CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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March 27, 2017

The Honorable Ed Chau
Room 5016
P.O. Box 942849
Sacramento, CA 94249-0049

The Honorable Kevin Kiley
Room 4153
P.O. Box 942849
Sacramento, CA 94249-0006

RE: Constitutional and Practical Issues with Assembly Bill 1104

Dear Chair Chau, Vice Chair Kiley, and Members of the Assembly Privacy and Consumer Protection Committee:

On behalf of the Center for Competitive Politics ("the Center"),[1] I respectfully submit the following comments on constitutional and practical issues with Assembly Bill 1104,[2] which is scheduled for a hearing before the Assembly Privacy and Consumer Protection Committee on March 28, 2017. Among other things, this legislation amends California's Elections Code to prohibit knowing and willful false or deceptive statements to be made on the internet about a candidate or a ballot issue. This dangerous standard would place powerful government bureaucrats in the precarious position of determining the truth or falsity of statements and thoughts about political issues, which by their very nature implicate strong differences of opinion. Worse still, as a result of Supreme Court precedent, this bill is very likely unconstitutional.

If legislation that is in any way similar to Assembly Bill 1104 becomes law, that statute faces a high likelihood of being found unconstitutional in court. Any potential legal action will cost the state a great deal of time and resources to defend, and will divert your Attorney General's office from meritorious legal work. Furthermore, under the federal Civil Rights Act, Article III courts are empowered to order states to pay costs and damages to successful plaintiffs. The Center has received such judgments, including twice in the past year.

If passed and signed into law, A.B. 1104 will enable partisan enforcement of a law that tasks government officials with an impossible mandate – determining the truth or falsity of speech on the internet. Such a regulatory apparatus will inevitably hurt "the little guy" who decides to

[1] The Center for Competitive Politics is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Just this past year, we secured judgments in federal court striking down laws in the states of Colorado and Utah on First Amendment grounds. We are also currently involved in litigation against California, Missouri, and the federal government.

[2] The California Political Cyberfraud Abatement Act, A.B. 1104, California Legislature – 2017-2018 Regular Session (as introduced) ("A.B. 1104").

express his political opinions online and via social media accounts, potentially in violation of this measure. The remedy to any perceived issues with false statements made on the internet is more speech – not identifying and censoring speech deemed to be "false or deceptive" by powerful regulators. Lastly, libel and defamation laws already exist to protect candidates from false speech in those serious instances in which such speech crosses the proverbial line.

For more information on false statement law statutes, their dubious constitutionality, and the numerous practical and policy issues they pose, please consult the Center for Competitive Politics' Issue Review, "State False Statement Laws: Should the Government Act as the Truth Police?"[3] I have enclosed a copy of the Center's report with this analysis.

I. The First Amendment bars efforts to restrict speech on the basis of content, subject, or message.

"[A]s a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[4] This includes, except in cases of outright libel or perjury, the regulation of knowingly false statements. In *United States v. Alvarez*, the Supreme Court struck down the Stolen Valor Act, which criminalized false claims about winning significant military decoration. That law attempted to preserve the honor of our Nation's highest awards, but even in that context was found to impermissibly burden speech protected by the First Amendment.

A.B. 1104, meanwhile, seeks to regulate *political* speech, not merely speech about military decorations, and "there is practically universal agreement that a major purpose of…[the First] Amendment was to protect the free discussion of governmental affairs."[5] Accordingly, the courts have long held that the best solution to "false or deceptive" social media postings is for others to enter the debate and counter with the truth. Or, as Justice Oliver Wendell Holmes properly stated nearly a century ago, "the best test of truth is the power of the thought to get itself accepted in the competition of the market…That at any rate is the theory of our Constitution."[6]

II. The enforcement of a provision prohibiting "false or deceptive statements" online will inevitably be exploited by those motivated by partisan purposes.

False statement laws grant government regulators extraordinary power to determine the "truth" of political speech and to impose hefty fines – or imprisonment – upon those found to be in violation of these statutes. Ostensibly written to prevent the proliferation of mistruths during a political campaign, false statement laws have the direct effect of stifling speech, and are particularly susceptible to abuse by candidates seeking to silence their critics.

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[3] Matt Nese and Brennan Mancil, "State False Statement Laws: Should the Government Act as the Truth Police?," Center for Competitive Politics. Retrieved on March 24, 2017. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-07-17_Issue-Review_Mancil_State-False-Statement-Laws.pdf (July 17, 2014).
[4] *United States v. Alvarez*, 132 S. Ct 2537, 2543-2544 (2013) (plurality op.).
[5] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citation and internal quotation marks omitted).
[6] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Consider the facts of the Supreme Court case *SBA List v. Dreihaus*.[7] The plaintiff, Susan B. Anthony (or "SBA") List, is a pro-life organization. During the 2010 election cycle, after then-Congressman Steven Driehaus voted in favor of the Patient Protection and Affordable Care Act, SBA List announced it would run an advertising campaign informing voters that Congressman Driehaus voted to publicly fund abortions. The veracity of this statement – like many assertions about intricate legislation and hot-button political issues – is a complex matter about which there is a measure of dispute. What is not arguable is that some consider the statement to be objectively true.[8]

Rather than accepting that tough ads are an assumed risk of participating in politics, or attempting to counter SBA List's view of how the Affordable Care Act works, former Congressman Driehaus sought to silence SBA List. He threatened legal action not just against SBA List, but also against a private billboard owner willing to rent space to display SBA List's message, and filed a complaint under Ohio's false statement law.

Significantly, Congressman Driehaus withdrew his complaint *before* a final ruling was issued under the Ohio law. The reason for this was two-fold. First, the complaint itself was sufficient to cast doubt on the organization criticizing the congressman – the court of public opinion acts far more quickly than the regulatory agencies that enforce false statement law provisions. Second, by withdrawing the complaint, Congressman Driehaus effectively stopped SBA List from defending itself against the false statement charge. The Sixth Circuit Court of Appeals ruled that SBA List couldn't even challenge the law, because, by that point in time, Congressman Driehaus had withdrawn his complaint.

The net result of Ohio's false statement law in this case was nothing more than a political attack on an opponent. No false or misleading statements were exposed or punished, and voters were deprived of a full and fair political debate.

Given the proliferation of political speech by citizens on the internet about every issue imaginable, California is likely to see similar legal exploits, through which powerful individuals will tie up administrative agencies and the courts in seeking to silence the speech of those with which they disagree. Short of any politically-motivated complaints, merely attempting to enforce this provision will become a nearly impossible endeavor, as regulators will be forced to evaluate and decide a given statement's veracity, often in the context of political disagreement, technical disagreements, and uncertain prognostication. Each question will likely pit regulators with competing worldviews against each other in deciding whether a particular statement is true or false. And the danger of selective enforcement will be ever-present.

III. False statement provisions, like the one at issue in A.B. 1104, will inevitably silence the speech of citizens lacking substantial resources, particularly those innocently expressing their opinions on the internet.

[7] 134 S. Ct. 2334 (2014).

[8] Richard M. Doerflinger, "A Careful Reading: Could federal health care money be used for abortion?," *America: The Jesuit Review of Faith & Culture*. Retrieved on March 24, 2017. Available at: http://www.americamagazine.org/issue/careful-reading (March 26, 2014).

While Susan B. Anthony List eventually had their day in the Supreme Court, the process took significant time and money that would not be available to most of the 39 million Californians who use the internet and social media accounts daily as a tool for sharing their political opinions. In the SBA List case, for instance, another group also wanted to run ads critical of Congressman Dreihaus, but "it was afraid that doing so would expose it to enforcement actions and potential criminal penalties."[9] Ohio's false statement law, in this instance, effectively silenced not only the supposedly offending "false speech," but also speech from a small organization without the resources to defend itself in front of regulatory bodies and courts – regardless of whether its planned speech was false.

Since A.B. 1104 specifically targets false internet communications, it is even more likely to implicate innocent Californians. The democratizing effect of the internet is well-known, and has applied to speech about political issues as well. No longer is effective political speech the sole purview of candidates and well-funded organizations; the internet has enabled anyone with a computer or smartphone to register their opinions on political debates. By specifically targeting these speakers with threats of fines, or even jail time, for speech as broad as a "deceptive statement designed to influence the vote,"[10] A.B. 1104 effectively undoes this process. If A.B. 1104 were to pass, the state would be in the position of policing every blog, Facebook post, and tweet to determine whether such comments mislead or are false about a candidate or ballot question. Further, because the law could be targeted at publishers, no website could reasonably be expected to host a free and open debate without fear of running afoul of the law.

This measure would do untold harm, not just to political debates in California, but also to the wider cultural sphere. If A.B. 1104 was enacted and enforced, every Californian would be forced to think about government repercussions before posting any message that might be construed as even vaguely political. Beyond the constitutional implications, California would essentially end the free and open internet.

IV. The remedy for false or misleading speech is more speech.

If candidates, political parties, or other organizations find false or misleading messages to be a problem, the alternative is not censorship, but more speech. The Supreme Court has consistently adopted this position. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth…. The theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[11]

And those supposedly "protected" from false speech under A.B. 1104 are uniquely suited to answer false speech directly. As the online blog *techdirt* recently wrote:

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[9] Br. for Pet'rs at 7, *Susan B. Anthony List*, 134 S. Ct. 2334 (2014). Available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-193_pet.authcheckdam.pdf.
[10] A.B. 1104, § 2.
[11] *United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2550 (2012).

> It would seem the "victims" listed in the proposed amendment aren't really in need of a free speech-abusing law. If California's government doesn't like the tone of online posts about ballot measures, it has plenty of opportunities (and numerous platforms) to set the record straight. Worse, it gives the government the power to shut down speech it doesn't agree with under the pretense [of] preventing voters from being misled.
>
> As for political candidates, they rarely suffer the problem of having too *little* speech. Bullsh–t can be countered with *more* speech, a rhetorical weapon everyone has access to, but political candidates in particular tend to be especially well-equipped in this department.[12]

The state is not, and cannot be, the arbiter of truth. If candidates don't like Californians' opinions on the political issues of the day, the remedy is not more regulation, it's more speech.

V. Existing libel and slander laws are sufficient to protect candidates from genuine unfair harm.

Outside of the obvious remedy to speech one disagrees with or finds "false or deceptive," candidates may find solace in existing libel and slander laws. These statutes already provide ample protection against false speech that causes real damage. When applied properly, these provisions succeed in compensating the victims of defamatory or libelous speech, frequently resulting in favorable settlement or the payment of damages. For example, since Nevada's false statement law was deemed unconstitutional in *Nevada Press Association v. Nevada Commission on Ethics*,[13] candidates in the state have turned to existing libel and slander laws to gain compensation for damaging speech.

While libel or defamation cases are rare, such cases have been successful across the country when speech against a candidate proved genuinely harmful. Again, using Nevada as an example, a candidate won a $250,000 settlement in 2007 from a union that sent out a mailer depicting her behind bars.[14] In 2012, an Iowa jury awarded a candidate for state senate $231,000 after being defamed by the opposing political party.[15] In Washington State, a defamation case stemming from statements made in a 2014 campaign is currently progressing through the courts.[16]

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[12] Tim Cushing, "California Lawmakers Looking To Make Bad Law Worse By Banning 'False' Political Speech," *techdirt*. Retrieved on March 24, 2017. Available at: https://www.techdirt.com/articles/20170317/17054236942/california-lawmakers-looking-to-make-bad-law-worse-banning-false-political-speech.shtml (March 20, 2017).

[13] *Nev. Press Ass'n v. Nev. Comm'n on Ethics*, 2005 U.S. Dist. LEXIS 4923 (D. Nev. Mar. 26, 2005). The case began with original proceedings on Sept. 12, 2002, and was decided on March 26, 2005.

[14] Steve Sebelius, "System works when it comes to negative campaigns," *Las Vegas Review-Journal*. Retrieved on March 24, 2017. Available at: http://www.reviewjournal.com/steve-sebelius/system-works-when-it-comes-negative-campaigns (April 20, 2012).

[15] Haley Behre, "Iowa state senator wins $231,000 in defamation suit over campaign ad," *Reporters Committee for Freedom of the Press*. Retrieved on March 24, 2017. Available at: https://www.rcfp.org/browse-media-law-resources/news/iowa-state-senator-wins-231000-defamation-suit-over-campaign-ad (April 11, 2012).

[16] Ed Friedrich, Judge allows defeated candidate's libel suit to continue," *Kitsap Sun*. Retrieved on March 24, 2017. Available at: http://www.kitsapsun.com/story/news/local/communities/south-kitsap/2016/08/05/judge-allows-defeated-candidates-libel-suit-to-continue/94329760/ (August 5, 2016).

While the preferred avenue for answering political commentary or misleading speech in campaigns is more speech, in extreme circumstances, candidates are entitled to use existing libel and slander laws to seek protection and damages from the courts.

* * *

Thank you for the opportunity to provide these comments on Assembly Bill 1104. Should you have any further questions regarding this legislation, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully,

Matt Nese
Director of External Relations
Center for Competitive Politics

ISSUE REVIEW

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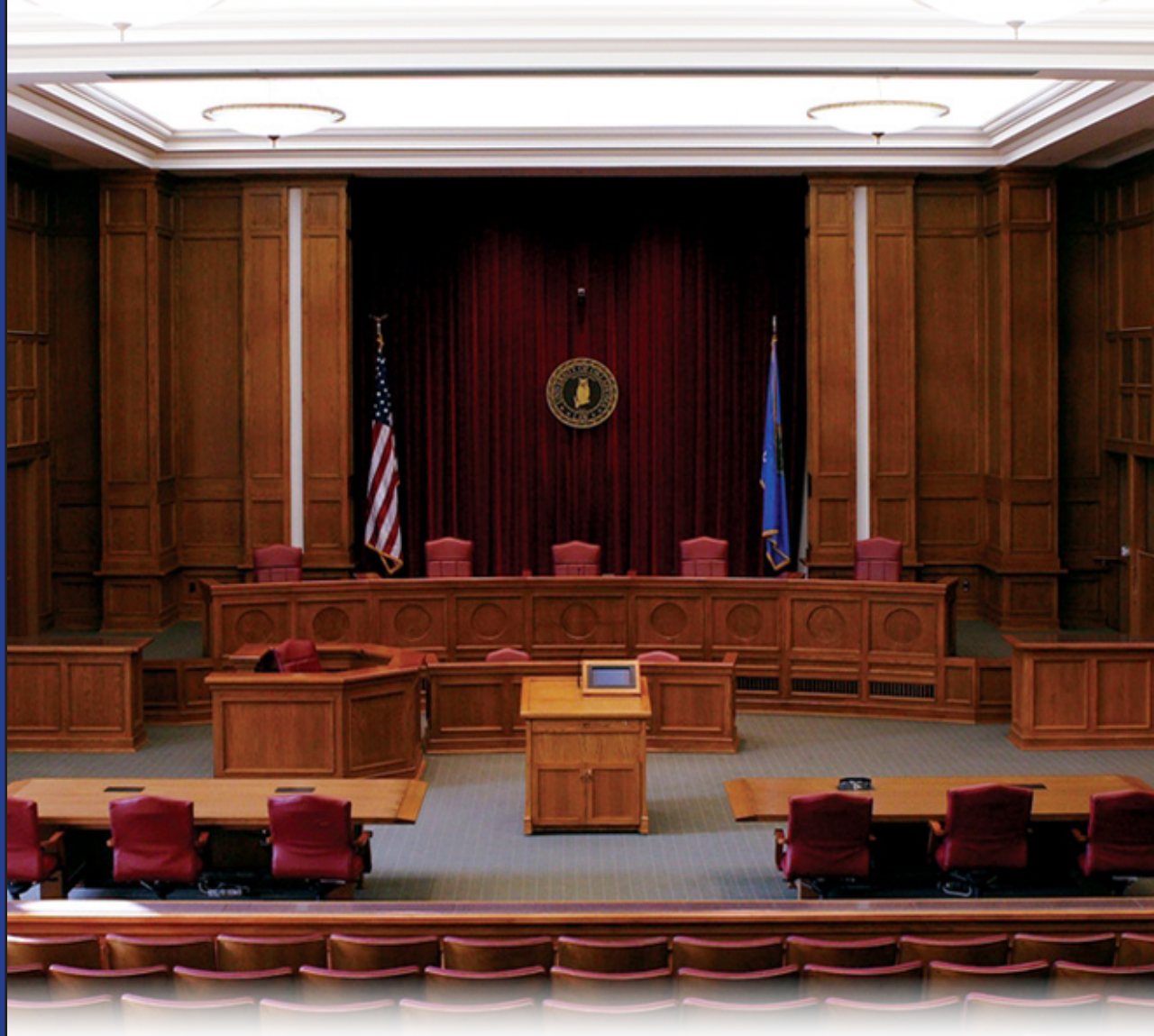
CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

State False Statement Laws:
Should the Government Act as the Truth Police?

By Matt Nese and Brennan Mancil



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Executive Summary

- Seventeen states have adopted constitutionally vulnerable "false statement" laws that unwisely put government in the business of acting as the "truth police." Such statutes cover general speech about a candidate or public official, as well as speech about a candidate's particular voting record or stands on issues.
- Judgments about violations of such laws are often done on the basis of biased or partisan determinations by unelected government regulators, allowing these government bureaucrats to unfairly influence an election.
- Numerous court cases have demonstrated that false statement laws are constitutionally questionable and susceptible to legal challenge because of their impact on speakers' First Amendment political speech rights and Fourteenth Amendment due process rights.
- In particular, in *SBA List v. Driehaus*, the United States Supreme Court considered a procedural question in the context of Ohio's false statement law: namely, whether a would-be speaker could sue to challenge the law before it had been enforced against him. The Court unanimously ruled that such a challenge was appropriate, as the speaker had a legitimate concern that its desired expression might be found to be "false" by the Ohio regulators. Accordingly, challenges to false statement statutes in Ohio (and the sixteen other states with these statutes) are now easier to mount in the wake of the unanimous *SBA List* opinion.
- If any of these state false statement statutes are challenged, there is a high likelihood that they will be found unconstitutional. Any potential legal action will cost states a great deal of money defending their offending statutes, and will distract these Attorney Generals from meritorious legal work. Additionally, it is probable that states will be forced by the courts to award legal fees to successful plaintiffs. Legal fee awards are frequently costly – often well over one hundred thousand dollars.
- Seventeen states – Alaska, Colorado, Florida, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, West Virginia, and Wisconsin – have some form of false statement law, many of which carry severe penalties. These penalties are particularly problematic given that the "truth" or "falsity" of the speech at issue necessarily turns upon determinations by (often partisan) government regulators.
- Many existing libel and slander laws provide sufficient protection for individuals truly harmed by defamatory campaign speech. To this end, some candidates have sued and recovered damages when injured by such speech.
- Accordingly, out of respect to the First Amendment and due process rights of their constituents, state policymakers should repeal existing false statement laws in their states and avoid adopting proposals to regulate "false" campaign speech.

Introduction

Generally, false statement laws prohibit "false" speech about candidates or public officials (including their official voting records). Analogous libel and slander statutes – which also penalize false speech – require jury consideration (and often proof of actual malice), in accordance with the constitutionally guaranteed right to due process. False statement laws, by contrast, task often unelected government regulators with evaluating the truth or falsity of the speech at issue, transforming the government into the truth police.

Employed by seventeen states, false statement laws seriously harm the First Amendment's protection of free discussion. Because they permit the government to police political speech – the speech at the very heart of the debate over who should govern – such laws are particularly susceptible to abuse by those wishing to silence their political opponents. As a result, numerous court cases have demonstrated that false statement laws are constitutionally questionable and susceptible to legal challenge because of their impact on speakers' First Amendment political speech rights and Fourteenth Amendment due process rights. This dubious legality, along with false statement laws' tendency to stifle constitutionally protected expression and invite costly litigation, is described in this report.

False Statement Laws

False statement laws grant government regulators extraordinary power to determine the "truth" of political speech and to impose hefty fines – or imprisonment – upon those found to be in violation of these statutes. Ostensibly written to prevent the proliferation of mistruths during a political campaign, false statement laws have the direct effect of stifling speech, and are particularly susceptible to abuse by candidates seeking to silence their critics.

Generally, once a candidate challenges the "truth" of a claim about him, an unelected panel of government officials holds a hearing to determine whether – in their collective opinion – the speech is "false." Given the time-sensitive nature of election-related speech, these cases are rarely decided in time for the speech to be effective. Further, even if the false statement complaint is dismissed, the speaker has been discredited in the court of public opinion, due to public knowledge of the complaint against him, allowing the complainant to gain a tangible campaign advantage without ever having to prove the falsity of the statement at issue.

The reason these abusive campaign tactics occur is because the law requires that regulators accomplish an almost impossible task – arbitrating truth from falsehood in some of this country's oldest and most divisive political debates. Whether the alleged false statement concerns abortion, taxes, climate change, or any other political issue, there are sure to be passionate arguments made by citizens and organizations on both sides of a debate. False statement laws task government bureaucrats with picking a side in a political dispute in the midst of a heated election – when it is precisely the voters who should have the final say. As a result, these statutes work grave harm upon sensitive due process and First Amendment rights.

Existing libel and slander laws provide ample protection against false speech that causes real damage. These laws repeatedly succeed in compensating the victims of false speech, frequently resulting in favorable settlement or the payment of damages. For example, since Nevada's false statement law[1] was deemed unconstitutional in *Nevada Press Association v. Nevada Commission on Ethics,*[2] candidates in the state have turned to existing libel and slander laws to gain recompense from damaging speech, and have done so with much success: the cases are often settled with cash payments or result in verdicts in favor of plaintiffs.[3]

Moreover, as the District Court judge in *SBA List v. Driehaus* recognized, decades of controlling Supreme Court precedent make clear that, "associating a political candidate with a mainstream political position, *even if false*, cannot constitute defamation, as a matter of law."[4] Thus, statutes attempting to regulate such a category of speech via "false statements" remain especially vulnerable to a legal challenge.

Further, it is extremely difficult to enforce false statement laws without violating the Fourteenth

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1 Nev. Rev. Stat. 294A.345, 1997.

2 *Nev. Press Ass'n v. Nev. Comm'n on Ethics,* 2005 U.S. Dist. LEXIS 4923 (D. Nev. Mar. 26, 2005). The case began with original proceedings on Sept. 12, 2002, and was decided on March 26, 2005.

3 Steve Sebelius, "System works when it comes to negative campaigns," *Las Vegas Review Journal*. Retrieved on July 17, 2014. Available at: http://www.lvrj.com/opinion/system-works-when-it-comes-to-negative-campaigns-148227365.html (April 20, 2012).

4 *Susan B. Anthony List v. Rep. Steve Driehaus*, No. 1-10-cv-720, 2013 U.S. Dist. LEXIS 10261at *2 (S.D. Ohio Jan. 25, 2013) (emphasis added).

Amendment's guarantee of due process. Indeed, a United States federal court found that the "extremely abbreviated"[5] process for finding a violation of Nevada's false statement law departed from full due process in numerous and glaring ways.[6] The Court declared the law unconstitutional on its face, and enjoined the Nevada Commission on Ethics from enforcing it.[7] Thus, this case demonstrates that, even if the state has an interest in ensuring fairness in elections, attempts to regulate the "truth" or "falsity" of campaign speech are likely to infringe upon due process rights more than can be constitutionally justified.

False statement laws also violate the First Amendment because they operate to prohibit speech that the Constitution explicitly protects. Multiple Supreme Court decisions denounce laws banning false statements as antithetical to the First Amendment. Indeed, because political speech is essential to self-government, the Court reiterated in *Snyder v. Phelps*[8] that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[9] In *United States v. Alvarez*, the Court applied this broad rule in a narrower context, holding that false statements about military honors are indeed protected by the First Amendment.[10] *Alvarez*, which was quoted favorably in the *SBA List v. Driehaus* decision, further noted:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth…. The theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[11]

Because of this Supreme Court precedent as well as the significant First Amendment and Fourteenth Amendment due process concerns implicated by false statement statutes, states with these speech-stifling provisions can expect challenges to these laws.

5 *Nev. Press Ass'n v. Nev. Comm'n on Ethics*, 2005 U.S. Dist. LEXIS 4923 at *15.

6 *Id.* at *15-19.

7 *Id.* at *19.

8 131 S. Ct. 1207 (2011).

9 *Id.* at 1215 (citations and quotation marks omitted) (quoted favorably in *Susan B. Anthony List*, 2013 U.S. Dist. LEXIS 10261 at *3).

10 *United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2551 (2012).

11 *Id.* at 2550 (citations and quotation marks omitted).

The Impact of SBA List v. Driehaus

On June 16, 2014, the Supreme Court issued its unanimous decision in *SBA List v. Driehaus*, a procedural challenge brought in the context of Ohio's false statement law. While the Court did not directly assess the constitutionality of Ohio's particular statute, its decision ensured that challenges to such speech-suppressing laws would receive meaningful review in the federal courts. Thus, this decision implicates the seventeen state false statement law statutes enumerated later in this report.

To be sure, Ohio's false statement law is constitutionally questionable. "Any person" may file a complaint that any political statement is a lie. A state agency comprised of partisan officials – the Ohio Elections Commission – then determines whether there is "probable cause" that the statement is indeed untrue. Upon such finding, the complainant gets to conduct an invasive investigation, including depositions, electronic discovery, interrogatories, etc. If, after such an investigation, the full Commission finds a violation, it refers the case to a prosecutor for trial.

Thus, under color of state law, a member of Congress (for example) may obtain a free pass to tear apart his political foes. This is a far cry from the constitutional command that governments "make no law…abridging the freedom of speech."

The plaintiff, Susan B. Anthony (or "SBA") List, is a pro-life organization. During the 2010 election cycle, after then-Congressman Steven Driehaus voted in favor of the Patient Protection and Affordable Care Act, SBA List announced it would run an advertising campaign informing voters that Driehaus voted to publicly fund abortions. The veracity of this statement – like many assertions about the administrative state – is a complex matter about which there is certainly a measure of dispute. What's not arguable is that *some* consider the statement to be objectively true.[12]

Rather than accepting that tough ads are an assumed risk of participating in politics, or attempting to counter SBA List's view of how the Affordable Care Act works, former Congressman Driehaus sought to silence SBA List. He threatened legal action against a private billboard owner willing to rent space to display SBA List's message, and filed a complaint under Ohio's false statement law. Another unrelated, advocacy group declined to run similar ads about Driehaus for fear of being hauled before the Ohio Elections Commission.

During the discovery process associated with his ethics complaint, Congressman Driehaus demanded depositions of both SBA employees and employees of *outside* groups, as well as "SBA's communications with allied organizations, political party committees, and Members of Congress and their staffs."[13] SBA List responded by filing a case in federal court asserting the unconstitutionality of Ohio's law. After the election – which he lost – Driehaus withdrew his complaint and moved to Africa to work for the Peace Corps.

Even though the Ohio Elections Commission found probable cause that SBA List's statement about Congressman Driehaus was untruthful, and even though SBA List wanted to run ads about *other* Ohio elected officials and "taxpayer-funded abortion," the Sixth Circuit Court of Appeals ruled that SBA List *couldn't even challenge the law*, because, by that point in time, Driehaus had withdrawn his complaint. To sue – and thus ensure that it would not be hauled before the Commission in the future – the Sixth Circuit ruled that SBA List would have to wait for an opportunity to go through the entire

12 Richard M. Doerflinger, "A Careful Reading," *America Magazine*. Retrieved on July 17, 2014. Available at: http://americamagazine.org/issue/careful-reading (April 7, 2014).

13 *SBA List v. Driehaus*, 573 U.S. __, No. 13-193 slip op. at 4 (2014).

process *again* (and, after having expended time and resources, hope that this next complaint was not also withdrawn).

SBA List, properly outraged, appealed to the Supreme Court, which ultimately issued the unanimous opinion described above.

Under longstanding judicial precedent, plaintiffs can sue *before* they violate a law if they "allege[] a credible threat of enforcement."[14] This is particularly true in the First Amendment context – forcing a plaintiff to speak and then accept any sanctions of a likely unconstitutional law before they may challenge such law's constitutionality is an onerous burden, and cannot be reconciled with the Constitution. Indeed, most people will simply decline to speak, which is precisely the *opposite* of the First Amendment's purpose.[15]

It is worth emphasizing that the Court's opinion was unanimous. The nine justices – who have expressed strikingly different views of the First Amendment in other notable political speech cases[16] - *all* want to ensure that states do not limit fundamental rights, and then functionally shut the door on judicial review of the offending laws. As Chief Justice Roberts wrote in the 2007 case, *FEC v. Wisconsin Right to Life*, procedural roadblocks themselves "constitute[] a severe burden on political speech."[17]

The result of *SBA List v. Driehaus* is particularly welcome because laws like Ohio's can, in practice, be wielded as partisan political tools. When Congressman Driehaus filed his complaint, he was invoking his rights as an Ohioan – and "'the Commission has no system for weeding out frivolous complaints.'"[18] "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."[19]

Given such potential gamesmanship, the unanimous Court decided that SBA List needed its day in court *now*, not later. Court watchers and state legislators alike can expect future challenges to false statement laws nationwide to arise from the Court's unanimous opinion in *SBA List*.

If any of these state false statement statutes are challenged, there is a high likelihood that they will be found unconstitutional. Any potential legal action will cost states a great deal of money defending their statute, and will distract these Attorney Generals from meritorious legal work. Additionally, it is probable that states will be forced by the courts to award legal fees to successful plaintiffs. Legal fee awards are frequently costly – often well over one hundred thousand dollars.

For the reasons given above, state policymakers in the seventeen states with false statement laws should act to repeal these statutes before their state is faced with a costly – and likely successful – legal challenge.

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14 *Id*. slip op. at 9.

15 *See Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring) ("[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

16 *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. __, No. 12-536 (2014).

17 551 U.S. 449, 468 n. 5 (2007).

18 *SBA List*, slip op. at 14 (quoting *amicus* brief of Mike DeWine, Attorney General of Ohio at 6).

19 *Id.* (citing to DeWine Br. at 8).

False Statement Laws Across the Nation

Seventeen states enforce some form of false statement law. Penalties for speakers found in violation of these statutes are often severe, and range from heavy fines to imprisonment. As the particular statutes differ between states, each regulation (whether civil or criminal), and the attendant punishments, are summarized in the following table. The appendix to this report contains further detail about each state's law.

Seventeen States with False Statement Laws

State	*Legal Citation*	*Civil or Criminal?*	*Punishments*
Alaska	Alaska Stat. § 15.56.014(a)(3)(A-C)	Criminal (Class B Misdemeanor)	Punishable by up to 90 days imprisonment and a fine of up to $2,000
Colorado	Colo. Rev. Stat. § 1-13-109(1)-(3)	Criminal (Class 1 Misdemeanor)	Punishable by up to eighteen months imprisonment and/or a fine of up to $5,000
Florida	Fla. Stat. § 104.271(2)	Civil	Punishable by a fine of up to $5,000
Louisiana	La. Rev. Stat. § 18:1463(A) and (C)(1)	Criminal	Punishable by up to two years imprisonment and/or a fine of up to $2,000
Massachusetts	Mass. Gen. Laws ch. 56, § 42	Criminal	Punishable by up to six months imprisonment or a fine of up to $1,000
Michigan	Mich. Comp. Laws § 168.931(3)	Criminal (Misdemeanor)	Punishable by up to 90 days imprisonment and/or a fine of up to $500
Minnesota	Minn. Stat. § 211B.06, Subds. 1 and 2	Criminal (Gross Misdemeanor)	Punishable by up to 90 days imprisonment and/or a fine of up to $3,000
Mississippi	Miss. Code Ann. § 23-15-875	Criminal (Misdemeanor)	Punishable by arrest under $500 bond and imprisonment of up to one year
Montana	Mont. Code Ann. § 13-37-131(1)	Civil	Punishable by a fine of up to $1,000
North Carolina	N.C. Gen. Stat. § 163-274(a)(8)	Criminal (Class 2 Misdemeanor)	Punishments range from 1 to 60 days imprisonment, depending on prior convictions
North Dakota	N.D. Cent. Code § 16.1-10-04	Criminal (Class A Misdemeanor)	Punishable by up to one year imprisonment and/or a fine of up to $3,000
Ohio	Ohio Rev. Code Ann. § 3517.21(B)(9) and (10)	Criminal	Punishable by up to six months imprisonment or a fine of up to $5,000

Oregon	OR. REV. STAT. § 260.532(1)	Civil	Punishable by a fine for noneconomic damages or $2,500, whichever is greater
Tennessee	TENN. CODE § 2-19-142	Criminal (Class C Misdemeanor)	Punishable by up to thirty days imprisonment and/or a fine of up to $50
Utah	UTAH CODE ANN. § 20A-11-1103	Criminal	Punishable by up to six months imprisonment and/or a fine of up to $1,000
West Virginia	W. VA. CODE § 3-8-11(c)	Criminal (Misdemeanor)	Punishable by up to one year imprisonment and/or a fine of up to $10,000
Wisconsin	WIS. STAT. § 12.05	Criminal	Punishable by up to three years imprisonment and/or a fine of up to $10,000

Conclusion

While false statement laws empower government as the truth police ostensibly to protect individuals against defamatory speech, they have the end result of significantly impacting speakers' Fourteenth Amendment due process rights and First Amendment political speech rights. Consequently, court cases have shown false statement laws to be susceptible to legal challenges on these grounds. Moreover, existing state libel and slander laws offer sufficient protection against defamatory speech. Harmed speakers can and have sued and retrieved damages using existing libel and slander laws, when appropriate.

In practice, false statement laws are often employed as a political tactic to silence speech that some individual or entity dislikes or disagrees with. Numerous cases in state and federal court have established that statements are no less protected simply because of their falsity. Implicit in this principle is the recognition that truth and falsity are very often relative, and should be determined by the hearer of a statement – *not* a supreme regulatory body stifling the flow of information into the marketplace of ideas.

The presence of false statement laws in seventeen states indicates the pervasiveness of this problem. First Amendment concerns are pressing when considering the repeal of these laws, especially when they carry such costly penalties.

The great misconception behind false statement laws is that false statements are inherently libelous, or defamatory. As a matter of law, this cannot be the case. Furthermore, to repeat the opinion of the U.S. Supreme Court in *United States v. Alvarez*, "one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace."[20]

State policymakers should act to repeal these laws by honoring this principle. If faced with proposals to enact these laws, policymakers should look to the courts and the First Amendment before they attempt to regulate the most basic privilege of a free society: the freedom of speech.

20 *Alvarez*, 132 S. Ct. at 2551.

Appendix: State False Statement Statutes

For further analysis of each state's false statement law statute, this appendix provides the text of and cites to the corresponding statutes of the seventeen states with these laws.

Alaska – Alaska Stat. § 15.56.014(a)(3)(A-C)

Sec. 15.56.014. Campaign misconduct in the second degree.

(a) A person commits the crime of campaign misconduct in the second degree if the person

(3) knowingly makes a communication, as that term is defined in AS 15.13.400,

(A) containing false factual information relating to a candidate for an election;

(B) that the person knows to be false; and

(C) that would provoke a reasonable person under the circumstances to a breach of the peace or that a reasonable person would construe as damaging to the candidate's reputation for honesty or integrity, or to the candidate's qualifications to serve if elected to office.

Colorado – Colo. Rev. Stat. § 1-13-109(1)-(3)

1-13-109. False or reckless statements relating to candidates or questions submitted to electors - penalties - definitions.

(1) (a) No person shall knowingly make, publish, broadcast, or circulate or cause to be made, published, broadcasted, or circulated in any letter, circular, advertisement, or poster or in any other communication any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office.

(b) Any person who violates any provision of paragraph (a) of this subsection (1) commits a class 1 misdemeanor and, upon conviction thereof, shall be punished as provided in section 18-1.3-501, C.R.S.

(2) (a) No person shall recklessly make, publish, broadcast, or circulate or cause to be made, published, broadcasted, or circulated in any letter, circular, advertisement, or poster or in any other communication any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office. Notwithstanding any other provision of law, for purposes of this subsection (2), a person acts "recklessly" when he or she acts in conscious disregard of the truth or falsity of the statement made, published, broadcasted, or circulated.

(b) Any person who violates any provision of paragraph (a) of this subsection (2) commits a class 2 misdemeanor and, upon conviction thereof, shall be punished as provided in section 18-1.3-501, C.R.S.

(3) For purposes of this section, "person" means any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons, including a group organized under section 527 of the internal revenue code.

Florida – Fla. Stat. § 104.271(2)

Sec. 104.271 (2) Any candidate who, in a primary election or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code.

Louisiana – La. Rev. Stat. § 18:1463(A) and (C)(1)

§18:1463. Political material; ethics; prohibitions

A. The Legislature of Louisiana finds that the state has a compelling interest in taking every necessary step to assure that all elections are held in a fair and ethical manner and finds that an election cannot be held in a fair and ethical manner when any candidate or other person is allowed to print or distribute any material which falsely alleges that a candidate is supported by or affiliated with another candidate, group of candidates, or other person, or a political faction, or to publish statements that make scurrilous, false, or irresponsible adverse comments about a candidate or a proposition…The legislature further finds that it is essential to the protection of the electoral process to prohibit misrepresentation that a person, committee, or organization speaks, writes, or acts on behalf of a candidate, political committee, or political party, or an agent or employee thereof.

[…]

C.(1) No person shall cause to be distributed, or transmitted, any oral, visual, or written material containing any statement which he knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

Massachusetts – Mass. Gen. Laws ch. 56, § 42

Section 42. No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed or tends to aid or to injure or defeat such candidate.

No person shall publish or cause to be published in any letter, circular, advertisement, poster or in any other writing any false statement in relation to any question submitted to the voters, which statement is designed to affect the vote on said question.

Whoever knowingly violates any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months.

Michigan – Mich. Comp. Laws § 168.931(3)

(3) A person or a person's agent who knowingly makes, publishes, disseminates, circulates, or places before the public, or knowingly causes directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in this state, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for public office at an election in this state, that is false, deceptive, scurrilous, or malicious, without the true name of the author being subscribed to the assertion, representation, or statement if written, or announced if unwritten, is guilty of a misdemeanor.

Minnesota – Minn. Stat. § 211B.06, Subds. 1 and 2

211B.06 FALSE POLITICAL AND CAMPAIGN MATERIAL; PENALTY; EXCEPTIONS.

Subdivision 1. Gross misdemeanor. A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

A person is guilty of a misdemeanor who intentionally participates in the drafting of a letter to the editor with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat any candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

Subdivision 2. Exception. Subdivision 1 does not apply to any person or organization whose sole act is, in the normal course of their business, the printing, manufacturing, or dissemination of the false information.

Mississippi – Miss. Code Ann. § 23-15-875

§ 23-15-875. Prohibitions against charges with respect to integrity of candidate; proceedings against violators

No person, including a candidate, shall publicly or privately make, in a campaign then in progress, any charge or charges reflecting upon the honesty, integrity or moral character of any candidate, so far as his private life is concerned, unless the charge be in fact true and actually capable of proof; and any person who makes any such charge shall have the burden of proof to show the truth thereof when called to account therefor under any affidavit or indictment against him for a violation of this section. Any language deliberately uttered or published which, when fairly and reasonably construed and as commonly understood, would clearly and unmistakably imply any such charge, shall be deemed and held to be the equivalent of a direct charge. And in no event shall any such charge, whether true or untrue, be made on the day of any election, or within the last five (5) days immediately preceding the date of any election.

Any person who shall willfully and knowingly violate this section shall be guilty of a misdemeanor, and upon the affidavit of any two (2) credible citizens of this state, before any judicial officer having jurisdiction of misdemeanors, said officer shall thereupon forthwith issue his warrant for the arrest of said alleged offender, and when arrested the officer shall forthwith examine into the matter, and if the proof of guilt be evident or the presumption great, the officer shall place the accused person under bond in the sum of Five Hundred Dollars ($ 500.00), with two (2) or more good sureties, conditioned that the person bound will appear at the next term of the court where the offense is cognizable, and in addition that the person bound will not further violate this section; and additional affidavits may be filed and additional bonds may be required for each and every subsequent offense. When and if under a prosecution under this section, the alleged offender is finally acquitted, the persons who made the original affidavit shall pay all costs of the proceedings.

Montana – MONT. CODE ANN. § 13-37-131(1)

13-37-131. Misrepresentation of voting record.

(1) It is unlawful for a person to misrepresent a candidate's public voting record with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

North Carolina – N.C. GEN. STAT. § 163-274(a)(8)

§ 163-274. Certain acts declared misdemeanors.

(a) Class 2 Misdemeanors. - Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this subsection to be unlawful, shall be guilty of a Class 2 misdemeanor. It shall be unlawful:

> (8) For any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

North Dakota – N.D. CENT. CODE § 16.1-10-04

16.1-10-04. Publication of false information in political advertisements - Penalty.

A person is guilty of a class A misdemeanor if that person knowingly, or with reckless disregard for its truth or falsity, publishes any political advertisement or news release that contains any assertion, representation, or statement of fact, including information concerning a candidate's prior public record, which is untrue, deceptive, or misleading, whether on behalf of or in opposition to any candidate for public office, initiated measure, referred measure, constitutional amendment, or any other issue, question, or proposal on an election ballot, and whether the publication is by radio, television, newspaper, pamphlet, folder, display cards, signs, posters, billboard advertisements, websites, electronic transmission, or by any other public means. This section does not apply to a newspaper, television or radio station, or other commercial medium that is not the source of the political advertisement or news release.

Ohio – OHIO REV. CODE ANN. § 3517.21(B)(9) and (10)

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

As used in this section, "voting record" means the recorded "yes" or "no" vote on a bill, ordinance, resolution, motion, amendment, or confirmation.

Oregon – Or. Rev. Stat. § 260.532(1)

(1) No person shall cause to be written, printed, published, posted, communicated or circulated, any letter, circular, bill, placard, poster, photograph or other publication, or cause any advertisement to be placed in a publication, or singly or with others pay for any advertisement, with knowledge or with reckless disregard that the letter, circular, bill, placard, poster, photograph, publication or advertisement contains a false statement of material fact relating to any candidate, political committee or measure.

Tennessee – Tenn. Code § 2-19-142

2-19-142. Knowingly publishing false campaign literature.

It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.

Utah – Utah Code Ann. § 20A-11-1103

A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election.

West Virginia – W. Va. Code § 3-8-11(c)

(c) Any person who shall, knowingly, make or publish, or cause to be made or published, any false statement in regard to any candidate, which statement is intended or tends to affect any voting at any election whatever…Is guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than ten thousand dollars, or confined in jail for not more than one year, or, in the discretion of the court, shall be subject to both such fine and imprisonment.

Wisconsin – Wis. Stat. § 12.05

12.05 False representations affecting elections.

No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

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