

(DON'T) LIE TO ME: CAN FALSE POLITICAL STATEMENT LAWS BE REHABILITATED AFTER THE SIXTH CIRCUIT'S SUSAN B. ANTHONY LIST RULING?

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ABSTRACT

To put it mildly, laws criminalizing false political statements have proven to be controversial.¹ In the wake of the Supreme Court of the United States' ruling in *U.S. v. Alvarez*, several state statutes which punish false statements made regarding candidates running for public office have been deemed unconstitutional.² As vividly exemplified by the Sixth Circuit's recent holding in *Susan B. Anthony List v. Driehaus* and the Eighth Circuit's holding in *281 Care Comm. v. Arneson*, this invalidation trend does not appear to be stalling any time soon.³ Despite the apparent inevitable demise of many current formulations of false political statement laws, it is important to examine exactly why these laws have been deemed to fail on constitutional grounds. Furthermore, the question is begged as to what, if anything, can be salvaged from these laws, and is there any value in doing so? This note aims to explore recent and historical developments regarding false political statement laws, giving special attention to Supreme Court decisions. Ohio's struggles with false political statement laws are additionally explored in-depth. This note concludes with a compilation of deficiencies that have consistently been found regarding false political statement laws, and a proposal for improvement through new legislation.

I. INTRODUCTION

Over a dozen states still have some form of law which criminally punishes the making of certain false statements about candidates or ballot issues during

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1. *See generally* Rickert v. State, 168 P.3d 826, 827 (Wash. 2007).

2. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016) (referencing Minnesota, Massachusetts, and Washington laws being struck down).

3. *See* 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014) (referencing Minnesota's reporting statute); *see also* Susan B. Anthony List, 814 F.3d at 476.

the course of an election.⁴ Typically, violators are subject to thousands of dollars in fines, jail-time, or both.⁵ Minnesota, Massachusetts, Washington, and Ohio have all had laws found unconstitutional in the last decade.⁶ Though all false political statement laws invariably differ in language and thoroughness to some degree, the core elements remain essentially the same. For example, Wisconsin's law which criminalizes false political statements, aptly titled "False Representations Affecting Elections", states succinctly "[n]o 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 of an election." (emphasis added).⁷ The inclusion of the qualifier "knowingly" was no doubt in recognition of the Supreme Court's *New York Times* rule, which requires a scienter equating to "actual malice" to punish many false statements.⁸ This standard was thought to be constitutionally sufficient for nearly fifty years, and continues to endure in other areas of law.⁹ However, recent Supreme Court and federal circuit decisions have cast serious doubts on the extent to which the addition of this language insulates false political statement laws from invalidation.¹⁰ Additionally, the breadth of these statutes has proven problematic, as the intermediaries by which false political statements are made, typically media and advertisers, are subject to criminal penalties in equal force as the party from which the statement originated.¹¹

False political statement laws are usually coupled with some form of statute delineating the process of reporting alleged violations, typically to some state administrative election commission, and have in-turn drawn judicial ire of their

4. See Margaret H. Zhang, *Susan B. Anthony List v. Driehaus and the (Bleak) Future of Statutes That Ban False Statements in Political Campaigns*, 164 U. PA. L. REV. 19, 20 (2015) (listing eighteen states that have had false political statement laws within the last ten years).

5. See *generally* *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014); see also *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 n.1 (Mass. 2015) (listing various penalties for violating false political statement laws).

6. See *Susan B. Anthony List*, 814 F.3d at 476.

7. WIS. STAT. ANN. § 12.05 (West 2015).

8. See *generally* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (enumerating the "actual malice" standard).

9. See *generally* *New York Times Co.*, 376 U.S. at 279-80; see also *Rickert*, 168 P.3d at 843-44 (Wash. 2007) (Madsen, J., Dissenting) (applying the "actual malice" standard to false political statement laws).

10. See *Susan B. Anthony List*, 814 F.3d at 476.

11. Evan Richman, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 *Cardozo Arts & Ent. L.J.* 667, 669 (1998).

own.¹² An example of this is Ohio's reporting statute, which states "[u]pon the filing of a complaint with the Ohio elections commission, which shall be made by affidavit of *any person*, on personal knowledge, and subject to the penalties for perjury, or upon the filing of a complaint made by the secretary of state or an official at the board of elections, setting forth a failure to comply with or a violation of any provision in [any of Ohio's false political statement statutes]." (emphasis added).¹³ Several courts have specifically expressed concerns regarding provisions which allow *any person*, not just elected public officials, to file a complaint with state election commissions.¹⁴ Furthermore, it has been noted that the ability to lodge complaints against persons who are alleged to have violated the statutes, regardless of whether criminal charges are ever brought, may be wielded as a tool of oppression by political rivals seeking nothing more than to force the alleged violator to divert time, energy, and money to defending what may ultimately be a bogus or trivial allegation before an election commission.¹⁵ This disquieting reality is further enhanced by the fact that the vast majority of these allegations are not resolved by election commissions before the conclusion of that particular election period, let alone proceeding to a court of law for formal adjudication.¹⁶

II. DO FALSE POLITICAL STATEMENT LAWS HAVE VALUE?

It would appear that false political statement statutes, under current formulations, are at the very least perceived to be largely deficient. These statutes may ultimately result in harsh punishments far out-weighting any actual harm, are ripe for abuse motivated by political machinations, and could result in serious "chilling effects" on open political discourse.¹⁷ This begs the question; if these laws are so riddled with problems, are they even worth saving? While certainly imperfect, the spirit of these laws is laudable at the core, and with extensive renovation can serve their intended purpose—preserving the integrity

12. See *Lucas*, 34 N.E.3d at 1255 ("[T]he statute may be manipulated easily into a tool for subverting its own justification").

13. OHIO REV. CODE ANN. § 3517.153(a) (West 2013).

14. See *Susan B. Anthony List*, 814 F.3d at 470 (referencing Ohio's reporting statute); see also *281 Care*, 766 F.3d at 778 (8th Cir. 2014) (referencing Minnesota's reporting statute).

15. See generally *Lucas*, 34 N.E.3d at 1255 (speculating on the possible mischievous applications of the Massachusetts law at issue).

16. See *Susan B. Anthony List*, 134 S. Ct at 2346.

17. See *id.*; see also *Rickert*, 168 P.3d at 831 (specifically referencing "procedural defects" in Washington's statute which could "chill" political speech).

and fairness of elections. There is no reason to quietly accede in the extinction of false political statement laws without a word said in defense of the nearly departed, simply “stand[ing] on the dock and wav[ing] goodbye”.¹⁸

While unpopular opinions, sharp criticism, and even some degree of nastiness serve the function of informing the public on matters related to democratic choices, outright falsehoods have no significant utilitarian value.¹⁹ The discretion of individuals to fabricate often-convincing lies—with nigh absolute impunity—obscures the ability of citizens to make informed decisions. Deliberate misinformation is certainly a significant contributing factor to public mistrust of otherwise veracious information during election season.²⁰ It is not much of a stretch to assume that some individuals, recently unfettered from the restraints of punishment for knowingly or recklessly disseminating false political information, could brazenly take ever more liberty composing untruthful narratives to suit particular political ends.²¹ Rather than simply abandoning the notion that legislation can alleviate the very real prospect of systematic public misinformation generated by false political statements, perhaps what is needed is a re-examination of how these laws can be more narrowly-tailored to serve their legitimate, original purposes. The first step in this process is understanding the historical development and criticism of false political statement laws.

III. EARLY JURISPRUDENCE AND EMERGING STANDARDS

A. *New York Times, Garrison, and “Actual Malice”*

The starting point for Supreme Court false political statement analysis is *New York Times v. Sullivan* and the soon after *Garrison v. State of Louisiana*. Decided in 1964, the case was firmly embedded against the backdrop of the civil rights movement.²² The “false statements” at issue – political in nature but not

18. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014) (referring to an unwillingness to let the Environmental Protection Agency have unfettered regulatory discretion, but the phrase seems apt here).

19. *See generally* *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964); *see also* *U.S. v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring) (“Such false factual statements are less likely than are true factual statement to make a valuable contribution to the marketplace of ideas.”).

20. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 295 (2004) (“[F]alse statements can lead or add to voter alienation by fostering voter cynicism and distrust of the political process.”).

21. *See Richman, supra* note 11, at 686.

22. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

directly related to an election – were included in an editorial advertisement published in the New York Times.²³ The advertisement had been paid for and provided on behalf of an African-American right-to-vote and student movement, but the suit had been brought against the New York Times as publisher.²⁴ The respondent who alleged the harm from the advertisement was the elected commissioner of Montgomery, Alabama, who was not named in the advertisement, other than his assertion that the word “police” referred to him as citizens “knew” he had the ability to direct their conduct.²⁵

Entitled “Heed Their Rising Voices”, the advertisement described the plight of certain African-American college students who were engaging in non-violent protests in Alabama being subjected to a “wave of terror” by the police.²⁶ “The first statement at issue was the description of college students singing “My Country, Tis of Thee” on the Alabama State Capitol Building steps, after which student leaders at the demonstration were arrested and expelled by the Alabama Board of Education.²⁷ In response, a number of demonstrators engaging in reactive protests on the campus of Alabama State College were “ringed” by armed police, who lobbed tear-gas into the crowd in order to disperse them.²⁸ The advertisement continued by stating that “the entire student body” was locked out of the campus dining hall after refusing to re-register with the college, “in an attempt to starve them into submission.”²⁹ The second statement dealt with Dr. Martin Luther King, Jr., which vividly recounted the responses to his calls for “peaceful protests” which included “intimidation and violence”, specifically the bombing of his home, which nearly killed his wife and young daughter.³⁰ The advertisement then gave a litany of charges and arrests against Dr. King, including speeding, loitering, and now “perjury”—a *felony* under which they could imprison him for *ten years*.³¹

23. *Id.*

24. *Id.* at 256-57.

25. *Id.* at 288.

26. *Id.* at 256.

27. *Id.* at 259.

28. *Sullivan*, 376 U.S. at 259.

29. *Id.* at 257.

30. *Id.*

31. *Id.* at 258.

The Supreme Court held that both sections of the advertisement were not accurate characterizations of the events in Alabama. First, the student leaders who were expelled for singing “My Country, Tis of Thee” were dismissed for a separate incident; a sit-in at the lunch counter of the Montgomery County courthouse.³² Second, the students involved in the reactive protests of the student leaders’ expulsion by the Board of Education were not punished by Alabama State College for refusal to re-register with the college, but rather for boycotting classes “on a single day.” Furthermore, the Court found no credible evidence that the dining hall was ever padlocked “on any occasion,” and the only students who were refused service had “neither signed a preregistration application or requested temporary meal tickets.”³³ The “ringing” event was also found to be a significant mischaracterization. The Court concluded that the proffered criminal history of Dr. King was also exaggerated, and the events all occurred prior to the Respondent being elected as city commissioner.³⁴

The instructions given by the trial judge, and affirmed by the Alabama Supreme Court on appeal, informed the jury that the statements in the advertisement were “libelous *per se*,” creating a presumption of malice, and that so long as the statements were made “of and concerning” the respondent the jury could award both general and punitive damages.³⁵ The jury returned a verdict against the New York Times for \$500,000.³⁶ The Supreme Court of the United States, while taking umbrage with some the particulars of the Alabama state law and its application, decided to make its ruling couched in more general constitutional considerations. The Court began by stating that erroneous statements are an “inevitable” by-product of open political debate, and as such are afforded a measure of “breathing space . . . needed to survive.”³⁷ To meet this end, the Court surmised requiring the defense of “an erroneous statement . . . honestly made” was as essential for proof as that of “guilty knowledge” regarding the statement.³⁸ The Court concluded by holding that under the First and Fourteenth Amendments “a public official [is prohibited] from recovering damages for a defamatory falsehood relating to his official conduct unless he

32. *Id.* at 259.

33. *Id.*

34. *Sullivan*, 376 U.S. at 259.

35. *Id.* at 262.

36. *Id.* at 254.

37. *Id.* at 271-72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

38. *Id.* at 278 (quoting *Smith v. California*, 361 U.S. 147 (1959)).

proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁹

The Court, applying the newly-formulated “actual malice” standard to the present case, found that the Alabama law could not stand if all that was required was a “presumption of malice”, as a demonstration of “actual malice” was required.⁴⁰ The only thing in the Court’s view that had been proven was “at most a finding of negligence [of the New York Times] in failing to discover the misstatements” not equating to recklessness, and as such the evidence was constitutionally insufficient to support the lower court’s ruling.⁴¹ The Court further expressed serious skepticism regarding whether the advertisement’s use of the words “they” and “police” could reasonably be perceived as relating to the Respondent.⁴²

The newly formulated “actual malice” standard was met with immediate criticism in renowned textualist Justice Hugo Black’s concurring opinion. While agreeing with the majority on the ultimate reversal of the judgement against the New York Times, he lamented that the “malice” standard was “[even as defined by the Court] an elusive, abstract concept, hard to prove and hard to disprove” and instead would base the ruling exclusively on “absolute, unconditional” First Amendment immunity of the New York Times, in its capacity as the media, to publish criticisms of public officials.⁴³

Several months after *New York Times v. Sullivan*, the Court applied the “actual malice” standard in *Garrison*, a case involving the alleged criminal defamation by the District Attorney of New Orleans against eight Parish District Court judges during a press conference.⁴⁴ The alleged defamatory statements included various accusations of “inefficiency, laziness, and excessive vacations” by the judges.⁴⁵ The District Attorney further openly questioned the motives of the judges in refusing to authorize expenses for undercover police vice work,

39. *Id.* at 279-80.

40. *Sullivan*, 376 U.S. at 283.

41. *Id.* at 287-88.

42. *Id.* at 288.

43. *Id.* at 293 (Black, J., concurring).

44. *See generally Garrison*, 379 U.S. at 65-67 (discussing District Attorney of New Orleans’ public comments regarding behavior of local judges).

45. *Id.* at 65-66.

stating this “[made] clear where [the judges] sympathies lie,” which in the Court’s view implied some form of racketeering influence on the judges.⁴⁶

The Court began by stating that the “*New York Times* rule” was applicable to the imposition of criminal sanctions involving statements against official conduct of public officials.⁴⁷ The Louisiana statute had a prominent quirk; it did not require that a statement be intended to inflict “harm through falsehood” to impose criminal penalties, it merely required “an intent to inflict harm.”⁴⁸ A truthful statement, made with “ill-will or reckless disregard”, was equally punishable as the knowingly false statement made with “malice”. The Court locked-down the recently established *New York Times* rule or “actual malice” standard by stating that the only criticisms of public officials able to be punished, criminally or civilly, are those that are false and made with a “knowing or reckless disregard of the truth.”⁴⁹ Justice Brennan concluded by offering the Court’s rationale for holding only knowing or recklessly made false statements about public officials as legally cognizable:

Although an honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity . . . for the use of a known lie as a toll is at once at odds with premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected . . . hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.⁵⁰

For nearly fifty years, “actual malice” was the applicable standard for false statement laws.⁵¹

B. Washington’s False Political Statement Law Falls First

Though a number of cases dealing with false political statement laws managed to find their way to the Supreme Court, the statutes largely survived

46. *Id.* at 66.

47. *Id.* at 67.

48. *Id.* at 73.

49. *Id.* at 78.

50. *Garrison*, 379 U.S. at 75.

51. *See Rickert*, 168 P.3d at 843 (Wash. 2007) (Madsen, J., dissenting).

judicial scrutiny notwithstanding certain auxiliary aspects found to be unconstitutional.⁵² However, prior to the veritable sea change post-*Alvarez*, only one state statute was deemed unconstitutional *in toto*. Though not decided by the Supreme Court of the United States, Washington's *Rickert v. State* was in hindsight a harbinger of trouble to befall false political statement laws nationally.

The Washington statute was not unique. It called for punishment for sponsoring "with actual malice a statement constituting libel or defamation per se [in] [p]olitical advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office."⁵³ The majority opinion opened by referring to the law on its face as a "censorship scheme" whereby the government had illegitimately assumed the role of "guardianship of the public mind."⁵⁴ While acknowledging that other state courts had upheld these statutes, the majority concluded "such holdings should be neither admired nor emulated."⁵⁵

The court first asserted that the *New York Times* "actual malice" line of cases dealt only with "defamatory statements", and absent this select category of unprotected speech the law was subject to "strict scrutiny" as it extends to constitutionally-protected political speech.⁵⁶ Strict scrutiny, as the name would suggest, is not an easy standard to overcome. It creates a presumption the law is unconstitutional, and requires a significant, "compelling" governmental interest, and the statute then must be narrowly-tailored to further that interest.⁵⁷ While conceding the state has some interest in preventing false political statements, the salient criticism by the majority was that the law was ill suited to advance its asserted purpose; preserving the integrity of the election process.⁵⁸ In the majority's view, the statute was both under- and over-inclusive

52. See generally *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (striking down the portion of the Ohio Revised Code punishing anonymous political leafletting); see also *Pesttrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1995) (holding two of Ohio's mechanisms for enforcing false political statement laws unconstitutional).

53. WASH. REV. CODE. ANN. § 42.17A.335(1)(a) (West 1999).

54. *Rickert*, 168 P.3d at 827 (quoting *Meyer v. Grant*, 486 U.S. 414, 419 (1988)).

55. *Id.* (citing *Pesttrak*, 926 F.2d at 573).

56. *Id.* at 828 (quoting *Rickert v. State*, 119 P.3d 379 (2005)).

57. See generally *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1992) (affirming strict scrutiny test for content-based prohibitions on speech).

58. *Rickert*, 168 P.3d at 830.

as it only applied to statements made against a candidate, not those made by the candidate themselves or their supporters.⁵⁹ Furthermore, the majority took serious objection to the fact the enforcement was done via a governmental agency composed of unelected officials, who not only reviewed the alleged false statements, but had the power to impose certain sanctions.⁶⁰ These officials, appointed by the governor, could plausibly use their *de facto* prosecutorial discretion to punish only political rivals, resulting in a marked “chilling effect” on open political discourse.⁶¹ After holding the law unconstitutional, the majority concluded with the axiom “the best remedy for false or unpleasant speech is more speech, not less speech.”⁶²

In a lengthy dissent, one judge flatly concluded that “[Washington’s statute] infringes on no First Amendment rights.”⁶³ The majority through its invalidation of the statute had essentially signed “an invitation to lie with impunity.”⁶⁴ Refocusing the application of the *New York Times* test, the dissent urged that calculated, knowing falsehoods are categorically unprotected speech that do nothing but subvert the electoral process.⁶⁵ Furthermore, Supreme Court precedent indicated that “actual malice”, rather than “strict scrutiny”, was the appropriate standard and thus the analytical framework relied upon by the majority was faulty from its outset.⁶⁶ Even if the court was at liberty to choose its own analytical framework, the dissent urged that the “actual malice” standard was a difficult test to pass, and only knowing or reckless material falsehoods, established by clear-and-convincing evidence, would suffice.⁶⁷

C. Changes Abound; *Alvarez* and *Shifting Scrutiny*

Despite the largely anomalous *Rickert* ruling, state false political statement laws were fairly ubiquitous and generally accepted until *Alvarez*, which proved

59. *Id.* at 831.

60. *Id.*

61. *Id.*

62. *Id.* at 832.

63. *Id.* at 833 (Madsen, J., dissenting).

64. *Rickert*, 168 P.3d at 833.

65. *Id.*

66. *Id.* at 834.

67. *Id.*

to cast serious doubt on the constitutionality of many state statutes.⁶⁸ *Alvarez* was a somewhat remarkable case to herald the recent invalidating wave of false political statement jurisprudence, as the factual background was a wholly distinct arena of false speech involving military honors.⁶⁹ Though not regarded as a direct analytical framework for reviewing false political statement laws, many of the federal circuit cases which followed directly referenced *Alvarez* as informing their decisions.⁷⁰ Perhaps more than anything else, the case exemplified growing judicial skepticism regarding false statement laws generally.⁷¹

Besides being factually distinct, *Alvarez* was beset by a common Supreme Court issue concerning precedent; a “fragmented” court consisting of a four-justice majority, a two-justice concurrence, and a three-justice dissent.⁷² The case dealt with the Stolen Valor Act, a federal law that punished individuals making false claims of receiving military honors.⁷³ Opening the majority opinion, the respondent was described in less-than flattering terms.⁷⁴ Justice Kennedy began “Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute”.⁷⁵ The statute called for criminal sanctions against any person who falsely represented themselves as having received any decoration or medal reserved for the Armed Forces of the United States.⁷⁶ A subsection stated that the punishment was enhanced when the false claim regarded the Congressional

68. See Zhang, *supra* note 4, at 19.

69. See generally *Alvarez*, 132 S. Ct. at 2537 (discussing the factual underpinnings of the case leading to appeal).

70. See generally *Susan B. Anthony List*, 814 F.3d at 471 (discussing Ohio’s false political statement statutes); see also *281 Care Comm.*, 766 F.3d at 781 (discussing Minnesota’s statute).

71. See generally Zhang, *supra* note 4, at 29 (noting judicial skepticism following the *Alvarez* decision).

72. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“[When] a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”).

73. See 18 U.S.C. § 704 (2006).

74. *Alvarez*, 132 S. Ct. at 2542.

75. *Id.*

76. See 18 U.S.C. § 704 (2006); see also 18 U.S.C.A. § 704 (West 2013).

Medal of Honor, ramping up the punishment to up to one year of imprisonment in addition to a fine.⁷⁷ Quite notably, the law contained no specific mens rea requirement; there was no mention of *New York Times*' "actual malice" standard. Furthermore—though obviously an issue of prosecutorial discretion and evidence—the law was not restricted to publicly made false statements.⁷⁸

The Respondent challenged the statute as a "content-based suppression of pure speech" in violation of the First Amendment, falling outside the normal purview of categories of expression where content regulation by the State is permissible, including false political statements laws.⁷⁹ The majority opinion then dealt a serious blow to what seemed to be a common interpretation of Supreme Court jurisprudence, and in-turn false political statement laws; "[t]he Court has never endorsed the categorical rule the Government advances: that false statements receive no constitutional protection."⁸⁰ The Court then turned to the statute itself, expressing concern that the law allowed the government to decree certain speech a criminal offense, and thus garnered unflattering Orwellian comparisons.⁸¹ The law "cast a chill" that ran afoul of the First Amendment.⁸²

The majority then advanced the appropriate standard to evaluate the law; nearly insurmountable strict scrutiny.⁸³ Justice Kennedy thoroughly explored the aim of Stolen Valor Act—protecting the integrity of military honors and their recipients—and concluded it was most-assuredly a strong state interest.⁸⁴ However, this was to no avail as the restriction must be "actually necessary", with a direct causal link with the restriction on behavior and the injury to be prevented.⁸⁵ Protecting military honors from being diluted due to false claims

77. *Alvarez*, 132 S. Ct. at 2543.

78. *Id.* at 2547 ("[T]he statute would apply with equal force to personal, whispered conversations within a home.").

79. *Id.* at 2543 (Justice Kennedy expressed that restrictions under this category were "the most difficult to sustain.").

80. *Id.* at 2545.

81. *Id.* at 2547 (referencing the "Oceania Ministry of Truth" from George Orwell's *Nineteen Eighty-Four*).

82. *Id.* at 2548.

83. *See Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring) ("[strict scrutiny implies] near automatic condemnation.").

84. *Id.* at 2549.

85. *Id.* (quoting *Brown v. Entm't Merch. Ass'n.*, 131 S. Ct. 2729, 2734 (2011)).

was not enough to support laws that burden core speech.⁸⁶ Furthermore, the majority posited that counter-speech would work equally or more effectively than formal governmental intervention.⁸⁷ Indirectly echoing the penultimate sentence of the *Rickert* majority, Justice Kennedy prescribed that best cure for false speech is speech that is true.⁸⁸ The dissent of Justice Alito, joined by Justices Scalia and Thomas, largely took exception to the majority's assertion that punishing falsehoods such as the present one had any "chilling" effect on free speech, and a "long line of cases" make it clear that free speech does not encompass falsehoods which cause real harm and serve no legitimate purpose.⁸⁹

In a notable concurrence by Justice Breyer joined by Justice Kagan, it was conceded that the Stolen Valor Act indeed ran afoul of constitutional safeguards, but suggested a different analytical approach. The appropriate test was rather that of "intermediate" or "proportional" scrutiny, where the law must be demonstrated as working speech-related harm out of proportion to its asserted utility.⁹⁰ In Justice Breyer's view, there was not a significant chance a law that curtailed the making of false statements regarding easily verifiable facts was a disservice to the public's "marketplace of ideas," and that false factual statements are not particularly worthy of judicial or constitutional protection.⁹¹ Nonetheless, the law was over-broad as it punished privately made statements in the same manner as public statements.⁹² The chilling effects of the statute were undeniable without a clear *mens rea*, though this could nonetheless reasonably be assumed as part of a *prima facie* case.⁹³ In dicta, Justice Breyer noted that false statement statutes in political contexts caused particular difficulty, as statements concerning elections were far more likely to cause a behavioral difference—altering voting patterns—than that of the present statute.⁹⁴ False political statement laws could also more easily result in

86. *See id.* at 2549 (rejecting the Government's "common sense" argument).

87. *Id.* at 2550.

88. *Id.*

89. *Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting).

90. *Id.* at 2551 (Breyer, J., concurring).

91. *Id.* at 2552.

92. *Id.* at 2555 (lamenting that the statute applies with equal force to "barstool braggadocio").

93. *Id.* (Breyer, J., concurring).

94. *Id.* at 2556.

ensorship, and thus the statutes must be more narrowly tailored than others.⁹⁵ Despite the questionable precedential fit, the aftermath of the decision proved to be swift and significant for false political statement laws.

D. The Beginning of the End for False Political Statement Laws

Massachusetts and Minnesota’s political statement laws fell within three years of *Alvarez*. The first to be struck down was Minnesota’s statute. Taking up *281 Care* after a remand to the district court, the Eighth Circuit began with the proposition that the first step of analysis for false speech regulation was to determine the appropriate level of scrutiny.⁹⁶ Laws which implicate First Amendment speech concerns, if regulating the actual content of a protected class of speech, are “content-based prohibitions” and thus subject to some level of heightened scrutiny.⁹⁷ Despite being a common interpretation for nearly half a decade, false speech enjoyed no categorical First Amendment protection.⁹⁸ Statutes seeking to curtail false political speech now faced the undesirable possibility of being subjected either to intermediate or strict scrutiny. And as *Alvarez* did not provide a clear precedent from which lower courts could draw the appropriate standard, courts were left to either use the strict standard espoused by the majority against the Stolen Valor Act—which was not a law concerning political speech—or rely on Justice Breyer’s concurrence which recommended an intermediate level of scrutiny for “other” false statement laws.⁹⁹

The Minnesota statute at-play did not punish false political statements about a person, rather it prescribed sanctions, upon review by a state administrative agency, the making of false statements about proposed ballot initiatives.¹⁰⁰ Two “grassroots advocacy organizations” opposing certain school-funding levies attacked the constitutional propriety of Minnesota’s false political statement law.¹⁰¹ Among the provisions that drew the ire of the appellants

95. *Alvarez*, 132 S. Ct. at 2556 (“I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve.”).

96. See *281 Care Comm.*, 766 F.3d at 774. The 8th Circuit initially remanded to the district court upon finding complainants had demonstrated standing and ripeness.

97. *Id.* at 782.

98. See *Rickert*, 168 P.3d at 843 (Madsen, J., dissenting).

99. See *Marks*, 430 U.S. at 193; see also *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring).

100. See *281 Care Comm.*, 766 F.3d at 777.

101. *Id.*

were the ability of any person to lodge a complaint, and the only enforcement mechanism being a mandatory misdemeanor prosecution upon referral by the agency.¹⁰² The district court determined that the appropriate level of scrutiny was intermediate, as espoused by Justice Breyer in *Alvarez*.¹⁰³ Nevertheless, the district court elected to use a strict scrutiny analysis as a means of demonstrating that the Minnesota statute was constitutional even against the heaviest scrutiny, and upheld the law.¹⁰⁴

The Eighth Circuit disagreed with the district court's understanding of *Alvarez*, stating that *Alvarez* dealt with non-political statements and was thus was not controlling in the present case.¹⁰⁵ Applying strict scrutiny, the court found that "no amount of narrow-tailoring" could support the statute in its current form. The court largely swept aside the degree of "legitimate" state interest as irrelevant, as even if that element was satisfied the statute still did not pass constitutional muster.¹⁰⁶ Specifically, the court viewed the statute as simultaneously overbroad and under-inclusive, and it was not the least-restrictive means of attaining its alleged goal of fair and informed elections.¹⁰⁷ The "anyone-can-report" aspect of the statute was ripe for mischief, and even though "commonsense" would dictate that this law would help preserve the integrity of the election process, "commonsense" is not enough to overcome the rigors of strict scrutiny.¹⁰⁸ Furthermore, counter-speech in the form of correcting falsehoods by supplying truthful information could be an equal or greater force for protecting the democratic process.¹⁰⁹

281 Care was not an anomaly. Applying strict scrutiny, the Supreme Judicial Court of Massachusetts struck-down the State's own false political statement law in *Commonwealth v. Lucas*.¹¹⁰ There, a political action committee published

102. See *281 Care Comm.*, 766 F.3d at 778 (holding MINN. STAT. ANN. § 211B.06 (West 2014) unconstitutional).

103. See *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011).

104. *281 Care Comm.*, 766 F.3d at 779.

105. *Id.* at 783 ("*Alvarez* is not the ground upon which we tread.>").

106. *Id.* at 787 ("We concede that regulating falsity in the political realm definitely exemplifies a stronger state interest than, say, regulating the dissemination and content of information generally . . .").

107. *Id.* at 788.

108. *Id.* at 790.

109. *Id.* at 793.

110. *Lucas*, 34 N.E.3d at 1245.

brochures that contained verifiably false statements against an incumbent state representative, accusing him of personally making \$140,000 from taxpayer money while “protecting sex-offenders.”¹¹¹ Reprising a salient criticism of modern false political statement rulings, the Supreme Judicial Court of Massachusetts took serious exception to the statute’s reporting mechanism, which allowed any party to file a complaint.¹¹² Furthermore, the statute did not apply exclusively to false political statements in public, as it was equally applicable to “friends engaging in a spirited political discussion in a local pub.”¹¹³ The statute could likewise be used for political gamesmanship just as easily as for its intended purpose.¹¹⁴ Facing the label of “presumptively invalid” stemming from strict scrutiny, the law was deemed unconstitutional under the First Amendment.¹¹⁵ The Court concluded by offering the now proverbial judicial statement that the cure for false speech is true speech.¹¹⁶

IV. OHIO’S SAGA AS A MICROCOSM OF THE STRUGGLE WITH FALSE POLITICAL STATEMENT LAWS

With actual malice now relegated to a supporting role in false political statement jurisprudence, a brief case study serves to further demonstrate the evolution of these laws. Ohio serves as a model example, due to its long-line of false political statement cases and its quadrennial role as America’s political bellwether.¹¹⁷

A. First Iteration of ORC; *Pesttrak & McIntyre*

The appropriate starting point for Ohio’s history is *Pesttrak v. Ohio Elections Comm’n*, decided by the Sixth Circuit in 1991.¹¹⁸ Walter Pesttrak was a candidate for the office of Trumbull County Commissioner, seeking to unseat the

111. *Id.*

112. *Id.* at 1247.

113. *Id.* at 1255 (referencing *McIntyre*, 514 U.S. at 351).

114. *Id.* at 1248.

115. *Id.*

116. *Lucas*, 34 N.E.3d at 1256.

117. See generally Chris Cillizza, *Why Ohio is the most important state in the country*, WASH. POST: THE FIX (Oct. 11, 2012), <https://www.washingtonpost.com/news/the-fix/wp/2012/10/11/why-ohio-is-the-most-important-state-in-the-country/> (discussing Ohio’s special role in presidential elections).

118. See generally *Pesttrak v. Ohio Elections Comm’n* 926 F.2d 573 (6th Cir. 1991).

incumbent holding the same position.¹¹⁹ Pestrak placed a number of newspaper advertisements accusing the incumbent of “various illegal acts,” which the court found to be demonstrably false upon review.¹²⁰ At the time, the Ohio Revised Code (“ORC”) stated that no person, during the conduct of a political campaign, using campaign material, shall “[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same is false or with reckless disregard of whether it was false or not, concerning a candidate that is designated to promote the election, nomination, or defeat of the candidate.”¹²¹ This largely tracked the language of the “actual malice” standard promulgated in *New York Times v. Sullivan*.¹²²

The ORC then listed several subsections prescribing the means of enforcement of the statute. Among these was the authorization of the Ohio Election Commission to investigate, hold hearings, and make preliminary findings as to whether the substantive portion of the statute was violated.¹²³ Upon finding a violation, the Commission was then authorized to levy a fine of less than \$1,000, present a county prosecutor with the Commission’s findings, and in select instances issue cease-and-desist orders against the violator.¹²⁴ In the present case, the Commission held a hearing, found probable cause that Pestrak had violated the statute, and turned its findings over to an appropriate prosecutor.¹²⁵ Pestrak subsequently lost the election before any formal state prosecution was initiated.¹²⁶

The district court, via summary judgement, struck down all of the statute’s enforcement mechanisms as unconstitutional, specifically as “prior restraint on constitutionally protected speech” and liability on less than clear-and-convincing evidence.¹²⁷ At the Sixth Circuit, the court immediately refuted the main proposition of Pestrak and amicus ACLU’s brief; that the statute in its

119. *Id.* at 575.

120. *Id.* at 575-76.

121. *Pestrak*, 926 F.2d at 575 (quoting OHIO REV. CODE ANN. § 3599.091(B)(10) (West 1986) (repealed 1995)).

122. *See generally Sullivan*, 376 U.S. at 279.

123. *Pestrak*, 926 F.2d at 576.

124. *Id.*

125. *Pestrak*, 926 F.2d at 576.

126. *Id.*

127. *Id.*

entirety was unconstitutional as it involved content-based prohibitions on speech.¹²⁸ Relying on *New York Times v. Sullivan*, the court supported the substantive portion of the statute as passing constitutional muster due to its “knowing or reckless” mens rea requirements, which in the court’s view were exempt from constitutional protection as a category.¹²⁹

Ohio’s laws, however, did not emerge unscathed. Two of the enforcement mechanisms, the levying of fines and issuance of cease-and-desist orders, were found to be constitutionally deficient.¹³⁰ First, no fines involving arguably First Amendment considerations may be levied, except upon presentation of clear-and-convincing evidence.¹³¹ Second, an alleged violator of the statute had no obvious recourse to the Commission’s cease-and-desist power; there was no opportunity for judicial review.¹³² With these two exceptions, the Sixth Circuit upheld the remaining portions of the ORC.¹³³

Four years later, the ORC was challenged again. This time, however, it was the Supreme Court of the United States who would evaluate the constitutional propriety of Ohio’s false political statement statutes.¹³⁴ In *McIntyre v. Ohio Elections Comm’n*, the core issue was an auxiliary aspect of Ohio’s law, which forbid the dissemination of anonymous leafletting involving “anonymous campaign literature.”¹³⁵ After a winding trip through Ohio’s state courts, ultimately the Ohio Supreme Court upheld the conviction and fine of the petitioner for anonymous leafletting which opposed a school-levy.¹³⁶ The Supreme Court of the United States disagreed, stating that the value of anonymous literature entering the “marketplace of ideas,” political in nature or otherwise, “unquestionably outweighs any public interest in requiring disclosure as condition of entry.”¹³⁷ The Court further described the issue as one of “pure

128. *Id.* at 577.

129. *Id.*

130. *Id.* at 578.

131. *Pesttrak*, 926 F.2d at 578.

132. *Id.*

133. *Id.* at 580.

134. *See generally McIntyre*, 514 U.S. at 334.

135. *Id.* at 336.

136. *Id.* at 339.

137. *Id.* at 342.

speech,” which required “exacting” scrutiny (essentially strict scrutiny) and held that it was not narrowly-tailored to serve an overriding state interest.¹³⁸ Somewhat curiously given later developments, the Court appeared to at least acknowledge the aggregate value of Ohio’s other false political statement laws, stating that these were alternative means of preserving the state’s interest in assuring fair elections.¹³⁹ After the ruling, the 1986 version of the ORC was amended to reflect the ruling without any other major substantive changes, and stood until being struck-down in its entirety by the Sixth Circuit in 2016.¹⁴⁰

B. Susan B. Anthony List and The Demise of Ohio’s False Political Statement Laws

A case, which no Ohio court or the Sixth Circuit was initially willing to hear on the merits, eventually proved to be the downfall of Ohio’s false political statement laws. In 2010, Steven Driehaus was a member of the United States’ House of Representatives for Ohio’s First District. Prior to the beginning of his re-election campaign, a pro-life political organization, Susan B. Anthony List (“SBA”), created and shopped an advertisement claiming Driehaus supported “tax-payer funded abortions” under the Affordable Care Act.¹⁴¹ Driehaus’ counsel, after becoming aware of SBA’s intention to contract with a billboard company to publish the advertisement, approached the publisher who in-turn agreed not to display the advertisement.¹⁴² Despite the incident, SBA subsequently ran the ad through other means.¹⁴³

Approximately one month before the election took place, Driehaus filed a formal complaint with the Ohio Election Commission (“OEC”) accusing SBA of violating Ohio’s false political statement laws under the ORC.¹⁴⁴ The penalty was a misdemeanor that included up to six-months imprisonment, a \$5,000 fine, or

138. *Id.* at 345-46 (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)).

139. *Id.* at 348 (“Ohio does not, however, rely solely on § 3599.09(A) to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns.”).

140. *See generally* OHIO REV. CODE ANN. § 3517.21 (West 2016); *see also Susan B. Anthony List*, 814 F.3d at 466 (striking down Ohio’s 1995 amended statute).

141. *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 412, 414 (S.D. Ohio 2011).

142. *Id.*

143. *Id.*

144. *Id.*

both.¹⁴⁵ At the probable-cause hearing, SBA claimed the statement was “true”, after which the OEC voted 2-1 finding probable cause that SBA had violated one of the statutes, and recommended a hearing before the full commission.¹⁴⁶ After a brief but impressive whirlwind of legal maneuvering in the district and appellate courts, Driehaus ultimately withdrew his complaint after losing his re-election bid.¹⁴⁷

After withdrawal of the OEC proceedings, the Ohio Southern District Court lifted the stay, and SBA subsequently withdrew its complaint.¹⁴⁸ At this point, the Coalition Opposed to Additional Spending and Taxes (“COAST”), another political action committee critical of Driehaus, took up SBA’s mantle as plaintiff.¹⁴⁹ COAST asserted its desire to engage in speech similar to SBA, but was “fearful” of being subjected to SBA’s treatment and held-off on disseminating certain campaign materials.¹⁵⁰ The district court dismissed COAST’s now consolidated, amended complaint challenging the constitutionality of Ohio’s laws as failing on ripeness and standing grounds.¹⁵¹ In the district court’s view, COAST’s “alleged subjective chill” was too conjectural to be adjudicated, and furthermore there was no “real and immediate threat of prosecution” as COAST maintained what it had intended to disseminate was true.¹⁵² The district court concluded by offering up another significant hurdle COAST was to face; the speech it claimed was being “chilled” warranted no constitutional protection if it were, in fact, false speech.¹⁵³ On appeal, the Sixth Circuit affirmed the district court’s ruling in its entirety.¹⁵⁴

145. See *Susan B. Anthony List*, 134 S. Ct. at 2339.

146. *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

147. *Id.* at 415 (quoting the Sixth Circuit denial of injunction) (“SBA List clearly has not been enjoined from any speech, and all indications are that its speech continues to be robust.”).

148. *Id.*

149. *Id.*

150. See *id.* at 415-16.

151. *Id.* at 420 (referencing test as laid out in *Insomnia, Inc. v. City of Memphis, Tenn.*, 278 Fed. App’x 609, 612 (6th Cir. 2008)).

152. *Susan B. Anthony List*, 805 F. Supp. 2d at 420.

153. *Id.* at 422 (“Ohio’s false statement statute does not encroach upon any constitutionally protected speech.”).

154. *Susan B. Anthony List v. Driehaus*, 525 Fed. App’x 415, 416 (6th Cir. 2013).

COAST, undeterred by the trial and appellate court's refusal to hear the case on the merits, applied for and was granted certiorari in 2014. Justice Thomas wrote the opinion of a unanimous court, stating that COAST's claims had sufficient "ripeness" and Article III standing to proceed to adjudication.¹⁵⁵ In particular, COAST's intent to engage in its stated course of conduct rendered the threat of enforcement sufficiently imminent.¹⁵⁶ The opinion, while not deciding the case on its merits, appeared to offer a great degree of skepticism regarding Ohio's laws generally. Justice Thomas lamented that Ohio's law "sweeps broadly," and suggested that the "any person" language of the statute could be a tool of harassment wielded by political rivals.¹⁵⁷ Furthermore, the statutes, by mere existence, forced individuals to choose between "refraining from core political speech" and being subjected to lengthy and expensive OEC administrative proceedings, regardless of whether the case is ever presented in a court of law.¹⁵⁸

Now squarely faced with the issue, the Southern District of Ohio ruled on the merits. Holding Ohio's false political statement laws were content-based restrictions subject to strict scrutiny, the district court granted COAST summary judgment, rendering the laws unconstitutional and permanently enjoining the OEC from enforcement.¹⁵⁹ On appeal before the Sixth Circuit for the second time, the appellate court held that its previous analytical framework under *Pesttrak* was no longer valid due to intervening Supreme Court decisions.¹⁶⁰ Furthermore, the Sixth Circuit held that the 1986 version of the statute evaluated in *Pesttrak* was "alleviate[d]" to some degree by different enforcement mechanisms.¹⁶¹ Specifically, the 1986 version of the ORC did not provide the OEC with power to issue probable-cause findings.¹⁶² Instead, the

155. See *Susan B. Anthony List*, 134 S. Ct. at 2334, 2337, 2347.

156. *Id.* at 2343.

157. See *id.* at 2337, 2344.

158. *Id.* at 2347 ("[Ohio's statute is] forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.").

159. See *Susan B. Anthony List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014).

160. *Susan B. Anthony List*, 814 F.3d at 471.

161. See *id.*

162. *Id.*

OEC had to wait until investigations were complete before it could offer a ruling.¹⁶³

The Sixth Circuit then turned to *Alvarez* to reject the notion that false speech possessed no categorical First Amendment protection, despite other courts' apprehensions as to the degree to which *Alvarez* was applicable to false political statement jurisprudence.¹⁶⁴ No longer able to shield Ohio's false political statement laws with the actual malice standard, the court held that the laws regulated political speech, and therefore core-speech, which is evaluated under a strict scrutiny standard.¹⁶⁵

Under a strict scrutiny standard, as the Sixth Circuit noted, the laws at issue must: "(1) serve a compelling state interest and (2) [be] narrowly tailored to achieve that interest."¹⁶⁶ While largely conceding that Ohio's interest in protecting voters from the "confusion and undue influence" of false political advertising was compelling, the second prong of strict scrutiny analysis was unsatisfied.¹⁶⁷ The Sixth Circuit found the laws were deficient due to lack of adequate screening processes to weed out frivolous complaints, applicability to non-material statements, liability of media and other intermediaries, and general over- and under-inclusiveness.¹⁶⁸ Accordingly, the court held that the laws were unconstitutional and struck them down in their entirety.¹⁶⁹

V. CONSISTENT STANDARDS, CONSISTENT CRITICISMS, AND IMPROVEMENT

Given the veritable mountain of negative judicial opinion regarding false political statement laws over the last several years, one might reasonably question how these laws are salvageable—if even worthy of the effort. To this end, I propose a new formulation that preserves the valuable aspects of false

163. *Id.*

164. *See id.* at 471-72 (referencing the Supreme Court's rejection in *Alvarez* of the "categorical rule . . . that false statements receive no First Amendment protection."). *But see* 281 Care Comm., 766 F.3d at 779 (reasoning that the *Marks* test regarding fragmentation would indicate that the concurring opinion of Justice Breyer is the appropriate standard if *Alvarez* has any precedential value for false political statement cases).

165. *See id.* at 473.

166. *Susan B. Anthony List*, 814 F.3d at 473.

167. *See id.*

168. *See id.* at 474.

169. *Id.* at 476.

political statement laws, while mitigating or eliminating many of the negative qualities. Additionally, while it appears that strict scrutiny is the “go-to” for false political statement laws in the current judicial climate, this may not be the appropriate standard to apply. Until the Supreme Court weighs in definitively, the prospect of intermediate scrutiny must continue to be entertained as the possible standard for false political statement laws.

A. False Political Statement Laws Serve a Valuable Function

Outright falsehoods have little to no value from a utilitarian perspective.¹⁷⁰ Until recently, it was a relatively common presumption that First Amendment safeguards did not extend to false statements made with either knowledge of untruthfulness or a reckless disregard as to whether the statement was true.¹⁷¹ A politically-motivated false message, done for the purpose of persuading a voter to cast a ballot in a particular way, works real and tangible harm to the democratic process. First and foremost, a voter who is moved by the false message is now operating with faulty knowledge of a candidate or issue, and in turn is more likely to vote in a fashion that does not reflect the individual’s actual will or values.¹⁷² Moreover, the person who disseminates the false political statement can more easily exploit that vulnerability if there is no real threat of sanction.¹⁷³ One can easily envision the exorbitant amounts of money to be spent on crafting advertisements that are patently false.

It is incumbent upon citizens to make informed democratic choices to ensure the government’s actions are consistent with their values. Even in a hypothetical climate where well-funded political organizations are largely given *carte blanche* to disseminate whatever information suitable to their particular ends, the public has a duty to inform itself of a political matter’s truth, irrespective of any difficulty. Nonetheless, it is fair to assume that a weary public who is already skeptical – if not outright cynical – of information proffered during election season would be even more alienated in a system that does not

170. See *Garrison*, 379 U.S. at 75; see also *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring) (explaining that false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas).

171. See *Rickert*, 168 P.3d at 833-34 (Madsen, J., dissenting); see also *Alvarez*, 132 S. Ct. at 2541.

172. See Colin B. White, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J. L. & TECH. 1, 5 (2009); see also *Rickert*, 169 P.3d at 842 (Madsen, J., dissenting).

173. See *Rickert*, 169 P.3d at 833-34 (Madsen, J., dissenting).

formally punish these sorts of falsehoods.¹⁷⁴ The proposition that “more speech” could “cure” false speech in a climate where many voters are already tired, confused, and mistrustful of media fact-checking is not entirely tenable.¹⁷⁵

A major component of having false political statement laws is symbolic. Calculated falsehoods do not advance the democratic process, and laws usually serve as a formal expression of a society’s values and ideals. Though imperfect, false political statement laws deter some of the worst kinds of misinformation engineering—those that subvert an informed electorate.¹⁷⁶ A well-crafted law would only punish the most egregious falsehoods and serve as a looming reminder to those who would otherwise be inclined to engage in behavior that substantially frustrates the purpose of informed elections.

B. A Proper Analytical Framework?

Alvarez is a less-than-perfect precedent to evaluate false political statement laws.¹⁷⁷ The factual background in *Alvarez* dealt with false statements about military honors under federal law; it was not explicitly political and certainly not concerned with the electoral process.¹⁷⁸ Moreover, the *Marks* standard, as observed by the Eighth Circuit, casts some doubt on whether the majority or concurring opinion is binding.¹⁷⁹ Additionally, at least one circuit has openly stated *Alvarez* is not the framework to evaluate false political statement laws.¹⁸⁰ Absent some future guidance from the Supreme Court, courts will likely continue to struggle and stretch *Alvarez* to interpret false political statement statutes.

174. *Id.* at 842.

175. See Doug Heye, *How Media Fact-Checking Can Stoke Voters’ Cynicism*, WALL ST. J. (Aug. 17, 2016), <http://blogs.wsj.com/washwire/2016/08/17/how-media-fact-checking-can-stoke-voters-cynicism/>.

176. See *Rickert*, 169 P.3d at 842 (Madsen J., dissenting).

177. See 281 Care Comm., 766 F.3d at 783 (8th Cir. 2014) (“[A]lthough *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech . . . [this is the reason why] *Alvarez* is not the ground upon which we tread.”).

178. See *id.* at 782-83.

179. See *id.* at 779.

180. See *id.* at 783 (“[A]lthough *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech . . . [this is the reason why] *Alvarez* is not the ground upon which we tread.”).

Despite questionable binding authority, *Alvarez* does indicate a number of reference points for interpreting aspects of false political statement laws. False statements are not, as a category, exempt from First Amendment protection.¹⁸¹ “Actual malice” has implicitly been relegated to a factor role.¹⁸² Given this, courts will continue to apply some scrutiny standard to false political statement laws because they implicate some constitutionally-protected content.¹⁸³ If a court applies a strict scrutiny standard, the law must (1) serve a compelling governmental interest, and (2) be narrowly tailored to achieve that interest.¹⁸⁴ It is highly doubtful that any current laws implicating speech – particularly those that deal with political speech – would survive that demanding standard.¹⁸⁵ Alternatively, “intermediate” or “proportionality” scrutiny is a far more forgiving analytical framework.¹⁸⁶ Under that framework, the law in question must have governmental utility that outweighs any perceived infringement on speech-related rights, essentially a cost-benefit analysis.¹⁸⁷

C. A Few Proposals

Even though Justice Breyer in his *Alvarez* concurrence expressed some apprehension as to whether political statements could survive even a more lenient standard, his opinion – and many other recent cases – indicate what aspects of false political statement laws are particularly objectionable.¹⁸⁸ If any variation of these laws are to withstand judicial scrutiny, several common features of false political statement laws must be excised.

181. See *Alvarez*, 132 S. Ct. at 2545; see also *Susan B. Anthony List*, 814 F.3d at 471-72.

182. See *Alvarez*, 132 S. Ct at 2545 (referencing *Garrison*, 379 U.S. at 75 (1964)).

183. *Id.* at 2552 (Breyer, J., concurring).

184. *Susan B. Anthony List*, 814 F.3d at 473.

185. See *Alvarez*, 132 S.Ct. at 2552 (Breyer, J., concurring).

186. See *id.*

187. *Id.*

188. See *Susan B. Anthony List*, 814 F.3d at 475 (“Ohio’s laws apply to *all* false statements, including non-material statements.”); see also *Lucas*, 34 N.E.3d at 1255 (“[the Massachusetts statute] reaches not only those statements that are widely disseminated through commercial advertisement, but also those exchanged between two friends engaged in a spirited political discussion in a local pub.”); see also *Rickert*, 168 P.3d at 830 (“there is no requirement that the statements subject to sanction under [the statute] be of the kind that tend to cause harm to an individual’s reputation.”).

Though actual malice is no longer the golden standard by which courts evaluate false political statement laws, it remains an indispensable requirement.¹⁸⁹ By requiring that individuals be only punished for knowing or reckless falsehoods, actual malice heavily reduces the potential fear that individuals would refrain from expressing political opinions that are honestly held or even doubted to some extent.¹⁹⁰ But this can be taken even further to reduce concerns about “chilling” speech.¹⁹¹ The statutes could require a specific intent for a violation. For example, an individual must make the false statement knowingly or recklessly *with the purpose of misinforming the public regarding a ballot measure, voter eligibility, polling times or locations, or by defaming a candidate for public office*. Some states use vaguer, open-ended language toward this end.¹⁹² It is not enough that the party intended to affect the outcome of the election because that element is presumed by the very act of widely disseminating political statements. This requirement would likely serve to punish only the most serious violations and more readily promote the purpose of the statutes—ensuring fair and informed elections. The statutes could further prescribe that the alleged violation be proven by clear-and-convincing evidence, which many but not all false political statement laws do explicitly.¹⁹³

But there is more that could be done. Some statutes do not add the qualifier that the statements are material in nature.¹⁹⁴ With this omission, petty and insignificant false statements are theoretically drawn within the purview of statutes just the same as those that serve to significantly misinform the public and disrupt the election process.¹⁹⁵ Of particular concern is that many statutes at least implicitly are applicable to non-public statements.¹⁹⁶ Besides any

189. See *Sullivan*, 376 U.S. at 271-72 (referring to “breathing space”); see also *Alvarez*, 132 S. Ct. at 2553 (Breyer, J. concurring) (“Hence, the Court emphasizes *mens rea* requirements that provide ‘breathing room’”).

190. See *Sullivan*, 376 U.S. at 279-80.

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

192. See, e.g., WISC. STAT. ANN. § 12.05 (West 2015) (punishing a false statement that “is intended or tends to affect voting of an election.”); see also OHIO REV. CODE § 2517.21(A) (West 2013) (requiring “knowingly and with the intent to affect the outcome of such campaign”).

193. See, e.g., *Pesttrak*, 926 F.2d at 576.

194. See *Susan B. Anthony List*, 814 F.3d at 473

195. *Id.*

196. See, e.g., *Lucas*, 34 N.E.3d at 1255 (“[the Massachusetts statute] reaches not only those statements that are widely disseminated through commercial advertisement, but also those exchanged between two friends engaged in a spirited political discussion in a local pub.”).

imaginary justifications, this lends to the appearance of the government engaging in the paternalistic and “Orwellian” function of declaring what constitutes the truth, as noted by Justice Kennedy in *Alvarez*.¹⁹⁷ While it is highly doubtful that few, if any, prosecutors would even entertain the idea of prosecuting a person who lied about a political candidate in their own home, the very notion that such prosecution is even possible is unacceptable.

Returning to *New York Times v. Sullivan*, Justice Black reasoned in his dissent that denial of recovery to the Alabama Commissioner was proper due to the “absolute, unqualified” immunity of The New York Times as a media outlet to criticize political candidates.¹⁹⁸ This warrants revisiting. Many false political statement statutes insulate media and advertisers, so long as the media and advertisers are not themselves the ones engineering the false statements.¹⁹⁹ Numerous courts have pointed directly to the inclusion or omission of these provisions.²⁰⁰ As such, a false political statement law should include provisions that are careful to avoid “sweep[ing] broadly” and targeting intermediaries.²⁰¹ All of these factors and considerations needlessly raise the degree to which speech-related rights are adversely impacted and hampers the ability of the statutes as a whole to withstand any form of cost-benefit analysis.

Though peripheral to the ability of false political statement laws to survive judicial scrutiny, an exercise in direct democracy could serve to test whether the statutes truly reflect the will of the public. The Sixth Circuit’s decision in *Susan B. Anthony List* abrogated Ohio’s statute, and as the most recent state to lose its false political statement laws, it is a prime candidate for consideration.²⁰² Ohio is one of twenty-four states that allows for some form of direct vote or ballot initiative to introduce new laws.²⁰³ As such, it is possible that a new false

197. See *Alvarez*, 132 S. Ct. at 2547 (referencing the book *Nineteen Eighty-Four* by George Orwell).

198. See *Sullivan*, 376 U.S. at 293 (Black, J., concurring).

199. See, e.g., *281 Care Comm.*, 766 F.3d at 778 (referencing Minnesota’s statute); see also *Susan B. Anthony List*, 814 F.3d at 476 (referencing Ohio’s statute); see also Samuel S. Sadeghi, *Election Speech and Collateral Censorship at the Slightest Whiff of Legal Trouble*, 63 UCLA L. REV. 1472, 1476 (2016).

200. *281 Care Comm.*, 766 F.3d at 778; *Susan B. Anthony List*, 814 F.3d at 476.

201. See, e.g., *Susan B. Anthony List*, 134 S. Ct. at 2344 (“The Ohio false statement law sweeps broadly”).

202. See *Susan B. Anthony List*, 814 F.3d at 466.

203. *Initiative and Referendum States*, NAT’L CONGRUENCE OF STATE LEGISLATURES (Dec. 2015), <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>.

political statement law could be put to a vote after obtaining 1,000 signatures of registered state voters.²⁰⁴ After garnering the prerequisite signatures, the Ohio Attorney General must make a “fair and truthful” assessment and certification to Ohio’s Secretary of State.²⁰⁵

This is only the initial step on a difficult path to a state-wide ballot, but nonetheless it could prove a valuable exercise in gauging public opinion. There is, however, an irony in the fact that if a false political statement law proposal were ever go to a vote in Ohio, it could be knowingly and recklessly lied about with virtual impunity.

VI. OUTLOOK & CONCLUSION

The next several years will be critical for the survival of false political statement laws. After several key circuit and state supreme court decisions, it appears judicial attitudes towards the statutes are growing increasingly unfavorable. It is likely that as more invalidations occur, the prospect of any court upholding the statutes will wane as the negative holdings reach a critical mass. However, it should be cautioned that the Supreme Court has yet to take a false political statement case on constitutional merits in a number of years, and the probability of doing so by its own volition or spurred by a circuit-split is certainly possible. The Court may also wish to correct the “fragmented” and unclear precedential quality of *Alvarez*.

Regardless of what comes next for the statutes currently on the books, this note has sought to explore the history and various criticisms of false political statement laws in their current iterations. A significant portion of current State false political statement laws do not precisely achieve the goal of protecting the fairness and integrity of the electoral process. Irrespective of the scrutiny standard, certain aspects of false political statement laws are indispensable. These include the requirements of clear-and-convincing evidence, reservation for material statements, and insulating media and advertisers. More auxiliary suggestions could further alleviate collateral harm and improve utility. Finally, if these laws are truly reflective of public will, a form of direct democracy could shed light on what direction, if any, false political statement laws should have going forward.

204. *Ballot Initiative and Referendum Processes*, OHIOATTORNEYGENERAL.GOV, <http://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives> (last visited Aug. 15, 2016).

205. *Id.*