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FOR JUSTICE  

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TWENTY  
YEARS

SECRET SPENDING  
IN THE STATES

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

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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.<sup>1</sup>

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.”<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>
- **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.<sup>5</sup> At the federal level that degree of dominance can easily cost in the \$10 millions.<sup>6</sup>
- **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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.

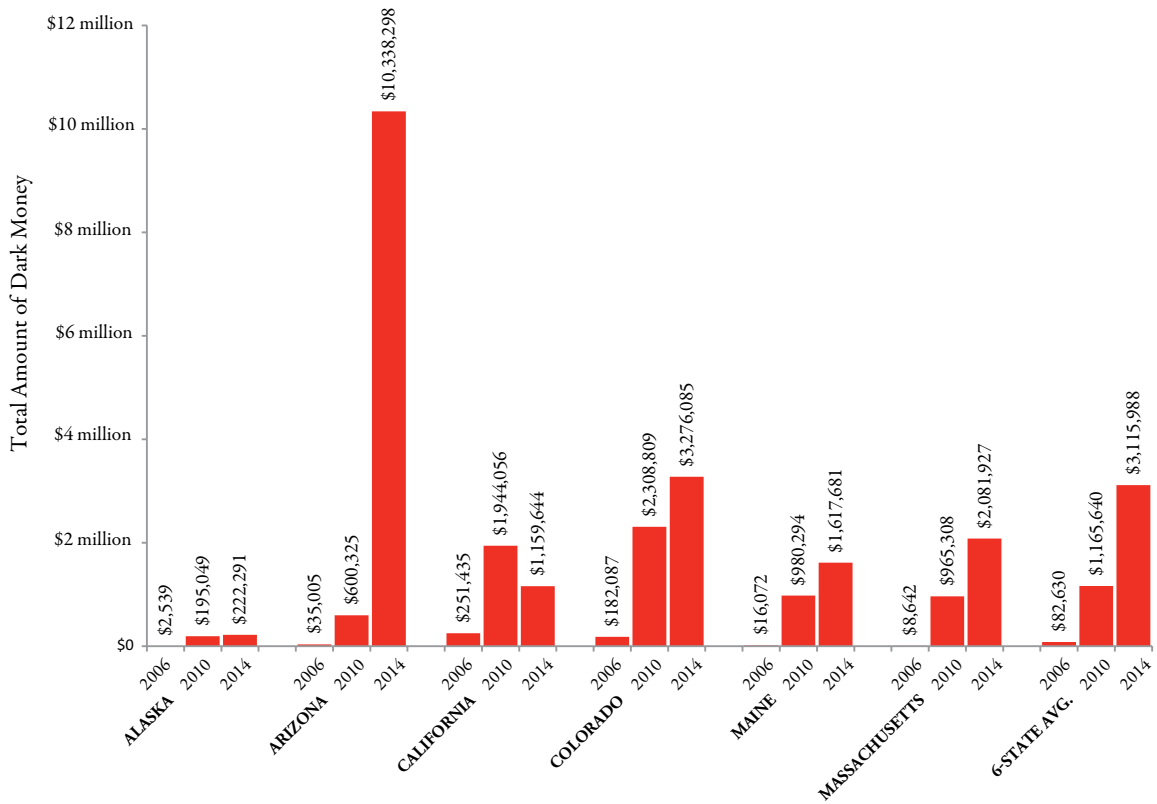
We reviewed outside spending in candidate elections in the 2006, 2010, and 2014 cycles in Alaska, Arizona, California, Colorado, Maine, and Massachusetts. We anticipated that the January 2010 *Citizens United* ruling, lifting limits on independent spending by unions and corporations including nonprofits, 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

### Changes in Dark Money in Six States, 2006-2014



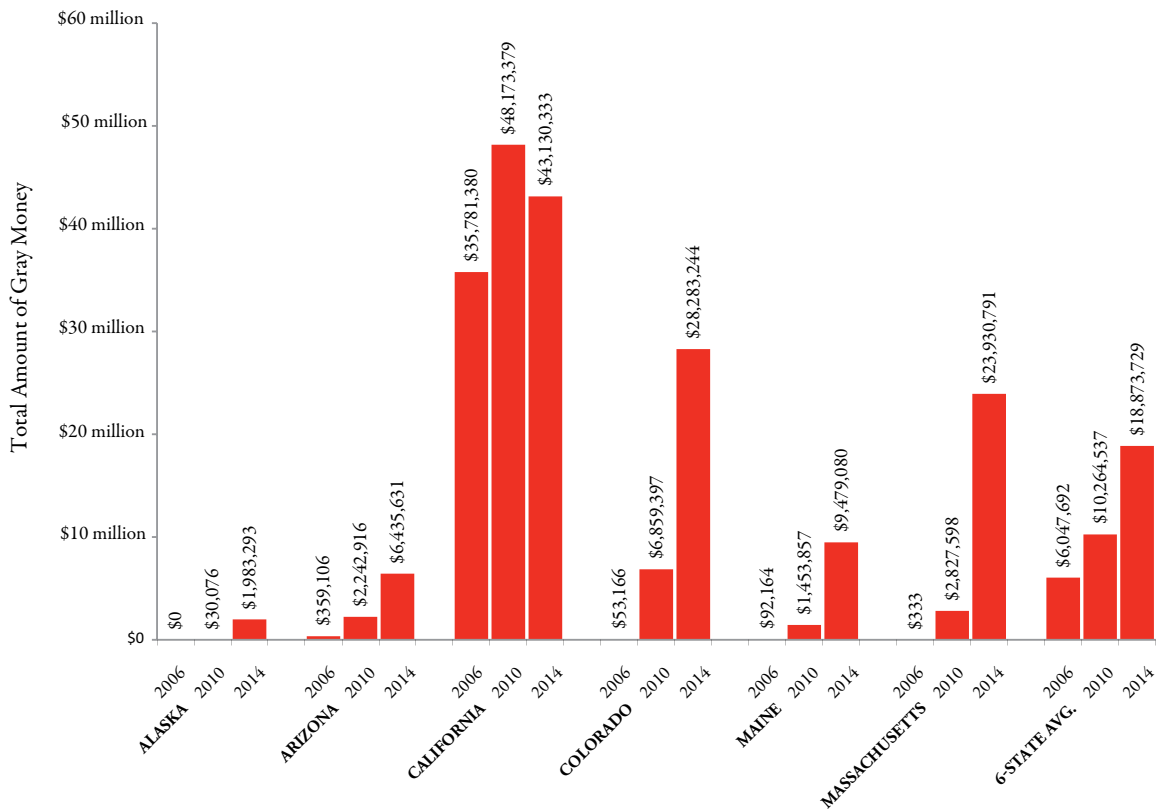
Trends in two outlier states are worth noting. Arizona saw by far the biggest surge in dark money, with the amount in 2014 rising to 295 times — nearly three hundred times — the level in 2006. By contrast, California saw remarkably little dark money over all cycles, especially considering the high levels 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.<sup>21</sup> Certain loopholes remained, but in 2014 the state enacted a measure to close one and likely reduce dark money even further in future elections.<sup>22</sup> 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.<sup>23</sup>

## 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.<sup>24</sup> In 2006, 25 percent of contributions disclosed by such PACs came from other PACs, on average across the six states.<sup>25</sup> By 2014, 66 percent of contributions to such PACs on average came from other PACs.

**Changes in Gray Money in Six States, 2006-2014**

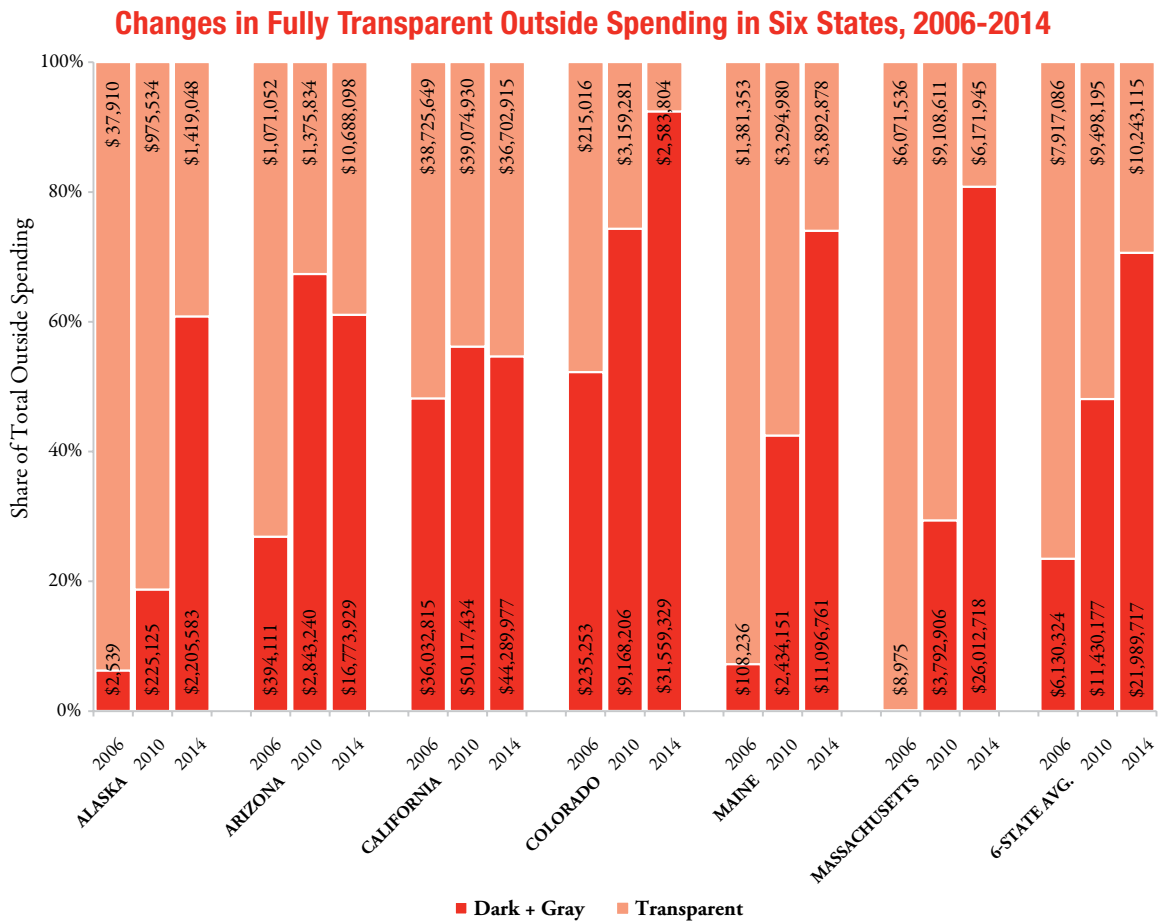


The amount of gray money increased dramatically in every state except California between 2006 and 2014. California nevertheless saw a significant amount of gray money spent in each cycle, as much as 54 percent of all outside spending in 2010.<sup>26</sup> This trend reflects California’s unusual success 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

### 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.<sup>30</sup>

“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.<sup>31</sup> Thirty-six states elect a comptroller or equivalent, the CFO of the state.<sup>32</sup> Twelve states elect a commissioner of agriculture.<sup>33</sup> One even elects its mine inspectors.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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.”<sup>37</sup>

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.<sup>38</sup> At the time of the election, voters saw only that Montana Growth Network, a nonprofit, was funding the ads.<sup>39</sup>

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.<sup>40</sup>

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.”<sup>41</sup> 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.<sup>42</sup> The lenders sought Swallow’s protection from newly toughened consumer rights rules.<sup>43</sup> 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.<sup>44</sup>

The biggest conduit for undisclosed lender support of Swallow was a nonprofit called the Proper Role of Government Education Association.<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup>

Swallow handily won his party’s primary and the general election.<sup>48</sup> 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.”<sup>49</sup>

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

### *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.<sup>53</sup> Soon after, it began lobbying for a law to expedite environmental review of mining applications.<sup>54</sup> The bill failed by one vote in the senate.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> King lost by less than 1 percent of the vote.<sup>58</sup> Shortly after the election, in the next legislative session, King’s opponent cast the deciding vote in favor of the pro-mining legislation.<sup>59</sup>

The nonprofits involved have refused to disclose any details of their political spending including donor names.<sup>60</sup> 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.”<sup>61</sup> 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.**”<sup>62</sup>



### *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.<sup>63</sup>

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.<sup>64</sup> In 2008, before the solar policy, all outside spending in the commission races amounted to only \$3,298, and none of it was dark.<sup>65</sup>

“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.<sup>66</sup> 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.<sup>67</sup>

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).<sup>68</sup> 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.<sup>69</sup> “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*.<sup>70</sup>

The company has not confirmed or denied funding specific ads.<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup> It confirmed one six-figure donation to a social welfare nonprofit that donated to a super PAC advertising in the 2012 elections.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

### *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.<sup>77</sup>

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.<sup>78</sup> "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.<sup>79</sup> "This is a common practice as campaign consultants believe it best to maintain local name ID," he explained.<sup>80</sup> 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.<sup>81</sup> The group's public contributor reports named only Garcia's statewide PAC, which had received and passed along the original donors' money.<sup>82</sup> One of the four open seats went to a pro-charter candidate, the co-founder of a large network of charter schools in California.<sup>83</sup>

## **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."<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

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."<sup>87</sup>

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.<sup>88</sup> “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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> The No on 522 committee, opposing the initiative, amassed the most money ever raised to defeat a Washington ballot initiative, more than \$22 million.<sup>94</sup> 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.<sup>95</sup>

Initially, a group called Moms for Labeling had filed a lawsuit demanding disclosure during the 2013 election battle.<sup>96</sup> “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.”<sup>97</sup> A judge dismissed that complaint on procedural grounds.<sup>98</sup> 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.”<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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."<sup>103</sup>

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

### *School Funding in Arizona*

In 2012, the generically named Americans for Responsible Leadership (ARL), a nonprofit reported to be funded by the Koch brothers,<sup>106</sup> 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.<sup>107</sup> The state legislature had in previous years cut other K-12 education funding by nearly one-fifth.<sup>108</sup> 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."<sup>109</sup>

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.<sup>110</sup> But that disclosure revealed merely a list of other nonprofit groups and PACs.<sup>111</sup> The tax measure was soundly defeated.<sup>112</sup> A year later, Arizona's per-pupil spending ranked third-lowest in the nation.<sup>113</sup> 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.<sup>114</sup>

### *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.<sup>115</sup> 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.<sup>116</sup>

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."<sup>117</sup> One ad claimed, "If Proposal 2 passes, teachers caught drunk on the job get five chances."<sup>118</sup> Another warned, "Instead of just worrying about our kids' grades, we'll have to pray for their safety."<sup>119</sup> The advertisements named only "Protecting Michigan Taxpayers" as the sponsor.<sup>120</sup>

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.<sup>121</sup> The Center for Public Integrity then reported the posting.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> At the federal level, that degree of domination can easily cost in the \$10 millions.<sup>127</sup> 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.<sup>128</sup> The company, Phillips 66, was based in Texas but owned operations in Rialto, California.<sup>129</sup> Using the mantle of Californians for Good Schools and Good Jobs, the company, secretly spent \$38,000 on the 2012 mail campaign.<sup>130</sup> The mailers showed only the shell organization's civic-minded name, not the name of the oil company.<sup>131</sup> Announcing Phillips 66's agreement to settle the case this year, state officials concluded that the Texas company had “misled the voters of Rialto.”<sup>132</sup> 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.<sup>133</sup> The \$38,000 investment by a company that netted just over \$4 billion in 2012 paid off.<sup>134</sup>

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.<sup>135</sup> “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.”<sup>136</sup>

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.<sup>137</sup> Driving issues in the contest included land use and rent control.<sup>138</sup> The NEC described itself as “a coalition of community members interested in collaborative decision making.”<sup>139</sup> 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.<sup>140</sup>

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.”<sup>141</sup> 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.<sup>142</sup> “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.<sup>143</sup> “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.<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup> One contributor was an out-of-state limited liability company that gave \$45,000, according to news reports.<sup>147</sup> Citizens Against Taxation donated \$10,000 to another group, called Sarasota Citizens for Our Schools, that supported the pro-charter candidate.<sup>148</sup> 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.<sup>149</sup> The four competitors for one seat spent more than \$135,000 in total.<sup>150</sup>

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.”<sup>151</sup> “That’s not the way school board races have been,” he said.<sup>152</sup> “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.”<sup>153</sup>

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.<sup>154</sup> “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.”<sup>155</sup> 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.”<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup>

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.<sup>159</sup> “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.”<sup>160</sup>

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.<sup>161</sup> “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.”<sup>162</sup>

#### **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.<sup>163</sup>

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.<sup>164</sup>

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.<sup>165</sup> “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.<sup>166</sup> “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.<sup>167</sup>

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.<sup>168</sup> One week before Election Day, acting on a complaint from Republican Secretary of State Ben Yursa, an Idaho court ordered the nonprofit to disclose its donors.<sup>169</sup> 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.<sup>170</sup> 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.”<sup>171</sup> 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.”<sup>172</sup> Ultimately, Idahoans voted against putting more public education dollars into online systems.<sup>173</sup>

### *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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> (Ironically one of the group’s ads said that Prop 32 promised “real tough campaign finance reform, no loopholes, no exceptions.”)<sup>177</sup> A watchdog group, California Common Cause, complained about the PAC’s lack of donor disclosure, prompting the investigation.<sup>178</sup> 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.<sup>179</sup> 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.<sup>180</sup> Forging 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.<sup>181</sup> The investigation made headlines. Voters ultimately rejected these spenders’ messages, adopting the tax increase but nixing the limit on union fundraising.<sup>182</sup>

### *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.<sup>183</sup> 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.<sup>184</sup> Richmond’s largest employer and taxpayer, Chevron had spent generous sums in previous city elections, but the fire and officials’ responses raised the stakes.<sup>185</sup> 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.”<sup>186</sup> 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*.<sup>187</sup>

Under California’s unusually robust disclosure laws, Chevron election spending was public knowledge.<sup>188</sup> 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.<sup>189</sup> But a state rule required each communication to bear a disclaimer ending with “major funding by Chevron,” among other transparency measures.<sup>190</sup> 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.”<sup>191</sup>

Voters rejected all of Chevron’s preferred candidates for mayor and city council in 2014.<sup>192</sup> 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.”<sup>193</sup> Ultimately, as a Chevron spokesman told the *San Francisco Chronicle*, “The voters have spoken.”<sup>194</sup>

### ***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.<sup>195</sup> The company’s role was out in the open, because California law requires that political ads contain a disclaimer identifying the sponsor.<sup>196</sup> 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.”<sup>197</sup> 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.<sup>198</sup>

### 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.<sup>199</sup> Moreover, even while it has steadily dismantled other campaign finance laws, the Supreme Court has consistently upheld disclosure measures.<sup>200</sup>

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.<sup>201</sup> “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.<sup>202</sup> 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.<sup>203</sup> 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'.<sup>204</sup> Both states' laws apply explicitly to the types of nonprofit groups — social welfare organizations and trade associations — that are notorious conduits for anonymous electioneering.<sup>205</sup>

- **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.<sup>206</sup> 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.<sup>207</sup>

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.<sup>208</sup> Compliance with the donor disclosure requirement, however, is minimal, because of a loophole in the current interpretation of the law.<sup>209</sup> A pending bill would extend the disclosure period to the entire year of an election.<sup>210</sup> 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.<sup>211</sup> Delaware now requires disclosure of all donors to groups that buy these types of ads.<sup>212</sup> 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.<sup>213</sup>

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.<sup>214</sup>

### **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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup>

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.<sup>218</sup> California requires outside spenders to list the top two donors who gave at least \$50,000.<sup>219</sup> 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.<sup>220</sup> 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.”<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> Both states also extended the pre-election period during which accelerated reporting of large expenditures is required.<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup>

### **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.<sup>228</sup> 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."<sup>229</sup> 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.<sup>230</sup> Moreover, small contributions and expenditures do not raise the risks of corruption or distorting influence that disclosure laws ideally serve to mitigate.<sup>231</sup> 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.<sup>232</sup> And outside spenders in Georgia do not have to disclose donors of \$1,000 or less in their pre-election reports.<sup>233</sup> 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.<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> These programs apply to applications for voter registration, drivers' licenses, and campaign finance disclosure.<sup>237</sup>

- **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.<sup>238</sup> 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.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

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.<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup>

## 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](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](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](http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race_us_572b9f4ce4b016f378951c8f).
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- 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](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](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](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](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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