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MINISTRY OF TRUTH: WHY LAW CAN'T STOP PREVARICATIONS, BULLSHIT, AND STRAIGHT-OUT LIES IN POLITICAL CAMPAIGNS

Catherine J. Ross*

The distinction between truth and falsehood in politics is much in the news these days. Candidates and office holders—from water district board members like Xavier Alvarez (of *United States v. Alvarez*¹) to President Donald Trump—are fact-checked, awarded Pinocchios, and sometimes indicted, for half-truths, untruths, and fantastical fabrications. Many observers fear there is an increasing disconnect between verifiable facts and political discourse, a lack of embarrassment about even complete fabrication, and a divide between voters who appear to be operating based on completely different sets of “facts.”

Lies in politics and political campaigns are nothing new. Neither are efforts to rein them in. Legislators and citizens insist “something must be done” to curtail the most egregious abuses. However, any government-directed effort to restrain deception in campaign speech by candidates or their supporters faces constitutional obstacles that appear to be insurmountable.

This Article analyzes lies during electoral campaigns,² legislative fixes that have been enacted, and the constitutional obstacles to such regulation. Part I provides a brief historical introduction to the problem. Part II proposes a taxonomy of the kinds of lies that arise during political campaigns. Part III reviews federal and state statutes that regulate campaign falsehoods. In Part IV, I demonstrate the First Amendment infirmities of campaign falsehood statutes. Part V presents a case study that reveals the difficulty of reaching agreement on what constitutes a verifiable lie. In concluding, Part VI briefly considers whether recent developments in technology, social media, and culture require modifications of First Amendment doctrine in order to ensure informed voting.

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¹ 567 U.S. 709, 713–14 (2012).

² The lies I am concerned with here include deceptive speech about candidates, their records and substantive issues on the ballot or pertinent to a candidacy. I have excluded lies designed to discourage or interfere with voting, such as lies about when and where to vote, which raise distinct issues. See, e.g., Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 72–73 (2013).

I. A BRIEF HISTORY OF ELECTION LIES

The election of 2016 was hardly the first time that observers lamented widespread falsehoods in campaigns and the risks that such falsehoods would not be adequately addressed in time to enable voters to make well-informed decisions. The problem manifested itself during the first contested presidential election in 1796.³ The country had quickly divided into two parties, with the Federalists supporting the John Adams/Thomas Pinckney ticket against the Democratic-Republicans' slate of Thomas Jefferson and Aaron Burr.

The 1796 election gave rise to the first documented outright lie—"a false statement of fact"—in Boston's *Independent Chronicle*.⁴ The paper alleged that presidential candidate John Adams had secretly conspired to remove Washington as the commanding general of the revolutionary forces, even though the conspirator had actually been his second cousin Sam Adams.⁵ Other "varieties of innuendo, distortion and falsehood," as one chronicler has dubbed them, in that first election included unfounded charges that Adams was variously pro-British or pro-French and, on the other side, that Jefferson was a drunkard, an illegitimate, interracial child, and, horrors, a "philosopher," as well as a supporter of the French Jacobins (the equivalent of being a card-carrying communist in the 1950s).⁶

The cross-charges continued when the candidates opposed each other again four years later in a campaign that has received more historical attention for its rancor, including allegations that Jefferson was so depraved (as an atheist who had spent time in libertine France) that his election would lead to "a national orgy of rape, incest, and adultery."⁷

The record of political lies in presidential races continued—and countless lies that were less well documented doubtless entered other electoral contests at every level of government—with what the leading account of political deception in politics has labelled "spectacularly dirty" races in "Jackson's first election, Lincoln's second, the Hayes-Tilden debacle, and Cleveland's first election" as well as the "Hoover-Smith clash of 1928" and Franklin Roosevelt's third and last

³ BRUCE L. FELKNOR, *DIRTY POLITICS* 18–19 (1966).

⁴ *Id.* at 18.

⁵ *Id.* at 19.

⁶ *Id.*; see also Jed Shugerman, *The Golden or Bronze Age of Judicial Selection?*, 100 IOWA L. REV. BULL. 69 (2015) (on the election of 1800).

⁷ FELKNOR, *supra* note 3, at 21.

campaign.⁸ But all of that was nothing, argued Bruce Felknor, the long-time executive director of the Fair Campaign Practices Committee, a non-partisan public interest group, and author of the leading account of deception in presidential campaigns, when compared to the “shrill and frenzied” attacks on presidential candidates and Presidents that took off beginning in the middle of the twentieth century.⁹

During each of the last few election cycles, commentators have lamented new lows (or heights) of deception. The apparent trend took off in 2004 with the swiftboating ad campaign a political action committee directed at John Kerry for which President George W. Bush could disclaim responsibility.¹⁰ Observers of the 2012 presidential contest accused Mitt Romney’s campaign of “a special level of shamelessness in its ads and attacks,” including taking President Obama’s quotes out of context “to portray the president as having said things he flatly didn’t say,” and running against things that never happened (like a purported elimination of the work requirement for welfare recipients).¹¹ By the 2016 election cycle, the Pulitzer Prize-winning website Politifact awarded its 2015 annual distinction “Lie of the Year” to the collective “campaign misstatements of Donald Trump,” based on “inaccurate statistics and dubious accounts of his own records and words” that “exhibited range, boldness and a blatant disregard for truth.”¹²

⁸ *Id.* at 40.

⁹ *Id.* at 41 (“Treason” would become a “constant campaign issue.”).

¹⁰ Elisabeth Bumiller, *The 2004 Campaign: Vietnam Record; Lawyer for Bush Quits Over Links to Kerry’s Foes*, N.Y. TIMES (Aug. 26, 2004)

<http://www.nytimes.com/2004/08/26/us/2004-campaign-vietnam-record-lawyer-for-bush-quits-over-links-kerry-s-foes.html>. Benjamin Ginsberg, counsel to the Bush campaign resigned after disclosures that he had advised the veterans’ group that

made “unsubstantiated attacks” on the war record of John Kerry who had been awarded “three Purple Hearts, a Silver Star and a Bronze Star” for his bravery in Vietnam). *Id.* The term “swiftboat” has entered popular discourse in the U.S. as meaning to “[t]arget (a politician or public figure) with a campaign of personal attacks.” *Swift-boat*, OXFORD DICTIONARY,

<https://en.oxforddictionaries.com/definition/us/swift-boat> (last visited Mar. 11, 2018). In addition, according to the Political Dictionary, the smear is “untrue or unfair.” *Swiftboating*, POLITICAL DICTIONARY,

<http://politicaldictionary.com/words/swiftboating/> (last visited Mar. 11, 2018). For a more recent example of swiftboating, see Amy Chozick & Ashley Parker, *Donald Trump’s Gender-Based Attacks on Hillary Clinton Have Calculated Risk*, N.Y. TIMES (April 28, 2016) (noting that Donald Trump was swiftboating Hillary Clinton “by throwing shade on what should be a strength”).

¹¹ Robert Schlesinger, *Lies, Damned Lies, and Mitt Romney’s Ads: A New Level of Shamelessness in Campaigns*, U.S. NEWS (Aug. 8, 2012, 11:47 AM), <https://www.usnews.com/opinion/blogs/Robert-schlesinger/2012/08/08/lies-damned-lies-and-mitt-romneys-ads>.

¹² Lauren Carroll and Linda Qiu, *Looking Back at Lie of the Year*, POLITIFACT (Dec. 13, 2016, 5:28 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/looking-back-lie-year/> (noting that all of the contenders

II. A TAXONOMY OF CAMPAIGN FALSEHOOD

Most definitions of lying begin with the proposition that the speaker “says something she does not believe to be true.”¹³ Beyond that, the lying speaker wants the listener to accept the falsehood she proposes as truth.¹⁴

The variety of kinds and degrees of lies exacerbates the definitional and drafting problems that arise from any effort to regulate deception in political campaigns. This Part proposes a taxonomy of the varieties of lies, and establishes the definitional, volitional, and materiality issues they raise, showing that it is difficult if not impossible to address the permutations of campaign lies through statutory language or common law, even before adding constitutional considerations to the analysis. In this framework, the expression of those who support one side in a campaign is generally attributable to the candidate.

A. Straight-out lies: (A) self-referential and (B) oppositional

The first and simplest category is what the plurality in *United States v. Alvarez* labeled the “straight[-]out lie.”¹⁵ The straight-out lie states a verifiable fact that is easily confirmed or refuted. It is a knowing falsehood, resolving any issue of *mens rea*—“an intended, undoubted lie,” about which there is no room to argue about interpretation or shades of meaning.¹⁶

I start with the straight-out lie told by the candidate or his supporters about the candidate, not about his or her opponent. The straight-out lie about oneself (or the candidate the speaker supports), which I shall call the “self-referential straight-out lie,” concerns a simple fact that the candidate personally knows is either true or false. For example, in Xavier Alvarez’s case, the claim was that he received a Medal of Honor, but he was never actually awarded one.¹⁷ However,

for 2015 were Trump’s and he scored 76% Mostly False, False or Pants on Fire, more than any other politician). In the first 100 days, Trump as President averaged five lies a day. See Charles L. Blow, *In Defense of the Truth*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/opinion/trump-truth-wiretapping-obama.html>. Trump received the dubious honor of winning PolitiFact’s Lie of the Year again, at the end of 2017, for his repeated assertions that Russian interference in the 2016 elections was a “made-up-story.” Angie Drobnic Holan, *2017 Lie of the Year: Russian Election Interference is a ‘Made-Up-Story’*, POLITIFACT (Dec. 12, 2017, 6:30 AM), <http://www.politifact.com/truth-o-meter/article/2017/dec/12/2017-lie-year-russian-election-interference-made-s/>.

¹³ SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 13 (2014); see also SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1989).

¹⁴ *E.g.*, BOK, *supra* note 13, at 13.

¹⁵ *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion).

¹⁶ *Id.* at 715.

¹⁷ *Id.* at 709.

Alvarez's lie was not voiced during a campaign.¹⁸ Although Alvarez held a very minor public office—he had recently been elected a member of the local water district board when he falsely claimed to be a military hero—the Court noted that he did not lie until after the election and could not have hoped to garner votes from his deception.¹⁹ As discussed more fully in Part IV below, the Court held that the First Amendment extended to Alvarez's false claim.²⁰

Other easily verified facts about oneself include, "I am the incumbent," which, as discussed below, the state may or may not be able to regulate even if it is not strictly true depending on exactly how the claim is phrased.²¹

The bald-faced lie is often referred to in conversation as claiming, "up is down" or "black is white." I instead use the analogy "blue is yellow," a more accurate reference to opposite or complementary pigments on the color wheel which do not share any pigmentation.

A closely related but modestly distinguishable category involves the straight-out lie about an opponent, which I designate the "oppositional straight-out lie": "she is not the incumbent, though she calls herself 'Congresswoman';"²² "he is on the list of convicted sex offenders;" or "he is ineligible for the presidency because he was born in Kenya."²³ Again, each of these is easily verified or refuted with only a little bit of digging, either by the speaker or, in the age of online research, arguably by voters themselves. Citizens can determine who is the actual incumbent with a minimum of effort; check with the police to find the list of sex offenders; and, arguably, determine from news sources where the candidate was born, at least if the internet is not full of fake news or alternative facts.

¹⁸ *Id.* at 713–14 (explaining that the lie was told at his first board meeting as an already elected board member).

¹⁹ *Id.* at 714. ("The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.").

²⁰ *Id.* Alvarez made his untrue claim at the first public meeting of the Three Valley Water District Board he attended after being elected, apparently in "a pathetic attempt to gain respect that eluded him, not to obtain any benefit. *Id.* Presumably, winning the election might be construed as securing employment or other benefit. See *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015) (concluding that if a candidate made Alvarez's false claim "at a preelection debate," then Alvarez inoculates the candidate from criminal prosecution).

²¹ See, e.g., *Cook v. Corbett*, 446 P.2d 179, 182–83 (Or. 1968).

²² *Id.* at 183–85 (holding that a candidate who was not an incumbent violated the false campaign speech statute by urging voters to "re-elect" her).

²³ See Lily Rothman, *This Is How the Whole Birther Thing Actually Started*, TIME (Sept. 16, 2016), <http://time.com/4496792/birther-rumor-started/> (explaining the beginnings of the "birther" conspiracy theory about President Obama, which alleged that he was born in Kenya—not the United States).

B. Intentional Distortions

The second category of deceptions is composed of what I call “intentional distortions,” misleading but not strictly untrue statements about the record of either the candidate or the candidate’s opponent. Here, prevarication extends beyond biographical particulars to embrace disputes over policy issues, including ballot referenda.²⁴ These come in at least two classic forms. In the first, “false claims of credit,” the candidate who is speaking, say, running for re-election as governor, campaigns based on support for a popular measure he signed into law—although he opposed the measure when the legislature considered it, and it passed again with a veto-proof majority. In the second scenario, which I label “contextual distortion,” the distortion arises from the willful failure to disaggregate multiple issues that have been artificially compacted, as with omnibus legislation. For example, a candidate who opposes so-called “pork” might nonetheless vote to approve the annual budget, even though it is filled with lard, and then be accused of voting for pork barrel spending. An incumbent who has long been vociferous about her opposition to abortion may be accused of voting to support “taxpayer-funded abortion” because she voted for a broad health insurance bill that incidentally allowed funding for abortions.²⁵

C. Hyperbole

Beyond straight-out lies about the speaker and the opponent, and intentional distortions, a third category of campaign falsehood involves hyperbole. Hyperbole and similar rhetorical devices (including satire and parody, which I am rolling into the term hyperbole here) may not fit the definition of lying at all because the speaker does not offer the statement as truthful, much less verifiable, and does not expect any reasonable listener to believe it, or to rely on it.²⁶ Falsehoods

²⁴ See *281 Care Comm. v. Arneson*, 766 F.3d 774, 785, 788 (8th Cir. 2014) (holding that Minnesota’s Fair Campaign Practices Act, which made it a crime to knowingly or with reckless disregard for the truth make a false statement about a proposed ballot initiative, failed strict scrutiny as it was “simultaneously overbroad and underinclusive”).

²⁵ See *Susan B. Anthony List v. Driehaus*, 134 U.S. 2334 (2014) (holding that plaintiffs had standing to challenge Ohio’s false statement act under which the state’s Elections Commission found probable cause of a violation based on a proposed billboard that would have proclaimed “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion” without mentioning that the vote was for the Affordable Care Act); see also *Lucas*, 34 N.E.3d at 1256 (“Assertions regarding a candidate’s voting record on a particular issue may very well require an in-depth analysis of legislative history that will often be ill-suited to the compressed time frame of an election.”).

²⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49 (1988) (explaining that even the most repugnant allegations are not actionable if they “could not reasonably have been interpreted as stating actual facts”); see also *RESTATEMENT (SECOND) OF TORTS* §

that hold out no pretense of being factual or truthful don't need to be unmasked. The marketplace they enter immediately discounts their contribution, at least as far as facts are concerned.²⁷

Hyperbole may include vigorous and hurtful epithets: liar, blackmailer, pimp, accomplice to murder.²⁸ If not capable of being seen as “reasonably implying false and defamatory facts,” hyperbole is not actionable in lawsuits for defamation, and presumably is beyond regulation as political deception for similar reasons.²⁹ Hyperbole may also embrace exaggeration of the speaker's successes, like a record of “bests.”³⁰

581A (AM. LAW INST. 1977) (providing a clear example in the law of defamation where two extremes provide defenses—one complete defense to a suit for defamation being truth).

²⁷ Catherine J. Ross, *Incredible Lies*, 89 U. of Colorado L. Rev. 101 (forthcoming 2018) (discussing hyperbole and other statements not offered for their truth in the context of defamation and fortune-telling).

²⁸ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990) (holding that simply stating “Jones is a liar—in terms of opinion—‘In my opinion Jones is a liar’—does not dispel the factual implications contained in the statement”); *Greenbelt Coop. Publ'g Ass'n v. Bressler*, 398 U.S. 6, 14 (1970) (stating that “blackmail” referred to a tough negotiation stance, not a crime); *Kniewel v. ESPN*, 393 F.3d 1068, 1079 (9th Cir. 2005) (holding that a “reasonable person would not construe caption under photo on website as charging celebrity with being pimp or that wife was prostitute, as required to establish defamation”); *Horsley v. Rivera*, 292 F.3d 695, 696, 702 (11th Cir. 2002) (holding that talk show host comments that an “anti-abortion activist was ‘an accomplice to murder’” was “non-literal rhetorical hyperbole”); *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005) (discussing hypotheticals and holding “crook,” in context, to be “colloquial, exaggerated, and non-literal”). Absent a showing of malice, the “rhetorical hyperbole often present in vehement debate” and the “misstatements and misrepresentations ordinarily associated with the political milieu” are “rhetorical hyperbole” and not actionable as defamation. *Herbert v. Okla. Christian Coal.*, 992 P.2d 322, 332 (Okla. 1999) (citing *Greenbelt Coop. Publ'g Ass'n*, 398 U.S. at 10–11). But an accusation of criminal activity may constitute defamation if stated as fact during a political campaign. See *Newman v. Delahunty*, 681 A.2d 671, 680, 683 (N.J. 1994) (holding that a news story headlined “Newman's thugs attack senior citizen” and complaining about taxes and corruption was defamatory statement of fact, actionable if actual malice was shown, and distinguishable from cartoons making similar points because cartoons are “ordinarily understood” to “be rhetorical, exaggerated means of expressing opinions.”); see also *Celebrezze v. Dayton Newspapers, Inc.*, 535 N.E.2d 755, 758 (Ohio 1988) (holding that a cartoon during a reelection campaign that depicted a judge as a murderer was clearly “exaggeration, hyperbole,” comparable to a cartoon depicting the city “council as a prostitute willing to sell her favors”).

²⁹ See *Milkovich*, 497 U.S. at 2 (holding that “statements that cannot reasonably be interpreted as stating actual facts about an individual are protected”).

³⁰ Lauren Carroll, *The 10 Biggest Falsehoods From the Year of Trump*, POLITIFACT (June 16, 2016, 8:43 AM), <http://www.politifact.com/truth-o-meter/article/2016/jun/16/10-biggest-falsehoods-year-trump/> (Trump “oversold his personal successes,” citing misleading references to the “largest” winery “on the East Coast,” “the best-selling business book of all time,” and the claim the Trump University received an A grade from the Better Business Bureau” six months before he paid \$25 million to settle a lawsuit by defrauded students); see also *Judge Approves \$25 Million Settlement Of Trump University Lawsuit*, NPR (Mar. 31, 2017, 1:51 PM), <http://www.npr.org/sections/thetwo-way/2017/03/31/522199535/judge-approves-25-million-settlement-of-trump-university-lawsuit> (Trump paid \$25 million to settle a lawsuit by defrauded students).

But liars often claim after the fact and without justification that their statements were intended as “jokes,”³¹ hyperbole, or parody. This category of speech is not a get out of jail free card. The humor or exaggeration must be readily apparent for the hyperbole defense to be sustainable.³²

If the speaker has no concern about the truth or falsehood of what she is saying, as philosopher Harry Frankfurt has pointed out, she may just be “bullshitting,” a different form of speech than hyperbole, but sharing the attribute that no lie is intended.³³ “Lack of . . . concern with truth —[an] indifference to how things really are,” Frankfurt tells us, is “of the essence of bullshit.”³⁴ Both hyperbole and bullshit, if recognizable as such, fall within the domain of expression I have argued elsewhere the law protects precisely because it is so out of bounds that no reasonable person would believe it.³⁵ Its absurdity renders it harmless to the recipient and materially worthless to the speaker.³⁶

D. Indirect Prevarication

The fourth variety of campaign lies in many ways poses the most difficult definitional dilemma: it is neither an outright fabrication, nor a matter of omitting context that helps to explain what happened and why, but rather a situation in which key facts and outcomes can be read in different ways and easily exploited by the sly speaker. Let’s return to the color circle. Imagine that observers, asked to label each pigment as a primary color, are told to assign labels to purple. They might choose red or blue—both choices would be arguably correct or incorrect. This category is not intended to embrace conclusions about which reasonable minds may differ, but rather is designed to incorporate the sleight of tongue, which I call “indirect prevarication,”—falsehoods the speaker can disingenuously deny.

³¹ Chris Cillizza, *Donald Trump Likes to ‘Joke’ About a Lot of Things That Aren’t Funny*, CNN: THE POINT (Aug. 1, 2017, 4:25 PM), www.cnn.com/2017/08/01/politics/trump-joking-police/index.html (White House says the President was “just joking” when he urged police officers to rough up suspects, urged supporters to “knock the hell” out of protesters at rallies, and called on Russia to hack more of the Clinton campaign’s emails.).

³² *In re O’Callaghan*, 796 S.E.2d 604, 625–26 (W. Va. 2017) (rejecting a judicial candidate’s claim that his misleading campaign flyer was a parody or alternatively rhetorical hyperbole).

³³ HARRY G. FRANKFURT, ON BULLSHIT 61 (2005).

³⁴ *Id.* at 33–34.

³⁵ Ross, *supra* note 27.

³⁶ *Id.*

Push polling questions provide a perfect example of deniable indirect prevarication.³⁷ During the 2000 South Carolina Republican primary, for example, push pollers working for the Bush campaign suggested that John McCain had “fathered an illegitimate black child.”³⁸ Recurring forms of questions whose verifiability can be denied include, “Did you know . . . ?” and “Would it change your opinion if you knew . . . ?”³⁹

The subtlest of distinctions may prove dispositive in an assessment of whether claims are true or false. In two cases decided one year apart, the highest court in Oregon held first that the ubiquitous campaign slogan “Re-elect” used in a primary by a challenger to the actual incumbent constituted a deliberate material falsehood, “intended to create the belief in the reader” that the candidate, referred to as “Senator Corbett,” was the incumbent, even though her term in office had expired the previous year.⁴⁰

The very next year, the same court held that a candidate for county commissioner did not make false claims to incumbency by using the slogan “Return a proven leader,” despite the possible inference that the candidate currently held a public office, possibly even the one up for grabs in the pending election.⁴¹ The court reasoned that the candidate had once served as sheriff, and could claim to be “a veteran in government.”⁴² An intentionally ambiguous statement, susceptible to a truthful interpretation, may be treated as truthful no matter how many voters it misleads.⁴³ Or perhaps not, in the hands of a different court or with a slight twist on the facts. And whether a candidate is regarded as “a proven leader”

³⁷ Push polls purport to be neutral opinion polls but are in fact acting on behalf of a campaign. *See* N.H. Att’y Gen. v. Bass Victory Comm., 104 A.3d 181, 184 (N.H. 2014). The questions commonly include inferences and misinformation. *See id.* at 184 (noting that the statute under review defined push polling as “[a]sking questions related to opposing candidates for public office which state, imply, or convey information about the candidates [sic] character, status, or political stance or record.”).

³⁸ News Shrink, *McCain’s Revenge*, DAILY BEAST (Nov. 5, 2008, 7:16 AM), <http://www.thedailybeast.com/mccains-revenge?source=dictionary>.

³⁹ Frederick F. Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 297 (1978) (explaining that statements that can be tested are “susceptible to verification and thus may be characterized as true or false with some degree of certainty”).

⁴⁰ *See* Cook v. Corbett, 446 P.2d 179, 179 (Or. 1968). *See also* United States v. Alvarez, 567 U.S. 709, 738 (2012) (Breyer, J., concurring) (upholding, against a First Amendment challenge, a statute prohibiting campaign materials falsely claiming that the candidate is an incumbent).

⁴¹ *Mosee v. Clark*, 453 P.2d 176, 177 (Or. 1969).

⁴² *Id.* at 178.

⁴³ *Id.* (“Ambiguity may be just cause for criticism in political debate, but it is not a statutory ground for forfeiting an election.”).

was a matter of opinion, immune to regulation.⁴⁴ Perhaps it also matters whether the indirect prevarication is contained in an off-the-cuff remark, voiced in casual conversation, or a meticulously crafted evasion read from a script or incorporated into myriad campaign materials.

1. Opinion distinguished.

Indirect prevarication can be difficult to distinguish from opinion, which does not implicate verifiable facts.⁴⁵ Opinions voiced during a campaign do not amount to misleading statements for the same reason opinions do not constitute defamation: they are not susceptible to proof or disproof.

A 2017 fundraising email from then-Senator Al Franken provided an apt explanation:

Minnesota hotdish is one of the most delicious foods. Betsy DeVos is the most unqualified cabinet nominee ever. Washington is one of the most dysfunctional places in the country. These are all opinions. I think they're correct, but I'm biased because these are my opinions. These are not facts.⁴⁶

The email continues with what Franken correctly labels verifiable "facts": "The FEC [fundraising] deadline is in 6 days, and my campaign has not yet met its goal."⁴⁷

Another example involves disputes over whether a proposed tax is "fair."⁴⁸ As one appellate panel explained, whether a vote for a ballot measure that would impose a new tax on a particular industry would make it pay its "fair share" is

not subject to objective verifiability. You can get a Ph.D. in political science studying what 'fair shares' are and still not come to any firm conclusion. The subject has occupied political philosophers since at least Aristotle It is one

⁴⁴ *Id.* at 177.

⁴⁵ SCHAUER, *supra* note 39, at 279 (highlighting the difficulty of distinguishing between facts and opinions, stating that "[i]n between these extremes lie statements reflecting varying degrees of inference, synthesis, and value judgment, the presence of each making the process and possibility of verification somewhat less certain").

⁴⁶ Email from Al Franken, Senator from Minn., to author (Sept. 24, 2017) (on file with author) (Re: "Opinions vs [sic] Facts").

⁴⁷ *Id.*

⁴⁸ *Huntington Beach City Council v. Superior Court*, 94 Cal. App. 4th 1417, 1436 (Cal. App. 2002).

of those topics that is particularly suited for the marketplace of ideas.⁴⁹

It is, in short, “mere opinion.”⁵⁰ On the other hand, a speaker cannot count on escaping liability for defamation by labeling a scurrilous charge that implies knowledge of facts as “just my opinion.”⁵¹

Do the allegations that “my opponent’s plan is likely to destroy the budget,” or “leave hundreds homeless,” suggest underlying facts?⁵² The answer may depend on whether a factual statement appears to be embedded in hyperbole or ambiguity that insulates it from prosecution, or whether the speech may be construed to imply “an assertion of objective fact.”⁵³

Many statements present a mix of facts and opinion that can be difficult for candidates, judges, and, presumably, voters to disaggregate. For example, a candidate seeking reelection to the Oregon state senate in a contested primary sued his opponent for claiming that he had “voted against the Farm Use Deferral.”⁵⁴ On closer inquiry, it appeared that the bill the incumbent candidate had voted against would have deprived some current Farm Use Deferral recipients of continued eligibility for the benefit, and thus the candidate construed his vote “against” as a vote “for” Farm Use Deferral because of the effect he expected his vote to have.⁵⁵ An appellate court held that “characterization of the meaning of the [candidate’s] vote” was not a statement of fact but “in reality . . . a nonactionable expression of opinion” under a state law regulating campaign falsehood.⁵⁶

Other courts agree that it is simply too difficult to sort out convoluted legislative histories and the motives of individual legislators so that statements about a candidate’s voting record “fall within the ambit of reasonable comment on

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 1 (1990) (holding that a “separate constitutional privilege for ‘opinion’ was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by [the] First Amendment”).

⁵² *Sumner v. Bennett*, 608 P.2d 566, 566 (Or. Ct. App. 1980) (holding after the election that characterization of a candidate’s voting record was opinion, “not actionable as false statements within [the] meaning of [Oregon’s] Corrupt Practices Act”).

⁵³ *Neumann v. Liles*, 369 P.3d 1117, 1119 (Or. 2016).

⁵⁴ *Yes on 24-367 Comm. v. Deaton*, 367 P.3d 937, 942 (Or. App. 2016).

⁵⁵ *Id.*

⁵⁶ *Id.* at 355.

official conduct.”⁵⁷ The problem is exacerbated by the increasing use of omnibus bills to which controversial measures are attached as amendments.⁵⁸

These are just examples of what concerned the highest court in Massachusetts when it advised: “it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case.”⁵⁹

In another twist, the candidate (or a person or group speaking on the candidate’s behalf) might repeat a rumor with the caveat that the speaker has no idea whether the rumor is true, as many people do in conversation. Consider these hypotheticals:⁶⁰ “someone told me that my opponent runs a child sex ring from a pizza shop”;⁶¹ “some people say my opponent was arrested for pedophilia”; “I saw a picture, I don’t know if it was photo-shopped or not, indicating that my opponent’s father was present when President Kennedy was assassinated.”⁶²

2. Just bullshitting.

Unlike the straight-out lie, in the examples set out immediately above, the speaker makes no pretense of knowing whether the allegation is true or false. If the speaker doesn’t care about the truth of the matter, perhaps the statement is just bullshit. But in an electoral context, we might expect the campaign to have an obligation to perform due diligence before repeating a rumor, because the stakes are high: “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker).”⁶³ Does it matter whether the rumor is already in circulation, or whether the campaign itself originated the

⁵⁷ *Herbert v. Okla. Christian Coal.*, 992 P.2d 322, 331 (Okla. 1999) (summarizing cases from other jurisdictions and the Kansas Supreme Court in stating, “[A]lthough the whole truth was not stated, it seldom is in political campaigns” (citing *Hein v. Lacy*, 616 P.2d 277, 286 (Kan. 1980))).

⁵⁸ *E.g., id.* at 326 n.2 (describing a vote for a “massive bill that would have recodified [the state’s] Criminal Code,” characterized by opponents as a vote to decriminalize sodomy and legalize marijuana).

⁵⁹ *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1255 (Mass. 2015) (quoting *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 244 (Mass. 1987)).

⁶⁰ See generally H. Taylor Buckner, *A Theory of Rumor Transmission*, 29 PUB. OPINION Q. 54 (1965).

⁶¹ See BBC Trending, *The Saga of ‘Pizzagate’: The Fake Story that Shows How Conspiracy Theories Spread*, BBC (Dec. 2, 2016), <http://www.bbc.com/news/blogs-trending-38156985>.

⁶² Robert Farley, *Fact Check: Trump Defends Claim on Oswald and Cruz’s Father*, USA TODAY (July 23, 2016, 12:31 PM), <https://www.usatoday.com/story/news/politics/elections/2016/07/23/fact-check-trump-lee-harvey-oswald-rafael-cruz/87475714/>.

⁶³ *United States v. Alvarez*, 567 U.S. 709, 738 (2012) (Breyer, J., concurring).

rumor? In the latter instance, does that bring the statement into the straight-out lie category? How about the candidate who says: “I was just joking” but has nonetheless introduced a rumor into the marketplace of ideas, where the falsehood may have staying power.⁶⁴

The taxonomy⁶⁵ of deceptive campaign speech I have proposed here includes (from simplest to most complex): (i) straight-out lies, self-referential (where the speaker knows the truth as well as anyone) or oppositional; (ii) intentional distortions, including both false claims of credit and contextual distortion of an opponent’s words or acts; (iii) hyperbole; and (iv) indirect prevarication.⁶⁶ Each of these categories—and the list is not exhaustive—raises distinct issues concerning: the speaker’s intent to mislead; how we define the statements subsumed under the label; the harms and degree of harm the falsehoods may cause; and whether, how, and with what ease the statements may be verified.

The reader should keep these variations on campaign deceptions in mind while reading Part III, which reviews statutes that purport to contain falsehood in elections. Consider whether the statutory language is likely to reach the vast majority of straight-out lies, of indirect prevarications, or of the gradations of falsehood between those two extremes.

II. REMEDIAL STATUTES

Each category in the taxonomy I have just proposed may contain expression that under other circumstances would be considered libelous, but actions for defamation are unlikely to bring relief in the face of campaign lies.⁶⁷ To begin with,

⁶⁴ See Maria Konnikova, *Trump’s Lies vs. Your Brain*, POLITICO: MAGAZINE (Jan./Feb. 2017), <http://www.politico.com/magazine/story/2017/01/donald-trump-lies-liar-effect-brain-214658>.

⁶⁵ Other commentators have proposed different taxonomies focused on other aspects of lies. See Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1443–54 (2015) (proposing a different sort of taxonomy for lies, one that divides falsehoods based on their social value and assigns different levels of protection to different categories of lies). Helen Norton has proposed a number of insightful taxonomies of lies, including one addressed specifically to election lies. She suggests (and I agree) that the various taxonomies of election lies, and presumably of other lies, are “by no means mutually exclusive.” Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. (forthcoming 2018) (offering a taxonomy with numerous dimensions including the speaker’s identity, (candidate, robot, corporation), motive (to be elected or undermine truth), the subject matter of the lie, and the timing of the lie in relation to election day, and arguing that the distinctions may bear on the nature and scope of the harm election lies cause).

⁶⁶ See Chen & Marceau, *supra* note 65, at 1443–54.

⁶⁷ See Brooks Jackson, *Suing Over False Political Advertising*, FACTCHECK.ORG (Feb. 7, 2008), <http://www.factcheck.org/2008/02/suing-over-false-political-advertising/> (“Supreme Court decisions make it extremely difficult for a public figure—especially

neither civil nor criminal defamation actions are likely to be resolved before the election is in a distant rearview mirror.⁶⁸ More to the point for my purposes, candidates in every election—local to national, party primary to the presidential ballot—are public figures under defamation jurisprudence.⁶⁹

The defamation rules crafted for public figures in *New York Times v. Sullivan*⁷⁰ apply, making it extremely difficult for a plaintiff to prevail.⁷¹ Libel laws, numerous courts have held, will not provide a remedy for political candidates absent a showing of actual malice or reckless disregard for truth.⁷² To the contrary, the Supreme Court expressly explained that the “clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.”⁷³ “[I]t is by no means easy,” the Court warned, “to see what statement about a candidate might be altogether without relevance to his fitness for the office he seeks.”⁷⁴ Relevance to the candidate’s fitness for office appears to inoculate even the false statement from liability.

This gap has led legislators at every level of government to enact statutes purporting to penalize campaign lies. Efforts may have started during the progressive era,⁷⁵ well before the Supreme Court incorporated the First Amendment through the Fourteenth to govern state and local regulations on speech,⁷⁶ and before the Court even began to interpret the meaning of the

anyone running for public office—to win a libel case even if what is said about them is false.”).

⁶⁸ *Id.* (“[I]t can take years for a libel case to come to trial, and so there would be no hope of getting a court to rule until the election in question was long over.”).

⁶⁹ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272–74 (1971); *Harte-Hanks Commc’ns., Inc. v. Connaughton*, 491 U.S. 657, 686–88 (1989).

⁷⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷¹ *See id.* at 279–280 (holding that a public figure must show that the speaker acted “with ‘actual malice,’ that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

⁷² Richard L. Hasen, *supra* note 2, at 63.

⁷³ *Monitor Patriot Co.*, 401 U.S. at 275.

⁷⁴ *Id.* at 274–75 (reserving without deciding the question of “whether there remains some exiguous area of defamation against which a candidate [might] have . . . recourse” and reversing and remanding where the jury was instructed to consider whether the allegation that a candidate for office had been a “small-time bootlegger” decades earlier was relevant to his “fitness for office” and therefore within the *New York Times* standard).

⁷⁵ *See* Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 46 (2016) (citing *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1273–79 nn. 39, 49 (1975)). The earliest campaign falsehood statute appears to be the precursor of the Minnesota law overturned in *Care Committee v. Arneson*, 766 F.3d 774 (2014), originally enacted in 1893. Five other states appear to have enacted campaign falsehood statutes during the Progressive era: West Virginia (1908), Oregon (1909), North Dakota (1911) (limited to prohibiting payment to a newspaper to support or oppose a candidate for public office), Montana (1912), and North Carolina (1913).

⁷⁶ *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (containing dicta that extends First Amendment freedom of speech guarantee to the states).

Speech Clause.⁷⁷ Watergate and the associated revelations about events during the 1972 presidential election brought renewed popular and legislative focus to deceptive speech in campaigns and renewed efforts to regulate such expression lest it undermine informed voting and democracy.⁷⁸

A. Federal Responses

The scandal that unfolded after the break-in at the Democratic National Committee's headquarters in the Watergate complex eventually revealed that President Nixon's reelection team engaged in a myriad of "dirty tricks"⁷⁹ beyond the crimes of breaking and entering, stealing records, and covering up the initial burglary. Pressure mounted on Congress to do something, "but do what?"⁸⁰ Asked to advise congressional leaders, distinguished constitutional scholars and commentators warned that any "comprehensive" response that attempted to "regulate 'smears,' however desirable it may seem" would "necessarily raise First Amendment questions," which they did not lay out.⁸¹

Ignoring that caveat, Congress acted.

Democratic Senator Birch Bayh, who sponsored the section of a campaign finance bill containing language designed to rein in campaign lies which Congress adopted in 1974, expressly recognized "the difficult problems that a broader criminal libel statute presents in terms of [F]irst [A]mendment guarantees."⁸² He hoped to circumvent those barriers in a narrower provision aimed at "dirty tricks."⁸³ The tricks, he

⁷⁷ See CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 13–16 (2015).

⁷⁸ SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, HEARINGS ON WATERGATE AND RELATED ACTIVITIES, 93RD CONG., 1ST SESS., ch. 5, (1973).

⁷⁹ These "tricks" were of course conduct, not speech that could even arguably be protected as a matter of constitutional law. They included the earlier burglary of the office of the Pentagon Paper's leaker Daniel Ellsberg's psychiatrist by a group that overlapped with those who conducted the Watergate break-in, including G. Gordon Liddy, the general counsel of the Finance Committee of the Committee to Re-Elect the President ("CREP"). RALPH K. WINTER, JR. WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH 14–15 (1974). For "dirty tricks," the report recommended restricting any legislative fix to "political espionage . . . requiring proof of specific intent," but noted that "the most serious activities" are already illegal under existing law and that "there are abundant pitfalls in undertaking" an "expansion," including differentiating tricks from mere humorous "pranks." *Id.* at 50.

⁸⁰ *Id.*

⁸¹ *Id.* at 51 (discussing only the protections for anonymity extending to campaign literature and the risk of selective prosecution). The group included Ralph Winter, Alexander Bickel and Harry Wellington, all of Yale Law School, as well as Paul Bator, Aaron Wildavsky and James Q. Wilson. *Id.*

⁸² 120 CONG. REC. 10814 (daily ed. Apr. 11, 1974) (statement of Sen. Birch Bayh).

⁸³ *Id.*

reminded his colleagues on the Senate floor, included a 1972 incident in which the Committee to Re-Elect the President forged a letter on the stationery of Democratic Senator Edward Muskie that “accused Senators HUMPHREY and JACKSON,” against whom he was competing in the Democratic presidential primary, “of the most bizarre type of personal conduct.”⁸⁴ Specifically, the unsigned letter, sent through U.S. mail to thousands of voters, falsely alleged that Senator Humphrey had a call girl in his car with him when he was arrested in 1967 for drunk driving, and that Senator Jackson had been arrested twice for homosexuality.⁸⁵ Neither Senator had been arrested, and no evidence existed that Senator Humphrey had ever been seen with a call girl.

Bayh’s language enacted into federal law prohibitions on falsely attributed statements in campaigns for federal office “on a matter which is damaging to [an opposing] candidate or political party.”⁸⁶ Violations constituted felony fraud, and penalties included imprisonment.⁸⁷ The language on

⁸⁴ *Id.* (capitalization in original).

⁸⁵ Martin Waldron, *Segretti Indicted in Mailing of Bogus Muskie Letter*, N.Y. TIMES (May 5, 1973), http://www.nytimes.com/1973/05/05/archives/segretti-indicted-in-mailing-of-bogus-muskie-letter-linked-to-plot.html?_r=0. Donald Segretti, an attorney, was convicted and served four-and-a-half-month sentence. John M. Crewdson, *Out of Prison a Month, Segretti Tries to Pick Up the Pieces of His Old Carefree Life*, N.Y. TIMES (Apr. 22, 1974), <http://www.nytimes.com/1974/04/22/archives/out-of-prison-a-month-segretti-tries-to-pick-up-the-pieces-of-his.html>. The federal statute under which Segretti was charged reached campaign falsehoods transmitted through the United States Postal Service or in interstate commerce. 18 U.S.C. § 371 (1988) (amended 1994); 18 U.S.C. § 612 (1970) (repealed 1976). Section 617, enacted in 1974, reached speech in any format, whether or not it was transmitted by U.S. mail or entered interstate commerce. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

The false allegations Republicans hurled at Humphrey were being lived by Wilbur Mills, the Democratic Chair of the House Ways and Means Committee, with whom District of Columbia police engaged in a car chase until a drunk Mills drove his car into the Tidal Basin where he was found with his frequent companion, burlesque performer Fanne Fox. Stephen Green & Margot Hornblower, *Mills Admits Being Present During Tidal Basin Scuffle*, WASH. POST (Oct. 11, 1974), <http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/tidalbas.htm>. The revelations that followed ended his career. Dennis Hevesi, *Wilbur Mills, Long a Power in Congress, is Dead at 82*, N.Y. TIMES (May 3, 1992), <http://nytimes.com/1992/05/03/us/wilbur-mills-long-a-power-in-congress-is-dead-at-82.html?pagewanted=print>. Because the facts were verifiable, political opponents remained free to exploit them even after the Federal Election Campaign Act Amendment of 1974.

⁸⁶ 18 U.S.C. § 617 (Supp. 1975).

⁸⁷ *Id.* The statute remains in place today in modified form. 52 U.S.C. § 30124(a) (2012); 52 U.S.C. § 30109 (2012). There do not appear to be any reported cases involving enforcement of the campaign falsehood section of the federal election laws. Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L. J. 663, 674 n.63 (1992) (there are “no reported decisions” under 2 U.S.C. § 441(h) (1988), which prohibits fraudulent misrepresentation by a member of a political party). The only reported case since then, my research revealed, involved the same section. *See* FEC v.

“damaging” to an opponent is common in state statutes aimed at deception in politics analyzed in Part IV below.

Congress declined to adopt a competing campaign finance statute that contained an alternative restriction on deceptive campaign speech that would have reached more political expression. Referred to as Section 20, the provision would have criminalized “dirty tricks,” engaged in “with the specific intent [to] mislead[] voters or disrupt[] a campaign” coupled with a likelihood of success.⁸⁸ It enumerated illegal “acts,” many of which were in fact speech, making it a crime to: (i) “convey false instructions to a campaign worker”; (ii) “place misleading advertisements”; (iii) or “utter a false oral or written statement concerning any material fact about a candidate.”⁸⁹

Section 20, which resembled many of the state statutes discussed below in Part III B, was rife with First Amendment perils, though nothing in the written record suggests they were explored at the time.⁹⁰ What, for example, constitutes a “misleading” advertisement?⁹¹ What facts about a candidate are “material” or, for that matter, “false”?⁹² Must the falsehood be about an opposing candidate, or could it be a falsehood that puts the candidate who is speaking or whose supporters speak in a better light than the truth would sustain?⁹³ All of these issues arise in state campaign truth statutes that remain on the books today, as Part IV demonstrates.

B. State Responses

At least sixteen states currently have laws that regulate or criminalize false campaign speech.⁹⁴ Taking all of the

Novacek, 739 F. Supp.2d 957, 959–60 (N.D. Tex. 2010) (fraudulent implication that a telemarketer was raising funds for the Republican party).

⁸⁸ 120 CONG. REC. 8663 (1974) (statements of Sen. John Tower); *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1296, 1296 n.354 (1975) (questioning not the constitutionality but “rather the wisdom of a comprehensive approach encompassing all types of deceptive practices”).

⁸⁹ 120 CONG. REC. 8663 (1974).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ ALASKA STAT. § 15.13.095 (2012); COLO. REV. STAT. § 1-13-109 (2015); FLA. STAT. § 104.271 (2015); 10 ILL. COMP. STAT. 5/29-4 (2014); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); MINN. STAT. § 211B.06 (2014); MISS. CODE ANN. § 23-15-875 (2015); N.C. GEN. STAT. § 163-274(a)(7)–(8) (2015); N.D. CENT. CODE § 16.1- 10-04 (2015); OHIO REV. CODE ANN. § 3517.21–.22 (LexisNexis 2013); OR. REV. STAT. § 260.532 (2013); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); VA. CODE ANN. § 24.2- 1005.1(A) (2011); WASH. REV. CODE § 42.17A.335 (2014); W. VA. CODE § 3-8-11 (2013); WIS. STAT. § 12.05 (2011). These statutes were last checked by the author in October, 2017. The Federal Election Campaign Act does not preempt the states from regulating fraud in political advertising or, it seems,

provisions together, they would arguably reach all of the categories of deceptive campaign speech set out in the taxonomy described in Part II,⁹⁵ but each state leaves some substantial categories of campaign falsehood unregulated.

Broadly, the state statutes take a number of common approaches.

First, some statutes target false speech about an opponent.⁹⁶ Modifiers may restrict the statute's reach to falsehoods aimed at defeating the candidate.⁹⁷ The language in these statements, including clauses like "any statement about an opposing candidate which is false,"⁹⁸ reaches far beyond oppositional straight-out lies.

Recognizing potential First Amendment issues, a number of states have tried to bring their regulations within the doctrine governing defamation of public figures in civil actions by including requirements that the speaker proceeded with "actual malice"⁹⁹ or in "reckless disregard" of knowledge that

other campaign falsehoods in elections for national office. *See* *State v. Jude*, 554 N.W.2d 750, 752 (Minn. Ct. App. 1996).

⁹⁵ *See supra* Part II.

⁹⁶ For statutes criminalizing false speech about opponents, see COLO. REV. STAT. § 1-13-109 (2015); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2004). Similarly, for statutes criminalizing false speech about opponents or the other side regarding substantive issues submitted to voters, see ALASKA STAT. § 15.13.095(a) (2012); COLO. REV. STAT. § 1-13-109(2)(a) (2015); LA. STAT. ANN. § 18:1463(c) (2008); MINN. STAT. § 211B.06 (2014); N.C. GEN. STAT. § 163-274(a)(7)-(8) (2015); N.D. CENT. CODE § 16.1-10-04(2015); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013), *held unconstitutional by Magda v. Ohio Elections Comm'n*, 58 N.E.3d 1188 (Ohio Ct. App. 2016); OR. REV. STAT. § 260.532 (2013).

⁹⁷ *E.g.*, MASS. GEN. LAWS ch. 56, § 42 (2014).

⁹⁸ FLA. STAT. § 104.271(2) (2015).

⁹⁹ *E.g.*, FLA. STAT. § 104.271(2) (2015). Statutes aimed at false campaign advertisements may incorporate the language of defamation law governing public figures, requiring actual malice or reckless disregard, which are notoriously hard to prove. *See* Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889 *passim* (2008) (arguing that the standard should be relaxed). Some statutes that allowed liability on a standard of less than actual malice have been struck down or amended to include an actual malice standard. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (addressing the constitutionality of Canons of the Georgia Code of Judicial Conduct and JQC rule regulating statements by judicial candidates); *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122-23 (D. Haw. 2001) (examining provisions of the statutory Code of Fair Campaign Practices); *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207, 218-19 (Ala. 2001) (examining the Federal Constitution of Alabama Canon of Judicial Ethics); *In re Chmura*, 608 N.W.2d at 43-44 (addressing the constitutionality of Canon 7(B)(1)(d) of the Code of Judicial Conduct); *State v. Jude*, 554 N.W.2d 750, 753-54 (Minn. Ct. App. 1996); *Smith v. Russell*, 456 So. 2d 462, 464 (Fla. 1984) ("[T]he applicable New York Times standard allows public figures or public officials to recover for injury to reputation only upon clear and convincing proof of actual malice."); *see also* MASS. GEN. LAWS ch. 56, § 42 (2014); MISS. CODE ANN. § 23-15-875 (2015); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2011).

the statement was false.¹⁰⁰ Those statutes do not appear to impose an affirmative obligation to ascertain the facts before speaking.¹⁰¹

Statutes also frequently reach any false statement about either side that “is intended or tends to affect any voting at any primary, convention, or election.”¹⁰² These provisions reach beyond allegations about candidates to referenda and other substantive ballot issues, including, as Florida’s legislature puts it, “any false statement designed to affect the vote on any issue submitted to the electors.”¹⁰³ There are generally no guardrails around these provisions analogous to the actual malice or reckless disregard requirements for defamatory falsehoods about candidates.

A smaller number of jurisdictions also prohibit deceptive speech tending to benefit the speaker or the candidate with whom the speaker is associated, what I have called the self-referential straight-out lie and the intentional distortion falsely claiming credit.¹⁰⁴ These provisions do not impose any particular standard of care because the candidate knows better than anyone whether misleading biographical information is true or false.¹⁰⁵ The statements at issue range from misleading

¹⁰⁰ See, e.g., *Green v. N. Publ’g Co.*, 655 P.2d 736, 741 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983). *But see In re Judicial Disciplinary Proceedings Against Gableman*, 784 N.W.2d 631, 639 (Wis. 2010) (Prosser, J.) (proceeding with an evenly divided court, leaving proceedings below in place) (discussing whether defamation law, developed in a civil context where no government regulation applies, is inapplicable to regulation of campaign speech).

¹⁰¹ *Sharkey v. Fla. Elections Comm’n*, 90 So.3d 937, 939 (Fla. Dist. Ct. App. 2d 2012) (holding that a failure to investigate whether a falsehood was true before speaking does not satisfy the actual malice standard in Florida’s statute barring false statements about opposing candidates).

¹⁰² UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2017) (“A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election.”).

¹⁰³ FLA. STAT. § 104.271 (2017).

¹⁰⁴ COLO. REV. STAT. § 1-13-109 (2016) (“any false statement designed to affect the vote”); LA. STAT. ANN. § 42:1130.5 (2016) (false claim to have an endorsement, and “any false statement”); MASS. GEN. LAWS ch. 56, § 7 (2017) (falsehood designed or tending to “aid” election); MINN. STAT. §211B (2017) (tends to elect or promote ballot issue); N.D. CENT. CODE § 16.1-10-04 (2016) (false statements “on behalf of”); OHIO REV. CODE ANN. § 3517.22 (“false statement . . . designed to promote the adoption . . . of any ballot proposition or issue”); OR. REV. STAT. § 260.532 (2015) (false statements of “material fact relating to any candidate, political committee or measure”); UTAH CODE ANN. §20A-11-1103 (LexisNexis 2017) (“any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting . . .”).

¹⁰⁵ The Washington statute expressly notes that a candidate “cannot defame himself or herself,” making false statements by the candidate or the candidate’s supporters exempt from the portion of the statute regulating defamation with actual malice. WASH. REV. CODE § 42.17A.335(3) (2017); see also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.16 (1995).

claims of current incumbency (discussed *supra* Part II.B) to false claims about having received endorsements, to deceptive biographical details such as having attended or graduated from a prestigious college, having served honorably in the military, or having received a military honor.

None of those statutes appear to limit the antics of the rare candidate who assumes a new identity in an effort to win votes. Issues surrounding name changes by two candidates in Arizona's 7th Congressional district arose during the 2014 election season in the midst of a crowded Democratic primary to replace a retiring Congressman. In a district where more than fifty percent of the voters were Hispanic, a Hispanic surname was thought to be highly advantageous.

Scott Fistler, who had previously sought office as a Republican and began the primary season with his Republican registration intact, legally changed his name to Cesar Chavez, piggybacking on the renown of the widely respected labor organizer and civil rights activist whose reputation would presumably resonate with many of the district's voters. Fistler, who does not appear to have any Hispanic ancestors, also changed his party registration midway through the primary season so that he could get on the ballot. The grandson of the renowned Cesar Chavez sued to enjoin the name change, but the suit was promptly dismissed.¹⁰⁶ No statute stood in Fistler-Chavez's way. As in most or all states, Arizona law permits name changes unless made with "intent to defraud," whether or not the change is registered with the state.¹⁰⁷

At about the same time, a lawsuit was filed against a Hispanic leader in the state's House of Representatives, also running in the Democratic congressional primary, who had changed his name from Ruben Marinelarena to Ruben Marinelarena Gallego. The suit was filed by supporters of yet another primary candidate of Hispanic origin, Mary Rose Wilcox, who sometimes included her birth name, Garrido, on campaign materials, and who posited, "We the people have a right to know who is running to represent us in Congress."¹⁰⁸ Gallego retorted that he had changed his name from the family

¹⁰⁶ Meghan Kenneally, *Arizona Congressional Candidate Changes His Name to Cesar Chavez in Order to Appeal to Hispanic Voters*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2647456/Arizona-congressional-candidate-changes-Cesar-Chavez-order-appeal-Hispanic-voters.html> (last updated June 3, 2014, 5:18 PM); Jaime Fuller, *This Arizona Candidate Changed His Name. His Opponent Wasn't Happy About It.*, WASH. POST (June 12, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/12/this-arizona-candidate-changed-his-name-his-opponent-wasnt-happy-about-it/?utm_term=.eb182c67190e.

¹⁰⁷ 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 483 (15th ed. 2017).

¹⁰⁸ Fuller, *supra* note 104.

name of his father who had abandoned him in infancy to that of his mother who had raised him as a single parent and whose father was “a father figure” to him.¹⁰⁹ Apparently voters did not agree with Wilcox that Gallego was trying to mislead them; Gallego won handily and still represents the district.

The two name-change stories are manifestly distinguishable. One appeared to be nothing but a stunt intended to mislead the uninformed, the other (predating the primary by four years) reflected biographical realities that regularly lead people to change their names. It is hard to imagine a statute that could bar the first while permitting the second, unless the name change was required to have preceded the election by a certain number of years.¹¹⁰

A handful of states outlaw falsehoods in specific settings, including political advertisements,¹¹¹ during telephone polling,¹¹² and at polling places (where many states outlaw all electioneering).¹¹³ One state expressly targets charges about the “honesty, integrity, or moral character of any candidate, so far as his or her private life is concerned, unless the charge shall be in fact true and actually capable of proof.”¹¹⁴ The statute further provides that any statements that “clearly and unmistakably imply” such attacks on personal integrity shall be treated as a direct charge (reaching what I have labelled indirect prevarications as well as straight-out oppositional lies and intentional distortions).¹¹⁵

Misleading campaign speech and complaints alleging falsehood by the other side often enter the marketplace very shortly before the balloting occurs. The short time frame until election day makes it much more difficult for the candidate who was besmirched or the party against whom a meritless complaint for violating a campaign falsehood statute is filed to respond effectively.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ If I ran for office, my opponent could accuse me of changing my name from Rosovsky to Ross, because my father “Americanized” our family name when I was a toddler.

¹¹¹ MINN. STAT. § 211B.06 (2014); N.D. CENT. CODE § 16.1-10-04 (2015); OR. REV. STAT. § 260.532(1) (2013); TENN. CODE ANN. § 2-19-142 (2014).

¹¹² ALASKA STAT. § 15.13.095 (2016).

¹¹³ MINN. STAT. § 211B.11 (2014); 10 ILL. COMP. STAT. 5/7-41(c) (2007); *see also* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding narrowly drawn statute barring electioneering at polling places).

¹¹⁴ MISS. CODE ANN. § 23-15-875 (2015).

¹¹⁵ *Id.*

¹¹⁶ For example, in *List*, even though the allegedly false campaign materials appeared as early as August 9, Congressman Driehaus did not file his complaint with the Ohio Elections Commission until “[j]ust before the election,” and proceedings were ongoing on election day. *List v. Driehaus*, 779 F.3d 628, 631 (6th Cir. 2015). Until 2017, Mississippi barred any accusations that a candidate had violated the campaign deception statute within five days of an election, or on election day. That provision

Outside the context of ballot initiatives, referenda and the like, no statute appears to expressly limit campaign deception of any variety respecting substantive issues.¹¹⁷ To the extent that statutes are modelled on defamation law, they are inapplicable to ballot issues and substantive debate.¹¹⁸

III. FIRST AMENDMENT BARRIERS TO REGULATING CAMPAIGN FALSEHOODS

Now we reach the constitutional day of reckoning: can the federal and state statutes regulating deception in political campaigns survive First Amendment scrutiny? Or, do they raise the specter of “Oceana’s Ministry of Truth,” which the *Alvarez* plurality reminded us has no place in “[o]ur constitutional tradition”?¹¹⁹

A. First Principles, Content-Based Regulations, and the Ministry of Truth

The Ministry of Truth wielded enormous power in the Oceana of George Orwell’s *1984*. Like other ministries in Oceana, it did the opposite of what its name suggested. The Ministry of Truth dealt with lies. That is, it falsified the past and the present, ensuring no other sources of information were available for public consumption, so that whatever the rulers

was repealed in 2017. MISS. CODE ANN. § 23-15-875, Amendment Notes (2017). The former language acknowledged the difficulty of responding to last minute accusations, including accusations that one had violated a law that prohibits allegations “with respect to integrity” of the opposing candidate. Recent developments, including heavy reliance on social media both to spread falsehood and to respond it and voting that is spread over several weeks, may affect the calculations about the window of opportunity for deception and response. Oregon’s statute anticipates the urgency of resolving campaign deception disputes by requiring that all complaints under its law be filed within 30 days of the election during which the violation allegedly occurred, and that courts expedite hearings on such claims, so that final judgments relating to primary elections be rendered no later than 30 days before the general election, and final judgments respecting complaints arising during a general election be resolved “before the term of that office begins.” OR. REV. STAT. § 260.532 (9) (2017).

¹¹⁷ Greg Mellen, *Huntington Beach Prepared to Go to Court to Keep At-Large Elections*, ORANGE CTY. REGISTER (May 25, 2017, 5:11 PM), <https://www.oregister.com/2017/05/25/huntington-beach-prepared-to-go-to-court-to-keep-at-large-elections/> (interpreting and applying a statute governing deception in the language of ballot propositions and the accompanying explanatory material). See *supra* note 102 (listing statutes that seem broad enough to reach campaign deception respecting substantive positions of individual candidates). Language targeting false statements “intended” or “tending to” affect the outcome of an election may reach misrepresentation of substantive positions, but I have not found any cases interpreting that language as reaching substantive claims that were not understood as disparaging the other side.

¹¹⁸ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.16 (1995) (quoting *People v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987) (“A public question clearly cannot be the victim of character assassination.”)).

¹¹⁹ *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion).

declared as truth became “truth.” It is the perfect propaganda machinery for the state because it methodically eliminates all sources of conflicting ideas and messages, even as it scales back language itself.¹²⁰

In contrast to such dystopias and authoritarian regimes, the Speech Clause forbids any “broad censorial power” vested in government.¹²¹ To avoid even the risk of chilling expression, “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹²² Any effort to proscribe speech as false—whether as a straight-out lie or an indirect prevarication, or anything in between—necessarily rests on its content. Such content-based regulations are presumptively unconstitutional, unless they aim at the narrow categories of speech that fall outside the First Amendment’s protection such as defamation, fraud, or obscenity.

Before the Supreme Court’s 2012 decision in *United States v. Alvarez*, legislatures could arguably be forgiven if they were under the impression that falsehoods might fall outside the First Amendment’s protections altogether or, at a minimum, receive less zealous protection than other forms of speech.¹²³ More than 100 federal statutes regulated falsehoods.¹²⁴ And there was a Circuit split over whether the Speech Clause protected falsehood when the Court considered *Alvarez*.¹²⁵

Justice Kennedy’s plurality opinion in *Alvarez*, however, forcefully repudiated the government’s assertion that it had the power to control deception. The cases do not establish, Justice Kennedy insisted, the “principle” the government urged in *Alvarez*, “that all proscriptions of false statements are exempt

¹²⁰ GEORGE ORWELL, *Appendix: The Principles of Newspeak*, in *ANIMAL FARM*: 1984 379 (Houghton Mifflin Harcourt 2003) (1949) (heretical thought becomes literally “unthinkable” through the elimination of words which “simply ceased to exist”).

¹²¹ *Alvarez*, 567 U.S. at 723 (plurality opinion).

¹²² *Id.* at 716 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

¹²³ Brief of Petitioner at 18–36, *United States v. Alvarez*, 567 U.S. 709 (2012) No. 11-210; *Alvarez*, 567 U.S. at 732–33 (Breyer, J., concurring) (conceding that the “Court has frequently said or implied that false factual statements enjoy little First Amendment protection”); *Alvarez*, 567 U.S. at 746 (Alito, J., dissenting) (citing cases recognizing that “false factual statements possess no intrinsic First Amendment value”).

¹²⁴ *See Alvarez*, 567 U.S. at 747–48 (Alito, J., dissenting) (noting that “many kinds of false factual statements have long been proscribed without ‘raising any Constitutional problem,’” including “[l]aws prohibiting fraud, perjury, and defamation,” and that “more than 100 federal criminal statutes” punish “false statements” related to the work of federal agencies).

¹²⁵ *United States v. Strandlof*, 667 F.3d 1146, 1160 (10th Cir. 2012) (upholding the Stolen Valor Act and a conviction under it using “breathing space” analysis, not strict scrutiny, and reviewing the rulings of “most circuit courts” that false statements of fact receive “limited First Amendment protection”), *vacated*, 684 F.3d 962 (10th Cir. 2012).

from exacting First Amendment scrutiny.”¹²⁶ They do not support the “broader proposition that false statements are unprotected when made to any person, at any time, in any context.”¹²⁷ Most starkly, a law that “targets falsity and nothing more” violates the First Amendment.¹²⁸ There would be, Kennedy wrote, “no limiting principle” if the government had “authority to compile a list of subjects about which false statements are punishable” regardless of “whether shouted from the rooftops or made in a barely audible whisper.”¹²⁹

The Court held that the First Amendment protected Alvarez’s straight-out self-referential lie, a form of puffery, and overturned the federal Stolen Valor Act under which he was convicted. Even a “straight-out lie,” the Court underscored, could not be criminalized based on its indisputable falsity without more: harm to others or unwarranted advantage to the speaker.¹³⁰

The dissenters in *Alvarez*, who would have upheld both the Stolen Valor Act and Alvarez’s conviction under it, acknowledged that “it is perilous to permit the state to be the arbiter of truth.”¹³¹ Even if we could ignore the state action required to ban deception in campaign speech, how would such statutes be administered and enforced absent a government role in discerning what is true or false?

Broadly speaking, the statutes rely on two courses of action. The candidate or concerned citizens may complain by going directly to court, or by asking a state agency or prosecutor to determine whether a prima facie case has been made that a campaign engaged in the type of deceptive speech the statute bars, in which case a court would then conduct hearings. In either instance, the state (whether through the

¹²⁶ *Alvarez*, 567 U.S. at 720 (plurality opinion).

¹²⁷ *Id.*

¹²⁸ *Id.* at 719.

¹²⁹ *Id.* at 723.

¹³⁰ *Id.* at 727. Kennedy cabined the Court’s earlier statements about falsehoods that the state could punish within several narrow categories. These included falsehoods voiced “to effect a fraud or secure moneys or other valuable considerations,” several types of material falsehoods made to government officials, and perjured testimony, made under oath, which “undermines the function . . . of the law,” forms the basis of government action and “affects the rights and liberties of others.” *Id.* at 720–21. The rights and liberties of others include the victims of defamation, long protected under common law. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11–12 (“Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person’s reputation by the publication of false and defamatory statements” thereby “allowing an individual to vindicate his good name” and obtain “redress for harm caused by such statements”). This is why many of the statutory frameworks discussed in Part III are modeled on laws regulating fraud or libel. *See* *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1246–50 (Mass. 2015) (rejecting the State’s arguments that the campaign speech statute aims at unprotected fraudulent and defamatory expression).

¹³¹ *Alvarez*, 567 U.S. at 752 (2012) (Alito, J., dissenting).

executive branch, an independent agency, or ultimately the judiciary) becomes the arbiter of truth. As the Supreme Court explained in *New York Times v. Sullivan*, the precise form the government uses to impose truthfulness is irrelevant: “Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials”¹³² For the time being, I’ll ask that you set aside that particular obstacle to regulation, because the enforcement mechanism may be the least of the First Amendment barriers to constraining deceptive campaign speech, as I argue in the next part.

B. Legal Standards

The Supreme Court has never considered whether lies in campaign speech can be regulated without violating the expressive rights of speakers.¹³³ *Alvarez* and earlier Supreme Court decisions set out a framework, but do not expressly resolve a number of threshold issues including: whether lies in political campaigns and other political speech have greater or lesser constitutional protection than autobiographical lies of the sort at issue in the case,¹³⁴ and what standard of review applies to inhibitions on protected but deceptive expression.¹³⁵ *Alvarez* is the starting point for any contemporary discussion of laws governing falsehood; it informs but does not determine the outcome of recent cases in which litigants have challenged the constitutionality of campaign deception statutes.

Like other types of expression, even political speech is not immune from prosecution if it fits within a category of speech that falls outside the First Amendment. Where the restrictions on election falsehood aim at defamatory communications, there is no need to choose a standard of review if the court determines that the speech is defamatory

¹³² *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

¹³³ The decision in *Susan B. Anthony List v. Driehaus* focused on justiciability issues: standing and mootness. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341–47 (2014). The Court did not reach the merits.

¹³⁴ *E.g.*, *Alvarez*, 567 U.S. at 732–33 (Breyer, J., concurring); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472 (6th Cir. 2016); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235–36 (2015); *281 Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014).

¹³⁵ There was no majority on the issue of what standard of review should apply in *Alvarez*. The plurality used the terms “exacting” and “most exacting” instead of strict scrutiny, presumably because Justice Breyer’s concurring opinion proposed using “proportionality” or intermediate scrutiny which would only require the state to demonstrate a “legitimate” objective rather than a compelling interest. *Alvarez*, 567 U.S. at 724 (plurality opinion); *id.* at 730 (Breyer, J., concurring).

under *New York Times v. Sullivan*.¹³⁶ *New York Times* sets a high bar for recovery where public figures, a group that includes all candidates for public office, allege that they have been defamed. It requires clear and convincing evidence that the statement was false and that the defendant acted with actual malice or reckless disregard of the truth.¹³⁷

This is a hard standard to satisfy under the best of circumstances, and “recovery by a candidate is highly unusual.”¹³⁸ That matters because, as discussed above, so many state statutes attempt to squeeze regulation of campaign communications within the framework of defamation.¹³⁹

1. Political speech under *Alvarez*

It has long been undisputed that political speech is at the apex of First Amendment freedoms.¹⁴⁰ We have, the Supreme Court reminds us again and again, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.”¹⁴¹ Even before *Alvarez*, the Court warned that the “breathing space” the First Amendment requires for such robust debate carries the risk of falsehoods and broken promises.¹⁴²

Speech related to political campaigns may be even more sacrosanct, at least according to longstanding dicta. The foundational principle that inhibitions on expression based on content are presumptively invalid has, the Supreme Court has stated, the “‘fullest and most urgent application’ to speech uttered during a campaign for political office.”¹⁴³ The reasons

¹³⁶ *Rickert v. Pub. Disclosure Comm’n*, 168 P.3d 826, 859 (Wash. 2007) (en banc) (Madsen, J., dissenting) (“[I]f the actual malice standard is met[,] the speech . . . is not constitutionally protected” and the statute does not have to be analyzed under strict scrutiny.); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964).

¹³⁷ *Sullivan*, 376 U.S. at 279–80.

¹³⁸ *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 196 (Cal. Ct. App. 3d 2016) (quoting *Beilenson v. Superior Court*, 52 Cal. Rptr. 2d 357, 365 (1996)).

¹³⁹ See *supra* notes 94–96 and accompanying text.

¹⁴⁰ See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,” including “candidates” and “all such matters relating to political processes.”); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

¹⁴¹ *Sullivan*, 376 U.S. at 270.

¹⁴² *Id.* at 271–72 (“[E]rroneous statement is inevitable in free debate . . .”); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“[P]romises” are “indispensable to decisionmaking in a democracy,” but here candidate’s promise to take a reduced salary was barred by statute, and quickly retracted.).

¹⁴³ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); see also *Brown*, 456 U.S. at 53 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971)). In the more recent decisions, much of the “speech” at issue is actually the expenditure of money.

are manifold. As James Madison explained in 1800, electing public officials is “the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits”¹⁴⁴ In more modern parlance, although false statements during elections may have profound consequences if they mislead voters,¹⁴⁵ a state may not “enhance[] the ability of its citizenry to make wise decisions by restricting the flow of information to them.”¹⁴⁶ Cutting off the flow of information to voters not only diminishes the campaign’s expressive rights, it also implicates the voter’s right to receive information.

Therefore, it is a bit startling that the various opinions in *Alvarez* seem to signal a step back from full protection for campaign speech.¹⁴⁷ Recall that the splintered opinions provided no majority resolution of what standard of scrutiny applies to falsehood. If intermediate scrutiny were to apply to all false speech, then *Alvarez* would not mean what six justices agreed the case stands for: falsehood is not categorically removed from First Amendment protections, at least without the government showing some more specific harm. If that is the case, then it suggests that the hierarchy of First Amendment values which, if anything, privilege political and campaign speech, should remain in place until “something more” (such as defamation within the context of political speech) is proven that removes the particular statement from constitutional protection. The Eighth Circuit, considering a sister statute to the statute at issue in *List*, distinguished *Alvarez* as a case that did not involve political speech, but rather involved a statute that proscribed falsehood outside the political context.¹⁴⁸ It held that strict scrutiny applies when the state attempts to regulate political speech at the core of First Amendment protections and that, “*Alvarez* does not alter the landscape on this issue.”¹⁴⁹

A closer look at the plurality and concurring opinions in *Alvarez* provides some insight. Concurring, Justice Breyer distinguished “false statements about verifiable facts” of the sort

¹⁴⁴ *Harte-Hanks Commc’ns., Inc. v. Connaughton*, 491 U.S. 657, 687–688 (1989) (quoting James Madison (citing THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 575 (Jonathan Elliot ed., 4th ed. 1861))).

¹⁴⁵ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

¹⁴⁶ *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (The state’s claim must “be viewed with some skepticism.”).

¹⁴⁷ E.g., 281 *Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) (reversing a district court’s conclusion that *Alvarez* mandated intermediate scrutiny in a case involving campaign speech).

¹⁴⁸ *Id.* at 782–85.

¹⁴⁹ *Id.* at 784.

at issue in *Alvarez* from the potentially broader reach of the Stolen Valor Act.¹⁵⁰ He would impose a clear *mens rea* requirement even in the context of verifiability.¹⁵¹

More importantly, he worried that the Stolen Valor Act could reach “political contexts, where such lies are more likely to cause harm,” presumably by misleading voters. And, he continued, the regulations may inadvertently distort political discourse because of the risk of selective prosecution of falsehoods.¹⁵² It is easy to imagine an administrative body with authority over campaign falsehood whose members were appointed by an incumbent governor who is running for reelection selectively choosing which deceptions merit investigation and which statements meet the definition of falsehood. Much less would be needed to find selective prosecution.

Breyer analogizes the risks of consumer confusion in trademark law to certain kinds of lies the government might have a compelling interest in restricting. He reminds us that trademark plaintiffs must usually show that confusion is likely before they can claim a risk of dilution. Couldn’t candidates unfairly tarred by deceptive speech make similar claims: “voters are likely to be confused” or “my reputation will be diminished.” But could the candidates back those claims up with statistically reliable evidence?

And Justice Breyer anticipated chill in both public and private contexts (“barstool braggadocio” as well as “family, social or other private contexts”).¹⁵³ Justice Kennedy, writing for the plurality, sounded similar alarms about the statute’s potential reach into: “personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings.”¹⁵⁴ Some state statutes aimed at campaign deception share the same infirmity.¹⁵⁵ But nothing in the *Alvarez* plurality

¹⁵⁰ *United States v. Alvarez*, 567 U.S. 709, 732 (2012) (Breyer, J., concurring). *But cf. id.* at 710 (plurality opinion).

¹⁵¹ *Id.* at 732 (Breyer, J., concurring).

¹⁵² *Id.* at 736.

¹⁵³ *Id.* at 736–37.

¹⁵⁴ *Id.* at 722–23 (plurality opinion).

¹⁵⁵ COLO. REV. STAT. § 1-13-109 (2016) (any “person” who makes “any false statement designed to affect the vote”); LA STAT. ANN. § 18:1463(2)(C) (2016) (reaching false statements by any person who “knows or should reasonably be expected to know” that it is false, about a candidate or a proposition submitted to voters); MASS. GEN. LAWS ch. 56, § 7 (2017) (falsehood designed or tending to “aid” election); MINN. STAT. §211B.06(B) (2017) (reaching letters to the editor that are “false” and tend to elect or promote ballot issue); UTAH CODE ANN. §20A-11-1103(reaching any “person” who “knowingly” makes “any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting . . .”). *See also* MASS. GEN. LAWS. ch. 56 § 42, *overturned by* *Commonwealth v. Lucas*, 34 N.E. 3d 1242 (Mass. 2015)

opinion, or in Justice Breyer's concurrence, indicates whether or to what extent the Court's prior statements about diminished protection for "calculated falsehood" in political campaigns remains good law after *Alvarez*.

C. Scrutinizing Regulation of Campaign Lies

Before *Alvarez*, a number of scholars compared the regulation of campaign falsehoods to the regulation of campaign finance in that both seek to mitigate potential distortions; but all or most of them wrote before the Supreme Court upended the government's capacity to control campaign spending.¹⁵⁶ Commentators before and after *Alvarez* have disagreed about whether any effort to restrain deception during political campaigns could withstand First Amendment challenge.¹⁵⁷ Some authorities who support regulation of falsehood during campaigns have relied on the defamation model many states have used, including the "actual malice" standard, or have argued that the standard need not be so high because of the unique dangers inherent in false manipulation of voters.¹⁵⁸ And still others, like Diogenes seeking the honest person, are on a quest to craft a statute that would strike the right balance between freedom of expression and electoral integrity.¹⁵⁹

Outside the defamation framework,¹⁶⁰ most state courts and lower federal courts considering restrictions on campaign

(applicable to ballot issues, applied as soon as the issue was announced and could be enforced against exchanges "between two friends engaged in a spirited political discussion in a local pub.").

¹⁵⁶ William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300–22 (2004); see also *Citizens United v. FEC*, 558 U.S. 310, 319 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014); *McConnell v. FEC*, 540 U.S. 93, 171–73 (2003).

¹⁵⁷ Many scholars argue that campaign falsehood statutes are unlikely to survive constitutional review. See, e.g., Jack Windsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 863–65 (1987) (pre-*Alvarez*) (emphasizing that the cure is more and better speech); Lance Conn, *Mississippi Mudslinging: The Search for Truth in Political Advertising*, 63 MISS. L.J. 507, 514 n.40 (1994) (restrictions on electoral lies chill speech and are ineffective); Richard L. Hasen, *supra* note 2.

¹⁵⁸ E.g., Michelle Roberts, *Ask Me No Questions and I'll Tell You No Lies: The First Amendment in Ballot Question Campaigns*, 33 LOY. L.A. ENT. L. REV. 37, *passim* (2013) (arguing that falsehood with actual malice is outside the First Amendment); Jason Zenor, *A Reckless Disregard for Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 63–71 (2016) (arguing for an intermediate standard of review akin to commercial speech doctrine); Goldman, *supra* note 99, at 892–97 (discussing false negative ads as "serious First Amendment concerns," but advocating for a negligence standard immediately prior to balloting).

¹⁵⁹ E.g., Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1076–78 (2013).

¹⁶⁰ *List v. Driehaus*, 779 F.3d 628, 633 (6th Cir. 2015) (affirming summary judgment to SBA List on grounds that the elements of defamation were not established because

speech since *Alvarez* have applied strict scrutiny, reasoning that it is the standard for all content-based regulations.¹⁶¹ If there had been any doubt, several courts have noted, *Reed v. Gilbert* resolved the issue.¹⁶²

Strict scrutiny provides that content-based laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹⁶³ Applying strict scrutiny to campaign deception regimes reveals a cornucopia of First Amendment flaws in each of the statutes that have reached the courts.

2. Compelling interest.

The lower courts have generally had little difficulty acknowledging the compelling nature of the government interest in regulating campaign lies: to preserve the integrity of the electoral process; to protect “voters from confusion and undue influence,” sometimes described as distortion; and to “ensur[e] that an individual’s right to vote is not undermined by fraud in the election process.”¹⁶⁴ However, states overstep when they offer what the Massachusetts Supreme Judicial Court terms “the rather remarkable argument that the election context gives the government broader authority to restrict speech”

the facts were “subject to differing interpretations”); *see also* *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1246 (Mass. 2015) (rejecting the state’s efforts to “shoehorn” its campaign deception law into the categorical exceptions of fraud or defamation).

¹⁶¹ *Driehaus*, 814 F.3d at 472 (noting that strict scrutiny applies to restrictions on “core speech” and indeed to all content-based regulations, whether under “old . . . or more recent First Amendment law”) (citing, *inter alia*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (reiterating that strict scrutiny applies to all content-based prohibitions on expression)); *Winter v. Woinitzek*, 834 F.3d 681, 693 (6th Cir. 2016) (holding that strict scrutiny applies to the false statements and misleading statements clauses of Kentucky’s ban on speech during judicial elections); *281 Care Comm. v. Arneson*, 766 F.3d 774, 779 n.9 (8th Cir. 2014) (standard hotly contested below in light of splintered decision in *Alvarez*, strict scrutiny applies to regulations on falsity in the “context of political campaigns on a ballot issue”); *Lucas*, 34 N.E.3d at 1250–52 (discussing *Alvarez* in light of *Gilbert* and applying strict scrutiny as required for a content-based regulation and as directed by the Massachusetts Declaration of Rights).

¹⁶² *Driehaus*, 814 F.3d at 473 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (clarifying that strict scrutiny applies to all content-based regulations, even if the regulation does not distinguish based on viewpoint)).

¹⁶³ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

¹⁶⁴ *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *281 Care Comm.*, 766 F.3d at 785–86 (assuming, for purposes of analysis, that the compelling interest had been established and noting that the State “indisputably has a compelling interest in preserving the integrity of its election process”); *Lucas*, 34 N.E.3d at 1252 (“[A]s a general matter,” the State has a compelling interest in “free and fair elections.”); *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 858–80 (Wash. 2007) (en banc) (Madsen, J., dissenting); *Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 699–700 (Wa. 1998) (Madsen, J., concurring). *But see Rickert*, 168 P.3d at 830 (rejecting the claim that the legislature has a compelling interest in “protecting political candidates (including themselves)”).

presumably to help citizens discern reliable campaign statements.¹⁶⁵ To the contrary, a long line of cases make clear that, “The opposite is true.”¹⁶⁶

The countervailing interests in protecting political speech might weigh heavily against even acknowledging that the state’s interest is compelling, because of the constitutional imperative of protecting free speech during campaigns for political office.¹⁶⁷ The claim that the state may “prohibit false statements of fact in political advertisements” or in a broader swath of expression “presupposes that the State possesses an independent right to determine truth and falsity in political debate . . . Rather, the First Amendment operates to insure the public decides what is true and false with respect to governance.”¹⁶⁸

Even before *Alvarez*, the Supreme Court of Washington held that the state lacked a compelling interest in regulating speech published with actual malice in political advertisements that contained a false statement of material fact—at least if the lies did not defame an actual person.¹⁶⁹ The court expressly rejected the state’s reliance on defamation law because the statute at issue reached (and the controversy in the case before it involved) a referendum; the absence of an individual whose private rights could be harmed or vindicated rendered defamation inapposite.¹⁷⁰ Where an initiative measure is involved, the court held, “there is no competing interest sufficient to override our precious freedom to vigorously debate

¹⁶⁵ *Lucas*, 34 N.E.3d at 1253.

¹⁶⁶ *Id.*; *Rickert*, 168 P.3d at 827; 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014). In 2009, the legislature of the State of Washington explained the purpose of post-*Rickert* legislation barring defamatory statements made with actual malice as part of campaign materials: such statements “damage the integrity of elections by distorting the electoral process. Democracy is premised on an informed electorate. To the extent such defamatory statements misinform the voters, they interfere with the process upon which democracy is based, . . . lower the quality of campaign discourse and debate, and lead or add to voter alienation by fostering voter cynicism and distrust of the political process.” S. Comm. on Gov’t Operations & Elections, B. 5211, 61st Leg., Reg. Sess. (Wash. 2009), amending Rev. Code Wash. 42.17.530.

¹⁶⁷ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *119 Vote No! Comm.*, 957 P.2d at 698 (rejecting the State’s asserted compelling interest in shielding the public from falsehood during campaigns as “patronizing and paternalistic”).

¹⁶⁸ *119 Vote No!*, 957 P.2d at 695 (citing *Meyer v. Grant*, 486 U.S. 414, 419–20 (1963)); *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 791 (1988).

¹⁶⁹ *119 Vote No! Comm.*, 957 P.2d at 691.

¹⁷⁰ *Id.* at 697 (citing Charles Fried, *Speech in the Welfare State: The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992)). The state legislature subsequently adopted a statute limited to political advertisements that with actual malice contained a false statement of material fact about a candidate for public office. 1999 WASH. SESS. LAWS 1290 § 2(1)(a)(1999). That law, too, was found unconstitutional on its face. *Rickert*, 168 P.3d at 845.

the wisdom of enacting a measure, even if that debate contains falsehoods as well as truths.”¹⁷¹

In light of *Alvarez*, another way of thinking about the state’s compelling interest would be to ask whether the state was targeting the kinds of harms—the “something more” than even a straight-out lie—that the plurality said was required before silencing protected speech: harm to others or unwarranted advantage to the speaker. This inquiry turns out not to be simple either.

Presumably, winning an election might be construed as securing employment or other benefit of the sort the *Alvarez* plurality had in mind. One might think that if Alvarez had falsely claimed to be a war hero during his election campaign, and that claim garnered votes for him, he would have obtained a concrete benefit, subjecting his lie to regulation. The Massachusetts Supreme Judicial Court considered that very hypothetical. It concluded that *Alvarez* inoculates from criminal prosecution a candidate who might make Alvarez’s false claim “at a preelection debate.”¹⁷² No court appears to have addressed the question whether misleading the public constitutes the sort of harm to others the *Alvarez* plurality had in mind, which itself suggests the answer is no. Consistent with the precedents the plurality discussed, that harm likely requires an individual who is defrauded, defamed, or otherwise suffers directly as a result of speech that the First Amendment is already understood not to protect.

3. Narrow tailoring

Establishing a compelling interest is just the beginning of the analysis. The state must next show that its regulations have a relationship to the danger it seeks to forestall,¹⁷³ that the remedy is narrowly crafted, and that it is neither underinclusive nor overbroad. Outside of the judicial election context, discussed in Part V below, none of the state campaign deception statutes that have reached the courts since *Alvarez* have survived the next stages of strict scrutiny.¹⁷⁴

¹⁷¹ *119 Vote No! Comm.*, 957 P.2d at 700.

¹⁷² *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015).

¹⁷³ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–803 (2011).

¹⁷⁴ Before *Alvarez*, some courts had sustained regulations on deceptive campaign speech. Goldman, *supra* note 99. Afterwards, courts held that *Alvarez* required them to reject those precedents. *E.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470-71 (6th Cir. 2016) (expressly rejecting reliance on *Pestak v. Ohio Elections Comm’n*, 926 F.2d 573 (6th Cir. 1992), because *Alvarez* “clearly abrogates *Pestak*’s reasoning” that false speech is unprotected).

a. Is the inhibition of speech necessary to address the problem?

A tight “fit” or nexus is required between the compelling interest a regulation on speech is designed to serve and the specific inhibition on expression. The restriction must be “actually necessary” to achieve the state’s goals,¹⁷⁵ and the state must demonstrate “a direct causal link between the restriction imposed and the injury to be prevented.”¹⁷⁶

Government lawyers defending deceptive campaign speech statutes have asked courts to rely on common sense and “conjecture” about the likely impact of campaign lies.¹⁷⁷ A reasonable inference is not a sufficient substitute for empirical evidence showing a close link between the harm to be prevented and the impact of suppressing protected speech.¹⁷⁸ Granted, the secret ballot makes it very difficult to ascertain whether and to what extent voters were deceived by campaign falsehoods and whether they changed their votes as a result. The very proposition is undermined in cases where the victorious candidate was the target of the deceptive speech.¹⁷⁹ None of the reported cases contain evidence of the alleged harm and, failing that, the state cannot show how regulating campaign speech would ameliorate the purported (though common-sensical) harms.

b. Overbreadth

Defamatory statements are beyond the First Amendment’s protection whether the statement is uttered in the context of a business transaction or an election. However, statutes that purport to apply the legal standard for defamation to bar campaign falsehoods are overbroad if they reach falsehoods that are not defamatory.¹⁸⁰

Beyond that threshold problem, even if it were possible to draft a deceptive campaign speech statute narrowly enough that it could survive strict scrutiny on its face, matters of timing

¹⁷⁵ *Brown*, 564 U.S. at 799.

¹⁷⁶ *United States v. Alvarez*, 567 U.S. 709, 710 (2012) (plurality opinion).

¹⁷⁷ 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014).

¹⁷⁸ *Id.* at 790 (Minnesota failed to present evidence of harm or efficacy of regulating campaign speech.); see also Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 501–21 (2000) (The government must show that the harm is real, not conjectural, and that the regulation will “alleviate the harm ‘in a direct and material way.’”).

¹⁷⁹ *E.g.*, *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 828 (Wash. 2007) (en banc) (The target of falsehood, who complained to the administrative body charged with enforcing the campaign deception act, was re-elected with 79% of the vote.); *Zollman v. Dawson*, 611 P.2d 1175, 1177 (Or. Ct. App. 1980) (finding no evidence that violations of the law were “capable of affecting the result of the election”).

¹⁸⁰ *Rickert*, 168 P.3d at 828 (holding that non-defamatory false statements about candidates may not be prohibited).

threaten to make fair application extremely vexing. As I have noted, many of the false campaign statements and advertisements that reach the courts appear very shortly before election day, when there is little time for the target to respond effectively. The last-minute lie, however, is not treated differently under the First Amendment.¹⁸¹ The lie is out there, and given the notorious persistence of misinformation,¹⁸² might be very difficult to dislodge under the best of circumstances: unlimited time and budget to spread the repetition of the truth.

But elections have a deadline. The lie is in play. This is the very evil the regulations are intended to redress. However, an unintended but easily predictable consequence flows from the regulatory scheme. The target of the alleged lie may weaponize the regulatory apparatus if (as is often the case) the enforcement mechanism allows the target, his or her supporters, or “any citizen” to file a complaint that initiates a formal inquiry. That inquiry, in turn, is reported in the press, tarnishing the original speaker, who may not have been lying at all. Alternatively, the purported deceptive statement may fit within one of the many definitional loopholes for deception that will result in the allegations that the statute has been violated amounting to naught—many months after the election is over.

The overbreadth potential of campaign deception statutes is both built in and easily manipulated to reach speech that will not be found to meet the definitions of lies contained in a narrowly crafted regulatory scheme. This is, as many courts have found, exceedingly likely to chill campaign speech.

c. Underinclusiveness

In order for the government’s regulation of campaign deception to survive strict scrutiny, the regulatory scheme would need to address all of the intentional deceit that was likely to cause the harms to the integrity of elections the state had identified. These would, at minimum, include all of the categories of lies I have set out: straight-out lies, both oppositional and self-referential; intentional distortions that can be disproven; hyperbole that is not so obvious a rhetorical device that voters are likely to believe it; and indirect

¹⁸¹ “[A]n eleventh-hour anonymous smear campaign” is insufficient to justify a restriction on speech.” *People v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987); *see also* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352–53 (1995).

¹⁸² Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 *POL. BEHAV.* 303 (2010); R. Kelly Garrett & Brian E. Weeks, *The Promise and Peril of Real-Time Corrections to Political Misperceptions* (Feb. 23–27, 2013) (on file with the Proceedings of the 2013 Conference on Computer Supported Cooperative Work) (noting that even real-time corrections can be ineffective with citizens who have already formed views while processing misinformation).

prevarication—at least if it is shown to be knowing and intentional.

To the extent that campaign deception statutes only target straight-out lies about opponents, they are underinclusive. An exception that allows candidates to lie about themselves is not calculated to serve the state’s asserted compelling interest in promoting the integrity of the electoral process.¹⁸³

Most, perhaps even all, of the existing campaign deception statutes, are also underinclusive because they fail to address many kinds of campaign deceptions that may be at least as harmful to the electoral process as the ones that are targeted.¹⁸⁴ For example, no statute appears to forbid lies about substance, such as the candidate’s platform, or the platform’s likely costs and impact. So-called alternative facts appear to be beyond any efforts at regulation.

IV. CAN WE IDENTIFY CAMPAIGN LIES WHEN WE SEE THEM?

Even if courts were to find that the state has a compelling interest in regulating deceptive speech in political campaigns, and a specific statute and regulatory scheme survived strict scrutiny, it might prove nearly impossible for regulators and judges to agree about what constitutes a lie. The problem does not entirely rest in post-modernist approaches to reality. Courts have long taken the position that a statement is not false if any reasonable inference can be drawn from it that is either a fact or a matter of opinion that is immune from being labelled untrue.¹⁸⁵

In the context of alleged defamation of a public figure, courts have drawn fine lines in discussing how “far removed from the truth” a statement must be in order to “permit an inference of actual malice, even assuming *arguendo* [a statement] was false.”¹⁸⁶ If the “gist or sting” of the defamatory statement “is not so very different from the ‘truth,’” the “campaign rhetoric” is protected.¹⁸⁷ More broadly, under

¹⁸³ *Rickert*, 168 P.3d at 831; *ACLU of Nev. v. Heller*, 378 F.3d 979, 996–97 (9th Cir. 2004) (holding that a statute providing exceptions to the ban on anonymous campaign speech for political parties and candidates still fails narrow tailoring).

¹⁸⁴ *Id.* at 831 (The “statute is underinclusive because it does not apply to many statements that pose an equal threat to the State’s alleged interest in protecting elections. Specifically, the statute exempts all statements made by a candidate” or by the candidate’s supporters about the candidate him- or herself).

¹⁸⁵ *Mosee v. Clark*, 453 P.2d 176, 177 (Or. 1969).

¹⁸⁶ *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 194 (Cal. Ct. App. 3d 2016).

¹⁸⁷ *Id.* at 194–96 (holding that calling the losing candidate a “crook” and “unscrupulous” attorney was not so far from the truth as to permit a finding of actual malice).

the “substantial truth doctrine” courts are called upon to give the benefit of the doubt to the speaker accused of deception: If the statement “is ‘substantially’ true in overall effect, minor inaccuracies or falsities will not create falsity.”¹⁸⁸ Liability will only be found where “‘the substance, the gist, the sting’ of the communication taken as a whole, is patently false.”¹⁸⁹

Judicial elections provide a sort of petri dish for testing the feasibility of identifying intentional and material falsehood. A subset of cases suggests that the state may have a compelling interest in regulating materially misleading statements by candidates for judicial office and that such regulations may survive strict scrutiny even when regulations imposed on candidates for other offices would not.¹⁹⁰ States argue that the integrity of the judicial system—the third branch of government—itsself is at stake. The regulations may be contained in the state’s code of judicial conduct, which itself inhibits the robust response that would be entailed in the traditional admonition to drown out lies with truth, or more and better speech.¹⁹¹

Judicial elections have not been immune to the scorched earth tactics exemplified by the Willie Horton ads pro-Republican PAC aired during the 1988 presidential campaign, which falsely accused the Democratic candidate of being responsible for a program of weekend passes under which a convicted African American felon committed additional violent crimes. Taking a page from that approach to campaigning, Michael Gableman, running for a seat on the highest court in Wisconsin in 2008, approved a television ad that accused his opponent of using a legal “loophole” to get the rapist of an 11-year-old girl out of prison, allowing him to molest another

¹⁸⁸ *In re O’Callaghan*, 796 S.E.2d 604, 627 (W. Va. 2017) (quoting *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)).

¹⁸⁹ *Id.*

¹⁹⁰ *Callaghan*, 796 S.E.2d at 623 (noting that regulations on materially false statements by judges during elections aim at preserving respect for the judicial system and have been uniformly upheld); *see also* *Winter v. Woinitzek*, 834 F.3d 681, 693 (6th Cir. 2016); *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1139 (D. Mont. 2016). *But see In re Judicial Campaign Complaint against O’Toole*, 24 N.E.3d 1114, 1121 (Ohio 2014) (overturning the portion of the judicial code that barred speech “conveying true information about the candidate or her opponent” that, though true, “nonetheless would deceive or mislead a reasonable person”).

¹⁹¹ *Callaghan*, 796 S.E.2d at 624 (noting that if the code were not upheld, a judicial candidate would be left with a “Hobson’s choice of leaving false attacks unrequited or following his or her opponent into the ethical minefield of judicial counter-speech”).

child.¹⁹² Gableman was elected and was sworn in as a justice of the Wisconsin Supreme Court.¹⁹³

The state's Judicial Commission charged Gableman with violating the state's Supreme Court rules¹⁹⁴ by knowingly mispresenting a fact concerning an opponent.¹⁹⁵ A judicial conduct panel granted summary judgment to Gableman, and the matter reached the Wisconsin Supreme Court for review in 2010. The Court's six justices unanimously rejected Gableman's argument that the state's framework regulating knowing or reckless falsehoods during judicial campaigns violated the First Amendment.¹⁹⁶

The panel was bitterly divided, however, over whether Gableman's advertisement constituted a misrepresentation of fact. The justices were so divided over a matter involving their colleague on the bench that the justices who signed Justice Prosser's opinion declined to publish their views under the same citation as the one attached to Chief Justice Abramson's opinion, which proposed remanding for a jury trial as to the meaning of Gableman's ad.¹⁹⁷

The transcript of the television ad read in full:

Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true!

Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe—putting child molesters behind bars for over 100 years.

Louis Butler worked to put criminals on the street.

Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.

¹⁹² *In re* Judicial Disciplinary Proceedings Against Gableman, 784 N.W.2d 605, 633–34 (Wis. 2010).

¹⁹³ Both candidates were incumbent judges sitting on the state's lower courts. Any criticisms they directed toward each other might well have been considered speech directed at public officials, at the pinnacle of First Amendment protections.

¹⁹⁴ WIS. SUP. CT. R. 60.06(03)(c); *see also* WIS. STAT. § 757.87(3) *et seq.* (providing procedures for enforcement and review).

¹⁹⁵ *Gableman*, 784 N.W.2d at 630.

¹⁹⁶ *Id.* at 617, 646–47.

¹⁹⁷ *Id.* at 605.

Can Wisconsin families feel safe with Louis
Butler on the Supreme Court?

Justice Prosser's opinion, dispositive because there was no majority and the opinion below granting summary judgment to Gableman remained undisturbed, concluded that each sentence taken in isolation was "objectively true" and immune to penalty.¹⁹⁸ The Prosser opinion treats the disputed text as if it were a series of tweets spun out over days or weeks that had no contextual connection to each other. Each sentence, Prosser concluded, contained facts.

Chief Justice Abramson, in contrast, took the position that one could not, as the Commission and Justice Prosser did, "read each of the sentences . . . in isolation, as if the other sentences did not exist."¹⁹⁹ A myopic focus on literal truth, she asserted, denudes each sentence of "context or meaning."²⁰⁰ The message communicated that "Butler's actions in finding a 'loophole' led to Mitchell's release and his commission of another crime." No other reasonable interpretation of the advertisement has been suggested . . . This message is objectively false."²⁰¹

What did Louis Butler actually do? In the early 1990s, Butler worked as a public defender and, in that capacity, was appointed to represent Mitchell. During the appeal of Mitchell's criminal conviction, Butler successfully argued that the state had violated the rape shield law during the trial.²⁰² The Wisconsin Supreme Court subsequently declared the evidentiary error harmless, and Mitchell remained in prison until he was released on parole in the normal course of events.²⁰³ The oral narration to Gableman's advertisement was accompanied by written information, including citations to opinions in Mitchell's case, which pointedly omitted any citation to the Wisconsin Supreme Court opinion.²⁰⁴ Mitchell committed a new offense after his parole. The Judicial Conduct Panel concluded that: "Nothing that Justice Butler did in the course of his representation of Mitchell caused, facilitated, or enabled Mitchell's release from prison in 1992."²⁰⁵ Nor did any aspect of Butler's representation of Mitchell have "any

¹⁹⁸ *Id.* at 641–44 (defining truth objectively will limit prior restraint, reduce uncertainty and chill, and will not put the speaker "at the mercy of the hearer's understanding").

¹⁹⁹ *Id.* at 613.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 615.

²⁰² *Id.* at 612.

²⁰³ *Id.*

²⁰⁴ *Id.* at 616.

²⁰⁵ *Id.* at 612.

connection to Mitchell's commission of a second sexual assault of a child."²⁰⁶

In the absence of a majority opinion, the summary judgement below vindicating Gableman remained in place. The Supreme Court had no occasion to consider the appropriate penalty for knowing misrepresentations, or to ask whether removal from office could be an appropriate remedy. As this Article goes to press, Gableman remains on the Wisconsin Supreme Court; in June of 2017, he announced that he would not seek reelection in 2018.²⁰⁷

The Gableman story contains a number of cautionary tales.

First, the liar may be an incumbent, with connections to decision makers. Imagine how uncomfortable the six justices on the Wisconsin Supreme Court must have been sitting in judgment on a colleague with whom they had to work (and possibly share lunch and coffee with) every day.

Second, the facts were pretty straightforward. The advertisement wasn't an impromptu misstatement. Gableman had the opportunity to consider the text, and he used it. Moreover, he "virtually conceded" through counsel at the Judicial Conduct Panel that the advertisement was "misleading."²⁰⁸ Even in what seems like a very straightforward case, it is difficult to obtain consensus on how to distinguish truth from falsehood. The judges could not even agree about what methodology to apply.

Third, a regulatory structure designed to sustain the integrity of the judicial system allowed a misleading advertisement for a person seeking the highest judicial office to materially undermine public understanding of the adversary system by asking voters to hold a lawyer personally responsible for the later actions of a client he was appointed to zealously represent.

Chief Justice Abramson concluded that the court's deadlock in *Gableman*—a refusal to even remand the matter for a jury trial to ascertain whether the advertisement violated the statute—amounted to an invitation to "future judicial candidates to push and distort the content of advertising in judicial campaigns as far past truthful communication as the creative use of language may allow."²⁰⁹ If the advertisement, taken as a whole, did not amount to a straight-out oppositional

²⁰⁶ *Id.* (quoting Judicial Conduct Panel Findings of Fact # 17).

²⁰⁷ *Michael Gableman*, BALLOTPEdia, https://ballotpedia.org/Michael_Gableman (last visited Mar. 15, 2018).

²⁰⁸ *Gableman*, 784 N.W.2d at 616 n.34 (quoting Judicial Conduct Panel, slip op. at 17 (Deininger, J., concurring)).

²⁰⁹ *Id.* at 614.

lie, it surely was an intentional distortion, or, at a minimum, an indirect prevarication resting on contextual distortion that was intended to deceive voters.

The Gableman saga indicates that even if the First Amendment posed no obstacle to regulating campaign falsehood, and even if a regulatory scheme survived strict scrutiny, it might be nigh on impossible for regulators to agree about where the boundaries lie. If regulation of campaign lies were constitutionally permissible, which I have argued it is not, such a statutory or regulatory scheme would hold little promise of offering a panacea. If straight-out defamatory statements about opponents in judicial elections are amenable to regulation, as several decisions suggest, then the normative message to partisans seems to be: use innuendo with abandon.

V. FACTS AND FICTIONS

I have argued that the First Amendment poses a virtually insurmountable obstacle to government regulation of deceptive campaign speech. Above all, freedom of expression means that the state cannot become the arbiter of truth, even where misleading statements are nothing more than straight-out lies. The same holds true no matter where the deception falls within the taxonomy of campaign lies I have set out. And even if we assumed for purposes of argument that the government could punish campaign deception, *Gableman* demonstrates the difficulty that would confront government officials asked to define and identify misleading expression. Instead, it is incumbent on journalists to ferret out and expose the facts—an essential aspect of the fourth estate's contribution to democracy.

Confronted with cases involving campaign deceptions, the courts have, almost without exception, reiterated that the classic First Amendment response to “falsehood and fallacies” enunciated by Justice Brandeis in 1927 remains an effective remedy to contemporary lies: “the remedy to be applied is more speech, not enforced silence.”²¹⁰ The *Alvarez* plurality underscored that the facts in that case demonstrated the power of “the dynamics of free speech, of counterspeech, of refutation [to] overcome the lie.”²¹¹ Xavier Alvarez was “ridiculed online,” exposed in the press, and called on to resign, even

²¹⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in inter alia*, *United States v. Alvarez* 617 F.3d 1198, 1216–17 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012); *List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 778 (S.D. Ohio 2014), *aff'd*, 814 F.3d 466 (6th Cir. 2016).

²¹¹ *United States v. Alvarez*, 567 U.S. 709, 726 (2012) (plurality opinion).

before the FBI began to investigate his false claims.²¹² Channeling Justice Brandeis, the plurality offered succinct guidance: “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight[-]out lie, the simple truth.”²¹³

This response seems particularly appropriate in the context of an election where, as the Supreme Court explained in 1982, “a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First Amendment remedy of ‘more speech, not enforced silence,’ thus has special force.”²¹⁴ The opponent’s accurate correction is expected to prevail in the marketplace of ideas, at least in theory. State courts also point to more and better speech as the constitutional remedy to election falsehoods.²¹⁵

Granted, none of the election falsehood cases I have relied on have been decided in the short time since new information emerged about the scope of disinformation spread by third parties during the 2016 election cycle.²¹⁶ In closing, I’d like to place my analysis of the constitutional limitations on

²¹² *Id.* at 727. Once he was known as a liar, Alvarez was investigated for misappropriating public funds. He was charged, convicted and sentenced to a five-year prison term. *People v. Alvarez*, No. B220044, 2010 WL 3964595, at *1 (Cal. Ct. App. Oct. 12, 2010) (unpublished).

²¹³ *Alvarez*, 567 U.S. at 727 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015) (overturning campaign falsehood statute) (“*Alvarez* teaches that the criminalization of such falsehoods is unnecessary because a remedy already exists: ‘the simple truth.’” (quoting *United States v. Alvarez*, 567 U.S. 709, 727 (2012))).

²¹⁴ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

²¹⁵ *See, e.g.*, *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015); *Rickert v. Pub. Disclosure Comm’n*, 168 P.3d 826, 832 (Wash. 2007) (en banc); 281 *Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) (“[E]specially as to political speech, counterspeech is the tried and true buffer and elixir.”). Narrow exceptions are found in cases involving judicial elections, where some opinions have concluded that counterspeech, concededly the usual remedy for falsehood, is inadequate to restore confidence in the integrity of the courts once deceptive campaign by candidates for judicial office undermines it. *In re O’Callaghan*, 796 S.E.2d 604, 624 (W. Va. 2017); *Myers v. Thompson*, 192 F. Supp.3d 1129, 1140 (D. Mont. 2016).

²¹⁶ *See* Samuel C. Woolley & Douglas R. Guilbeault, *Computational Propaganda in the United States of America: Manufacturing Consensus Online* 18–22 (Univ. of Oxford Computational Propaganda Research Project, Working Paper No. 2017.5, 2017) (discussing the role of bots during the 2016 election cycle to manipulate public opinion in the U.S., based on ethnographic research and a study of 17 million tweets); Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html> (noting that Russian agents reached an estimated 126 million users on Facebook, published 131,000 messages on Twitter and posted more than 1,000 YouTube videos to influence voters during the 2016 election, in addition to paid advertising by the Russian Internet Research Agency, which the companies characterized as a “minuscule” portion of overall traffic).

efforts to regulate deceptive campaign speech more directly in the context of the fake news that is this Symposium's focus.

Campaign deception—at least in its most blatant forms (straight-out lies)—may fit within PEN America's excellent, narrow definition of fraudulent news: “demonstrably false information that is being presented as a factual news report with the intention to deceive the public,”²¹⁷ except that the campaign, not the journalist, puts out false information intending to deceive.

In the face of Russian trolling and bots on social media sites, the seemingly widespread collapse of confidence in traditional sources of information, and allegations of fake news (all discussed elsewhere in this Symposium issue), some readers may justifiably wonder whether misleading speech by candidates and their supporters matters very much in the scheme of things. Amidst the breakdown of long-held norms, perhaps analyzing run-of-the-mill campaign deceptions and the obstacles to regulating them is purely quixotic, a rendering from a simpler time, about problems that, to draw from a different context, “Don't amount to a hill of beans in this crazy world.”²¹⁸

As other authors have demonstrated, the universe of information today and the way in which consumers of information assess it, has undergone a paradigm shift since the First Amendment was adopted and since Brandeis formulated his classic statement about the remedy to be applied to falsehood and fallacy. Recent events and survey data may seem to challenge the notion that truth will expose fiction, or that once voters hear verifiable facts they will weigh those facts in ways commentators consider appropriate. For example, a 2017 Fox News survey revealed that more respondents (45%) trusted the Trump administration to “tell the public the truth” than trusted the reporters who cover the administration (42%). Another 10% did not trust either. In 1996, 52% of those polled trusted the media more than the administration, while another 25% trusted both to tell them the truth. Only 9% trusted “politicians” to tell the truth in 1996; the 2017 survey did not

²¹⁷ *Faking News: Fraudulent News and the Fight for Truth*, PEN AM. 1, 4 (2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

²¹⁸ *Casablanca*, IMDB, <http://www.imdb.com/title/tt0034583/quotes> (last visited Dec. 16, 2017) (quoting Rick, the hero, commenting on the insignificance of his personal happiness compared to the stakes of fighting fascism during World War II); see also *My Cousin Vinny (1992) Movie Script*, SPRINGFIELD! SPRINGFIELD!, http://www.springfieldspringfield.co.uk/movie_script.php?movie=my-cousin-vinny (last visited Mar. 15, 2018).

ask whether the President is by definition a politician because he won the office.²¹⁹

Whether we are actually confronting an epistemic crisis about the meaning of truth, whether we have lost shared sources and facts upon which to base debates, and what to do about shifting cultural norms—such questions are all beyond the scope of this Article. But while I have argued that the First Amendment limits the government’s role in responding to deceptive speech in campaigns (and more broadly to fake news and the like,) it does not stand in the way of private responses and solutions, including some of those proposed in these pages.

Real news matters, and truth continues to matter—all the participants in this Symposium take both of those statements as foundational principles. Lies campaigns tell about themselves and about their opponents matter beyond the immediate electoral context in large part because they undermine trust in politics and in civic institutions.

It primarily falls to overworked and underfunded journalists and fact-checkers to expose campaign deceptions. In the present climate, it is essential for journalists to call out lies as lies, to present facts that undermine fictions in the same story, and to reject gestures toward evenhandedness that amount to false equivalency.

Ultimately, any solution rests in cultural norms that go far beyond the parameters of this Article. The main burden, as always, falls on the voter who consumes information. The efficacy of faith in “more speech” relies on rational educated citizens. To that end, there are no constitutional barriers to better education, more transparency about the sources of information, assertive exposure of lies by private organizations, and other actions by private individuals and groups aimed at inoculating citizens and society from the most nefarious consequences of deception in public discourse. Most important, as public discussion of how our society should respond to this perceived crisis intensifies, we should not succumb to the temptation to undermine foundational First Amendment principles that constrain what government itself can do.

²¹⁹ *Fox News Poll 2/17/17*, FOX NEWS, <http://www.foxnews.com/politics/interactive/2017/02/17/fox-news-poll-21717.html> (last visited Mar. 15, 2018) (referring to page 7, Question 43).