



**Deceptive
Election
Practices
and
Voter
Intimidation**
*The Need for
Voter Protection*



Deceptive Election Practices and Voter Intimidation

The Need For Voter Protection

BACKGROUND

This report, “Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection,” follows the 2008 report, “Deceptive Practices 2.0: Legal and Policy Responses,” issued by Common Cause, the Lawyers’ Committee for Civil Rights Under Law, and the Century Foundation.

The 2008 report examined the sufficiency of state and federal laws in protecting voters from deceptive election practices, with a focus on false information disseminated via the Internet, email and other new media. At the state level, our examination focused on anti-hacking and computer crime laws, as well as laws on the unauthorized use of state seals and insignias, and impersonation of public officials.

On the federal level, we examined the utility of copyright, trademark, and anti-cybersquatting laws, the Computer Fraud and Abuse Act, the Wire Fraud Statute, Section 230 of the Communications Act, and the Can-Spam Act. We also explored the power of state and federal election laws in combating deceptive online practices.

“Deceptive Practices 2.0” recommended a number of ways that existing laws could potentially protect voters from deceptive election practices and be updated to combat the growing problem of electronic deceptive election practices.

To read the 2008 report, please visit www.commoncause.org/deceptivepracticesreport and <http://www.866ourvote.org/newsroom/publications/body/0064.pdf>

ACKNOWLEDGEMENTS

This report was written with the enormous pro bono assistance of the former law firm Dewey & LeBoeuf LLP.

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EXECUTIVE SUMMARY

Almost fifty years after the passage of the Voting Rights Act, historically disenfranchised voters remain the target of deceptive election practices and voter intimidation. The tactics employed, however, have changed; over time, they have become more sophisticated, nuanced, and begun to utilize modern technology to target certain voters more effectively.

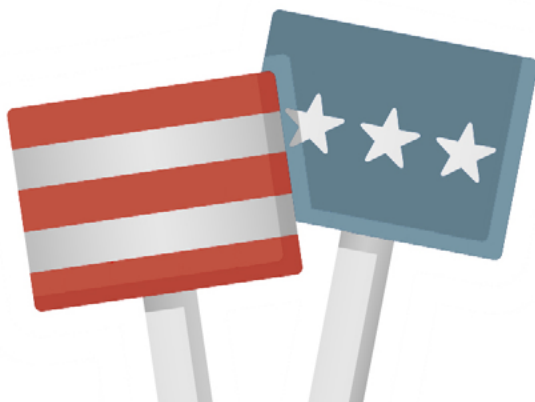
The right to vote should be unimpeded by deception and intimidation. Yet, the freedom to exercise this right is compromised when voters encounter trickery, fraud, or intimidation before and during the voting process. Deceptive election practices occur when individuals, political operatives, and organizations intentionally disseminate misleading or false election information that prevents voters from participating in elections.

These tactics often target traditionally disenfranchised communities – communities of color, persons with disabilities, persons with low income, eligible immigrants, seniors, and young people. These “dirty tricks” often take the form of flyers or robocalls that give voters false information about the time, place, or manner of an election, political affiliation of candidates, or criminal penalties associated with voting. Today, with a majority of Americans receiving information via the Internet and social media platforms like Facebook and Twitter, and given the viral nature of such communication tools, the potential is greater than ever that these tactics will deprive even more voters of the right to vote.



State and federal lawmakers have an obligation to create strong laws that protect voters from deceptive election practices and voter intimidation so that these schemes do not undermine the integrity of elections. Congress and some states have made attempts to address deceptive election practices, but few laws have passed that directly address this type of conduct.¹

A small number of states prohibit conduct that interferes with an individual’s ability to vote, which may result in ambiguity about its application to the intentional dissemination of materially false information about the time, place, or manner of voting.² While other states narrowly proscribe only certain kinds of deceptive election practices (such as false statements about a candidate or ballot initiative), the majority do not have any law which captures this type of voter suppression.³ Regardless, law enforcement authorities often fail to investigate and prosecute deceptive election practices.



¹ The Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1994, was reintroduced by U.S. Senators Charles Schumer (D-NY) and Ben Cardin (D-MD) in December of 2011. See also S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012), S.B. 1009, 2011-2012 Sess. (N.Y. 2011), and S.B. 1283, 82d Leg., Reg. Sess. (Tex. 2011).

² See e.g., Ariz. Rev. Stat. § 16-1006.

³ See e.g., Colo. Rev. Stat. § 1-13-109.

EXAMPLES OF DECEPTIVE ELECTION PRACTICES AND INTIMIDATION

Deceptive election practices take many different forms, and it is critical that reform proscribes the various ways deceptive election practices can deceive or confuse voters. The following are examples of the types of misinformation that voters have been forced to deal with during recent elections:



Flyers with bogus election rules.

In 2004, flyers were distributed in minority neighborhoods in Milwaukee, Wisc., from a non-existent group called the “Milwaukee Black Voters League claiming that, “If you’ve already voted in any election this year, you can’t vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can’t vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.”



Flyers advertising the wrong election date.

In 2008, fake flyers alleging to be from the Virginia State Board of Election were distributed falsely stating that, due to larger than expected turnout, “[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th...All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th.”



Deceptive online messages.

In 2008, an email was circulated at 1:16 AM on Election Day to students and staff at George Mason University, purportedly from the University Provost falsely advising that the election had been postponed until Wednesday.



Robocalls with false information.

On Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: “Hello. I’m calling to let everyone know that Governor O’Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We’re okay. Relax. Everything’s fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you.”

RECOMMENDATIONS/MODEL LEGISLATION

Such nefarious tactics often target certain voters and result in depriving these citizens of their fundamental right to vote and the perpetrators of these pernicious forms of voter suppression must be held accountable. In order to address ongoing suppression practices, state election laws must be amended to directly target the dirty tricks that disenfranchise voters year after year.

To this end, we propose a model statute which:

Explicitly makes it unlawful, within 90 days of an election, to intentionally communicate or cause to communicate materially false information regarding the time, place, or manner of an election, or the qualifications for voter eligibility with the intent to prevent a voter from exercising the right to vote when the perpetrator knows the information is false;

Requires the Attorney General of the state to:

- Investigate all claims of deceptive voter practices;
- Use all effective measures to provide correct election information to affected voters, such as public service announcements and emergency alert systems; and
- Refer the matter to the appropriate federal, state, and local authorities for prosecution;

Provides a private right of action for any person affected by these practices; and

Requires the state Attorney General to provide a detailed report within 90 days of an election describing any deceptive election practice allegations, a summary of corrective actions taken, and other pertinent information.

Given the hyper-polarized political climate, technology providing new and innovative ways of communication, and narrow election margins, we have seen a rise in attempts to disseminate false and misleading information and expect this trend to continue through the 2012 election cycle. For these reasons, it is more important than ever that state and national legislators take action to strengthen current laws and fill existent gaps so that their constituents are not prevented from fully participating in our democracy.

This report focuses exclusively on the power of state election laws to effectively combat deceptive election practices. Having reviewed data reported from all fifty states about deceptive election activity and the relevant state laws, we conclude that not only has law enforcement largely failed to prosecute this conduct under existing statutory frameworks, but that more action is needed – including the passage of additional laws to ensure that voters are fully protected.

Introduction

Deceptive election practices continue to prevent eligible voters from casting their ballots. These fraudulent acts include the dissemination of false or misleading information about voter qualifications; false information about the time, place, or manner of voting; and intimidation or threats to voters at polling places. The tactics have become more sophisticated and nuanced, employing modern technology to target certain voters. Targeted voters—predominantly people of color, the elderly, young voters, low-income individuals, naturalized citizens, and people with disabilities—fall prey to those who wish to intimidate or trick them into not voting.

After the controversial 2000 presidential election, the nation's largest non-partisan voter protection coalition, Election Protection, now led by the Lawyers Committee for Civil Rights Under Law, was created to assist voters with questions or problems before and on Election Day. Thousands of calls to the 866-OUR-VOTE hotline and requests for assistance at voting precincts are made each year and are logged into a database.

The data show that blatant barriers of the past have been replaced with more subtle—but just as insidious—tactics to prevent specific blocs of voters from casting a meaningful ballot.

Common Cause and its state chapters have worked with election officials for years to monitor the proliferation of deceptive practices and reform state laws to more adequately address the harms that such activities cause. Combining the data collected through the Election Protection hotline and in-person voter protection programs with the knowledge gained by Common Cause's activities on the ground has enabled us to capture the extent of intimidation and deceptive election practices confronting voters around the nation.

The data show that blatant barriers of the past have been replaced with more subtle—but just as insidious—tactics to prevent specific blocs of voters from casting a meaningful ballot. Intentionally communicating false election information to voters, especially new voters and those with specific presumed political leanings, has emerged as a leading strategy of disenfranchisement. Section 11(b) of the Voting Rights Act does provide some recourse against intimidation but does not address all of the deceptive practices voters experience today.⁴ Voters who face these barriers need laws that not only penalize such conduct but also provide the opportunity to remedy the damage caused in a timely manner.

⁴ No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e) [of the Act]. Voting Rights Act of 1965 sec. 11(b) The penalty for violation is as follows:Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

HOW IT WORKS: EXAMPLES OF DECEPTIVE ELECTION PRACTICES AND INTIMIDATION

Deceptive election practices take many different forms, and it is critical that reform proscribes the various ways deceptive election practices can deceive or confuse voters. The following are examples of what voters faced during recent elections:

- **Individuals using official-looking seals or insignias to intimate voters.**

In 2003, men with clipboards bearing official-looking insignias and 300 cars with decals resembling those of federal agencies were dispatched in black neighborhoods in Philadelphia to ask voters for identification.



- **Flyers with bogus election rules.**

During the 2004 election, flyers purporting to be from a non-existent group called the “Milwaukee Black Voters League,” were distributed in Milwaukee, Wisconsin. The flyers were distributed in minority neighborhoods and claimed, “If you’ve already voted in any election this year, you can’t vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can’t vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.”



- **Flyers advertising the wrong election date.**

In 2008, fake flyers alleging to be from the Virginia State Board of Election were distributed in the southern part of the state, and on the Northern Virginia campus of George Mason University falsely stating that, due to larger than expected turnout, “[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th...All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th.”



- **Deceptive online messages.** In 2008, an email falsely claiming to be from the University Provost was circulated at 1:16 am on Election Day to students and staff at George Mason University. The email advised recipients that the election had been postponed until Wednesday. Later, the Provost sent an email stating that his account had been hacked and informing students the election would take place that day as planned.



- **Robocalls with false information.** During Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: “Hello. I’m calling to let everyone know that Governor O’Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We’re okay. Relax. Everything’s fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you.” It was later discovered that aides to former Governor Bob Ehrlich’s campaign against Governor O’Malley paid for these calls. In this instance, the perpetrator behind the deceptive robocalls was prosecuted under a Maryland election law that prohibits a person from willfully and knowingly influencing or attempting to influence a voter’s decisions whether to go to the polls and cast a vote through the use of fraud.



- **Facebook messages.** A pastor at a church in Walnut, Mississippi posted false information on his Facebook page in 2011 stating, “I just heard a public service announcement. Because of amendment 26 and the anticipation of a record [turnout], the [Secretary of State’s] office has had to devise a plan as to how to handle the record numbers. The [Secretary of State’s] office just announced that if you are voting YES on Ms26, then you are to vote on Tuesday [November eighth]. If you are voting NO on Ms26, then they ask that you wait until Wednesday [November ninth] to cast your vote.”





THE SOLUTION: FEDERAL AND STATE REFORM IS NEEDED NOW

While some legislators at the federal and state level have begun to recognize the need for stronger laws prohibiting these fraudulent election practices, more action is needed to safeguard voters and remedy their effects.

Although uniformity in such election laws would be preferable, any reform addressing deceptive practices should include:

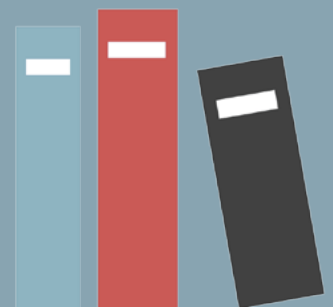
- Criminal and civil penalties to deter, prevent, and penalize deceptive election practices.
- Authorization of the appropriate law enforcement authority to pursue and prosecute individuals who knowingly communicate false election information or seek to intimidate voters with the intent to deny the right to vote.
- Direction to appropriate federal or state agencies to take corrective action by providing affected voters or communities with the correct election information.
- A private right of action so victims can seek immediate redress and protect themselves against such intimidation efforts.
- Transparency in the process through mandated public reporting processes.

Case Studies: Existing State Laws Should be Strengthened

With the notable exception of the Schurick case in Maryland (discussed below), state laws that address deceptive practices have been largely ineffective in deterring or punishing deceptive election practices and voters continue to pay the price.

Although some states have laws in place that address certain variations of deceptive election practices, they tend to be either too narrow in scope or are ambiguous in their application to deceptive election practices concerning the time, place, or manner of voting. As a result, deceptive election practices are not prosecuted, corrective information is not disseminated in a timely manner or at all, and these practices continue to negatively influence elections because bad actors are not deterred.

The following examples are not exhaustive, but provide a sampling of reports from the Election Protection hotline and media sources that illustrate the need for additional administrative and legislative action to ameliorate deceptive election practices. Each section provides examples of deceptive election practices that have occurred, a summary of the current law in each state, an analysis of the deficiencies in each state law as well as policy recommendations for each specific state and generally for states with no such laws currently on the books.



Case Study: Arizona



ISSUE

Report #1. On November 2, 2004, a message was left on a voter's phone telling him to go to the wrong polling place in Pima County. The voter used the "last number called" phone service which identified the number of a major political party's headquarters. The voter called the number back and gave them the name of his son, who was registered with the party. The voter was told that it was a "terrible mistake" and was given the correct polling information.⁵

Report #2. On Election Day in 2004, a voter reported a flier being distributed in Pima County that stated, "Republicans vote on Tuesday, Democrats vote on Wednesday."⁶

Report #3. In 2006, a Phoenix voter received a phone call telling him where to vote, which was 30 miles away from the correct polling place. Using Caller ID, the voter returned the call and was greeted by a person identifying himself as affiliated with a major political party.⁷

Report #4. On Election Day in 2008, voters in Arizona's Legislative District 20 received robocalls directing them to a polling location that was incorrect and far from their actual polling place.⁸

Report #5. On November 4, 2008, a voter from Kingman called to report a text message received from an unknown number saying that, because of the long lines at the polls, supporters of one major presidential candidate should vote on Wednesday instead of Election Day. The text also advised recipients to forward the message to all of their friends.⁹

CURRENT LAW

Current Arizona law broadly prohibits a person from using force, threats, menaces, bribery or "any corrupt means" to (1) attempt to influence an elector in casting his vote or to deter him from casting his vote; (2) "attempt to awe, restrain, hinder or disturb an elector in the free exercise of the right of suffrage;" and (3) "defraud an elector by deceiving and causing him to vote for a different person for an office or for a different measure than he intended or desired to vote for."¹⁰ A person who violates any provision of this section is guilty of a class 5 felony.

ANALYSIS

The broad language used in this section could cover many different types of corrupt election-related conduct, possibly extending to cover deceptive election practices in the scope of prohibited activities. Yet, it is uncertain whether the acts described above would definitely fall within its scope. The statute fails to define the phrase "corrupt means" and, because no case has been brought by law enforcement agencies to challenge deceptive practices under the law, Arizona courts have not had occasion to explain its meaning. In fact, the law – which has been on the books in its current form since 1979 – has never been the subject of any state appellate litigation.¹¹

RECOMMENDATION

- Clear and concise definition of the terminology, i.e. "corrupt means", in order to ensure proper and effective enforcement by authorities, and proscribing the specific conduct of disseminating false election information regarding the time, place, and manner of voting and voter qualifications.

⁵ Our Vote Live, 2004-11-02, 06:36:59 PST, Report no. 31308; Our Vote Live, 2004-11-02, 06:56:29 PST, Report no. 31651.

⁶ Our Vote Live, 2004-11-02, 12:28:36 PST, Report no. 40342.

⁷ Our Vote Live, 2006-11-07, 12:47:47, Report no. 1222.

⁸ Our Vote Live, 2008-11-04, 21:52:00 PST Report no. 94980.

⁹ Our Vote Live, 2008-11-04, 17:53 PST, Report no. 88447.

¹⁰ Ariz. Rev. Stat. § 16-1006.

¹¹ In federal court the law has only been implicated in vote-buying cases. See e.g. *United States v. Bowling*, 2010 U.S. Dist. LEXIS 129708 (Eastern District of Kentucky, Southern Division).

Case Study: Colorado



ISSUE

Report #1. During the 2004 Presidential Election, a Denver voter living in a historically African-American district received a phone call from a person purporting to represent a major political party. The caller told the voter to be sure to vote for that party's candidate and gave her an address for the wrong polling place.¹²

Report #2. In 2006, in Aurora a voter received two phone calls stating that her polling location had changed and gave her of the location of her new polling place. The voter went to that "new" polling place and was told she was at the wrong location.¹³

Report #3. In the lead up to the 2008 Presidential Election, signs appeared in front of a low-income housing apartment complex, among other places, directing Alameda voters to incorrect polling locations.¹⁴

Report #4. On November 2, 2008, two days prior to Election Day, a voter in Boulder received a call urging him to vote for a major presidential candidate and falsely stating that the election was going to be held on November 11.¹⁵

Report #5. The day before the Presidential Election of 2008, a voter in Durango received a robocall telling him to vote for a major presidential candidate at an incorrect polling place (a non-existent elementary school).¹⁶

Report #6. On Election Day 2008, voters received text messages stating that supporters of a major presidential candidate should vote the next day, on Wednesday, due to long lines.¹⁷

CURRENT LAW

Under current Colorado law, it is uncertain whether these examples would constitute election violations. Colorado Revised Statutes section 1-13-713, entitled "Intimidation" provides that it is "unlawful for any person directly or indirectly . . . to impede, prevent, or otherwise interfere with the free exercise of the elective franchise of any elector or to compel, induce, or prevail upon any elector either to give or refrain from giving his vote at any election" Though the deceptive election practices described in the above examples could fall within the prohibited conduct of this statute, it is not clear whether Colorado courts would consider the delivery of false election information as "imped[ing], prevent[ing] or otherwise interfere[ing]" with a voter's free exercise.

ANALYSIS

Colorado also broadly proscribes conduct that interferes with the right to vote – a proscription which could theoretically be used to prosecute deceptive election practices but which also leaves much ambiguity about what type of conduct it reaches. The ambiguity in the law may explain why Colorado law enforcement agencies have not prosecuted such acts under this statute despite the chronic nature of the problem in the state.

In 2012, a bill was introduced in the Colorado legislature to explicitly prohibit deceptive election practices and require corrective action. It passed one chamber.¹⁸

RECOMMENDATIONS

- Greater clarity about the type of conduct covered under the current statute through a more precise definition.
- Mandated immediate corrective action by state authorities to remedy misinformation.

¹² Our Vote Live, 2004-11-01, 16:54:16 PST, Report no. 26329.

¹³ Our Vote Live, 2006-11-07, 12:04:00, Report no. 4086.

¹⁴ Our Vote Live, 2008-10-30, 20:34:00 PM, Report no. 17212.

¹⁵ Our Vote Live, 2008-11-02, 15:54:00 PM, Report no. 33994.

¹⁶ Our Vote Live, 2008-11-03, 19:06:00 PM, Report no. 39341.

¹⁷ Our Vote Live, 2008-11-04, 14:47:00 PM, Report no. 70637.

¹⁸ S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012)

Case Study: Connecticut



CURRENT LAW

Signed by Connecticut Governor Daniel P. Malloy on June 15, 2012, House Bill No. 5022 (also known as “An Act Increasing Penalties for Voter Intimidation and Interference and Concerning Voting by Absentee Ballot”) goes into effect on July 1. The law builds on previous state law¹⁹ by increasing the penalty imposed on private citizens and employers that intentionally attempt to disenfranchise voting or registering to vote.²⁰ The legislation increased fines for violations from a maximum of five hundred or \$1,000 dollars and imprisonment of no more than five years to a Class D felony, which is punishable with up to \$5,000 in fines and up to five years in prison. Furthermore, the new law characterizes as a Class C felony punishable by up to \$10,000 in fines and 10 years imprisonment any behavior that attempts to influence by threat or force the right to vote or speak in a primary, caucus, referendum convention, or election.

The legislation was passed in response to the unacceptable number of documented examples where voting rights were threatened by deceptive voter practices. For example, in 2011, Middletown police, a candidate for public office, and then-Mayor Sebastian Guiliano provided Wesleyan University students false and misleading information regarding their eligibility to vote. The Middletown Office of the Registrar of Voters failed to provide requesting students with a clear picture of their rights and incorrectly stated that the aforementioned misinformation may have merit, resulting in the likely disenfranchisement of hundreds of voters.²¹

ANALYSIS

The new law only increases the possible fine imposed on offending parties and increases possible jail time for offenses that involve force or threats. This increased deterrent against voter disenfranchisement is commendable and a step in the right direction. Unfortunately, the law fails to address existing insufficient voter protections provided for in our model legislation. First, state law provides no mechanism for private parties to hold offending parties accountable if the government fails to prosecute for any reason instances of deceptive voter practices. Moreover, the Connecticut Attorney General is not required to investigate claims of deceptive voter practices and refer such matters to the appropriate law enforcement authorities. Despite the fact that deceptive voter practices often pervade elections quickly and thoroughly, there is no obligation for the Attorney General to publicly correct misinformation. The law also does not require its Attorney General to publish a post-election report detailing deceptive election practice allegations and a summary of corrective actions taken – thus increasing the likelihood that previously identified deceptive voter practices will be repeated and voters will be unaware of past deceptive activity.

RECOMMENDATION

- Create a much stronger deterrent while empowering citizens by providing a private cause of action for those affected by deceptive election practices and voter intimidation.
- Require the state Attorney General to immediately combat deceptive election practices through a campaign of public education that utilizes all available and effective means.
- Mandate the Attorney General investigate all claims of deceptive election practices and refer such matters to the appropriate federal, state, and local authorities.
- Obligate the publication of a post-election report that lists all substantive allegations of deceptive election practices and voter intimidation and the remedial actions taken.

¹⁹ Conn. Gen. Stat. Ann. §§ 9-363, 9-364, 9-365.

²⁰ ELECTION OFFENSES—VOTERS AND VOTING—SENTENCE AND PUNISHMENT, 2012 Conn. Legis. Serv. P.A. 12-193 (H.B. 5022).

²¹ Connecticut Joint Favorable Committee Report, Connecticut Joint Favorable Committee Report, H.B. 5022, 3/30/2012.



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CALIFORNIA

- ALLIANCE FOR BORDER ENFORCEMENT (Imperial Beach, CA)
- AMERICAN CITIZENS TOGETHER (San Diego, CA)
- AMERICAN CIVIL RESPONSIBILITIES UNION (Anaheim, CA)
- AMERICAN NATL. COUNCIL for IMMIGRATION REFORM (Washington, D.C.)
- ANTI-ORISM TASK FORCE (Anaheim, CA)
- ARIZONIANS for IMMIGRATION REFORM (Tucson, AZ)
- ASIAN-AMERICANS for BORDER CONTROL (Daly City, CA)
- BAY AREA COALITION for IMMIGRATION REFORM (San Francisco, CA)
- BLACK AMERICANS for FAMILY VALUES (Huntington Beach, CA)
- BORDERERS (Austin, TX)
- CALIFORNIANS for IMMIGRATION CONTROL (Anderson, CA)
- COOR I - VENTURA CO. (Thousand Oaks, CA)
- CITIZENS for ACTION NOW (Orange County, CA)
- FLA-187 COMMITTEE (Pompano Beach, FL)
- FLOREMIANS for IMMIGRATION CONTROL (Delray Beach, FL)
- IMMIGRATION CONTROL ADVOCATES OF NORTHERN CALIFORNIA (San Rafael, CA)
- IMMIGRATION RFM NETWORK OF SILICON VALLEY (S. J. OSBORNE, CA)
- LATINO-AMERICANS for IMMIGRATION CONTROL (Salinas, CA)
- MID-CITIES IMMIGRATION REFORM ADVOCATES (Phoenix, AZ)
- MONTEREY BAY ACTION COMMITTEE I (Belmont, CA)
- MONTEREY BAY ACTION COMMITTEE II (Salinas, CA)
- OHIO COALITION for IMMIGRATION REFORM (Columbus, OH)
- PATRIOT CITIZENS (Warren, PA)
- SAN DIEGO COUNTY TAXPAYERS (Alpine, CA)
- TAXPAYER ACTION NETWORK (Fountain Valley, CA)
- TEXANS for FAIR IMMIGRATION (Austin, TX)
- TEXANS for IMMIGRATION REFORM (Houston, TX)
- WE STAND READY (Huntington Beach, CA)



Saludos [redacted]
 Se le envia esta carta debido a que recientemente ud. fue registrado para votar. Si ud. es ciudadano de los Estados Unidos, se le ruega a que participe en el proceso democrático de la votación.

Se le avisa que si su residencia en este país es ilegal o si es emigrado, votar en una elección federal es un delito que podrá resultar en encarcelamiento, y si será deportado por votar sin tener derecho a ello.

De la misma manera, se le avisa que el gobierno de los Estados Unidos está instalando un nuevo sistema computarizado para verificar los nombres de todos los nuevos registrados que voten en las elecciones de octubre y noviembre. Organizaciones en contra de la emigración podrán pedir información de este nuevo sistema computarizado.

No cómo en México, aquí no se aporta ningún incentivo para votar. En los Estados Unidos no hay tarjeta de registro para votar. Por lo tanto, es inútil y peligroso votar en cualquier elección si ud. No es ciudadano de los Estados Unidos.

No le haga caso a ningún político que le diga lo contrario. Éstos sólo velan por sus propios intereses. Sólo quieren ganar las elecciones, sin importarles en lo más mínimo qué le pase a ud.

Atte.

 Sergio Ramirez

ALABAMA

**Attention:
 Jefferson
 County!!!!**

**See You At The Poles
 November 4th, 2004.**

**To Find your local polling
 place, call Jefferson
 County Voter's
 Registration
 Commission.**

Columbus, Ohio
Franklin County Board of Elections

Election Bulletin

Because the confusion caused by unexpected heavy voter registration, voters are asked to apply to the following schedule:

Republican voters are asked to vote at your assigned location on **Tuesday**.

Democratic voters are asked to vote at your assigned location on **Wednesday**.

Thank you for your cooperation, and remember voting is a privilege.

Franklin County, Where Government Works

OHIO

NOTE: The fliers included in this report were obtained by the Lawyers' Committee for Civil Rights Under Law, and exemplify the sort of tactics used by perpetrators of deceptive election practices.

Case Study: Florida



ISSUE

Report #1: On Election Day in 2008, students at the University of Florida received text messages falsely instructing voters supporting Senator Obama to vote the following day, November 5, because lines at the polls were too long. One text read: “Due to high voter turnout Republicans are asked to vote today and Democrats are asked to vote tomorrow. Spread the word!” Another read: “News Flash: Due to long lines today, all Obama supporters are asked to vote on Wednesday. Thank you!! Please forward to everyone.” The school sent a corrective email to all students warning that the text was a hoax.²²

Report #2: Also on Election Day 2008, it was reported that students also received text messages delivering a similarly misleading message that purported to be from the vice president of the university.²³

CURRENT LAW

Section 104.0615 of the Florida Statutes, which is entitled the “Voter Protection Act,” prohibits any person from “knowingly us[ing] false information to. . . induce or attempt to induce an individual to refrain from voting. . . .”

In addition to Florida’s Voter Protection Act, Florida’s election code contains several laws intended to prevent interference with voting, or fraud in the election process. Its statutes prohibit, among other things, interference with voter registration (Fla. Stat. §104.012), fraud in connection with casting a vote (Fla. Stat. §104.041), interference with or deprivation of voting rights (Fla. Stat. §104.0515), corruptly influencing voting (Fla. Stat. §104.061), voter intimidation or suppression (Fla. Stat. §104.0615) and aiding, abetting, advising or conspiring in violation of the code (Fla. Stat. §104.091). A violation of many of these provisions is considered a second or third degree felony.

ANALYSIS

Although these text messages appear to have been sent to deter certain voters from voting, no one was prosecuted under the statute for sending them.

Though Florida is an example of a state with strong laws prohibiting the type of conduct associated with deceptive election practices, the failure to prosecute egregious acts as noted above demonstrate the need for a private right of action. When law enforcement authorities fail to act, voters who have had their rights violated should be able to hold the perpetrators accountable for their acts.

RECOMMENDATIONS

- Create a private right of action for individuals in case state and local officials are unwilling to prosecute bad acts under the current law.
- Mandate immediate corrective action by state authorities to remedy misinformation.

²² Dominick Tao, Students Receive Misleading Information on Election Day, ABC News (Nov. 4, 2008), <http://abcnews.go.com/Politics/Vote2008/story?id=6182271&page=1>.

²³ Id.

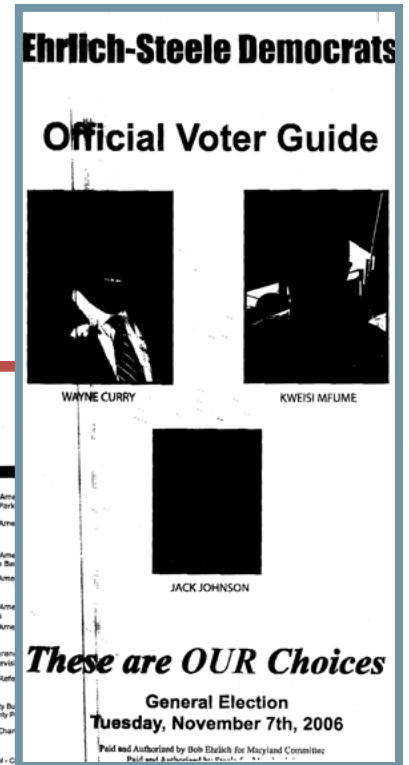
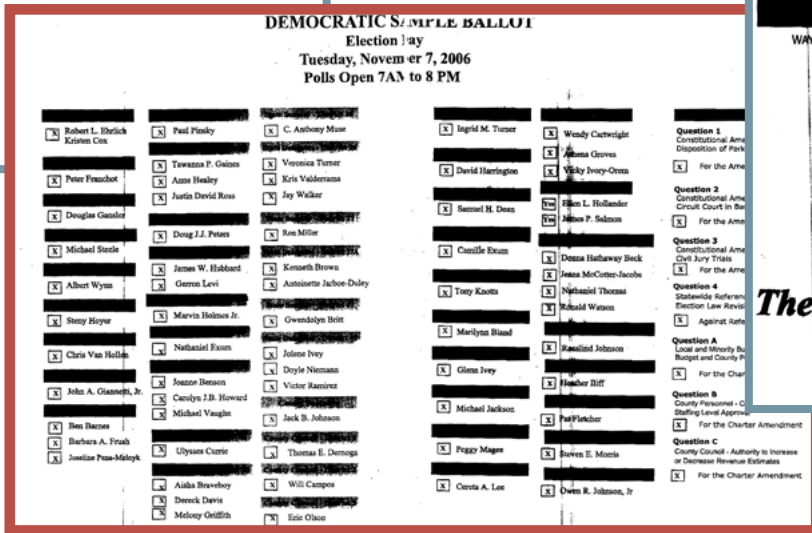
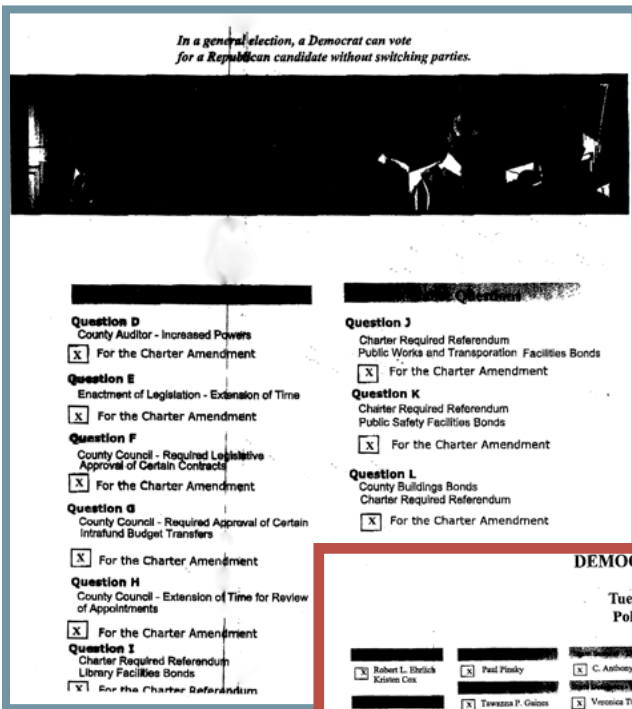
Case Study: Maryland

ISSUE

Report #1. In Maryland during the 2006 election cycle, Republican Robert Ehrlich's gubernatorial campaign funded the "Ehrlich-Steele Democrats Official Voter Guide," featuring a sample ballot falsely suggesting that Ehrlich and his running mate were Democrats. In Prince George's County, their sample ballot featured pictures of Kweisi Mfume, Jack B. Johnson, and Wayne K. Curry (all well-known former Democratic elected officials from that county) with the words "These are OUR Choices," suggesting that they were endorsing the Ehrlich-Steele campaign.²⁴



Report #2. On Election Day in 2010, voters in predominantly African-American jurisdictions of Maryland received robocalls authorized by Paul Schurick, Republican Robert Ehrlich's campaign manager, telling them that the Democratic candidates had won the election and that they no longer needed to vote. The call said, "I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're OK. Relax. Everything is fine. The only thing left is to watch on TV tonight. Congratulations and thank you."²⁵



²⁴ Democrats Blast Ehrlich-Steele Sample Ballot as a Dirty Trick, Washington Examiner, Nov. 8, 2006, <http://washingtosexaminer.com/local/2006/11/democrats-blast-ehrllich-steele-sample-ballot-dirty-trick/54123>; Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1994, 112th Cong. § 2 (2011).

²⁵ Susan Milligan, Maryland Fraud Conviction is an Important Warning, U.S. News and World Report, Dec. 7, 2011, <http://www.usnews.com/opinion/blogs/susan-milligan/2011/12/07/maryland-voter-fraud-conviction-is-an-important-warning>; Cardin Bill findings.

CURRENT LAW

It is questionable whether current Maryland law prohibits the first example of a misleading flyer because it falsely suggested support for the candidate rather than making deliberate attempts to confuse voters about the time, place, or manner of the election. Maryland's election statute has provisions that address "influenc[ing] a voter's decision" through intimidation (Section 16-201(5)), "influenc[ing] a voter's decision whether to go to the polls to cast a vote" through fraudulent activity (Section 16-201(6)), and "denial or abridgement of the right to vote on account of race, color or disability" (Section 16-201(7)). However, only the second of these provisions specifically addresses fraud, and that provision is limited to fraudulent activity designed to suppress the vote. The sort of misleading information described in Report #1 sought to confuse voters about their choice of candidates as opposed to attempting to keep them from casting their ballots in the first place.

The second example of how deceptive election information was spread gave rise to one of the very few prosecutions and convictions based on such activity. This case attracted widespread media attention and serves an important example to officials from other states as the defendant was convicted of violating a broadly worded statute that is similar in scope to the voter intimidation statutes in other states. Schurick was successfully prosecuted under the Maryland Election Code and convicted on four counts, including under § 16-201(7),²⁶ and on February 16, 2012, he was sentenced to 30 days of in-home detention, 4 years of probation, and 500 hours of community service.²⁷ Of particular interest is the fact that Schurick's conviction rested on his violation of Section 16-201(7), which prohibits conduct that results in "the denial or abridgement of the right of any citizen ... to vote on account of race," whereas the indictment²⁸ cites fraud to influence the decisions of voters to go to the polls.

26 Note that the charges in Schurick's indictment cited § 16-201(7), but used language more consistent with § 16-201(6) ("using fraud to influence the decision of voters whether or not to go to the polls to cast a vote").

27 Peter Hermann, Schurick Will Not Serve Jail Time in Robocalls Case, *The Baltimore Sun*, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.

28 Indictment, *Maryland v. Schurick*, available at <http://www.wbal.com/absolutem/articlefiles/74883-Hensonindictment.pdf>.

ANALYSIS

What makes the Maryland case so critical to combating deceptive practices generally is that it exemplifies how a broadly worded fraud statute concerning interference with the electoral franchise allowed for the successful prosecution of a deceptive robocall. Because such "interference" statutes are already on the books in many states, they should continue to be used to prosecute bad actors who employ these deceitful tactics. It is important to note, however, that the prosecution in the Schurick case was supported by exceptionally strong evidence that demonstrated the defendant's intent to suppress the vote. For example, a campaign memorandum included explicit references to the "Schurick Doctrine," which it boasted is "designed to promote confusion, emotionalism, and frustration among African American democrats [sic], focused in precincts where high concentrations of AA [African Americans] vote." The campaign memorandum explicitly stated that "[t]he first and most desired outcome is voter suppression. The goal is to have as many African American voters stay home as a result of triangulation messaging." Such strong evidence strengthened the hand of the prosecution in using the broadly-worded fraud statute, because the goal of voter suppression through "confusion" was explicitly outlined in the evidence introduced to trial.²⁹

However, given the almost nonexistent use of interference laws to prosecute deceptive election practices, we recommend a more specific statute along with a private right of action in states where officials might be more hesitant to act.

RECOMMENDATIONS

- A clear and specific definition in the law to enable prosecution of deceptive election practices, i.e. clarification of legislative intent to combat deceptive election practices.
- Provide for a private right of action to allow for a remedy when federal or state authorities fail to respond.

29 Documents from Robocall Trial, *Wash. Post* (June 27, 2012), <http://www.washingtonpost.com/wp-srv/metro/documents/maryland-robocall-documents.html>.

Case Study: Pennsylvania



ISSUE

Report # 1. During the 2004 elections, multiple voters across Pennsylvania reported receiving robocalls from a person stating he was a major political party figure and that the members of his party should vote the day after Election Day.³⁰

Report #2. Over a month before the 2008 Presidential Election, a Philadelphia voter reported that people were hanging flyers stating that individuals who had outstanding warrants or parking tickets would be arrested when they went to vote.³¹

Report #3. On October 24, 2008, a voter from Shavertown received a robocall instructing her to vote between 11 am to 1 pm or 2 pm to 4 pm that day – more than a week before Election Day (Pennsylvania does not have early voting).³²

Report #4. On October 30, 2008, canvassers reported that voters from the 8th Ward of Philadelphia’s 3rd District and the 10th Ward of its 1st District were receiving calls telling them that Latinos would only be allowed to vote from 2pm to 6pm on Election Day.³³

Report #5. In the run-up to the 2008 Presidential Election, multiple voters reported receiving calls and fliers containing incorrect polling place information that were supposedly from a presidential candidate’s campaign.³⁴ For example, a Pittsburg voter received a call from someone purporting to be “Terry” of the Obama Campaign. “Terry” urged the voter to vote for Obama at the incorrect polling place. No return number was left. The voter knew that the polling location given was incorrect and verified that his correct polling place was, in fact, at a different location.³⁵

30 Our Vote Live, 2004-11-02, Report no. 31375; Our Vote Live 2004-11-02 06:59:35 PST, Report no. 31926; Our Vote Live, 2004-11-02, 07:10:30 PST, Report no. 32198; Our Vote Live, 2004-11-02, 09:33:26 PST, Report no. 35968; Our Vote Live, 2004-11-02, 12:53:16 PST, Report no. 41467.

31 Our Vote Live, 2008-09-24, 9:51:00 AM, Report no. 284

32 Our Vote Live 2008-10-31, 11:50:00 AM, Report no. 18084.

33 Our Vote Live, 2008-10-30, 9:30:00 PM, Report no. 17330

34 Our Vote Live, 2008-11-02, 13:22:00 PM, Report no. 23014; Our Vote Live 2008-11-02, 13:44:00 PM, Report no. 23080; Our Vote Live, 2008-11-03, 10:42:00 AM, Report no. 26895; Our Vote Live, 2008-11-03, 12:30:00 PM, Report no. 28786; Our Vote Live, 2008-11-04, 6:46:00 AM, Report no. 43397; Our Vote Live, 2008-11-04, 10:17:00 AM, Report no. 56685.

35 Our Vote Live, 2008-11-02, 12:02:00 PM, Report no. 22781

Report #6. Prior to Election Day 2010, a voter reported receiving a notice in her mailbox falsely advising of a change in her polling location.³⁶

Report #7. On Election Day 2010, a voter was advised to “vote tomorrow” even though the election was that day.³⁷

CURRENT LAW

As in the previous state examples, under current Pennsylvania law it is unclear whether these examples constitute violations. 25 P.S. § 3527 directs that no person may use “intimidation, threats, force or violence with design to . . . prevent him from voting or restrain his freedom of choice.” Dissemination of false election information has not been prosecuted under this law.

25 P.S. § 3547 may be more on point, which prohibits use of a “fraudulent device or contrivance” to “impede[], prevent[], or otherwise interfere[] with the free exercise of the elective franchise of any voter.”

ANALYSIS

Despite having some clarity in the statute regarding which acts will qualify as deceptive election practices, key phrases in this provision are left undefined. For example, what must be demonstrated to prove that a misleading flyer is a fraudulent device that interfered with a voter’s right to vote? Again, none of the reported acts of deceptive election practices were prosecuted under this law.

RECOMMENDATION

- Clear and concise explanation of what is needed to demonstrate a deceptive election practice interfered with the right to vote.

36 Our Vote Live, 2010-11-02, 13:34:56, Report no. 5504.

37 Our Vote Live, 2010-11-02, 16:52:35, Report no. 9053.



McCandless Township
Allegheny County, PA

-Attention voters-

township

Due to the immense voter turnout that is expected on Tuesday, November 2 the state of Pennsylvania has requested an extended voting period.

Voters will be able to vote on both November 2 and November 3. In an attempt to limit voter wait times Allegheny County is requesting that the following actions be made.

Party	Voting date
Republican	November 2
Democrat	November 3

Thank you for cooperating with us in this endeavor to create a peaceful voting environment. We are sorry for any inconveniences that these changes may cause.

Your local representative,

Anne Ryan

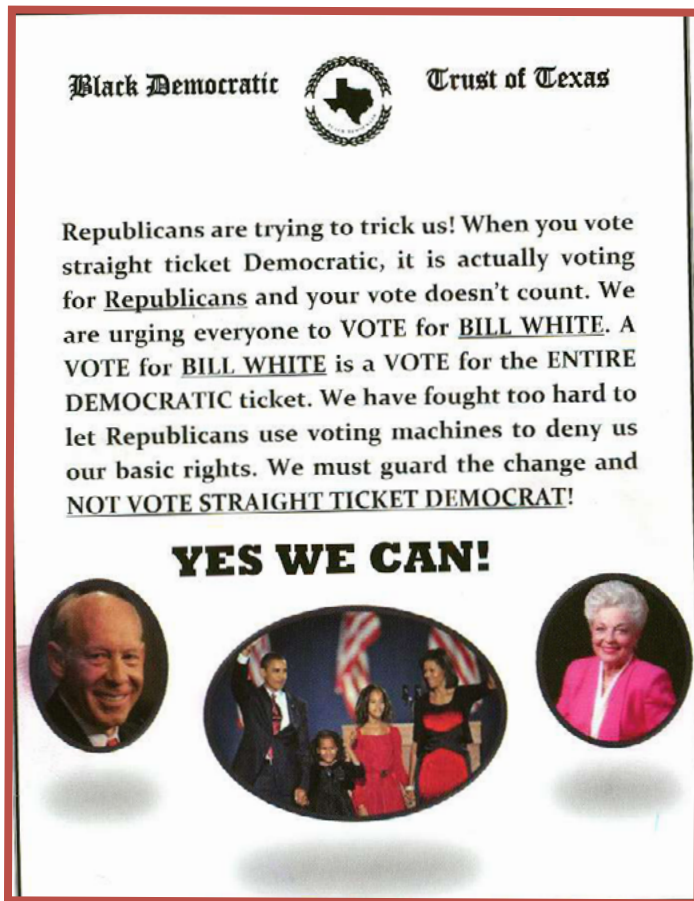
In the event of an emergency, voting stations may not be opened. Stations are opened or closed as an emergency basis. In an emergency, please stay tuned to local media or call the Emergency Operations Center at (813) 272-1900 to confirm which voting stations are open.

PENNSYLVANIA

Case Study: Texas

ISSUE

Report #1: In 2010, misleading flyers stating that the “Black Democratic Trust of Texas” (a non-existent organization) produced them were distributed at various polling sites in predominantly African-American neighborhoods of Houston. The flyers falsely warned voters that voting the straight Democratic ticket would actually cast their ballots for Republicans. They indicated that voters should instead vote for the Democratic gubernatorial candidate Bill White, as a vote for him would be a vote for the entire Democratic ticket. The flyers read, “Republicans are trying to trick us! . . . We have fought too hard to let Republicans use voting machines to deny us our basic rights,” and included photos of Mr. White, President Obama and his family, and former Texas governor Ann Richards.³⁸



³⁸ Caught: Fake Voting Flyers Distributed to African Americans in Texas, The Raw Story (Oct. 28, 2010), <http://www.rawstory.com/rs/2010/10/28/fake-flyers-aim-mislead-texas-voters>.

CURRENT LAW

Texas law is woefully inadequate in addressing the most common forms of deceptive election practices. Its statutes do not address intentionally false statements concerning the time, place, or manner of voting. The closest Texas law comes to addressing deceptive practices is a statute on concerning impersonation of public servants.³⁹

ANALYSIS

The Texas statute prohibits the impersonation of government officials with the intent to induce someone to submit to a pretended official authority or rely on official acts. However, application within the context of voting and elections is ambiguous and attenuated from the act of voting, and a strong deceptive election practices statute would clarify the scope of the law. This statute has not been litigated at the appellate level as applied to deceptive voter practices.

In 2009, a Texas legislator introduced a bill to prohibit deceptive election practices, but it died in committee.⁴⁰

RECOMMENDATION

- Pass comprehensive deceptive practices legislation.

³⁹ See Tex. Penal Code Ann. § 37.11.

⁴⁰ HB 283, 81st Regular Session (2009).



Case Study: Virginia

ISSUE

Report #1. In 2008, one week before the Election Day, Virginia State Police issued a press release announcing that it was investigating “the source responsible for an erroneous election flyer circulating in the Hampton Roads region and via the Internet. The one-page flyer falsely claims to be from the State Board of Elections and provides incorrect voting dates. The same flyer has apparently been scanned and is now circulating by email.”⁴¹

Report #2. During the 2008 Presidential Election, the email account of George Mason University Provost was hacked and used to send a deceptive email. The email went to the entire George Mason University community at 1:16 am on Election Day and stated that the election had been moved to the following day.



The school sent a corrective email to all recipients advising them that the prior email contained false information and that the election was still being held that day.⁴²

Report #3. In the lead-up to the 2008 elections, a local registrar of elections issued misleading warnings aimed at Virginia Tech students stating that students who registered to vote at their college addresses would no longer be eligible to be claimed as dependents on their parents’ tax returns, could lose scholarships, and could lose coverage under their parents’ car and health insurance policies. The statement about students’ tax status was incorrect, and it is unclear what basis the registrar had for the statements about scholarships and insurance policies.⁴³

CURRENT LAW

Laudably, in 2007, Virginia passed legislation aimed at reducing deceptive election practices by creating penalties for engaging in the communication of false information to a registered voter. The statute makes it unlawful for any person to knowingly communicate false information about the date, time, and place of an election or about a voter’s precinct, polling place, or voter registration status to a registered voter in order to impede the voter in the exercise of his or her right to vote.⁴⁴ In addition, section 24.2-607 of the Virginia Code, a preexisting provision, makes it unlawful for any person to “hinder, intimidate, or interfere with any qualified voter so as to prevent the vote from casting a secret ballot.”

ANALYSIS

In the first example, the Virginia State Police press release announcing its investigation into the fake flyers from election officials specifically cited Virginia’s deceptive practices law. However, one week later, the State police issued a follow-up press release stating that “[a]fter a thorough investigation into the origins of a fake election flyer ... no criminal activity occurred and no charges

A George Mason University student forwards over a pair of emails that went out to the student body of the Virginia school:

First:

-----Original Message-----

From: ANNOUNCE04-L on behalf of Office of the Provost
Sent: Tue 11/4/2008 1:16 AM
To: ANNOUNCE04-L@mail04.gmu.edu
Subject: Election Day Update

To the Mason Community:

Please note that election day has been moved to November 5th. We apologize for any inconvenience this may cause you.

Peter N. Stearns
Provost

And then:

-----Original Message-----

From: Office of the Provost on behalf of Office of the Provost
Sent: Tue 11/4/2008 8:08 AM
To: PROVOSTOFFICE-L@mail04.gmu.edu
Subject: Urgent Voting Information

Dear Colleagues,

It has come to my attention early this morning that a message was hacked into the system fraudulently stating that election day has been moved. I am sure everybody realizes this is a hoax, it is also a serious offense and we are looking into it. Please be reminded that election day is today, November 4th.

Peter N. Stearns
Provost

41 Press Release, Virginia State Police, Virginia State Police Investigate Source of Erroneous Election Flyer (Oct. 29, 2011), available at <http://www.vsp.state.va.us/News/2008/NR-57%20VSP%20BCI%20Investigates%20Source%20of%20Erroneous%20Election%20Flyer.pdf>

42 Ben Smith, A Fake Email at George Mason, Politico, Nov. 4, 2008, http://www.politico.com/blogs/bensmith/1108/A_fake_email_at_George_Mason.html.

43 Elizabeth Redden, Warning for College Student Voters, Inside Higher Ed, Sept. 3, 2008, <http://www.insidehighered.com/news/2008/09/03/voting>; Tamar Lewin, Voter Registration by Students Raises Cloud of Consequences, N.Y. Times, Sept. 7, 2008, <http://www.nytimes.com/2008/09/08/education/08students.html>.

44 Va. Code Ann. § 24.2-1005.1.

will be filed” because the Police determined it was an “office joke.”⁴⁵ A private right of action in Virginia’s otherwise strong deceptive election practices law may have resulted in a more thorough investigation as other parties would have been responsible for investigating the matter.

In the second example, the email falls within the scope of Virginia’s new law because it was providing false information about the date of the election. However, to our knowledge, no one was prosecuted for the activity described in Report #2. This also strengthens the need for a private right of action and a legal directive for law enforcement agencies to take corrective action to protect voters from the false information.

In Report #3, the local registrar who issued the warnings about tax statuses for campus voter registration might not be liable under Virginia law because the information communicated did not fall specifically within the categories enumerated in the deceptive practices statute. As for Virginia’s broader law prohibiting interference with the right to vote, it is unclear whether the registrar’s conduct would be deemed by courts as prohibited under that statute. If Virginia law required state officials to conduct a review of deceptive practices in the wake of an election, however, officials would be in a better position to correct the record and disseminate correct information if other dubious claims about tax status come up in subsequent elections.



RECOMMENDATIONS

- Require a review of deceptive election practices after an election.
- Create a private right of action for individuals to advocate for themselves in the absence of state enforcement.

⁴⁵ Press Release, Virginia State Police, No Charges Filed in Bogus Election Flyer Investigation (Nov. 3, 2008), available at http://www.vsp.state.va.us/News/2008/news_release_11-03-08.shtm.

Virginia State Board of Elections

Commonwealth of Virginia



For Immediate Release: 10/24/2008

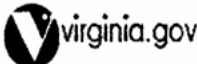
Due to the larger than expected voter turnout in this years electoral process. An emergency session of the General Assembly has adopted the follwing emergency regulations to ease the load on local electoral precincts and ensure a fair electoral process.

All Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th as precribed by law.

All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th as adopted by emergency regulation of the Virginia General Assembly.

We are sorry for any inconvenience this may cause but felt this was the only way to ensure fairness to the complete electoral process.

Virginia State Board of Elections - **Contact us**
Suite 101, 200 North 9th Street, Richmond, Virginia 23219-3485
Telephone: 804 864-8901 Toll Free: 800 552-9745 FAX: 804 371-0194



Case Study: Wisconsin



ISSUE

Report #1. During the 2004 Presidential Election, a Milwaukee voter reported receiving a robocall delivering a message in what she believed to be the fake voice of a major presidential candidate; the message gave her the wrong polling place.⁴⁶

Report #2. In 2006, a voter from Kenosha received a call from someone identifying himself as being affiliated with a major political party. The caller gave the voter incorrect polling place information which was very far from the voter's residence. Fortunately, the voter checked her polling location online and discovered that the caller had given her incorrect information.⁴⁷

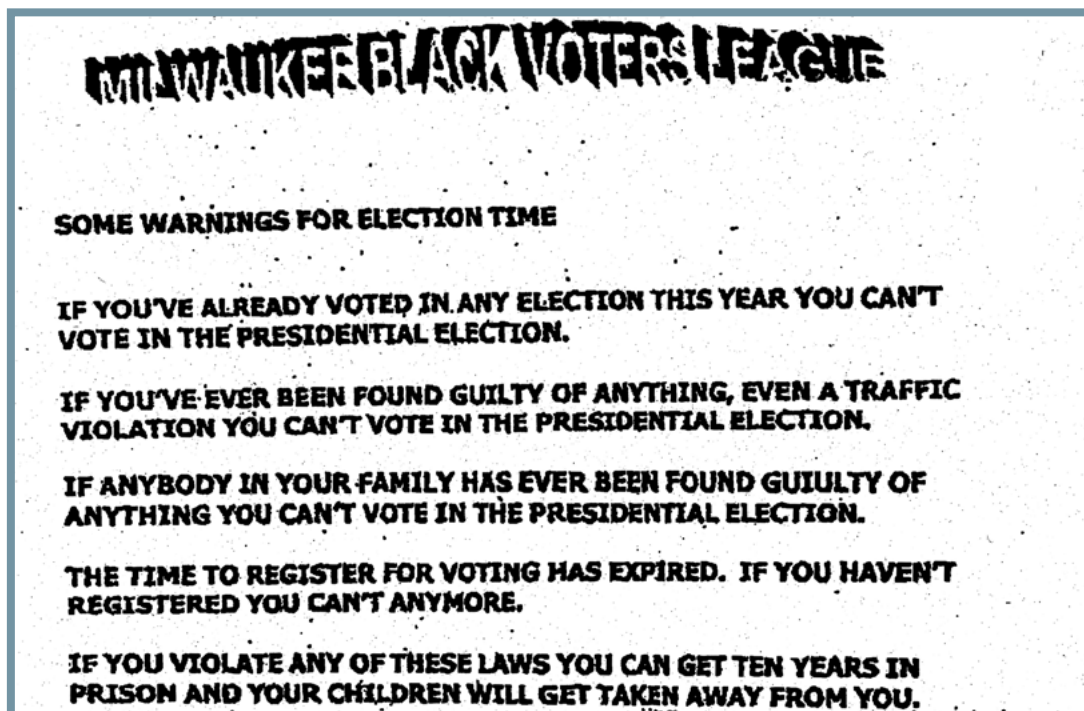
Report #3. In July 2011, voters registered with one major political party received robocalls claiming to be from an anti-abortion rights group saying that they did not need to go to a polling place to vote because their absentee ballot was in the mail. The calls came on the last day that polling places were open for the Democratic primary and a recall election—too late to submit an absentee ballot.⁴⁸

CURRENT LAW

Current Wisconsin law could apply to these examples, but the breadth of the applicable statutes render their applicability vague and therefore potentially ineffective. For example, one broadly worded statute provides that “[n]o person may personally or through an agent, by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise at an election.”⁴⁹ No definition is provided for the phrase “fraudulent device or contrivance,” nor has it been litigated, and it is unclear how broadly courts will interpret it. Another statute prohibits the knowing false representation “pertaining to a candidate or referendum which is intended or tends to affect voting at an election.”⁵⁰ This is exceptionally broad but is aimed at statements about candidates rather than the time, place or manner of voting and would be inapplicable to these examples.

RECOMMENDATION

- Clearly and concisely define terms in the current law.



⁴⁶ Our Vote Live, 2004-11-02 15:32:21 PST, Report no. 45803.

⁴⁷ Our Vote Live, 2006-11-07, 12:32:39 AM, Report no. 705.

⁴⁸ Kase Wickman, Robocalls Spam WI Democrats, Telling Them Not to Vote in Recall Elections, The Raw Story (July 12, 2011), <http://www.rawstory.com/rs/2011/07/12/robocalls-spam-wi-democrats-telling-them-not-to-vote-in-recall-elections>.

⁴⁹ Wis. Stat. § 12.09.

⁵⁰ Id. § 12.05.

Summary and General Policy Recommendations

As is clear from the various examples, there are many recurring themes with respect to deficiencies in state laws.

THE NEED FOR A CLEAR LEGAL DEFINITION

These examples show that although the laws which broadly prohibit interference with the right to vote could be read as proscribing deceptive election practices, they are not being applied or used to prosecute such activity. This may be due to a few reasons: the broad sweep of these interference laws and resulting confusion about their application; the challenge associated with prosecuting anonymous communications; and perhaps even the lack of incentive to prosecute deceptive election practices. Regardless, there remains an exigent need for a clear basis in the law to combat this type of election fraud. Such laws would provide attorneys with the clarity they need to pursue these acts as election crimes and serve as a warning to the perpetrators themselves that their deceptive election practices are subject to prosecution.



To be effective and protect voters, it is critical that the law provide a clear and exacting legal definition prohibited deceptive practice: that disseminating materially false information concerning the time, place, or manner of voting with the intent to prevent a voter from exercising his or her right to vote is prohibited.

To be effective and protect voters, it is critical that the law provide a clear and exacting legal definition prohibited deceptive practice: that disseminating materially false information concerning the time, place, or manner of voting with the intent to prevent a voter from exercising his or her right to vote is prohibited. First, the information must be materially false, which means that there must be a false statement of fact or a factual omission resulting in a false statement. Second, the statement must be made with the intent to prevent a voter from voting. This is essential to ensuring that only those who intentionally communicate false election information are prosecuted and that honest mistakes made without the intent to disenfranchise voters do not fall within the scope of the law.

Additionally, an effective law should be precise enough to include the different modes of communication that can be used to disseminate false information to the public – written, electronic, and telephonic – so that the prohibition will extend not only to robo-calls and neighborhood flyers, but also to online deceptive election practices (such as emails or spyware) that could rapidly spread false information under the guise of official communications from a campaign or election administrators.⁵¹ This provision is especially important as electronic communication is quickly becoming the preferred method of disseminating false election information.

REQUIRE CORRECTIVE ACTION

Protecting voters from deceptive election practices requires more than a prohibition on the conduct; jurisdictions should also take measures to counteract deceptive election practices with accurate information. While it may be impossible to fully neutralize deceptive election practices, it would be helpful for jurisdictions to establish policies and procedures by which all reasonably available means of communication could be employed to disseminate correct voting information. All avenues and channels of transmission should be utilized to disseminate correct information, including outreach via news media, the press, social media, phone calls, and canvassing.



⁵¹ See additional recommendations on false information disseminated via the Internet, email and other new media in “Deceptive Practices 2.0,” published by Common Cause and the Lawyers’ Committee on Civil Rights Under Law in 2008, available at www.commoncause.org/deceptivepracticesreport.

Election officials need not wait for state legislators to act to clarify criminal penalties and prohibited behavior in jurisdictions in which such acts are proscribed by law.

Deceptive election practices are a continual threat in all elections, and they occur most often in the run-up to Election Day when there is little time to react and correct misinformation. Secretaries of state and law enforcement agencies can and should coordinate with voting rights and other civil rights organizations on the ground to plan a coordinated and rapid response to deceptive election practices when they occur.

This plan should include the creation of a system designed to monitor deceptive election practices and intake reports. There may also be avenues for political parties or attorneys general to obtain an injunction against deceptive election practices from a known perpetrator (for example, to shut down robocalls from known numbers).

Voter education is also a critical component to combating deceptive election practices. In communities where such activity is known to occur frequently, election administration officials should preemptively address these practices as part of their voter engagement and outreach plans. Information about voting procedure should be placed clearly and conspicuously in areas where the community gathers, in the local media, and online so that people know what to expect.

ENFORCEMENT

Law enforcement officials should use every tool at their disposal to prosecute individuals and campaign entities responsible for perpetrating deceptive election practices.

Enforcement entities should also make known their intent to fully prosecute those who intend to mislead voters about their rights.

From the examples provided in the case studies section, the need for an effective enforcement mechanism to empower voters who are deprived of their right to vote are a result of the actions of others is clear. Even in states with some type of law to protect against deceptive election practices, there is a slim record of enforcement by any state authority. Therefore, any successful model to curb deceptive election practices must include a private right of action so victims can immediately seek redress and provide an effective defense against such intimidation efforts.



TRANSPARENCY

Finally, to further document deceptive election practices and refine an effective response in subsequent elections, attorneys general or other data-collection agencies should compile a post-election report of deceptive election practices utilized during the election that details the critical components of such activities for follow-up investigation.

This data should include the geographic location and the racial, ethnic, and/or language-minority group toward whom the alleged deceptive election practice was directed. Corrective actions, referrals to prosecutors, litigation, and criminal prosecution should also be analyzed.



Federal Legislative Action

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2005

In 2005, then Senator Barack Obama (D-IL) introduced S. 1975, the Deceptive Practices and Voter Intimidation Prevention Act of 2005 which would have made it 1) a federal crime to knowingly deceive another person regarding the time, place, or manner of conducting any federal election; 2) a criminal offense to knowingly misrepresent the qualifications on voter eligibility for any such election; 3) created a private right of action for any person aggrieved by a violation of the prohibition; and 4) requirement that the Attorney General investigate any report of a deceptive election practice within 48 hours after its receipt and provide correct information to affected voters. Additionally, it would require the Attorney General to conduct an immediate investigation and take all effective measures necessary to provide correct information if the deceptive activity took place within 72 hours of an election. Congressman Rush Holt (D-NJ), Congressman John Lewis (D-GA), and others introduced a companion bill in the U.S. House of Representatives.

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2007

In 2007, Senators Barack Obama (D-IL), Charles E. Schumer (D-NY), Ben Cardin (D-MD) and others re-introduced the Deceptive Practices and Voter Intimidation Prevention Act of 2007 (S. 453). This version of the bill, introduced in the 110th Congress, was identical to the bill originally proposed by Obama in 2005. It continued to emphasize the importance of ensuring that voters had access to correct and valid information in order to protect the integrity of our election process and ensure that all eligible votes are counted. It was voted out of the Senate Judiciary Committee and was placed on the Senate Calendar. During that year, the U.S. House of Representatives passed a similar version of the Senate bill. Introduced by then-Congressman Rahm Emmanuel (D-IL) and Chairman John Conyers (D-MI), the House bill, H.R. 1281, passed unanimously on the House floor. With this momentum coming out of the House of Representatives, S. 453 was poised to be passed on the Senate floor until its lead co-sponsor announced his run for the Presidency which stalled further deliberations in the Senate.

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2011

In 2011, Senators Chuck Schumer and Ben Cardin introduced the Deceptive Practices and Voter Intimidation Act of 2011, S.1994. Senators Cardin and Schumer worked with Department of Justice officials and civil rights organizations to make minor adjustments from the previous bills. Among the changes, the revised Schumer-Cardin bill added extensive legislative findings, specified that prohibited conduct includes any means of communication (written, electronic, and telephonic), and expands the corrective action required by the Department of Justice.

ADDRESSING FIRST AMENDMENT CONCERNS

Some concerns have been raised that criminalizing deceptive election practices unconstitutionally restricts freedom of speech. The importance of freedom of speech to democracy is immeasurable and should be fiercely guarded by courts and legislators. The constitutional right to free speech, however, cannot be used to prevent another person from exercising an equally fundamental right: the right to vote. The model law we propose does not infringe on freedom of speech because it captures only unprotected speech.

Supreme Court jurisprudence has long established that certain categories of low-value speech are outside the realm of First Amendment protection.⁵² Obscenity, defamation, incitement, and fraud have historically been considered by the Court as unworthy of First Amendment protection. Deceptive election speech regarding voting is fraudulent and therefore unprotected.

This is for good reason. False statements have little constitutional value.⁵³ They do little to contribute to the “uninhibited, robust, and wide-open debate” on public issues, the key principle underlying freedom of speech protection.⁵⁴ Spreading lies about an election to prevent certain people from voting certainly does not comport with this principle. The distinguishing element between false statements which are protected and those which are unprotected is the existence of a malicious intent.⁵⁵ The Court has steadfastly

52 U.S. v. Stevens, 130 S.Ct. 1577, 1584 (2010).

53 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

54 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

55 United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010). aff'd, 567 U.S. ____ (June 28, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf>.

Conclusion

held that when an individual communicates a false statement of fact about a matter of public concern, the speaker can be held to account only upon a showing of intent; this avoids the risk of punishing innocent mistakes.⁵⁶ The model law proposed in this report regulates only unprotected speech because, in addition to a false statement, it requires the showing of intent to deprive another of the right to vote. To hold a person accountable under the model law, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false and demonstrate that the defendant made the representation with the intent to mislead the audience.⁵⁷

Even where unprotected speech is concerned, a statute must be carefully crafted to target only the proscribed conduct so as not to chill protected speech. The model law does exactly that: it prohibits specific communications – materially false statements about the time, place, or manner of elections or qualifications for voting – and applies only to the 90 days prior to an election, during the height of election activity such as voter registration and early voting. By prohibiting only unprotected speech, the model law mirrors provisions in the National Voter Registration Act of 1993 that criminalize fraudulent registration and voting.⁵⁸

Even if analyzed under heightened scrutiny, the model law would pass constitutional muster because states have a compelling interest in protecting the right to vote. In *Burson v. Freeman*, the Court upheld a provision of the Tennessee Code, which prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.⁵⁹ The Court reasoned that the 100-foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process.⁶⁰ It clearly follows from this holding that the state has a compelling interest in protecting the actual act of voting, which is precisely what deceptive election practices seek to prevent. Losing the opportunity to vote through no fault of the voter is an irreparable harm. Once polls close on Election Day, there is nothing that a victim of deceptive election practices can do; that person has lost his or her vote and their loss cannot be recovered or remedied.

⁵⁶ *Id.* at 1206-07 (citing *Sullivan*, 376 U.S. at 283).

⁵⁷ See *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003).

⁵⁸ 42 U.S.C.A. § 1973gg-10 (West).

⁵⁹ 504 U.S. 191, 210 (1992).

⁶⁰ *Id.*

Five decades after the passage of the Voting Rights Act, the examples highlighted in this report demonstrate that the right to vote remains under attack. The examples of deceptive election practices contained within this report paint a grim picture of what voters may face when heading to the polls in November.

Although many states have enacted laws that arguably address some of the pernicious campaigns designed to confuse voters, very few states have unambiguous statutes prohibiting the use of deception concerning the time, place, or manner of voting, voter qualifications, or other forms of interference in the election process.

Some states have narrowly construed laws prohibiting the impersonation of election officials or use of fraudulent documents that appear to come from official government sources. Other states have attenuated laws regarding traditional deceptive election practices as they pertain to the process of voting that also cover false statements about a candidate or ballot initiative intended to affect the outcome of an election. Law enforcement and election officials need a clear direction to address deceptive election practices.

In the short term, before laws can be officially reformed, election administrators should use their regulatory authority to promulgate policies that will combat deceptive election practices and disseminate corrected information to voters in a timely manner. The policy recommendations in this report provide common sense reforms that will address a problem that has persisted in elections for far too long and will continue to persist unless decisive action is taken. It is time for our leaders to ensure that the rights of all voters are protected without ambiguity to ensure they can fully participate in our democracy.

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Appendix

SECTION 1. SHORT TITLE.

This act shall be known and may be cited as the 'Deceptive Practices and Voter Intimidation Prevention Act'

SECTION 2. DECLARATION OF POLICY

The General Assembly finds and declares as follows:

1. Deceptive practices, which are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot, have been perpetrated in order to suppress voting, intimidate the electorate, and skew election results.
2. This type of voter suppression often goes unaddressed by authorities and perpetrators are rarely caught. New technology makes the spread of these false information campaigns particularly widespread and egregious through the use of robocalls, electronic mail, and other new social media such as Facebook, Twitter, and microblog websites.
3. The right to vote is a fundamental right and the unimpeded exercise of this right is essential to the functioning of our democracy.
4. Those responsible for deceptive practices and similar efforts must be held accountable, and civil and criminal penalties must be available to punish anyone who seeks to keep voters away from the polls by providing false information.
5. Moreover, this State's government must take a proactive role in correcting such false information and preserve the integrity of the electoral process, assist voters in exercising their right to vote without confusion and provide correct information.

SECTION 3. THE LAW _____ IS AMENDED TO READ:

1. It shall be unlawful for any person within 90 days before an election:
 - A. Intentionally communicate or cause to be communicated by any means (including written, electronic, or telephonic communications) materially false information regarding the time, place, or manner of an election, or the qualifications for or restrictions on voter eligibility (including any criminal penalties associated with voting, voter registration status or other) for any such election with the intent to prevent a voter from exercising the right to vote in such election, when the person knows such information is false.
 - B. Make to the public, or cause to be made to the public, a materially false statement about an endorsement if such person intends to mislead any voter and knows that the statement is false.
2. Immediately after receiving a credible report concerning materially false information described in subsection (1) or is otherwise aware of false information described in subsection (1), the [Attorney General or other chief law enforcement official designated by the Attorney General] shall investigate all claims and [the Attorney General or other chief law enforcement official designee .or Secretary of State] shall undertake all effective measures including where available public service announcements, emergency alert systems, and other forms of public broadcast, necessary to provide correct information to voters affected by the deception, and refer the matter to the appropriate federal, state, and local authorities for civil and criminal prosecution.
 - A. The Attorney General shall promulgate regulations concerning the methods and means of corrective actions to be taken under paragraph (2).
 - B. Such regulations authorized by (2)(a) shall be developed in consultation with civil rights organizations, voting rights groups, State and local election officials, voter protection groups and other interested community organizations.

Appendix continued

3. DEFINITIONS

- A. For purposes of this Section, an election is a general, primary, run-off, or special election held for the purpose of nominating or electing a candidate for the federal, state, or local elected office.
 - B. For purposes of this Section, a statement about an endorsement is materially false if:
 - i. In an upcoming election, the statement states that a specifically named person, political party, or organization has endorsed the election of a specific candidate for an elected office; and
 - ii. Such person, political party, or organization has not stated that it supports the election of a candidate, or supports the election of another candidate.
4. **CIVIL RIGHT OF ACTION:** Any person aggrieved by a violation of this section may institute a civil action or other proper proceeding for preventive relief, including a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. The court, in its discretion, shall have the power to include in its judgment recovery by the party from the defendant of all court costs and reasonable attorney fees incurred in the legal proceeding [as well as punitive damages where consistent with state law].
5. **CRIMINAL PENALTY:** Any person who violates paragraph (1) shall be fined not more than [\$100,000], imprisoned not more than 5 years, or both.

SECTION 4. REPORTS TO STATE LEGISLATURE

1. In General, Not later than 90 days after any general election, the Attorney General shall submit to the appropriate committees of the state legislature a report compiling and detailing all allegations of deceptive practices received pursuant to this Act that relate to elections held in the previous two years.
2. Contents – In general – each report submitted shall include:
 - A. Descriptions of each allegation of a deceptive practice, including the geographic location and the racial and ethnic composition, as well as language minority group membership, of the persons toward whom the alleged deceptive practice was directed;
 - B. Descriptions of each corrective actions taken in response to such allegations;
 - C. Descriptions of each referrals of such an allegation to other Federal, State, or local agencies;
 - C. Descriptions of any civil litigation instituted in connection with such allegations; and
 - E. Descriptions of any criminal prosecution instituted in connection with the receipt of such allegations.
3. Report Made Public – On the date that the Attorney General submits the report required under this subsection, the Attorney General shall also make the report publicly available through the Internet and other appropriate means.

SECTION 5. EFFECTIVE DATE

This act shall take effect within 90 days of its passage.

SECTION 6. SEVERABILITY

If any provision of this Act or any amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendments to any person or circumstance, shall not be affected by the holding.