



**Testimony of Professor Ciara Torres-Spelliscy<sup>1</sup>  
Before the House Judiciary Committee  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
Regarding the Tenth Anniversary of *Citizens United v. FEC*  
February 6, 2020**

Honorable Chair, Ranking Member and Members of the Committee,

## **Taking Stock of *Citizens United v. FEC***

Thomas Mann of the Brookings Institution wrote contemporaneously in 2010, “[t]he 5-4 conservative majority decision in *Citizens United vs. the Federal Election Commission* that struck many decades of law and precedent will likely go down in history as one of the Supreme Court’s most egregious exercises of judicial activism.”<sup>2</sup> Ten years later Mr. Mann’s assessment still stands. As Former Justice of the Montana Supreme Court Nelson stated recently in 2020, “[o]n January 21, 2010, the Supreme Court of the United States handed down one of its worst and most activist decisions ever. Indeed, in terms of harm caused and likelihood for future harm, the Court’s decision in *Citizens United* is, likely, the most pernicious Supreme Court decision ever issued in our nation’s history.”<sup>3</sup>

Nearly a decade ago, I told Congress after *Citizens United v. FEC* that I predicted two problems with inviting corporate money into our democracy: a lack of consent<sup>4</sup> and a lack of transparency,<sup>5</sup> which is sometimes known as the dark money problem.<sup>6</sup> I regret to say that both of these problems remain as unsolved as they were ten years ago.

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<sup>2</sup> Thomas E. Mann, *Citizens United vs. Federal Election Commission is an Egregious Exercise of Judicial Activism*, BROOKINGS (Jan. 26, 2010), <https://www.brookings.edu/opinions/citizens-united-vs-federal-election-commission-is-an-egregious-exercise-of-judicial-activism/>.

<sup>3</sup> Jim Nelson (Former Montana Supreme Court Justice), *The Citizens United Decision: Another Date That Will Live in Infamy*, ACS EXPERT FORUM (Jan. 21, 2020), <https://www.acslaw.org/expertforum/the-citizens-united-decision-another-date-that-will-live-in-infamy/>.

<sup>4</sup> Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARVARD LAW REVIEW 83, 83-85 (2010).

<sup>5</sup> *Ciara Torres-Spelliscy’s Testimony for the Committee on House Administration Hearing*, BRENNAN CENTER FOR JUSTICE (Feb. 2, 2010), <https://www.brennancenter.org/analysis/ciara-torres-spelliscys-testimony-committee-house-administration-hearing>; for more information on corporate political spending see Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30(2) CONSTITUTIONAL COMMENTARY 431 (Summer 2015).

<sup>6</sup> Abby Wood, *Citizens United turns 10 today. Here’s what we’ve learned about dark money.*, WASH. POST (Jan. 21, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/> (“...when a super PAC is supported by dark money groups, the donor list may not contain any individuals at all. For example, the pro-Trump super PAC Get Our Jobs Back reported over \$50 million in independent expenditures during the 2016 primary. Its filing lists only four donors: the New York Post, Statware, “Other Firms” and TowersInvestors.com. Because three of these donors are dark money groups that do not need to report their donors, observers cannot follow the money to its original source.”).



The tenth anniversary of *Citizens United* has prompted many scholars and non-profits that specialize in campaign finance and corporate governance to look back at the decision and the intervening decade. I canvass some that new data and analysis here.

## Measuring Money by the Billion

President Obama predicted in his 2010 State of the Union that *Citizens United* would “open the floodgates for special interests — including foreign corporations — to spend without limit in our elections.”<sup>7</sup> What scholars and activists could not know for certain the day that *Citizens United* was decided was whether spending patterns would actually change in elections after the opinion. But with the passage of time, it is apparent that as documented by Open Secrets, who keep meticulous records of spending in federal elections, that outside political spending exploded in the intervening ten years. To wit, “outside spending is the primary consequence of *Citizens United*, with non-party groups now dominating presidential elections and the most tightly contested House and Senate contests. Non-party outside groups have spent nearly \$4.5 billion influencing elections since the 2010 cycle. Over the previous two decades, they spent a combined \$750 million.”<sup>8</sup>

*Citizens United* led to the D.C. Circuit decision *SpeechNow*, which in turn allowed for the creation of Super PACs.<sup>9</sup> Super PACs have been mega-spenders in federal elections which were also funded by a handful of mega-donors. As *ABC News* reported, “[d]uring the 2016 campaign, more than 2,300 Super PACs spent \$1.1 billion – nearly 17% the \$6.5 billion amount spent by all parties involved in the election cycle at all levels. Most of that money came from just 100 donors...”<sup>10</sup> Moreover, according to Open Secrets, “[j]ust 10 donors accounted for more than \$1 billion over the decade.”<sup>11</sup> One measure of how impactful outside spending was post-*Citizens United* is that in 126 races the outside spending dwarfed what the federal candidate himself or herself spent.<sup>12</sup>

Another development in the post-*Citizens United* era was the price tag for federal elections continued to trend upwards. Each midterm election between 1998 and 2018 was more expensive than the midterm election that preceded it. And every presidential election cycle, including congressional

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<sup>7</sup> *Remarks by the President in State of the Union Address*, WHITE HOUSE (Jan. 27, 2010),

<https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address>; see also Jesse Lee, *President Obama on Citizens United: “Imagine the Power This Will Give Special Interests Over Politicians”*, WHITE HOUSE BLOG (July 26, 2010 at 3:07 PM ET), <https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

<sup>8</sup> Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.

<sup>9</sup> *SpeechNOW.Org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>10</sup> Devin Dwyer, *10 years after landmark Citizens United Supreme Court decision, record cash flooding US elections*, ABC NEWS (Jan. 20, 2020, 5:07 AM), <https://abcnews.go.com/Politics/10-years-landmark-citizens-united-supreme-court-decision/story?id=68099167>; see also David M. Shribman, *Ten years on, Citizens United ruling has changed U.S. politics — but not in the way many feared*, LOS ANGELES TIMES (Jan. 12, 2020, 4:00 AM), <https://www.latimes.com/world-nation/story/2020-01-12/citizens-united-ruling-anniversary-how-it-changed-american-politics> (“the 100 top donors [of the last midterm election] were responsible for two-thirds to three-quarters of all the money raised by super PACs...”).

<sup>11</sup> OpenSecrets.org, *Everything you need to know about Citizens United on its 10th anniversary*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/2020/01/citizens-united-on-its-10th-anniversary/>.

<sup>12</sup> Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs> (“In some of the most competitive races, outside groups wage ad wars of their own, battling for spending superiority to influence voters. Since the 2010 midterms, outside spending has surpassed candidate spending in 126 congressional races. In the five cycles prior, that phenomenon occurred just 15 times.”).



races between 2000 and 2016 was more expensive than the presidential election cycle that preceded it, though the cost of the 2016 presidential race (Trump/Clinton) alone was slightly down from 2012 (Obama/Romney).<sup>13</sup> Contributing to the upward trajectory were costly congressional races. In my home state of Florida, we experienced the most high-priced Senate race in history between Rick Scott and Bill Nelson. “Eight of the top 10 most expensive Senate races ever occurred after *Citizens United* with inflation factored in. With \$213 million spent — including \$97 million in outside spending — the hotly contested 2018 Florida Senate race is the most expensive ever.”<sup>14</sup> So far, as of February 1, 2020, presidential candidates had already raised over \$1 billion with billionaire candidates President Trump, Mayor Bloomberg and Tom Steyer all raising over \$200 million.

While the press has focused on the explosion of small donors in recent federal elections including the last midterm, as the Brennan Center for Justice at NYU School of Law has documented, “[t]o be sure, 2018 was a banner year for small donations. Donors who gave \$200 or less contributed \$1.4 billion to campaigns and political committees, a more than 50 percent increase over the last midterm cycle. But donors who gave more than \$100,000 together contributed almost \$2 billion, well over twice the total from 2014, resulting in a much greater portion of election funding coming from them than small donors.”<sup>15</sup>

### **Mega-Donors Play in State Elections Too**

*Citizens United* also impacted state and local elections. It is worth noting that outside political spending also mushroomed in these elections. According to the National Institute on Money in Politics which tracks political spending in all 50 states, “[a]t the state level, Americans have seen a marked increase in independent spending after *Citizens United*, and some states have experienced exponential growth. For instance, in Colorado’s 2006 election, independent spending totaled less than \$400,000. The next post-*Citizens United* comparable election, 2014, saw \$33.8 million spent independently. Most recently, 2018’s election had a remarkable \$136.9 million of independent spending. *It boggles the mind.*”<sup>16</sup>

Not unlike what happened in federal elections where rich individuals took center stage, a similar thing happened in state electoral spending as well. According to Campaign Finance Institute, “[i]n the years before the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission* (CU), independent expenditures (IEs) in state elections were dominated by formal state and local party organizations and labor unions. In the years since then, ... ascendant have been national, party-affiliated organizations (such as the Republican and Democratic Governors Associations) and

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<sup>13</sup> *Total Cost of Election (1998-2018)*, CENTER FOR RESPONSIVE POLITICS <https://www.opensecrets.org/overview/cost.php> (last visited Feb. 1, 2020).

<sup>14</sup> Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.

<sup>15</sup> Ian Vandewalker, *The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United*, BRENNAN CENTER (Jan. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united>.

<sup>16</sup> Stacy Montemayor, *10 years after Citizens United: State races transformed by explosive growth in independent spending*, NATIONAL INSTITUTE ON MONEY IN POLITICS (Jan. 21, 2020), <https://www.followthemoney.org/research/institute-reports/10-years-after-citizens-united-state-races-transformed-by-explosive-growth-in-independent-spending> (emphasis added).



– most dramatically – single-issue organizations funded by wealthy mega-donors.”<sup>17</sup> Simultaneously, there’s a dark money problem in state and local elections.<sup>18</sup>

## Millions of Other People’s Money

As I and other scholars have noted, the Supreme Court in *Citizens United* displayed a surprising lack of appreciation of how corporate governance actually works in the real world. As the Chief Justice of the Delaware Supreme Court noted, “the Supreme Court ignored, or misunderstood, the traditional corporate law concept of the corporation and thereby subjected millions of American investors to suffer the involuntary use of their entrusted capital for speech that has no rational connection to their decision to buy stock. That is bad corporate law making bad constitutional law.”<sup>19</sup>

In the previous presidential election in 2016, the top donor to Jeb Bush’s Super PAC Right to Rise was a corporation called CV Starr & Co, a private subsidiary of the Starr Companies, an insurance firm. CV Starr gave Right to Rise \$10 million. Many corporations, LLCs and business partnerships also gave.<sup>20</sup> An additional \$2.3 million came from Rooney Holdings Inc. Another in the \$1 million club was Jasper Reserves LLC. Yet another million-dollar donor to Right to Rise was NextEra Energy Inc. NextEra is a horse of different color because it is a publicly traded company (NYSE ticker: NEE).<sup>21</sup>

That is just a snap shot of corporate spending in one election through one candidate’s Super PAC. According to Open Secrets, looking over the past decade, “36 companies on the S&P 500 contributed \$25,000 or more to super PACs since 2012. The largest donors on that list are Republican-backing oil & gas companies such as Chevron and NextEra Energy. Corporations gave \$301 million to super PACs and hybrid PACs from the 2012 to 2018 cycles, 87 percent of which went to conservative groups. These contributions made up 10 percent of funding to these groups in the 2012 cycle, a high water mark. That figure dipped to just 5 percent in 2018.”<sup>22</sup> I tracked publicly

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<sup>17</sup> Press Release, *Independent Spending in State Elections, 2006-2016 The big winners were single-issue organizations funded by wealthy mega-donors*, CAMPAIGN FINANCE INSTITUTE NIMP (Sept. 18, 2018), [http://www.cfinst.org/Press/PReleases/18-09-18/Working\\_Paper\\_Independent\\_Spending\\_in\\_State\\_Elections\\_2006-2016.aspx](http://www.cfinst.org/Press/PReleases/18-09-18/Working_Paper_Independent_Spending_in_State_Elections_2006-2016.aspx).

<sup>18</sup> Chisun Lee & Douglas Keith, *How Semi-Secret Spending Took Over Politics*, THE ATLANTIC (June 28, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/>; see also Tiffany Muller, *Citizens United: The Court Ruling That Sold Our Democracy*, COMMON DREAMS (Jan. 22, 2020), <https://www.commondreams.org/views/2020/01/22/citizens-united-court-ruling-sold-our-democracy> (“Now, almost half of all outside spending is dark money that has no or limited disclosure of its donors.”).

<sup>19</sup> Jonathan R. Macey & Leo E. Strine Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019); see also Skaife, H.A., Werner, T., *Changes in Firms’ Political Investment Opportunities, Managerial Accountability, and Reputational Risk*, JOURNAL OF BUSINESS ETHICS (2019), <https://doi.org/10.1007/s10551-019-04224-6>; Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48:1 THE JOURNAL OF LEGAL STUDIES 81-116 (2019), <https://www.journals.uchicago.edu/doi/abs/10.1086/700846>; Michael Hadani, Jonathan P.Doh & Marguerite Schneider, *Social movements and corporate political activity: Managerial responses to socially oriented shareholder activism*, 95 JOURNAL OF BUSINESS RESEARCH 156-170 (Feb. 2019), <https://doi.org/10.1016/j.jbusres.2018.10.031>.

<sup>20</sup> Daniel Nasaw, *Which Candidates’ Super PACs Are Getting Most Corporate Money?*, WALL ST. J. (Aug. 20, 2015 10:52 am ET), <https://blogs.wsj.com/washwire/2015/08/20/which-candidates-super-pacs-are-getting-most-corporate-money/>.

<sup>21</sup> Ciara Torres-Spelliscy, *Corporate America’s Wasted Investment in Jeb Bush*, BRENNAN CENTER BLOG (Feb. 29, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/corporate-americas-wasted-investment-jeb-bush>.

<sup>22</sup> Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.



traded company spending in my book Political Brands and I found that publicly traded companies had spent \$37.9 million between *Citizens United* and 2018.<sup>23</sup> This is a problem because when corporate managers spend money from the treasuries of publicly traded companies they are using what Justice Brandeis once called “other people’s money.”<sup>24</sup>

## It’s Getting a Little Dark in Here

As I discuss in my first book, Corporate Citizen, dark money has plagued American elections in the intervening years between 2010 and today:

The impact of *Citizens United* was immediately clear. Roughly \$450 million in outside money was spent in [the 2010 midterm] federal election, and \$131 million of that spending was from dark money sources. “Dark money,” means political spending where the original source is impossible for the public to discover. As the Chair of the Federal Election Commission (FEC) Ann Ravel noted, “[t]here are circuitous ways to spend. We have the nesting doll problem with dark money.” Because much of that dark money was funneled through trade associations like the U.S. Chamber of Commerce, there is a deep suspicion that much of this dark money came from corporations exercising their new *Citizens United* rights to spend. But because the money is dark, the public may never know for sure. As prominent political lawyer Trevor Potter explained, “[w]e only know corporate funding of most political ads when it is inadvertently disclosed.”<sup>25</sup>

In fact, over \$1 billion dollars in dark money has been spent in federal elections alone since 2008.<sup>26</sup> In the 2018 election, over \$147 million in dark money was spent.<sup>27</sup> Dark money is money spent in elections which cannot be traced to its real source.<sup>28</sup> With dark money, the voting public only knows the last entity that spends in an election, but not the identity of underlying donors. The typical way dark money is created is by spending through an opaque non-profit like a 501(c)(4) (a social welfare organization) or 501(c)(6) (a trade organization). And then porous rules at the FEC have allowed donors to these nonprofits to remain anonymous, even if they spend millions during elections to influence voters.<sup>29</sup>

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<sup>23</sup> CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* 71-75 (Elgar 2019) (\$3,350,000 in 2010, \$4,250,000 in 2012, \$5,206,925 in 2014, \$6,975,000 in 2016 and \$18,192,930 in 2018).

<sup>24</sup> LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).

<sup>25</sup> CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN?: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE* 14 (Carolina 2016) (internal citations omitted).

<sup>26</sup> Anna Massoglia, *State of Money in Politics: Billion-dollar ‘dark money’ spending is just the tip of the iceberg*, CENTER FOR RESPONSIVE POLITICS (Feb. 21, 2019), <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

<sup>27</sup> *Dark Money Basics*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 2, 2020), <https://www.opensecrets.org/dark-money/basics> (showing \$147.7 million in dark money spent in 2018).

<sup>28</sup> Michael E. Hartmann, *The Etymology of “Dark Money” Where did the phrase originate, and what does it mean?*, Capital Research Center (July 15, 2019) (Bill Allison at the Sunlight Foundation coined the phrase ‘dark money.’).

<sup>29</sup> *Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements/Obligations for Electioneering Communications)*, Federal Election Commission (Jan. 2018), <https://www.fec.gov/resources/cms-content/documents/fecform9i.pdf> (“Schedule 9-A [listing donors] must be filed only if the donations received for the purpose of furthering electioneering communications aggregate \$1,000 or more per donor since the first day of the preceding calendar year. ... 11 CFR 104.20(c)(9).”).



## An Agency Asleep

A functioning and effective Federal Election Commission could have crafted rules to prevent dark money even before *Citizens United* because the phenomenon started before 2010.<sup>30</sup> But to date, the FEC has not promulgated any rules to make dark money transparent for American voters.<sup>31</sup>

The only slight improvement on the dark money front has come at the order of a federal court, not through the normal notice and comment rule making process.<sup>32</sup> The D.C. District Court in *CREW v. FEC* in 2018 mandated that those entities who buy independent expenditures must actually name their donors.<sup>33</sup> The FEC provided guidance on how to comply with the court's order for political ads purchased after September 18, 2018 directing the listing of donors over \$200 in filings with the Commission.<sup>34</sup> The Supreme Court let the ruling in this case stand for the purposes the 2018 election.<sup>35</sup> Troublingly, the Campaign Legal Center found that many groups were not complying with the new required transparency on the eve of the 2018 midterm election.<sup>36</sup> Moreover, *CREW v. FEC* is still being litigated, so the ultimate result in the federal courts is unknown.<sup>37</sup>

*CREW v. FEC* won't solve the dark money problem completely because it only applies to independent expenditures which contain *Buckley v. Valeo's* magic words of express advocacy (such as "vote for" or "vote against").<sup>38</sup> Yet many political ads fall into a different category called "electioneering communications." These are broadcast ads that never use the magic words, but feature a federal candidate in the days leading up to a federal election.<sup>39</sup> The *CREW v. FEC* case doesn't apply to electioneering communications. Thus, those ads are more likely to be funded by dark money.

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<sup>30</sup> Steve Weissman, *Press Release New CFI Report Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, Campaign Finance Institute (Feb. 25, 2009), [http://www.cfinst.org/press/releases\\_tags/09-02-25/Soft\\_Money\\_Political\\_Spending\\_by\\_Nonprofits\\_Tripled\\_in\\_2008.aspx](http://www.cfinst.org/press/releases_tags/09-02-25/Soft_Money_Political_Spending_by_Nonprofits_Tripled_in_2008.aspx).

<sup>31</sup> Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Federal Election Commission (Feb. 2017) ("Due to the bloc's ideological opposition to campaign finance law, major violations are swept under the rug and the resulting dark money has left Americans uninformed about the sources of campaign spending."); Megan R. Wilson, *FEC deadlocked on 'dark money'*, The Hill (Feb. 11, 2015), <https://thehill.com/homenews/campaign/232582-fec-deadlocked-on-dark-money>; Daniel I. Weiner, *The FEC Deadlocks (Again) on Dark Money*, BRENNAN CENTER BLOG (Aug. 1, 2014), <https://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

<sup>32</sup> Ciara Torres-Spelliscy, *The 2018 Elections Have \$100 Million in Dark Money and Counting Voters are more in the dark than ever about who's funding political ads*, Brennan Center Blog (Oct. 22, 2018), <https://www.brennancenter.org/blog/2018-elections-dark-money>.

<sup>33</sup> *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018).

<sup>34</sup> Press Release, *FEC provides guidance following U.S. District Court decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), FEDERAL ELECTION COMMISSION (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

<sup>35</sup> Dave Levinthal & Sarah Kleiner, *Supreme Court Lets Stand a Decision Requiring 'Dark Money' Disclosure*, The Atlantic (Sept. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/09/supreme-court-lets-stand-a-decision-requiring-dark-money-disclosure/570670/>.

<sup>36</sup> Brendan Fischer & Maggie Christ, *How the FEC is Still Allowing Dark Money Groups to Remain Dark*, Campaign Legal Center (Oct. 17, 2018), <https://campaignlegal.org/update/how-fec-still-allowing-dark-money-groups-remain-dark>.

<sup>37</sup> Citizens for Ethics in Washington, *CREW VS. FEC – CROSSROADS GPS* (last visited Feb. 2, 2020), <https://www.citizensforethics.org/lawsuit/crew-vs-fec-crossroads-gps/>.

<sup>38</sup> *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976), see also *Writing Reform*, Brennan Center for Justice at VII-5 - VII-7 (2010).

<sup>39</sup> *The Nuts and Bolts of Electioneering Communications*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 2, 2020), <https://www.opensecrets.org/527s/electioneering.php>.



However, Congress should know that the Supreme Court has been consistent in decisions over the past four decades that disclosure of money in politics is perfectly constitutional.<sup>40</sup>

On-line political ads that lack magic words present a significant problem as they fundamentally fall into a no-mans-land and thereby escape traditional campaign finance reporting requirements.<sup>41</sup> Essentially, if an on-line political ad that attacks or supports a federal candidate yet avoids *Buckley*'s magic words, it is not a reportable expenditure under current federal law. States are stepping up to fill this void in transparency for on-line political ads by expanding campaign finance reporting requirements to on-line platforms for state elections, but that is only a patchwork solution that calls out for a national resolution.<sup>42</sup> In meantime, Congress could provide more clarity in legislation that dark money is not allowed in federal elections, specifying reasonable donor disclosure thresholds for campaign ads including those that appear on-line.

### Rubles, Renminbi & Malaysian Ringgit

Faith in the integrity of American elections was shaken after the American Intelligence Community informed the public in 2016 and in 2017 that the 2016 election was attacked by Russians.<sup>43</sup> This assessment was then reinforced by indictments in 2018 from the Special Counsel against Russians for hacking during the 2016 election, as well as a large Russian social media disinformation campaign.<sup>44</sup> And evidence of foreign interference was further articulated in the redacted version of the Special Counsel's Report in 2019.<sup>45</sup>

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<sup>40</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 915-917 (2010) (upholding BRCA's disclosure requirements); *McConnell v. FEC*, 540 U.S. 93, 191-193 (2003) (upholding BRCA's disclosure requirements); *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (upholding FECA's disclosure requirements).

<sup>41</sup> Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, CENTER FOR RESPONSIVE POLITICS (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

<sup>42</sup> Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center's Erin Chlopak*, Hewlett Foundation (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/> ("Vermont, Washington, and Wyoming each amended their campaign finance laws to extend reporting and disclaimer requirements to online political ads."); *id.* ("Maryland, California, and New York have enacted legislation that requires the creation of digital archives of information about online ads relating to candidates and ballot initiatives.").

<sup>43</sup> *Joint Statement from the Department Of Homeland Security and Office of the Director of National Intelligence on Election Security*, Department of Homeland Security (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> ("The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations."); Director of National Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections*, ICA 2017-01D (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf) ("We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.").

<sup>44</sup> *U.S. v. Viktor Borisovich Netyksho*, 1:18-cr-215 at 7-8 (D.D.C.) (Indictment July 13, 2018), [www.documentcloud.org/documents/5021502-Indictment-as-to-Viktor-Borisovich-Netyksho-Et-Al.html](http://www.documentcloud.org/documents/5021502-Indictment-as-to-Viktor-Borisovich-Netyksho-Et-Al.html) ("on or about July 27, 2016, the Conspirators attempted after hours to spearfish for the first time email accounts at a domain hosted by a third-party provider and used by Clinton's personal office."); *U.S. v. Internet Research Agency LLC*, 1:18-cr-32 (D.D.C.) (Indictment Feb. 16, 2018).

<sup>45</sup> Special Counsel Robert S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Department of Justice (Apr. 18, 2019), [www.justice.gov/storage/report.pdf](http://www.justice.gov/storage/report.pdf) (redacted version).



In light of these revelations about the 2016 election, which I write about in my book Political Brands, American voters need to know that all hands are on deck to prevent or catch the next foreign effort to interfere with our elections.<sup>46</sup> But instead, what Americans have seen from the Federal Election Commission (FEC) is an inability to investigate Russian interference including the purchase political ads on Facebook with rubles,<sup>47</sup> the failure to make any new rules that would address foreign interference, and the failure to address dark money which could provide cover for foreign meddling.<sup>48</sup>

As I explain in my book Political Brands, one thing that the American public still doesn't know is whether dark money is hiding illegal money, including money from foreign nationals:

As Lisa Gilbert of Public Citizen notes ... “One of our biggest concerns about our system of money in politics is that it can flow in a very secretive way. And because dark money flows behind the scenes, foreign nations are able to take advantage of the lack of transparency, and influence our politics.”<sup>49</sup>

Campaign finance reform advocates have long worried that dark money could be hiding illegal foreign money. Recent events show that this fear was not far-fetched. As Professor Abby Wood noted in the *Washington Post*, “[Dark money hiding foreign influence] is the hardest point to study systematically. Consider the indictments of Igor Fruman and Lev Parnas, figures in the Trump impeachment case, for violating campaign finance laws. A lawyer at a nonprofit carefully matched Fruman’s and Parnas’s addresses to that of a dark money donation from a shell corporation to a super PAC that supported Trump — and found that the pair were laundering over \$1 million from foreign countries to support Trump. That’s illegal under our laws, which forbid foreign nationals to donate to U.S. elections and forbid anyone to donate under someone else’s name.”<sup>50</sup>

Are foreigners spending in U.S. elections? Largely, we don't know because many of those that would be sophisticated enough to spend in U.S. elections, likely know how to spend in a secretive way. But there have been examples of foreign spending in U.S. elections that has been caught red-handed. For example, a Chinese company, American Pacific International Capital, Inc. (APIC), gave \$1.3 million to the pro-Jeb Bush Super PAC Right to Rise in the 2016 presidential election. In a rare instance of the FEC enforcing the ban on foreign spending in U.S. elections, a complaint against Right to Rise resulted in FEC fines against the Super PAC and the Chinese company.<sup>51</sup>

In other cases, the FEC has been passive about enforcing the law against foreign spending. As I discussed in Corporate Citizen, in a particularly colorful episode, a foreign pornographer spent in a Los Angeles election in 2012 in favor of President Obama's reelection. This spending violated a

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<sup>46</sup> TORRES-SPELLISCY, POLITICAL BRANDS.

<sup>47</sup> Josh Dawsey, *Russian-funded Facebook ads backed Stein, Sanders and Trump*, POLITICO (Sept. 26, 2017), <https://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>.

<sup>48</sup> See *infra*.

<sup>49</sup> TORRES-SPELLISCY, POLITICAL BRANDS at 304 (quoting Lisa Gilbert).

<sup>50</sup> Abby Wood, *Citizens United turns 10 today. Here's what we've learned about dark money.*, WASH. POST (Jan. 21, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/>.

<sup>51</sup> Kate Sullivan, *FEC fines Jeb Bush super PAC and a Chinese company \$1 million over foreign interference in 2016 election*, CNN (Mar. 11, 2019) (“The FEC fined the Jeb Bush super PAC Right to Rise \$390,000 for soliciting a contribution from a foreign national and the American Pacific International Capital \$550,000 for making the contribution...”).





longstanding ban on foreign money in any American election (federal, state or local).<sup>52</sup> Nevertheless the FEC would not enforce the federal law against the foreign pornographer. This spending also violated California law, and fortunately for the rule of law, California enforced its law against him.<sup>53</sup>

In another case which is ongoing, Pras Michel of the musical group The Fugees has been indicted by the U.S. Department of Justice (DOJ) for allegedly facilitating political spending from a foreign donor in the 2012 presidential election. As soon as these actions were discovered, campaign finance experts complained about Mr. Michel's alleged behavior to the FEC, which, again, did nothing about it.<sup>54</sup> Thankfully the DOJ picked up the ball that the FEC dropped in this case, which allegedly involved over \$21 million in foreign money.<sup>55</sup>

As demonstrated above, because the FEC has largely been nonfunctional, or stuck in deadlocks, even investigations of foreign spending or punishment for foreign spending has been lacking.<sup>56</sup> The FEC also has not made new rules to better deter foreign spending post-2016.<sup>57</sup> Though I should note that the current Chair of the FEC has put out strong statements reminding the public that foreign spending in U.S. elections is illegal, especially when the spending is from foreign governments.<sup>58</sup>

The ban on foreign spending is not controversial and the Supreme Court has upheld the foreign ban.<sup>59</sup> Yet the lack of enforcement by the FEC against foreign spending in the two notable cases mentioned above, among others, has sent a terrible message to anyone paying attention: the message is campaign finance law is basically not enforced at the federal level to keep foreign money at bay. Given the experience of 2016 with Russians' breaking U.S. election laws with abandon, the lessons for North Korea, China, Iran or any other hostile foreign actors is that interference in our elections can be done largely without legal consequences from the primary regulator—the FEC.

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<sup>52</sup> 52 U.S.C. § 30121 & 11 CFR 110.20.

<sup>53</sup> CORPORATE CITIZEN at 121-122.

<sup>54</sup> Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel indictment exposes how FEC dysfunction opens our elections to foreign meddling*, Campaign Legal Center (May 15, 2019), <https://campaignlegal.org/update/delay-deadlock-dismiss-pras-michel-indictment-exposes-how-fec-dysfunction-opens-our>.

<sup>55</sup> Press Release, *Entertainer/Businessman and Malaysian Financier Indicted for Conspiring to Make and Conceal Foreign and Conduit Contributions During 2012 U.S. Presidential Election*, Department of Justice (May 10, 2019), <https://www.justice.gov/opa/pr/entertainerbusinessman-and-malaysian-financier-indicted-conspiring-make-and-conceal-foreign>.

<sup>56</sup> Rick Hasen, *Breaking: Republican FEC Commissioners Block Investigation into NRA Russian Ties in 2016 Election*, Election Law Blog (Aug. 16, 2019 11:54 AM), <https://electionlawblog.org/?p=106940>.

<sup>57</sup> Jordan Muller, *FEC rejects proposal to consider new rules on foreign spending in US elections*, CENTER FOR RESPONSIVE POLITICS (May 25, 2018), <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.

<sup>58</sup> Chair Ellen L. Weintraub's Statement Regarding Illegal Contributions From Foreign Governments, FEDERAL ELECTION COMMISSION (June 14, 2019), <https://go.usa.gov/xy38U>.

<sup>59</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (upholding the federal foreign political spending ban).



## Resistance to *Citizens United*

*Citizens United* has so angered many Americans that they have organized to overturn it using the Article V amendment process outlined in the U.S. Constitution.<sup>60</sup> “As of last year [2019], 20 states and 800 municipalities had passed resolutions calling for *Citizens United* to be overturned.”<sup>61</sup>

Meanwhile, many shareholders have also used their rights under the securities law to push back and ask for more transparency of corporate political spending.<sup>62</sup> Shareholder proposals about corporate dark money have been one of the most frequently filed topics in the past few years.<sup>63</sup> The Forum for Sustainable and Responsible Investment (US SIF) reported, “[i]n the 2014 season, the bulk of the 130-plus resolutions on political spending and lobbying asked companies to report on their lobbying expenditures, including through indirect channels such as trade associations and non-profit organizations that do not have to report their donors.”<sup>64</sup> The trend remained the same years later according to the Sustainable Investment Institute (Si2), which tracked these types of shareholder proposals in 2018, “80 resolutions ask[ed] companies to disclose political activity spending ....”<sup>65</sup> The result of this activism is that the number of publicly traded companies that have chosen to adopt best practices for transparency jumped from 70 to 173 over the past decade.<sup>66</sup> However, there are two rule makings pending at the Securities and Exchange Commission (SEC) which could gut the ability of shareholders to hold corporations accountable on a range of issues including spending dark corporate money in elections.<sup>67</sup>

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<sup>60</sup> Jeffrey D. Clements, “*But It Will Happen*”: *A Constitutional Amendment to Secure Political Equality in Election Spending and Representation*, 13.2 HARVARD LAW & POLICY REVIEW 373 (2019).

<sup>61</sup> Chris Kromm, *Citizens United at 10: Why fighting corruption is a racial justice issue*, FACING SOUTH (Jan. 17, 2020), <https://www.facingsouth.org/2020/01/citizens-united-10-why-fighting-corruption-racial-justice-issue>.

<sup>62</sup> Julie N.W. Goodridge & Christine Jantz, *Corporate Political Spending: Why Shareholders Must Weigh In*, 5(2) JOURNAL OF VALUES-BASED LEADERSHIP Article 3 (2012), <https://scholar.valpo.edu/jvbl/vol5/iss2/3>.

<sup>63</sup> Eliza Newlin Carney, *Shareholders Demand Disclosure -- and Republicans Push Back*, AMERICAN PROSPECT (May 4, 2017), <https://prospect.org/power/shareholders-demand-disclosure-republicans-push-back/>.

<sup>64</sup> *Shareholder Resolutions*, US SIF (2015), <http://www.ussif.org/resolutions>.

<sup>65</sup> Sustainable Investment Institute, *Proxy Preview Climate, Politics, and Women Top Shareholder Issues for Proxy Season 2018* (Mar. 8, 2018), [https://siinstitute.org/press/2018/Proxy\\_Preview\\_2018\\_PressRelease.pdf](https://siinstitute.org/press/2018/Proxy_Preview_2018_PressRelease.pdf).

<sup>66</sup> Press Release, *CPA Statement on 10th Anniversary of Citizens United*, CENTER FOR POLITICAL ACCOUNTABILITY (Jan. 17, 2020), <https://politicalaccountability.net/hifi/files/Citizens-United-Ten-Years-Later.pdf> (“By January 2010, 70 major companies had already adopted CPA’s corporate governance model for political disclosure and accountability. Today, that number has more than doubled to 173, as more companies have recognized the risks and benefits of disclosure and corporate board oversight. These companies recognize their duty as responsible stewards of other people’s money to refrain from hiding in the dark corners of politics. In addition, three-fifths of the S&P 500 companies, the dominant source of corporate political money, have some form of disclosure, as measured by a CPA-Wharton School annual benchmarking of those companies’ political disclosure and accountability policies.”)

<sup>67</sup> Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, SEC Release No. 34-87457 & File No. S7-22-19, <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>; Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, SEC Release No. 34-87458 & File No. S7-23-19, <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>; Commissioner Robert J. Jackson Jr., Statement on Proposals to Restrict Shareholder Voting, SEC (Nov. 5, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting>; Ciara Torres-Spelliscy, *A Trump Administration Plan that Could Boost Corporate ‘Dark Money’ in Elections*, BRENNAN CENTER BLOG (Nov. 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trump-administration-plan-could-boost-corporate-dark-money-elections>; Ciara Torres Spelliscy, *How Corporate Law Can Help Democracy Post-Citizens United*, BRENNAN CENTER BLOG (Jan. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/how-corporate-law-can-help-democracy-post-citizens-united>.



## Conclusion and Solutions

There's much that could be done to mitigate the damage caused by *Citizens United* including:

- (1) Amend the Constitution to overturn the *Citizens United v. FEC* decision.<sup>68</sup>
- (2) Work within the existing constitutional structure to pass legislation to address the case's fallout:
  - a. Pass better disclosure rules for elections including disclosure of paid advertising on-line through the federal election laws.<sup>69</sup>
  - b. Pass better disclosure rules for publicly traded corporations' spending in politics through the securities laws.<sup>70</sup>
  - c. Provide for a consent mechanism for investors in publicly traded companies like the one that exists in the U.K.<sup>71</sup>
  - d. Improve and expand public financing of elections so that candidates have an alternative to the privately-funded dialing-for-dollars free-for-all that we have now in federal elections.<sup>72</sup>

Thank you again for considering my testimony.

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<sup>68</sup> Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235 (2010-2011).

<sup>69</sup> Heather Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2013-2014); Ciara Torres-Spelliscy *Congress could hardwire dark money into our democracy*, THE HILL (Dec. 4, 2017), <https://thehill.com/opinion/campaign/363144-congress-would-hardwire-dark-money-into-our-democracy>.

<sup>70</sup> Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112(6) HARVARD LAW REVIEW 1197 (Apr., 1999); Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12(2) CONNECTICUT PUBLIC INTEREST LAW JOURNAL 361 (2012-2013), <https://ssrn.com/abstract=2184554>.

<sup>71</sup> Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479 (Spring 2012).

<sup>72</sup> Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 (2) SETON HALL LEGISLATIVE JOURNAL 271 (2018); Gareth Fowler & Daniel I. Weiner, *H.R.1's public finance reforms represent the best hope for bringing about the transformative changes that voters demanded in 2018*, BRENNAN CENTER (Sept. 20, 2019); Ian Vandewalker & Kevin Morris, *The Reform Law Needed to Counter Citizens United: H.R. 1*, BRENNAN CENTER (Jan. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/reform-law-needed-counter-citizens-united-hr-1> ("The flood of big money in politics unleashed by the Supreme Court keeps growing. Public campaign financing offers candidates a way to run without chasing megadonors.").