“Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.” This message was to adorn billboards in Ohio during former U.S. Representative Steve Driehaus’ 2010 re-election campaign. Driehaus discouraged the billboard company from posting the message and filed a complaint with the Ohio Elections Commission saying the statement was a lie. He subsequently lost his re-election campaign and filed charges under Ohio’s Campaign Fair Practices law—which prohibits making false statements about a candidate—against Susan B. Anthony List (SBA List), the political action committee that paid for the billboard.

This message and others like it across the nation could be subject to campaign fair practice laws that regulate false statements during elections. However, such laws may be susceptible to constitutional challenges based on the First Amendment and its protection of free speech. In June 2014, The U.S. Supreme Court heard Susan B. Anthony List v. Driehaus and remanded the case to the lower court—the U.S. District Court for the Southern District of Ohio—thus allowing the SBA List to continue its challenge of the Ohio law’s constitutionality. In September, the district court held that Ohio’s law was unconstitutional, based on the right to free speech, and permanently prohibited the Ohio Elections Commission from enforcing the law.

U.S. Supreme Court and other court decisions have made political speech—generally defined as speech that discusses a political candidate, campaign or political issue—the most protected form of speech, stating that a free exchange of ideas is essential to the American political process. Over the years, however, state legislatures have passed statutes that prohibit making false statements during campaigns.

The goal of these laws is to increase the integrity of elections by curtailing the number of false statements that might motivate people to vote for a candidate they otherwise would not choose.

Regulating false statements, and the constitutional challenges they’ve faced, are the subject of much debate. At the center of the debate is the question: “Is it the government’s place to
determine what is true and what is false?” Proponents of these regulations argue that false statements in elections decrease both voter participation and confidence in elections. Opponents argue that these laws establish “judicial truth commissions” and indicate a legislative lack of trust in voters’ ability to determine what is true or false.

**State Action**

Thirty-one states address false statements made about an election or a candidate in one of two ways. One way is to prohibit various classes of false statements about a candidate or an election. Another is to provide fair practice pledges that candidates sign, stating they will conduct their campaigns fairly and ethically.

**Prohibiting False Statements.** Twenty-seven states prohibit specific types of false statements, most commonly false claims of incumbency; false claims about candidate endorsements; or false statements about information people need to be able to vote, such as the date of the election. Various other types of false statements—such as a candidate’s veteran status—also may be prohibited. Some states are not as specific, but do prohibit false statements concerning an election, typically making it a crime to knowingly or recklessly distribute false information about a candidate or election. These laws generally are interpreted to include the specific types of communications mentioned above, as well as communications that are made to appear as though they come from the government or the opposition’s candidate.

**Campaign Fair Practice Pledges.** Arkansas, California, Illinois, Maine, Montana, Nevada, Texas and West Virginia offer campaign fair practice pledges. By signing a pledge, candidates promise to conduct their campaigns in a fair and honest manner. The pledge is mandatory only in Arkansas and voluntary in the others. In most of the voluntary pledge states, candidates who sign the pledge may advertise that they have done so; the only penalty for breaking the pledge is that permission to advertise the fact would be revoked. Breaking Arkansas’s mandatory pledge is a misdemeanor.

Some overlap exists between laws that address false statements and pledges. California, Montana, Texas and West Virginia, for example, offer a voluntary pledge and also restrict false statements either generally or specifically.

**Federal Action**

While most election regulation occurs at the state level, federal courts have been active on the issue. In 2012, the U.S. Supreme Court decided in *U.S. v. Alvarez* that the Stolen Valor Act, which makes it a crime to lie about having received military honors or decorations, violates the First Amendment right to freedom of speech. While the case did not directly address campaign fair practice laws, all justices indicated that laws that restrict speech purely on the grounds of falsity—such as some campaign fair practice laws—could be considered unconstitutional, especially when the prohibited speech is described broadly. More recently, two federal courts held against campaign fair practice laws’ false speech prohibitions—in the Ohio case, *Susan B. Anthony List v. Driehaus*, and in a Minnesota case, *281 Care Committee v. Arneson*. In a separate case, *Clayton v. Niska*, which decided that a violation of a Minnesota fair campaign practice law had occurred, a petition for writ of certiorari (a higher court review of a decision by a lower court) has been filed with the U.S. Supreme Court. If the Court takes up the case, it would address the constitutionality of many campaign fair practice laws.

**NCSL Contact and Resources**

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NCSL’s Ethics Center

NCSL’s Web page, Campaign Fair Practice Laws: Is There a Right to Lie?