

## MISLEADING POLITICAL ADVERTISING: HOW CHANGING NATIONAL RULES CLOUD THE PICTURE FOR MAINE VOTERS

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With the campaign season in full swing, Maine voters are hit with a steady barrage of political advertising. Television screens and radio airways are full of spots offering facts – and also outright misinformation. Citizens intuit that claims have to be taken with a grain of salt. But many may not realize how much the rules for political advertising have recently changed.

Maine's Clean Election Law used to ensure a measure of balance on the airways. If one candidate got big contributions, public funds went to the other to even things out. But the Citizens United decision by the United Supreme Court has changed the rules. Now national groups can send in big contributions or buy advertising time with no counterbalance. What is more, donors can pay for political advertising without revealing their true identities. A telling example is the shadowy national group called "Maine Freedom" now running ads in our state.

### **Truth Matters in Commercials – But Not in Political Ads**

It's important to know that political advertising is not like commercial advertising. Ironically, it is illegal to mislead consumers of commercial products – but perfectly ok under current U.S. law to sell voters a false bill of goods! Companies that advertise products or services are regulated by the Federal Trade Commission and are held to "truth in advertising" standards, but political marketers are not required to be truthful. Because political advertising lies within the more constitutionally protected domain of free "political speech," it cannot be regulated for truthfulness.

Even libel laws do not compel political advertisers to be truthful. That is because America's constitutional guarantees for political free speech have been interpreted to protect people who talk about "public figures," including government officials and candidates running for office. Speakers can say almost anything, including untrue things, about public figures.

Without regulation, a political campaign's most serious incentive to be truthful lies in the possibility that voters could turn against a candidate or a campaign if they knew it was being untruthful, deliberately spreading falsehoods. Current U.S. election rules require candidates to claim responsibility for advertising sponsored by their campaign – "I am Jim Smith, candidate for the U.S. House, and I approve this message" – so that voters can give appropriate credit or blame for the content of advertisements.

This sunlight principle might work, but in today's politics, there are many sources of political advertisements beyond any given candidate's campaign. Interest groups and "political action committees" can run advertisements under misleading or phony labels. They do not have to reveal any specific information about who, exactly, has funded an advertisement.

## How Super PACs Hide Donors

The Supreme Court's 2010 decision in *Citizens United* was transformative, overturning a century-old principle enshrined in federal and state election laws that corporate spending on elections should be restricted in order to prevent corruption or the appearance of corruption. Many people realize that unlimited fat cat funding has been unleashed by this decision. But fewer citizens understand that *Citizens United* not only released companies and unions to spend unlimited amounts on campaigns, but also created rules that allow funders to hide their identities. *Citizens United* opened doors for a legal class of organizations called "independent expenditure groups" – or "super PACs" – which can collect unlimited amounts of money without having to disclose donors in a timely or meaningful way.

Donors to these groups can hide by registering as shell corporations with fuzzy names. For example, if Coca-Cola wanted to push a political message, Coca-Cola stockholders could create a shell company called "Citizens for Health Limited Liability Company" and run an advertising campaign claiming that all the Pepsi out on the shelves is contaminated. While "Citizens for Health LLC" might show up on the group's disclosures, nothing else would be publicly available. Without this disclosure, not only do you not know who is behind the advertising you see, but the group would face no backlash even if it ran a blatantly false ad.

This is something for Maine voters to consider when they see a cheerfully named but unfamiliar organization at the bottom of a political ad. For example, not only do you not know who "Maine Freedom" is, you are not supposed to know. The companies and people donating to that group have done a good job of hiding their involvement. Maine's press has been trying to discover who contributes to "Maine Freedom" and they have been unable to do it. Eventually, we may find out, but only long after the election, well after the information would serve its public purpose.

## Financial Means are No Longer Balanced

This is the first general election following the changes made by the Maine legislature to bring our state's Clean Elections practices into compliance with the Supreme Court's rulings. Last year the Supreme Court struck down the "fair fight" provision of Arizona's clean election laws, which let the state match expenditures made by candidates opposing candidates who have accepted public election rules and funding. Like Arizona, Maine tried to counterbalance big donations to competing candidates.

With matching funds, D.C.-based super PACs such as Maine Freedom were discouraged from pouring hundreds of thousands of dollars into a race because those ads would be balanced by matching public funds to allow an effective response. Without the matching-funds provision, candidates now face tough choices. Either they sign on to clean election rules and get public funding while facing the chance that they can be buried by outside donations, or candidates decide they have to forgo public funding and find themselves some similarly deep-pocketed national donors.

Either way, big national money gains sway in Maine elections – and Maine voters see and hear more ads without full disclosure of their funders. Maine has been one of several states taking the lead in trying to clean up elections – only to have its efforts undermined by recent Supreme Court decisions. Voters must be extra vigilant if they want candidates and their supporters to take responsibility for telling the truth.