

5-15-2013

Ask Me No Questions and I'll Tell You No Lies: The First Amendments and Falsehoods in Ballot Question Campaigns

Michelle Roberts

J.D., Loyola Law School, 2013

Recommended Citation

Michelle Roberts, *Ask Me No Questions and I'll Tell You No Lies: The First Amendments and Falsehoods in Ballot Question Campaigns*, 33 Loy. L.A. Ent. L. Rev. 37 (2013).

Available at: <http://digitalcommons.lmu.edu/elr/vol33/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

***ASK ME NO QUESTIONS AND
I'LL TELL YOU NO LIES¹:***

**THE FIRST AMENDMENT AND FALSEHOODS
IN BALLOT QUESTION CAMPAIGNS**

*Michelle Roberts**

American voters have come to expect exaggeration, distortion, and mudslinging in political campaigns, but do campaigners have a First Amendment right to blatantly lie—to simply make up false statistics and “facts”? A recent appellate court suggests that lying is permissible in initiative and referendum campaigns. However, providing constitutional protection for such statements undermines the most compelling justification for the right to free speech: preservation of enlightened self-government. Voters cannot be expected to govern wisely or in accordance with their consciences when they are subjected to a barrage of lies. The Supreme Court already recognizes discrete areas where free speech rights are curtailed because of significant personal or public interests in protecting reputations, consumer choices, and governmental processes. Likewise, the Court should recognize that falsehoods told with actual malice in ballot campaigns are exempt from First Amendment protection.

1. BING CROSBY AND THE ANDREWS SISTERS, *Ask Me No Questions (And I'll Tell You No Lies)*, on THEIR COMPLETE RECORDINGS TOGETHER (MCA Records 1996). A version of the phrase seems to have originated with “Ask me no questions, and I’ll tell you no fibs” in Act III of Oliver Goldsmith’s 1773 play, SHE STOOPS TO CONQUER. E.g., JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 401 (10th ed. 1919). The phrase has proved popular with generations of musicians. E.g., B.B. KING, *Ask Me No Questions*, on INDIANOLA MISSISSIPPI SEEDS (MCA 1970); LYNRYD SKYNYRD, *Don’t Ask Me No Questions*, on SECOND HELPING (MCA 1974).

* J.D. Candidate, May 2013, Loyola Law School. With whole-hearted thanks to Professors John T. Nockleby and Justin Levitt, both of whom generously offered advice and insight in the drafting process, and to the editors and staff of *Loyola of Los Angeles Entertainment Law Review*, who tirelessly combed through the details to get the article publication-ready.

I. INTRODUCTION

When Pinocchio failed to heed warnings that he should not lie, the consequences were swift and undeniable.² Pinocchio's animated nose tip jutted ever farther from his face as branches sprouted from it.³ "You see, Pinocchio, a lie keeps growing and growing until it's as plain as the nose on your face," the fairy explained.⁴ Unfortunately, in the world of adult politics, the lies are not so plain. A substantial number of voters admitted to encountering false information in the previous election cycle, and despite this knowledge, poll data indicated "strong evidence that voters were substantially misinformed" about many prominent election issues.⁵

In an effort to deter lying in political campaigns, at least sixteen states have enacted laws making it illegal to make or publish false statements intended to influence political campaigns ("falsehood statutes").⁶ While the statutes do not all explicitly prohibit false statements "of fact," it is implicit that the regulations apply to facts since those are the only kinds of statements that would be provably false.⁷ Of the sixteen states with falsehood statutes, nine specifically outlaw such statements in ballot

2. See *Pinocchio (1940)*, IMDB, <http://www.imdb.com/media/rm1513393664/tt0032910> (last visited Mar. 9, 2013) (showing his lengthy nose as a result of lying).

3. *Id.*

4. *Memorable Quotes for Pinocchio (1940)*, IMDB, <http://www.imdb.com/title/tt0032910/quotes> (last visited Mar. 9, 2013).

5. CLAY RAMSAY ET AL., MISINFORMATION AND THE 2010 ELECTION: A STUDY OF THE US ELECTORATE 3-4 (2010), available at http://www.worldpublicopinion.org/pipa/pdf/dec10/Misinformatio_n_Dec10_rpt.pdf.

6. *E.g.*, COLO. REV. STAT. ANN. § 1-13-109 (West 2011); FLA. STAT. ANN. § 104.271 (West 2011); LA. REV. STAT. ANN. § 18:1463 (2011); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2011); MINN. STAT. ANN. § 211B.06 (West 2011); MISS. CODE ANN. § 23-15-875 (West 2001); MONT. CODE ANN. § 13-35-301 (2011); N.C. GEN. STAT. § 163-274 (2011); N.D. CENT. CODE § 16.1-10-24 (2011); OHIO REV. CODE ANN. §§ 3517.21-3517.22 (LexisNexis 2011); OR. REV. STAT. ANN. § 260.532 (West 2011); TENN. CODE ANN. § 2-19-142 (2011); UTAH CODE ANN. § 20A-11-1103 (West 2011); WASH. REV. CODE § 42.17A.335 (2012); W. VA. CODE ANN. § 3-8-1 (West 2011); WIS. STAT. ANN. § 12.05 (West 2011).

7. *E.g.*, *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981) (finding that a precursor statute to Minnesota Statute Section 211B.06 was directed at false factual statements and not at extreme inferences such as voting "no" on the budget demonstrates lack of support for any of the individual items in the budget); *B.U.I.L.D. Citizen Comm.*, No. 4-6385-17049-CV, 2006 WL 954093, at *2 (Minn. Office of Admin. Hearings Jan. 10, 2006) (requiring evidence of factual misrepresentation before determining whether there is a prima facie showing for a Minnesota Statute Section 211B.06 complaint).

question campaigns.⁸ While most of the prohibitions have been on the books for years, recent court rulings have raised questions about whether such prohibitions are constitutional.⁹

The rulings suggest that partisans in ballot campaigns have a constitutional right to blatantly lie, regardless of the consequences to the electoral process.¹⁰ An Eighth Circuit Court of Appeals ruling on a Minnesota statute prohibiting falsehoods told with actual malice in initiative and referendum campaigns illustrates this point.¹¹ In *281 Care Committee v. Arneson*, the Eighth Circuit determined that, as a content-based regulation,¹² Minnesota Statute Section 211B.06 should be analyzed under “strict scrutiny.”¹³ Because the Minnesota statute failed to survive strict scrutiny, it was declared unconstitutional and unenforceable for all practical purposes.¹⁴ The Minnesota challenge was not the only one to such laws; a challenge to a substantively similar law in Ohio was filed on the heels of the appellate court’s *281 Care Committee* decision.¹⁵

8. *E.g.*, COLO. REV. STAT. ANN. § 1-13-109 (West 2011); LA. REV. STAT. ANN. § 18:1463 (2011); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2011); MINN. STAT. ANN. § 211B.06 (West 2011); N.D. CENT. CODE § 16.1-10-24 (2011); OHIO REV. CODE ANN. §§ 3517.21–3517.22 (LexisNexis 2011); OR. REV. STAT. ANN. § 260.532 (West 2011); UTAH CODE ANN. § 20A-11-1103 (West 2011); WIS. STAT. ANN. § 12.05 (West 2011). Another seven states have similar prohibitions directed at making false statements with regard to candidates only. *E.g.*, FLA. STAT. ANN. § 104.271 (West 2011); MISS. CODE ANN. § 23-15-875 (West 2001); MONT. CODE ANN. § 13-35-301 (2011); N.C. GEN. STAT. § 163-274 (2011); WASH. REV. CODE. § 42.17A.335 (2012); W. VA. CODE ANN. § 3-8-1 (West 2011); TENN. CODE ANN. § 2-19-142 (2011).

9. *E.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012); *COAST Candidates PAC v. Ohio Elections Comm’n*, No. 1:11cv775, 2012 WL 4322517 (S.D. Ohio Sept. 20, 2012). The latter case was dismissed due to lack of standing. *COAST Candidates*, 2012 WL 4322517, at *5.

10. *See 281 Care Comm.*, 638 F.3d at 633–34 (finding that “knowingly false campaign speech” is not “outside the protections of the First Amendment”).

11. *281 Care Comm.*, 638 F.3d. 621.

12. 16B C.J.S. *Constitutional Law* § 827 (2011) (defining content-based regulation as “laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed”).

13. *281 Care Comm.*, 638 F.3d at 633–34. Strict scrutiny test requires a compelling state interest and a narrowly tailored statute to serve that interest for a regulation to be deemed constitutional. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

14. *281 Care Comm.*, 638 F.3d 621; *see also Playboy Entm’t Grp.*, 529 U.S. at 818 (noting that content-based speech regulations will rarely be found permissible because they risk silencing dissent and stifling individuality).

15. Verified Complaint for Injunctive and Declaratory Relief, *COAST Candidates PAC v. Ohio Elections Comm’n*, No. 1:11cv775, 2012 WL 4322517 (S.D. Ohio Sept. 20, 2012).

Unfortunately, despite the presence of important legal questions with significant public policy implications, the Supreme Court denied certiorari on the last day of the previous term.¹⁶ The Supreme Court should have settled the issue by properly weighing all of the competing interests at stake, including potential damage to the democratic processes that the First Amendment¹⁷ is designed to protect.¹⁸ For guidance, the Court should have looked to other regulated areas like defamation and perjury, where other significant interests outweigh free speech rights.¹⁹ By taking this approach, the Court would have recognized that falsehoods told with actual malice²⁰ in ballot campaigns should be categorically exempt from First Amendment protection.

This Article argues that a limited categorical exemption for knowing and reckless falsehoods told in ballot campaigns is appropriate in light of the important democratic issues at stake and the structural space for free speech provided by narrow application of the laws. Part II discusses the history of First Amendment protections for political speech and the Amendment's relationship to the electoral process. Part III analyzes the Eighth Circuit's decision in *281 Care Committee* and the law that the court relied upon in its decision. Part IV provides a summary of how speech has been constitutionally regulated in other areas, and advocates the regulation of lying in the context of ballot campaigns.

16. *Arneson v. 281 Care Comm.*, 133 S. Ct. 61 (2012).

17. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

18. *See* Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251, 1253 (2006) (noting ““democratic participation”” is frequently cited as the First Amendment’s purpose).

19. *See, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that despite the First Amendment’s protection, a public official may recover for defamation if false statements were made with actual malice because of the necessity of vigorous public debates and discouragement of self-censorship); *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (Kennedy, J., plurality) (noting that perjured statements are not warranted First Amendment protection because “[p]erjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system”) (citing *United States v. Dunnigan*, 507 U.S. 87, 97 (1993)).

20. *Sullivan*, 376 U.S. at 280 (defining a statement with “actual malice” as one made “with knowledge that it was false or with reckless disregard of whether it was false or not”).

II. HISTORICAL DEFERENCE FOR FREE SPEECH COLLIDES WITH COMPELLING INTEREST IN PREVENTING CAMPAIGN FALSEHOODS

While four values have been said to underpin the guarantees of the First Amendment—“self-realization, truth-seeking, democratic participation and social adaptability”—judges most frequently invoke democratic participation as the driving purpose in their First Amendment decisions.²¹ Political speech is central to the historical and modern purpose of the First Amendment.²² In *Citizens United v. Federal Election Commission*, the Supreme Court discussed the First Amendment’s “fullest and most urgent application” to campaign speech.²³ The Court underscored that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”²⁴ This prerequisite to enlightened democracy prevents temporary majorities from exercising the power to determine not only right and wrong, but also true and false.²⁵ “No other nation claims as fierce and stringent a system of legal protection for speech.”²⁶

Courts, however, sometimes give insufficient weight to the government’s interest in protecting the electoral process itself.²⁷ They overlook the fact that even the most basic rights are illusory if the right to vote and self-determine are impaired.²⁸ They fail to balance what Justice Breyer recognized as the tension between the ability to engage in as much speech as one wants and public confidence in the electoral process.²⁹

Despite the insufficient weight given to concerns for the electoral process over the years, states have a legitimate interest in protecting the

21. Murchison, *supra* note 18.

22. *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010).

23. *Id.* at 898.

24. *Id.*

25. 281 Care Comm. v. Arneson, 638 F.3d 621, 636 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012).

26. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 229 (1992).

27. Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 891 (2008).

28. *See id.* at 897 (stating that once the public becomes distrustful of campaign advertising, the “integrity of the election process” is undermined).

29. Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002) (discussing this tension in the context of campaign finance limitations).

integrity of the electoral process.³⁰ The Supreme Court has recognized that state interest, even as it has moved to curtail speech regulations.³¹ For example, in *McIntyre v. Ohio Elections Commission*, although the Court struck down a law prohibiting anonymous campaign speech, it recognized that the state had a legitimate interest in preventing fraud and libel in campaigns where false statements might have “serious adverse consequences” for a voting public that could not fairly evaluate the proposed law before it.³² Specifically, the *McIntyre* leaflet urged citizens to vote against a school tax levy in order to stop “wast[ing] . . . taxpayer dollars.”³³ Yet, the distributor of the pamphlets was not accused of promoting factual inaccuracies, but only of violating the anonymous speech statute.³⁴ In ruling that anonymous speech could not be prohibited, the Court noted that Ohio had already addressed fraud concerns by enacting other statutes prohibiting dissemination of falsehoods about candidates and issue-driven ballot measures.³⁵ Those statutes were quoted by the Court as part of its reasoning in reaching its holding,³⁶ and incidentally, were very similar to Minnesota statute section 211B.06.³⁷

Concern about adverse consequences in elections—namely that voters will be deceived into casting ballots based on false information—may be even more acute in an age when fraud and misinformation spread faster and farther than it ever could have without modern technology.³⁸ Ideally, voters would carefully consider and educate themselves on ballot measures

30. *E.g.*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

31. *Id.*; *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

32. *McIntyre*, 514 U.S. at 349.

33. *Id.* at 337 n.2.

34. *McIntyre*, 514 U.S. at 338; OHIO REV. CODE ANN. § 3599.09(A) (West 1988), *repealed* by OHIO REV. CODE ANN. §§ 3517.21–3517.22 (West 2011).

35. The Court specifically mentioned OHIO REV. CODE ANN. §§ 3599.09.1(B)–3599.09.2(B) (West 1988). *McIntyre*, 514 U.S. at 349.

36. *Id.* at 349–51.

37. *Compare* § 3599.09.1(B) (banning general publication advocating for a certain candidate or position if there is no name or contact information of the individual or group responsible for the message), *with* MINN. STAT. ANN. § 211B.06 (West 2011) (making it a gross misdemeanor for a person to be involved in the preparation or dissemination of a publication that promotes a false message).

38. *See* Terri R. Day, “Nasty as They Wanna Be” Politics: Clean Campaigning and the First Amendment, 35 OHIO N.U. L. REV. 647, 649 (2009) (noting the oft-cited concern about technology’s ability to spread negative material).

to prepare for Election Day; however, reality often defies that aspiration.³⁹ Many voters are instead at the mercy of television advertising.⁴⁰ Furthermore, even if voters wanted to educate themselves, many ballot measures are technical and complicated.⁴¹ The lengthy explanatory voter pamphlets are of little help because the reading skills required to understand the proposed laws are too high for many;⁴² roughly fourteen and a half percent of Americans lack the ability to read anything more than short, commonplace prose.⁴³ Lastly, the ability of fast-paced digital media to turn negative campaign statements into overnight “tidal waves” further confuses voters and fuels fear that the electoral process is compromised by “pervasive and exaggerated mud-slinging.”⁴⁴

Polls indicate that this concern is warranted.⁴⁵ Campaign misinformation and the perception of misinformation have a measurable effect on voters.⁴⁶ In a 2010 study conducted by the Program on International Policy Attitudes at the University of Maryland, researchers found that a substantial quantity of voters encountered misleading information in the 2010 election.⁴⁷ Perhaps more importantly, researchers found strong evidence that although voters recognized some information as false, they continued to remain substantially misinformed about prominent issues.⁴⁸ For example, only a small percentage of respondents accurately

39. Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129, 130 (2001).

40. *Id.*

41. *Id.* at 144.

42. A study of California ballot initiatives from 1974 to 1980, for example, found that the voter pamphlet explanation reading levels are well beyond the high school graduate level and sometimes beyond college graduate level. *Id.* at 145.

43. Institute of Education Sciences, *National Assessment of Adult Literacy: State & County Estimates of Low Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/naal/estimates/Overview.aspx> (last visited Mar. 7, 2013).

44. Day, *supra* note 38, at 649.

45. See generally RAMSAY ET. AL., *supra* note 5, at 2 (outlining the key findings of the study); Dana Blanton, *Fox News Poll: 24 Percent Believe Obama Not Born in U.S.*, FOX NEWS (Apr. 7, 2010), <http://www.foxnews.com/politics/2011/04/07/fox-news-poll-24-percent-believe-obama-born/> (reporting that one-quarter of voters still believe President Obama is not a natural-born citizen).

46. See generally RAMSAY ET. AL., *supra* note 5, at 4–15 (detailing the effects of campaign misinformation on key issues, including the stimulus legislation, health care reform and climate change).

47. *Id.* at 3.

48. *Id.* at 4–15.

stated what economists had been saying about recession stimulus funding approved by Congress.⁴⁹ The misinformation was so pervasive that the respondents' varying levels of education had little impact on their ability to differentiate truthful statements from false ones.⁵⁰

The danger of misinformed and misled voters may be even more disconcerting in the direct democracy of ballot measure campaigns, where voters *are*, in effect, legislators.⁵¹ Currently, twenty-four states permit direct democracy in the form of referendums or initiatives, and all fifty states allow legislatures to refer questions to voters, who then make law by approving or disapproving of policy or taxes.⁵² In essence, voters have become "a fourth branch of government."⁵³ Unlike the other branches of government, however, these citizen-legislators do not have aides and advisors to assist them in deciphering the accurate and pertinent information needed to make decisions.⁵⁴ Problems like poor drafting, a confusing number of ballot questions, ineffective voter education, and the failure of voters to account for a law's effects already plague direct democracy.⁵⁵ Some ballot measures are even "drawn to confuse voters into voting 'incorrectly'—in a manner at odds with their [political] preferences."⁵⁶ Given all these challenges and voters' susceptibility to misinformation, states should be permitted to regulate those who attempt to intentionally deceive citizen legislators. Minnesota statute section 211B.06 and similar laws are just such an effort to address these concerns.⁵⁷

49. *Id.* at 5.

50. *Id.*

51. See Christopher A. Coury, Note, *Direct Democracy Through Initiative and Referendum: Checking the Balance*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 573 (1994) (noting that drafters of state constitutions included referendum and initiative powers in the constitutions because they "intended to empower the people to introduce, consider, and vote upon issues themselves").

52. *What are ballot propositions, initiatives, and referendums?*, INITIATIVE AND REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA, <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited Jan. 9, 2013).

53. Coury, *supra* note 51, at 574.

54. Kruse, *supra* note 39, at 157–58.

55. Coury, *supra* note 51, at 574.

56. Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 908 (2006).

57. The Minnesota statute at issue in *281 Care Comm.* has deep origins in the state's history. *281 Care Comm.*, 638 F.3d at 625. Minnesota began criminalizing knowingly false speech about political candidates in 1893. *Id.* False statements about issue-related speech were

III. EIGHTH CIRCUIT FINDS LYING IN BALLOT CAMPAIGNS SHOULD BE SUBJECT TO HIGHEST LEVEL OF CONSTITUTIONAL SCRUTINY

Minnesota's statute section 211B.06(1) prohibits false statements made knowingly or recklessly about both candidates and ballot questions.⁵⁸ Specifically, it states:

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 of 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.⁵⁹

Three advocacy groups that opposed school funding ballot initiatives challenged the regulation, which falls within the Minnesota Fair Campaign Practices Act, on the grounds that it violated the First Amendment free speech guarantees.⁶⁰ As a preliminary matter, the district court found the case non-justiciable for lack of standing and ripeness.⁶¹ Nonetheless, the district court addressed the merits of the case and concluded that the false statements prohibited by the statute fell outside of First Amendment protections.⁶² The Eighth Circuit disagreed with the lower court on both justiciability and the First Amendment question.⁶³ While both courts spent considerable time analyzing whether

added to the prohibition nearly a century later. *Id.*; see also Day, *supra* note 38, at 659 (citing statutes like Minnesota's as a response to growing concerns about the effect of negative speech on the electoral process).

58. See MINN. STAT. ANN. § 211B.06(1) (West 2011).

59. *Id.*

60. 281 CARE Comm. v. Arneson, No. 08-CV-5215, 2010 U.S. Dist. LEXIS 14712, at *1–2 (D. Minn. Feb. 19, 2010), *rev'd and vacated*, 638 F.3d 621 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012); see generally McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) (explaining that the First Amendment extends to state and local governments through the Fourteenth Amendment).

61. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *7, *11–12, *14–15.

62. *Id.* at *19.

63. 281 Care Comm v. Arneson., 638 F.3d 621, 633 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012).

the plaintiffs had standing and whether their claim was ripe in the absence of an actual prosecution,⁶⁴ this Note will focus only on the First Amendment issues addressed by the courts.

A. Trial Court in 281 Care Committee Finds That Regulation of False Statements Made with Actual Malice Does Not Violate the First Amendment

The three plaintiff groups did not specifically outline what prohibited statements they hoped to make,⁶⁵ but they wanted to voice their opposition to bond initiatives that would increase school funding, and they did so by making statements that could be interpreted as recklessly false statements.⁶⁶ In 2006, officials investigated one of the plaintiff groups, W.I.S.E. Citizen Committee, after school district officials lodged a complaint with the Office of Administrative Hearings.⁶⁷ The complaint centered around the use of a consultant who, immediately prior to the election, mailed voters a brochure using significantly lower student enrollment numbers and inconsistent cost figures to undermine the argument for additional school funding; the consultant later admitted that the figures were wrong.⁶⁸ Although the W.I.S.E. Citizen Committee was never prosecuted, an administrative judge found that a *prima facie* case of intentional falsehoods had been established.⁶⁹ Because section 211B.06 could only be applied to statements of fact, not criticisms or unfavorable deductions⁷⁰—a precedent established by a 1981 Minnesota Supreme Court case⁷¹—the administrative judge called an evidentiary hearing for only three of the seventeen

64. *Id.* at 627–33; *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *5–19.

65. Plaintiffs argued that the law “inhibit[ed] plaintiffs’ ability to speak freely against these ballot initiatives” without elaborating on the kinds of statements that they wanted to make. *281 Care Comm.*, 638 F.3d at 625.

66. Brief for Appellant at 10–11, *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (No. 10-1558).

67. *281 Care Comm.*, 638 F.3d at 625–26 (discussing the complaint which alleged that the W.I.S.E. Citizen Committee had prepared and distributed campaign materials containing false statement of facts that it knew to be false).

68. Lynda Jensen, *Levy Opponents Wish to Overturn False Campaign Materials Law*, HERALD J., (Nov. 19, 2007), <http://www.herald-journal.com/archives/2007/stories/wise.html>.

69. B.U.I.L.D. Citizen Comm., No. 4-6385-17049-CV, 2006 WL 954093, at *1 (Minn. Office of Admin. Hearings Jan. 10, 2006).

70. MINN. STAT. ANN. § 211B.06(1) (West 2011).

71. *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

statements about which there were complaints.⁷² An administrative panel later dismissed the complaint against the W.I.S.E. Citizen Committee.⁷³

During the following year, 281 Care Committee successfully waged a vigorous campaign to defeat a school funding initiative for the Robbinsdale Public School District.⁷⁴ The campaign included a 36-second taped phone message to voters which implied that students from North Minneapolis, who were allowed to attend schools in the district through open enrollment, brought “problems” and were involved in “gang fights” and “bomb threats.”⁷⁵ The superintendent said the group’s tactics were “without conscience” and “racist”⁷⁶—a charge denied by the plaintiffs.⁷⁷ In addition, the superintendent told the media that the school “district was investigating 281 Care Committee and exploring ways to deal with ‘false’ information that it spread” during the campaign.⁷⁸ That committee, along with the W.I.S.E. Citizen Committee and another group, challenged Minnesota statute section 211B.06.⁷⁹ The complaint asserted that the advocacy groups had a constitutional right to make statements that “w[ould] be interpreted by others as false, misleading, non-defamatory, unfavorable or unfair deductions or inferences.”⁸⁰ After all, the primary purpose of the grassroots advocacy groups was “to make statements regarding the effect of ballot questions

72. The three statements that were subject to an evidentiary hearing because they could be proved false were (1) “[District] taxpayers saw their tax support of schools shift from property taxes to state income taxes a few years ago,” (2) The construction contract signed by the district would take the district out of most decisions about the project and quality control, and (3) The head of W.I.S.E. had “personally been offered a bribe” by the school district’s architect. B.U.I.L.D. Citizen Comm., 2006 WL 954093 at *5, *7, *9. Other statements, however, were found not to merit an evidentiary hearing because they seemed to be opinions. Those statements included ones like “we don’t have a growth/space problem” and others that merely questioned whether more construction should be done. *Id.* at *3, *4.

73. *E.g.*, 281 Care Comm., 638 F.3d at 626.

74. *Id.*

75. Paul Levy, *Robbinsdale School Official Added to Suit: An Anti-Levy Group Said it Has Added the School Superintendent for Describing its Tactics as Racist*, STAR TRIBUNE (MINN.), Nov. 10, 2007, at 7B.

76. *Id.* North Minneapolis has seen a significant demographic shift in the last 30 years, with African-Americans now representing 43 percent of the population. Kerry Ashmore, *Ethnic Makeup Changed in North Minneapolis*, DAILY PLANET (June 7, 2011), <http://www.tcdailyplanet.net/news/2011/06/07/ethnic-makeup-changed-north-minneapolis>.

77. Levy, *supra* note 75.

78. 281 Care Comm., 638 F.3d at 626.

79. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *2.

80. *Id.* at *7.

which are ‘not easily representative or supportable by fact.’”⁸¹

In its order, the district court gave credence to the committees’ argument that it had a right to make statements that others might interpret as false.⁸² The order stated that such false statements would not be subject to prosecution under the statute⁸³ because the law only targeted false statements of fact made with actual malice, not mere criticisms or unfavorable deductions.⁸⁴ It was reasoned that “[g]ood faith or negligent errors of fact are protected by the First Amendment; knowing falsehoods are not. The same holds true of factual errors in campaign statements.”⁸⁵ Minnesota statute section 211B.06 does not prohibit all false statements or even negligent ones, but only those “made with knowledge of their falsity, or with reckless disregard of whether they are true or false.”⁸⁶ Finding that such regulations fell within a First Amendment categorical exemption already recognized by the Supreme Court, the district court held that the Minnesota law did not violate the U.S. Constitution.⁸⁷

In reaching its decision, the district court relied on several Supreme Court cases, which had held that the state could punish false statements made with actual malice, even in a political context.⁸⁸ For example, *Brown v. Hartlage*, which challenged a Kentucky statute that prohibited candidates from offering a material benefit in exchange for votes,⁸⁹ the Supreme Court determined that the statute violated the First Amendment because it lacked limitations.⁹⁰ Yet, even as the Court in *Brown* held that the law was unconstitutional, it recognized that states have a “legitimate interest in upholding the integrity of the electoral process itself.”⁹¹ In considering that

81. Brief of Appellant, *supra* note 66, at 25.

82. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *7–8.

83. See MINN. STAT. ANN. § 211B.06(1) (West 2011) (identifying the limited circumstances under which false political speech is prohibited).

84. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *8.

85. *Id.* at *9.

86. *Id.* at *8 (citing the *New York Times* rule).

87. *Id.* at *19.

88. *Id.* at *9–12.

89. *Brown v. Hartlage*, 456 U.S. 45, 54 (1982).

90. *Id.* at 52–62. For example, the Court held that the state could prohibit candidates from promising to give voters something of value in exchange for their votes because the state was entitled to prevent vote-buying. *Id.* at 54. It could not, however, interpret the prohibition to include statements promising a public good, like committing to reduce one’s salary if elected. *Id.* at 57–58.

91. *Id.* at 52.

interest and important First Amendment principles,⁹² the Supreme Court concluded the state could not prosecute *all* false statements,⁹³ but only those made in bad faith or with actual malice.⁹⁴ Similarly, in *281 Care Committee*, the District Court noted that Minnesota statute section 211B.06 contained such an appropriate limitation.⁹⁵

For similar reasons, the district court cited *Garrison v. Louisiana*,⁹⁶ a ruling in which the Supreme Court extended guidelines on civil defamation to criminal defamation cases.⁹⁷ The Court struck down Louisiana's criminal defamation statute because it made no distinction between false statements made with ill will and those made with a reasonable belief in their truthfulness.⁹⁸ Still, the *Garrison* court noted that calculated falsehoods should be regarded differently, even in the context of politics:

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.⁹⁹

In short, lying and democracy stand at odds with each other.

B. Eighth Circuit Finds No Exemption for Regulations like Minnesota's Statute and Orders Law Subjected to Strict Scrutiny

Despite the persuasive dicta in prior Supreme Court decisions, the Eighth Circuit Court of Appeals rejected the district court's holding on the constitutionality of the Minnesota statute, finding such falsehoods to be protected by the First Amendment.¹⁰⁰ Accordingly, the case was remanded

92. *Id.* at 52–53.

93. *Id.* at 61.

94. *Id.* at 61–62.

95. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *9.

96. *Id.* at *8.

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

98. *Id.* at 78.

99. *Id.* at 75.

100. *281 Care Comm.*, 638 F.3d at 626.

for analysis under a strict scrutiny test,¹⁰¹ and the Supreme Court denied certiorari.¹⁰² While the Eighth Circuit did not unequivocally declare the Minnesota statute unconstitutional,¹⁰³ content-based restrictions rarely survive strict scrutiny, which requires a compelling state interest and a law narrowly tailored to serve that interest.¹⁰⁴ The Eighth Circuit rejected the district court's conclusion that knowingly false speech was among the categories of existing exceptions—such as fighting words, obscenity, child pornography and defamation—which are not subject to the stringent strict scrutiny analysis.¹⁰⁵

The Eighth Circuit accepted the plaintiffs' argument that the First Amendment exemption for false speech made with actual malice *only* applied to defamation, not more generally to false speech.¹⁰⁶ It held that the exemption for defamatory speech was not an exemption for all reckless or knowingly false speech.¹⁰⁷ The court reasoned that defamation law is driven not only by falsehood, but by the important private interests of individuals whose reputations are damaged by defamatory speech.¹⁰⁸ The applicability of those defamation law principles to all false political speech could not be assumed because not all false political speech implicates a private interest.¹⁰⁹ Therefore, defamation law cannot extend to political speech.¹¹⁰ The court noted that a government entity cannot bring a defamation claim, and “[a] ballot initiative clearly cannot be the victim of character assassination.”¹¹¹ Although the court acknowledged that some language from defamation cases could be read broadly enough to cover non-defamatory falsehoods, it did not examine the interests that undergird

101. *Id.* at 636.

102. *Arneson v. 281 Care Comm.*, 133 S. Ct. 61 (2012).

103. *281 Care Comm.*, 638 F.3d at 633–34.

104. *Constitutional Law*, *supra* note 12 (noting that regulations based on content are “strongly presumed to be invalid”).

105. *281 Care Comm.*, 638 F.3d at 633–34 (“We find that the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment and we will not do so today.”).

106. *Id.* at 634–35.

107. *Id.* at 634.

108. *Id.*

109. *Id.*

110. *Id.*

111. *281 Care Comm.*, 638 F.3d at 634.

other prohibitions against false speech.¹¹²

The Eighth Circuit was especially reluctant to allow a First Amendment exemption for “quintessential political speech.”¹¹³ It noted that “[t]he breadth of protection afforded to political speech under the First Amendment is difficult to overstate.”¹¹⁴ In particular, the Eighth Circuit pointed out that earlier in 2011, the Supreme Court struck down a tort verdict won by the grieving father of a U.S. Marine, whose funeral was protested by members of a controversial anti-gay church.¹¹⁵ That ruling followed *Citizens United v. Federal Elections Committee*, where the Court struck down a ban on limiting corporate political contributions while emphasizing the special status of political speech under the First Amendment.¹¹⁶ The Eighth Circuit noted that “[t]he *Citizens United* Court went so far as to suggest that there may be a bright-line rule against restrictions on political speech.”¹¹⁷

In addition, the Eighth Circuit followed the lead of the Ninth Circuit, which invalidated the Stolen Valor Act on First Amendment grounds.¹¹⁸ The Stolen Valor Act subjected anyone who falsely claimed to have received a military decoration to a fine and up to one year in prison.¹¹⁹ In invalidating the law, the Ninth Circuit held that “the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths”—was an essential protection afforded by the First Amendment.¹²⁰

The Supreme Court’s plurality opinion affirmed the judgment, but it is more circumspect.¹²¹ Four justices, in a plurality opinion authored by Justice Kennedy, declared the Stolen Valor Act unconstitutional because it

112. *Id.*

113. *Id.* at 635.

114. *Id.* at 635 n.3.

115. *Id.*; *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

116. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

117. *281 Care Comm.*, 638 F.3d at 635 n.3.

118. *United States v. Alvarez (Alvarez I)*, 617 F.3d 1198 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012).

119. *Military Medals or Decorations*, 18 U.S.C. § 704(b)–(c) (2006), *invalidated by United States v. Alvarez (Alvarez I)*, 617 F.3d 1198 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012).

120. *Alvarez I*, 617 F.3d at 1205.

121. *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537 (2012) (Kennedy, J., plurality).

fell outside recognized exemptions to First Amendment protection.¹²² Justice Breyer and Justice Kagan reasoned that the law was unconstitutional because it was not narrowly tailored enough to survive intermediate scrutiny,¹²³ since it applied to *any* false statement made about a military decoration at *any* time, whether in a political debate or at home.¹²⁴ Furthermore, Justice Breyer said that given the broad drafting, the statute worked a “disproportionate constitutional harm” as the scope of the speech restriction was too broad for the interest that was being protected.¹²⁵

The Stolen Valor Act is distinguishable in a significant way from the Minnesota law.¹²⁶ Minnesota statute section 211B.06 does not have the main drafting infirmity that plagued the Stolen Valor Act since it applies only to reckless and knowing falsehoods told for a specific purpose.¹²⁷ Furthermore, the Minnesota law mirrors the Ohio statute the Court cited in *McIntyre v. Ohio Elections Commission* to bolster its decision to strike down the prohibition on anonymous speech.¹²⁸ The *McIntyre* court agreed that the state’s interest in preventing voter deception “carries special weight during election campaigns” and noted that the state already protected voters’ interests with a statute containing language much like Minnesota statute section 211B.06.¹²⁹ Accordingly, the Supreme Court should have agreed to consider the constitutionality of the law.¹³⁰

IV. FALSE STATEMENTS MADE WITH ACTUAL MALICE IN BALLOT CAMPAIGNS SHOULD NOT BE PROTECTED BY THE FIRST AMENDMENT

Few people would argue that deliberate lies in political campaigns are

122. *Id.* at 2543–47.

123. *Id.* at 2556 (Breyer, J., and Kagan, J., concurring); *see also id.* at 2555 (finding the goal of preserving the honor of military decorations was a substantial justification but one that could be achieved in a less burdensome way).

124. *Id.* at 2555 (Breyer, J., and Kagan, J., concurring); *see also id.* at 2547 (Kennedy, J., plurality).

125. *Id.* at 2556 (Breyer, J., and Kagan, J., concurring).

126. *Compare* Military Medals or Decorations, 18 U.S.C. § 704(b)–(c) (2006) (subjecting any false statement to criminal prosecution), *invalidated by* United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012), *with* MINN. STAT. ANN. § 211B.06 (West 2001) (proscribing only known and reckless falsehoods).

127. *See* § 211B.06(1).

128. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

129. *Id.*

130. *Armeson*, 133 S. Ct. 61.

something to be celebrated or condoned,¹³¹ and in light of the risks that deliberate lies pose to the democratic process, the Supreme Court should grant states the power to prevent or remedy such lies with statutes like Minnesota statute section 211B.06. Permitting limits on false campaign speech does not represent a departure from the court’s reluctance to curtail free speech.¹³² In fact, allowing states to enact falsehood statutes comports with other First Amendment exemptions—such as defamation, fraud, and perjury—which are already recognized by the Court.¹³³ Based on those previous First Amendment carve-outs and the important interests at stake here, a categorical exemption should be recognized for falsehoods, told recklessly or knowingly, in ballot question campaigns.

*A. Falsehoods Told with Actual Malice Do Not
Benefit the Marketplace of Ideas*

Courts sometimes treat false speech as a participant in the “‘marketplace’” of ideas.¹³⁴ Justice Holmes, creator of the marketplace metaphor, reasoned that society arrived at “ultimate good” through the free trade of ideas and that the “‘best test for the truth is the power of thought to get itself accepted in the competition of the market.’”¹³⁵ The well-worn metaphor, however, presupposes that the idea market is efficient enough to

131. See generally 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011) (conceding that the state may have been right in describing knowing falsehoods as “often valueless”), *cert. denied*, 133 S. Ct. 61 (2012).

132. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas . . .”).

133. See *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537, 2546 (2012) (Kennedy, J., plurality) (noting that perjured statements are not protected under the First Amendment; *United States v. Alvarez (Alvarez I)*, 617 F.3d 1198, 1213 (9th Cir. 2010) (noting that historically speech that is fraudulent, dangerous or injurious is unprotected); *Chaplinsky*, 315 U.S. at 571–72 (holding that libelous speech has always been unprotected).

134. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”).

135. BRIAN K. PINAIRE, *THE CONSTITUTION OF ELECTORAL SPEECH LAW: THE SUPREME COURT AND THE FREEDOM OF EXPRESSION IN CAMPAIGNS AND ELECTIONS* 26 (2008) (citation omitted).

actually sort out good and bad information, the truth from a falsehood.¹³⁶

Pragmatically speaking, some false statements are inevitable,¹³⁷ and courts have occasionally suggested they even enhance the exchange of ideas.¹³⁸ For example, in *N.Y. Times Co. v. Sullivan*, the Supreme Court said false statements are valuable because they bring “clearer the perception and livelier impression of truth, produced by its collision with error.”¹³⁹ The Court in that case, however, was not addressing falsehoods told with actual malice.¹⁴⁰ Instead, the case centered on a Civil Rights-era newspaper advertisement containing factual errors regarding actions undertaken by students and government officials at Alabama State College after protests by African-American students.¹⁴¹ The law allowed a judge to instruct the jury that the errors were “libelous *per se*”—requiring nothing more than proof that the statement was untrue and that it involved the plaintiff.¹⁴² In contrast, the Minnesota statute does not prohibit accidental misstatements or falsehoods that the speaker reasonably believes to be true; it specifically targets statements made with actual malice.¹⁴³

Marketplace proponents argue that valueless speech can be checked simply by putting more speech into the market,¹⁴⁴ but that is not always the case. In defamation cases, for example, the speaker’s free speech rights are trumped by the victim’s reputational rights because a rebuttal of falsehoods rarely undoes the harm caused by the lie.¹⁴⁵ In other areas, too, social science has proven that people are not rational shoppers in the marketplace

136. *Id.*

137. *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 48–49 (1982) (citing candidate’s mistake in campaign speech and later retraction); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

138. *See, e.g.*, *State of Washington ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (Wash. 1998).

139. *Sullivan*, 376 U.S. at 279 n.19.

140. *Id.* at 285–86 (“[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands”).

141. *Id.* at 258–59.

142. *See id.* at 263.

143. MINN. STAT. ANN. § 211B.06 (West 2011).

144. *See Alvarez I*, 617 F.3d at 1211 (finding a law criminalizing speech is inconsistent with the First Amendment when the disfavored speech can simply be fought with more speech); *Goldman, supra* note 27, at 899 (“[T]he proper remedy for false speech is more, not less, speech.”).

145. *See Alvarez I*, 617 F.3d at 1210.

of ideas.¹⁴⁶ Comedian Stephen Colbert dubbed the phenomenon “truthiness”—an intuitive “from the gut” knowledge that disregards evidence, logic or facts.¹⁴⁷ It is the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true.¹⁴⁸ Colbert was joking about then-President George W. Bush, but social scientists have repeatedly found “people can maintain a high degree of confidence in the validity of specific answers even when they know that their overall [accuracy] rate is not very high.”¹⁴⁹ People balance the arguments for and against a particular hypothesis without sufficient regard for the quality of the data; this behavior “gives rise to overconfidence when people form a strong impression on the basis of limited knowledge.”¹⁵⁰ The marketplace metaphor, however, relies on a different type of decision-making since it assumes voters in the idea market will assess facts and make rational decisions.¹⁵¹ For that to work, people must be sufficiently interested in and qualified to participate in an exchange driven by reason.¹⁵² “More speech” might be an adequate solution to combat disfavored speech, but when used against false speech, it simply “leaves the listener with conflicting facts and no basis on which to discern the truth.”¹⁵³

Polling data confirms that the market does not work in the efficient way imagined by Justice Holmes.¹⁵⁴ Large portions of the electorate do not or cannot distinguish true statements from false ones on important public matters, as evidenced by the University of Maryland study showing voters were substantially misinformed about prominent issues.¹⁵⁵ In another poll

146. See Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 238, 242 (Thomas Gilovich et al. eds., 2002).

147. THE COLBERT REPORT (Comedy Central television broadcast Oct. 17, 2005), available at <http://www.colbertnation.com/the-colbert-report-videos/24039/october-17-2005/the-word---truthiness>.

148. *Id.*

149. Griffin & Tversky, *supra* note 146, at 247.

150. *Id.* at 242.

151. See PINAIRE, *supra* note 135, at 32.

152. *Id.*

153. Kruse, *supra* note 39, at 162; see also *Alvarez II*, 132 S. Ct. at 2556 (Breyer, J., and Kagan, J., concurring) (noting that false factual statements are less likely to be valuable than true factual statements).

154. See, e.g., RAMSAY ET AL., *supra* note 5, at 4.

155. *Id.*

conducted in April 2011, Fox News found that nearly one-in-four voters still believed that President Barack Obama was born outside the United States, despite numerous stories debunking the rumor, birth announcements, and official state records from the President's birth state of Hawaii.¹⁵⁶ Some scholars speculate that the effect of misleading campaign statements may be particularly acute for less-educated, lower-income, minority, and women voters.¹⁵⁷ Those voters are more likely than average to vote against their actual position or not at all when confused by misleading advertisements.¹⁵⁸

B. The Risk of Chilling Legitimate Speech Is Not So Great That Falsehoods Told with Actual Malice Should Be Tolerated

Beyond their faith in the marketplace of ideas, courts have expressed concern that proscribing false speech chills legitimate speech.¹⁵⁹ In *N.Y. Times Co. v. Sullivan*, the Supreme Court spoke of free speech requiring "breathing space," for people to speak without fearing liability for every misstatement.¹⁶⁰ The grass-roots advocacy groups in *281 Care Committee* averred that the risk of enforcement of Minnesota statute section 211B.06 chilled their speech in elections since they wanted "to make arguments that [were] not grounded in facts."¹⁶¹ The Eighth Circuit found the tactics used by the groups came close enough to reckless disregard for the truth that it was reasonable for them to modify their strategy.¹⁶² Similarly, challengers to Ohio Revised Code section 3517.22(B)¹⁶³ argued that their speech was

156. Blanton, *supra* note 45.

157. Kruse, *supra* note 39, at 131.

158. *Id.*

159. *See 281 Care Comm.*, 638 F.3d at 630.

160. *Sullivan*, 376 U.S. at 271–72.

161. *281 Care Comm.*, 638 F.3d at 630.

162. *Id.*

163. OHIO REV. CODE ANN. § 3517.22(B) (West 2011) ("No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following: (1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication; (2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.").

“tempered, chilled and/or stifled”¹⁶⁴ after a falsehoods complaint over statements in the campaign for Cincinnati’s streetcar system was filed.¹⁶⁵ The challengers’ argument was supported by the Attorney General of Ohio, who filed an *amicus* brief in the District Court of Ohio.¹⁶⁶ More specifically, the attorney general stated that the law “fail[ed] to provide adequate safeguards . . . against the chilling of political speech.”¹⁶⁷

The risk of chilling political speech, however, has been used most often by the Supreme Court to explain the Court’s refusal to proscribe *all* false speech, including that which was sincerely undertaken.¹⁶⁸ A sincere statement, though factually inaccurate, is one believed by the speaker to be true.¹⁶⁹ On the other hand, insincere speech—a statement made with knowledge falsity or reckless disregard of the truth—betrays the public good by manipulating the debate.¹⁷⁰ Most Americans would feel the government was overreaching and stifling expression if it punished people for sincerely made misstatements,¹⁷¹ and that is why the Supreme Court’s defamation jurisprudence holds that sincere falsehoods sometimes need to be protected.¹⁷²

164. Verified Complaint, *supra* note 15, at 8.

165. Exhibit A - Complaint at 3–5, *Cincinnatians for Progress v. COAST Candidates PAC*, No. 1:11cv775, 2012 WL 4322517 (No. 2011E-061) (detailing the 20 messages COAST was accused of posting on Twitter alleging that city fire services were “browned out” to pay for a streetcar project).

166. Brief of Michael DeWine, Attorney General of Ohio, as *Amicus Curiae* and in Support of Neither Party, *COAST Candidates PAC v. Ohio Elections Comm’n*, No. 1:11cv775, 2012 WL 4322517 (S.D. Ohio Feb. 10, 2012).

167. *Id.* at 6.

168. Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1209 (2008).

169. *Id.* at 1226.

170. *Id.* at 1226, 1254.

171. *See, e.g., Brown*, 456 U.S. at 61–62 (holding that only misstatements made with actual malice could be proscribed by states); *Sullivan*, 376 U.S. at 279 (“Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.”); *see also* Spottswood, *supra* note 168, at 1223 (“To a large degree, most of us would probably feel that the government was reaching too far if it punished us for innocent errors.”).

172. Spottswood, *supra* note 168, at 1225.

Insincere falsehoods, however, are another matter.¹⁷³ Insincere statements do not enhance the public debate or improve voters' ability to exercise their democratic rights.¹⁷⁴ Instead, insincere falsehoods undermine candid and healthy policy debates by seeking to win through manipulation.¹⁷⁵ Recognizing this important distinction, the Supreme Court in *N.Y. Times Co. v. Sullivan* held that while states could not proscribe all falsehoods, they could regulate those told with actual malice.¹⁷⁶ Protecting false statements made negligently or inadvertently offers enough breathing space for free speech to survive.¹⁷⁷

Minnesota's law provides precisely that same breathing space to falsehoods in ballot campaigns.¹⁷⁸ Minnesota statute section 211B.06 does not cover all falsehoods, only factual ones that are told knowingly or recklessly,¹⁷⁹ and therefore does not seriously risk chilling legitimate speech.¹⁸⁰ Underscoring the careful balance achieved by the law,¹⁸¹ it is important to note that neither criminal prosecutions nor state-initiated enforcement proceeding have resulted from Minnesota's campaign falsehoods statute.¹⁸²

173. See, e.g., *Brown*, 456 U.S. at 61–62 (holding that only misstatements made with actual malice could be proscribed by states); *Sullivan*, 376 U.S. at 283 (holding defamation of public officials requires evidence of actual malice); see also Spottswood, *supra* note 168, at 1225–26 (explaining that sincerity and “truth” are closely related, while an insincere statement does not accurately reflect the speaker’s belief).

174. See Spottswood, *supra* note 168, at 1253.

175. See *id.* at 1253–54.

176. *Sullivan*, 376 U.S. at 279–80.

177. See *id.* at 287–88 (finding no actual malice and at most, negligence in newspaper’s failure to check the accuracy of the advertisement).

178. See MINN. STAT. ANN. § 211B.06 (West 2011); see also 281 CARE Comm. v. Arneson, No. 08-CV-5215, 2010 U.S. Dist. LEXIS 14712, at *19 (D. Minn. Feb. 19, 2010) (noting that only falsehoods told with actual malice are prohibited), *rev’d and remanded*, 638 F.3d 621 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012).

179. *Arneson*, 2010 U.S. Dist. LEXIS 14712, at *8.

180. *Id.* at *18–19.

181. *Id.* at *11.

182. See *id.* at *11–12.

C. The Supreme Court Has Long Exempted Certain Types of Speech From First Amendment Protection to Guard Personal and State Interests Deemed Sufficiently Significant.

While the right to free speech has long been carefully protected, it has never been absolute.¹⁸³ Few would argue that speech should always take precedence over other values.¹⁸⁴ Certain well-defined and limited categories of speech are prohibited and punished without raising constitutional problems.¹⁸⁵ The exempted categories—including ones like defamation, fraud and perjury, which will be addressed here—can be defended because speech in these categories does not further truth or good public policy.¹⁸⁶ The Supreme Court has recognized that there are some utterances that have “no essential part of any exposition of ideas” and are of such “slight social value as a step to truth” that their value is outweighed by other interests.¹⁸⁷ The Court has been reluctant to create new categories of unprotected speech, but it has not said yet-unlisted categories cannot be recognized.¹⁸⁸ Unlike in *United States v. Stevens*, where the government sought an exemption for materials that bore little resemblance to existing exempted categories,¹⁸⁹ Minnesota’s prohibition on falsehoods in ballot campaigns shares the underlying interests and parameters for already-recognized exemptions.¹⁹⁰

At the outset, it should be acknowledged that courts are particularly, and rightly, sensitive to prohibitions on false speech about the government itself.¹⁹¹ Efforts to prohibit slander of the government have been rare and controversial.¹⁹² The United States attempted to outlaw libel against the

183. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

184. See SAMUEL P. NELSON, *BEYOND THE FIRST AMENDMENT: THE POLITICS OF FREE SPEECH AND PLURALISM* 41 (2005).

185. See *id.*

186. *Id.*

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

188. See *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (refusing to recognize “depiction of animal cruelty” as a new category of protected speech).

189. *Id.* at 1587.

190. See 18 U.S.C. § 1001 (2011) (outlawing perjury); *Sullivan*, 376 U.S. at 279–80 (1964) (discussing defamation).

191. See *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923).

192. See *id.* at 88–89 (calling the Sedition Act of 1798 the “only” effort by the United States to outlaw libel against the government, though the Espionage Act, as amended in May 16,

government in the Sedition Act of 1798, prohibiting “false, scandalous and malicious” statements meant to bring Congress or the President into contempt or disrepute.¹⁹³ President Thomas Jefferson declared the act a “nullity,” pardoning anyone convicted under the act and remitting all fines.¹⁹⁴ The few courts that have addressed the question of government libel have held that the government cannot make that claim.¹⁹⁵

However, while the government has no reputational interest that can be protected,¹⁹⁶ the Supreme Court has deemed other interests that are less important and far-reaching than the electoral as process worthy of protection.¹⁹⁷ An individual’s interest in preserving his or her reputation, for example, is protectable despite the First Amendment.¹⁹⁸ The Supreme Court has held that states have a legitimate interest in guarding an “individual’s right to the protection of his own good name.”¹⁹⁹ This, of course, falls within important limitations; good faith or sincerely believed falsehoods are not punishable while ones told in bad faith are.²⁰⁰ States must offer speakers more than a simple truth defense to pass constitutional muster.²⁰¹ States are limited in the types of defamation laws they can use to

1918, made it unlawful to use “disloyal, scurrilous and abusive language about the form of government of the United States.”). The Supreme Court also affirmed a wartime prosecution of individuals who urged ammunition workers to strike by calling the president “cowardly.” *Abrams v. United States*, 250 U.S. 616, 624–25 (1919). However, courts that have answered the question of whether the government can be defamed have universally concluded that a government entity may not sue for defamation. J. A. Bryant, Jr., Annotation, *Right of Governmental Entity to Maintain Action for Defamation*, 45 A.L.R.3d 1315 (1972).

193. *Tribune Co.*, 139 N.E. at 88.

194. *Id.* at 89.

195. See, e.g., *281 Care Comm.*, 638 F.3d at 634 (noting government has no cause of action for defamation); *Tribune Co.*, 139 N.E. at 90 (holding utterances that were not designed to persuade others to engage in violent overthrow of the government were protected); see also Bryant, Jr., *supra* note 193.

196. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

197. See, e.g., *Illinois ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 623–24 (2003) (citing choices about charitable giving as worthy of protection); *Gertz*, 418 U.S. at 341 (citing individual reputation as a valid protectable interest).

198. *Gertz*, 418 U.S. at 341.

199. *Id.*

200. See generally *Sullivan*, 376 U.S. at 279–81 (discussing the need for actual malice for a successful claim).

201. See generally *id.* at 279 (“[A]ny one claiming to be defamed by the communication must show actual malice or go remediless.”) (quoting *Coleman v. MacLennan*, 98 P. 281, 285 (Kan. 1908)).

protect an individual's reputational rights.²⁰² Since the 1960s, the Supreme Court has generally expanded free speech rights by narrowing defamation protection;²⁰³ however, private individuals and public officials still enjoy protection against some falsehoods.²⁰⁴ Specifically, private individuals are permitted to seek remedy for these private harms.²⁰⁵

By contrast, the prohibition on reckless falsehoods in ballot campaigns focuses on a more important interest of a "constitutional dimension":²⁰⁶ "the integrity of the election process."²⁰⁷ To start, this potential harm of a "constitutional dimension" is certainly weightier than the monetary interests protected by the exclusion of some other types of speech.²⁰⁸ While commercial speech generally enjoys less protection than other types of expression,²⁰⁹ the Supreme Court has been clear that "the First Amendment does not shield fraud."²¹⁰

Even shy of fraud, states may regulate deceptive advertising.²¹¹ Commentators suggest the latitude to proscribe such speech may be justified because the deceived listener is giving up money or other resources, making the statements akin to theft.²¹² Knowing or reckless falsehoods in ballot campaign materials may not be intended for the speaker's pecuniary gain, but such falsehoods potentially impinge on a more fundamental possession: effective self-governance.²¹³ Without the benefit of accurate information in

202. See *Gertz*, 418 U.S. at 347 (finding that states may not impose liability without fault and must limit damages to actual injury for private individuals); see also *Sullivan*, 376 U.S. at 280 (finding actual malice is required for defamation of public officials).

203. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 383 (1992).

204. See generally *Gertz*, 418 U.S. at 341 (noting the dignity and worth that is tied to an individual's protection of his name).

205. See generally *id.*

206. Goldman, *supra* note 27, at 914.

207. Brief of Appellees at 23, 281 *Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (No. 10-1558).

208. See Goldman, *supra* note 27, at 913–14.

209. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980).

210. *Madigan*, 538 U.S. at 612.

211. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

212. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 *UCLA L. REV.* 1107, 1114 (2006).

213. See Spottswood, *supra* note 168, at 1232.

ballot campaigns, people cannot govern themselves effectively or accurately detect abuses by government authorities.²¹⁴

As demonstrated above, the Supreme Court has been willing to acknowledge that reputational and pecuniary interests sometimes justify exempting speech from First Amendment protection. There is, however, another protectable interest that justifies exemption from the First Amendment: the integrity of governmental systems.²¹⁵ Perjury—a lie, sometimes even one not told under oath—is a “crime against the state.”²¹⁶ It is proscribed because “[p]erjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.”²¹⁷ Perjury stemming from judicial proceedings requires the speaker to have taken an oath,²¹⁸ but other laws prohibit false material statements with knowledge of their falsity, even without an oath.²¹⁹ Knowingly lying to or concealing information from any federal agency about anything material is punishable by up to five years in prison.²²⁰ Similarly, lying to Congress about a material fact can subject someone to criminal charges.²²¹ This is justifiable because “[t]he law does not seek to punish all lying for the sake of promoting moral virtues, but rather seeks to avoid the possibility that false testimony will lead to the wrong results in proceedings in which the life, liberty, and property of parties are at stake.”²²² Perjury law seeks to protect the decision-making process and the integrity of governmental systems.²²³ In *McGrain v. Daugherty*, the Supreme Court held that Congress has the power to hold inquiries and

214. See *id.*; Kruse, *supra* note 39, at 162 (noting that false speech confuses political debate).

215. See generally Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion*, 124 PROC. AM. PHIL. SOC’Y 438, 440 (1980) (noting James Endell Tyler’s conclusion that “history of Perjury, considered as a crime against the state . . . is full of interest”).

216. *Id.*

217. *Alvarez II*, 132 S. Ct. at 2546.

218. See 18 U.S.C. § 1621(1) (2011).

219. See *id.* at § 1621(2).

220. *Id.* The Model Penal Code contains a similar, though less harsh, provision, suggesting a misdemeanor offense for intentionally misleading a public servant with a known false statement. MODEL PENAL CODE § 241.3(1) (1962).

221. 18 U.S.C. § 1001 (2011).

222. Peter Meijes Tiersma, *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 430 (1990).

223. *Id.*

subpoena witnesses because “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change”²²⁴

The same can surely be said of voters in ballot question elections. Because voters are effectively serving as legislators when they cast their ballots,²²⁵ the decision-making process should be entitled to protections, just as Congress’ decision-making process is.²²⁶ The use of deceptive speech to create false evidence on important public matters, with the intent of altering an election, is especially dangerous.²²⁷ “It is hard to imagine a form of private conduct that could have broader negative impact on the state of public knowledge or on democratic values more generally.”²²⁸ This is especially true in light of social science research showing that people do a poor job weighing evidence.²²⁹ When people consider which of two hypotheses is true, the choice should depend on the degree to which evidence fits one hypothesis better than the other.²³⁰ However, researchers have found that people tend to focus on the strength of evidence for a given hypothesis while neglecting to consider how well the same evidence fits an alternative.²³¹ Furthermore, people in political debates tend “to accept at face value arguments and evidence congruent with their interests and beliefs, while critically scrutinizing arguments and evidence that threatens those interests and beliefs.”²³² Given that people have such metaphorical blinders when considering truth, allowing campaigners to knowingly inject patently false evidence or data into the debate cannot be in the interest of democracy.²³³

224. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

225. *See Coury*, *supra* note 51.

226. *See* 18 U.S.C. § 1001 (2011).

227. *Spottswood*, *supra* note 168, at 1259.

228. *Id.* at 1259–60.

229. *See Griffin & Tversky*, *supra* note 146, at 238.

230. *Id.*

231. *Id.*

232. Emily Pronin et. al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 637 (Thomas Gilovich, et al. eds., 2002).

233. *See Spottswood*, *supra* note 168, at 1259–60.

*D. Legislators Should Be Permitted to Regulate
Reckless Falsehoods about Ballot Questions Regardless of
Logistical Challenges to Enforcement*

Those who argue against an exemption for falsehoods told in political campaigns, even with actual malice, contend that hyperbole and exaggeration are so common that it would be difficult for courts to find the line between truth and falsity.²³⁴ Those logistical challenges, however, should not prevent states from being permitted to regulate the specific class of speech at issue here. Clearly, language is a complex process.²³⁵ “[T]here are many statements that are neither simply true nor simply false, but combine truth and falsity or convey shades of implied meaning that can be misleading.”²³⁶ Similarly, a statement might be literally true but false under the circumstances in which it was made.²³⁷ Yet, these same semantic difficulties exist for the already exempted categories of false speech, and the linguistic challenges do not create a constitutional barrier.²³⁸ In defamation cases, for example, courts parse actual falsehoods from opinions to determine what is actionable.²³⁹ “Worst teacher” and “very poor lawyer” are not actionable, while being accused of “screwing” a client might be actionable.²⁴⁰ Similarly, under perjury statutes, a witness may not be prosecuted if his or her statement is literally true but misleading²⁴¹ or for implying something he or she does not believe is true.²⁴² This required parsing, while inconvenient, does not make the exemptions unconstitutional; equally important, state election officials have already demonstrated a willingness to do this kind of linguistic analysis as evidenced by their desire

234. See Day, *supra* note 38, at 662.

235. Spottswood, *supra* note 168, at 1263.

236. *Id.* at 1224.

237. Tiersma, *supra* note 222, at 374.

238. See generally *Bronston v. United States*, 409 U.S. 352, 362 (1973) (finding that a statement that it is literally true but misleading under the circumstances cannot give rise to perjury).

239. See generally 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4:3.5, at 4-54 to -57 (4th ed. 2010) (listing statements that do not qualify as defamation).

240. *Id.* at § 4:3.5, § 4-54, § 4-56, § 4:3.6, § 4-58.

241. See *Bronston*, 409 U.S. at 357–58, 362.

242. See *id.* at 357–58.

to limit secondary hearings to carefully distinguished factual statements.²⁴³

Given the construction and application of these campaign falsehood laws, their reach will be limited.²⁴⁴ Many misleading and inflammatory statements are merely “criticism . . . or unfavorable deductions.”²⁴⁵ Statements that are “extreme and illogical” will not be barred unless they are also factually inaccurate,²⁴⁶ and that limited application provides plenty of breathing space for free speech.²⁴⁷ Nonetheless, laws like Minnesota statute section 211B.06 allow states to set “the outward boundary of permissible speech and serve as a possible deterrent to misleading ads.”²⁴⁸

Courts should not use logistical difficulties to prevent legislatures from making their best judgments about how to protect critically important interests, like the integrity of the democratic process.²⁴⁹ Concern that a particular legislative remedy might fail to fully mitigate the problem or might create new challenges is one of the paradoxes of government.²⁵⁰ “It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues.”²⁵¹ In this particular case, Minnesota and other states have chosen to “protect the integrity of the electoral process and the public from the distorting influence of false speech” by proscribing falsehoods told with actual malice,²⁵² and that choice should not be disturbed.

243. *E.g.*, B.U.I.L.D. Citizen Comm., No. 4-6385-17049 –CV, 2006 WL 954093, at *3, *9 (Minn. Office of Admin. Hearings Jan. 10, 2006) (finding a *prima facie* showing that merited an evidentiary hearing for a factual statement like the speaker had “personally been offered a bribe” by the school district’s architect but not for an opinion like “[w]e don’t have a growth/space problem”).

244. *See* MINN. STAT. ANN. § 211B.06 (West 2011) (limiting application to knowing and reckless falsehoods); B.U.I.L.D. Citizen Comm., 2006 WL 954093, at *3, *9 (finding that only false factual statements fall under purview of the law).

245. *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

246. *Id.*

247. *See* Kruse, *supra* note 39, at 133.

248. *Id.*

249. *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952) (“[I]t would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power.”).

250. *Id.*

251. *Id.* (upholding a law prohibiting material that subjected people to ridicule based on race or religion). While *Beauharnais* has never been expressly overruled, the case is unlikely to represent good law. Downie M. Davis, *Freedom of Expression—When May the Government Regulate the Public Expression of Ideas*, 25 LOY. L. REV. 395, 400 n.39 (1979).

252. Brief of Appellee, *supra* note 207.

V. CONCLUSION

No one is suggesting that allowing states to prohibit falsehoods told with actual malice in ballot campaigns will, by itself, stop the spread of “truthiness” or prevent voters from being misinformed when they go to the ballot box.²⁵³ However, the democratic interests that such laws seek to protect are significant.²⁵⁴ Discussion of public issues “and the merits of ballot propositions is critical to our ability to govern ourselves through the democratic process and reach wise decisions [A]fter all, we can hardly be expected to govern effectively when we are relying on false premises.”²⁵⁵ When the value of reaching true conclusions rises to such high levels, the potential harm from believing lies becomes substantial.²⁵⁶

As demonstrated above, the Supreme Court has already found both private and public interests compelling enough to trump the First Amendment in narrow categories. Falsehoods told with actual malice in ballot question campaigns should similarly be exempted from First Amendment protection in light of the significant democratic interests at stake.

253. See generally RAMSAY ET AL., *supra* note 5, at 2 (finding that voters were substantially misinformed about important issues including government bailout of the auto industry and economists’ view of economic stimulus spending); Blanton, *supra* note 45.

254. Spottswood, *supra* note 168, at 1259.

255. *Id.*

256. *Id.*