

By Brendan Fischer & Maggie Christ / April 2020

DIGITAL TRANSPARENCY LOOPHOLES IN THE 2020 ELECTIONS

As the COVID-19 pandemic spread in late March of 2020, a new nonprofit called “Fellow Americans” posted an ad to Facebook juxtaposing President Trump’s statements downplaying the virus with a graph showing the exponential growth of cases. The ad went national when it was copied by the Democratic super PAC Priorities USA Action, which spent \$6 million airing the message under Priorities’ own name, and which led the Trump campaign to send cease-and-desist letters to stations disputing the ad’s characterization of the president’s comments.

It is curious that a well-funded super PAC like Priorities—which spent \$190 million in the 2016 cycle, and has already raised \$27 million for 2020¹—would lift an ad from a mysterious nonprofit when it has ample resources to produce content on its own. More curious still is that the public cannot fully account for the ads produced and distributed by Fellow Americans.

To date, Fellow Americans reported to the Federal Election Commission (FEC) that it has spent around \$140,000 on anti-Trump ads this election cycle.² Yet political ad archives maintained by Facebook and Google only show around \$6,000 in ad spending from Fellow Americans.³

This is not an isolated case. In the weeks leading up to Super Tuesday, the dark money group “Big Tent Project Fund” reported to the FEC that it spent nearly \$4.4 million on digital ads in the Democratic presidential primary.⁴

But in an illustration of the limits of self-regulatory efforts by big internet platforms, only about \$165,000 of that spending can be accounted for, and only a fraction of the ads run by this secretly-funded group appear to be publicly available.⁵

Following Russia’s use of social media to meddle in the 2016 elections, and facing pressure from Congress, large platforms like Facebook and Google began voluntarily instituting new transparency requirements. These companies now maintain a public repository of political ads, along with information about whom the ads targeted and the amount spent.

Yet under **4%** of FEC-reported digital spending from the Big Tent Project, and just over **4%** of FEC-reported spending from Fellow Americans, is showing up in these much-heralded archives; the remainder may have gone to smaller platforms, like

streaming services, which have not created ad repositories. And the FEC-reported spending likely doesn't account for all of the paid digital political activity, because other ads from Big Tent Project appear to be running under fake names, and are not being reported to the FEC at all.

As the 2020 campaign progresses, the loopholes these groups have exploited will almost certainly be used by other political operatives—foreign or domestic—to attack or promote candidates across the political spectrum, leaving the public in the dark about the content of targeted political ads and making it harder to correct misleading information. These examples provide a compelling case for Congress to close these loopholes by adopting across-the-board digital ad disclosure legislation.

Secretly Funded Digital Operations

Little is known about Fellow Americans. The secretly funded nonprofit incorporated in October 2019, and listed its address at the Democratic law firm Perkins Coie.⁶ Its reported payments have gone to a newly created LLC whose address is associated with the former Obama White House digital director, Nathaniel Lubin.⁷

We don't know much about the Big Tent Project, either. The secretly funded nonprofit was incorporated in Delaware on February 12, 2020,⁸ and is run by Jonathan Kott, a former aide to Senator Joe Manchin (D-WV), who said he formed the group after Democratic donors expressed a desire to thwart Bernie Sanders' rise in the presidential primary.⁹ Kott told *Time* that he received six- and seven-figure donations for the group, but the identities of those donors are not publicly disclosed.¹⁰

As nonprofit corporations, Fellow Americans and Big Tent Project are not transparent about their donors, but they are required to report certain political ad spending to the FEC.

Take the Big Tent Project. In the three weeks after forming, the group reported to the FEC a total of \$4.8 million on independent expenditures attacking Sanders, around \$4.4 million of which were described as “online/digital advertising.”¹¹ Much of that digital spending—\$4.1 million—came in the final week before the crucial Super Tuesday elections on March 3, 2020.¹²

The FEC requires fairly minimal detail on independent expenditure reports: it is generally sufficient to report spending on “online/digital advertising,” as Big Tent Project did, without disclosing on which platforms the ads actually ran.

Yet, Big Tent Project's FEC-reported independent expenditures should show up in public archives if run on the large platforms. By definition, “independent expenditures” are ads that expressly advocate for or against a candidate's election, and therefore, Big Tent Project's FEC-reported ads would meet every platform's definition of “political advertising.”

So where did Big Tent Project's ads end up, and what messages did it disseminate to voters? We don't really know.

The Google archive—which includes ads from YouTube and the Google “Adwords” network—has no record of any ads run under the name “Big Tent Project Fund” or its variations.¹³ Google sometimes attributes political ads to the vendors that place them, but none of Big Tent Project’s vendors show up, either.

Snapchat’s political ad archive also has no record of ads from Big Tent Project or its vendors.¹⁴ Twitter says it is no longer accepting political ads, and neither Big Tent Project nor its vendors appear in the Twitter archive.¹⁵

Facebook (whose archive also captures Instagram ads) includes around 1,900 ads from Big Tent Project since the group’s formation—but Facebook’s archive discloses that those ads only cost \$164,673 through March 10, far short of the nearly \$4.4 million on “online/digital advertising” reported to the FEC.¹⁶

As a result, over 96% of Big Tent Project’s FEC-reported spending is unaccounted for.

Production fees, commissions, and costs associated with the purchase or rental of voter lists might be embedded in Big Tent Project’s total reported independent expenditures, but those input expenses would constitute a relatively small percentage of the overall spending—nowhere near 96%.

Fellow Americans shows a similar pattern. The group has reported \$139,552 in independent expenditures to the FEC, but reported the purpose merely as “advertising.”¹⁷ As of April 7, 2020, the Facebook ad library shows only \$5,332 in spending on an array of ads, many of which never mention Trump at all (and therefore would not be reportable to the FEC).¹⁸ Google’s archive shows \$500 in spending on two TV-style digital ads that did not appear in the Facebook archive, and nothing from the group’s vendor.¹⁹ Neither the group nor its vendor appears in the Snapchat or Twitter archives. As a result, over 95% of Fellow Americans’ FEC-reported spending remains unaccounted for.

The most likely explanation for the discrepancy between the amount reported to the FEC and the amount appearing in the Facebook or other ad archives is that Big Tent Project and Fellow Americans are running many or most of their ads on less transparent platforms, such as streaming services. Although Facebook captures the lion’s share of digital political ad revenue, many other platforms host political ads, so advertisers seeking to avoid transparency have multiple options.²⁰

As the *Washington Post*’s Tony Romm reported in February, political ads have been flooding Hulu and other streaming services in the 2020 election cycle, but there are no legal requirements that the ads themselves be made publicly available, and streaming platforms have not adopted voluntary transparency measures like Facebook’s.²¹

Streaming services, like other digital platforms, offer substantial targeting abilities, so an ad microtargeted on a platform like Hulu is only seen by the viewers to whom it is targeted, and not to the public as a whole. That lack of transparency makes it a challenge to address misinformation, and difficult for candidates who are the subject of the ads to respond. It also makes it harder for watchdogs, journalists, and law

enforcement to track spending and detect potential campaign finance violations.

As Romm notes, the absence of transparency requirements for streaming services “stands in stark contrast with traditional TV broadcasters, such as ABC, CBS, Fox, and NBC, which for decades have been required to maintain limited public files about political ads.”²²

Big Tent Project’s “United We Succeed”

Big Tent Project also appears to be running Facebook ads under the fake name “United We Succeed,” and exploiting loopholes in current law to avoid reporting that spending to the FEC at all.

The “United We Succeed” Facebook page spent nearly \$72,000 on ads attacking Sanders between March 5 and March 17.²³ The ad disclaimers state they are “paid for by United We Succeed,” but United We Succeed does not appear to actually exist. It does not appear to be a registered corporation, but it does have a website, which describes it as a “campaign in partnership with The Big Tent Project Fund.”²⁴ *POLITICO*’s Morning Score newsletter also tied Big Tent Project Fund to United We Succeed.²⁵

The “United We Succeed” example highlights another flaw in voluntary self-regulation by the big platforms—in this case, Facebook. It also exposes a gap in federal campaign finance law.

First, the flaws in Facebook’s verification procedures.

In the 2018 election cycle, Facebook began to require that political ads include a disclaimer stating who paid for them. However, reporters at outlets like the *New York Times* and *Vice* found that Facebook allowed advertisers to fill in the disclaimer field with whatever made-up name they chose—like “Mike Pence,” or a “freedom loving American Citizen exercising my natural law right.”²⁶

In response to cases like these, in August 2019, Facebook announced that “advertisers will need to provide more information about their organization before we review and approve their disclaimer” in order to “confirm the legitimacy of an organization.”²⁷ But these new requirements are easily satisfied: Facebook will allow political ads to run under the name of any entity that has a website and organizational email address.²⁸

As a result, Facebook allowed the already-mysterious Big Tent Project to run political ads under the made-up name “United We Succeed,” apparently because Big Tent Project took the simple step of registering a website for the fake group.²⁹

Big Tent Project didn’t completely disguise its connection to United We Succeed—the relationship can be discovered with a little digging through Facebook or the United We Succeed website—but the ease with which this dark money group could launder its messages using a disclaimer attributed to a fake name demonstrates how porous Facebook’s verification procedures remain. Moreover, it is difficult to know how many other made-up names Big Tent Project has used for other Facebook ads.

Second, the gaps in campaign finance law.

Although the \$4.8 million in anti-Sanders ads run by Big Tent Project were reported to the FEC, the anti-Sanders ads attributed to “United We Succeed” apparently never were.

Ads from both Big Tent Project and “United We Succeed” similarly focused on the costs of Sanders’ policies and his record on nuclear waste disposal, but ads attributed to the latter page were carefully worded to exploit digital gaps in campaign finance law.

Whereas most Big Tent Project ads expressly urged viewers to vote against Sanders—and thus constituted “independent expenditures” subject to legal reporting and disclaimer requirements—the United We Succeed attack ads instead ended with an appeal for voters to “call” Sanders.

If the ads were run on TV, they would have been reported to the FEC as “electioneering communications.” Under current law, “electioneering communications” are defined as broadcast — but not digital — ads run near an election that name a candidate, and which are targeted to that candidate’s voters, even if the ads don’t expressly tell viewers to vote for or against a candidate.³⁰

United We Succeed’s ads named Sanders and were targeted to voters in places like Michigan, Mississippi, and Missouri shortly before primary elections in those states. Those ads would therefore be reportable electioneering communications if run on TV, but because the ads were run online, Big Tent Project can avoid reporting them to the FEC at all. The ads can also evade legal disclaimer requirements—which would have required that the “paid for by” message be attributed to the entity that actually paid for the ad—meaning that only Facebook’s porous disclaimer rules apply.

Conclusion and Solutions

The loopholes Big Tent Project exploited in the Democratic primary, and those being exploited by Fellow Americans to attack President Trump, will almost certainly be used by other political operatives as the 2020 campaign progresses. Yet there are solutions to the problems highlighted by this case study.

First, Congress should follow the lead of states like New York and adopt across-the-board digital disclosure legislation that places the obligation to maintain political ad archives on a government agency like the FEC, rather than on platforms like Facebook. If such legislation were enacted, voters could visit the FEC website and see all of the FEC-reported digital ads disseminated by a group like the Big Tent Project, rather than only that subset of ads run on big platforms that created public archives.

This is a slightly different approach than the Honest Ads Act, a federal bill first introduced with bipartisan support in 2017. That bill requires that larger platforms like Facebook and Google—specifically, those with over 50 million unique monthly visitors—collect and create a public archive of political ads run on that platform. Yet, as the Fellow Americans and Big Tent Project examples demonstrate, when only larger

platforms maintain archives, political advertisers can sidestep transparency by routing ad spending to smaller platforms that are not required to make ads publicly available. If enacted in its current form, the Honest Ads Act would likely not require transparency for all FEC-reported ads run by Fellow Americans and Big Tent Project.

These problems could be addressed by housing the archive within a government agency—likely the FEC—and by requiring that political ad purchasers provide the information directly to that agency. (Platforms wouldn't be entirely off the hook: they could be required to prevent evasion by collecting a copy of the information that ad purchasers must provide to the FEC, and to make that information available to the FEC upon request.) Such a model would make it harder to sidestep transparency, easier for journalists to track spending and monitor political messages, and easier for watchdogs and law enforcement to detect violations of campaign finance law.

Second, the FEC should require political advertisers to report more detail about the nature of their independent expenditures, such as information about the digital platforms or ad-buying networks that are distributing the communications. The agency should also proceed with its long-overdue rulemaking to clarify disclaimer requirements for digital ads.

Third, Congress should take the long-overdue step of updating campaign finance law for the 21st century.

Legislation like H.R. 1, the “For the People Act,”³¹ and the Honest Ads Act³²—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.

Bills like these would update campaign finance law for the digital age by extending the “electioneering communication” definition to include digital ads and clarifying disclaimer requirements, so that ads like those run by Big Tent Project under the “United We Succeed” name would be subject to transparency rules.

Finally, Facebook, Google, and other large platforms should strengthen verification procedures for political advertisers, and require that “paid for by” disclaimers state the name of the individual or entity that actually paid for the ad—rather than just the name of a pop-up Facebook page or website.

Unfortunately, it might be too late for Congress and the FEC to enact these solutions before voters go to the polls in November 2020—although the large platforms might be able to move more quickly. The problems with dark digital advertising are likely to get worse before they get better.

- ¹ Priorities USA Action, Financial Summary, FEC.gov, <https://www.fec.gov/data/committee/C00495861/?tab=summary> (last visited Mar. 30, 2020).
- ² As of April 7, 2020, Fellow Americans has reported \$139,552 in spending on anti-Trump ads to the FEC. Fellow Americans, Filings, 2019-20, FEC.gov, <https://www.fec.gov/data/committee/C90019258/?tab=filings> (last visited Apr. 7, 2020).
- ³ As of April 7, 2020, the Facebook and Google ad archives together show \$5,832 in spending by Fellow Americans. See Ads by Fellow Americans, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=102756811269921 (last visited Apr. 7, 2020); Ads by Fellow Americans, Google Transparency Report, GOOGLE, <https://transparencyreport.google.com/political-ads/advertiser/AR34083623510474752?hl=en> (last visited Apr. 7, 2020). No Fellow Americans ads appear in the Snapchat archives. Snap Political Ads Library, SNAP, INC., <https://www.snap.com/en-US/political-ads/> (last visited Apr. 7, 2020).
- ⁴ Big Tent Project Fund, Independent expenditures (24- and 48-hour reports), FEC.gov, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90019175&is_notice=true&most_recent=true&candidate_office=P (last visited Mar. 11, 2020).
- ⁵ As of April 7, 2020, the Facebook and Google ad archives together show \$164,673 in spending by Big Tent Project. Ads by Big Tent Project, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=112739086975178 (last visited Apr. 7, 2020). No Big Tent Project ads appear in the Google archives, see Google Transparency Report, GOOGLE, <https://transparencyreport.google.com/political-ads/region/US> (last visited Apr. 7, 2020), or the Snapchat archives, Snap Political Ads Library, SNAP, INC., <https://www.snap.com/en-US/political-ads/> (last visited Apr. 7, 2020).
- ⁶ Business Filings Search for “Fellow Americans,” D.C. Dep’t of Consumer & Regulatory Affairs, DC.gov, <https://corponline.dcr.dcgov/Home.aspx/ProcessRequest> (last visited Mar. 30, 2020).
- ⁷ On its independent expenditure reports filed with the FEC, see sources cited *supra* note 2, Fellow Americans reported paying “Incite Studio, LLC” at a New York address that, according to New York property records on file with CLC, is associated with Nathan Lubin. Lubin was Director for the Office of Digital Strategy at the Obama White House, and helped launch the Democratic consulting firm Bully Pulpit Interactive. See Nathaniel Lubin, White House Author, President Barack Obama White House (archived), <https://obamawhitehouse.archives.gov/blog/author/nathaniel-lubin> (last visited Mar. 30, 2020).
- ⁸ Entity Search for “Big Tent Project Fund,” STATE OF DELAWARE, <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> (last visited Mar. 11, 2020).
- ⁹ Alana Abramson, *Big-Money Democratic Donors Are Trying to Stop Bernie Sanders. But Even They Worry It Could Be Too Late*, TIME (Feb. 27, 2020), <https://time.com/5791185/bernie-sanders-democratic-party-donors/>.
- ¹⁰ *Id.*
- ¹¹ Big Tent Project Fund, Independent expenditures (24- and 48-hour reports), *supra* note 4.
- ¹² *Id.*
- ¹³ Google Transparency Report, GOOGLE, <https://transparencyreport.google.com/political-ads/region/US> (last visited Apr. 7, 2020).
- ¹⁴ Snap Political Ads Library, SNAP, INC., <https://www.snap.com/en-US/political-ads/> (last visited Apr. 7, 2020).
- ¹⁵ Ads Transparency Center, TWITTER, <https://ads.twitter.com/transparency> (last visited Apr. 7, 2020).
- ¹⁶ Ads by Big Tent Project, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=112739086975178 (last visited Apr. 7, 2020). In fact, some Big Tent Project ads appearing in the Facebook archive may not constitute “independent expenditures” since they do not expressly advocate against Sanders’ election; that could indicate that an even smaller percentage of Big Tent Project’s digital independent expenditures can be accounted for.
- ¹⁷ Fellow Americans, Filings, *supra* note 2.
- ¹⁸ Ads by Fellow Americans, Facebook Ad Library, *supra* note 3. Many of Fellow Americans’ ads appearing in the Facebook archive do not mention Trump at all, nor do they expressly advocate for or against his election, and thus do not constitute “independent expenditures” subject to FEC reporting. As a result, it is very likely that even smaller percentage proportion of Fellow Americans’ FEC-reported spending can be accounted for.
- ¹⁹ Ads by Fellow Americans, Google Transparency Report, *supra* note 3.
- ²⁰ Michael Grothaus, *Facebook and TV dominate political ad spending, suggesting advertisers think older voters are key to winning*, FAST COMPANY (Feb. 12, 2020), <https://www.fastcompany.com/90463458/facebook-and-tv-dominate-political-ad-spending-suggesting-advertisers-think-older-voters-are-key-to-winning>.

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- ²¹ Tony Romm, *Political ads are flooding Hulu, Roku and other streaming services, revealing loopholes in federal election laws*, WASH. POST (Feb. 20, 2020), <https://www.washingtonpost.com/technology/2020/02/20/hulu-roku-political-ads-streaming/>.
- ²² *Id.*
- ²³ Ads by United We Succeed, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=100926438191751 (last visited Apr. 7, 2020).
- ²⁴ UNITED WE SUCCEED, <https://www.unitedwesucceed.org> (last visited Apr. 7, 2020).
- ²⁵ Zach Monterallo, *What to watch for in tonight's primaries*, POLITICO (Mar. 10, 2020), <https://www.politico.com/newsletters/morning-score/2020/03/10/what-to-watch-for-in-tonights-primaries-785969>.
- ²⁶ Kevin Roose, *In Virginia House Race, Anonymous Attack Ads Pop Up on Facebook*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/virginia-race-comstock-wexton-facebook-attack-ads.html>; 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-facebookapproved-all-of-them. In another instance, an unknown person or group created a Facebook page called “America Progress Now,” and ran paid ads urging voters in competitive U.S. House and Senate races to cast ballots for third-party candidates—despite “America Progress Now” not existing outside of the pop-up Facebook page, and not reporting its spending to the FEC. See CLC Complaint to FEC Against America Progress Now (Sept. 12, 2019), <https://campaignlegal.org/sites/default/files/2019-09/9-12-19%20America%20Progress%20Now%20%28signed%20and%20stamped%29.pdf>.
- ²⁷ Katie Harbath & Sarah Schiff, *Updates to Ads About Social Issues, Elections or Politics in the US*, FACEBOOK (Aug. 28, 2019), <https://about.fb.com/news/2019/08/updates-to-ads-about-social-issues-elections-or-politics-in-the-us/>.
- ²⁸ Political advertisers that additionally provide an FEC ID or tax ID will get a “confirmed organization” tag.
- ²⁹ Domain records show that www.UnitedWeSucceed.org was registered via a proxy on February 13, 2020, one day after Big Tent Project was incorporated in Delaware. Whois Search for “unitedwesucceed.org,” GoDADDY.COM, <https://www.godaddy.com/whois/results.aspx?domain=unitedwesucceed.org> (last visited Apr. 7, 2020). The United We Succeed Facebook page was created a few weeks later, on February 29, and began running ads “paid for by United We Succeed” on March 5, 2020. Ads by United We Succeed, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=100926438191751 (last visited Apr. 7, 2020).
- ³⁰ 52 U.S.C. § 30104(f)(3).
- ³¹ For the People Act, H.R. 1, 116th Cong. (2019).
- ³² Honest Ads Act, S. 1356, 116th Cong. (2019).