

Fact Sheet: Regulation of False, Misleading, or Intimidating Speech About Elections

False, misleading, and intimidating speech has [proliferated](#) in both online and real world spaces, particularly as it relates to [elections](#). Although the right to free speech is generally protected by the First Amendment, that right does not extend to saying anything, anywhere, in any manner.¹ When governments identify efforts to intimidate, deter, or otherwise interfere with voters, the First Amendment allows them to safeguard the fundamental right of citizens to vote freely without fear, threat, or undue influence. Governments can also take steps to prevent, suppress, or remove false and misleading speech that seeks to disrupt the process of voting. This Fact Sheet outlines the legal framework for governments to counter false, misleading, or intimidating election-related speech within the bounds of the First Amendment.

Is voter intimidation illegal?

Yes. The right of each voter to cast a ballot free from intimidation or coercion is a foundational principle of a free and democratic society.² Federal law prohibits voter intimidation.³ Every state also separately prohibits interference with voters and/or voter intimidation.⁴ Intimidating messages that threaten people with serious consequences, including harms to their economic, legal, or physical wellbeing,⁵ *can* be prohibited if the speech rises to the level of a “true threat,”⁶ particularly in the elections context. Criminal convictions and civil enforcement actions may be upheld against First Amendment challenges where intimidating robocall messages, for example, threaten people with tax audits, immigration consequences, eviction, and even “mandatory vaccination” if they tried to exercise their right to vote.⁷

Are election-related false statements protected by the First Amendment?

Generally yes, but not if they seek to interfere with the process of voting. The Constitution protects lies, particularly if they are not spoken under oath and can be easily countered.⁸ But false statements can be

¹ *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired”).

² See *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (“[T]he true principle of a republic is, that the people should choose whom they please to govern them....” (citation omitted)); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society....”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is a “fundamental political right, because [it is] preservative of all rights”).

³ 18 U.S.C. § 594; 18 U.S.C. § 245(b)(1)(A); 52 U.S.C. § 20511(1).

⁴ For further information, including examples of voter intimidation and how the First Amendment applies to intimidating and threatening speech, see Inst. for Const. Advoc. & Prot., *Fact Sheet: Protecting Against Voter Intimidation* (accessed Apr. 2, 2024), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/Voter-Intimidation-Fact-Sheet.pdf>.

⁵ See U.S. Dep’t of Just., *Federal Prosecution of Election Offenses* 50, (Richard C. Pilger ed., 8th ed. Dec. 2017), <https://www.justice.gov/criminal/file/1029066/dl>.

⁶ For more information about how to evaluate “true threats” that are unprotected by the First Amendment, see Inst. for Const. Advoc. & Prot., *Fact Sheet: True Threats and the First Amendment* (accessed July 22, 2024), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/07/True-Threats-Guidance.pdf>.

⁷ See, e.g., *United States v. Nguyen*, 673 F.3d 1259, 1266 (9th Cir. 2012); *Nat’l Coalition on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).

⁸ See generally *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion).

regulated in many contexts, including fraud,⁹ defamation and libel,¹⁰ false statements made to government officials or perjury (false statements made under oath),¹¹ false representations that one is speaking on behalf of the government or as a government official,¹² and misleading advertising or commercial speech.¹³

What kinds of false statements about elections can be constitutionally prohibited?

Governments can regulate false or misleading speech about the voting process: for example, about **when, where, or how to vote**. “[T]he State may prohibit messages intended to mislead voters about voting requirements and procedures.”¹⁴ In particular, the government’s interest in safeguarding the right to vote “carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.”¹⁵ In a recent case illustrating this point, the Department of Justice successfully prosecuted a social media influencer who made online posts ahead of the 2016 election to “disseminate fraudulent messages that encouraged supporters of presidential candidate Hillary Clinton to ‘vote’ via text message or social media, which was legally invalid.”¹⁶ Although the defendant challenged his prosecution by claiming that his deceptive posts were “political speech,” a federal court found that his speech was “merely a single element within a course of criminal conduct”—namely, a conspiracy to interfere with the right to vote.¹⁷ Accordingly, the speech was “integral to criminal conduct” and thus unprotected by the First Amendment.¹⁸

The court also found that intentionally false speech about voting procedures did not fall within the core of political speech and that it could be regulated by the government where it did not address the substance of what was *on* the ballot but instead dealt with access *to* the ballot.¹⁹ Thus, speech that harms the integrity of the election process—such as misinformation about where, when, or how to vote—can be regulated even where speech about a candidate or a candidate’s views, even if false, could not be.

Can the government ever regulate other speech related to elections?

Yes. In order to protect the right to vote, the Supreme Court has recognized that government has compelling interests in protecting voters “from confusion and undue influence,”²⁰ and in “preserving the integrity of its election process.”²¹ In the Court’s view, “preventing voter intimidation and election fraud” is “necessary,”²² and “[e]nsuring that every vote is cast freely, without intimidation or undue influence, is ... a valid and

⁹ *Id.* at 723 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

¹⁰ *Id.* at 718 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

¹¹ *Id.* at 720-21 (citing 18 U.S.C. § 1001; *United States v. Dunnigan*, 507 U.S. 87, 97 (1993)).

¹² *Id.* at 721 (citing *United States v. Lepowitch*, 318 U.S. 702, 704 (1943)) (constitutionality of 18 U.S.C. § 912).

¹³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

¹⁴ *Minn. Voters All. v. Mansky*, 585 U.S. 1, 18 n.4 (2018).

¹⁵ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (Court has “upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself”); *People v. Burkman*, ___ N.W. 3d ___, 2024 WL 2982804 *19 (Mich. June 13, 2024) (holding that a state statute constitutionally proscribes speech “if it is intentionally false speech that is related to voting requirements or procedures and is made in an attempt to deter or influence an elector’s vote.”).

¹⁶ Press Release, U.S. Dep’t of Just., *Social Media Influencer Sentenced for Election Interference in 2016 Presidential Race* (Oct. 18, 2023), <https://www.justice.gov/opa/pr/social-media-influencer-sentenced-election-interference-2016-presidential-race>. The posts included a false advertisement, targeted at Black voters, that said: “Avoid the Line. Vote from Home,” “Text ‘Hillary’ to 59925.”

¹⁷ *United States v. Mackey*, 652 F. Supp. 3d 309, 347-48 (E.D.N.Y. 2023), *appeal pending*, No. 23-7577 (2d Cir.).

¹⁸ *Id.* at 341 (citing *Alvarez*, 567 U.S. at 717).

¹⁹ *Id.* at 345-46.

²⁰ *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

²¹ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

²² *Burson*, 504 U.S. at 206.

important state interest.”²³ Thus, where it is necessary to regulate speech about elections—a content-based category of speech that is subject to strict scrutiny—the government can take steps that are the least restrictive means necessary to protect this compelling interest. No-electioneering buffer zones have been upheld as a valid exercise of the government’s power under this framework.²⁴

Can government actors work with third parties to identify false or misleading speech?

Yes. In a recent case, *Murthy v. Missouri*, the Supreme Court rejected a suit brought by two states and several social media users against Executive Branch officials and agencies, claiming that government officials’ contacts with social media companies about misinformation related to the COVID-19 pandemic and the 2020 election violated First Amendment guarantees against government censorship.²⁵ The Court emphasized that social media companies already had policies against misinformation and disinformation, which they enforced by “exercis[ing] their independent judgment” even after consulting with government officials as well as outside experts.²⁶ The Court held that the plaintiffs lacked standing, in part because they could not “link ... past social media restrictions” imposed by the social media companies to the government officials’ communications in which they identified potential misleading and false speech.²⁷

Most major social media companies have in place policies against election-related misinformation and disinformation.²⁸ After *Murthy*, social media companies remain free to enforce these policies on their own platforms by exercising their own judgment and conferring with outside experts, including government officials who may reach out to alert them to potential false statements. Unless there is “evidence of continued pressure” from government officials to interfere with companies’ independent application of their content-moderation policies, companies are “free to enforce, or not enforce, those policies,” even if those decisions are informed by contacts with government actors.²⁹

This guidance was prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center. ICAP’s mission is to use strategic legal advocacy to defend constitutional rights and values while working to restore confidence in the integrity of governmental institutions. Connect with ICAP at www.law.georgetown.edu/icap/, reachICAP@georgetown.edu, or [@GeorgetownICAP](https://www.instagram.com/GeorgetownICAP).

²³ *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 672 (2021).

²⁴ *Burson*, 504 U.S. at 211. For more information on constitutionally permissible tools that governments can deploy to regulate speech, see Inst. for Const. Advoc. & Prot., *Protests & Public Safety: A Guide for Cities & Citizens* (Aug. 2022), <https://constitutionalprotestguide.org>.

²⁵ *Murthy v. Missouri*, 144 S.Ct. 1972, 1981 (2024).

²⁶ *Id.* at 1987.

²⁷ *Id.* at 1988-89.

²⁸ See States United Democracy Ctr., *Social Media Policies: Mis/Disinformation, Threats, and Harassment* (June 24, 2024), <https://statesuniteddemocracy.org/resources/social-media-policies/>.

²⁹ *Murthy*, 144 S. Ct. at 1995.