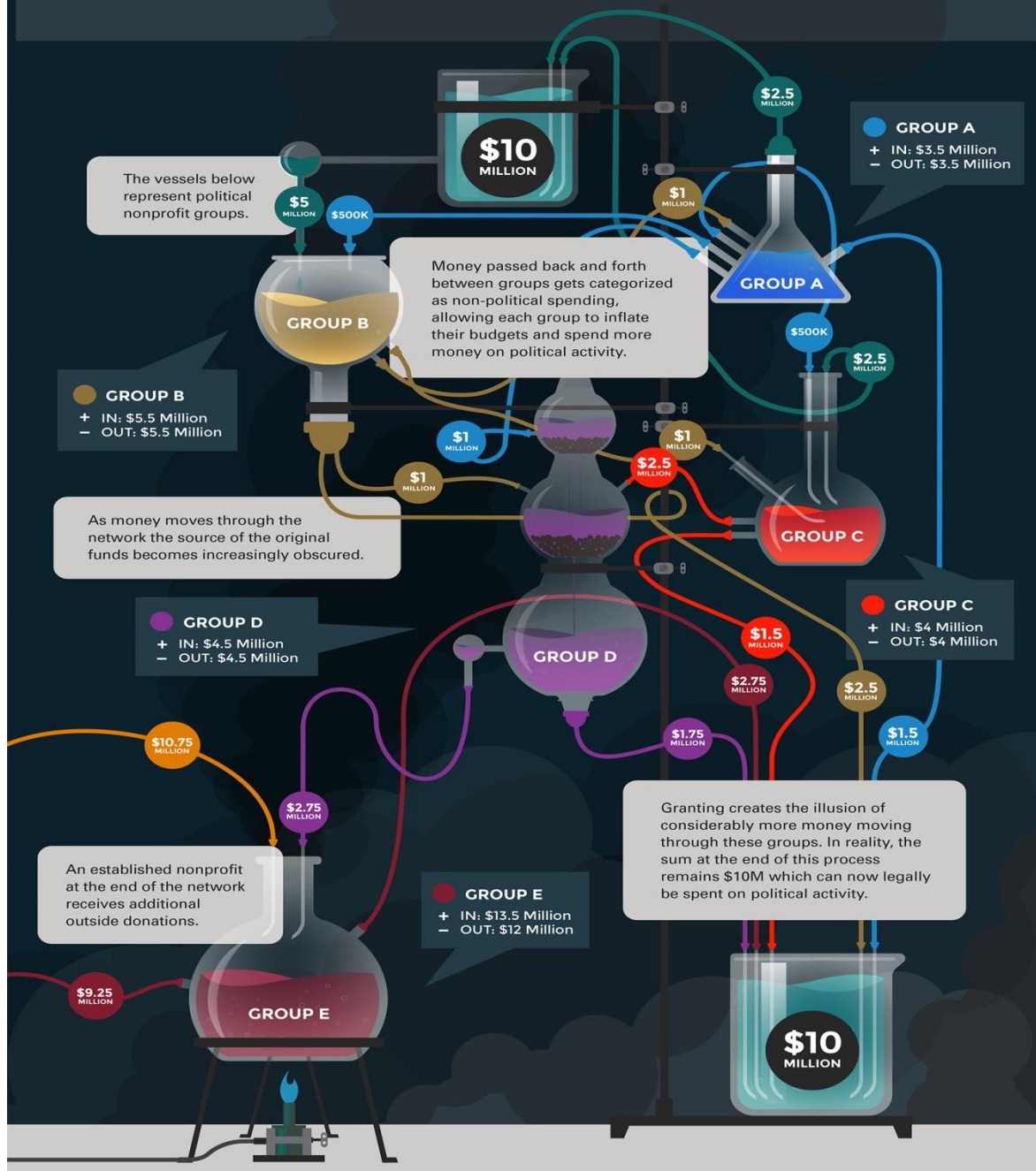


DARK MONEY ALCHEMY

Dark Money refers to funding from anonymous sources spent to influence elections.

This money is funneled as *grants* through politically active nonprofits. Although nonprofits are required to spend more than half of their budget on non-political activity, they avoid this requirement by passing money back and forth with each other to create the illusion of larger budgets.

Here's an example of how \$10M from anonymous donors can flow through a network of organizations.

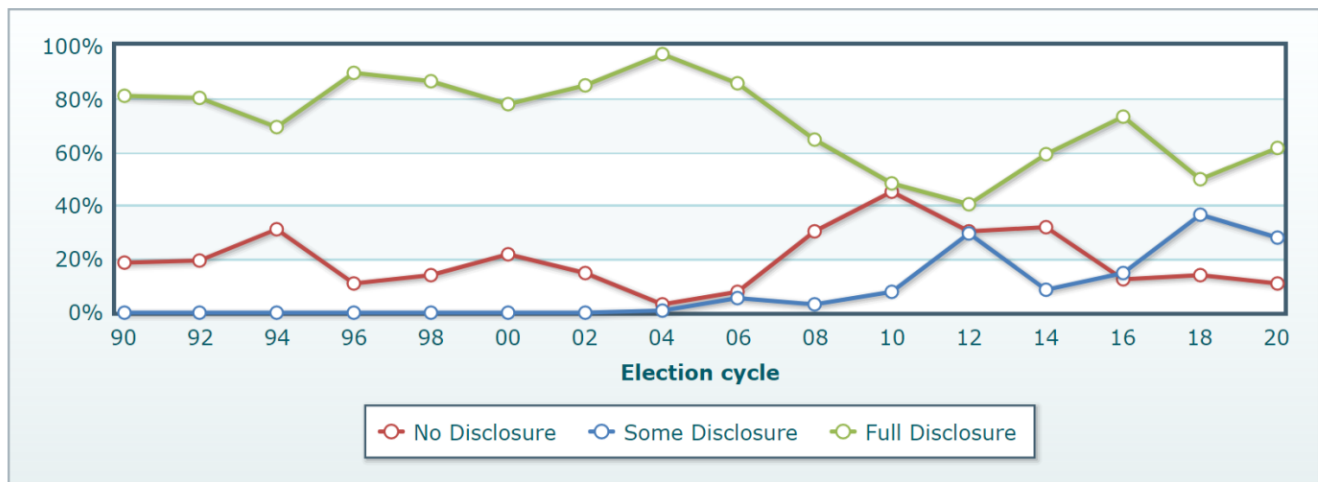


Level of Disclosure

While some outside groups — like super PACs — are required to disclose their donors, others are not, such as 501(c)(4)s. Both types of organizations can engage in a number of activities, including buying ads that advocate for or against a candidate, running phone banks and making contributions to super PACs.

Even groups that are required to disclose their donors do not disclose them in real time. In many cases, much of the money that has been donated is not disclosed until long after the election cycle.

Total Outside Spending by Percentage Disclosure, by Cycle, Excluding Party Committees



Benefits of being a 501(c) organization/political nonprofit

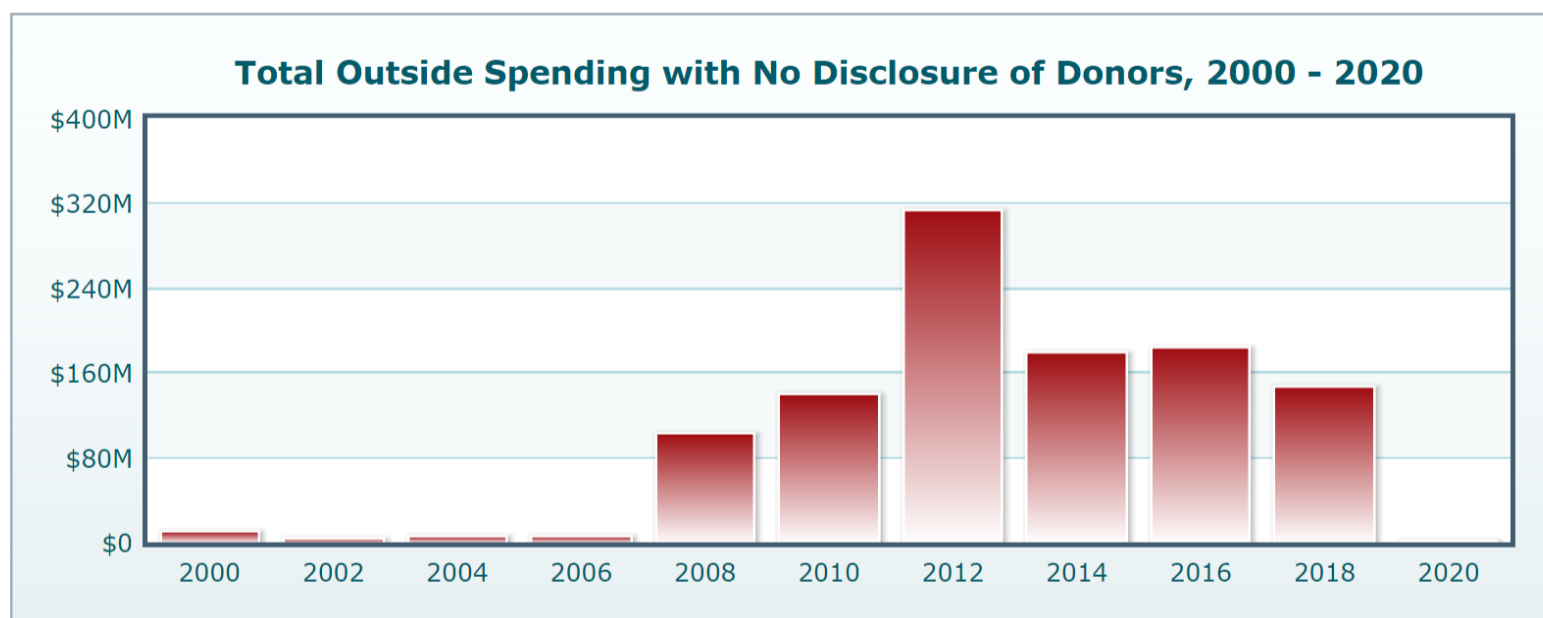
- 💰 Operate without incurring tax liability.
- 💰 Ability to mask the true nature of a highly political organization with nondisclosure.
- 💰 Take donations from individuals and corporations that may not want shareholders or customers to know they're taking a stand on a controversial topic.
- 💰 Disclose financial activity long after it has taken place.

Dark Money Growth

Dark Money groups account for staggering gaps in understanding exactly how each funding dollar is being spent during political elections. These gaps are becoming wider with every election cycle.

Dark Money groups have reported spending more than \$1 billion on independent expenditures since OpenSecrets began tracking it and even more on political activities framed as "issue" advocacy that may not be reported to the Federal Election Commission.

Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees



Based on data released daily by the FEC. Last update on September 10, 2019.

Attachment B

By Brendan Fischer & Maggie Christ / March 2019

DIGITAL DECEPTION

How a Major Democratic Dark Money Group Exploited Digital Ad Loopholes in the 2018 Election

Majority Forward was one of the top-spending “dark money” groups in the 2018 elections, reporting approximately \$46 million in independent expenditures to the Federal Election Commission (FEC) in 2018 while keeping its donors hidden from the public.¹

But new evidence shows Majority Forward secretly spent more on undisclosed digital political ads targeted at voters in states with competitive Senate seats.

Thanks to gaps in federal campaign finance law, Majority Forward never reported its spending on these digital ads to the FEC. Voters targeted by these ads—which stated only that they were paid for by “The Tax Scam”—were given no indication that a major Democratic dark money group was funding them.

Using the combined new tools of ProPublica’s Facebook ad archive and Facebook’s own ad archive, Campaign Legal Center (CLC) identified this little-noticed and unreported Majority Forward digital campaign in the 2018 elections. But this is likely only one example among many—indeed, Majority Forward’s tactics echo those employed elsewhere, such as in Alabama shortly before the December 2017 special election.²

For years, thanks in large part to obstruction by 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.³ Meanwhile,

Congress has failed to update campaign finance law for the digital age, omitting many online ads from the reporting requirements that apply to political spending on other mediums.

Congress has failed to
update campaign finance
laws for the digital age.

The story of The Tax Scam offers a glimpse into what greater transparency around digital political ads can reveal—and shows why Congress needs to codify and protect that transparency by updating our campaign finance laws for the 21st century.

The Tax Scam

In early 2018, a Facebook page called The Tax Scam began running targeted ads attacking Republican candidates for voting in support of the tax bill, and praising Democrats for voting against it.

The Tax Scam'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 "Sponsored" and suggested they were paid for by "The Tax Scam".⁴

<p>The Tax Scam Sponsored · 🌐</p> <p>Do you want to foot the bill for the 1%? Joe Donnelly doesn't want you to either. He voted no to a tax giveaway for billionaires</p> <p>You're on the hook It's a handout to the 1%</p> <p>REPUBLICANTAXSCAMS.COM</p> <p>Learn More</p> <p>First seen: March 20, 2018 Permalink to this ad</p>	<p>The Tax Scam Sponsored · 🌐</p> <p>Do you want to foot the bill for the 1%? Claire doesn't want you to either. She voted no to a tax giveaway for billionaires</p> <p>You're on the hook It's a handout to the 1%</p> <p>REPUBLICANTAXSCAMS.COM</p> <p>Learn More</p> <p>First seen: March 19, 2018 Permalink to this ad</p>
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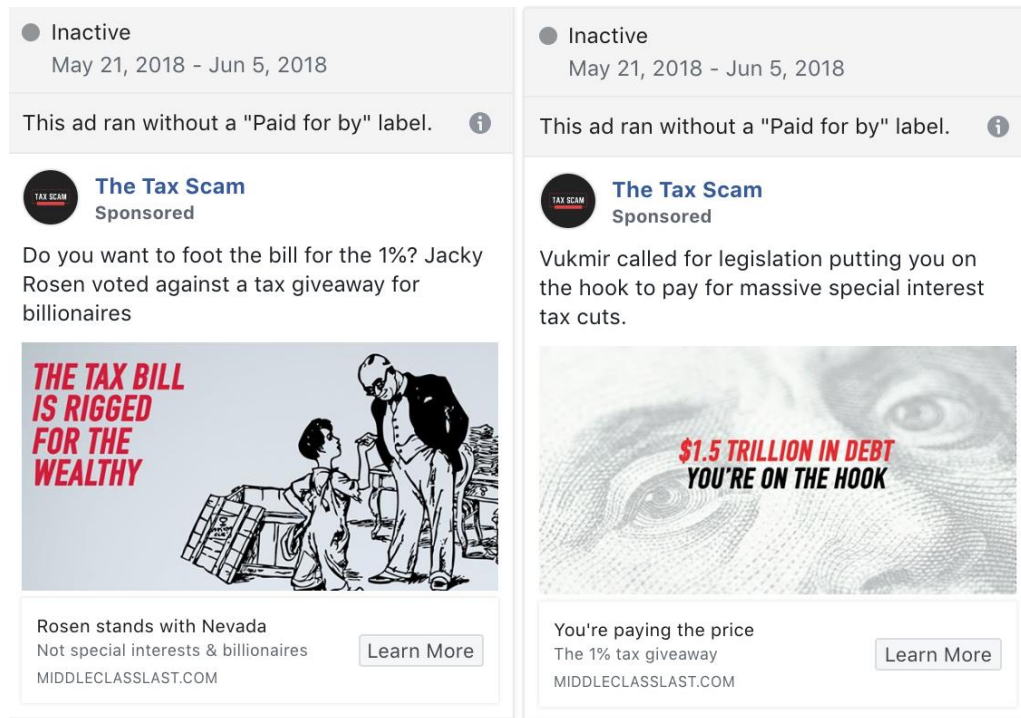
The Tax Scam is not registered as a political committee with the FEC. There is no record of it having incorporated in any state, or of having filed reports with the IRS.

The "about" section of The Tax Scam's Facebook page provided no details about the group.⁵ The ads directed viewers to the website RepublicanTaxScams.com, which also gave no information about who was funding the ads, according to an archived version of the now-defunct website.⁶ There was no "paid for by" disclaimer,⁷ which is required for websites run by political committees. There wasn't even an "about us" page.⁸

The mysterious Tax Scam operation encountered an obstacle in May 2018, when Facebook began requiring that all political ads include a disclaimer stating who paid for them. Facebook also began placing all political ads in a public archive, even those that it ultimately took down.

According to Facebook's political ad archive, shortly after the new disclaimer requirements took effect, The Tax Scam attempted to continue running ads, but

Facebook took them down because the ads didn't include a "Paid for by" disclaimer:⁹



Facebook says it took the ads down once it determined they were in violation of Facebook's new policy,¹⁰ but not before the ads had been running for about two weeks and had reached thousands of potential voters. For example, the ad mentioning Jacky Rosen gathered between 10,000 and 50,000 impressions from Facebook users in Nevada before it was taken down just a week before the Nevada primary.¹¹

Then, after the first week of June 2018, The Tax Scam went silent.

The Tax Scam benefitted from—and exploited—gaps in the law

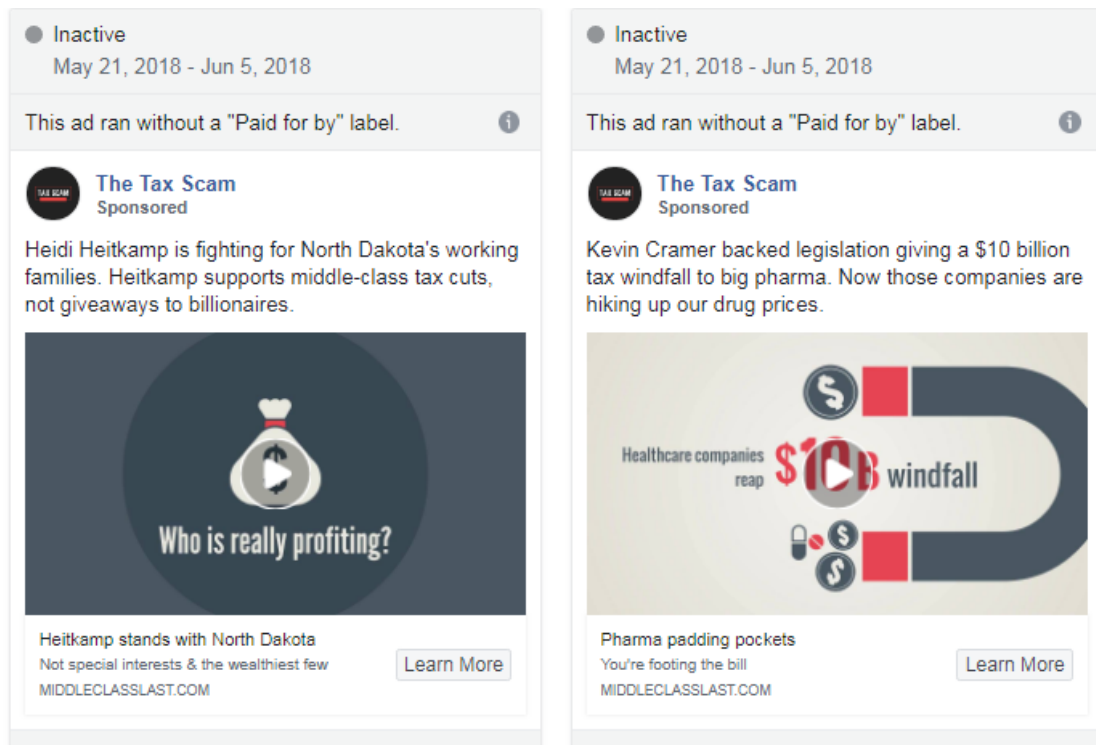
It turns out that The Tax Scam is a project of Majority Forward, the dark money nonprofit arm of the Senate Majority PAC (SMP), a Democratic super PAC.¹² But you wouldn't know it by looking at The Tax Scam's ads, or visiting The Tax Scam Facebook page, or reviewing The Tax Scam's websites.

If these ads had been run on TV, some would have been subject to legal disclaimer and reporting requirements.

Under current law, "electioneering communications" are defined as broadcast — but not digital — ads run near an election that name a candidate, and are targeted to that candidate's voters, even if they don't expressly tell viewers to vote for or against a

candidate.¹³

For example, ads targeting North Dakotans and praising then-Senator Heidi Heitkamp, or attacking her opponent Kevin Kramer, began running May 21, 2018, which fell within the electioneering communication period for the North Dakota primary.¹⁴ These ads would have been legally required to include “paid for by” disclaimers if broadcast on TV or radio, and Majority Forward’s spending on them would have been reported to the FEC if it exceeded reporting thresholds:



But because these ads were run online, they could remain shrouded in secrecy without breaking any laws. The ads did not tell viewers that Majority Forward paid for them, nor did Majority Forward report its spending to the FEC.

Under current law, politically active nonprofits like Majority Forward need only report their spending on digital ads that expressly advocate for or against the election of candidates. Spending on digital ads that praise or attack candidates, but stop short of express advocacy, need not be reported—even when those ads are run shortly before an election.

Because these ads were run online, they could remain shrouded in secrecy without breaking any laws.

Majority Forward likely calculated that its ads would be more effective if they appeared to come from an issue-focused organization called The Tax Scam rather than from a national Democratic dark money group. Federal campaign finance law's digital blind spot allowed them to get away with it.

Congress Should Bring the Law Into the 21st Century

Majority Forward's misleading Tax Scam project was not an outlier.

In the 2016 election, 25 percent of political ads run in the final weeks of the race mentioned the two major party presidential candidates, and therefore would have been subject to disclosure as “electioneering communications” if run on TV or radio, according to research by University of Wisconsin-Madison Professor Young Mie Kim and her team, Project DATA (Digital Ad Tracking & Analysis), which collected and analyzed millions of political ads.¹⁵ The funding sources or organizations behind many of these Facebook ads remain unknown. Moreover, reports prepared for the Senate Intelligence Committee showed that Russia's online influence efforts stretched across several platforms—Facebook, Instagram, YouTube, Pokémon Go, and others—and similarly exploited digital transparency gaps to run ads and push messages under innocuous sounding names.¹⁶

Recent developments, like the launch of Facebook's political ad archive, have provided voters, journalists, and watchdogs more information than ever before about digital political advertising. At the same time, the limits of these self-regulatory efforts underscore why we cannot outsource our democracy solely to private tech companies whose ultimate responsibility lies with their shareholders rather than voters.

For example, when The Tax Scam refused to include disclaimers on its ads, Facebook took them down. But not before its ads were able to run disclaimer-free for weeks, including in states where the electioneering communication period had already begun and the primaries were rapidly approaching.

As the 2018 elections proceeded, other limits of Facebook's voluntary disclaimer requirements became more clear. Reporters at the *New York Times* and *Vice* found that Facebook ads could 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.¹⁷

As the 2018 elections proceeded, other limits of Facebook's voluntary disclaimer requirements became more clear.

What disclaimer requirements currently apply to dark money groups' digital ads?

For years, digital political ads routinely failed to include disclaimers stating who paid for them. In large part, this is because the FEC in a series of advisory opinions created a loophole where political advertisers could evade legal disclaimer obligations by claiming their digital ads were too small to accommodate a disclaimer.

In 2018, Facebook created the space to include disclaimers, and began asking advertisers to provide them. After that, advertisers could no longer assert that their ads fell under a legal exception from disclaimer requirements. They were legally obligated to publicly disclose the name of the committee paying for the ads.

The problem, however, is that the law's disclaimer obligations largely only apply to candidates, parties, and PACs. Dark money groups are only subject to disclaimer requirements if their online ads expressly advocate for or against candidates.

As a result, Majority Forward was not *legally* obligated to include a disclaimer on its Tax Scam ads, which attacked or promoted candidates but didn't expressly tell viewers how to vote. The only disclaimer obligations came from Facebook.

As a result, Facebook would likely have allowed the Tax Scam Facebook page to run ads with disclaimers stating they were “paid for by The Tax Scam,” even if they were actually paid for by Majority Forward. But the porous nature of Facebook's disclaimer standards was not yet apparent in early 2018.

Fortunately, there are some relatively easy fixes to these problems. Legislation like H.R. 1, the “For the People Act,” and the Honest Ads Act—first introduced in 2017 with bipartisan support—would formally subject online ads to the same disclaimer and disclosure requirements that currently apply to ads run on any other medium.¹⁸

Bills like these would update our campaign finance laws for the digital age by extending the “electioneering communication” definition to include digital ads, clarifying disclaimer requirements, and requiring large platforms to maintain copies of ads they host in a publicly searchable database, among other provisions.

If these requirements had been in place in 2018, Majority Forward would have had to report its spending on many of the Tax Scam ads to the FEC, and would have been legally required to include a disclaimer stating that the ads were paid for by Majority Forward.

These changes would shine a spotlight on the forces behind campaigns like the Tax Scam, and would provide the sponsors with fewer tools of deliberate obfuscation to use in the first place.

If Congress fails to bring our campaign finance laws into the 21st century, these tactics designed to keep voters in the dark will only return with greater force in 2020 and beyond.

¹ Michael Beckel, *In 2018 Midterms, Liberal Dark Money Groups Outspent Conservative Ones for First Time Since Citizens United*, ISSUE ONE (2019), <https://www.issueone.org/wp-content/uploads/2019/01/Post-CU-Dark-Money-Mini-Report.pdf>.

² Political operatives ran Facebook ads purporting to support Alabama's Republican U.S. Senate candidate under pages with misleading names (like "Dry Alabama") that gave little indication they were funded by Virginia-based Democratic donors. Scott Shane & Alan Blinder, *Democrats Faked Online Push to Outlaw Alcohol in Alabama Race*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/politics/alabama-senate-facebook-roy-moore.html>. Other pages, tied to the same funders, used similarly deceptive techniques in the 2018 elections. Tony Romm, Elizabeth Dwoskin, & Craig Timberg, *Facebook is investigating the political pages and ads of another group backed by Reid Hoffman*, WASH. POST (Jan. 7, 2019), https://www.washingtonpost.com/technology/2019/01/07/facebook-is-investigating-political-pages-ads-another-group-backed-by-reid-hoffman/?utm_term=.2bd1003da7be.

³ 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>.

⁴ The Tax Scam, *You're On the Hook (Donnelly)*, ProPublica Facebook Political Ad Collector, <https://projects.propublica.org/facebook-ads/ad/23842779073950369> (last visited Mar. 4, 2019), The Tax Scam, *You're On the Hook (McCaskill)*, ProPublica Facebook Political Ad Collector, <https://projects.propublica.org/facebook-ads/ad/23842779065080369> (last visited Mar. 4, 2019).

⁵ The Tax Scam, *About*, Facebook <https://www.facebook.com/pg/The-Tax-Scam-1573634609418028/about/> (last visited Mar. 4, 2019).

⁶ Archived version of republican taxscams.com (Mar. 29, 2018), <https://web.archive.org/web/20180329170430/http://www.republicantaxscams.com:80/>.

⁷ *Id.*

⁸ *Id.*

⁹ Search results for "The Tax Scam," Facebook Political Ad Archive, [https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids\[0\]=1573634609418028&q=%22the%20tax%20scam%22](https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&page_ids[0]=1573634609418028&q=%22the%20tax%20scam%22) (last visited Mar. 4, 2019).

¹⁰ According to Facebook, "This ad ran without a 'Paid for by' label. After the ad started running, we determined that the ad was related to politics and issues of national importance and required the label. The ad was taken down." Search results for "The Tax Scam," Facebook Political Ad Archive, *supra* note 9 (message viewable by hovering over the "i" following the text, "This ad ran without a 'Paid for by' label.>").

¹¹ *Id.* (viewership details available by following the "See Ad Performance" link beneath the third search result).

¹² Lisa Hagen, *Major Dem Group Goes on Offense Against GOP Tax Plan*, THE HILL (Mar. 6, 2018), <https://thehill.com/homenews/campaign/376882-major-dem-group-goes-on-offense-against-gop-tax-plan>.

¹³ 52 U.S.C. 30104(f)(3), 11 C.F.R. 100.29.

¹⁴ Search results for "The Tax Scam," Facebook Political Ad Archive, *supra* note 9. The North Dakota primary was June 12, 2018; the electioneering communication period ran from May 13, 2018 to June 12, 2018. 2018 Electioneering Communication Windows, FEC.GOV https://transition.fec.gov/info/charts_ec_dates_2018.shtml (last visited Mar. 4, 2019).

¹⁵ CAMPAIGN LEGAL CTR., ISSUE ONE, & PROJECT DATA, CLOSING THE DIGITAL LOOPHOLES THAT PAVE THE WAY FOR FOREIGN INTERFERENCE IN U.S. ELECTIONS (2018), <https://campaignlegal.org/sites/default/files/04-16-18%20CLC-IO%20Issue%20Brief%20Young%20Mie%20Report%20FINAL.pdf>.

¹⁶ RENEE DI RESTA, ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY (2018), <https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf>.

¹⁷ 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-attackads.html?ref=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-senatorsto-run-ads-on-facebook-facebook-approved-all-of-them.

¹⁸ For the People Act, H.R. 1, 116th Cong. (2019); Honest Ads Act, S. 1989, 115th Cong. (2017).

Attachment C

BRENNAN

CENTER

FOR JUSTICE

TWENTY
YEARS

SECRET SPENDING
IN THE STATES

Chisun Lee, Katherine Valde, Benjamin T. Brickner, and Douglas Keith

ABOUT THE BRENNAN CENTER FOR JUSTICE

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ABOUT THE AUTHORS

Chisun Lee serves as senior counsel at the Brennan Center, focusing on money in politics. She previously covered legal issues as a staff reporter for *ProPublica*, where her work was co-published with *The New York Times*, *The Washington Post*, NPR, *The National Law Journal*, and PBS “Frontline,” among other outlets, and earned industry honors. She has also represented indigent clients in federal trial and appeals courts as a criminal defense attorney and served as a law clerk to the Honorable Gerard E. Lynch, then of the U.S. District Court for the Southern District of New York. She received her A.B. from Brown University and her J.D. from Harvard Law School.

Katherine Valde served as a Research and Program Associate in the Brennan Center’s Democracy Program. As part of the program’s money in politics unit, she researched and advocated for reasonable reforms to expand political opportunity for all. She graduated with High Distinction and Phi Beta Kappa from the University of Iowa with honors degrees in Political Science and History.

Benjamin T. Brickner served as counsel to the Brennan Center’s Democracy Program, where his work focused on money in politics. He joined the Brennan Center in 2014 after working as an associate at Debevoise & Plimpton LLP. He previously served as policy advisor to New Jersey Governor Richard J. Codey. Before joining the Brennan Center, Mr. Brickner authored *Reading Between the Lines: Congressional and State Legislative Redistricting*, a citizens’ guide and prescription for reform of the redistricting process, and co-authored *Clean Elections: Public Financing in Six States*, a policy primer and multi-case study of publicly financed electoral campaigns.

Douglas Keith is the Katz Fellow in the Brennan Center’s Democracy Program. Prior to joining the Brennan Center, he worked on voting rights litigation as a Ford Foundation Public Interest Law Fellow at Advancement Project, trained poll workers for the New York City Board of Elections, and organized election reform advocates in New York. He has also observed and analyzed democratic systems in North and West Africa, Central Asia and Eastern Europe. He received his J.D. from New York University School of Law.

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INTRODUCTION

Six years after *Citizens United* enabled unfettered spending in our elections, the use of so-called dark money has become disturbingly common. Contrary to the Supreme Court’s assumption that this unlimited spending would be transparent to voters, at the federal level powerful groups have since 2010 poured hundreds of millions of dollars into influencing elections while obscuring the sources of their funding.¹

But it is at the state and local levels that secret spending is arguably at its most damaging. For a clear understanding of the degree to which dark money is warping American democracy, state ballot referenda and local school board contests may be a better starting point than the presidential campaign or even congressional races. As Chris Herstam, a former Republican majority whip in the Arizona House of Representatives and now lobbyist, put it, “In my 33 years in Arizona politics and government, dark money is the most corrupting influence I have seen.”²

This report documents how far outside spending — election spending that is not coordinated with candidates — at the state and local levels has veered from the vision of democratic transparency the *Citizens United* Court imagined, drawing on an extensive database of news accounts, interviews with a range of stakeholders, campaign finance and tax records, court cases, and social science research. For the first time, it also measures changes in dark money — and a thus far unrecognized rise in what we term “gray money” — at the state level, by analyzing spender and contributor reports in six of nine states where sufficient usable data were available.³ This set of six geographically and demographically diverse states, comprising Alaska, Arizona, California, Colorado, Maine, and Massachusetts, represents approximately 20 percent of the nation’s population.

Altogether this review revealed several striking trends:

- **Our first-of-its-kind analysis showed that, on average, only 29 percent of outside spending was fully transparent in 2014 in the states we examined, sharply down from 76 percent in 2006.**
 - Dark money surged in these states by 38 times on average between 2006 and 2014.
 - State super PACs, which are legally required to disclose their donors and thus hold themselves out to be transparent, increasingly reported donations from nonprofit groups that are not, themselves, required to disclose their donors. Donations from dark groups to super PACs increased by 49 times in these states between 2006 and 2014, from less than \$190,000 to over \$9.2 million.

- **In a troubling new phenomenon we’ve identified, “gray money” has ballooned to nearly 60 percent of all outside spending in 2014, on average in the states we examined.**
 - Measuring dark money alone understates the extent of the transparency problem. We found a sharp rise in what we term “gray money”: spending by state super PACs that reported other PACs as donors, making it impossible to identify original donors without sifting through multiple layers of PAC disclosures.
 - “Gray money” ballooned from 15 percent of all outside spending on average across the six states in 2006 to 59 percent of all outside spending by 2014.
- **Dark money at the state and local levels frequently flows from special interests with a direct and immediate economic stake in the outcome of the contest in which they are spending, in contrast to what is often portrayed as the more broadly ideological outside spending at the federal level.** When uncovered, secret money at this level has traced back to such sources as a mining company targeting a state legislator who held a key role opposing quicker mining permits, payday lenders supporting an attorney general who promised to shield them from regulation, and food companies battling a ballot measure to add labeling requirements.⁴
- **Lower costs make it relatively easy for dark money to dominate state and local elections.** For many of the contests we looked at, dark money groups outspent candidates themselves with amounts in the low \$100,000s or even \$10,000s — a modest business expense for special interests, but a major hurdle for many candidates and community groups.⁵ At the federal level that degree of dominance can easily cost in the \$10 millions.⁶
- **Strong disclosure laws and enforcement can make a real difference.** California, which saw many times more outside spending than any of the other states we examined, nevertheless saw a remarkably low amount of dark money in each cycle. It seems that the state’s exceptionally tough disclosure requirements and active enforcement culture have helped to keep secretive spending at a relative minimum.

There are several reasons to be particularly concerned about the corrosive effects of dark and gray money at the state and local levels. First, regulatory power at these levels is more concentrated, and more often subject to direct election, than at the federal level. From attorney general to comptroller to water district director, numerous state and local elected offices are capable of directly impacting special interests’ bottom lines. Also distinct from the federal level, voters in every state and innumerable counties and towns face ballot measures where they directly decide policy questions — education spending, collective bargaining, taxes — often with major financial consequences for a relatively small but economically powerful constituency.

Second, these are often low-information elections, where it may not take much advertising to sway voters. This is particularly true in nonpartisan contests, such as ballot measure elections and many local

races, where voters do not have party affiliations as a signal. In such cases, special interest spenders can hope to have a greater influence on voters than in high-profile elections featuring many voices.

Finally, lower costs make it relatively easy for dark and gray money to flood state and local elections with unaccountable messages. Entities with deceptively community-minded names — Californians for Good Schools and Good Jobs, shielding a Texas oil company; Proper Role of Government Education Association, shielding payday lenders — can invest relatively modest amounts but still saturate the airwaves and mailboxes.⁷

How can this problem be fixed? One way would be to persuade the Supreme Court to overturn misguided decisions such as *Citizens United*, which empowered donors to funnel unlimited amounts of spending through opaque entities such as social welfare nonprofits and shell companies. Short of that, this report offers a set of practical reforms to improve electoral transparency while protecting truly vulnerable speakers. Though reform at the federal level has stagnated because of inaction at the Federal Election Commission, Internal Revenue Service, and Congress, a number of states and cities have been more eager and able to respond to recent onslaughts of dark money.

DARK AND GRAY MONEY EXPLAINED

In 2010, *Citizens United* set off a nationwide surge in **outside spending** — election advertising that is technically independent of candidates. But the Supreme Court didn't say the sources of that spending could be secret. The justices assumed that existing rules and enforcement mechanisms would enable “prompt disclosure” of the interests behind the money.⁸

That assumption couldn't be further from reality. The federal government has failed to enforce still-standing disclosure rules, let alone modernize those rules for the era of unlimited spending. The same is true in most states and cities. The result has been a rise in election spending by entities that do not publicly disclose their donors, commonly known as “**dark money**,” and also by entities that disclose donors in a way that makes the original sources of money difficult or perhaps impossible to identify, a type of spending this report terms “**gray money**.” We explain both phenomena below.

One major cause of dark money: disclosure rules overlook too many political *advertisers*. **Non-profit organizations** — particularly 501(c)(4) social welfare groups and 501(c)(6) trade associations — have become popular electioneering vehicles for donors seeking anonymity.⁹ Unlike **political action committees** (PACs), which typically must disclose their donors publicly, these non-profit groups normally are required to make only nonpublic disclosures to the IRS.¹⁰ While technically politics is not supposed to be their primary purpose, in the absence of effective rules and enforcement these groups have been able to devote a huge share of their resources to politics.¹¹

The other major cause of dark money: disclosure rules also overlook too many political *advertisements*. Typically for ads that expressly urge voters to vote for or against a candidate, the identity of the spender and sometimes that of the funders must be disclosed.¹² But when it comes to so-called “electioneering communications” — ads that attack or promote candidates in the guise of advocating about an issue — only 26 states require disclosure of the spender, let alone disclosure of the spender's funders.¹³

What causes gray money? Disclosure rules that overlook the true sources of funding. **Super PACs** — PACs that are supposed to advertise independent of candidates and, after *Citizens United* and related cases, can raise and spend unlimited sums — typically must disclose their donors.¹⁴ But increasingly they have disclosed not individuals or businesses, whose interests are relatively apparent, but rather other PACs. That money *might* be traceable, through multiple layers of PAC disclosures, to an original source. But most people lack the time to dig this deeply, and, increasingly, understaffed newsrooms do, too. (Super PACs sometimes disclose nonprofits as donors. Because nonprofits generally do not have to disclose their donors, we consider PAC spending derived from such sources to be dark money, not gray.)

I. THE RISE OF DARK MONEY IN THE STATES FROM 2006 THROUGH 2014

The scores of news accounts, official investigations, and interviews we compiled and reviewed suggest that dark money is becoming a bigger problem in many states than at the federal level. Our analysis of outside spending in six states with sufficient usable data from before and after *Citizens United* confirmed this supposition.¹⁵

In 2014, dark money was 38 times greater than in 2006, on average across the states we examined, while in federal elections it increased by 34 times over the same period.¹⁶ Between the increases in dark and gray money, we found that fully transparent outside spending — where regular voters may learn the true funder of an election ad by looking up the spender and possibly its donor reports — declined sharply, from 76 percent transparent in 2006 on average across the states we examined to just 29 percent transparent in 2014.

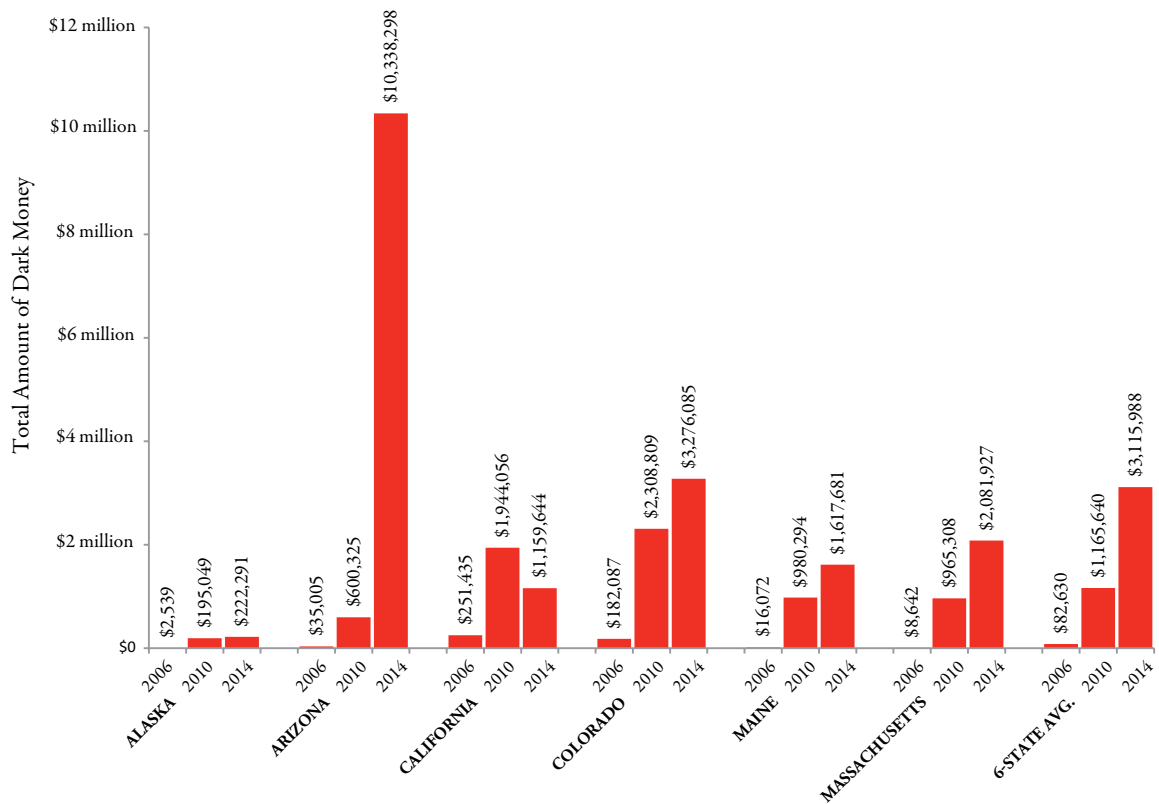
We reviewed outside spending in candidate elections in the 2006, 2010, and 2014 cycles in Alaska, Arizona, California, Colorado, Maine, and Massachusetts. We anticipated that the January 2010 *Citizens United* ruling, lifting limits on independent spending by unions and corporations including nonprofits, and an influential lower-court ruling that March, deregulating contributions to independent spenders, would affect outside spending trends beginning as soon as in the 2010 cycle.¹⁷ We knew that these widely publicized changes in the law had also transformed the culture of outside spending, even in states where the technical effect on laws was not great.¹⁸ Moreover, even as outside spending and giving were suddenly free to climb, old disclosure loopholes, such as the exemption of groups who claim not to have a primarily political purpose, remained.¹⁹

The following charts and analyses summarize our findings, some expected and many striking.

A. State-Level Dark Money Surged

While dark money exploded at both the federal and state levels between 2006 and 2014, the rate of increase was greater on average across the states we examined than in federal elections. In the states, dark money in 2014 was 38 times greater than in 2006, while in federal elections it increased by 34 times over the same period.²⁰

Changes in Dark Money in Six States, 2006-2014



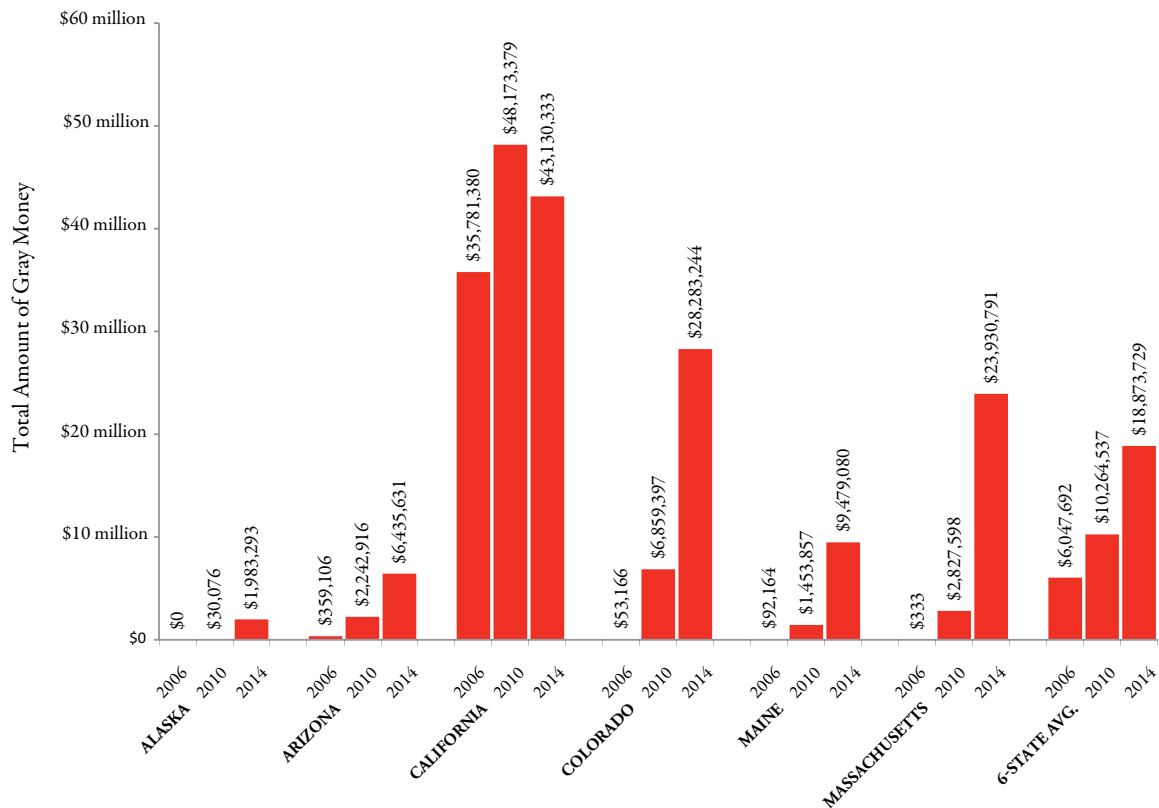
Trends in two outlier states are worth noting. Arizona saw by far the biggest surge in dark money, with the amount in 2014 rising to 295 times — nearly three hundred times — the level in 2006. By contrast, California saw remarkably little dark money over all cycles, especially considering the high levels of outside spending in the state. The major reason appears to be California's decades-long requirement that even nonprofits, the typical vehicle for dark money, disclose donors for their election spending.²¹ Certain loopholes remained, but in 2014 the state enacted a measure to close one and likely reduce dark money even further in future elections.²² These unusually tough rules, along with the state's robust enforcement culture, have enabled investigators and journalists to get to the bottom of many disclosure problems, which is why this report includes a disproportionately great number of incidents from California.

The overall rise in dark money partly reflects a spike in donations to super PAC spenders, which legally must disclose their donors, from nonprofit donors such as 501(c)(4) social welfare groups and 501(c)(6) trade associations that do not have to disclose their donors. Dark donations to technically transparent PACs increased by 49 times in the states we examined between 2006 and 2014, from less than \$190,000 to more than \$9.2 million.²³

B. “Gray Money” Also Ballooned

State super PAC spending based on donations from other PACs — spending we term “gray money” — also surged over the period we reviewed, meaning that voters seeking the original source of funding increasingly would have to investigate multiple layers of PAC disclosures.²⁴ In 2006, 25 percent of contributions disclosed by such PACs came from other PACs, on average across the six states.²⁵ By 2014, 66 percent of contributions to such PACs on average came from other PACs.

Changes in Gray Money in Six States, 2006-2014

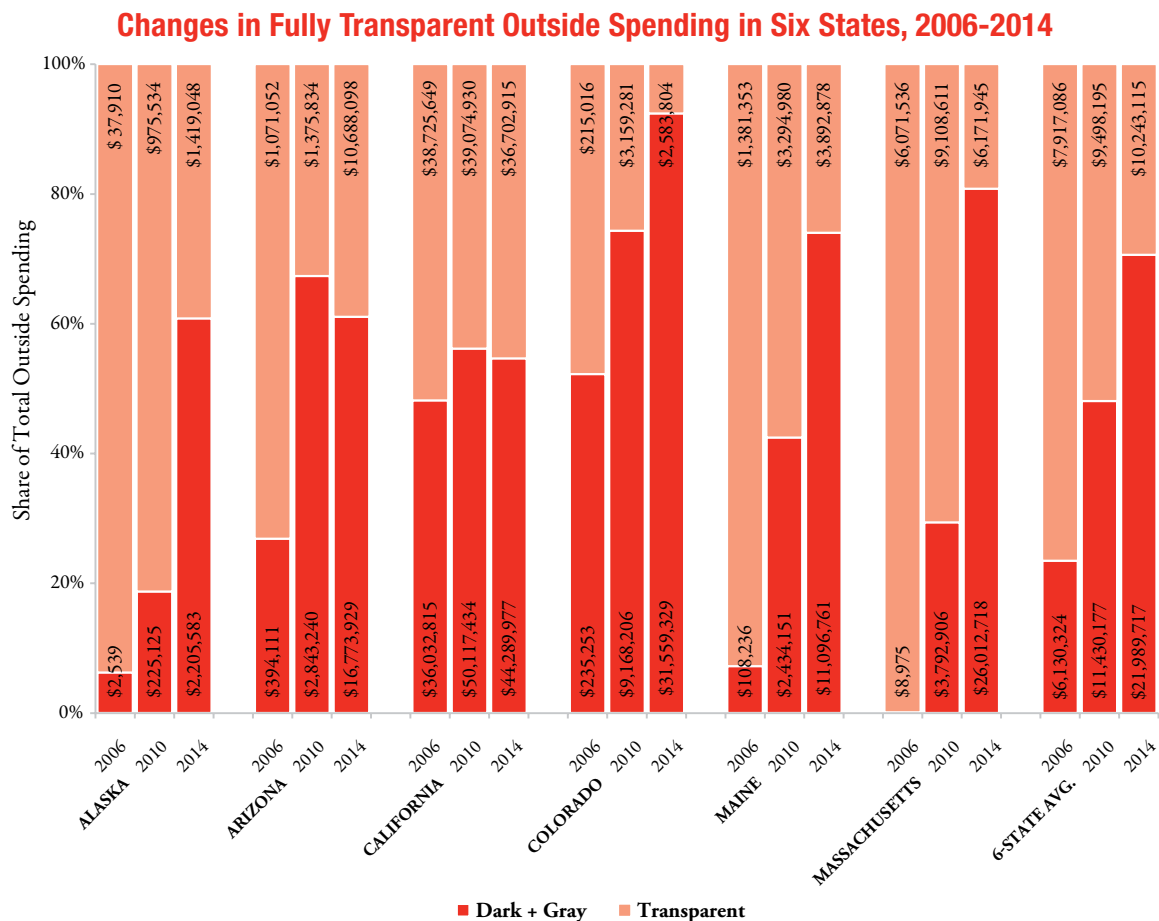


The amount of gray money increased dramatically in every state except California between 2006 and 2014. California nevertheless saw a significant amount of gray money spent in each cycle, as much as 54 percent of all outside spending in 2010.²⁶ This trend reflects California's unusual success in restricting *dark* money: For decades nearly all outside spenders have had to function as PACs that disclose their donors in relation to election spending.²⁷ Though it may still be onerous for members of the public to examine multiple layers of PAC donors to determine the ultimate source of gray money, it is at least possible to do so, especially under recent reforms that require disclosure of at least some underlying donors.²⁸

Even with California's gray money numbers holding relatively steady across the three election cycles, the increase in gray money's share of all outside spending on average across the states was still stunning. Gray money ballooned from 15 percent of all outside spending on average in 2006 to 59 percent of all outside spending by 2014.²⁹

C. Fully Transparent Outside Spending Declined Dramatically

The result of these rising trends in dark money and gray money has been a steep decline in the share of outside spending that, for a regular voter's purposes, is effectively transparent: from 76 percent in 2006 on average to just 29 percent in 2014 in the states we examined.



II. HOW DARK MONEY WORKS IN STATE AND LOCAL ELECTIONS

Dark money poses special dangers at the state and local levels. We examined dozens of instances where dark money in a state or local contest was linked, usually through shoe-leather reporting or official investigation, to a specific special interest. Three key trends emerged: (1) At these levels, dark money sources often harbor a narrow, direct economic interest in the contest's outcome; (2) relatedly, contentious ballot measures that carry major economic consequences frequently attract dark money; and (3) in the relatively low-cost elections at these levels, it is easy for dark money to dominate with unaccountable messages that voters cannot meaningfully evaluate.

In Arizona, which at \$10.3 million in 2014 had by far the greatest amount of dark money in any cycle of the states we examined, “politics have changed dramatically since *Citizens United* as a direct result of dark money,” according to Chris Herstam, currently a lobbyist who once served as Republican majority whip in the state House and as chief of staff to a Republican governor.³⁰

“In my 33 years in Arizona politics and government, dark money is the most corrupting influence I have seen,” he said, criticizing a recent move by the legislature to end state oversight of nonprofit groups’ political spending. He said that secretive special interest spending is making campaigning more costly, including in down-ticket contests, intimidating lawmakers from taking policy positions that might draw dark money attacks, and robbing voters of essential information.

“Without adequate disclosure laws, Arizonans do not know for sure who is purchasing their elected offices. And we, the citizens, don’t have the proof to make it an issue and take a stand against it in any particular election,” he said. He argued that the effect of dark money is more profound on a smaller political scale: “While dark money gets a lot of national publicity, it is having a monstrous effect in Arizona.”

A. Dark Money Sources Often Hold Direct Economic Interests in the Election Outcome

Unlike many federal spenders who pursue broader or longer-term agendas, secretive special interests at the state and local levels often seek more immediate, direct benefits. In part, this focus reflects the fact that a great deal more regulatory power is up for election below the federal level. From statewide offices such as attorney general, secretary of state, and treasurer to seats on local utility boards, public hospital boards, and courts, a great deal of power over economic matters is subject to direct election where at the federal level it is up to presidential nomination and confirmation by the Senate. Forty-three states elect an attorney general, a state’s top investigator and enforcer under laws banning fraud, environmental damage, employment discrimination, and a plethora of other business-relevant issues.³¹ Thirty-six states elect a comptroller or equivalent, the CFO of the state.³² Twelve states elect a commissioner of agriculture.³³ One even elects its mine inspectors.³⁴ Moreover, at the county and municipal levels, elections are frequently nonpartisan, leaving voters to depend especially heavily on other information about candidates, such as election ads.³⁵

One political consultant, who advises state campaigns across the South, pointed to places like Louisiana as ripe for hidden political spending. Several localities have sued oil and gas companies seeking money for coastal restoration. The fate of this litigation, or potential litigation, often hinges on the decisions of parish councils or commissions, local judges, or even a sheriff.³⁶ He expects to see dark money in these contests because “there are a set of local officials that are in position that directly affects oil and gas companies.”³⁷

Sometimes the interest can be even more parochial. Two billionaires secretly funded attack ads in a 2012 Montana Supreme Court election that related to their long-litigated fight to keep locals from their waterfront estates, according to an investigation concluded last December by the state’s election authority.³⁸ At the time of the election, voters saw only that Montana Growth Network, a nonprofit, was funding the ads.³⁹

Where weak disclosure rules allow special interests to buy influence through veiled election ads, these circumstances, at worst, risk corruption of the very officials meant to police those interests. More commonly, the lack of ad sponsor disclosure deprives voters of key information for evaluating messages.

Our review of dozens of elections since 2010 showed how dark money has served specific economic ends in many state and local elections, unbeknownst to voters at the time. Some of the most striking instances include:

Payday Lenders and the Utah Attorney General

At the egregious extreme is the confluence of economic incentives, unlimited outside spending, and absence of transparency laws that colored the campaign of successful 2012 Utah attorney general candidate John Swallow. With no incumbent running, the race was a real contest, though at the Republican primary stage in the solidly red state.⁴⁰

More than one year after Swallow’s victory, and nearly \$4 million, 165 witnesses, and tens of thousands of documents later, a state legislative committee determined that Swallow had “hung a veritable ‘for sale’ sign on the Office door that invited moneyed interests to seek special treatment and favors.”⁴¹ The committee’s 214-page report details how one industry, payday loan companies, worked with Swallow’s campaign to use a web of generically-named PACs and nonprofits to obscure approximately \$450,000 in donations for nominally independent election ads.⁴² The lenders sought Swallow’s protection from newly toughened consumer rights rules.⁴³ His advisors asked the lenders to donate to dark money groups that would not disclose their donors rather than to his campaign in order not to “make this a payday race” funded by an industry often seen as preying on struggling families, according to the investigation.⁴⁴

The biggest conduit for undisclosed lender support of Swallow was a nonprofit called the Proper Role of Government Education Association.⁴⁵ Proper Role funneled money via other nonprofits to an out-of-state super PAC called It’s Now or Never, which then ran attack ads against Swallow’s primary opponent.⁴⁶ At the time Swallow’s campaign manager denied any

connection to the attack ads, saying, “We’re actually really proud of the fact that we’ve been running a positive campaign from the very beginning.”⁴⁷

Swallow handily won his party’s primary and the general election.⁴⁸ Underscoring the special problem of corruption for elected offices such as the attorney general, the House Special Investigative Committee later wrote: “While the corruption of any public office is unacceptable, the corruption of the office specifically tasked with ensuring equal justice under law is particularly harmful because it undermines the public’s faith that justice in the State is being dispensed equally and without regard to economic, social or political status.”⁴⁹

Swallow was later arrested on unrelated bribery charges, and resigned.⁵⁰ The House committee turned over its findings to law enforcement authorities.⁵¹ Swallow pleaded not guilty to the bribery charges and as of May 2016 was awaiting trial.⁵²

Mining and the Wisconsin State Senate

An inadvertent court disclosure exposed how an out-of-state mining company in 2012 had secretly poured \$700,000 into ads attacking Wisconsin legislators who opposed speeding up mine permits. The Florida-based business had bought mining options in Wisconsin’s Penokee Hills in 2010.⁵³ Soon after, it began lobbying for a law to expedite environmental review of mining applications.⁵⁴ The bill failed by one vote in the senate.⁵⁵

State Senator Jessica King, who had cast a key vote against expediting, faced re-election in 2012. The Wisconsin Manufacturers & Commerce Issues Mobilization Council, registered as a social welfare nonprofit, launched ads attacking King as a jobs-killer, including one that misrepresented as disapproving a union leader who actually supported King.⁵⁶ The nonprofit received funding from another nonprofit, the Wisconsin Club for Growth, which in turn received the \$700,000 from the Florida company, according to court filings in a separate matter first reported by ProPublica in 2014 — two years too late for voters.⁵⁷ King lost by less than 1 percent of the vote.⁵⁸ Shortly after the election, in the next legislative session, King’s opponent cast the deciding vote in favor of the pro-mining legislation.⁵⁹

The nonprofits involved have refused to disclose any details of their political spending including donor names.⁶⁰ Indeed, they seem to exemplify the notion that anonymity in political advertising is power. One group told donors in 2012: “Last night conservatives flipped the state senate and grew our majority in the state assembly Thanks to your support, once again Wisconsin Club for Growth played a pivotal [*sic*] role in last night’s [*sic*] results.”⁶¹ The other group’s website declares: “Unlimited corporate donations are allowed under law, and are held strictly confidential — **we have never disclosed our donors, and never will.**”⁶²

Power Suppliers and Arizona's Utilities Commission

A shift in Arizona's energy policy away from industry sources to homeowner-generated solar presaged an exponential surge of dark money in elections for the state's five-member public utilities commission. Within a few years of the commission's solar-friendly policy change in 2010, nearly half a million Arizonans had joined a program meant to reduce industry-supplied power consumption by 22 percent.⁶³

The 2014 election to replace two term-limited commissioners drew an astonishing \$3.2 million in dark money ads — more than double the combined spending, \$1.2 million, of all six candidates in the primary and general elections, and almost 50 times the \$67,000 in dark money spent in races for three commission seats in 2012.⁶⁴ In 2008, before the solar policy, all outside spending in the commission races amounted to only \$3,298, and none of it was dark.⁶⁵

"It's like a John Grisham-type setting because of how powerful the ads are," recalled Vernon Parker, a Republican who ran in 2014 as a pro-solar candidate and lost at the primary stage after facing a flood of attack ads.⁶⁶ An African American who had previously won elections for city council and mayor in the conservative, majority-white town of Paradise Valley, Parker described the dark money onslaught as a political challenge of unprecedented magnitude. "I wouldn't wish this on anyone," he said.⁶⁷

News outlets have since reported that a major source of dark money funds likely was the state's largest utility business, Arizona Public Service Company (APS).⁶⁸ Former commissioner Bill Mundell has accused APS of creating a "circle of corruption," using profits from consumers to secretly fund ads to elect candidates who will favor APS over consumers.⁶⁹ "Who do you think those commissioners are going to listen to when there's a rate case pending? Are they going to listen to you or me, or will they listen to the APS executives?" he said at a 2016 appearance in his campaign to rejoin the commission, according to the *Payson Roundup*.⁷⁰

The company has not confirmed or denied funding specific ads.⁷¹ In 2014 it responded to stories of its alleged dark-money dealings with the general statement that "we routinely support public officials, candidates and causes that are pro-business and supportive of a sustainable energy future for Arizona," stressing its "right to participate in the political process."⁷² The company told the utilities commission in 2013 that it had spent \$3.7 million on "public relations work" to support a tax on solar households.⁷³ It confirmed one six-figure donation to a social welfare nonprofit that donated to a super PAC advertising in the 2012 elections.⁷⁴ But, because of gaping loopholes in Arizona's disclosure laws, it is impossible to know the full extent of the company's election-related activity through official records.

With the 2014 election, the composition of the five-member commission shifted from a majority that backed solar energy to one that had signaled openness to increasing solar's cost to consumers.⁷⁵ But the commission has been slow to act on the utility company's requests

to levy extra charges on solar consumers, because, according to some observers including one commission member, it is now sensitive to accusations of being influenced by dark money.⁷⁶

Charter Schools and the Los Angeles School Board

Though the nationwide debate about charter schools involves more than economic issues, it does fundamentally involve a tussle over where public education dollars should go. Our review of election accounts showed that many school board contests, once low-cost races funded mainly by local residents, drew significant amounts of dark money from charter school supporters along with big spending from opponents such as teachers' unions. The 2015 Los Angeles school board election stands out, not just for the massive amounts of dark money spent in the nation's most expensive school board contest, but also for the spender's admitted use of one dark-money technique: disguising non-local big money behind a local group, the better to woo voters.⁷⁷

A key operative explained the technique to the *Los Angeles Times*, after the paper, months after the election, reported the true funders of a local PAC called Parent Teacher Alliance in Support of Rodriguez, Galatzan, and Vladovic for School Board 2015.⁷⁸ "Local committees are established across the state to give a local flavor to each race, including [a] local name on disclaimers for campaign materials," Richard Garcia, director of elections communications for the California Charter Schools Association, said.⁷⁹ "This is a common practice as campaign consultants believe it best to maintain local name ID," he explained.⁸⁰ The local group's name betrayed nothing about the original sponsors of its \$2.3 million in ads, who included billionaire Michael Bloomberg and the family behind Wal-Mart.⁸¹ The group's public contributor reports named only Garcia's statewide PAC, which had received and passed along the original donors' money.⁸² One of the four open seats went to a pro-charter candidate, the co-founder of a large network of charter schools in California.⁸³

B. Dark Money Targets Ballot Measure Elections

Sometimes more even than candidate elections, state and local ballot measure elections tend to draw heavy anonymous spending by economically motivated special interests. The reasons are simple, according to Kory Langhofer, an Arizona-based lawyer who advises nonprofits on their political spending: "With ballot measures the economic interests are much sharper than with candidate campaigns."⁸⁴ Ballot measure elections, which do not exist at the federal level, ask voters to directly decide specific questions about policies such as taxes, business oversight, and collective bargaining.⁸⁵ Interest groups can spend tens of millions getting precisely the policies they want before voters and then promoting them, a more direct route to achieving their goals than lobbying law makers.⁸⁶

The reason such spending may be anonymous, Langhofer explained, is that anonymity keeps voters from dismissing an ad's message based on "the financial self-interest of a ballot measure supporter."⁸⁷

This shielding effect is arguably good for the political process, said Langhofer, because disclosure may cause voters to judge the messenger rather than seriously consider the message, particularly with controversial speakers.

Federal Election Commissioner Ann Ravel, who as then-chair of the California Fair Political Practices Commission helmed an investigation into \$15 million in dark money spent on two 2012 ballot measures, disagrees.⁸⁸ “When it comes to the influence of dark money in a place when the voter is sitting as the legislator of the day, the voter is being forced to make a legislative decision with insufficient information,” she said.⁸⁹

All 50 states allow some form of statewide ballot measure, on everything from constitutional amendments to the minimum wage to tax proposals, and all of them also permit local ballot measures.⁹⁰ The wording of these measures can be, notoriously, arcane. Voters might rely to an unusual degree on ads telling them how to vote.

Due to the often high stakes and potential for great influence, business spenders have flocked to ballot measure contests. In 2014 at least \$200 million in *disclosed* funding alone for ballot ads came from for-profit corporations or business groups, according to a review by the Center for Public Integrity.⁹¹ This year political groups have already raised more than \$125 million as of May in an attempt to place over 800 proposed measures on state ballots — a 74 percent increase from the amount raised for ballot measures at the same point in the 2014 election cycle.⁹²

Instances where dark money played a significant role in recent ballot measure elections include:

Food Labeling in Washington

In 2013 Washingtonians faced a ballot proposal to require the labeling of genetically modified foods, a financially high-stakes measure that prompted record spending.⁹³ The No on 522 committee, opposing the initiative, amassed the most money ever raised to defeat a Washington ballot initiative, more than \$22 million.⁹⁴ This March a county judge ruled that No on 522’s biggest donor had violated state disclosure laws by concealing the role of numerous household-brand companies, including PepsiCo, Nestle, Coca-Cola, Campbell Soup, and Kellogg, in pouring \$11 million into the effort.⁹⁵

Initially, a group called Moms for Labeling had filed a lawsuit demanding disclosure during the 2013 election battle.⁹⁶ “The motivation was largely about getting the truth out there *during* the campaign, so that we had a chance of winning,” said Knoll Lowney, an attorney for the group that described itself in court papers as “mothers who are harmed by the concealment of the true donors of the No on 522 Campaign.”⁹⁷ A judge dismissed that complaint on procedural grounds.⁹⁸ The state’s attorney general, Bob Ferguson, then took up the fight.

After the long-awaited decision this year, Ferguson told reporters, “This ruling sends an unequivocal message: Big money donors cannot evade Washington law and hide from public scrutiny.”⁹⁹

The donor in question, the Washington, D.C.-based Grocery Manufacturers Association (GMA), a 501(c)(6) trade association, had raised \$14 million from high-profile companies for a special “Defense of Brands” account to combat the GMO-labeling initiative.¹⁰⁰ These

were no mere dues paid by members to support a trade association, Thurston County Superior Court Judge Anne Hirsch ruled, but rather donations for a political purpose that should have been disclosed to the public as such.¹⁰¹ Though voters might have seen from the GMA name that grocery businesses, generally, were behind the ads, GMA's strategy was to "shield individual companies from public disclosure and possible criticism," according to an internal GMA document revealed in the lawsuit.¹⁰² Judge Hirsch concluded, "[T]he GMA intentionally took steps to create and then hide the true source of the funds in the DOB [Defense of Brands] account from the voting public of Washington state."¹⁰³

A poll taken seven weeks before the ballot measure election in 2013 had shown that 66 percent of potential voters supported GMO labeling.¹⁰⁴ After a barrage of commercials over subsequent weeks opposing labeling, though, 51 percent of voters ultimately rejected the measure.¹⁰⁵

School Funding in Arizona

In 2012, the generically named Americans for Responsible Leadership (ARL), a nonprofit reported to be funded by the Koch brothers,¹⁰⁶ funded more than half the advertising to block a citizens' ballot initiative to maintain a one-cent-per-dollar sales tax that helped fund Arizona's public schools.¹⁰⁷ The state legislature had in previous years cut other K-12 education funding by nearly one-fifth.¹⁰⁸ Anti-initiative ads issued dire warnings: "Prop 204 raises taxes \$1 billion a year, not to support students but to fund bigger bureaucracy with no education reform. And with no guarantee the money will ever reach the classroom."¹⁰⁹

That same year California authorities sued ARL over its secretive spending there, forcing some degree of disclosure of ARL's donors a few days before Arizonans voted on the school-funding measure.¹¹⁰ But that disclosure revealed merely a list of other nonprofit groups and PACs.¹¹¹ The tax measure was soundly defeated.¹¹² A year later, Arizona's per-pupil spending ranked third-lowest in the nation.¹¹³ By 2015 more than 40 of Arizona's 230 school districts had shrunk the school week to four days, to save on electricity and other basic costs.¹¹⁴

Collective Bargaining in Michigan

Facing a closely contested 2012 ballot proposal to strengthen collective bargaining rights in Michigan, one major employer headquartered in the state, Dow Chemical, gave more than \$2.5 million to groups that then gave money to advertisers opposing the measure, but did not disclose its role until the next year.¹¹⁵ With 48 percent of respondents supporting the measure, 43 percent opposing, and 9 percent undecided, in a poll taken two months before the election, it seemed advertising could make all the difference.¹¹⁶

Opposition ads stoked parental fears, claiming that Proposal 2 "would eliminate safety rules for school bus drivers" and "could prohibit schools from removing employees with criminal records."¹¹⁷ One ad claimed, "If Proposal 2 passes, teachers caught drunk on the job get five chances."¹¹⁸ Another warned, "Instead of just worrying about our kids' grades, we'll have to pray for their safety."¹¹⁹ The advertisements named only "Protecting Michigan Taxpayers" as the sponsor.¹²⁰

Dow's donations came to light only because it voluntarily posted on its website, well after the Michigan vote, contributions greater than \$50,000 to trade associations and social welfare nonprofits.¹²¹ The Center for Public Integrity then reported the posting.¹²² As with many voluntary disclosures, which some large corporations have embraced, it's not possible to verify the accuracy or completeness of the numbers.

Voters ultimately rejected the measure.¹²³ To be sure, Dow was just one of many funders who together gave more than \$20 million to oppose the collective bargaining measure, with roughly the same amount going to support it — a record in fundraising over a ballot proposal in Michigan.¹²⁴ The multilayered structure of funding that initially hid Dow's role likely shielded other donors on both sides of the measure.

C. Dark Money Can Dominate Local Contests

Dark money can be particularly powerful in state and local contests, simply because it is easier in lower-cost elections for special interests to dominate the political discourse. In Montana, where a typical state legislative campaign can cost less than \$20,000, “the effect of dark money can really be important,” said Duane Ankney, a Republican state senator who was the primary sponsor of a bipartisan law enacted in 2015 to increase outside spending transparency.¹²⁵ For many of the contests we looked at, a dark money group could have outspent candidates with amounts in the low \$100,000s or even \$10,000s — a modest business expense for special interests, but a major hurdle for many candidates and community groups.¹²⁶ At the federal level, that degree of domination can easily cost in the \$10 millions.¹²⁷ On the smaller scale, the power of dark money to mislead voters, intimidate or malign candidates, and even discourage would-be candidates and ballot measure advocates, can come relatively cheap.

In California, misleading mailers opposing a local ballot measure to raise taxes on oil companies turned out to have been funded by... an oil company, according to a post-election investigation by the state's Fair Political Practices Commission.¹²⁸ The company, Phillips 66, was based in Texas but owned operations in Rialto, California.¹²⁹ Using the mantle of Californians for Good Schools and Good Jobs, the company, secretly spent \$38,000 on the 2012 mail campaign.¹³⁰ The mailers showed only the shell organization's civic-minded name, not the name of the oil company.¹³¹ Announcing Phillips 66's agreement to settle the case this year, state officials concluded that the Texas company had “misled the voters of Rialto.”¹³² The order seemed to emphasize the critical difference that the mailers may have made in the fairly low-profile contest: it noted that the measure to raise oil company taxes failed by just 1,154 votes.¹³³ The \$38,000 investment by a company that netted just over \$4 billion in 2012 paid off.¹³⁴

For candidates used to modest budgets and low-key campaigning, dark money can prove an unfair and expensive obstacle, possibly discouraging potential candidates from deciding to compete. “Candidates have less control over their own races,” said Herstam, the Arizona lobbyist and former state legislator, because of unaccountable, unlimited special interest advertising.¹³⁵ “Legislative and state candidates now realize that more money is likely to be infused in their campaigns by outside expenditures than by their actual campaigns, and unfortunately the majority is funded by dark money.”¹³⁶

In the traditionally low-cost, low-information city council elections of Mountain View, California, candidates recalled, relatively big spending by a secretive group in 2014 had a significant impact. The folksy-sounding Neighborhood Empowerment Coalition (NEC) was the biggest spender in the election at \$83,000, spending more than half of what all nine candidates spent, combined.¹³⁷ Driving issues in the contest included land use and rent control.¹³⁸ The NEC described itself as “a coalition of community members interested in collaborative decision making.”¹³⁹ Only after the election did the public learn, from NEC’s untimely disclosure filings, that the NEC represented not local residents, as the “neighborhood” in its name might suggest, but rather was funded by the state branch PAC of the nation’s largest property owners’ association.¹⁴⁰

Candidates were unsettled by the size and secrecy of NEC’s spending. “What makes Mountain View distinct,” said City Councilmember Lenny Siegel, “is how inexpensive our campaigns are.”¹⁴¹ Costs typically maxed out at \$22,000, he said, and candidates campaigned by participating in “public forums, and knocking on doors.” But, shortly before Election Day, NEC began to inundate voters with mailers supporting three candidates, not mentioning rent control.

The added boost to name recognition alone for the NEC-backed candidates was “a big deal,” said Greg Unangst, who ran unsuccessfully for a council seat.¹⁴² “In a community like this, most people are hardworking and not paying very much attention,” he said. Two of the three candidates the NEC supported won.¹⁴³ “The money [the NEC] spent was effective,” Unangst said. In spite of substantial constituent support for rent control, the newly composed city council declined to pursue it.¹⁴⁴

The flood of dark money into once low-cost elections has discouraged some otherwise interested candidates from running. Last year a 15-year veteran of the school board in Sarasota County, Florida, announced that he would not run for re-election because of the unprecedentedly large sums involved in the previous year’s contest.¹⁴⁵ In 2014 a PAC called Citizens Against Taxation, promoting a pro-charter schools candidate, had raised \$278,000, though state records do not specify how much it spent on the race.¹⁴⁶ One contributor was an out-of-state limited liability company that gave \$45,000, according to news reports.¹⁴⁷ Citizens Against Taxation donated \$10,000 to another group, called Sarasota Citizens for Our Schools, that supported the pro-charter candidate.¹⁴⁸ A third group, the nonprofit Florida Federation for Children, which spent nearly \$1.3 million in various state elections, also advertised on behalf of that candidate.¹⁴⁹ The four competitors for one seat spent more than \$135,000 in total.¹⁵⁰

Explaining his decision not to run for re-election in 2016, board veteran Frank Kovach cited the influx of outside money into the 2014 contest, telling reporters that the process had been “corrupted by cash.”¹⁵¹ “That’s not the way school board races have been,” he said.¹⁵² “It has always been closest-to-the-people kind of races, where you build support financially and otherwise by word of mouth and reputation. Historically for school board races, if you raised \$10,000 or \$12,000, that was a well-funded school board race. Now all of a sudden you need \$100,000 to run for school board.”¹⁵³

Oklahoma-based political consultant Jennifer Carter said that dark money has changed the nature of state campaigns. In 2010 she advised a successful campaign for state schools superintendent in a race that saw no dark money. Four years later, \$195,000 in outside spending by a nonprofit called

Oklahomans for Public School Excellence — the sole outside spender — tipped the balance, she believes, against her candidate.¹⁵⁴ “When thinking about your strategy” these days, she said, “you have to budget for the very real possibility that dark money will be spent in your campaign.”¹⁵⁵ The lack of accountability, more than the amounts, is what troubles her. She said she opposes limits on political money, “but I do believe it is important for people to know who is speaking.”¹⁵⁶

The challenge of competing with deep-pocketed anonymous spenders may also be discouraging smaller groups from pursuing policy change through a type of ballot measure initiated by gathering voter signatures.¹⁵⁷ So-called citizens’ initiatives can be costly and complex to get on the ballot, let alone sustain against opponents with far greater resources. In Florida, proponents of a renewable-energy initiative this year got cold feet once the opposition received millions of dollars from non-disclosing nonprofits as well as power companies. “The fact that the utility companies spent \$7 million to stop our initiative scared some of our donors,” Steven Smith, chair of the Floridians for Solar Choice ballot committee, told Bloomberg News. “They may spend \$30 million to block it if we got on the ballot,” he said.¹⁵⁸

Even when candidates win, the threat of dark money may influence policy making once the candidate is in office. “I believe far too many Republican elected officials are now intimidated by the possibility of dark money-backed candidates running against them in their primaries,” said Herstam, the Arizona-based lobbyist and former lawmaker.¹⁵⁹ “That has a very bad effect on public policy making in our state. Special interests that make use of dark money in our political campaigns now have an advantage in the state capital.”¹⁶⁰

Whether or not elected officials are actually influenced by secretive special interests, it is a problem if the public perceives that they are, according to Robert Burns, a member of the Arizona public utilities commission where elections saw a \$3.2 million increase in dark money between 2006 and 2014 after a policy shift toward renewable energy. In a November 2015 public letter to the utility company reported to be behind much of the dark money, Burns criticized the company’s refusal to disclose its political giving. “[T]he public appears to look upon the Commission with suspicion and mistrust because of your alleged campaign contributions,” he wrote.¹⁶¹ “I understand that you have an interest in supporting candidates who may agree with your views. However, in my opinion, your support for any particular candidate should be open and transparent. Your unwillingness to disclose this information leads to a variety of unfortunate perceptions.”¹⁶²

D. Disclosure Can Make a Difference

It’s not just the relative ease of market-domination by unaccountable interests that is troubling, but also that the anonymity breeds a particularly troubling and effective type of advertising. According to candidates, political consultants, and social science research, it matters whether an election message can be tied to the real messenger.

With dark money ads, “donors get the political benefit of a hit piece, while still protecting their identity,” said Andy Billig, a Washington state senator who recently introduced legislation to reduce the practice of funneling donations through multiple layers of groups.¹⁶³

Anonymous attack ads are effective, social science research shows, precisely because viewers have little information to evaluate besides the content of the ad. When viewers learn more about an ad's sponsor—for instance, that it's an out-of-state group or a group that does not report its donors—they may become not only more skeptical about the ad's message but also more critical of the ad's intended beneficiary.¹⁶⁴

One political consultant, who advises state candidates in the South and has strategized ad campaigns using both transparent and non-disclosing entities, agreed that it is more effective to advertise through non-disclosing groups. When he used super PACs, which had to disclose their donors, “people would try to label our group as special interests and delegitimize us based on that,” he said.¹⁶⁵ “With a 501(c)(4), critics don't know. They have an idea they can attack, but their claims [of special interests] are kind of baseless,” he said, because there is no public record of who funds 501(c)(4) nonprofits, also known as social welfare groups. Not a fan of disclosure laws, the consultant urged that anonymity is important for business interests that want to engage in politics to advance their goals but “don't want to see their business affected because they are going up against someone in power.”

Ankney, the Republican state senator from Montana, disagrees that businesses' fear of exposure justifies secrecy in election spending. “The voters need to know where this money is coming from, and then they need to know what kind of agenda is being pushed. With this dark money, it's damn sure not an agenda being supported by people in the district,” he said.¹⁶⁶ “It's big money trying to rally their troops to get legislation passed that don't have a damn thing to do with the ranchers, the small businessmen, the people of this state,” he added. In Montana, critics of dark money have claimed the biggest spending flows from out-of-state businesses drawn to the state's rich natural resources.¹⁶⁷

On occasion a secretive spender actually has been compelled to disclose its backers in advance of Election Day, and the information appeared to matter to voters. Relatedly, when special interests have launched ad blitzes transparently, disclosing exactly who was backing the ads, voters were unpersuaded by the messages even though they far outnumbered any ads by the opposition. Instances where sponsorship information appeared to matter to voters include:

Idaho Education Ballot Measure

In 2012 Idaho voters faced a ballot measure to expand the online component of the state's high school education requirements. A social welfare nonprofit called Education Voters of Idaho spent heavily to promote the expansion, but the source of its money was a mystery.¹⁶⁸ One week before Election Day, acting on a complaint from Republican Secretary of State Ben Ysursa, an Idaho court ordered the nonprofit to disclose its donors.¹⁶⁹ The disclosure revealed a number of nationally known wealthy and out-of-state donors who did not appear to live up to the group's name. It also revealed that Education Voters of Idaho's biggest funder was an investor who had previously profited from online education services.¹⁷⁰ News outlets spread the word.

In ordering the disclosure Judge Michael Wetherell wrote, “The voters have a right to the most full, most accurate information they can get in spite of money obstacles placed in their way by those who would prefer to hide behind catchy, vague names.”¹⁷¹ Invoking an unusual state sunshine law, he continued, “The fact that the federal disclosure laws, apparently by omission,

create a ‘loophole’ as to reporting requirements for [social welfare nonprofits] through which it appears truckloads of millions of dollars drive through, does not bind either the voters of Idaho or their legislature.”¹⁷² Ultimately, Idahoans voted against putting more public education dollars into online systems.¹⁷³

California Ballot Measures to Raise Taxes and Limit Union Fundraising

A high-profile investigation by California’s elections agency, beginning in 2012, exposed a web of dark money groups that had used shell organizations to try to dodge the state’s unusually strong disclosure requirements for millions in advertising about two statewide ballot measures.¹⁷⁴ The revelation and the great publicity it generated came on the eve of the election, in time for voters to react.

Just weeks before the election, a California group called the Small Business Action Committee PAC had received \$11 million from an undisclosed source.¹⁷⁵ The group issued ads warning against Proposition 30, which sought to raise personal income and sales taxes, and supporting Proposition 32, which sought to limit union fundraising through automatic payroll deductions.¹⁷⁶ (Ironically one of the group’s ads said that Prop 32 promised “real tough campaign finance reform, no loopholes, no exceptions.”)¹⁷⁷ A watchdog group, California Common Cause, complained about the PAC’s lack of donor disclosure, prompting the investigation.¹⁷⁸ The probe revealed that the \$11 million contribution, the largest anonymous donation in California campaign history, came from the Koch brothers-backed Arizona nonprofit, Americans for Responsible Leadership.¹⁷⁹ But the trail didn’t end there.

Forced by a court order, Americans for Responsible Leadership disclosed that its funding for the \$11 million contribution to the California PAC had come through two other nonprofit organizations: from the Center to Protect Patient Rights, which in turn had received funds from the Virginia-based trade association Americans for Job Security.¹⁸⁰ Forking off into another trail, Americans for Job Security had sent another \$7 million through the Center to Protect Patient Rights to the American Future Fund, an Iowa-based nonprofit, which then gave \$4 million to its California affiliate PAC to spend on the ballot contests, bringing the total dark money uncovered by the state to \$15 million.¹⁸¹ The investigation made headlines. Voters ultimately rejected these spenders’ messages, adopting the tax increase but nixing the limit on union fundraising.¹⁸²

Chevron in Richmond, California, Municipal Elections

In a cautionary tale brandished by corporate opponents of disclosure, the multinational giant Chevron spent more than \$3 million in transparent dollars attacking a slate of municipal candidates in 2014 — dwarfing combined spending by nine candidates by nearly 5 to 1 — only to see straight losses.¹⁸³ The election focused on Chevron’s compensation to the city of Richmond, California, after an August 2012 fire at its local refinery sent 15,000 residents to the hospital with respiratory problems.¹⁸⁴ Richmond’s largest employer and taxpayer, Chevron had spent generous sums in previous city elections, but the fire and officials’ responses raised the stakes.¹⁸⁵ Disparaging a settlement the company had struck with state and county prosecutors

in 2013 for \$2 million, Richmond officials went to court for more, alleging “years of neglect, lax oversight, and corporate indifference to necessary safety inspection and repairs” and a “corporate culture which places profits and executive pay over public safety.”¹⁸⁶ Chevron called the lawsuit “a waste of the city’s resources and yet another example of its failed leadership,” according to the *San Francisco Chronicle*.¹⁸⁷

Under California’s unusually robust disclosure laws, Chevron election spending was public knowledge.¹⁸⁸ It almost singlehandedly funded a trio of political committees that, in the weeks before Election Day, launched a blitz of television advertisements, billboards, and mailers, averaging roughly \$72 per registered voter.¹⁸⁹ But a state rule required each communication to bear a disclaimer ending with “major funding by Chevron,” among other transparency measures.¹⁹⁰ Reacting to the ad blitz, one voter told Al Jazeera America, “I not only think it turned off voters. I think it inspired voters to come out and take a stand against the attempt to buy our elections.”¹⁹¹

Voters rejected all of Chevron’s preferred candidates for mayor and city council in 2014.¹⁹² In *The Richmond Standard*, the company wrote, “Chevron has been fully transparent regarding our participation in this election As the city’s largest employer and with such a large investment in this city, Chevron chose to participate in the election to make sure its voice was heard, and to provide the resources to help voters.”¹⁹³ Ultimately, as a Chevron spokesman told the *San Francisco Chronicle*, “The voters have spoken.”¹⁹⁴

California Ballot Measure to Restrict Regulation of Utilities

In 2010, Pacific Gas & Electric Co, a private utility company and California’s largest supplier, spent \$46 million on television, radio, print, and mailed ads promoting a ballot measure to limit the power of local governments to create public utilities.¹⁹⁵ The company’s role was out in the open, because California law requires that political ads contain a disclaimer identifying the sponsor.¹⁹⁶ Thus, one television ad claiming that “politicians want \$2.5 billion in public funds to pay for government-run electricity without voter approval” ended with the text: “Major funding from Pacific Gas and Electric Company.”¹⁹⁷ Though opponents raised just \$90,000 to counter the company’s \$46 million in ads, voters still rejected the ballot measure that would have protected the ads’ sponsor from competition and restricted consumer choice.¹⁹⁸

III. WHAT SHOULD BE DONE

Voters want more transparency. A November 2015 poll by the Associated Press showed 76 percent of respondents agreeing that “all groups that raise and spend unlimited money to support candidates should be required to publicly disclose their contributors,” with 87 percent believing that disclosure would be at least somewhat effective at reducing the influence of money in politics.¹⁹⁹ Moreover, even while it has steadily dismantled other campaign finance laws, the Supreme Court has consistently upheld disclosure measures.²⁰⁰

Increasing transparency will not be easy. The sheer numbers and variety of vehicles for dark money will challenge the most robust rules and toughest enforcer. As long as artificial entities enjoy unlimited fundraising and spending power under the law, anonymous political advertising will continue to pose a significant risk of misleading voters, unfairly attacking and even discouraging candidates, and, whether as carrot or stick, unduly influencing the decisions of elected representatives. But while many work toward achieving a course correction at the Supreme Court, certain reforms are likely to make a measurable difference in achieving transparency.

Recently, a growing number of jurisdictions have shown that it is possible to take concrete steps against dark money. When it comes to reform, the very scale that enables dark money to have an outsize effect at the state level can also be an asset, enabling relatively quick action compared to at the federal level. Jonathan Motl, Montana’s top enforcer of campaign finance laws as its commissioner of political practices, pointed out that dark money was able to have a “profound effect” in the state because of its relatively small political arena.²⁰¹ “But that’s also why we’re able to take quick action” to enact a legislative response, he said. In 2015, a bipartisan coalition of Montana legislators enacted a sweeping set of transparency laws, with members of both major parties disgusted by the influx of out-of-state dark money into primaries and general elections in 2012 and 2014.²⁰² Even a politically much larger state, California, has shown that strong disclosure laws and vigorous enforcement can result in remarkably low amounts of dark money, as our analysis of spending data in Section One indicated.

Our review of the major loopholes and recent efforts to close them yields a clear set of recommendations for reasonably and effectively improving transparency. In general, most longstanding regimes require disclosure of donors only by registered political committees or in other limited circumstances that minimally sophisticated donors and spenders can too easily dodge. This approach fails to capture how outside spending actually occurs in the post-*Citizens United* era. A modern and more effective approach should do the following:

Close loopholes that allow nonprofits to keep donors secret even when they spend money on politics.

- **Require disclosure by all groups that spend a substantial amount of money on politics.**

Currently the sources of huge swaths of political spending can remain anonymous because most jurisdictions require disclosure of all donors only for groups that register with the government

as political committees, which typically is required only if a group's primary purpose is deemed to be political.²⁰³ Other groups can avoid disclosure by claiming to have another primary purpose, such as to promote social welfare, even as they take and spend sizeable sums for electoral advocacy.

Two states recently enacted reforms to close this loophole. Changes in California and Montana recognize that groups may give or spend substantial amounts of money for election advertising, even if that's not their primary purpose, and that the public should know as much about these groups' political funding as about full-blown political committees'.²⁰⁴ Both states' laws apply explicitly to the types of nonprofit groups — social welfare organizations and trade associations — that are notorious conduits for anonymous electioneering.²⁰⁵

- **Require disclosure of both express advocacy ads and issue ads that mention candidates.**

Fifteen states require outside spenders to disclose only their spending on “express advocacy” communications — ads that specifically urge their audience to vote for or against a candidate.²⁰⁶ But this narrow category of ads encompasses only a fraction of independent spending. More common are so-called electioneering communications, or issue ads that attack or praise candidates in the guise of addressing an issue during election season but stop short of express advocacy. In these states, advertisers can easily dodge disclosure simply by avoiding the use of certain words. Moreover, some states require disclosure only of the fact that an entity *spent* on an election-related ad, no matter how explicitly political, not of where the entity got the money to spend.²⁰⁷

Federal law, recognizing the reality of election-season issue ads, requires advertisers to disclose spending and funding for any ad that names a candidate during election season — 60 days before a general election and 30 days before a primary election — and targets potential voters.²⁰⁸ Compliance with the donor disclosure requirement, however, is minimal, because of a loophole in the current interpretation of the law.²⁰⁹ A pending bill would extend the disclosure period to the entire year of an election.²¹⁰ It will be crucial to identify a period long enough to capture most communications intended to influence an election, but not so long as to capture other issue advocacy unconnected to an upcoming election.

- **Require disclosure of donors to political spending even if they don't “earmark” their contributions.**

Delaware and Montana recently embraced the federal model and now require outside spenders to disclose funding sources for issue ads that are actually electioneering communications.²¹¹ Delaware now requires disclosure of all donors to groups that buy these types of ads.²¹² Montana's law is more limited and requires disclosure only of donors who earmark their contributions for the electioneering ad in question, an approach that some states and to some extent the federal government already follow.²¹³

Requiring disclosure only of earmarked contributions poses some risk of evasion, by spenders or donors who take care to keep fundraising solicitations and contributions unspecified while still intending the money for election ads. In 2014, California enacted a novel approach to closing this potential loophole. The reform requires a spender to disclose enough contributions to account for all of its political advertising in a given cycle, even if the spender claims that not all the contributors gave specifically for those ads. The spender cannot go back in time and disclose long-ago contributors — which could help to conceal the true interests behind currently relevant ads — but rather must report the contributions made closest in time to the ads in question.²¹⁴

Ensure that voters and regulators know who is really behind the spending.

- **Extend disclosure to organizations that donate to spender organizations.**

Often when a transparent spender such as a PAC discloses its donors, a substantial amount of reported contributions come from entities that themselves received donations but do not have to disclose their donors. The spender is able to appear transparent, but voters cannot know the true source of the money spent. Campaign finance reformers sometimes refer to this problem as the “Russian nesting doll” problem — because the identity of the original donor may be nested within multiple organizations — or as the “covered transfer” problem, to describe funds raised by one organization but passed on for election spending to another organization.

States should require disclosure of the donors underlying these so-called “covered transfers.” Under California’s 2014 law, for example, even nonprofits must disclose the donors underlying any covered transfers to organizations that engage in outside spending.²¹⁵ A pending bill in Missouri would require not only outside spenders to disclose their donors, but also require the same disclosure of donors to that spender, donors to the first-level donor, and donors to the second-level donor.²¹⁶ A bill introduced in Washington state attempts to limit covered transfers in the first place, by prohibiting a political committee from receiving more than 70 percent of its funds from any other political committee.²¹⁷

To be sure, even if multiple layers of organizations must disclose their donors, voters may still have a tough time piercing all those layers to identify the original source of the money. This is what we have called the gray money problem. One solution would be a requirement that the outside spender report all of the lower layers of contributions in its own filings — putting the onus on the spender, rather than on the general public. Connecticut, for example, requires a spender to list the names of its own contributors, as well as the five biggest contributors to any of its donors that themselves receive covered transfers.²¹⁸ California requires outside spenders to list the top two donors who gave at least \$50,000.²¹⁹ In any case, election ad funding that is ultimately disclosed, even several layers down, is better than funding that remains secret.

- **Require disclosure of the people in charge of opaque spending entities.**

Campaign finance disclosures often list artificial entities — nonprofit corporations or limited liability companies, for instance — as spenders or contributors. There is no requirement that the names of these entities reflect their actual purpose or interests, and many use generic or even misleading names that obscure the nature of their funding. The widespread use of artificial entities to spend and donate election ad money risks robbing the public of any meaningful benefit from disclosure laws.

Some states and localities are already addressing this problem. Delaware’s new law requires entity contributors to provide “one responsible party” for the entity.²²⁰ Similarly, 2014 amendments to the New York City charter require that entities contributing to organizations engaging in outside spending disclose “at least one individual who exercises control over the activities of such contributing entity controlling party.”²²¹ Such reforms should make it easier for voters, regulators, journalists, and other members of the public to know who is really funding a particular ad.

Require disclosure before Election Day.

Some states’ disclosure schedules allow significant gaps between campaign spending and reporting, in some cases leaving the sources of major election spending undisclosed until just before or even well *after* voters have cast their ballots.²²² Belated disclosures, though better for accountability than no disclosure at all, risk depriving voters of crucial information about who is seeking to influence them in time for voters to act on that information.

The new disclosure laws in Montana and Delaware require additional reporting before an election, including more frequent reporting by groups that sponsor election ads even if their primary purpose is not political.²²³ Both states also extended the pre-election period during which accelerated reporting of large expenditures is required.²²⁴ A pending federal bill seeks to make all outside spenders, including super PACs and politically active nonprofit groups, disclose their major donors more frequently as their spending increases, rather than on a fixed schedule.²²⁵

States can also require spenders to disclose their top contributors in their advertisements themselves, informing voters in real time. Washington state requires political advertisers to identify their top five contributors in either a text or spoken disclaimer.²²⁶ Connecticut has a similar requirement and further requires that if any of the donors listed in that disclaimer are recipients of covered transfers, the underlying donors making those transfers must be listed in the spender’s filings.²²⁷

Include reasonable accommodations that ensure disclosure rules are not overly burdensome.

The goals of disclosure are to deter corruption and inform the voting public, not to chill political speech. Donors and spenders should not have to face unduly burdensome requirements. Yet this year in Arizona anti-disclosure voices took any legitimate concerns to the extreme in gutting the state’s law to exempt most nonprofit groups from state disclosure requirements, seemingly ignoring that

transparency has long been a part of American democracy.²²⁸ As the late Justice Antonin Scalia wrote, agreeing in a 2010 decision to uphold disclosure of signatures on a voters' petition to create a ballot measure, "[R]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."²²⁹ Well-crafted rules can ensure meaningful disclosure of big money without sacrificing political speech or legitimate privacy needs. Potential accommodations include:

- **Set reasonable monetary thresholds.**

In some cases, extensive disclosure requirements may risk hindering participation by some spenders. Ad hoc community groups, for instance, may lack the resources or expertise to readily comply, and potential small donors may be discouraged by the possibility of outside consequences — for instance, adverse action by a disapproving employer — for modest contributions.²³⁰ Moreover, small contributions and expenditures do not raise the risks of corruption or distorting influence that disclosure laws ideally serve to mitigate.²³¹ Setting reasonable dollar thresholds at which spenders must disclose, and at which donors must be made public, balances the need to achieve transparency at levels of spending that pose a risk to democracy with the desire to ease political participation for under-resourced speakers.

The level of a reasonable threshold will, of course, vary by jurisdiction. In Illinois, entities need to report their outside spending only if they spend at least \$3,000 in a 12-month period.²³² And outside spenders in Georgia do not have to disclose donors of \$1,000 or less in their pre-election reports.²³³ Both of these thresholds are significantly higher than the \$250 threshold for disclosure in several other states, yet likely do not increase the risk to the political process.²³⁴ While \$3,000 and \$1,000 thresholds may be appropriate for statewide races in Illinois and Georgia, they may be too high to capture even major spending in local races in many states.

- **Permit reasonable exemptions.**

For certain vulnerable participants, the publicity associated with disclosure as a donor could risk real harm. Survivors of domestic violence and similarly situated individuals may have a reasonable basis to fear the standard disclosure of name, address, and employer for political donors. Disclosure is also not appropriate when there is evidence that past disclosure exposed a group's members to severe retaliation such as "loss of employment, threat of physical coercion, and other manifestations of public hostility," as with the National Association for the Advancement of Colored People in the Jim Crow South.²³⁵ Carefully drawn exemptions can protect these individuals' demonstrated need for privacy without meaningfully reducing the anticorruption or informational value of disclosure by others. Thirty-five states currently provide confidentiality-protecting measures for survivors of domestic violence who would otherwise be expected to provide their home address to government agencies.²³⁶ These programs apply to applications for voter registration, drivers' licenses, and campaign finance disclosure.²³⁷

- **Make other reasonable accommodations.**

States should avoid capturing non-political spending in their campaign finance disclosure laws. As under California's recent reforms, individual donors should be able to expressly prohibit a recipient organization from using their money for political purposes and thus avoid having to be disclosed.²³⁸ Jurisdictions can also enable spenders whose primary purpose is not political to establish separate accounts exclusively for political spending, subjecting only those funds to disclosure. The DISCLOSE Act of 2010 called these Campaign-Related Activity Accounts, and as of 2013 Connecticut allows for the creation of dedicated independent expenditure accounts.²³⁹ For multipurpose organizations that do not separate their political spending, disclosure laws should still prioritize publicizing the information that is most valuable to voters. For instance, California requires nonprofits that have spent on a particular election ad to disclose donors who gave closest to the time of the spending, as these donors are most likely to have given to support that political spending.²⁴⁰ This approach absolves groups with significant non-political income and expenses from having to reveal all of their financial activity.

- **Make penalties proportional.**

Any penalty for failure to disclose should fit the severity of the violation. Small or technical lapses should not face onerous adjudication procedures or big fines, and any penalties should be predictable.²⁴¹ Recognizing the need for proportionality, in 2000 the Federal Election Commission created a separate enforcement track for minor violations such as failure to disclose small-dollar campaign finance activities. Previously, these matters had gone through the same, extensive enforcement process as more serious violations.²⁴² Proportional and predictable compliance enforcement can minimize any burdens on speech while still deterring intentional violations.

CONCLUSION: WHERE TO LOOK FOR DARK MONEY IN FUTURE ELECTIONS

The problem is not that dark money will flood every state and local election or even most. Rather, it's that dark money is most likely to turn up where the stakes are particularly valuable, in amounts that could make all the difference in persuading voters. Our review offers a number of indicators for when voters may see significant dark money and for figuring out who may be behind it.

Elections for offices that hold specific regulatory or enforcement powers with economic consequences are likely targets for dark money. Those elections may be for utilities regulator or school official or state judge. But they may also be for legislative seats in states or towns where the pressing questions of the day affect specific economic interests, such as whether to speed up development of natural resources or sue oil companies for environmental damage.

With many areas considered to be "safe" in terms of voter partisanship, the real contest may be at the primary stage. Motl, the Montana elections regulator, said that in his state, "The traditional place for undisclosed spending has been in Republican primary elections in which a more conservative candidate gets outside support" — one reason why the state's 2015 disclosure reform law received bipartisan support. Similarly, voters in the utilities commission elections in Arizona, a solidly Republican state, have seen most of the millions in dark money ads spent before the primary.

Ballot measure elections with economic consequences for deep-pocketed interests are also likely to draw dark money. Observers agree that it is too early to know exactly which measures voters will see this year, as ballot questions are not finalized until later. But Thomas Collins, executive director of the Arizona Citizens Clean Elections Commission, says measures having to do with the minimum wage and political spending disclosure are already on the radar in his state. "The spectrum suggests that there will be a lot of money spent and not a lot of it will be disclosed," Collins said.

As for where the dark money will come from, the good guesses can sometimes be obvious. It can be as simple as identifying who holds the big ownership interests in line to be affected: The chemicals manufacturer and the state ballot measure on collective bargaining where the manufacturer is headquartered. The oil company and the local ballot measure to raise taxes on oil companies. The gas company and the local elections in a state where the company stands accused by local officials of damaging the environment.

It also makes sense to wonder who or what is behind the biggest outside spending in a given contest — behind the TV ad blitzes and mountains of mailers — as it is simply so easy for well-resourced interests to dominate advertising in smaller contests through benignly-named entities. Moreover, with more dark money appearing in the guise of seemingly transparent PAC spending, via donations funneled through multiple groups, it is worth scrutinizing even PACs for their actual sponsors. The oil company fighting the local tax measure in Rialto disguised its outsized spending on mailers through a shell PAC claiming to care about education.

Areas with weak disclosure laws and enforcement are open country for dark money spenders. Collins, the Arizona official, said that the state's enormous spike in dark money in 2014 in part reflected spenders'

taking advantage of regulatory confusion following legislative efforts to cut back state oversight of nonprofits' political activity. Those efforts also caused "trepidation on the part of those responsible for enforcement," he said. By contrast, California, a robust disclosure law and enforcement state, saw Chevron spend \$3 million in a small municipal election, but *transparently*.

To be sure, strong rules and enforcement are not sufficient to end the tide of unlimited, unaccountable spending in an era where artificial entities are free to raise and spend whatever they like on politics. A fundamental change in campaign finance law, based on a pro-democracy interpretation of the Constitution, is required. But smart rules and real consequences that incentivize compliance can make a real difference in providing voters information that matters to their decisions and in keeping elected officials accountable to the public.

Where disclosures laws are weak and "as long as *Citizens United* isn't overturned," said Herstam, the former Arizona legislator, "the wealthy donors further solidify their power and maintain their corrupt influence for years to come."

APPENDIX: METHODOLOGY

Below we explain our approach to the research and conclusions reflected in this report.

For the accounts of particular candidate or ballot measure contests, we drew from a set we compiled of approximately 50 instances since 2010 where dark money could be linked to a particular type of, or an exact, sponsor. We began with a comprehensive scan of news databases for relevant accounts, finding most mentions in reporting by state or local news outlets. We further researched many of these instances, through review of campaign finance, tax, and/or court records where possible and through interviews of stakeholders.

For the analysis of outside election spending in six states from 2006 through 2014, we used data gathered by the National Institute for Money in State Politics (NIMSP), a nonpartisan research organization that maintains a verifiable database of campaign finance spending.²⁴³ This analysis would not have been possible without NIMSP's efforts and expertise. We also consulted hundreds of state campaign finance filings, state corporate registration forms, federal tax returns, and federal 527 disclosure reports.²⁴⁴

We selected the first six states in alphabetical order of nine that (1) held statewide elections in 2006, 2010 (the year of the *Citizens United* decision) and 2014; (2) supplied verifiable data compiled by NIMSP; and (3) tracked outside spending (also known as independent expenditures) on both political ads expressly calling for a candidate's election or defeat and also ads mentioning candidates in connection with issues.²⁴⁵ States that do not track candidate-related issue advertising, also known as electioneering communications, ignore an enormous amount of real-world spending and thus were not worth selecting for review.²⁴⁶ Analyzing the tens of thousands of disclosure reports by spenders and their contributors in all nine states was not feasible in the time we had. Thus, we stopped at six states: Alaska, Arizona, California, Colorado, Maine, and Massachusetts.

Of course the significance of our analysis is limited by the small though objectively-selected sample. But it is also worth noting that the data we reviewed for our empirical analysis excluded ballot measure spending, keeping our analysis in line with federal analyses where there are no ballot measures but likely excluding huge amounts of dark money based on the anecdotal evidence we gathered. Moreover, our calculations risked *undercounting* amounts of dark money, as will be further discussed below. Overall our findings, all adjusted for inflation, provide a conservative picture of any increases in dark money in the states.

In each state and election we analyzed, we counted spending by individuals, for-profit businesses, and labor organizations as transparent, because the interests behind these entities are usually apparent and because labor organizations are subject to extensive and public donor disclosure requirements by the U.S. Department of Labor.²⁴⁷ In each state except California, we counted most spending by 501(c)(3), (4) and (6) groups as dark, because in the other five states these entities are not legally required to disclose their donors, and we have found that they rarely do so voluntarily. If a state required normally non-disclosing nonprofits nevertheless to disclose any donor who contributed specifically for the purpose of supporting an election-related communication, and a nonprofit actually disclosed a donor under that requirement, we did not treat the relevant spending as dark but rather evaluated its transparency on its own merits.²⁴⁸

Seeking to understand whether disclosures by transparent outside spenders such as political action committees provided the public meaningful information about the source of funding, we also analyzed for transparency all but the smallest donors to each PAC that spent in an election cycle.²⁴⁹ As with our classifications of reported spending, we classified as “transparent” any contributions to these PACs by individuals, for-profit businesses, or labor organizations. We classified as “dark” any contributions to these PACs by donors, such as 501(c)(4) nonprofits, that were not themselves subject to disclosure. We classified as “gray” any contributions to these PACs by donors that themselves received contributions and were subject to disclosure, making it perhaps possible but not at all straightforward to identify the ultimate source of the money spent. Most often, this is money transferred from one PAC to another PAC. Whenever the total contributions to a PAC we analyzed exceeded the total spending reported by that PAC for a given cycle, we applied the proportions of transparent, dark, and/or gray contributions to the total amount of spending.

Our approach to analyzing the transparency of outside spending closely follows that of several other nonpartisan organizations that have undertaken significant efforts to quantify dark money at the federal level, including the Center for Responsive Politics and the Sunlight Foundation.²⁵⁰ We deviated from these organizations’ approaches in a few respects, as explained below, both to address particular challenges of studying state-level election spending and to provide a more detailed picture of transparency across the country.

- Analyses of federal spending have distinguished businesses with a genuine commercial purpose from so-called “shells,” organized as for-profit companies but whose real purpose is to engage in political activity. Our analysis considers all businesses to be transparent, because, unlike with the smaller set of spenders at the federal level, it was not feasible to individually investigate the purpose of the many thousands of business spenders in our data set. Had we done so, the amount of dark money we uncovered likely would have been much greater.
- Accounts of federal spending have also investigated whether a politically active group that is not legally required to disclose has done so voluntarily. We did not try to account for any voluntary disclosures by such groups, in part because the number of nonprofits across our six states would not have been feasible to investigate individually. Voluntary disclosure is also not one of our recommendations for ensuring election spending transparency, as there is no reliable way to ensure that it is accurate. Moreover, according to the Center for Responsive Politics, voluntary disclosure is exceedingly rare.²⁵¹ We believe that accounting for voluntary disclosure would have had little to no impact on our findings.
- For the most part federal spending studies have not investigated spenders’ disclosures to assess whether they provided true transparency or rather disclosed still other entities that themselves took money from donors, raising the problem of gray money.²⁵²

ENDNOTES

- 1 *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/disclosure.php> (last visited May 17, 2016).
- 2 Telephone Interview with Chris Herstam, Lobbyist and former State Senator, Ariz. (May 9, 2016).
- 3 For further details about our selections and calculations, see this report's Appendix: Methodology.
- 4 Theodoric Meyer, *In Wisconsin, Dark Money Got a Mining Company What It Wanted*, PROPUBLICA (Oct. 14, 2014), <http://www.propublica.org/article/in-wisconsin-dark-money-got-a-mining-company-what-it-wanted>; Nicholas Confessore, *A Campaign Inquiry in Utah Is the Watchdogs' Worst Case*, N.Y. TIMES, Mar. 18, 2014, *available at* <http://www.nytimes.com/2014/03/18/us/politics/a-campaign-inquiry-in-utah-is-the-watchdogs-worst-case.html>; Seattle Times Staff, *AG Says More Campaign Money Hidden in I-522 Food-Label Fight*, SEATTLE TIMES, Nov. 20, 2013, *available at* <http://www.seattletimes.com/seattle-news/ag-says-more-campaign-money-hidden-in-i-522-food-label-fight/>.
- 5 In 2013, the Koch-affiliated nonprofit Americans for Prosperity invested a self-estimated \$350,000 to successfully back four candidates for county school board in a Denver suburb—outspending all eight candidates by more than \$130,000. In one 2012 Utah state senate primary, secretive spending exceeded the two candidates' combined spending by \$15,000, accounting for almost 60 percent of total election spending. Dark money spending outstripped candidate spending by more than \$360,000, on average, in a 2014 primary for Arizona's secretary of state. *See* Stephanie Simon, *Koch vs. Unions in Schools Race*, POLITICO (Nov. 2, 2013), <http://www.politico.com/story/2013/11/koch-group-unions-battle-over-colorado-schools-race-99252.html>; Robert Gehrke, *Lawmaker Says PAC Attacking Him is Hiding Donors*, SALT LAKE TRIBUNE, May 19, 2013, *available at* <http://www.sltrib.com/sltrib/politics/54142501-90/bill-daw-donors-government.html.csp>; *Public Search*, STATE OF UTAH FIN. DISCLOSURES, <http://disclosures.utah.gov/Search/PublicSearch> (search query, data, and calculations on file with the Brennan Center); Mary Jo Pitzl, *Arizona Free Enterprise Club Doles Out Big Money in Election Races*, ARIZ. REPUBLIC, Aug. 5, 2014, *available at* <http://www.azcentral.com/story/news/arizona/politics/2014/08/03/arizona-free-enterprise-money-election-season/13537793/>; *Campaign Finance & Reporting*, ARIZ. SEC'Y OF STATE, <http://www.azsos.gov/elections/campaign-finance-reporting> (search query, data, and calculations on file with the Brennan Center).
- 6 In the 2014 U.S. Senate elections, dark money groups had to lay out a minimum of \$33 million to outstrip combined candidate spending in a single race. *See* IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED* 13 (2015), <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>.
- 7 Phillips 66, No. 16/111 (Cal. Fair Political Practices Comm'n Mar. 17, 2016) (stipulation, decision, and order); UTAH HOUSE OF REPRESENTATIVES, *REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE* (2014), *available at* http://le.utah.gov/investigative/Final_Report_simple.pdf.
- 8 *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).
- 9 Brian Naylor, *One Reason To Apply For Tax-Exempt Status: Anonymity*, NPR (May 15, 2013), <http://www.npr.org/2013/05/15/184223558/one-reason-to-apply-for-tax-exempt-status-anonymity>.
- 10 *See* INTERNAL REVENUE SERV., FORM 990 SCHEDULE B – SCHEDULE OF CONTRIBUTORS 5 (2015), <https://www.irs.gov/pub/irs-pdf/f990ezb.pdf>. Moreover, organizations can alter the timing of disclosure by changing their fiscal year. *See* INTERNAL REVENUE SERV., *INSTRUCTIONS FOR FORM 990 – RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX* 5–6 (2015), <http://www.irs.gov/pub/irs-pdf/i990.pdf>.

- 11 See 26 U.S.C. § 501(c)(4); Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); I.R.S. Gen. Couns. Mem. 34233 (Dec. 3, 1969); Van Hollen v. IRS, Nos. 13-0732, 13-1276 (D.D.C. dismissed Dec. 5, 2013); Sarah Muller, “*Exclusively*” vs. “*Primarily*”: IRS Law a “Disaster Waiting to Happen”, MSNBC (May 23, 2013, updated Oct. 2, 2013), <http://www.msnbc.com/the-last-word/exclusively-vs>; *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/disclosure.php> (last visited May 17, 2016).
- 12 See, e.g., 11 C.F.R. § 100.22 (defining express advocacy as any communication using particular phrases arguing for the support or defeat of a particular candidate, or any communication that “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)”; 52 U.S.C. § 30104(c)(2)(C) (requiring disclosure of any donors contributing more than \$200 for the purpose of furthering an independent expenditure).
- 13 PETE QUIST, NAT’L INST. ON MONEY IN STATE POLITICS, SCORECARD: ESSENTIAL DISCLOSURE REQUIREMENTS FOR INDEPENDENT SPENDING (2014), *available at* <http://www.followthemoney.org/research/institute-reports/scorecard-essential-disclosure-requirements-for-independent-spending-2014/>.
- 14 See *Citizens United*, 558 U.S. at 369; *Speechnow.Org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). At the time of the *Citizens United* decision, 25 states already permitted unlimited independent spending by unions and corporations. Keith E. Hamm, Michael J. Malbin, Jaclyn J. Kettler & Brendan Glavin, *Independent Spending in State Elections: 2006-2010: Vertically Networked Political Parties Were the Real Story, Not Business*, 12 FORUM 305, 308 (2014).
- 15 All calculations have been adjusted for inflation. For further details, see Appendix: Methodology.
- 16 See *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/disclosure.php?range=tot> (last visited May 17, 2016).
- 17 See *Citizens United*, 558 U.S. at 369; *Speechnow.Org*, 599 F.3d at 686.
- 18 Of the six states where this report analyzes outside spending trends, four (Alaska, Arizona, Colorado and Massachusetts) banned independent spending by corporations and unions prior to *Citizens United*, while two (California and Maine) did not. See Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 336 n. 107 (2014). Alaska also prohibited unlimited contributions by individuals to political committees. See Alaska Pub. Offices Comm’n, Advisory Opinion AO 12-09-CD (June 6, 2012) (advising that contribution limits would no longer apply to groups spending only on independent expenditures), *available at* <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4781>. See also CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER CITIZENS UNITED: *THE STORY IN THE STATES* 5 (2014), [http://www.brennancenter.org/sites/default/files/publications/After Citizens United_Web_Final.pdf](http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf).
- 19 LAWRENCE NORDEN, BRENT FERGUSON & DOUGLAS KEITH, BRENNAN CTR. FOR JUSTICE, FIVE TO FOUR (2016), <https://www.brennancenter.org/publication/five-four>.
- 20 See *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/disclosure.php?range=tot> (last visited May 17, 2016).
- 21 See CAL. GOV’T CODE §§ 82013, 84200, 84211; CAL. CODE REGS. tit. 2, § 18215. See also Cal. Fair Political Practices Comm’n, Diane M. Fishburn Advice Letter No. A-06-075, at *4 (June 9, 2006) (detailing the reporting obligations these provisions placed on nonprofit organization).
- 22 See CAL. GOV’T CODE §§ 84222(e)(5).

- 23 Data and calculations on file with the Brennan Center.
- 24 The term “super PAC”—a PAC capable of unlimited fundraising and election spending as long as not coordinating with a candidate—emerged only after *Citizens United* and related decisions in 2010. See *Citizens United*, 558 at 369; *SpeechNow.Org*, 599 F.3d at 686; Dave Levinthal, *Genesis of a Super Name*, POLITICO (Jan. 10, 2012), <http://www.politico.com/story/2012/01/genesis-of-a-super-name-071285>. Yet some states had permitted the legal equivalent of super PACs before 2010. See ILL. CAMPAIGN FIN. REFORM TASK FORCE, INDEPENDENT EXPENDITURES AND ILLINOIS ELECTIONS 25 (2013), available at <http://www.elections.il.gov/downloads/campaigndisclosure/pdf/iereport3202013.pdf> (discussing the few states that had to change or clarify their provisions on contribution limits after *SpeechNow*); see also *supra* note 18 (discussing the effect, if any, of *Citizens United* in the six states we examined).
- 25 Data and calculations on file with the Brennan Center.
- 26 *Id.*
- 27 See CAL. GOV’T CODE §§ 82013, 84200, 84211; CAL. CODE REGS. tit. 2, § 18215.
- 28 Telephone Interview with Hyla Wagner, Gen. Counsel, Cal. Fair Political Practices Comm’n (May 13, 2016); see, e.g., CAL. GOV’T CODE § 89501 *et seq.*; CAL. CODE REGS. tit. 2, §§ 18450.1-18450.5; *Top 10 Contributor Lists*, CAL. FAIR POLITICAL PRACTICES COMM’N, <http://www.fppc.ca.gov/transparency/top-contributors.html> (last visited June 7, 2016).
- 29 Data and calculations on file with the Brennan Center.
- 30 Telephone Interview with Chris Herstam, Lobbyist and former State Senator, Ariz. (May 9, 2016).
- 31 NAT’L ASSOC. OF ATTORNEYS GENERAL, http://www.naag.org/naag/about_naag.php (last visited May 11, 2016).
- 32 *Treasurer*, BALLOTPEDIA, <https://ballotpedia.org/Treasurer> (last visited June 7, 2016).
- 33 Louis Jacobson, *Where Have All the Democratic Agriculture Commissioners Gone?*, GOVERNING (Feb. 26, 2016), <http://www.governing.com/topics/politics/gov-agriculture-commissioners.html>.
- 34 *Running for Statewide Office*, ARIZ. SEC’Y OF STATE, <http://www.azsos.gov/elections/running-office/running-statewide-office> (last visited May 12, 2016).
- 35 *Partisan vs. Nonpartisan Elections*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections>.
- 36 Jeff Adelson, *Louisiana Attorney General Moves to Take Over Coastal Lawsuits Filed by 3 Parishes Against Oil, Gas Firms*, ADVOCATE (Mar. 15, 2016), <http://theadvocate.com/news/neworleans/neworleansnews/15197922-133/louisiana-attorney-general-moves-to-take-over-coastal-lawsuits-filed-by-3-parishes-against-oil-gas-f>.
- 37 Telephone Interview with Anonymous, Political Consultant (April 21, 2016).
- 38 Paul Blumenthal, *Two of America’s Richest Men Secretly Tried To Sway Montana’s Judicial Elections*, HUFFINGTON POST (May 10, 2016), http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race_us_572b9f4ce4b016f378951c8f.
- 39 *Id.*

- 40 Nicholas Confessore, *A Campaign Inquiry in Utah Is the Watchdogs' Worst Case*, N.Y. TIMES, Mar. 18, 2014, *available at* <http://www.nytimes.com/2014/03/18/us/politics/a-campaign-inquiry-in-utah-is-the-watchdogs-worst-case.html>; Nick McClellan & Chris Kirk, *What are the Most Republican States?*, SLATE (Aug. 28, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/08/map_utah_wyoming_idaho_are_the_most_republican_states_.html.
- 41 UTAH HOUSE OF REPRESENTATIVES, REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE 2 (2014), *available at* http://le.utah.gov/investigative/Final_Report_simple.pdf; Robert Gehrke, *More Swallow Emails Recovered, Probe's Price Nears \$4M*, SALT LAKE TRIBUNE, Mar. 8, 2014, *available at* <http://www.sltrib.com/sltrib/news/57648883-78/swallow-sltrib-committee-attorney.html.csp>.
- 42 UTAH HOUSE OF REPRESENTATIVES, *supra* note 41, at 76-94.
- 43 *Id.* at 8-9, 69-70.
- 44 *Id.* at 71, 86.
- 45 *Id.* at 83-85.
- 46 Confessore, *supra* note 40; UTAH HOUSE OF REPRESENTATIVES, *supra* note 41, at 89-91.
- 47 Wendy Leonard, *Race for Utah's Attorney General Heats Up with Super PAC's Attack Ad*, DESERET NEWS, June 21, 2012, *available at* <http://www.deseretnews.com/article/765585091/Race-for-Utahs-attorney-general-heats-up-with-super-PACs-attack-ad.html?pg=all>.
- 48 *See Election Results*, UTAH LIEUTENANT GOVERNOR ELECTIONS, <http://elections.utah.gov/election-resources/election-results> (follow "2012 Primary Election" and "2012 General Election" hyperlinks).
- 49 UTAH HOUSE OF REPRESENTATIVES, *supra* note 41, at 2.
- 50 Jennifer Dobner, *Former Utah AG John Swallow Pleads Not Guilty in Corruption, Bribery Case*, SALT LAKE TRIBUNE, July 27, 2015, *available at* <http://www.sltrib.com/home/2754408-155/former-utah-ag-john-swallow-expected>.
- 51 UTAH HOUSE OF REPRESENTATIVES, *supra* note 41, at 3.
- 52 Dobner, *supra* note 50; Jennifer Dobner, *Utah Judge Cancels 2016 Public Corruption Trial for John Swallow*, SALT LAKE TRIBUNE, Feb. 17, 2016, *available at* <http://www.sltrib.com/home/3306452-155/utah-judge-cancels-2016-public-corruption/>.
- 53 Theodoric Meyer, *In Wisconsin, Dark Money Got a Mining Company What It Wanted*, PROPUBLICA (Oct. 14, 2014), *available at* <http://www.propublica.org/article/in-wisconsin-dark-money-got-a-mining-company-what-it-wanted>.
- 54 A.B. 426, 2011-12 Leg. (Wis. 2011), *available at* <http://docs.legis.wisconsin.gov/2011/proposals/AB426>; Ron Seely, *Mining Firm Lobbies Legislature to Shorten Permit Process*, WIS. STATE J., May 6, 2011, *available at* http://host.madison.com/news/local/environment/mining-firm-lobbies-legislature-to-shorten-permit-process/article_e5530920-7816-11e0-9b00-001cc4c03286.html.
- 55 *See* A.B. 426, 2011-12 Leg. (Wis. 2011), *available at* <http://docs.legis.wisconsin.gov/2011/proposals/ab426>; Meyer, *supra* note 53.
- 56 Meyer, *supra* note 53; *See* Wis. Mfrs. & Commerce Issues Mobilization Council, *Senate District 18 Jessica King - Jobs*, YOUTUBE (Sept. 7, 2013), *available at* <https://www.youtube.com/watch?v=RqjMqlRbvn4>; Jessica Opoien, *WMC's Anti-Jessica King Ad Features? A King Supporter*, THE OSHKOSH NORTHWESTERN, Oct. 25, 2012.

- 57 Meyer, *supra* note 53; *Supplemental Opposition to Plaintiffs' Motion for Preliminary Injunction*, PROPUBLICA, <https://www.propublica.org/documents/item/1311285-supplemental-opposition-to-plaintiffs-motion-for.html#document/p10/a181635>.
- 58 *County by County Report – General Election State Senate*, WIS. GOV'T ACCOUNTABILITY BD (Nov. 6, 2012), http://www.gab.wi.gov/sites/default/files/County%20by%20County_11.6.12%20Gen%20Election_State%20Senate.pdf.
- 59 *Wisconsin Senate Roll Call 2013-2014 Session, Senate Bill 1*, WIS. STATE LEG. (Feb. 27, 2013), <http://docs.legis.wisconsin.gov/2013/related/votes/senate/sv0041>.
- 60 *Wis. Right to Life v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014); Testimony of Kevin J. Kennedy, Director and General Counsel, Wis. Gov't Accountability Bd., to Senate Committee on Elections and Local Government and Assembly Committee on Campaigns and Elections Joint Informational Hearing (Mar. 24, 2015) *available at* http://www.gab.wi.gov/sites/default/files/publication/63/testimony_and_exhibits_joint_informational_heari_15501.pdf (reviewing the impact of a series of court cases, including *Citizens United*, that have “rendered the current campaign finance law wholly inadequate to the times” and recommending legislative action).
- 61 *Now for the Good News*, WIS. CLUB FOR GROWTH (Nov. 8, 2012), <https://wicfg.wordpress.com/2012/11/08/now-for-the-good-news/>.
- 62 *WMC IMC Ads Fight Back*, WIS. MFRS. & COMMERCE, <https://www.wmc.org/issues/advocacy/wmc-issues-mobilization-council-inc/> (last visited June 7, 2016) (formatting in original).
- 63 Ryan Randazzo, *Arizona Energy-Saving Program in Jeopardy*, ARIZ. REPUBLIC, Nov. 5, 2014, *available at* <http://www.azcentral.com/story/money/2014/11/05/arizona-energy-saving-programs-jeopardy/18572557/>; Ryan Randazzo, *Energy Efficiency Programs that Could be Cut Have Helped Thousands of Consumers*, ARIZ. REPUBLIC, Nov. 14, 2014, *available at* <http://www.azcentral.com/story/money/business/2014/11/14/energy-efficiency-programs-cut-helped-thousands-consumers/19036859/>.
- 64 Data and calculations on file with the Brennan Center.
- 65 *Id.*
- 66 Telephone Interview with Vernon Parker, Candidate, Ariz. Corp. Comm'n (July 6, 2015); Ryan Randazzo, *Little-Forese Team Wins Corp. Commission Republican Primary*, ARIZ. REPUBLIC, Aug. 26, 2014, *available at* <http://www.azcentral.com/story/money/business/2014/08/26/arizona-corporation-commission-primary-election-results/14575767/>.
- 67 Parker's critics have pointed to a 2008 investigation by the Small Business Administration (SBA) finding that Parker submitted misleading information about his then-status as a federal employee to get his consulting firm certified for a contracting program. Parker denies the allegations. The SBA's Office of Inspector General has since dismissed the allegation after new evidence verified Parker was working as a consultant to the U.S. Department of Agriculture, not as an employee. *See* Andrew Johnson, *PV Mayor's Consulting Firm Falsely Certified*, ARIZ. REPUBLIC, Jul. 23, 2008, *available at* <http://www.azcentral.com/community/scottsdale/articles/2008/07/23/20080723biz-parker0724-ON.html>; *see also* Andrew Johnson, *PV's Mayor to Continue SBA Battle*, ARIZ. REPUBLIC, Jan. 18, 2009, *available at* <http://archive.azcentral.com/arizonarepublic/business/articles/2009/01/18/20090118biz-parker0118.html#ixzz289u1Dg9d>; Telephone Interview with Vernon Parker, Candidate, Ariz. Corp. Comm'n (July 6, 2015); *QuickFacts, Paradise Valley Town, Arizona*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST120214/0452930> (last visited June 7, 2016); *2016 March Voter Registration*, ARIZ. SEC'Y OF STATE, <http://apps.azsos.gov/election/voterreg/2016-03-01.pdf> (last visited May 13, 2016).

- 68 Ryan Randazzo, *New Arizona Utility Regulators to Face First APS Case on Solar Rates*, ARIZ. REPUBLIC, Aug. 15, 2015, *available at* <http://www.azcentral.com/story/money/business/2015/08/16/new-arizona-utility-regulators-face-first-aps-case-solar-rates/31768739/>; Bill McKibben, *Power to the People*, NEW YORKER, June 29, 2015, *available at* <http://www.newyorker.com/magazine/2015/06/29/power-to-the-people>; David Purcell, Mark Chediak & Margaret Newkirk, *Shareholders Revolt Against Dark Money*, BLOOMBERG (May 14, 2015), *available at* <http://www.bloomberg.com/politics/articles/2015-05-14/shareholders-revolt-against-dark-money>.
- 69 Pete Aleshire, *Corporation Commission Candidate Blasts ‘Corrupt’ System*, PAYSON ROUNDUP, Apr. 29, 2016, *available at* <http://www.paysonroundup.com/news/2016/apr/30/corporation-commission-candidate-blasts-corrupt-sy/>.
- 70 *Id.*
- 71 Ryan Randazzo, *APS Refuses Request to Disclose Political Contributions*, ARIZ. REPUBLIC, Dec. 31, 2015, *available at* <http://www.azcentral.com/story/money/business/energy/2015/12/30/aps-refuses-request-disclose-political-contributions/78104254/>.
- 72 Mary Jo Pitzl, *Arizona Free Enterprise Club Doles Out Big Money in Election Races*, ARIZ. REPUBLIC, Aug. 5, 2014, *available at* <http://www.azcentral.com/story/news/arizona/politics/2014/08/03/arizona-free-enterprise-money-election-season/13537793/>; Lauren Gilger, *Fact Check: Dark Money Floods Normally Low-Profile Corporation Commission Race*, ABC 15 ARIZ., Oct. 27, 2014, *available at* <http://www.abc15.com/news/local-news/investigations/fact-check-dark-money-floods-normally-low-profile-corporation-commission-race>.
- 73 Letter from Robert L. Burns, Comm’r, Ariz. Corp. Comm’n, to Commissioners and Interested Stakeholders (Oct. 30, 2013), *available at* <http://images.edocket.azcc.gov/docketpdf/0000149190.pdf>; Letter from Thomas Loquvam, Counsel, Pinnacle West Capital Corp., to Robert L. Burns, Comm’r, Ariz. Corp. Comm’n (Nov. 6, 2013) *available at* <http://images.edocket.azcc.gov/docketpdf/0000149813.pdf>; Evan Wyloge, *Arizona Public Service: \$3.7 Million Spent on Metering Publicity*, ARIZ. CAPITOL TIMES, Nov. 7, 2013, *available at* <http://azcapitoltimes.com/news/2013/11/07/aps-3-7-million-spent-on-net-metering-publicity/>; Ryan Randazzo, *APS Seeks Higher Bills for New Solar Customers*, ARIZ. REPUBLIC, July 12, 2013, *available at* <http://archive.azcentral.com/business/consumer/articles/20130712aps-seeks-higher-bills-new-solar-customers.html>.
- 74 Robert Anglen & Ryan Randazzo, *2 Utilities’ Cash Went to 3 ACC Campaigns*, ARIZ. REPUBLIC, Nov. 5, 2013, *available at* <http://archive.azcentral.com/business/consumer/articles/20131109arizona-utilities-cash-went-acc-campaigns.html>; Ryan Randazzo, *Republicans Forese, Little Win Arizona Corporation Commission Race*, ARIZ. REPUBLIC, Nov. 4, 2014, *available at* <http://www.azcentral.com/story/money/business/2014/11/04/arizona-corporation-commission-election-night/18427899/>.
- 75 Ryan Randazzo, *APS Seeks Higher Bills for New Solar Customers*, ARIZ. REPUBLIC, July 12, 2013, *available at* <http://archive.azcentral.com/business/consumer/articles/20130712aps-seeks-higher-bills-new-solar-customers.html>; Ryan Randazzo, *Solar Power an Issue for Commission Candidates*, ARIZ. REPUBLIC, Sept. 14, 2014, *available at* <http://www.azcentral.com/story/money/business/2014/09/13/solar-power-future-corporation-commission/15605121/>; Ryan Randazzo, *Ariz. Regulator Chastises Rooftop-Solar Industry*, ARIZ. REPUBLIC, Jan. 5, 2015, *available at* <http://www.azcentral.com/story/money/business/consumer/2015/01/05/ariz-regulator-chastises-rooftop-solar-industry/21296289/>; Ryan Randazzo, *Regulators Delay APS Solar-Fee Decision*, ARIZ. REPUBLIC, Aug. 18, 2015, *available at* <http://www.azcentral.com/story/money/business/consumer/2015/08/19/regulators-delay-aps-solar-fee-decision/31963553/>; Robert Anglen & Ryan Randazzo, *2 Utilities’ Cash Went to 3 ACC Campaigns*, ARIZ. REPUBLIC, Nov. 5, 2013, *available at* <http://archive.azcentral.com/business/consumer/articles/20131109arizona-utilities-cash-went-acc-campaigns.html>.

- 76 Tim Gallen, *Arizona Corporation Commission Delays APS Solar Fee Decision*, PHX BUS. J., Aug. 18, 2015, <http://www.bizjournals.com/phoenix/blog/energy-inc/2015/08/arizona-corporation-commission-delays-aps-solar.html>; Letter from Robert L. Burns, Comm'r, Ariz. Corp. Comm'n, to Donald E. Brandt, Chairman and CEO, Pinnacle West Capital Corp. (Nov. 30, 2015), *available at* <http://images.edocket.azcc.gov/docketpdf/0000167075.pdf>.
- 77 Howard Blume, *PAC Shielded \$2.3 Million in Donations by L.A. Charter School Backers*, L.A. TIMES, Dec. 2, 2015, *available at* <http://www.latimes.com/local/education/la-me-charter-donations-20151202-story.html>.
- 78 *Id.*
- 79 *Id.*
- 80 *Id.*
- 81 *Id.*
- 82 *Id.*
- 83 *Id.*; *About, Founders*, PARTNERSHIPS TO UPLIFT COMMUNITIES, <http://www.pucschools.org/about/founders.php> (last visited May 13, 2016).
- 84 Telephone Interview with Kory Langhofer, Attorney, Statecraft Law (May 6, 2016).
- 85 *List of Ballot Measures by Topic*, BALLOTPEDIA, *available at* https://ballotpedia.org/List_of_ballot_measures_by_topic#tab=State_topics (last visited June 7, 2016).
- 86 Bill Allison, *Big Money Pours Millions Into Ballot Initiative Battles*, BLOOMBERG, May 5, 2016, *available at* <http://www.bloomberg.com/politics/articles/2016-05-05/big-money-pours-millions-into-ballot-initiative-battles>.
- 87 Telephone Interview with Kory Langhofer, Attorney, Statecraft Law (May 6, 2016).
- 88 Telephone Interview with Ann Ravel, Comm'r, Fed. Election Comm'n (June 22, 2015); Kim Barker, *Dark Money Groups Pay \$1 Million in Fines in California Case*, PROPUBLICA (Oct. 24, 2013), <http://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>.
- 89 Telephone Interview with Ann Ravel, Comm'r, Fed. Election Comm'n (June 22, 2015).
- 90 *Ballot Measure*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure (last visited June 7, 2016).
- 91 Liz Essley Whyte, *Big Business Crushed Ballot Measures in 2014*, CTR. FOR PUB. INTEGRITY (Feb. 5, 2015), <http://www.publicintegrity.org/2015/02/05/16693/big-business-crushed-ballot-measures-2014>.
- 92 Bill Allison, *Big Money Pours Millions Into Ballot Initiative Battles*, BLOOMBERG, May 5, 2016, *available at* <http://www.bloomberg.com/politics/articles/2016-05-05/big-money-pours-millions-into-ballot-initiative-battles>.
- 93 Melissa Allison, *Food-Labeling Initiative Gets Enough Signers to Go Forward*, SEATTLE TIMES, Feb. 1, 2013, *available at* <http://www.seattletimes.com/seattle-news/food-labeling-initiative-gets-enough-signers-to-go-forward/>; Lewis Kamb, *No on 522 Breaks Fundraising Record for Washington Initiative Campaigns*, SEATTLE TIMES, Oct. 28, 2013, *available at* <http://blogs.seattletimes.com/politicsnorthwest/2013/10/28/no-on-522-breaks-fundraising-record-for-washington-initiative-campaigns/>; *see Initiative Committees, 2013*, WASH. PUB. DISCLOSURE COMM'N, http://www.pdc.wa.gov/MvcQuerySystem/Committee/initiative_committees?year=2013; WASH. REV. CODE §§ 42.17A.205, .235, .240 and .442.

- 94 Jim Brunner, *Judge Tosses Lawsuit, Fines Plaintiffs Who Accused No on I-522 Campaign of Violations*, SEATTLE TIMES, Oct. 4, 2013, *available at* <http://blogs.seattletimes.com/politicsnorthwest/2013/10/04/judge-tosses-lawsuit-fines-plaintiffs-who-accused-no-on-i-522-campaign-of-disclosure-violations/>.
- 95 Letter Opinion, at 7, State of Wash. v. Grocery Mfrs. Ass’n, No. 13-2-02156-8 (Thurston Cnty. Sup. Ct. Mar.9, 2016); Rita R. Robinson, *Grocery Group Hid Names of Donors from Public, Court Rules*, SEATTLE POST-INTELLIGENCER, Mar. 11, 2016, *available at* <http://blog.seattlepi.com/boomerconsumer/2016/03/11/grocery-group-hid-names-of-donors-from-public-court-rules/>.
- 96 Brunner, *supra* note 94.
- 97 Telephone Interview with Knoll Lowney, Partner, Smith & Lowney PLLC (May 2, 2016); First Am. Compl., Moms for Labeling v. No on 522 and the Grocery Mfrs. Ass’n, No. 13-2-01960-1 (Thurston Cnty. Sup. Ct. Sep. 18, 2013).
- 98 Ruling, Moms for Labeling v. No on 522 and the Grocery Mfrs. Ass’n, No. 13-2-01960-1 (Thurston Cnty. Sup. Ct. Oct. 4, 2013).
- 99 Robinson, *supra* note 95.
- 100 Letter Opinion, at 3, State of Wash. v. Grocery Mfrs. Ass’n, No. 13-2-02156-8 (Thurston Cnty. Sup. Ct. Mar.9, 2016).
- 101 *Id.*
- 102 First Am. Compl. at 3–5, State of Wash. v. Grocery Mfrs. Ass’n, No. 13-2-02156-8 (Thurston Cnty. Sup. Ct. Nov. 20, 2013); Jim Brunner, *Attorney General Sues Grocery Association, Alleging Campaign-Finance Violations*, SEATTLE TIMES, Oct. 16, 2013, *available at* <http://blogs.seattletimes.com/politicsnorthwest/2013/10/16/attorney-general-sues-grocery-association-alleging-campaign-finance-violations/>; Jim Brunner, *Hidden Corporate Donors Poured \$11M into Fight to Stop GMO Labels in Wash.*, SEATTLE TIMES, Feb. 18, 2016, *available at* <http://www.seattletimes.com/seattle-news/politics/hidden-donors-poured-11m-into-fight-over-genetically-modified-food-labeling/>.
- 103 Letter Opinion, at 7, State of Wash. v. Grocery Mfrs. Ass’n, No. 13-2-02156-8 (Thurston Cnty. Sup. Ct. Mar.9, 2016).
- 104 *Elway Poll: Support for GMO-labeling I-522 Clings to Lead, but Momentum Has Shifted*, SEATTLE TIMES, Oct. 21, 2013, *available at* <http://blogs.seattletimes.com/politicsnorthwest/2013/10/21/elway-poll-support-for-gmo-labeling-i-522-clings-to-lead-but-momentum-has-shifted/>.
- 105 *Initiative to the Legislature 522 Concerns Labeling of Genetically-Engineered Foods*, WASH. SEC’Y OF STATE (Nov. 26, 2013), *available at* <http://results.vote.wa.gov/results/20131105/State-Measures-Initiative-to-the-Legislature-522-Concerns-labeling-of-genetically-engineered-foods.html>.
- 106 Viveca Novak, *Americans for Responsible Leadership Wholly Funded by Koch-Linked Group*, CTR. FOR RESPONSIVE POLITICS (Dec. 13, 2013), <http://www.opensecrets.org/news/2013/12/americans-for-responsible-leadership-wholly-funded-by-koch-linked-group/>.
- 107 Yvonne Wingett Sanchez, *Arizona Proposition Financiers May be Unveiled*, ARIZ. REPUBLIC, Nov. 1, 2012, *available at* <http://www.azcentral.com/news/politics/articles/20121030arizona-proposition-financiers-may-unveiled.html>.
- 108 Miranda Rivers, *Report: Arizona Among the Worst for Per-Pupil Spending Cuts*, ARIZ. REPUBLIC, Oct. 17, 2014, *available at* <http://www.azcentral.com/story/news/local/arizona/2014/10/17/report-ariz-per-pupil-spending/17477865/>; E.J. PERKINS, ARIZ. STATE UNIV. MORRISON INST. FOR PUB. POLICY, UNDERSTANDING ARIZONA’S PROPOSITIONS: 2012 SERIES, PROP. 204-QUALITY EDUCATION AND JOBS ACT (2012).

- 109 PERKINS, *supra* note 108; See Vote No on Prop 204, *Temporary*, YouTube (Oct. 4, 2012), available at <https://www.youtube.com/watch?v=fLK7KK5fAZo>.
- 110 Kim Barker, *Dark Money Groups Pay \$1 Million in Fines in California Case*, PROPUBLICA (Oct. 24, 2013), <http://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>.
- 111 *Id.*
- 112 Jeremy Duda, *Campaign Finance Moves Called 'Political Money Laundering'*, ARIZ. CAPITOL TIMES, Nov. 30, 2012, available at <http://azcapitoltimes.com/news/2012/11/30/campaign-finance-moves-called-political-money-laundering/>; Laurie Roberts, *Ducey Sends Warning to CEOs Pondering a School Tax*, ARIZ. REPUBLIC, May 20, 2015, available at <http://www.azcentral.com/story/laurieroberts/2015/05/20/ducey-business-leaders-initiative/27661663/>.
- 113 U.S. CENSUS BUREAU, EDUC. FIN. BRANCH, PUBLIC EDUCATION FINANCES: 2013 (2015), available at <http://www2.census.gov/govs/school/13f33pub.pdf>; MICHAEL LEACHMAN & CHRIS MAI, CTR. ON BUDGET AND POLICY PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION (2014), available at <http://www.cbpp.org/sites/default/files/atoms/files/9-12-13sfp.pdf>.
- 114 Fernanda Santos & Motoko Rich, *Recession, Politics and Policy Stretch Arizona School Budgets*, N.Y. TIMES, June 5, 2015, available at <http://www.nytimes.com/2015/06/06/us/arizona-school-budgets-stretched-by-recession-politics-and-policy.html>.
- 115 Michael Beckel, *Dow Chemical Backed Anti-Union Nonprofit with \$2 Million Donation*, CTR. FOR PUB. INTEGRITY (Jan. 16, 2014), available at <http://www.publicintegrity.org/2014/01/16/14109/dow-chemical-backed-anti-union-nonprofit-2-million-donation>. See also *Dow's Memberships in Trade Associations and Civic Organizations*, Dow (Dec. 12, 2013), <https://www.documentcloud.org/documents/1005548-dow-chemical-2012-trade-associations-amp-civic.html>.
- 116 Dawson Bell, *Election Poll Shows Power of 'No'*, DETROIT FREE PRESS, Sept. 16, 2012, at A1.
- 117 Dawson Bell, *What's True, What's Not About Proposal 2 Ads*, DETROIT FREE PRESS, Oct. 11, 2012, at A1; Protecting Michigan Taxpayers, *School Safety*, YouTube (Sept. 26, 2012), <https://www.youtube.com/watch?v=rulTEJYKyHg>.
- 118 Protecting Michigan Taxpayers, *Hurts*, YouTube (Oct. 10, 2012), <https://www.youtube.com/watch?v=8Ke-QTNvUMY>.
- 119 Protecting Michigan Taxpayers, *supra* note 117.
- 120 See Protecting Michigan Taxpayers, *supra* note 118; see also Protecting Michigan Taxpayers, *supra* note 117.
- 121 See *Dow's Memberships in Trade Associations and Civic Organizations*, Dow (Dec. 12, 2013), <https://www.documentcloud.org/documents/1005548-dow-chemical-2012-trade-associations-amp-civic.html>.
- 122 Michael Beckel, *Dow Chemical Backed Anti-Union Nonprofit with \$2 Million Donation*, CTR. FOR PUB. INTEGRITY (Jan. 16, 2014), available at <http://www.publicintegrity.org/2014/01/16/14109/dow-chemical-backed-anti-union-nonprofit-2-million-donation>.
- 123 *Id.*
- 124 MICH. CAMPAIGN FIN. NETWORK, A CITIZEN'S GUIDE TO MICHIGAN CAMPAIGN FINANCE 2012: DESCENDING INTO DARK MONEY 14, 40-42 (2013), http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev..pdf.

- 125 Telephone Interview with Jonathan Motl, Comm’r of Political Practices, Mont. (Sep. 5, 2014); Telephone Interview with Duane Ankney, State Senator, Mont. (Aug. 10, 2015).
- 126 *See supra* note 5.
- 127 In the 2014 U.S. Senate elections, dark money groups had to lay out a minimum of \$33 million to outstrip combined candidate spending in a single race. *See* IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* (2015), <https://www.brennancenter.org/sites/default/files/publications/Outside%20Spending%20Since%20Citizens%20United.pdf>.
- 128 Phillips 66, No. 16/111 (Cal. Fair Political Practices Comm’n Mar. 17, 2016) (stipulation, decision, and order). Some of the clearest examples of misleading spending come out of California, not because dark money problems are worse there, but rather because the state’s election authority is unusually diligent about investigating and documenting potential disclosure violations.
- 129 *Id.*
- 130 *Id.*
- 131 *Id.*
- 132 *Id.*
- 133 *Id.* The only other spender in the contest, a group of firefighters and police officers, did so transparently, spending approximately the same amount. *See County of San Bernardino Public Portal for Campaign Finance Disclosure*, ELECTIONS OFFICE OF THE REGISTRAR OF VOTERS, <http://nf4.netfile.com/pub2/Default.aspx?aid=SBD> (search query, data, and calculations on file with the Brennan Center).
- 134 PHILLIPS 66, 2012 SUMMARY ANNUAL REPORT (2013), *available at* http://s1.q4cdn.com/175206842/files/doc_financials/2012/Phillips-66-Summary-Annual-Report.pdf.
- 135 Telephone Interview with Chris Herstam, Lobbyist and former State Senator, Ariz. (May 9, 2016).
- 136 *Id.*
- 137 Daniel DeBolt, *Landlords Hid Big Election Spending*, MOUNTAIN VIEW VOICE, Feb. 6, 2015, *available at* <http://www.mv-voice.com/news/2015/02/06/landlords-hid-big-election-spending>; *Cal-Access Campaign Finance*, CAL. SEC’Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/> (search query, data, and calculations on file with the Brennan Center).
- 138 Telephone Interview with Lenny Siegel, City Councilmember, Mountain View, Cal. (April 18, 2016); Pam Marino, *Rent Control Off the Table in Mountain View—For Now*, SAN JOSE INSIDE, Oct. 29, 2014, *available at* <http://www.sanjoseinside.com/2014/10/29/rent-control-off-the-table-in-mountain-view-for-now/>.
- 139 DeBolt, *supra* note 137; *Cal-Access Campaign Finance*, CAL. SEC’Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/> (search query, data, and calculations on file with authors).
- 140 *Statewide Vendor Directory*, CAL. APARTMENT ASSOC., <http://caa.officialbuyersguide.net/index.asp> (last visited June 11, 2015); *Cal-Access Campaign Finance*, CAL. SEC’Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/> (search query, data, and calculations on file with the Brennan Center); DeBolt, *supra* note 137. Only activity through October 18, 2014 had to have been reported to the California Fair Political Practice Commission before the election. Everything from and after October 19, 2014 was not due to be reported until February of the following year. The bulk of the California Apartment Association

PAC's contributions (\$85,000) were not disclosed until after the election. *Filing Schedule for Candidates and Controlled Committees for Local Office*, CAL. FAIR POLITICAL PRACTICES COMM'N, <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Filing%20Schedules/2014/2014%2001%20Local%20Nov%204%20Cand%20cfhd.pdf> (last visited June 7, 2016); *Cal-Access Campaign Finance*, CAL. SEC'Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/> (search query, data, and calculations on file with the Brennan Center).

- 141 Telephone Interview with Lenny Siegel, City Councilmember, Mountain View, Cal. (April 18, 2016).
- 142 Telephone Interview with Greg Unangst, former candidate for City Council, Mountain View, Cal. (April 20, 2016).
- 143 Daniel DeBolt, *City Council: Showalter, Rosenberg, and Siegel Win Seats*, MOUNTAIN VIEW VOICE, Nov. 4, 2014, *available at* <http://mv-voice.com/news/2014/11/04/showalter-rosenberg-and-siegel-lead-in-early-council-election-results>.
- 144 Mark Noack, *City Drops Rent Control from Relief Package*, MOUNTAIN VIEW VOICE, Mar. 16, 2016, *available at* <http://mv-voice.com/news/2016/03/16/city-drops-rent-control-from-relief-package>.
- 145 Katy Bergen, *Kovach Says He's Finished*, SARASOTA HERALD-TRIBUNE, Apr. 22, 2015, *available at* <http://www.heraldtribune.com/article/20150422/ARCHIVES/504221054/-1/todaypaper?p=1&tc=pg>.
- 146 *Campaign Finance Database*, FLA. DEP'T OF STATE DIV. OF ELECTIONS, <http://dos.elections.myflorida.com/campaign-finance/contributions> (search query, data, and calculations on file with the Brennan Center).
- 147 *Id.*; Jeremy Wallace, *Out-of-State Funds Flow into School Board Race*, SARASOTA HERALD-TRIBUNE, Oct. 23, 2014, *available at* <http://politics.heraldtribune.com/2014/10/23/state-funds-flow-school-board-race/>.
- 148 Wallace, *supra* note 147.
- 149 AM. FED'N FOR CHILDREN, INC., FORM 990 (2013), *available at* <http://www.guidestar.org/FinDocuments/2013/330/627/2013-330627955-0b0dac63-9O.pdf>; Jeremy Wallace, *School Board Race Sees Influx of Dollars*, SARASOTA HERALD-TRIBUNE, Oct. 21, 2014, *available at* <http://politics.heraldtribune.com/2014/10/21/school-board-race-sees-influx-dollars/>; *Campaign Finance Database*, FLA. DEP'T OF STATE DIV. OF ELECTIONS, <http://dos.elections.myflorida.com/campaign-finance/contributions> (search query, data, and calculations on file with the Brennan Center).
- 150 *Candidates for 2014 Election Cycle, School Board, District 1*, SARASOTA CNTY. SUPERVISOR OF ELECTIONS, <http://www.sarasotavotes.com/ElectionCandidates.aspx?eid=79> (last visited June 6, 2016).
- 151 Bergen, *supra* note 145.
- 152 *Id.*
- 153 Shelby Webb, *School Board Candidate Reels in Donations*, SARASOTA HERALD-TRIBUNE, Aug. 12, 2015, *available at* <http://www.heraldtribune.com/article/20150812/ARTICLE/150819905?p=2&tc=pg>.
- 154 Clifton Adcock, *Information Scare on 'Dark Money' Group in Superintendent Campaign*, OKLA. WATCH (July 23, 2014), *available at* <http://oklahomawatch.org/2014/07/23/information-scarce-on-dark-money-group-in-superintendent-campaign/>; Telephone Interview with Jennifer Carter, Political Consultant and former Chief of Staff at the Okla. State Dep't of Educ. (May 10, 2016).
- 155 Telephone Interview with Jennifer Carter, Political Consultant and former Chief of Staff at the Okla. State Dep't of Educ. (May 10, 2016).

- 156 *Id.*
- 157 See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999).
- 158 Bill Allison, *Big Money Pours Millions Into Ballot Initiative Battles*, BLOOMBERG POLITICS, May 5, 2015, available at <http://www.bloomberg.com/politics/articles/2016-05-05/big-money-pours-millions-into-ballot-initiative-battles>.
- 159 Telephone Interview with Chris Herstam, Lobbyist and former State Senator, Ariz. (May 9, 2016).
- 160 *Id.*
- 161 Letter from Robert L. Burns, Comm’r, Ariz. Corp. Comm’n, to Donald E. Brandt, Chairman and CEO, Pinnacle West Capital Corp., Nov. 30, 2015, available at <http://images.edocket.azcc.gov/docketpdf/0000167075.pdf>.
- 162 *Id.*
- 163 Telephone Interview with Andy Billig, State Senator, Wash. (Aug. 21, 2015); *Bill Information for SB 5153-2015-16*, WASH. STATE LEG., available at <http://app.leg.wa.gov/billinfo/summary.aspx?bill=5153&year=2015>.
- 164 See Travis Ridout, Michael Franz & Erika Fowler, *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 154 (2015); Conor Dowling & Amber Wichowsky, *Attacks without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising*, 59 J. AM. POL. SCI. 19 (2014). See also Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM. POL. RES. 383 (2012); Christopher Weber, Johanna Dunaway & Tyler Johnson, *It’s All in the Name: Source Cue Ambiguity and the Persuasive Appeal of Campaign Ads*, 34 POL. BEHAV. 561 (2011).
- 165 Telephone Interview with Anonymous, Political Consultant (April 21, 2016).
- 166 Telephone Interview with Duane Ankney, State Senator, Mont. (Aug. 10, 2015).
- 167 Telephone Interview with Jonathan Motl, Comm’r of Political Practices, Mont. (Sep. 5, 2014).
- 168 Betsy Z. Russell, *School Ads Group Can’t Hide*, SPOKESMAN-REVIEW, Oct. 30, 2012, available at <http://www.spokesman.com/stories/2012/oct/30/school-ads-group-cant-hide/>.
- 169 *Id.*
- 170 EDUC. VOTERS OF IDAHO, INC., CAMPAIGN FINANCE DISCLOSURE REPORT (2012), available at <http://www.sos.idaho.gov/elect/Finance/2012/Oct10/PAC/EducationVotersID.pdf>; Betsy Z. Russell, *Albertson’s Heir Made Millions on K12 Inc., Promotes it to Idaho Schools*, THE SPOKESMAN-REVIEW, Feb. 19, 2011, available at <http://www.spokesman.com/blogs/boise/2011/feb/19/albertsons-heir-made-millions-k12-inc-promotes-it-idaho-schools/>.
- 171 John Miller, *Judge: Education Voters of Idaho Must Disclose Donors*, IDAHO PRESS TRIBUNE, Oct. 30, 2012, available at http://www.idahopress.com/news/local/judge-education-voters-of-idaho-must-disclose-donors/article_0c4329b8-225a-11e2-ae14-001a4bcf887a.html.
- 172 Order Granting Injunctive Relief, at 12, *Yursa v. Education Voters of Idaho*, No. CV-OC-2012-10280 (Ada Cnty. Dist. Ct. Oct.29, 2012).
- 173 *Idaho Voters Resoundingly Reject Propositions 1, 2 And 3*, NPR STATE IMPACT – IDAHO (Nov. 2012), <https://stateimpact.npr.org/idaho/tag/propositions-1-2-3/>.

- 174 *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the S. Comm. On Rules and Admin.*, 113th Cong. 1-4 (2014) (statement of Ann M. Ravel, Former Chair, Cal. Fair Pol. Prac. Comm'n).
- 175 Kim Barker, *Dark Money Groups Pay \$1 Million in Fines in California Case*, PROPUBLICA (Oct. 24, 2013), <http://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>; Michael Winter, *Calif. Accuses Ariz. Group of Laundering \$11M Donation*, USA TODAY, Nov. 6, 2012, available at <http://www.usatoday.com/story/news/politics/2012/11/05/election-california-arizona-money-laundering-koch-brothers/1684137/>.
- 176 *Special Interests are Misleading Voters about Propositions 30 and 32*, <https://ocpolitical.files.wordpress.com/2012/10/yeson32noon30front.jpg> (last visited June 7, 2016); *Fact Check: SBAC PAC Yes on Prop 32 Ad vs. The Truth*, L.A. POLICE PROTECTIVE LEAGUE, available at http://lapd.com/assets/FACT_CHECK_The_Yes_on_32_Radio_Ad_vs_The_Truth.pdf (last visited June 7, 2016).
- 177 *Fact Check: SBAC PAC Yes on Prop 32 Ad vs. The Truth*, L.A. POLICE PROTECTIVE LEAGUE, available at http://lapd.com/assets/FACT_CHECK_The_Yes_on_32_Radio_Ad_vs_The_Truth.pdf.
- 178 Matea Gold & Tom Hamburger, *California Donor Disclosure Case Exposes How Nonprofit Groups Can Play in Politics*, WASH. POST, Nov. 4, 2013, available at https://www.washingtonpost.com/politics/california-donor-disclosure-case-exposes-how-nonprofits-play-in-politics/2013/11/04/70e0b7ac-4246-11e3-a624-41d661b0bb78_story.html.
- 179 *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the S. Comm. On Rules and Admin.*, 113th Cong. 1-4 (2014) (statement of Ann M. Ravel, Former Chair, Cal. Fair Pol. Prac. Comm'n); Barker, *supra* note 175; Viveca Novak & Robert Maguire, *Nonprofit's Exemption Was Granted Despite Record Fine, Big Political Spending*, CTR. FOR RESPONSIVE POLITICS (Apr. 14, 2014), <http://www.opensecrets.org/news/2014/04/nonprofits-exemption-was-granted-despite-record-fine-big-political-spending/>.
- 180 Viveca Novak, *Americans for Responsible Leadership Wholly Funded by Koch-Linked Group*, CTR. FOR RESPONSIVE POLITICS (Dec. 13, 2013), <http://www.opensecrets.org/news/2013/12/americans-for-responsible-leadership-wholly-funded-by-koch-linked-group/>.
- 181 Barker, *supra* note 175.
- 182 Mike Rosenberg, *Proposition 30 Wins: Gov. Jerry Brown's Tax Will Raise \$6 Billion to Prevent School Cuts*, SAN JOSE MERCURY NEWS, Nov. 6, 2012, available at http://www.mercurynews.com/ci_21943732/california-proposition-30-voters-split-tax-that-would; Steven Harmon & Matt O'Brien, *Proposition 32: Measure that Would Restrict Union Donations is Defeated*, SAN JOSE MERCURY NEWS, Nov. 6, 2012, available at http://www.mercurynews.com/elections/ci_21943924.
- 183 Alice Kantor, *Progressives Capture City Hall and Council, Fending Off Chevron Money*, RICHMOND CONFIDENTIAL, Nov. 5, 2014, available at <http://richmondconfidential.org/2014/11/05/progressives-capture-city-hall-and-council-fending-off-chevron-money/>; Harriet Rowan, *Chevron Unleashes Campaign Spending to Influence Richmond Election*, CONTRA COSTA TIMES, Oct. 10, 2014, available at http://www.contracostatimes.com/west-county-times/ci_26703743/chevron-unleashes-campaign-spending-influence-richmond-election; *California Form 460 Campaign Statements*, CITY OF RICHMOND, <http://www.ci.richmond.ca.us/1438/Form-460---Campaign-Statements> (data and calculations on file with the Brennan Center).

- 184 Henry K. Lee, *Richmond Sues Chevron over Refinery Fire*, S.F. GATE, Aug. 2, 2013, *available at* <http://www.sfgate.com/bayarea/article/Richmond-sues-Chevron-over-refinery-fire-4703370.php>. Associated Press, *Report Blames Poor Safety Protocols For Chevron Richmond Refinery Fire That Sent 15,000 To Hospital*, CBS SF BAY AREA, Jan. 23, 2015, *available at* <http://sanfrancisco.cbslocal.com/2015/01/23/federal-report-blame-chevrons-poor-safety-protocols-for-2012-refinery-fire-that-sent-15000-neighbors-to-the-hospital/>.
- 185 Robert Rogers, *Chevron Spends Big on Richmond City Council Election*, SAN JOSE MERCURY NEWS, Oct. 8, 2012, *available at* http://www.mercurynews.com/breaking-news/ci_21726521/chevron-spends-big-richmond-elections; Madeline Ostrander, *Richmond: The Little Town That Beat Big Oil*, AL JAZEERA AMERICA, Nov. 7, 2014, *available at* <http://america.aljazeera.com/blogs/scrutineer/2014/11/7/richmond-chevrenelectionmoney.html>;
- 186 Robert Rogers and Malaika Fraley, *Chevron Pleads No Contest to Criminal Charges Stemming from Richmond Refinery Fire*, SAN JOSE MERCURY NEWS, Aug. 6, 2013, *available at* http://www.mercurynews.com/business/ci_23798673/chevron-pleads-no-contest-criminal-charges-stemming-from; Complaint, City of Richmond v. Chevron Corporation, No. C-13-01654 (Contra Costa Cnty. Sup. Ct. Aug. 1, 2013).
- 187 Henry K. Lee, *Richmond Sues Chevron Over Refinery Fire*, S.F. GATE, Aug. 2, 2013, *available at* <http://www.sfgate.com/bayarea/article/Richmond-sues-Chevron-over-refinery-fire-4703370.php>.
- 188 See CAL. GOVT. CODE § 84506.
- 189 Jennifer Baires and Robert Rogers, *Anti-Chevron Candidates Sweep to Victory in Richmond Races*, SAN JOSE MERCURY NEWS, Nov. 5, 2014, *available at* http://www.mercurynews.com/my-town/ci_26866567/butt-rogers-lead-early-numbers-richmond-mayor-council.
- 190 See CAL. GOVT. CODE § 84506.
- 191 Madeline Ostrander, *Richmond: The Little Town That Beat Big Oil*, AL JAZEERA AMERICA, Nov. 7, 2014, *available at* <http://america.aljazeera.com/blogs/scrutineer/2014/11/7/richmond-chevrenelectionmoney.html>.
- 192 Carolyn Jones, *Chevron's \$3 Million Backfires in Richmond Election*, S.F. GATE, Nov. 5, 2014, *available at* <http://www.sfgate.com/bayarea/article/Chevron-s-3-million-backfires-in-Richmond-5873779.php>.
- 193 Chevron Richmond, *Why the Election Mattered*, RICHMOND STANDARD, Nov. 19, 2014, *available at* <http://richmondstandard.com/2014/11/election-mattered/>.
- 194 Jones, *supra* note 192.
- 195 Dana Hull, *Public Anger at PG&E Helped Sink Prop 16*, SAN JOSE MERCURY NEWS, June 9, 2010, *available at* http://www.mercurynews.com/breaking-news/ci_15266026?nclck_check=1.
- 196 POLITICAL ADVERTISING DISCLAIMERS, CAL. FAIR POLITICAL PRACTICES COMM'N (2016), *available at* <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Campaign%20AdvertisementDisclosure/Political%20Advertising%20Disclaimers.pdf>.
- 197 Naz Ayala, *Yes on California Prop 16?*, YOUTUBE (May 25, 2010), <https://www.youtube.com/watch?v=ZtQ35jpG714>.
- 198 Lance Williams, *Prop. 16 Fight Highlights PG&E's Political Power*, CAL. WATCH (Jun. 2, 2010), <http://californiawatch.org/dailyreport/prop-16-fight-highlights-pges-political-power-2412>; David R. Baker, *PG&E's Prop. 16 Lost Big in its Service Area*, S.F. GATE, Jun. 10, 2010, *available at* <http://www.sfgate.com/business/article/PG-E-s-Prop-16-lost-big-in-its-service-area-3185513.php>.

- 199 AMERICANS' VIEWS ON MONEY IN POLITICS, THE ASSOCIATED PRESS-NORC & CTR. FOR PUB. AFFAIRS RESEARCH (2015), *available at* http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Topline_FINAL.pdf; *see also* Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015, *available at* <http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html>.
- 200 McCutcheon v. FEC, 134 S. Ct. 1434, 1460 (2014) (plurality opinion); Doe v. Reed, 561 U.S. 186 (2010); *Citizens United*, 558 U.S. at 370–71.
- 201 Telephone Interview with Jonathan Motl, Comm'r of Political Practices, Mont. (April 27, 2016).
- 202 2015 Mont. Laws ch. 259; Charles S. Johnson, *Late-Night Soul-Searching Pushed Garner to Forefront of Dark Money Fight*, THE MISSOULIAN, Mar. 29, 2015, *available at* http://missoulian.com/news/state-and-regional/late-night-soul-searching-pushed-garner-to-forefront-of-dark/article_0532cdfd-f5de-5171-813c-e98db825f449.html.
- 203 *See, e.g.*, N.C. GEN. STAT. § 163-278.6(14) and VA. CODE ANN. § 24.2-945.1. In practice it is extremely rare for government agencies to determine a group's purpose to be political when it has not itself registered as a political organization. *See* Matea Gold, *IRS Approves Tax-Exempt Status of Crossroads GPS After More than Five Years*, WASH. POST, Feb. 9, 2016, <https://www.washingtonpost.com/news/post-politics/wp/2016/02/09/irs-approves-tax-exempt-status-of-crossroads-gps-after-more-than-five-years/>; *but see* Troy Carter, *Taking Control: Montana Elections Getting New Disclosure Rules*, BOZEMAN DAILY CHRONICLE, Aug. 16, 2015, *available at* http://www.bozemandailychronicle.com/news/mtleg/taking-control-montana-elections-getting-new-disclosure-rules/article_54292cc2-ce68-5b6a-8233-b5f466cd523b.html (reporting that Montana's Commissioner of Political Practices drafted rules for determining a group's primary purpose in order to limit this type of evasion of disclosure). *See also* Buckley v. Valeo, 424 U.S. 1, 79 (1976).
- 204 California recognizes a "multipurpose organization" that includes most 501(c) nonprofit groups. *See* CAL. GOV'T CODE §§ 84222(a); 2014 Cal. Stat. ch. 16 § 6. A recent Montana law defined an incidental committee to include groups that may be treated like political committees on account of their political activity. 2015 Mont. Laws ch. 259 § 2. Though incidental committees need only report donors who contributed in order to support a specified candidate or ballot measure. *Id.* at § 14.
- 205 2014 Cal. Stat. ch. 16 § 6; 2015 Mont. Laws ch. 259 § 16.
- 206 PETE QUIST, NAT. INST. ON MONEY IN STATE POLITICS, SCORECARD: ESSENTIAL DISCLOSURE REQUIREMENTS FOR INDEPENDENT SPENDING (2014), *available at* <http://www.followthemoney.org/research/institute-reports/scorecard-essential-disclosure-requirements-for-independent-spending-2014/>.
- 207 *See, e.g.*, 25 PA. CONS. STAT. § 3246(g) (2016); ARIZ. REV. STAT. § 16-914.02 (2016).
- 208 11 C.F.R. § 104.20.
- 209 Only donations made *for the purpose* of making the reportable spending must be disclosed. But this almost never happens because the manifest intent (earmarking) required to find such a purpose is easy to avoid. 11 C.F.R. § 104.20(c)(9). The D.C. Circuit Court of Appeals recently upheld as reasonable this interpretation by the Federal Election Commission of a statutory requirement of disclosure of electioneering communications by corporations and unions. *Van Hollen v. FEC*, 811 F.3d 486 (2016). Other persons making electioneering communications still must report *all* donors regardless of their purpose. *Id.* at 491.
- 210 DISCLOSE Act, S. 229, 114th Cong. § 2 (2015).
- 211 78 Del. Laws ch. 400 (2012); 2015 Mont. Laws ch. 259 §14.

- 212 78 Del. Laws ch. 400 § 8 (2012).
- 213 2015 Mont. Laws ch. 259 § 14(1).
- 214 CAL. GOV'T CODE §§ 84222(e)(1)(C), (e)(2). The FPPC first instituted last-in-first-out reporting in 2012. CAL. CODE REGS. tit. 2 § 18412 (2012).
- 215 CAL. GOV'T CODE §§ 84222(e)(5).
- 216 S.B. 1113, 2016 Sess. (Mo. 2016).
- 217 S.B. 5528, 64th Leg., 2015 Reg. Sess. (Wash. 2015).
- 218 CONN. GEN. STAT. § 9-621(j)(1).
- 219 CAL. CODE REGS. tit. 2 § 18422.5 (2015).
- 220 78 Del. Laws ch. 400 § 7 (2012).
- 221 2014 N.Y. City Law No. 041.
- 222 In Utah, for example, groups other than political committees that make political expenditures file their final pre-election report seven days before the election, covering the period up until the twelfth day before the election. Expenditures made after the twelfth day before an election are not reported until after Election Day. Groups that make \$1,000 or more of independent expenditures have thirty days to report that activity, regardless of how close to Election Day the expenditures are made. UTAH CODE §§ 20A-11-701, 11-1704.
- 223 2015 Mont. Laws ch. 259 §§ 11(4) and (5); 78 Del. Laws ch. 400 § 8.
- 224 2015 Mont. Laws ch. 259 §§ 11(4) and (5); 78 Del. Laws ch. 400 § 8. At the same time, however, Montana also reduced the speed at which accelerated reports must be filed during the extended pre-election period, from one to two business days after receiving a triggering contribution or making a triggering expenditure.
- 225 DISCLOSE Act of 2015, S. 229, 114th Cong. § 2 (2015).
- 226 WASH. REV. CODE § 42.17A.320.
- 227 CONN. GEN. STAT. § 9-621(h), (j)(1).
- 228 2016 Ariz. Sess. Laws, ch. 79.
- 229 Doe v. Reed, 561 U.S. at 228 (Scalia, J., concurring).
- 230 IAN VANDEWALKER & DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, STRONGER PARTIES, STRONGER DEMOCRACY 16 (2015), https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf; see also Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POLITICAL BEHAVIOR 753 (2013) (describing survey responses that show individuals who have different political views than other people in their social networks, including co-workers, are more likely to be turned off from making political contributions because of public disclosure).
- 231 Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1300-01 (2012).
- 232 10 ILL. COMP. STAT. 5/9-8.6.
- 233 GA. CODE ANN. § 21-5-34(f).

- 234 See, e.g., MASS. GEN. LAWS. ch. 55, § 18A.
- 235 See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (prohibiting Alabama from compelling disclosure of NAACP’s members for the purpose of determining whether it qualified as a foreign corporation). In *NAACP*, in addition to the evidence of past retaliation, the state had a less substantial interest in disclosure than exists in the realm of campaign finance. See *Buckley*, 424 U.S. at 69-72.
- 236 *Address Confidentiality Laws by State*, GREATER BOSTON LEGAL SERVICES NAT’L NETWORK TO END DOMESTIC VIOLENCE (July 2013), http://nnedv.org/downloads/SafetyNet/NNEDV_ACPChart_2013.pdf.
- 237 Telephone Interview with Pa. Office of the Victim Advocate (May 9, 2016); see also *Survivor Privacy*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/resources/survivor-privacy.html>.
- 238 CAL. GOV’T CODE §§ 84222(e)(2); see also H.B. 3773, 84th Leg., Reg. Sess. (Tex. 2015).
- 239 DISCLOSE Act, H.R. 5175, 111th Cong. (2010); CONN. GEN. STAT. § 9-601d(g)(1).
- 240 CAL. GOV’T CODE §§ 84222(e)(1)(C), (e)(2).
- 241 *Administrative Fine Calculator*, FED. ELECTION COMM’N, http://www.fec.gov/af/afcalc_20130725.shtml (last visited June 7, 2016).
- 242 See *How the Administrative Fine Program Works*, FED. ELECTION COMM’N, http://www.fec.gov/pages/brochures/admin_fines.shtml (last visited June 7, 2016).
- 243 *Our Data*, NAT’L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/our-data/> (last visited June 7, 2016).
- 244 Sources, data, and calculations on file with the Brennan Center.
- 245 Of the 26 states that track spending on electioneering communications, only 12 record their data in such a way that NIMSP has been able to develop a complete record of such spending from 2006 through 2014; three of these states held statewide elections in 2008 and 2012, providing only two cycles to compare.
- 246 The Supreme Court rested a portion of its *McConnell* decision on this belief, citing a trove of supporting evidence. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 193 (2003) ([T]he unmistakable lesson from the record in this litigation . . . is that *Buckley’s* magic-words requirement [defining the narrower category of express advocacy] is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted.” (internal citations omitted)). See also PETE QUIST, NAT’L INST. ON MONEY IN STATE POLITICS, SCORECARD: ESSENTIAL DISCLOSURE REQUIREMENTS FOR INDEPENDENT SPENDING (2014), available at <http://www.followthemoney.org/research/institute-reports/scorecard-essential-disclosure-requirements-for-independent-spending-2014/>.
- 247 We count spending by Section 501(c)(5) labor organizations as transparent because, unlike other 501(c) nonprofits, labor organizations are subject to extensive reporting requirements by the Department of Labor. See 29 U.S.C. § 431(b); 29 C.F.R. § 403.2. In particular, large labor organizations (those with annual receipts of \$250,000 or more) must disclose the source of all receipts of \$5,000 or more, and the recipient of all expenditures for political activities, no matter the amount. See DEP’T OF LABOR, INSTRUCTIONS FOR FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT I AND 25 (2010), http://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM-2_Instructions4-2015_techrev.pdf. Smaller labor organizations (those with annual receipts of less than \$250,000) are subject to less extensive reporting requirements and are not required to itemize their receipts or expenditures. Our analysis has found that large labor organizations (those required to itemize) are responsible for nearly all political spending by labor organizations in the United States. See *Union Search*, U.S. DEP’T OF LABOR, <https://olms.dol-esa.gov/query/getOrgQry.do> (last visited June 7, 2016).

- 248 See, e.g., ALASKA STAT. § 15.13.040(e) (requiring disclosure of donors making contributions “for the purpose of influencing the outcome of an election”).
- 249 We analyzed only donors who gave an amount equal to more than 5 percent of the committee or organization’s reported outside spending in each cycle.
- 250 See *Political Nonprofits: Methodology*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/methodology.php> (last visited June 7, 2016). The Sunlight Foundation follows a methodology developed by University of Connecticut political science professor Paul Herrnson. See Paul S. Herrnson & Christian J. Caron, *The Transparency of Single-Candidate Super PACs*, Presentation at the Annual Meeting of the New England Political Science Association (April 22, 2016).
- 251 Interview with Robert Maguire, Political Nonprofits Investigator, Ctr. for Responsive Politics (Apr. 13, 2016).
- 252 Recent reports have identified a similar but still relatively limited trend among federal super PACs, where some funding has been coming through limited liability companies that shield the money’s true source. See Will Tucker, *LLC Gifts Are Making Up a Bigger Share of Super PACs’ Fundraising Hauls*, CTR. FOR RESPONSIVE POLITICS (Mar. 24, 2016), <http://www.opensecrets.org/news/2016/03/llc-gifts-are-making-up-a-bigger-share-of-super-pacs-fundraising-hauls/>; Matea Gold & Anu Narayanswamy, *How ‘Ghost Corporations’ Are Funding the 2016 Election*, WASH. POST, Mar. 18, 2016, available at https://www.washingtonpost.com/politics/how-ghost-corporations-are-funding-the-2016-election/2016/03/18/2446e526-ed14-11e5-a6f3-21ccdbc5f74e_story.html; Eliza Newlin Carney, *When Super PACs Go Dark: LLCs Fuel Secret Spending*, AMERICAN PROSPECT (Feb. 25, 2016), <http://prospect.org/article/when-super-pacs-go-dark-llcs-fuel-secret-spending>.

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