QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

"Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994"

Questions for Ms. House

1. At the hearing you testified, "We have specifically put in place working with your offices … language that would ensure that this is not indeed chilling political speech."

    a. To which individuals or groups were you referring when you used the term "we"?

Response: The Lawyers' Committee for Civil Rights Under Law worked with Common Cause and others to provide guidance to the offices of Senators Schumer, Cardin, and Leahy during the drafting stages of S. 1994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011. These are the groups and individuals I was referring to when I used the word "we" in my testimony.

    b. Please provide copies of all drafts of language that the individuals or groups referenced in your answer to (a) above provided to the offices of any members of the Senate Judiciary Committee.

Response: Please see attachments for the initial drafts of the language now included in Section 3, Prohibition on Deceptive Practices in Federal Elections, of S. 1994.

2. At the hearing, you testified that the bill "ensure[s] that there's a limitation on the type of speech that we're actually regulating, which is time, place, manner."

    a. To which individuals or groups were you referring when you used the term "we"?

Response: Again, as Public Policy Director at the Lawyers' Committee for Civil Rights Under Law, my staff and I collaborated with Common Cause and others to provide guidance to the offices of Senators Schumer, Cardin, and Leahy during the drafting stages of S. 1994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011. These are the groups and individuals I was referring to when I used the word "we" in my testimony.

    b. How is possible for a bill that is "actually regulating" a "type of speech" to be a time, place, or manner restriction on speech? Is it not true that S. 1994, in the words of the Supreme Court's plurality opinion at page 4 in *United States v. Alvarez*, "restricts expression because of its message, its ideas, its subject matter or its content," and is therefore a conduct-based restriction on speech and not one based on time, place, or manner? If you continue to believe that S. 1994 is a time, place, or manner based restriction on speech, and is not content-based, what case law supports your conclusion?

Response: Respectfully, I believe you have misunderstood my statement. My statement regarding "time, place, and manner" was a reference to the model legislation proposed by the Lawyers' Committee for Civil Rights and Common Cause, which prohibits materially false speech regarding the time, place, or manner of an election.

c. If you now conclude that S.1994 in fact is a content-based regulation of speech, and not one that regulates a type of content the Supreme Court has held is permissible under the First Amendment, plurality op. at 5-6, how does S.1994 satisfy the "most exacting scrutiny," *id.* at 12, that such content-based restrictions of speech must withstand under the First Amendment?

Response: Not all content-based restrictions of speech must satisfy "most exacting scrutiny," commonly called "strict scrutiny." In *Alvarez v. United States*, the Supreme Court acknowledged that "Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more." Plurality op. at 7. This strict scrutiny standard only applies to laws, like the Stolen Valor Act, that outlaw false speech "entirely without regard to whether the lie was made for the purpose of material gain." Plurality op. at 11. As the plurality acknowledges, "[w]here false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment." *Id.*

Following *Alvarez*, the Fourth Circuit recently upheld a statute that criminalized, without more, "falsely assum[ing] or pretend[ing] to be" a law enforcement officer. *United States v. Chappell*, No. 10-4746, slip op. at 2 (4th Cir. Aug. 14, 2012) (Wilkinson, J.). As the Fourth Circuit explained, "the Supreme Court [in *Alvarez*] distinguished the Stolen Valor Act, which criminalized 'pure speech,' from a number of constitutionally permissible statutes that regulate speech in a manner that 'implicate[s] fraud or speech integral to criminal conduct." *Id.* at 13. Such "statutes, *Alvarez* explains, are constitutional because they do more than 'merely restrict false speech'; they also 'protect the integrity of Government processes' and 'maintain the general good repute and dignity of government service itself.' *Id.* at 14.

For the same reason, laws like the DPVI that regulate false speech in a more limited context are not subject to strict scrutiny. In addition to a false statement, the DPVI requires the showing of intent to deprive another of the right to vote through a misleading statement of material fact. Under the proposed law, first, the proposed law requires the statement to be *materially* false, that is, it must be either a false endorsement, a false statement regarding the time or place of an election, or a false statement regarding the qualifications for or restrictions on voter eligibility (such as false criminal penalties associated with voting). Second, the statement must be made with knowledge of its falsity. Third, the speaker must intend to mislead voters.

Like the law at issue in *Chappell*, the DPVI "has a plainly legitimate sweep," *Chappell*, slip op. at 5, serving the nation's critical interest in free and fair elections. The restriction here "protects the integrity of Government processes" and "maintains the general good repute and dignity of government service itself." *Alvarez*, plurality op. at 9 (quoting *United States v. Lepowitch*, 318

U.S. 702, 704 (1943)). The law applies only to speech made to mislead voters on material facts and so implicates only unprotected speech. It is therefore not subject to the strict scrutiny standard.

Further, under *Alvarez*, laws restricting false speech irrespective of fraud or other material gain are subject to intermediate, not strict scrutiny. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Here, two Justices concurred, but on the grounds that the Stolen Valor Act was subject to, and could not withstand, intermediate scrutiny. Concurring op. at 3. The Fourth Circuit in *Chappell* described this as the "controlling concurring opinion." *Chappell*, slip op. at 16. With the three dissenting Justices who would hold that no protection applied to the Act, this constitutes five Justices who would uphold a law on a showing that it met intermediate, rather than strict scrutiny.

Even if analyzed under strict scrutiny, much less intermediate scrutiny, the law would pass constitutional muster because the government has a compelling interest in protecting the right to vote. In *Burson v. Freeman*, the Court upheld a provision of the Tennessee Code prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. 504 U.S. 191, 210 (1992). 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. *Id.* It clearly follows from this holding that the state has a compelling interest in protecting the actual act of voting, which S. 1994 is narrowly tailored to protect.

3. At the hearing, you testified that "the Department of Justice has indicated… they support this type of legislation because it would enable them to be very directed in addressing these types of deceptive tactics and fliers." I have asked the Department of Justice for any public statements it has made in support of S. 1994. On July 2, 2012, the Department provided me a copy of a letter on this subject, issued on that same date, that they had sent to Chairman Leahy.

    a. On what basis were you able to make on June 26, 2012, the statement that "the Department of Justice has indicated … they support this type of legislation…."?

Response: This was based on statements by the Attorney General during his speech at the LBJ School of Public Policy in December of 2011.

    b. Please provide copies of any documents, communications, or records of conversations that form the basis for your testimony that the Department of Justice had indicated support for legislation similar to S. 1994 prior to July 2, 2012.

Response: Please see the copy of the Attorney General's speech located at - http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html

4. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.

    a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?

Response: No. As federal law, S. 1994 would only apply to elections in which federal candidates are on the ballot.

    b. If not, why would S. 1994 be relevant to such elections?

Response: I cited the Wisconsin recall election on June 5, 2012 to highlight recent examples of deceptive practices in order to demonstrate that this issue is a very real and ongoing problem, and will threaten the integrity of the election results this November. I also chose to focus on the Wisconsin recall to demonstrate that current state and federal laws fail to address deceptive practices. For example, Wisconsin law 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,"[1] but the definition of a "fraudulent device or contrivance" has not been clarified through statutory or case law.[2] Additionally,Wisconsin law addresses false statements about candidates through a statute prohibiting false representation "pertaining to a candidate or referendum which is intended or tends to affect voting at an election," but does not address the time, place, and manner of voting.[3] Further, no remedy currently exists at the federal level to effectively address deceptive election practices. Passing S. 1994 would be an important step in implementing provisions to combat deceptive practices, and we hope that Congressional action will then influence states to pass similar legislation.

    c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?

Response: Please see response to question 4a.

    d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, "Federal Prosecution of Election Offenses"?

Response: Please see response to question 4a.

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[1] WIS. STAT. § 12.09 (West, Westlaw through 2011 Act 286, published April 26, 2012).

[2] COMMON CAUSE & THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, DECEPTIVE ELECTION PRACTICES AND VOTER INTIMIDATION: THE NEED FOR VOTER PROTECTION 19 (2012).

[3] WIS. STAT. § 12.05 (West, Westlaw through 2011 Act 286, published April 26, 2012); COMMON CAUSE ET AL., *supra* note 1.

5. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.

    a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: S. 1994 would cover a broader range of deceptive election practices than either 18 U.S.C. 594 and 42 U.S.C.1973gg-10(1). The language of 18 U.S.C. 594 institutes criminal penalties of one year imprisonment, a fine, or both for any person who "intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce" any other person for the purpose of influencing his or her vote for a federal candidate.[4] As the Department of Justice Manual, "Federal Prosecution of Election Offenses," notes, the operative words are "intimidates, threatens, or coerces" in this statute.[5] These words indicate that the statute covers actions that are intended to raise a voter's fear of loss if he or she does not cast a ballot for the preferred candidate of the perpetrator of the deceptive practice.[6] Indeed, as the DOJ Manual further highlights, the legislative history of Section 594 indicates that "Congress intended Section 594 to apply when persons were placed in fear of losing something of value for the purpose of extracting involuntary political activities."[7] Thus, Section 594 does not cover practices that provide voters with misleading information, such as deceptive flyers or robocalls, because they do not create a fear of loss among voters.

Further, 42 U.S.C. 1973gg-10(1) imposes a penalty of up to five years imprisonment or a fine for any person who "knowingly and willfully intimidates, threatens, or coerces" or attempts to do so, another person for registering to vote, assisting other persona in voting, or exercising his or her right to vote. Again, the language "intimidates, threatens, or coerces" contained within 42 U.S.C. 1973gg-10(1) would apply only to deceptive practices which place direct pressure on a voter, and not deceptive practices which instead spread misleading information.

Instead, S. 1994 contains language that would also encompass misleading practices. Sections 3(a)(2)(A)(ii), 3(a)(3)(A)(ii), and 3(b)(1)(C) directly address misleading practices. Further, the language of Section 3(a)(4), stating that "[n]o person . . . shall corruptly hinder, interfere with, or prevent another person from voting, registering to vote, or aiding another person to vote or register to vote" in a federal election also would cover misleading as well as explicitly coercive deceptive election practices. Without this broad language, perpetrators who spread misleading flyers, organize deceptive robocalls, or otherwise propagate false information about elections will go unpunished, disenfranchising millions of Americans on Election Day.

    b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter

[4] 18 U.S.C. 594 (West, Westlaw through P.L. 112-139 approved June 27, 2012).
[5] UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 57 (2007).
[6] *See id.*
[7] *Id.* (citing 84 CONG. REC. 9596-611 (1939).

intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?

Response: Congress is charged with supporting the Department of Justice in fulfilling the agency's mission. The deceptive election practices which would be prohibited under S. 1994 will significantly increase the ability of the DOJ to fulfill its mission in assuring the integrity of our elections and prosecute individuals or organizations who seek to undermine the vitality of our democracy.

6. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to "providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: Section 241 contains several shortcomings that limit its effectiveness in combating deceptive election practices. First, a suit under Section 241 can only be brought if "two or more persons" are engaged in a conspiracy to injure, oppress, threaten, or intimidate" any person in the exercise of their right to vote.[8] Therefore, Section 241 cannot be used as a tool for prosecuting perpetrators of deceptive practices when there is only sufficient evidence against one individual to bring a case. S. 1994 would allow the prosecution of individuals who have been engaged in a deceptive practice. Additionally, as the Department of Justice Manual notes, not all deceptive practices, including bribery, are covered under the language of Section 241, but would be covered under S. 1994.[9] Finally, Section 241 does not permit a voter to bring a private cause of action when they feel that their voting rights have been infringed upon by a deceptive practice, which would be implemented in Section 3(b) of S.1994.

7. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 80, 2 U.S.C. 441(h) "prohibits fraudulently representing one's authority to speak for a federal candidate or political party." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

Response: Section 441(h) of Title 2 of the U.S. Code, although covering statements providing false information about the standpoint of a candidate or political party, does not cover misleading statements about elections, which will be included under S. 1994.

8. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez*

[8] 18 U.S.C. 241 (West, Westlaw through P.L. 112-139 approved June 27, 2012).
[9] UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 5, at 39.

decision, the plurality opinion stated, at page 11, "Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement is not relevant to the constitutionality of S. 1994 because the speech prohibited by the law at issue in *Alvarez* is far different from the speech prohibited by S. 1994, both in substance and effect. "The [Stolen Valor Act] seeks to control and suppress *all* false statements on this one subject in almost limitless times and settings." Plurality op. at 10-11 (Emphasis added.) As explained above in response to Question 2c, the DPVI is far narrower and captures only unprotected speech. First, the proposed law requires the statement to be *materially* false, that is, it must be either a false endorsement, a false statement regarding the time or place of an election, or a false statement regarding the qualifications for or restrictions on voter eligibility (such as false criminal penalties associated with voting). Second, the statement must be made with knowledge of its falsity. Third, the speaker must intend to mislead voters. And unlike the speech addressed in the Stolen Valor Act, the false statements at issue in S. 1994 will result in an irreparable harm to voters by depriving them of the fundamental right to vote – once the opportunity to cast a ballot is lost due to a false statement, it is lost forever. The harm is equally harmful whether the false statement is made in public or private.

9. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement does not render S. 1994 a violation of freedom of speech. The passage does not stand for the proposition that a financial benefit must be realized for false speech to be unconstitutional. Indeed, there are numerous examples of unprotected speech where the harm to be protected against is not financial in nature, many of which were enumerated by the plurality. Some obvious examples include obscenity, defamation, and incitement. *See* plurality op. at 5. The plurality also clearly distinguished between statements effecting fraud and those made to secure moneys, stating clearly that both may be regulated: "Where false claims are made to *effect a fraud or secure moneys* or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment." Plurality op. at 11 (emphasis added). The Court was simply making the point that there must usually be some cognizable harm for false speech to be prohibited. This is reinforced by the Fourth Circuit's recent decision in *Chappell*, discussed above in response to Question 2c. In that case, the court upheld a law banning impersonation of police officers that contained no

financial benefit requirement. *See id*., slip op. at 2-4. In the cited statement, the Court was using the gain of a material advantage as one such example. Clearly, protecting the right to vote is a legitimate goal that the government may legislate to protect. *See Alvarez*, plurality op. at 9 (describing legitimacy of laws that "protect the integrity of Government processes" and that are directed at "maintaining the general good repute and dignity of government service itself").

10. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

Response: The cited statement is from the plurality's discussion of whether the Stolen Valor Act could withstand strict scrutiny, not whether it was subject to it. Specifically, the Court was explaining the requirement under strict scrutiny that "the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." Plurality op. at 13. As discussed at length above, particularly in response to Question 2c, the DPVI would not be subject to strict scrutiny, and therefore the cited statement is not applicable.

Moreover, even if strict scrutiny applied (or as is more likely, for the reasons discussed above in response to Question 2c, intermediate scrutiny), there is a direct causal link between the prohibition on deceptive election information contained in DPVI and the injury to be prevented: voters losing the opportunity to vote by innocent reliance on those false communications. There is ample evidence demonstrating this causal link in the findings section of S. 1994 which shows how voters are harmed by false election information.

11. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, "The remedy for speech that is false is speech that is true. That is the ordinary course in a free society." And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that "in this area more accurate information will normally counteract the lie." Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?

Response: These statements are not relevant in analyzing the constitutionality of S. 1994 on First Amendment grounds. They were made in the course of the Court's review of whether the Stolen Valor Act met the requirement of strict scrutiny that the Act be necessary to the government's stated interest, plurality op. at 15, or the requirement of intermediate scrutiny that the government's object can be met in a less burdensome way, concurring op. at 8-9. As discussed above in response to Question 2c, the DPVI would not be subject to either.

Further, as explained in *Chappell*, counterspeech is not capable to achieve the Government's interest in all cases. Slip op. at 15-16. In this area, counter-speech would simply not be

sufficient to counteract the false information; even one citizen not hearing the counterspeech and so attempting to vote a day late would be too many. The plurality in *Alvarez* made clear that "any true holders of the Medal [of Honor] who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage." Plurality op. at 17. Here, any persons misled by the regulated false statements into either casting a vote for the wrong candidate or losing their votes altogether could not be vindicated by any amount of community outrage. As noted in Justice Breyer's concurrence, "[i]n the political arena a false statement is more likely to make a behavioral difference . . . ." Concurring op. at 9. The behavioral difference made by those who hear false claims of military awards is not remotely comparable to those who hear false claims of election dates, polling locations or of fake candidate endorsements.

Further, *post facto* correction alone, though a helpful and necessary countermeasure, is not by itself adequate to counter the invidious harm created by the lie. There is no way to know whether the correction ever reached the voter, and 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 that loss cannot be recovered or remedied.

12. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate "accurate" information to "correct" the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates….Only a weak society needs government protection or intervention before its resolve to preserve the truth." Do you agree with this statement? To what extent does it bear on the constitutionality of the "corrective action" provisions of S.1994?

Response: These statements are not relevant in analyzing the constitutionality of S. 1994 on First Amendment grounds. They were made in the course of the Court's review of whether the Stolen Valor Act met the requirement of strict scrutiny that the Act be necessary to the government's stated interest. Plurality op. at 15. As discussed above in response to Question 2c, the DPVI would not be subject to strict scrutiny.

As to the statement in *Alvarez*, I agree with the first part and disagree with the second part as it relates to the corrective action provision of S. 1994. Empowering the Attorney General to give voters accurate election information does not, in my view, evince the weakness of those voters or of American society.

13. Justice Breyer's concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, "[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." Do you agree? If so, how does his statement relate to S.1994?

Response: I agree with Justice Breyer's statement. However, the DPVI does not implicate speech regulated by the First Amendment, for the reasons described above in response to

Question 2c. Moreover, the limitations within the DPVI requiring a knowingly false statement made with the intent to abridge the right to vote provide an adequate safeguard against the chilling of true speech.

14. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5 that such statutes may lead "those who are unpopular [to] fear that the government would use that weapon selectively." Do you believe that such a concern is applicable to S.1994? If not, why not?

Response: I do not believe that statement applies here. First, the DPVI does not give the government power to prosecute falsity without more. Second, Justice Breyer was discussing laws that criminalize statements "made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm." Concurring op. at 5. None of these statements apply to the DPVI, that regulates only speech where the speaker "knows such information to be materially false; and . . . has the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election." S. 1994 at 9.

15. Justice Breyer's *Alvarez* concurrence noted at page 5 that other false statement statutes "tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm." And he added, *id.*, that fraud statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: These statements do have bearing on the constitutionality of S. 1994, in that the DPVI is a limited statute in the manner described by Justice Breyer, not unlimited in the manner of the Stolen Valor Act. The DPVI limits the scope of its application to contexts in which a tangible harm is especially likely to occur – that is, the loss of the right to vote – and to those lies particularly likely to cause that harm. It does this by requiring materially false statements, that the speaker knows to be materially false, and that are made with the intent to mislead voters or impede another person from exercising the right to vote. The DPVI is therefore narrower on its face than the law upheld by the Fourth Circuit against a challenge based on *Alvarez*. *See Chappell*, slip op. at 2-4. For these reasons, among others, the DPVI is not subject to the same strict scrutiny analysis as the Stolen Valor Act, which is without any comparable limitations.

16. Justice Breyer's *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, … [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: These statements have bearing on the constitutionality of S. 1994, by demonstrating its constitutionality through its distinctions from the Stolen Valor Act. The limitations on S. 1994, far more stringent than those on the Stolen Valor Act, ensure little to no chance that valuable speech is chilled. The DPVI does not "range[] very broadly," as the Stolen Valor Act did, because it regulates highly specific false factual statements made within a prescribed period of time and with the intent to harm voters and deprive them of their right to vote. For these reasons, among others, the DPVI is not subject to the same strict scrutiny analysis as the Stolen Valor Act.

17. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, "although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high." Additionally, he noted that in applying such statutes in the political context, "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: If the suggestion is that deceptive election information constitutes "political speech," these questions have little bearing on the constitutionality of S. 1994. False factual statements made about the time or place of an election or voter qualifications are not, in my view, the kind of "political context" contemplated by the quoted passage. That the false election information simply *relates* to an election is a red herring and does not convert the false election information into "political speech." Even if considered as being within made within the "political arena'," the DPVI is more than adequately restricted: It requires a speaker to make materially false statements, that the speaker knows to be materially false, and that are made with the intent to mislead voters or impede another person from exercising the right to vote. The Stolen Valor Act had no comparable restrictions, and these restrictions are sufficient safeguard against the potential effects Justice Breyer describes.

18. Justice Breyer stated in his *Alvarez* concurrence, page 9, "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) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas." Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

Response: This statement has some bearing on the constitutionality of S. 1994, in that it highlights how carefully balanced and therefore constitutionally sound the proposed law is. The false statements regulated by S. 1994 are undeniably likely to make a behavior change by, for example, convincing voters that the Election Day is a Wednesday instead of a Tuesday and therefore permanently depriving them of the right to vote. At the same time, it is carefully limited to false statements of material fact such as time, place, and manner of holding elections

and the endorsement of other figures. The limitations of S. 1994 demonstrate its careful balance of the concerns expressed by Justice Breyer.

19. Section 3(b) of S.1994 creates a private right of action, which creates a "civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order."

    a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?

Response : Section 3(b) of S. 1994 amends 42 U.S.C. § 1971(c). Under current 42 U.S.C. § 1971(c), "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." Section 3(b) of S. 1994 neither enlarges nor shrinks the remedies that may be sought from a United States district court, but merely allows a private civil action to seek such an order.

    b. Would such an order constitute a prior restraint on speech? If not, why not?

Response : An order issued under Section 3(b) of S. 1994 through a private civil action implicates the same speech rights as through an action instituted by the Attorney General of the United States, and so such an order is not affected by the amendment cited above.

    c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

Response : An order issued under Section 3(b) of S. 1994 through a private civil action implicates the same speech rights as those implicated in an action instituted by the Attorney General of the United States, and so such an order not affected by the amendment cited above.

Common Cause/Lawyers' Committee
MODEL DECEPTIVE PRACTICES STATUTE

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.

(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;
   d. 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.

FOLLOW UP QUESTION FOR THE RECORD FOR MS. HOUSE FROM SENATOR GRASSLEY

1. I originally asked you a three-part question, number 19, that inquired whether the bill's private right of action permitted a court to issue an order restraining an individual from committing any future violations; whether such an order would constitute a prior restraint on speech; and, if so, whether such an order would be consistent with the First Amendment guarantee of free speech. In each instance, you responded that the Attorney General under current law may bring such an action; that S.1994 simply allows a private civil action to seek such an order in the same fashion as the Attorney General; and therefore, such an order would not be affected by the First Amendment.

Respectfully, your answers did not respond to the questions. Regardless of what remedies the Attorney General may bring under the current statute, does S.1994's private right of action enable a United States District Court to restrain an individual from future statutory violations, would such an order constitute a prior restraint of speech, and, if so, would such an order be consistent with the First Amendment's guarantee of free speech?

Response: To the extent the question is asking whether S.1994 would make injunctive relief available to private plaintiffs pursuant to 42 U.S.C. §1971, the answer is yes, S. 1994 would enable a federal court, in appropriate circumstances, to issue an injunction prohibiting or removing false statements that are in violation of S.1994. Whether or not an injunction would constitute a prior restraint depends on the parameters of the injunction. Based on my understanding of your question, which is asking whether an injunction that by its terms would prohibit "future violations of S. 1994," this would not be considered a prior restraint since S.1994 itself is consistent with the First Amendment's guarantee of free speech.