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## Legislating Against Lying in Campaigns and Elections

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# LEGISLATING AGAINST LYING IN CAMPAIGNS AND ELECTIONS

JOSHUA S. SELLERS\*

*Political speech receives robust protection under the First Amendment, but lying in campaigns and elections is harmful to democracy. In light of the former, what can be done about the latter? In the wake of the Supreme Court's 2012 decision in United States v. Alvarez, the answer to the question is uncertain. In Alvarez, six Justices supported the conclusion that intentional lies are protected under the First Amendment. The decision renders existing laws regulating intentionally false campaign and election speech extraordinarily vulnerable.*

*In the following Essay, I consider three circumstances in which narrowly drawn campaign and election speech restrictions are doctrinally defensible. The first is when foreign nationals, during a campaign or election, engage in intentionally false speech expressly advocating for or against the election of a candidate. The second is when intentionally false speech is used to undermine election administration. And the third is when a campaign or outside political group intentionally falsifies a mandatory disclosure filing. Aside from quite limited circumstances such as these, it is exceptionally difficult to craft novel campaign and election speech restrictions that can survive a First Amendment challenge.*

## *Introduction*

The Patient Protection and Affordable Care Act (ACA), the cornerstone of President Barack Obama's legislative legacy, exists in both fact and fiction. Controversial from its inception, the Act is simultaneously viewed as both progressive triumph and tyrannical dictate, and its intent and effects have been fantastically mischaracterized. It is fitting, then, that the ACA was entangled in the Supreme Court's most recent case involving intentional lies in political campaigns, *Susan B. Anthony List v. Driehaus*.<sup>1</sup>

Steve Driehaus is a former United States Congressman from Ohio.<sup>2</sup> Elected in 2008, Driehaus, a Democrat, voted for the ACA.<sup>3</sup> One of the

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\* Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. I received very helpful feedback from Helen Norton, James Weinstein, and my junior colleagues at the Sandra Day O'Connor College of Law.

1. 134 S. Ct. 2334 (2014).

2. *Id.* at 2339.

3. *Id.*

misleading claims made about the ACA is that it includes subsidies for elective abortions.<sup>4</sup> Susan B. Anthony List (SBA), a pro-life advocacy organization, distributed advertisements asserting that in voting for the ACA, Driehaus advocated for taxpayer-funded abortions.<sup>5</sup> Driehaus perceived the advertisements to be knowingly false and defamatory, and filed a complaint with the Ohio Elections Commission, the agency charged with enforcing various Ohio election law statutes.<sup>6</sup>

At the time, one of those statutes criminally prohibited the making of “a false statement concerning the voting record of a candidate or public official.”<sup>7</sup> Despite Driehaus losing his 2010 bid for reelection and dropping his complaint, the dispute proceeded, with the SBA litigating the narrow question of whether it had standing to challenge the constitutionality of the false statement statute under the First Amendment.<sup>8</sup> The Supreme Court ultimately found that the SBA’s intention to distribute similar advertisements in the future, coupled with a credible threat of future enforcement of the false statement statute, was sufficient to establish standing.<sup>9</sup> The statute was ultimately declared unconstitutional by a federal district court,<sup>10</sup> and the SBA continues its efforts in earnest.<sup>11</sup>

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4. The Patient Protection and Affordable Care Act places express prohibitions on the use of federal funds for elective abortions. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119, 170 (2010). President Obama issued an executive order expressly enforcing the prohibition on the use of tax credits and cost-sharing reduction payments for elective abortions. Segregation of Funds for Abortion Services, 45 C.F.R. § 156.280 (2012); *see also* Michelle Ye Hee Lee, *Does Obamacare Provide Federal Subsidies for Elective Abortions?*, WASH. POST (Jan. 26, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/01/26/does-obamacare-provide-federal-subsidies-for-elective-abortions/?utm\\_term=.25532dff23bd](https://www.washingtonpost.com/news/fact-checker/wp/2015/01/26/does-obamacare-provide-federal-subsidies-for-elective-abortions/?utm_term=.25532dff23bd); Alina Salganicoff et al., *Coverage for Abortion Services and the ACA*, HENRY J. KAISER FAM. FOUND. (Sept. 19, 2014), <https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/> (“The ACA reinforces the current Hyde Amendment restrictions, continuing to limit federal funds to pay for pregnancy terminations that endanger the life of the woman or that are a result of rape or incest.”).

5. *Driehaus*, 134 S. Ct. at 2339.

6. *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 412, 414 (S.D. Ohio 2011), *rev’d*, 134 S. Ct. 2334 (2014).

7. OHIO REV. CODE ANN. § 3517.21 (West 1995), *invalidated by* *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 770 (S.D. Ohio 2014).

8. *Driehaus*, 134 S. Ct. at 2340.

9. *Id.* at 2343–47.

10. *Susan B. Anthony List*, 45 F. Supp. 3d at 770.

11. *See* Jessie Hellmann, *Anti-abortion Groups Press for Change to ObamaCare Bills*, THE HILL (Dec. 19, 2017), <http://thehill.com/policy/healthcare/365576-anti-abortion-groups-press-for-change-to-obamacare-bills>.

Anticlimactically, then, the Supreme Court never squarely addressed the question of the statute's constitutionality, though many legal experts viewed it (and view other states' statutes resembling it) as extraordinarily vulnerable.<sup>12</sup>

One could be forgiven for not knowing that *any* laws against lying in politics exist, given the deluge of inaccuracies peddled by elected (and aspiring) government officials these days. But in fact, when *Driehaus* was decided, sixteen states had statutes regulating false campaign speech, election speech, or both.<sup>13</sup> When challenged, however, such laws have not fared well.<sup>14</sup> The results are unsurprising to anyone with a basic knowledge of First Amendment doctrine. Political speech is at the core of the First Amendment, and as such, enjoys the greatest protection from government regulation.<sup>15</sup> Discussions about the government's ability to suppress

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12. See, e.g. *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Apr. 22, 2014) (interview with Geoffrey R. Stone). A video clip of the Stone interview is embedded in an accompanying story on the MSNBC website. See Adam Serwer, *Lying in Politics Not a Crime?*, MSNBC (Apr. 22, 2014), <http://www.msnbc.com/msnbc/supreme-court-susan-b-anthony-list-lying-politics-not-crime>.

13. See Lyle Denniston, *Argument Preview: Attack Ads and the First Amendment*, SCOTUSBLOG (Apr. 17, 2014, 12:02 AM), <http://www.scotusblog.com/2014/04/argument-preview-attack-ads-and-the-first-amendment/>.

14. See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014) (striking a Minnesota law criminalizing the dissemination of false information pertaining to ballot initiatives, and asserting that “[t]he citizenry, not the government, should be the monitor of falseness in the political arena”); Commonwealth v. Lucas, 34 N.E.3d 1242, 1257 (Mass. 2015) (“We conclude that § 42 cannot be limited to the criminalization of fraudulent or defamatory speech, is neither necessary nor narrowly tailored to advancing the Commonwealth’s interest in fair and free elections, and chills the very exchange of ideas that gives meaning to our electoral system.”).

15. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”); see also L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 281 (“It is not so much that we retain a naive belief that truth is knowable or that the electorate will rationally choose it, as that the simple recognition that no theory requiring people to stop speaking (or stop listening) better fits with our traditions than the one we have adopted.”); Geoffrey R. Stone, *Electoral Exceptionalism and the First Amendment: A Road Paved with Good Intentions*, 35 N.Y.U. REV. L. & SOC. CHANGE 665, 668 (2011) (“At first blush, of course, one might reasonably think that the electoral setting would, if anything, justify even *greater* protection for speech. After all, such speech is fundamentally what the First Amendment is about.”).

political speech predictably involve analogies to totalitarian regimes and references to the classics of George Orwell.<sup>16</sup>

Are we, therefore, inherently hamstrung in our attempts to superintend intentionally false campaign and election speech? Given the distortions in the metaphorical marketplace—due to both the stakes of electoral contests and the mere volume of messages in circulation<sup>17</sup>—are there compelling reasons to regulate campaign and election speech, specifically?<sup>18</sup> Both of these questions are doctrinally complex.

Certainly, most of us would not countenance blatant attempts to mislead voters in campaigns and elections; such efforts are easy to condemn. Yet such lies occur “in a context where the countervailing First Amendment dangers are unusually acute.”<sup>19</sup> Those dangers—namely, that speech regulations prove ineffective, overbroad, underinclusive, threatening to valuable speech, and ripe for partisan abuse—cannot be understated.<sup>20</sup>

With these considerations in mind, I want to explore three circumstances in which narrowly drawn campaign and election speech restrictions are doctrinally defensible. The first is when foreign nationals, during a campaign or election, engage in intentionally false speech expressly advocating for or against the election of a candidate. The rights of foreign nationals to participate in campaigns and elections have been considered by courts in the campaign finance context.<sup>21</sup> The regulations upheld in that context suggest that the regulation of foreign nationals’ campaign and election speech might be sustained on similar grounds. The second circumstance is when intentionally false speech is used to undermine

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16. For instance, Orwell’s “Ministry of Truth” was invoked multiple times in the *Driehaus* oral argument. See GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 4 (1949).

17. See Sue Halpern, *How He Used Facebook to Win*, N.Y. REV. BOOKS (June 8, 2017), <https://www.nybooks.com/articles/2017/06/08/how-trump-used-facebook-to-win/> (“While it may not have created individual messages for every voter, the Trump campaign used Facebook’s vast reach, relatively low cost, and rapid turnaround to test tens of thousands and sometimes hundreds of thousands of different campaign ads.”).

18. The most sophisticated exploration of this question is in Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1825 (1999) (“[T]he question is whether regulation should be permissible to remedy various perceived pathologies of current electoral discourse, even if that same degree of government intervention would be impermissible to remedy the parallel pathologies of non-electoral discourse in roughly comparable situations.”).

19. Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 199.

20. See William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 297–300 (2004) (summarizing the arguments).

21. *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

election administration.<sup>22</sup> For instance, falsely and maliciously advising prospective voters about polling place locations or about the functionality of a voting machine are examples of speech that might be proscribed, given the compelling interest the government has in protecting the right to vote. And the third circumstance is when a campaign or outside political group (such as a political action committee (PAC) or Super PAC)<sup>23</sup> intentionally falsifies a mandatory disclosure filing. Again, campaign finance doctrine is instructive, as disclosure requirements have been afforded greater deference than either contribution or expenditure limits.<sup>24</sup> As such, prohibitions on the falsification of mandatory disclosure filings would almost certainly survive a First Amendment challenge.

These are three quite limited circumstances, which reflects the First Amendment's broad protection of political speech, even if false or misleading. To be sure, other longstanding speech prohibitions function as indirect restrictions on electoral speech—lying to a government official, defamation, libel, slander, incitement to violence, and so on—and my analysis does not require dispensing with or modifying those doctrines. My intention is to explore areas where those doctrines can conceivably be supplemented. Though dishonesty in politics is more a feature than a bug, we can and should work to curb its excesses.

This Essay proceeds as follows: Part I briefly reviews the doctrine involving the right to lie, including the Court's consequential decision in *United States v. Alvarez*.<sup>25</sup> Part II examines states' attempts to regulate false campaign and election speech and looks more narrowly at two cases following *Alvarez* involving the right to lie in campaigns and elections. Part III explores three circumstances in which lying in campaigns and elections can be proscribed: (1) when foreign nationals engage in intentionally false speech that includes express advocacy, (2) when intentionally false speech is used to undermine election administration, and (3) when a campaign or outside political group intentionally falsifies a mandatory disclosure filing.

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22. See Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 MONT. L. REV. 53, 71 (2013) ("The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters.").

23. Richard Briffault, *Super Pacs*, 96 MINN. L. REV. 1644, 1644 (2012) (offering definitions).

24. See *infra* Part III; *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholder to react to the speech of corporate entities in a proper way."); *Buckley v. Valeo*, 424 U.S. 1, 75–76 (1976).

25. 567 U.S. 709 (2012).

*I. The First Amendment, the Constitutional Right to Lie, and Alvarez*

When Xavier Alvarez, at the time a member of the Three Valley Water Board District in southern California, publicly lied about having received the Congressional Medal of Honor,<sup>26</sup> the doctrinal status of intentional lies was uncertain. On occasion, the Supreme Court had suggested that false speech was valueless. As stated in *Gertz v. Robert Welch, Inc.*, “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>27</sup> Yet in other preeminent speech cases, certain passages could be read to provide protection for lies.

The Court in *New York Times v. Sullivan* famously held that public officials who bring defamation claims against their critics must demonstrate not only that the offending speech was false, but that it “was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>28</sup> The announced standard was deemed necessary to prevent the chilling of protected speech.<sup>29</sup> The standard was later applied to defamation claims brought by public figures,<sup>30</sup> and then to both public officials and public figures seeking damages for the intentional infliction of emotional distress.<sup>31</sup> Given these precedents,

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26. *Alvarez*, 567 U.S. at 713.

27. 418 U.S. 323, 340 (1974); *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 389–90 (1967) (“[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct.”).

28. 376 U.S. 254, 279–80 (1964).

29. *See* Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 450 (2017) (“The takeaway seemed to be that although falsity disrupts the marketplace of ideas, its protection is necessary to avoid chilling truthful speech.”); Marshall, *supra* note 20, at 306 (“*Sullivan*’s reasoning, however, was less about the First Amendment value of falsity . . . than it was about providing breathing space for protected expression on grounds that too quickly sanctioning falsity would chill public debate.”); Norton, *supra* note 19, at 169 (“[F]alse statements are protected by the First Amendment, not because the speech itself is valuable, but because government efforts to regulate such speech might chill individuals’ willingness to engage in valuable expression.”).

30. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (“I therefore adhere to the *New York Times* standard in the case of ‘public figures’ as well as ‘public officials.’ It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation.”).

31. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (“We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional

Alvarez had reason to believe that the Stolen Valor Act (SVA),<sup>32</sup> the federal statute under which he was charged, might be judged unconstitutional. He was correct.

The SVA stated that anyone who “with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.”<sup>33</sup> There was no dispute over whether Alvarez violated the statute; rather, the case turned on whether the statute was an impermissible content-based speech restriction.<sup>34</sup> The plurality decision, authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, found the SVA to lack a “clear limiting principle,”<sup>35</sup> to “give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition,”<sup>36</sup> and to fall short of “the Government’s heavy burden when it seeks to regulate protected speech.”<sup>37</sup>

Justice Kennedy emphasized that content-based speech restrictions are subject to strict scrutiny and are only justified “when confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’”<sup>38</sup> These categories include speech that incites imminent unlawful action, obscenity, defamation, speech integral to criminal conduct, child pornography, and fraud.<sup>39</sup> Significantly, the opinion rejected the government’s assertion that false speech is “presumptively unprotected,”<sup>40</sup>

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distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice.’”).

32. 18 U.S.C. § 704 (Supp. II 2014).

33. *Id.* § 704(b).

34. *United States v. Alvarez*, 567 U.S. 709, 715–17 (2012).

35. *Id.* at 723.

36. *Id.*

37. *Id.* at 726 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)).

38. *Id.* at 717 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

39. *Id.*; see Norton, *supra* note 19, at 173 (“To date, the categories of expression identified by the Court as ‘low value’ include commercial speech, true threats, incitement to imminent illegal action, ‘fighting words,’ obscenity, defamation, fraud, child pornography, and speech that is integral to criminal conduct.”).

40. *Alvarez*, 567 U.S. at 721–22; see Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1452 (2015) (“*Alvarez*, then, reflects a turning point: an intentional lie of little or no value, which arguably caused some harm, was nonetheless deemed protected speech.”).



and went on to find the government's stated compelling interests unconvincing.<sup>41</sup>

Justices Breyer and Kagan concurred in the judgment, though unlike the plurality they evaluated the SVA under a form of intermediate scrutiny:

Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise . . . concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter.<sup>42</sup>

Nonetheless, Justices Breyer and Kagan found the SVA unique in its breadth,<sup>43</sup> and threatening in its potential to chill protected speech.<sup>44</sup> And despite the SVA's redeeming purposes (namely, preserving the integrity of military honors), they perceived it as inadequately tailored to its intended ends.<sup>45</sup>

Justice Alito, in dissent with Justices Thomas and Scalia, viewed the SVA as "a narrow statute that presents no threat to the freedom of speech"<sup>46</sup> insofar as it covered "only knowingly false statements about hard facts directly within a speaker's personal knowledge."<sup>47</sup> Rejecting the plurality's summary of the doctrine, Justice Alito asserted that "[t]ime and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value."<sup>48</sup> As such, he claimed, false speech may only be afforded First Amendment protection when necessary

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41. *Alvarez*, 567 U.S. at 725 ("The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown.").

42. *Id.* at 731–32 (Breyer, J., concurring).

43. *Id.* at 736 ("[F]ew statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter.").

44. *Id.* at 733 ("[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart.").

45. *Id.* at 738 ("[A] more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.").

46. *Id.* at 739 (Alito, J., dissenting).

47. *Id.*

48. *Id.* at 746.

to prevent the chilling of protected speech.<sup>49</sup> Justice Alito was unconvinced that the SVA presented such a concern.<sup>50</sup>

In sum, in *Alvarez*, six Justices supported the conclusion that intentional lies are protected under the First Amendment. The decision is generally understood to constitute a departure from earlier holdings,<sup>51</sup> and it quite clearly renders laws regulating false campaign and election speech constitutionally suspect.<sup>52</sup> I turn to consider those laws in Part II.

## II. Campaign and Election Lies After Alvarez

Even in the wake of *Alvarez*, a surprising number of states have laws on the books prohibiting false campaign speech, election speech, or both.<sup>53</sup> The laws, though largely unenforced, vary in scope. For example, Alaska prohibits the use of false statements “made as part of a telephone poll or an organized series of calls, and made with the intent to convince potential voters concerning the outcome of an election.”<sup>54</sup> North Dakota’s statute, much broader by comparison, reads as follows:

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49. *Id.* at 750.

50. *Id.* at 752 (“In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.”).

51. Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA J. (Sept. 5, 2012), [http://www.abajournal.com/news/article/the\\_first\\_amendment\\_and\\_the\\_right\\_to\\_lie](http://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie) (“What makes *Alvarez* surprising is that the Roberts court had generally rejected free speech claims when the institutional interests of the government were at stake, showing deference when the restrictions on speech were for the military or in schools or in prisons.”); Chen & Marceau, *supra* note 40, at 1453 (“But, for the first time, the Court also recognized a distinct set of lies that warranted protection, and the six Justices who voted to invalidate the law fundamentally agreed on the limiting principles that apply in this context.”); Kozel, *supra* note 29, at 450 (“Concerns about continuity played little role in the *Alvarez* analysis.”).

52. Hasen, *supra* note 22, at 56 (“The result of *Alvarez* is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their choice of remedies.”).

53. *See, e.g.*, ALASKA STAT. § 15.13.095(a) (2010); COLO. REV. STAT. § 1-13-109 (2012); FLA. STAT. ANN. § 104.271 (West 2008); LA. REV. STAT. ANN. § 18:1463(C) (2011); MISS. CODE. ANN. § 23-15-875 (2007); N.C. GEN. STAT. § 163-274(A)(8) (2011); N.D. CENT. CODE § 16.1-10-04 (2007); OR. REV. STAT. ANN. § 260.532 (West 2009); S.D. CODIFIED LAWS § 12-13-16 (Supp. 2012); TENN. CODE ANN. § 2-19-142 (2003); UTAH CODE ANN. § 20a-11-1103 (West 2010); WASH. REV. CODE ANN. § 42.17a.335 (West 2012); W. VA. CODE ANN. § 3-8-11 (West 1995); WIS. STAT. ANN. § 12.05 (West 2004).

54. ALASKA STAT. § 15.13.095(a).

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.<sup>55</sup>

Wisconsin's statute is far less verbose: "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."<sup>56</sup>

Judged in light of the plurality opinion in *Alvarez*, each of these statutes appears vulnerable.<sup>57</sup> And unsurprisingly, when challenged, similar statutes have met their end. As detailed below, in recent years, campaign and election false speech laws have been invalidated in Minnesota and Massachusetts.

#### A. 281 Care Committee v. Arneson

Minnesota has long criminalized intentionally false speech about political candidates.<sup>58</sup> In 2004, the Minnesota legislature extended the prohibition to speech made "with respect to the effect of a ballot question,"<sup>59</sup> codifying both restrictions in the Minnesota Fair Campaign

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55. N.D. CENT. CODE § 16.1-10-04.

56. WIS. STAT. ANN. § 12.05.

57. See Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1056 (2013) ("The holding in *Alvarez* creates a sizeable hurdle for any law that seeks to regulate false speech.").

58. 281 Care Comm. v. Arneson, 638 F.3d 621, 625 (8th Cir. 2011).

59. *Id.* (quoting MINN. STAT. § 211B.06 (2017)). The full text of the statute reads: 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

Practices Act (MFCPA).<sup>60</sup> Two advocacy organizations that opposed school-funding ballot initiatives challenged the MFCPA under the First Amendment.<sup>61</sup> A unanimous panel of the Eighth Circuit found the MFCPA unconstitutional.<sup>62</sup>

The court's detailed analysis of the appropriate standard of review considered, yet ultimately rejected, the State's argument that the MFCPA should be judged under intermediate scrutiny.<sup>63</sup> While acknowledging Justice Breyer's application of intermediate scrutiny in *Alvarez*,<sup>64</sup> the court determined that intermediate scrutiny is appropriate only when evaluating laws proscribing *non-political* false speech: "The key today, however, is that although *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech."<sup>65</sup>

After concluding that strict scrutiny was required, the court then found the MFCPA to lack the requisite tailoring,<sup>66</sup> and, in its most damning conclusion, to be potentially exploitable for political advantage by liars themselves.<sup>67</sup> Of particular concern to the court was the State's lack of evidence in support of the statute's necessity. The court critiqued the State's

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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.

MINN. STAT. § 211B.06 (2017).

60. 281 Care Comm. v. Arneson, 766 F.3d 774, 777–78 (8th Cir. 2014).

61. *Id.*

62. *Id.* at 793 ("Putting in place potential criminal sanctions and/or the possibility of being tied up in litigation . . . at the mere whim and mention from anyone who might oppose your view on a ballot question is wholly overbroad and overburdensome and chills otherwise protected speech.").

63. *Id.* at 782–84.

64. Because Justices Breyer and Kagan provided the fifth and sixth votes in *Alvarez*, their decision to apply intermediate scrutiny constitutes the narrowest, and thus controlling, judgment.

65. *Arneson*, 766 F.3d at 783.

66. *Id.* at 787–96.

67. *Id.* at 796 ("[T]he practical application of § 211B.06 only opens the door to more fraud. The statute itself actually opens a Pandora's box to disingenuous politicking itself.").

appeal to “common sense” as a basis for its regulation<sup>68</sup> and suggested that counterspeech was a preferable alternative.<sup>69</sup>

*B. Commonwealth v. Lucas*

The State of Massachusetts similarly attempted to regulate intentionally false campaign and election speech in a statute declaring the following:

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.<sup>70</sup>

The statute, as was the case with the MFCPA, contained criminal penalties.<sup>71</sup>

The statute was challenged by a PAC that published and distributed brochures in opposition to a state representative, who in turn brought a criminal complaint against the PAC’s chairwoman.<sup>72</sup> The Supreme Judicial Court of Massachusetts, in reliance at times on *281 Care Committee*, echoed a number of conclusions reached in that case. For one, the court found strict scrutiny to be the appropriate standard of review.<sup>73</sup> The court also found it problematic that anyone could initiate a complaint, a feature

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68. *Id.* at 790 (“[The] reliance upon ‘common sense’ to establish that the use of false statements impacts voters’ understanding, influences votes and ultimately changes elections, is not enough on these facts to establish a direct causal link between [the statute] and an interest in preserving fair and honest elections.”).

69. *Id.* at 793 (“There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal.”).

70. MASS. GEN. LAWS ch. 56, § 42 (2017).

71. *Id.* (“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.”).

72. *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1245 (Mass. 2015).

73. *Id.* at 1251–52 (“[W]e find it doubtful that the concurring opinion of two justices in *Alvarez* abrogated the well-established line of First Amendment precedent holding that content-based restrictions of political speech must withstand strict scrutiny.”).

that threatened to “create lingering uncertainties of a criminal investigation and chill political speech by virtue of the process itself.”<sup>74</sup>

Massachusetts had argued that strict scrutiny was unwarranted since the speech that its statute proscribed could fairly be characterized as fraud or defamation, two categories of speech receiving minimal First Amendment protection.<sup>75</sup> The court was unmoved by these characterizations. As to fraud, the court found that most fraud statutes turn on a showing of materiality, an element absent in this instance.<sup>76</sup> Moreover, even if the statute did proscribe fraudulent statements, its overall scope remained too wide.<sup>77</sup>

The court found the State’s characterization of the proscribed speech as defamatory to be “similarly flawed.”<sup>78</sup> As noted above, a successful defamation claim requires a demonstration of “actual malice.”<sup>79</sup> The court found the statute to exceed the categorical boundaries of defamation: “Although [the statute] is capable of reaching such defamatory statements, it is also capable of reaching statements regarding ballot questions and statements by a candidate about himself designed to enhance his own candidacy, i.e., statements that are clearly not defamatory.”<sup>80</sup> The court concluded with a perfunctory endorsement of an open marketplace of ideas,<sup>81</sup> and invalidated the statute under the state constitution.<sup>82</sup>

Considering *Alvarez*, *281 Care Committee*, and *Lucas* collectively, it is evident that laws prohibiting intentionally false campaign or election speech are presumptively unconstitutional. Concerns about chilling political speech are too serious to permit doctrinal carve outs that might be perceived

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74. *Id.* at 1247.

75. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (illustrating the fraud example); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (illustrating the defamation example).

76. *Lucas*, 34 N.E.3d at 1249 (“[The statute] plainly does not require a showing of reliance or damage.”).

77. *Id.* (“Thus, the fact that [the statute] may reach fraudulent speech is not dispositive, because it also reaches speech that is not fraudulent.”).

78. *Id.*

79. *See supra* Part I.

80. *Lucas*, 34 N.E.3d at 1250.

81. *Id.* at 1256 (“Thus, in the election context, as elsewhere, it is apparent ‘that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the people’s wishes safely can be carried out.]’” (quoting *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1164 (Mass. 1993)).

82. *Id.* at 1257.

as gag orders. And we understandably fear a regulatory slippery slope.<sup>83</sup> Are, then, speech regulations of intentionally false campaign and election lies categorically impermissible? In the next Part, I consider three circumstances in which I believe such lies can be proscribed.

### *III. Regulating Campaign and Election Lies: Three Possibilities*

As committed as we are to protecting political speech, whether true or false, there are limited circumstances in which we might justifiably delimit intentionally false campaign and election lies. I posit three circumstances below. The first is when foreign nationals, during a campaign or election, engage in intentionally false speech expressly advocating for or against the election of a candidate. The second is when intentionally false speech is used to undermine election administration. And the third is when a campaign or outside political group intentionally falsifies a mandatory disclosure filing.

#### *A. Foreign Nationals and the Right to Lie in Campaigns and Elections*

Federal law prohibits “foreign nationals” from contributing any “money or other thing of value” to political candidates—in federal, state, or local elections—and to political parties.<sup>84</sup> It also prohibits foreign nationals from making “an expenditure, independent expenditure, or disbursement for an electioneering communication.”<sup>85</sup> Importantly, an “electioneering communication” is a communication that expressly advocates for the election of a particular candidate, or is functionally equivalent to such a communication, and is targeted towards the electorate.<sup>86</sup> Foreign nationals are defined as individuals who are neither citizens of the United States nor lawful permanent residents of the United States.<sup>87</sup>

As background, in the Supreme Court’s landmark ruling in *Buckley v. Valeo*, political contributions were distinguished from political

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83. Stone, *supra* note 15, at 676 (“If the government can regulate speech in the electoral context without meeting the ordinary requirements of the First Amendment merely because it maintains that such restrictions will improve the process, then there is nothing to prevent it from demanding a similar exception for speech restrictions that it claims would improve public debate more generally.”); *see also* Hasen, *supra* note 22, at 56 (“The government also might make mistakes in ferreting out the truth and ironically lead voters to make wrong decisions.”).

84. 52 U.S.C. §§ 30121(a)(1)(A)–(B) (2012).

85. *Id.* § 30121(a)(1)(C).

86. *FEC v. Wis. Right to Life*, 551 U.S. 449, 476–82 (2007).

87. 52 U.S.C. § 30121(b).

expenditures.<sup>88</sup> The simplest example of the former is a monetary donation made to a candidate or political party. The latter is money spent, independent of any candidate or political party, to influence an election. Thus, money given to a Super PAC would fall in this category.

Contributions are understood to constitute a form of speech and can be restricted because they present a risk of corruption (that is, quid pro quo exchanges). As such, contribution limits are subject to something less than strict scrutiny. In contrast, expenditures are understood to constitute core political speech that may not be restricted, given the absence of an equivalent corruption concern. As a result, expenditure limits are evaluated under strict scrutiny. In short, contributions are heavily regulated, whereas expenditures are not.<sup>89</sup>

Congress' decision to prohibit foreign nationals from making both contributions and expenditures is a prophylactic effort to prevent foreign interference in our elections.<sup>90</sup> This particular threat needs no further explication, as we continue to come to terms with the role that Russia played in the presidential election of 2016.<sup>91</sup> Suffice it to say that the problem is multidimensional, and remedial efforts are ongoing.<sup>92</sup> At present, I want to focus on the narrow question of whether the intentionally false campaign and election speech of foreign nationals might be regulated.

The most significant precedent is *Bluman v. FEC*, which was decided by a three-judge panel of the United States District Court for the District of

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88. 424 U.S. 1, 20 (1976).

89. See generally Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. (forthcoming 2018) (providing background).

90. *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (“As money became more important to the election process, concern grew that foreign entities and citizens might try to influence the outcome of U.S. elections.”).

91. Nicholas Confessore & Daisuke Wakabayashi, *How Russia Harvested American Rage to Reshape U.S. Politics*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/technology/russia-election-facebook-ads-rage.html>; Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>; OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS* (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

92. See Kenneth P. Doyle, *Klobuchar Accuses Tech Companies of Stalling 'Honest Ads' Bill*, BLOOMBERG BNA (Jan. 31, 2018), [http://news.bna.com.ezproxy.lib.ou.edu/mpdm/MPDMWB/split\\_display.adp?fedfid=127646275&vname=mpebulallissues&fcn=1&wsn=499879500&fn=12764627](http://news.bna.com.ezproxy.lib.ou.edu/mpdm/MPDMWB/split_display.adp?fedfid=127646275&vname=mpebulallissues&fcn=1&wsn=499879500&fn=12764627).



Columbia in 2011.<sup>93</sup> The plaintiffs in the case—one a Canadian citizen, the other a dual citizen of Canada and Israel—desired to contribute money to political candidates, and, for one of the plaintiffs, to give money to the Club for Growth, a 501(c)(4) that expends money on electioneering communications.<sup>94</sup> The plaintiffs challenged the applicable statutory prohibition under the First Amendment. The court initially engaged the question of the appropriate standard of review, acknowledging that the plaintiffs’ First Amendment rights were pitted against the Federal Election Commission’s purported national security concerns.<sup>95</sup> Ultimately, however, the court decided to simply assume that strict scrutiny applied.<sup>96</sup>

Despite this assumption, the court upheld the statute.<sup>97</sup> The core of the opinion recognizes that the case “raises a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process.”<sup>98</sup> After summarizing the doctrine establishing the constitutional rights enjoyed by noncitizens, the opinion reviews the exception within that doctrine when foreign citizens seek to participate in activities that are “intimately related to the process of democratic self-government.”<sup>99</sup> For activities of that type—the right to teach in public schools<sup>100</sup> or the right to serve as a police officer,<sup>101</sup> to give two examples—noncitizen exclusions are constitutional. Given those precedents, the court found, the right to make political contributions and expenditures could likewise be denied.<sup>102</sup>

The court was careful to note that it did not perceive the statute to constitute a blanket restriction on the speech rights of foreign nationals.<sup>103</sup> Rather, it viewed the statute as a limited prohibition on “a certain form of

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93. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

94. *Id.* at 285.

95. *Id.*

96. *Id.* at 285–86.

97. *Id.* at 292.

98. *Id.* at 286. “Foreign citizens” refers to noncitizens, some of whom may be lawful permanent residents. In contrast, the category of foreign nationals does not include lawful permanent residents.

99. *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

100. *Ambach v. Norwick*, 441 U.S. 68 (1979).

101. *Foley v. Connelie*, 435 U.S. 291 (1978).

102. *Bluman*, 800 F. Supp. 2d at 288–89 (“In our view, spending money to influence voters and finance campaigns is at least as (and probably far more) closely related to democratic self-government than serving as a probation officer or public schoolteacher. Thus, our conclusion here follows almost *a fortiori* from those cases.”).

103. *Id.* at 290.

expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.”<sup>104</sup>

The “express advocacy” component is significant and was reinforced by the court’s assessment that the statute is not underinclusive in scope merely because it is silent on foreign nationals’ ability to make contributions and expenditures related to ballot initiatives: “Congress’s determination that foreign contributions and expenditures pose a greater risk in relation to candidate elections than such activities pose in relation to ballot initiatives is a sensible one and, in our view, does not undermine the validity of the statutory ban on contributions and expenditures.”<sup>105</sup>

*Bluman* contains the key elements of an argument that some intentional lies by foreign nationals can be proscribed. Simply put, if foreign nationals are prohibited from making contributions and expenditures—rights that, especially in the case of expenditures, have enjoyed substantial constitutional protection—it naturally follows that their right to engage in intentionally false speech expressly advocating for or against the election of a candidate may be similarly regulated. Under the Court’s precedents, there is no discernible difference between literal speech and election expenditures.<sup>106</sup> Standing on a street corner with a placard that reads “Vote for Jones!” is tantamount to giving \$100 to a Super PAC that runs an advertisement with the same entreaty. Thus, telling an intentional lie that expressly advocates for or against a candidate—“Jones is a murderer! Vote for Williams!”—warrants no special solicitude merely because the speech involved is not financial in nature. If, as the precedents make clear, literal speech and election expenditures are analogous speech rights, then Congress may constitutionally deny foreign nationals the right to intentionally lie.

The logic is straightforward. Intentionally false lies containing express advocacy are “intimately related to the process of democratic self-government,”<sup>107</sup> rendering potential appeals to the constitutional rights of noncitizens inapposite, and obliging the government to demonstrate only a

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104. *Id.*

105. *Id.* at 291.

106. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 16 (1976) (“Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).

107. *Bluman*, 800 F. Supp. 2d at 287 (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

rational relationship between its interest and its classification.<sup>108</sup> Even if reviewed under strict scrutiny,<sup>109</sup> though, *Bluman* makes clear that the government's interest in this context is compelling.<sup>110</sup>

Would laws of the sort I've described have a transformative impact on our politics? Almost certainly not. Nonetheless, given the severe distortion in our democratic discourse, and, again, in light of recent foreign interference in our elections, laws of this sort could be defended as a corollary to proposed legislation aimed at eliminating foreign influence by way of the internet.

### *B. Campaign and Election Lies Intended to Undermine Election Administration*

A second circumstance in which regulations are justified is when intentionally false speech is used to undermine election administration. Election administration is an umbrella term referring to a variety of administrative matters. For instance, courts routinely resolve legal disputes involving voter registration,<sup>111</sup> the effectiveness of various kinds of voting machines,<sup>112</sup> and voter identification requirements,<sup>113</sup> to give a few examples. These are election administration issues. Intentionally lying about such issues—those pertaining to what we might think of as the “machinery” of elections—threatens to compromise election integrity and should be prohibited.

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108. *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

109. Let us imagine a court was persuaded by the reasoning in *281 Care Committee v. Arneson* and *Commonwealth v. Lucas* that strict scrutiny must be applied to false political speech regulations.

110. *Bluman*, 800 F. Supp. 2d at 288 (“[T]he United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”); see Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 121 (2018) (“[F]oreign speakers’ lies to influence American elections to their own advantage threaten especially grave harm to key constitutional values—particularly if we understand the First Amendment’s primary purpose as protecting speech that facilitates the United States’ democratic self-governance.”). *But see* Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 298 (2018) (“[I]t at least remains an open question after *Citizens United* whether the government may exclude from the domestic marketplace of ideas the political speech of foreigners, as opposed to their campaign contributions and expenditures.”).

111. *See Am. Civil Rights Union v. Phila. City Comm’rs*, 872 F.3d 175 (3d Cir. 2017).

112. *See Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597 (E.D. Pa. 2018).

113. *See Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018).

By way of example, imagine a poll worker intentionally provides false instruction about how to operate a voting machine. Or a situation in which campaign volunteers, engaged in get-out-the-vote efforts, intentionally mislead prospective voters, whom they believe to oppose their preferred candidate, about their voting eligibility. These lies are uniquely harmful. Professor Richard Hasen, after providing the example of an individual falsely informing listeners that “Republicans vote on Tuesday, Democrats vote on Wednesday,” sees little significance in such lies: “A state should have the power to criminalize such speech. The law would be justified by the government’s compelling interest in protecting the right to vote.”<sup>114</sup> As Professor James Weinstein notes in his contribution to this symposium, and in making a similar point, “if government were powerless to stop such deception, the integrity of the election process might be badly compromised.”<sup>115</sup> Typical concerns about chilling valuable speech are, in this circumstance, flimsy.<sup>116</sup>

More narrowly, when told by government officials, lies intended to undermine election administration unquestionably infringe upon the fundamental right to vote.<sup>117</sup> If designed to advantage one political party over another, they also constitute an impermissible form of government partisanship that unconstitutionally burdens opponents’ political beliefs.<sup>118</sup>

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114. Hasen, *supra* note 22, at 71.

115. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 223 (2018).

116. *Id.* (“[B]anning false statements about when an election will be held obviously will not deprive the electorate of valuable information or perspectives; nor will such a narrowly targeted ban ‘chill’ the expression of any useful information.”).

117. Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 116 (2015) (“In other words, these lies—like lies about the existence of, or consequences of exercising, constitutional rights more broadly—directly deprive targets of a constitutionally protected right for reasons that should fail strict scrutiny, and thus violate the Due Process Clause.”).

118. See Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 274 (“[I]f parties or officials in power use their control over government resources to secure their own reelection, the dangers to the democratic processes, and thus to larger First Amendment concerns, again seem apparent.”). Statutory relief, depending on the facts, may also exist. See *Cal. Republican Party v. Mercier*, 652 F. Supp. 928, 936 (C.D. Cal. 1986) (“The strongest case for allowing a § 1985(3) cause of action against a private conspiracy motivated by political animus would be where a private group tried to physically restrain an opposing political group from reaching the polls, or tried to coerce the opposing group’s votes when at the polls, or tried to destroy the opposing group’s ballots after the polling.”).

To be sure, government officials routinely make transparently partisan statements, some of which are deceptive. General statements of this sort are constitutionally unproblematic. But when government lies are intended to compromise electoral processes for political gain, constitutional concerns arise. Professor Michael Kang's observation is instructive:

To be clear, elected officials themselves are party actors free to politick and electioneer on a partisan basis in their individual capacities as citizens, candidates, and political figures. Nothing in a norm against government partisanship prohibits a party official from endorsing other candidates or campaigning along party lines, or advancing partisan priorities as a policy agenda—such activities define democratic elections and public life. The distinction is that lawmakers cannot leverage official *state action* for such explicitly partisan activities.<sup>119</sup>

Professor Helen Norton draws a similar—and, in my view, necessary—distinction between “lies by an individual government official when expressing her own views in a personal capacity,” and lies made by an official empowered to speak for the government.<sup>120</sup> The challenge, of course, is in enumerating official government actions.<sup>121</sup> In sum, many intentional lies aimed at undermining election administration are already unconstitutional under the Fourteenth Amendment, and if told with discriminatory partisan motives, also violate the First Amendment.

But what about intentional lies told by private actors, along the lines of the examples provided above (poll workers, campaign volunteers, and the like)? While such lies might be thought to be less coercive than government lies, they also pose a serious threat to democracy. Although private individuals must be guaranteed ample freedom to speak on matters of public concern, I believe intentional lies meant to undermine the right to vote may be regulated. The Supreme Court, albeit in another context, has relaxed First Amendment rights when weighed against the right to vote.<sup>122</sup> Judicial deference is given to “generally applicable and evenhanded

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119. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 378–79 (2017).

120. Norton, *supra* note 117, at 76.

121. I am sympathetic to Professor Norton's endorsement of a functional approach to this challenge. *Id.* at 89 (“I propose that government lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive of their targets to constitute the functional equivalent of such deprivations.”).

122. *Burson v. Freeman*, 504 U.S. 191, 210 (1992).

restrictions that protect the integrity and reliability of the electoral process itself.”<sup>123</sup>

Time and again, the Court, in evaluating various election administration issues, has affirmed a government interest in avoiding electoral confusion.<sup>124</sup> Notably, however, that interest does not encompass government attempts to categorically root out falsehoods. As put by Justice Marshall, “[a] ‘highly paternalistic approach’ limiting what people may hear is generally suspect.”<sup>125</sup> It is for this reason that the comprehensive regulation of intentional lies in campaigns and elections is infeasible. Lies pertaining to policy issues, the likely effects of ballot measures, candidate voting histories, and candidate endorsements, while distressing, are protected speech, and attempts to regulate them would pose insurmountable enforcement difficulties. In contrast, lies pertaining to the “time, place, and manner” of elections are more readily verifiable, more threatening, and more constitutionally defensible in deference to states’ “interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.”<sup>126</sup>

### *C. Intentionally Lying on a Mandatory Disclosure Form*

The final circumstance in which regulations would be upheld is when a campaign or outside political group intentionally falsifies a mandatory disclosure filing. The Supreme Court has been more accepting of disclosure requirements than it has of limits on either contributions or expenditures.<sup>127</sup> Such requirements are evaluated under an “exacting scrutiny” standard, which requires the government to demonstrate a substantial relationship between the regulation and a sufficiently important government interest.<sup>128</sup>

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123. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

124. *See, e.g., Eu v. S.F. Cty. Democratic Ctr. Comm.*, 489 U.S. 214, 228 (1989) (“The State’s second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate.”); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986); *Jenness v. Fortson*, 403 U.S. 431, 442 (1970) (describing the state interest in “avoiding confusion, deception, and even frustration of the democratic process at the general election”).

125. *Eu*, 489 U.S. at 223–24 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

126. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

127. *See infra* note 130.

128. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). While an identical level of scrutiny is given to contribution limits, the Court has shown greater deference to disclosure laws than contribution limits. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 196 (2003).

The disclosure landscape is complex, as candidates, political parties, outside groups, and donors are each subject to different disclosure obligations. A full treatment is outside the scope of this Essay.<sup>129</sup> In general, however, recent disclosure challenges have involved the obligations faced by outside groups: 527s, 501(c)(4)s, and Super PACs. The exemption from disclosure that some of these groups enjoy distinguishes them from candidates and political parties:

[A]ll three types o[f] organizations—Super PACs, 527s, and 501(c)s—may engage in election-related spending without dollar limits and accept contributions to pay for that spending from individuals, corporations, and unions without dollar limits. Super PACs are subject to FECA disclosure of their donors, and 527s are subject to IRS disclosure of their donors, while 501(c)s are not required to publicly disclose their donors at all.<sup>130</sup>

There are, of course, significant First Amendment concerns associated with mandating disclosure, and scholars have wrestled with the questions of whether disclosure requirements should be, and why they have been, upheld.<sup>131</sup> There are also troubling findings about the effectiveness of the current disclosure regime.<sup>132</sup> Nonetheless, disclosure requirements remain a widely used device for regulating modern politics.

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129. For a detailed introduction, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 531–48 (5th ed. 2016); Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1854–58 (2013).

130. Briffault, *supra* note 23, at 1649; *see also* ISSACHAROFF ET AL., *supra* note 129, at 544 (“[C]andidates, parties and traditional PACs must obey [statutory] disclosure and disclaimer rules, while some types of outside groups do not.”).

131. *See, e.g.*, Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 560 (2012) (“[D]isclosure laws are much better than nothing in ferreting out when an elected official might act to benefit her supporters rather than act in the public interest.”); Gilbert, *supra* note 129, at 1853 (“Perhaps disclosure is better understood as a regulatory problem that requires the kind of detailed, contextual cost-benefit analysis administrative agencies carry out in other areas of law.”); Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 654 (2012) (“We should understand disclosure and disclaimer requirements as more likely to further, rather than frustrate, First Amendment values when they regulate speakers who seek to keep secrets (and occasionally tell lies) to manipulate listeners’ choices and thus threaten their autonomy.”).

132. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1499 (2014) (“Standing alone,

This undoubtedly results from the Court's acquiescence to disclosure laws. In *Buckley v. Valeo*, the Court identified three government interests that justify disclosure requirements. The first interest is an "informational interest."<sup>133</sup> As expressed, "[t]he sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."<sup>134</sup> The second interest is in "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity."<sup>135</sup> The third interest is in policing circumvention of contribution and expenditure limits.<sup>136</sup> Each of these interests is premised on the importance of establishing a healthy marketplace of ideas for voters.<sup>137</sup>

The informational interest identified in *Buckley* remains decisive.<sup>138</sup> In both *McCutcheon v. Federal Election Commission*<sup>139</sup> and *Citizens United v. Federal Election Commission*,<sup>140</sup> the Court's most recent major campaign finance cases, the Court spoke approvingly of the informational benefits provided by disclosure.<sup>141</sup> To that end, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'"<sup>142</sup>

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more disclosure will not work. Disclosure needs to be very different, and much better, if it is to achieve the goals the Supreme Court has articulated for it.").

133. *Buckley*, 424 U.S. at 81.

134. *Id.* at 67.

135. *Id.*

136. *Id.* at 67–68.

137. Sarah C. Haan, *Voter Primacy*, 83 *FORDHAM L. REV.* 2655, 2663–64 (2015) ("The critical idea behind *Buckley*'s analysis of FECA's disclosure provisions was that voters use campaign finance information to make voting decisions. The Court's analysis was voter-centric, looking at each disclosure requirement from the perspective of a voter evaluating candidates.").

138. *Id.* at 2664 ("*Buckley* laid the groundwork for all of the Court's subsequent analysis of the informational interests supporting compelled registration, recordkeeping, disclaimers, and reporting, and it remains today the most detailed elucidation of the informational interest.").

139. 134 S. Ct. 1434 (2014).

140. 558 U.S. 310 (2010).

141. *McCutcheon*, 134 S. Ct. at 1460 ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information."); *Citizens United*, 558 U.S. at 369 ("Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests.").

142. *Citizens United*, 558 U.S. at 366 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).



Whatever right to lie was recognized in *Alvarez* is inapposite in the context of mandatory disclosure. The government has a longstanding and substantial interest in providing information to voters about where a candidate's financial support is coming from. Permitting a donor to lie on a mandatory disclosure form would directly undermine that government interest. As courts have held in rejecting purported rights to anonymous political speech, the government interest "extends more generally to promoting transparency and accountability in the electoral process."<sup>143</sup> Additionally, as with election administration, the government has a substantial interest in protecting the integrity of the political process. Finally, in *Alvarez* itself, Justice Kennedy acknowledged the legitimacy of the federal statute criminalizing the making of a false statement to a government official<sup>144</sup>—a statute that undoubtedly prohibits the inclusion of intentional lies on a mandatory disclosure form.<sup>145</sup>

### Conclusion

Lying in campaigns and elections is harmful to democracy. As we now know all too well, people are often highly, and perhaps uniquely, susceptible to political lies.<sup>146</sup> It is, therefore, tempting—even intuitive—to promote their elimination. Few would argue otherwise. But to delegate authority over the regulation of lies to the government presents risks that are far from trivial.<sup>147</sup> In this Essay, I have explored three circumstances in

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143. *Doe v. Reed*, 561 U.S. 186, 198 (2010); *see also* *Citizens United v. Schneiderman*, 882 F.3d 374, 383 (2d Cir. 2018) ("But totalitarian tendencies do not lurk behind every instance of a state's collection of information about those within its jurisdiction. Any form of disclosure-based regulation—indeed, any regulation at all—comes with some risk of abuse. This background risk does not alone present constitutional problems.").

144. *United States v. Alvarez*, 567 U.S. 709, 720 (2012).

145. *United States v. Rosen*, 365 F. Supp. 2d 1126 (C.D. Cal. 2005); *see also* *United States v. Mattox*, 689 F.2d 531, 533 (5th Cir. 1982) ("Silence may be falsity when it misleads, particularly if there is a duty to speak.").

146. *See* Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html>; *see also* HANNAH ARENDT, *CRISES OF THE REPUBLIC* 6 (Harcourt Brace 1972) (1969) ("Lies are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear.").

147. *See* RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 4–5 (1992) ("A society that wishes to take openness seriously as a value must therefore devise rules that are deliberately tilted in favor of openness in order to counteract the inherent proclivity of governments to engage in control, censorship, and secrecy.").

which campaign and election lies can be regulated. My suggestions are modest. My suggestions are unlikely to transform the state of our politics. But there is value in delineating what is permissible within the boundaries of the First Amendment as we work towards enhancing our democratic discourse.