

2013

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Recommended Citation

Lieffring, Staci, "First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech after United States V. Alvarez" (2013). *Minnesota Law Review*. 351.
<https://scholarship.law.umn.edu/mlr/351>

Note

First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After *United States v. Alvarez*

Staci Lieffring*

People rely more and more on political advertising to inform them about candidates and elections.¹ However, political advertising has become “dirty” and full of false or misleading information.² People will stop trusting campaign advertising and lose respect not only for the candidates, but the entire political process if the information is found to be false or misleading.³ If the information voters collect is really false, elections will no longer represent the will of the people, which would defeat the whole purpose behind the democratic process.⁴ Thus, false campaign speech undermines the integrity of the electoral system.⁵ In order to protect election integrity, some states have enacted laws banning false campaign materials.⁶

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1. Evan Richman, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 *CARDOZO ARTS & ENT. L.J.* 667, 667 (1998).

2. See Colin B. White, Note, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 *UCLA J.L. & TECH.* 1, 1–3 (2009) (“The American public has grown weary of political advertisements that manipulate the truth”); Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 *EMORY L.J.* 853, 853–54 (1987) (tracing the history of misleading political advertising).

3. See, e.g., Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 *TUL. L. REV.* 889, 889–90 (2008).

4. Winsbro, *supra* note 2, at 863.

5. See *id.* at 863–65.

6. See, e.g., MINN. STAT. § 211B.06, subd. 1 (2010) (“A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . .

The problem with these statutes, however, is that the First Amendment “has its fullest and most urgent application’ to speech uttered during a campaign for political office.”⁷ Recently, the Supreme Court gave even more protection to false statements. The Court struck down the Stolen Valor Act, which made it a crime to lie about receiving a Medal of Honor, finding that these false statements are protected by the First Amendment.⁸ With this backdrop, how to strike an appropriate balance between the state’s interest in maintaining election integrity on one hand, and a citizen’s right to free speech on the other hand, is a problem that the courts and states currently struggle to answer.

The Supreme Court has said, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”⁹ However, the Supreme Court has also stated, “That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government”¹⁰ The Eighth Circuit Court of Appeals recently found a Minnesota statute criminalizing the dissemination of knowingly false speech in promotion or defeat of a candidate or ballot initiative to be unconstitutional unless it can pass a strict scrutiny standard.¹¹ The Supreme Court, in a similar ruling, struck down a federal law making it a crime to make false statements about one’s own military service, holding that false, non-defamatory speech was protected under the First Amendment.¹² The question has now

that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”).

7. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971)).

8. *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

9. *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

10. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (internal quotations omitted).

11. See *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011), *cert. denied*, 2012 WL 2470100 (June 29, 2012).

12. Compare *Alvarez*, 132 S. Ct. at 2551 (plurality opinion) (declaring that any law banning content-based speech must meet strict scrutiny), with *id.* at 2556 (Breyer, J., concurring) (arguing that it must survive intermediate scrutiny).

become: what can a state regulate as false statements under the First Amendment?

This Note addresses the question of how, if at all, “knowingly false statements of fact” can be regulated in order to protect the state’s compelling interest in election integrity without infringing upon one’s First Amendment right, in addition to looking at other ways to protect election integrity. Part I of this Note examines the Supreme Court’s First Amendment jurisprudence and the current state of election regulation laws. Part II analyzes the current challenges to laws attempting to limit false speech. It will analyze different statutory schemes against court precedent as well as other proposed solutions. Part III will pull from Supreme Court precedent, current laws, and other case law to propose a solution that could be implemented to combat false campaign speech while surviving a First Amendment challenge.

I. THE DEVELOPMENT OF FIRST AMENDMENT JURISPRUDENCE REGARDING FALSE CAMPAIGN SPEECH

Political speech is fundamental in the United States.¹³ This Part discusses the current Supreme Court precedent regarding political speech, the First Amendment, and fraudulent speech. It discusses other closely related proscribed speech deemed constitutional by the Court. It then discusses current legislation regarding the ban of false campaign speech across the country and how some courts have interpreted the statutes.

A. LONG HISTORY OF SUPREME COURT PRECEDENT REGARDING THE FIRST AMENDMENT

The First Amendment of the United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech”¹⁴ The Supreme Court has held that freedom of speech does not mean that there is an absolute right to speak or publish, with full immunity, whatever one may choose, nor does it give people full protection for everything they say.¹⁵ The First Amendment does not prevent the punishment of those who abuse the freedom of speech it protects.¹⁶ Therefore, states

13. See *Citizens United v. FEC*, 130 S. Ct. 867, 898 (2010).

14. U.S. CONST. amend. I.

15. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

16. *Id.*

may regulate certain speech.¹⁷ Generally, any content-based restrictions must meet the demands of strict scrutiny,¹⁸ meaning the restrictions are narrowly tailored to meet a compelling government interest.¹⁹

There are exceptions to the general rule providing for strict scrutiny review for a few well-defined and narrowly limited categories of speech.²⁰ There has not been any constitutional problem with the prevention and punishment of these particular categories of speech.²¹ These classes of non-protected speech include obscenity,²² fighting words,²³ child pornography,²⁴ and defamation.²⁵ Society has permitted restrictions with a less rigorous standard of review provided the restrictions are viewpoint neutral²⁶ because those classes are “of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.”²⁷ The government’s power to prohibit particular speech “on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.”²⁸ While the Constitution protects free speech, the Court has recognized exceptions to free speech.

17. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 776, 777 (1986) (“[T]he government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.”).

18. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

19. See *281 Care Comm. v. Arneson*, 638 F.3d 621, 633 (8th Cir. 2011), *cert. denied*, 2012 WL 2470100 (June 29, 2012).

20. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

21. See *id.*

22. See *Roth v. United States*, 354 U.S. 476, 485 (1957); see also *Miller v. California*, 413 U.S. 15, 23 (1973).

23. See *Chaplinsky*, 315 U.S. at 572.

24. See *New York v. Ferber*, 458 U.S. 747, 760–61 (1982).

25. See *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974) (narrowing the scope of the exception for defamation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (incorporating an “actual malice” standard for defamation laws).

26. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–83 (1992).

27. *Chaplinsky*, 315 U.S. at 572.

28. *R.A.V.*, 505 U.S. at 386, 391 (holding that a St. Paul ordinance banning symbols or displays of “fighting words” that “insult, or provoke violence, ‘on the basis of race, color, creed, religion, or gender’” was facially unconstitutional because they could not impose special prohibitions on speakers who express views on disfavored subjects and not on others).

1. Defamation, *Sullivan*, and the Rise of the Actual Malice Standard

Defamation is one category of speech that the Supreme Court has found does not merit First Amendment Protection. In the landmark case *New York Times Co. v. Sullivan*, Sullivan alleged that an advertisement in the *New York Times* falsely implicated him and reflected poorly on him as the Commissioner of Montgomery, Alabama.²⁹ The Supreme Court held that the First and Fourteenth Amendments prohibited a government official from recovering damages for a defamatory speech related to his official conduct unless the statement was made with actual malice.³⁰ The Court defined actual malice to mean “with knowledge that it was false or with reckless disregard of whether it was false or not.”³¹

In a subsequent case, the Court further defined the actual malice standard. Looking at precedent, the Court did not define reckless disregard to mean whether a reasonably prudent person would have published, or would have investigated before publishing.³² Instead, the Court held that the evidence must be sufficient enough to show that the defendant actually “entertained serious doubts” about the truthfulness of his words.³³ Publishing statements with serious doubts of the truthfulness of the statements “shows reckless disregard for truth or falsity and demonstrates actual malice.”³⁴

Lastly, the Court in *Brown v. Hartlage* applied the actual malice standard to political speech.³⁵ The Court found that a candidate has just as much of a First Amendment right to engage in public debate and advocate for his own election or others as any other person.³⁶ A candidate does not give up his or her First Amendment rights when he or she runs for public office.³⁷ The Court struck down the state law which as-applied

29. See *Sullivan*, 376 U.S. at 256–58.

30. See *id.* at 279–80.

31. *Id.*

32. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

33. *Id.*

34. *Id.*

35. *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982).

36. *Id.* (applying actual malice standard to statute that prohibited candidates from making certain campaign promises).

37. See *id.* at 53.

prohibited speech, because it did not provide sufficient breathing space by not meeting the actual-malice standard.³⁸

2. Other Types of False Speech Are Also Unprotected by the First Amendment

The Court has ruled other areas of false speech are unprotected, and thus, has generally upheld laws barring certain kinds of false speech. A state fraud law was held constitutional because the “[e]xacting proof requirements” provided sufficient breathing room for any protected speech.³⁹ Frivolous lawsuits can also be punished.⁴⁰ Tort actions for false, non-defamatory statements, such as false light invasion of privacy, where the only damage is the offensiveness of the falsehood, not its injury to reputation, can also survive, provided the false statements of fact were made knowingly or with reckless disregard.⁴¹ The Court has also found false statements made for intentional infliction of emotional distress, which are not defamatory, nor an invasion of privacy, to be unprotected.⁴² In addition, under 18 U.S.C. § 1001, it is a federal crime to knowingly lie to federal officers.⁴³ In upholding this statute, the Court reasoned a citizen cannot knowingly and willfully lie to a federal officer and not be punished.⁴⁴ Instead, the citizen has the option to not answer the questions or answer the questions honestly.⁴⁵ The Court has also upheld perjury laws.⁴⁶ By finding these other ar-

38. See *id.* at 61 (finding there was “no showing . . . that [Brown] made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard”).

39. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (including requirements that “the defendant made the representation with the intent to mislead the listener, and succeeded in doing so”).

40. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (upholding punishment for frivolous lawsuits that are consistent with “breathing space principles” (internal quotation marks omitted)).

41. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 390–91 (1967) (finding that although the false, non-defamatory statements were not protected by the First Amendment in their own right, plaintiffs could not recover unless the false statements were made knowingly or with reckless disregard).

42. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

43. 18 U.S.C. § 1001 (2006) (“[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation [has committed an offense].”).

44. *Bryson v. United States*, 396 U.S. 64, 72 (1969) (upholding criminal liability for violation of 18 U.S.C. § 1001).

45. *Id.*

46. See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961).

eas of false speech unprotected by the First Amendment, the Court has suggested that there may be no constitutional value in protecting false statements of fact or false speech.

3. False Statements of Fact Have No Constitutional Value

The Supreme Court has frequently found false statements of fact to be particularly valueless. Sharing false information is not authorized by the First Amendment⁴⁷ because the spreading of lies does not serve any legitimate end of the First Amendment.⁴⁸ False statements not only interfere with the “truth-seeking function of the marketplace of ideas,” but also cause significant injury to someone’s reputation that is often beyond repair even by persuasive rebuttals.⁴⁹ The Court has found that intentional lies or even careless mischaracterizations work against the societal interest in having “uninhibited, robust, and wide-open debate” in the public realm.⁵⁰ However, while false statements may be deemed valueless, the Court has warned that the Constitution does prevent the state from prohibiting speech merely because that speech is not worthy; the First Amendment should prevent any ad hoc balancing of relative social costs and benefits.⁵¹ Regardless of their lack of worth, the Court has never held that false statements receive no protection from the First Amendment and rejected a categorical rule that false speech alone is not protected.⁵²

4. Protection of False Speech to Avoid the Chilling of Protected Truthful Speech

While the Court has deemed false statements valueless, it has also provided that false statements may need to be protected. In *Sullivan*, the Court carved out an exception from categorically unprotected speech in circumstances in which it would

47. *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

48. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

49. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

50. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).

51. *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (invalidating a federal statute criminalizing commercial creation, sale, or possession of depictions of animal cruelty because it was overbroad and thus violated the First Amendment).

52. *See United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

be necessary to avoid chilling true and protected speech.⁵³ The Court recognized that incorrect statements are inevitable during the course of free debate; therefore, some false speech must be protected in order to give speech the “breathing space” it needs to survive.⁵⁴ This again was seen in *Brown*, as mentioned previously, when the Court struck down the statute because it did not provide sufficient breathing space by requiring knowledge of improper nature.⁵⁵ The Court has held that in appropriate situations some false statements of fact receive “a measure of strategic protection” in order to ensure that regulation of speech does not unduly inhibit fully protected speech.⁵⁶

5. Political Speech Is One of the Most Protected Forms of Speech Under the First Amendment

The breathing space exception to prevent a “chilling effect” on protected speech applies to political speech. Political speech is at the heart of the protections of the First Amendment.⁵⁷ In *Citizens United v. Federal Election Commission*, the Court repeatedly emphasized how important political speech is while striking down bans on political independent expenditures.⁵⁸ Despite this strong protection for political speech, the Court has found that a state also has a “compelling interest in preserving the integrity of its election process.”⁵⁹ The Court indicated that the state interest in preventing fraud in campaign communications carries special weight because false statements in election materials may have serious adverse consequences on the general public.⁶⁰ Additionally, the Supreme Court found that because almost every *truthful* statement about a candidate can be considered relevant to his or her capacity to hold office,⁶¹ the

53. See *Sullivan*, 376 U.S. at 271–72.

54. *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

55. See *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

56. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

57. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

58. *Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010) (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

59. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); see also *Burson v. Freeman*, 504 U.S. 191, 204–06 (1992) (upholding a total ban on political speech within 100 feet of a polling place on Election Day).

60. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 350–51 (1995) (recognizing an interest in preventing fraud, but striking down ban on anonymous campaign literature as only indirectly serving the state’s interest).

61. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (“The principal activity of a candidate in our political system . . . consists in putting before the

First Amendment protects the free flow of information about candidates running for public office.⁶² However, simply because speech is a tool used in the political sphere does not automatically mean it is protected by the First Amendment because intentionally lying is against the premise of democratic government.⁶³

Most restrictions on the freedom of speech must pass a strict scrutiny test. There are, however, some categories of unprotected speech that do not require strict scrutiny review. Defamation is one of these categories, but to avoid a chilling effect on speech, the Court incorporated an actual malice standard.⁶⁴

6. *United States v. Alvarez*: Protected False Speech

The Court's recent decision in *United States v. Alvarez* suggests that false speech is a protected class if it is non-defamatory and no harm comes from the lies.⁶⁵ The defendant was charged under the Stolen Valor Act, which made lying about receiving the Congressional Medal of Honor a criminal act, for lying in a public meeting about serving as a marine and receiving a Medal of Honor.⁶⁶ The plurality refused to recognize false speech as a category where content-based regulation is allowed.⁶⁷ Furthermore, the plurality required a strict scrutiny test, which the statute did not pass.⁶⁸ Even though the Court found the government's interest in protecting the integrity of the Medal of Honor "beyond question," the Court failed to find that the restriction was actually necessary to promote the in-

voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him.").

62. See Lance Conn, Comment, *Mississippi Mudslinging: The Search for the Truth in Political Advertising*, 63 MISS. L.J. 507, 513–14 (1994).

63. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

64. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (incorporating the actual malice standard in defamation case); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

65. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion) (finding the Stolen Valor Act overbroad because violations of the law do not result in a cognizable harm).

66. *Id.* at 2542.

67. *Id.* at 2543–47.

68. *Id.* at 2547–48 (arguing that if an interest in truthful discourse alone was sufficient to support banning speech, without any evidence to show it was used to gain a material advantage, the government would have too much censorship power).

terest.⁶⁹ The Court found that the “remedy for speech that is false is speech that is true.”⁷⁰ While four justices held that strict scrutiny should apply, the concurring two justices held that intermediate scrutiny should apply.⁷¹ However, the plurality strongly suggested that even with political statutes, in which a false statement is more likely to make a behavioral difference, the truth will counteract the lies.⁷² The holding in *Alvarez* creates a sizeable hurdle for any law that seeks to regulate false speech.

B. CURRENT LAWS PROHIBITING FALSE CAMPAIGN SPEECH

Although there is no federal law banning false campaign speech, there are currently seventeen states with statutes prohibiting such speech.⁷³ The definition of campaign speech and prohibited speech varies among states. Some statutes prohibit any false statement with regard to a candidate.⁷⁴ Some prohibitions are limited to specific kinds of false statements, such as statements relating to a candidate’s honesty, integrity or moral character,⁷⁵ those appearing in political advertisements or campaign literature,⁷⁶ or even those statements made as part of a telephone poll.⁷⁷ Florida limits the liability solely to false

69. *Id.* at 2549 (finding no link between the government’s interest and the Act’s restrictions; no evidence that public perception was diluted, and no reason that counterspeech would not serve to achieve the government’s interest).

70. *Id.* at 2550 (“Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”).

71. *Id.* at 2552.

72. *Id.* at 2556.

73. See ALASKA STAT. § 15.13.095 (2010); COLO. REV. STAT. § 1-13-109 (2012); FLA. STAT. ANN. § 104.271 (2008); LA. REV. STAT. ANN. § 18:1463 (2012); MASS. ANN. LAWS ch. 56, § 42 (2001); MINN. STAT. § 211B.06 (2010); MISS. CODE ANN. § 23-15-875 (2007); N.C. GEN. STAT. § 163-274(a)(7)-(8) (2011); N.D. CENT. CODE § 16.1-10-04 (2009); OHIO REV. CODE ANN. §§ 3517.21, 3517.22 (LexisNexis 2012); OR. REV. STAT. ANN. § 260.532 (2009); S.D. CODIFIED LAWS § 12-13-16 (2004 & Supp. 2012); TENN. CODE ANN. § 2-19-142 (2003); UTAH CODE ANN. § 20A-11-1103 (2010); WASH. REV. CODE ANN. § 42.17A.335 (West 2012); W. VA. CODE ANN. § 3-8-11 (LexisNexis 2011); WIS. STAT. ANN. § 12.05 (West 2004).

74. See COLO. REV. STAT. § 1-13-109; LA. REV. STAT. ANN. § 18:1463; MASS. ANN. LAWS ch. 56, § 42; OHIO REV. CODE ANN. § 3517.21; UTAH CODE ANN. § 20A-11-1103; W. VA. CODE ANN. § 3-8-11(c); WIS. STAT. ANN. § 12.05.

75. MISS. CODE ANN. § 23-15-875.

76. MINN. STAT. § 211B.06; N.D. CENT. CODE § 16.1-10-04; OR. REV. STAT. ANN. § 260.532(1); TENN. CODE ANN. § 2-19-142.

77. ALASKA STAT. § 15.13.095.

statements made by a candidate about an opposing candidate.⁷⁸ Some states punish only knowingly false statements,⁷⁹ while other states also prohibit statements made in reckless disregard of the truth.⁸⁰ Some statutes also include prohibitions on false speech about ballot initiatives.⁸¹ Oregon requires that the false statement be related to a material fact.⁸² In addition to laws banning false campaign speech, states also have laws banning deceptive practices.⁸³ States also have laws banning political material of campaigning in the polling place on Election Day.⁸⁴ Both Washington's and Minnesota's laws banning false political speech have been challenged and found to be unconstitutional by different courts.⁸⁵ A review of these decisions will provide insight into what courts have considered while evaluating restrictions on false political speech.

78. FLA. STAT. ANN. § 104.271.

79. See MASS. ANN. LAWS ch. 56, § 42; MISS. CODE ANN. § 23-15-875; S.D. CODIFIED LAWS § 12-13-16 (2004 & Supp. 2012); TENN. CODE ANN. § 2-19-142; UTAH CODE ANN. § 20A-11-1103; W. VA. CODE ANN. § 3-8-11(c); WIS. STAT. ANN. § 12.05.

80. See ALASKA STAT. § 15.13.095(a); COLO. REV. STAT. § 1-13-109(2)(a) (2012); LA. REV. STAT. ANN. § 18:1463 (2012); MINN. STAT. § 211B.06; N.C. GEN. STAT. § 163-274(a)(7)-(8) (2011); N.D. CENT. CODE § 16.1-10-04; OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2012); OR. REV. STAT. ANN. § 260.532.

81. See COLO. REV. STAT. § 1-13-109; MASS. ANN. LAWS ch. 56, § 42; MINN. STAT. § 211B.06; N.D. CENT. CODE § 16.1-10-04; OHIO REV. CODE ANN. § 3517.22; OR. REV. STAT. ANN. § 260.532; S.D. CODIFIED LAWS § 12-13-16; UTAH CODE ANN. § 20A-11-1103; WIS. STAT. ANN. § 12.05.

82. OR. REV. STAT. ANN. § 260.532(1).

83. See, e.g., VA. CODE ANN. § 24.2-1005.1(A) (2011) (criminalizing knowingly communicating false election information to a registered voter about the time, date, or place of voting and false information regarding a voter's polling site or registration status); see also 10 ILL. COMP. STAT. ANN. 5/29-4 (West 2010) ("Any person who, by . . . deception . . . knowingly prevents [another from voting or registering to vote has committed an offense.]); MINN. STAT. § 204C.035 (2010) (outlawing a person from knowingly deceiving another person about election information).

84. See, e.g., MINN. STAT. § 211B.11, subd. 1 (2010) (outlawing the display of campaign materials or otherwise attempting to persuade voters, including a ban on political buttons or other insignia, in polling places).

85. See 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011), cert. denied, 2012 WL 2470100 (June 29, 2012); Rickert v. State, Pub. Disclosure Comm'n, 168 P.3d 826, 827 (Wash. 2007); Washington ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 693 (Wash. 1998).

1. Washington State's Law Was Found Unconstitutional by Washington State Supreme Court

Washington's current statute regarding false campaign speech requires defamation or libel and actual malice.⁸⁶ Washington's statute has been struck down twice by the Washington Supreme Court as being unconstitutional under the First Amendment.⁸⁷ In *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, the Washington Supreme Court struck down the Washington statute that prohibited "any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact."⁸⁸ The court held that the statute was unconstitutional because it failed to meet the exacting strict scrutiny test.⁸⁹ The court found "the State's claimed compelling interest to shield the public from falsehoods during a political campaign [was] patronizing and paternalistic."⁹⁰ Washington then amended their law to "proscribe sponsoring, with actual malice, a political advertisement containing a false statement of material fact *about a candidate for public office*."⁹¹ The court later held that this amendment failed to remedy the statute's unconstitutionality.⁹² The court again found that the Washington statute extended to protected speech and was therefore subject to strict scrutiny.⁹³

86. See WASH. REV. CODE ANN. § 42.17A.335 (2012) ("(1) It is a violation . . . for a person to sponsor with actual malice a statement constituting libel or defamation per se under the following circumstances: (a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office.").

87. *Rickert*, 168 P.3d at 827; *119 Vote No! Comm.*, 957 P.2d at 693.

88. *119 Vote No! Comm.*, 957 P.2d at 693 (charging a political action committee with violating the Washington statute).

89. *Id.* at 699 ("We therefore conclude [the statute] chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification.").

90. *Id.* at 698.

91. *Rickert*, 168 P.3d at 827 (discussing the amended language).

92. *Id.* (finding the statute unconstitutional while recognizing that other states had enacted and upheld similar statutes).

93. See *id.* at 828–29 (holding that under the *Sullivan* standard, only defamatory statements were unprotected by the First Amendment, whereas the Washington statute did not purport to be limited to the narrow category of defamatory statements).

2. Eighth Circuit Court of Appeals Strikes down Minnesota's Ban on False Campaign Speech

More recently, in *281 Care Committee v. Arneson*, the Eighth Circuit Court of Appeals struck down Minnesota's ban on false campaign speech as unconstitutional unless it can meet the demands of strict scrutiny.⁹⁴ Minnesota's statute made it a gross misdemeanor to "intentionally participate[] in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false."⁹⁵ This statute proscribes only false statements of fact that are made with knowledge of their falsity or with reckless disregard of whether they are false,⁹⁶ which incorporates the actual malice standard set by the Supreme Court in *Sullivan*.⁹⁷ A group of grass-roots political associations sued the Minnesota Attorney General and the relevant county attorneys alleging that their rights to free speech were violated by the current Minnesota statute.⁹⁸

Regardless of the "actual malice" standard incorporated in the statute, *281 Care Committee* held that the campaign speech proscribed by the Minnesota statute was fully protected by the First Amendment.⁹⁹ The court found that because the speech in question was political in nature, it was "at the heart of the protections of the First Amendment,"¹⁰⁰ which raised special constitutional concerns.¹⁰¹ A state may only regulate false cam-

94. See *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011), *cert. denied*, 2012 WL 2470100 (June 29, 2012) (remanding to the district court for strict scrutiny analysis because the district court originally determined that the speech at issue fell outside the protections of the First Amendment, thus concluding that a strict scrutiny analysis was unnecessary).

95. MINN. STAT. § 211B.06, subd. 1 (2010). The statute was amended after a state court decision in which the Minnesota Court of Appeals struck down the previous version of the statute for not meeting the actual malice standard in *Sullivan*. See *State v. Jude*, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996) (holding that the phrase "knows or has reason to believe is false" was overbroad and did not meet the actual malice standard from *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

96. MINN. STAT. § 211B.06, subd. 1.

97. See *Sullivan*, 376 U.S. at 279–80.

98. See *281 Care Comm.*, 638 F.3d at 625 (alleging plaintiff's speech was chilled due to the threat of possible prosecution).

99. See *id.* at 635 (finding that Supreme Court precedent does not recognize knowingly false speech as a category outside the protection of the First Amendment).

100. *Id.*

101. *Id.* at 636.

paigned speech “when it satisfies the First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.”¹⁰² This case tends to suggest that even if the “actual malice” standard is applied, courts could still be leery of enforcing prohibitions on false campaign speech unless they meet the demand of strict scrutiny.

3. Minnesota’s Ban on Soliciting near Polling Places

The District Court in Minnesota upheld Minnesota’s statute prohibiting people from displaying campaign material, including posting signs or asking voters to vote a particular way within 100 feet of a polling place as constitutional.¹⁰³ The court found that the Supreme Court had found a similar law restricting display of campaign posters or signs within 100 feet of a polling place passed strict scrutiny as a “facially content-based restriction on political speech in a public forum.”¹⁰⁴ The court upheld the constitutionality of an as-applied challenged to buttons containing the phrase “Please I.D. Me,” as a politically charged issue, in addition to the potential to cause voter confusion and deception.¹⁰⁵

The Supreme Court has suggested it would allow some prohibitions on free speech by finding there is sufficient “breathing space” for speech that is protected. “Breathing space” has generally been interpreted to mean an “actual malice” standard.¹⁰⁶ There are many different variations of state prohibitions on free speech, some of which have recently been challenged. In addition, the Court has approved laws aimed at decreasing or eliminating voter deception. Part II of this Note will analyze different approaches of banning false political speech against what the Court suggested will not withstand a

102. *Id.* (“[G]iven our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment.” (quoting *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012))).

103. *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1133 (D. Minn. 2011).

104. *Id.* at 1121 (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)).

105. *Id.* at 1123.

106. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

constitutional challenge under strict scrutiny and the “breathing space” standard set forth by the Court in defamation cases.

II. COMPARISON OF STATUTORY SCHEMES WITH COURT PRECEDENT

Part II of this Note analyzes the public harm as a compelling state interest, as well as other attempts to decrease false campaign speech. This Part considers different methods and viewpoints of addressing the problem of false political speech and analyzes the various schemes in light of existing precedent. In order for false political speech to be most effectively stopped, the Supreme Court would have to fundamentally change its position to include false, non-defamatory speech as a category unprotected by the First Amendment. Despite this obstacle, this section will discuss some proposed remedies or other solutions that may help to counteract false and deceptive campaign speech.

A. WHAT THE COURT PRECEDENT SUGGESTS AS APPROPRIATE RESTRICTIONS ON THE FIRST AMENDMENT

The Supreme Court has allowed some prohibitions on free speech by incorporating the actual malice standard to provide breathing space for protected speech. There is a strong presumption of First Amendment political speech being protected; therefore, any law that proscribes political speech would most likely have to meet a strict scrutiny standard.¹⁰⁷ *281 Care Committee* found that the state may regulate false political speech only when the regulation is narrowly tailored to meet a compelling government interest;¹⁰⁸ it did not hold whether or not the statute passed strict scrutiny.¹⁰⁹ After the decision in *Alvarez*, any statute directly regulating false speech would have to pass strict scrutiny. It seems likely that the Court would strike down any attempt to regulate false, non-defamatory campaign speech. This Part of the Note considers if

107. See *United States v. Alvarez*, 132 S. Ct. 2537, 2538 (2012) (plurality opinion) (holding that the Stolen Valor Act did not survive strict scrutiny, although the concurring justices applied intermediate scrutiny to strike down the Act); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

108. *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011), *cert. denied*, 2012 WL 2470100 (June 29, 2012).

109. *Id.* (remanding the case back to the district court for findings on whether the statute passed strict scrutiny).

any statutory language would pass strict scrutiny, or if regulating false campaign speech would ever be possible.

1. Strict Scrutiny Analysis

In order to pass the strict scrutiny test, a statute needs to incorporate an actual malice standard if it proscribes false political speech.¹¹⁰ The actual malice standard has been found to provide sufficient breathing space to not chill political speech in a defamatory action.¹¹¹ In addition to being narrowly tailored, any statute would need to be motivated by a compelling government interest. The state has a compelling interest in prohibiting false campaign speech. The fact that the Supreme Court has repeatedly recognized the state's strong interest in "preserving the integrity of its election process"¹¹² supports this proposition. False speech is harmful to public debate because it causes people to lose interest and leave the debate and voting arena and also has the capability of skewing the election outcome.¹¹³ In order to help bolster this compelling interest, a law-making body could add legislative findings showing the harm to the integrity of the election process caused by false campaign speech. The government can also show that false speech confuses voters and causes "undue influence" on voters.¹¹⁴ While the Washington State Supreme Court found this articulated state interest to be "patronizing and paternalistic" to voters,¹¹⁵ the Supreme Court has indicated its support of this state interest.¹¹⁶ The state's interest should be in protecting the election process itself, not just in protecting candidates' private interests, such as their reputation or privacy.¹¹⁷ To pass a strict

110. *Sullivan*, 376 U.S. at 279–80.

111. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

112. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

113. See Becky Kruse, Comment, *The Truth Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 160–62 (2001).

114. See *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (finding that states have "a compelling interest in protecting voters from confusion and undue influence"); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (finding the Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

115. *Washington ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 698 (Wash. 1998).

116. See *Burson*, 504 U.S. at 199; *Eu*, 489 U.S. at 231; *Celebrezze*, 460 U.S. at 788.

117. See Kruse, *supra* note 113, at 159 (arguing that ballot initiatives should also be protected from false speech because the state interest is in the

scrutiny test, a statute would need to be both narrowly tailored and aimed at a compelling state interest. The following Section of this Note discusses how these and other court precedent plays into the constitutionality of a statute.

2. State Statutory Language: Common Themes and Analysis Under Court Precedent

Following Court precedent, a statute regulating false speech would mostly likely be found unconstitutional; however, if a statute were found constitutional it would at least need to include four elements: falsity, statement of fact, which causes a cognizable harm, and actual malice.¹¹⁸ Most of the current state statutes would be considered overbroad.¹¹⁹ Even though most of the current state statutes limit speech because the speech is false, the statutes are overbroad by not encompassing all requirements and are therefore likely to be unconstitutional.¹²⁰ The Court has suggested that false speech should be remedied by more speech.¹²¹

Some states have a stricter standard of knowledge and only punish knowingly false statements.¹²² A statute that only punishes knowingly false statements is narrower than one that includes an actual malice standard. One would have to prove actual knowledge, not just reckless disregard; therefore, it would be harder to prosecute or bring an effective claim against someone. A statute only punishing knowingly false statements would not be as effective, nor would it apply to as much false speech as a statute that incorporated the actual malice stand-

electoral process and the need for a well—and accurately—informed electorate); see also *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1278–79 (1975) (arguing that the prohibition of false statements is directed towards the protection of processes to select political leaders, and not the individual's reputation).

118. See *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (2012) (Breyer, J., concurring); Kruse, *supra* note 113, at 163.

119. See *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (stating that a statute is overbroad when it “does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that . . . constitute an exercise [of protected speech]”).

120. See Kruse, *supra* note 113, at 163–65 (arguing that state statutes do not limit speech because of its content, but rather because of “the public evils of false political speech,” which the state has a compelling interest in limiting).

121. See *Alvarez*, 132 S. Ct. at 2550 (plurality opinion).

122. See MASS. ANN. LAWS ch. 56, § 42 (2001); MISS. CODE ANN. § 23-15-875 (2007); S.D. CODIFIED LAWS § 12-13-16 (2004 & Supp. 2012); TENN. CODE ANN. § 2-19-142 (2003); UTAH CODE ANN. § 20A-11-1103 (2010); W. VA. CODE ANN. § 3-8-11(c) (LexisNexis 2011); WIS. STAT. ANN. § 12.05 (West 2004).

ard because it would require proving actual knowledge versus reckless disregard. *Sullivan* calls for an actual malice standard.¹²³ The state statutes which punish knowingly false speech and speech made with reckless disregard of the truth,¹²⁴ while meeting the actual malice standard, would be seen as too broad on other grounds.

B. FALSE CAMPAIGN SPEECH PRESENTS A SUBSTANTIAL HARM

There are many problems associated with false campaign speech. It can reduce the integrity of the entire electoral process by misleading and manipulating voters by “distort[ing] the issues, distract[ing] the voters from making informed decisions, inhibit[ing] voter turnout, and alienat[ing] the citizenry.”¹²⁵ Democracy is based upon an informed electorate.¹²⁶ However, in a recent study more than nine in ten voters said they encountered at least some misleading campaign information, with more than half of the participants stating that they saw misleading information frequently.¹²⁷ Researchers also found that voters were substantially misinformed on many important issues in the election.¹²⁸ In fact, it can mislead voters into actually voting against their interests, which completely removes the legitimacy and representativeness of direct democracy.¹²⁹ Therefore, to the extent that false political ads confuse or mislead voters, those false ads obstruct the entire process that democracy is based upon.¹³⁰

123. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

124. See ALASKA STAT. § 15.13.095(a) (2010); COLO. REV. STAT. § 1-13-109 (2012); FLA. STAT. ANN. § 104.271 (2008); LA. REV. STAT. ANN. § 18:1463 (2012); MINN. STAT. § 211B.06 (2010); N.C. GEN. STAT. § 163-274(a)(7)-(8) (2011); N.D. CENT. CODE § 16.1-10-04 (2009); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2012); OR. REV. STAT. ANN. § 260.532 (2009).

125. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 285 (2004) (arguing that the effects of false campaign speech “can be as corrosive as the worst campaign finance abuses”).

126. Marcia Clemmitt, *Lies and Politics: Do Politicians Lie More Today?*, 21 CQ RESEARCHER 147, 148 (Feb. 18, 2011).

127. *Id.* at 148.

128. CLAY RAMSAY ET AL., MISINFORMATION AND THE 2010 ELECTION: A STUDY OF THE US ELECTORATE 4 (Dec. 10, 2010), available at http://www.worldpublicopinion.org/pipa/pdf/dec10/Misinformatio_Dec10_rpt.pdf.

129. Kruse, *supra* note 113, at 150 (arguing further that the state has an interest in preventing fraud because of the serious, adverse consequences to the public from false statements in political advertising causes).

130. Clemmitt, *supra* note 126, at 148; see also Louis A. Day, *Political Advertising and the First Amendment*, in POLITICAL COMMUNICATION 39, 41 (Robert Mann & David Perlmutter eds., 2011) [hereinafter Day, *Political Ad-*

Not only do lies in campaign speech mislead voters, lies also lower the quality of debate, which in turn leaves many voters distrustful.¹³¹ Attack ads containing false statements lower the quality of debate by creating an incentive for response ads, thereby decreasing the time spent on substantive issues.¹³² The potential for untruths and misrepresentations can also have the effect of discouraging a highly qualified candidate from running for any elected office.¹³³ This potential for untruths and misleading information is magnified by the ability of today's media to exaggerate negative campaign ads and cause even more concern for the integrity of the election process.¹³⁴ Overall, falsities in political campaigns create significant harms for the electoral process. This harm clearly shows a compelling state interest in protecting the general public from lies in campaign and political materials.

Although false speech about candidates is harmful to the integrity of elections, deceptive campaign practices also pose a significant risk.¹³⁵ Deceptive campaigns are designed to misdirect certain voters about the voting process or affect their inclination to vote.¹³⁶ Frequently used tactics include false statements about polling places, date of election, or eligibility of voters.¹³⁷ The state certainly has a compelling interest in making sure that all information regarding time, place and voter

vertising] (stating false statements can distort the electoral process); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) ("At first glance, restraining deceptive communication furthers rather than disrupts enlightenment of the populace—by promoting truth.").

131. See Goldman, *supra* note 3, at 895–96 (citing a USA TODAY/Gallup Poll, "where seven out of ten persons said they believed 'not much' or 'nothing at all' of what they heard in political ads" (internal quotation marks omitted)); see also Marshall, *supra* note 125, at 295–96 (arguing that low voter turnout has collateral harms such as negating the democratic process).

132. See Day, *Political Advertising*, *supra* note 130.

133. See Goldman, *supra* note 3, at 896–97 (stating that campaigns are the hardest on the candidates); see also Marshall, *supra* note 125, at 296 (arguing that false statements can "inflict reputational and emotional injury" and that damaging the reputation of political leaders leads to harm of the community as well).

134. See Terri R. Day, "Nasty as They Wanna Be" *Politics: Clean Campaigning and the First Amendment*, 35 OHIO N.U. L. REV. 647, 649 (2009) [hereinafter Day, *Clean Campaigning*].

135. See Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 350 (2010).

136. *Id.* at 353–54.

137. ELECTRONIC PRIVACY INFORMATION CENTER, *E-Deceptive Campaign Practices Report 2010: Internet Technology & Democracy 2.0*, 8 (Oct. 2010), http://epic.org/privacy/voting/E_Deceptive_Report_10_2010.pdf.

eligibility are correct. The Court, in the context of preventing voter fraud, has recognized that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”¹³⁸ Even though the government has a compelling interest, the Court is not likely to find that a statute banning false political speech is narrowly tailored.

C. FALSE CAMPAIGN SPEECH: ATTEMPTS TO BALANCE FIRST AMENDMENT RIGHTS WITH ELECTION INTEGRITY

There has been some debate over different solutions to the problem of false, negative advertising, and its adverse effect on the public. Some scholars would completely abolish any prohibitions on political speech and leave the consequences of false speech to candidates. Others would suggest taking non-legal remedies, such as creating truth taskforces, voluntary ethics codes, and other similar actions. Even among advocates of legal remedies there is disagreement. Some believe that a lesser standard than actual malice should apply, while others disagree regarding remedies or effectiveness.¹³⁹ This Section expands and analyzes these different approaches to solving this problem.

1. Critics Argue There Should Be No Restrictions on Political Speech

Free speech, especially political speech, is one of the most protected rights in America.¹⁴⁰ Therefore, many scholars argue that the government cannot and should not regulate political speech at all.¹⁴¹ They point to language of the Supreme Court that seems to suggest that the proper remedy for false or mis-

138. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (upholding voter identification laws because the state has strong interest in preventing voter fraud).

139. Compare *White*, *supra* note 2, at 50–52 (suggesting the use of actual malice), with *Goldman*, *supra* note 3, at 906 (advocating a lesser standard than actual malice).

140. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (stating the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office” (citations omitted)).

141. See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (“In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights . . .”).

leading speech is more speech, not less speech.¹⁴² The Court has also found that the “test of the truth” is simply the power of a thought to be accepted in the marketplace of ideas.¹⁴³ A political candidate has a large incentive to expose false statements.¹⁴⁴ Opponents of regulating false speech also argue that a state’s interest in regulating election integrity is not met by punishing false statements of speech; the process of finding the speech false is likely to take much longer than the election cycle, so it will do nothing to make sure voters are not misinformed.¹⁴⁵ Furthermore, opponents argue that negative advertising has little effect on voters.¹⁴⁶ While doing nothing is an option that would certainly provide no First Amendment issues, it would not address the issue of rampant campaign fraud and deception.

Doing nothing to curb false political speech is not an effective remedy. Candidates may not always respond to false or misleading assertions by their opponents.¹⁴⁷ Even if candidates did respond to every negative charge, they are then forced to focus their resources on responding, thus taking away from the time and money spent discussing real substantive issues.¹⁴⁸ Without an effective legal remedy there is no deterrence and false and misleading advertising will continue to increase.¹⁴⁹ While candidates may have an incentive to respond to false assertions made against them, states have a significant interest

142. See *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

143. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (“[T]ruth rarely catches up with a lie.”).

144. See *Hartlage*, 456 U.S. at 61 (“In a political campaign, a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent.”).

145. See *Marshall*, *supra* note 125, at 297 (putting forth arguments against regulating campaign speech, but rebutting these arguments by advocating remedies, such as invalidating election results or having a judicial decree of falsity).

146. See Day, *Clean Campaigning*, *supra* note 134, at 654.

147. See Winsbro, *supra* note 2, at 890–91 (discussing how candidates are arguably better off if they do not respond to attacks from opponents). There are generally three ways to respond to false or negative ads: by releasing one’s own false or carefully crafted charges against opponents, ignoring attacks completely, or merely asserting with no elaboration that the charges are false. *Id.*

148. See Goldman, *supra* note 3, at 895 (“False advertising, usually negative, lowers the quality of political discourse and debate.”).

149. See *id.* at 907.

in decreasing the incentive for false statements to be made at all. Even if the Court strikes down any statute banning false, non-defamatory speech, the option to sue for defamatory speech should be open and a possible avenue to dissuade false campaign speech.

2. Non-Legal Options for Prohibiting False Campaign Speech

Other ideas would be to change the political advertising industry instead of trying to create laws that may interfere with First Amendment rights.¹⁵⁰ There have been some calls for local media outlets to fact-check political advertisements.¹⁵¹ In past elections, a major advertising agency has even donated advertising so candidates can actually discuss issues instead of engaging in smear campaigns.¹⁵² Another suggestion is for networks to place restraints on televised ads, or to award candidates free air time on the condition they consent to an “issue-oriented” format for all television ads.¹⁵³ While these ideas may have some merit, some of the ideas would only apply or be feasible for large races, such as a presidential campaign. There are thousands of small, local elections and ballot issues that only affect a small portion of any television-viewing audience. It would not be possible or practical to allow all local candidates free air time. In addition, although these ideas could be effective at pointing out false claims to viewers, the suggestions may not be effective in changing any voters’ decision.¹⁵⁴ Plus, some of the suggestions, such as donating advertisement or free issue-oriented television air time, have no real deterrence factor, nor do they create a punishment. The best these suggestions can hope to do is create an incentive to play clean.

150. See, e.g., Martha M. Hamilton, *Cleaning Up the Mudslinging; Ad Executive Proposes Self-Regulating Body to Police Political Commercials*, WASH. POST, July 30, 1996, at C1 (quoting a former chairman of the American Association of Advertising Agencies who called for a self-regulating organization to test political ads for truthfulness and fairness).

151. See *id.* For an example of a “factcheck,” see POLITIFACT.COM, <http://www.politifact.com/> (last visited Nov. 29, 2012) (including a “truth-o-meter” to indicate if facts are true or “pants on fire” lies).

152. See Hamilton, *supra* note 150.

153. See Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 663 (1992) (advocating for a policy which awards free advertising rather than content restrictions that may violate the First Amendment).

154. See Richman, *supra* note 1, at 685 n.95 (citing a study regarding ad watches and the ineffectiveness of changing the intentions of the voter).

Other suggestions have included self-appointed bodies or having candidates pledging to uphold a code of campaign ethics.¹⁵⁵ But, self-regulating bodies lack any authority over candidates and are thus powerless to do anything even if the body made a finding that a candidate violated the self-regulating body's standard of ethics.¹⁵⁶ By the same token, voluntary codes have been found to be ineffective as well because there is nothing to bind a candidate to obeying the code even if the candidates can agree to the code in the first place.¹⁵⁷ These are not effective in protecting the state's interest in election integrity, and therefore, should not be considered narrower, effective alternatives in a strict scrutiny test.

3. There Needs to Be a Legal Remedy for False Statements of Political Speech

There needs to be a legal remedy or consequence for false campaign advertising, as a legal remedy is the only way to effectively and realistically decrease false statements and the statement's impacts on potential voters. Leaving candidates, interest groups, and other interested parties free to spread lies regarding their opposition poses a significant harm to the public. At the very least, laws banning deceptive tactics aimed at decreasing voter turnout should be in place. Not only does false or deceptive speech mislead voters, it has the potential to create outcomes not supported by the public.¹⁵⁸ In addition, self-regulating bodies, candidate pacts, and other similar remedies have already been shown to be ineffective.¹⁵⁹ Those non-legal remedies are only focused on candidates, and do nothing to curb outrageous lies by independent expenditures, interest groups, or individuals not affiliated with a particular candidate.

155. *See id.* at 684–85 (discussing the impracticality of these suggestions).

156. *See id.* at 685 (offering the Citizens for Fair Campaign Practices Committee as an example, which found that a candidate had an ad with “inaccuracies, distortions, and misrepresentations” at an open hearing, but lacked ability to punish the candidate).

157. *See id.*; *see also* Day, *Clean Campaigning*, *supra* note 134, at 654–55 (defining a voluntary pledge as a non-enforceable promise by a candidate and discussing the lack of enforceability).

158. *See* Kruse, *supra* note 113, at 150.

159. *See, e.g.*, Day, *Clean Campaigning*, *supra* note 134, at 655–58 (discussing the failures of attempts to judicially enforce “clean campaign” codes and promises).

D. ATTEMPTS TO CHANGE FALSE CAMPAIGN SPEECH
PROHIBITIONS

There have been several proposed changes to address the problem of false campaign speech, ranging from new causes of action to stricter knowledge standards or alternative remedies. This Section of the Note addresses the different proposed changes. It analyzes the effects of the solutions and discusses what would fail a strict scrutiny test.

One proposed solution would be for the courts to recognize a cause of action for campaign slander.¹⁶⁰ The solution would entail asking the court to make a factual finding and enter it into the public record that the information was inaccurate.¹⁶¹ A cause of action for campaign slander would not include a finding of actual malice, just that the facts were incorrect, unless the opponent repeated the same false statements after the initial finding.¹⁶² This would serve to give the candidate an “official vindication” that could be used to both attack her opponent’s credibility, as well as rehabilitate her own reputation.¹⁶³ While a candidate may be very concerned for his or her image and be willing to spend money to combat false statements,¹⁶⁴ this solution raises some concerns. First, this adjudication would need to happen very quickly; campaigns are relatively short, and false campaign speech could happen all the way up until Election Day. There would be very little incentive for someone to bring a challenge to false statements made within a week of the election, because there would be insufficient time to

160. Thomas Kane, Note, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 791–93 (1999).

161. *See id.* at 791.

162. *See id.* at 792–93 (proposing a cause of action that would create a “rebuttable presumption” that a party would be imputed with knowledge of falsity, and thus actual malice, if it repeated the challenged claim following an initial adjudication of falsehood; this would deter repetition in order to avoid paying large damages under a traditional defamation analysis).

163. *See id.* at 791–92 (arguing that vindication by a “neutral and detached judicial arbiter” is far more powerful than any current remedy and much more effective than responding directly or waiting for someone else to respond).

164. *See id.* at 794 (suggesting that the current strategy of “fighting fire with fire” indicates this cause of action would be utilized even without the availability of damages because candidates are already spending lots of money to rehabilitate their image in the media without being awarded damages; therefore, they would be likely to utilize this cause of action even though it would cost money to litigate and no damages would be awarded).

get a ruling and rehabilitate their campaign.¹⁶⁵ Even if effective, a cause of action for campaign slander would almost certainly not pass constitutional muster, as there is no “breathing space” to prevent a chilling effect on protected First Amendment speech.¹⁶⁶

One observer proposed the following statute specifically aimed at preventing false speech on ballot issues: “No person shall, with actual malice and intent to impede the success of a campaign for the passage or defeat of a ballot proposition, cause to be published a false statement of material fact concerning that ballot proposition.”¹⁶⁷ This proposed language, while focused on ballot initiatives, does include some important elements. Even though the actual malice requirement, along with a material fact requirement, narrows the statute, this still is not narrow enough to survive strict scrutiny. It does provide additional breathing space by including a “published” requirement.¹⁶⁸ This statute also fails to specify a remedy. Because it is only aimed at ballot provisions, it would not pass a strict scrutiny test. There is no “cognizable” harm, nor can any of the statements be seen as defamatory, because it addresses ballot initiatives, not candidates.

1. Actual Malice Standard and the Problems with Only a Negligence Standard

There are several different viewpoints on the effectiveness and necessity of an actual malice standard. One suggestion is that statutes prohibiting false campaign speech should be changed to conform to the actual malice standard in *Sullivan*.¹⁶⁹

165. See *Developments in the Law*, *supra* note 117, at 1285 (stating that there may not be enough time for corrective remedies to work or for a candidate to respond to false statements made in the final days or hours of the campaign).

166. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (finding that “erroneous statements are inevitable in free debate,” so there needs to be “breathing space” in the doctrine by requiring actual malice); see also *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342 (1974) (holding that in appropriate situations some false statements of fact receive “a measure of strategic protection,” in order to ensure that regulation of speech does not unduly inhibit fully protected speech).

167. See *Kruse*, *supra* note 113, at 170.

168. Cf. *Sullivan*, 376 U.S. at 271–72 (finding breathing space is required because inaccurate statements are unavoidable in free debate).

169. See, e.g., *Conn*, *supra* note 62, at 517 (“The Mississippi campaign falsity statute should . . . wholly conform to the standards set forth in *New York Times*.”).

This arguably would clear up uncertainties about what political false speech entails.¹⁷⁰ Similarly, another scholarly proposal argues for the actual malice standard to remain and be incorporated into a federal statute.¹⁷¹ While there are criticisms about the actual malice standard and the lack of effectiveness, *Sullivan* seems to suggest that something akin to the actual malice standard is necessary to provide breathing space.¹⁷²

Other scholars advocate for a lesser standard of negligence, arguing that the actual malice standard is too hard to meet and provides false campaign advertising with too much protection.¹⁷³ Instead, it has been argued that plain defamation cases are not the appropriate analogy for false campaign speech to follow.¹⁷⁴ One proposal suggests that the government should be responsible for bringing claims of false campaign speech under a federal statute and proving “by clear and convincing evidence that the challenged statement was false, material, and negligently made.”¹⁷⁵ To pass strict scrutiny, there would be limits placed on the proposed statute’s coverage based on the “proponent, the medium, and the time frame of the communication.”¹⁷⁶

This proposal still would not pass strict scrutiny. By only incorporating a negligence standard, it would have the effect of chilling protected speech.¹⁷⁷ A pure negligence standard would not meet the requirements of protecting the First Amendment right to free speech. It would be much easier for candidates to prove a mere negligence standard, thus having a much greater chilling effect on speech by candidates or others that may wish to speak but are worried about their statements being challenged. Even the threat of having to face a lawsuit could have the effect of quieting speech, because a negligence standard is much lower, and would entice many more candidates to bring claims.

170. *See id.*

171. *See White, supra* note 2, at 50–52 (arguing that the actual malice standard provides a meaningful remedy).

172. *Sullivan*, 376 U.S. at 271, 280.

173. Goldman, *supra* note 3, at 905–06 (arguing that in today’s world of tabloids and Internet sources, a defendant would likely have some basis to assert she “thought” it was true).

174. *Id.* at 909–14 (putting forth arguments that the First Amendment right is weaker and the state’s interest is stronger in false political campaign contexts than regular defamation contexts).

175. *Id.* at 915.

176. *Id.* at 921.

177. *See St. Amant v. Thompson*, 390 U.S. 727, 731–32 (1968); *Sullivan*, 376 U.S. at 279–80.

2. Material and Objective False Statements of Fact Which Cause Cognizable Harm

Narrowing the prohibited speech to statements that are “material or have a recognizable effect on a candidate’s electoral prospects”¹⁷⁸ may help a statute pass the strict scrutiny test. Minor misstatements should not be actionable if the entirety of the ad is substantially accurate.¹⁷⁹ Minor misstatements should also not be actionable if no reasonable voter would change or base her vote on the false statement.¹⁸⁰ This would have the effect of narrowly tailoring the statute to prohibit only materially false statements of material facts, and that have an actual impact on the candidate’s chance of being elected. Narrowing the statute to those false statements with a material effect on a campaign may be too hard a test for the courts to implement. It would be very difficult for a candidate to show harm, or even determine what harm is necessary in terms of polling numbers.

In order for the false statements to be actionable, it must be possible to actually prove the statements were false.¹⁸¹ Therefore, a statute with the standard of objectively false statements would apply only to statements of fact, not opinions or ideas.¹⁸² In order to determine if something is a fact or an opinion, the courts should look to *Ollman v. Evans*.¹⁸³ The pro-

178. Conn, *supra* note 62, at 517–18.

179. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991).

180. See *Goldman*, *supra* note 3, at 919–20 (arguing that candidates should not have to prove that they would have won the election had it not been for the false statement, but rather that a voter would have reasonably based her vote on the false statement of fact; for example, if the advertisement stated the candidate voted with the president 96% of the time, but in reality it was 94% the difference would not lead reasonable voters to change their minds, but if it was actually 38%, a voter may base her vote on the false statement).

181. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990) (finding that hyperbole statements are not included as statements of fact); see also William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 338 (2007) (suggesting that to be constitutional, a state law must apply only to statements that may be proven false by objective evidence, not including hyperboles, and place the burden on the plaintiff to prove the falsity and actual malice of the statements made by the defendant).

182. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (“Under the First Amendment there is no such thing as a false idea.”); see also Kruse, *supra* note 113, at 169 (suggesting that to avoid being found overbroad, statutes need to proscribe only false statements of fact, not opinions).

183. 750 F.2d 970, 979 (D.C. Cir. 1984) (applying the plurality’s four-part test: (1) specificity of language; (2) verifiability; (3) linguistic context; and (4)

scribed statement should be objectively verifiable, because then it could be considered a proposed fact and not an opinion.¹⁸⁴ It would be optimal to proscribe misleading statements; however, it would be constitutionally unfeasible to do so.¹⁸⁵ The prohibiting of false advertising objectively intended to mislead,¹⁸⁶ while noble, would be very difficult to prove. Prohibiting advertising intended to mislead voters would also raise additional questions, such as which standard of proof to use, which party has the burden of proving intent or lack of intent, and what evidence would be allowed to show the intent.

3. Other Proposed Ways in Which to Narrowly Tailor a Statute

One proposed statute would include the language “intent to impede.”¹⁸⁷ This language, however, would make the statute too narrow, and could lead the statutes to be classified as under-inclusive. This would preclude the punishment of false statements made by a candidate about himself, or false statements made about a candidate by an interest group supporting a candidate, both of which could cause harm. Another proposed solution would be to limit the application of the statute to just candidates or political parties.¹⁸⁸ While it may be true that candidates and political parties do the most advertising and individuals are the most likely to have their speech chilled for fear of being sued,¹⁸⁹ this limitation would be under-inclusive. The limitation would not ban all false statements and would

social context). See Kruse, *supra* note 113, at 171–78, for a more in-depth analysis of how this analysis would work and what would or would not be considered false under this test.

184. *Cf. Milkovich*, 497 U.S. at 18–20 (“[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” (alterations in original) (quoting *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 64 (2d Cir. 1980))).

185. See Goldman, *supra* note 3, at 917–18 (arguing that the state cannot hold someone accountable for a misleading statement made in good faith because of the enormous chilling effect it would have on political speech); see also *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 217–18 (Ala. 2001) (concluding that a statute covering true, but misleading, statements in political advertisement was unconstitutional).

186. Goldman, *supra* note 3, at 918 (concluding that the intent requirement would decrease the threat of chilling good faith statements but still punish those clearly aimed at misleading the public).

187. Kruse, *supra* note 113, at 170.

188. Goldman, *supra* note 3, at 921–22.

189. *Id.*

not apply the law equally to all. In addition, by limiting the statute only to candidates or political parties, the statute could be easily evaded by individuals creating independent expenditures, or through direct donations to independent expenditures which then could create false ads without fear of punishment.

Another way to limit a statute is to have it apply only to published statements¹⁹⁰ or broadcast, satellite, or cable advertising.¹⁹¹ While a statute should be narrow, limiting it to just published statements or just television advertising narrows a statute too much and does not encompass the whole realm of false campaign speech. However, if a statute bars all false political speech it would be too inclusive and would not provide enough breathing space, by possibly extending the repercussions of the statute to statements made in the course of a live debate or a live interview. This could have a chilling effect on candidates and hinder their ability to partake in debating the issues for fear of stating something that may turn out to be false.¹⁹² Limiting a statute to all paid political campaign advertising or campaign material would allow candidates to partake in free debates and interviews without worry that any spontaneous misstatement would be punished. Although some forms of false statements would not be subject to punishment, such as internet blogs, these could be seen as less trustworthy by voters anyway and therefore less influential in the outcome of the election.

Another proposed limitation would be to limit the timeframe of the statute to immediately preceding an election.¹⁹³ While this could be helpful in narrowing the statute, it is unnecessary. Since most political advertising, if not all campaign advertising, occurs within that time frame, it would not have a noticeable effect. It would allow for general criticism of the government and its members,¹⁹⁴ but by restricting a statute to political campaign advertising, the ability to generally criticize the government would already be protected.

190. Kruse, *supra* note 113, at 170.

191. Goldman, *supra* note 3, at 922–23.

192. *See id.* (excluding public debates and live interviews from a proposed television advertising limitation).

193. *See id.* at 923–24 (advocating for a 90 day window prior to an election for congressional members, a 120 day timeframe for presidential races, and a 60 to 90 day time period for state and local elections).

194. *Id.* at 924.

The government has a compelling interest in protecting the integrity of the elections. Regardless of this compelling interest, any statute would need to be narrowly tailored to pass a strict scrutiny test. There are numerous different state statutes currently enacted and several proposals about how to create a constitutional statute prohibiting false speech. A purely criminal statute or a statute that does not provide adequate remedies will not be effective; however a statute that would be more effective, such as a pure negligence standard, would not provide enough breathing space.

III. RECOMMENDED CAUSE OF ACTION

Based on Court precedent, current state statutes, and the above-discussed proposals, the most likely outcome would be for the Court to find any attempt to regulate false, non-defamatory statements of political speech unconstitutional. The Court made it clear in *Alvarez* that purely false speech is a protected category under the First Amendment.¹⁹⁵ In order for the statute to meet strict scrutiny it likely needs to prevent a specific harm.¹⁹⁶ There are two possible ways to combat false campaign speech. First, someone may bring a defamatory action. Secondly, a statute could regulate other campaign tactics and techniques, such as deception, to prevent the total erosion of election integrity.

The Court has already allowed defamatory actions against protected free speech using an actual malice standard.¹⁹⁷ By at least allowing for a defamatory action, there is a remedy for egregious violations and falsities. Including a defamatory requirement in a statute, similar to the statute below, narrowly tailors the statute to speech that is harmful and already actionable. The following is a potential statute that incorporates an actual malice and defamatory standards:

195. See *United States v. Alvarez*, 132 S. Ct. 2537, 2546–47 (2012) (plurality opinion) (“This opinion . . . rejects the notion that false speech should be in a general category that is presumptively unprotected.”).

196. See *id.* at 2555 (Breyer, J., concurring) (stating that most statutes that have survived strict scrutiny “narrow the statute to a subset of lies where specific harm is likely to occur”).

197. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“[C]onstitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . .”).

No person shall knowingly participate in the preparation or distribution of paid political campaign advertising or paid campaign material that is designed or tends to elect or defeat a candidate for nomination or election to public office, that includes objectively false and material statements of defamatory facts that the person knows to be false or communicates to others with reckless disregard of whether they are false.

This proposed language, or something similar, would be an effective way to deter false statements of fact and to provide a remedy for those who were harmed by the statements. It includes the actual malice standard from *Sullivan*,¹⁹⁸ as well as narrowly tailoring it to apply only to paid campaign advertising or material. By phrasing the actual malice standard as “that the person knows to be false or communicates to others with reckless disregard of whether they are false,” it creates breathing space and could arguably be narrowly tailored and pass the test for strict scrutiny. States should also include findings or make a record of legislative history regarding the impact of false advertising to political turnout, voter confusion regarding false statements, and the threat to the integrity of their electoral process.¹⁹⁹ Legislative findings will help bolster the evidence of a compelling state interest of protecting their election integrity.

Even with this statute, it will still be hard to prove that the statements were objectively false and made with actual malice. A more effective statute would ban all misleading statements of fact or at least those with the intent to mislead,²⁰⁰ but that type of statute would not pass a breathing space analysis, and therefore would not withstand strict scrutiny. This statute would not be as effective as a flat-out ban on false political speech because it would require showing that the speech was defamatory. The Court would likely find any attempt to narrowly tailor a statute banning false, non-defamatory speech at odds with the First Amendment. Another concern of the Court’s in *Alvarez* was prosecutorial discretion that political prosecutors would have in bringing criminal action.²⁰¹ In order to combat this problem, a statute could create a civil cause of action, similar to libel or defamation.

198. *Id.* at 270.

199. *See, e.g.*, Richman, *supra* note 1, at 667; White, *supra* note 2, at 1–3; Winsbro, *supra* note 2, at 853–54.

200. *See* Goldman, *supra* note 3, at 919–20.

201. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring).

States should regulate deceptive campaign practices. Even if constitutionally barred from banning false political speech, a state could pass a statute that regulates the dissemination of deceptive materials aimed at dissuading voters from voting or voting a particular way. The Court has recognized a state interest in upholding election integrity.²⁰² Laws aimed at preventing false information about voter eligibility, polling places or election dates and times would help prevent voter deception and would be deemed constitutional. While critics could argue that any ban on speech is unconstitutional, this particular ban could pass strict scrutiny. The Court has already upheld constitutional concerns regarding campaigning in the polling places, as well as other statutes banning some speech. Here, the court could find that the statute was narrowly tailored and the ban actually protected the compelling state interests. The harm, confused voters who are deceived into not voting, could be directly prevented by a statute that prevents knowingly false information. By providing for knowingly false or reckless disregard, the state could protect breathing space but still stop deceptive campaign tactics.

CONCLUSION

While the State has a compelling interest in protecting the integrity of its elections, it is highly unlikely that any law focusing strictly on the falsity of statements would be held constitutional. Even a state statute regulating false speech or defamatory material statements of fact in campaign literature, material, or advertising calls into question the First Amendment right to freedom of speech, especially free political speech. Despite the constitutional barriers present, this Note analyzes and proposes a different way to protect election integrity without infringing on First Amendment rights.

202. See *Burson v. Freeman*, 504 U.S. 191, 204–06 (1992).