# OFFICE OF POLICY AND LEGAL ANALYSIS

**Date:** February 17, 2020

**To:** Veterans and Legal Affairs Committee

**From:** Janet Stocco, Legislative Analyst

**LD 157** **An Act Regarding the Fair Representation of Candidate Identities** (*Rep. Grohoski*)

## SUMMARY

**Prohibitions:** This bill prohibits a candidate for a federal, State or county office[1]—or the candidate's "authorized political committee"—from, either directly or through an agent:

- Financing or authorizing a communication that uses the words "re-elect" or "reelect" in relation to the nomination or election of that candidate; or
- Financing or authorizing a communication that "names or identifies the candidate using the title of the office to which the candidate seeks nomination or election";

Unless "the candidate holds that office **at the time the communication is made**."

**Communication:** "Communication" is defined for purposes of LD 157 to include the types of electioneering communications that must, under 21-A M.R.S. §1014 of existing law, include a disclosure indicating whether they were authorized by a candidate. LD 157 therefore applies to a communication made:

> through broadcasting stations, cable television systems, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications . . .

**If** the communication **either** expressly advocates for the election or defeat of a clearly identified candidate **or** names or depicts a clearly identified candidate and is disseminated during a specified time period before election day—28 days before a primary election, 35 days before a special election, or between Labor Day and election day for a general election. *See* §1014(1), (2), (2-A). Unlike §1014, however, LD 157 does not exclude signs that are lettered or printed individually by hand and or items that are too small to contain the disclosures required by §1014, for example badges, campaign buttons and pens. Each of these items may not contain false statements of incumbency under LD 157.

**Penalty:** The Commission on Governmental Ethics and Election Practices may impose a civil penalty of up to $5,000 on a candidate or candidate's authorized political committee that the Commission finds has violated the bill's prohibitions.

[1] Candidates for municipal office in a town or city with a population of 15,000 or more are automatically subject to Sections 1001 to 1020-A of Title 21-A, which would include the prohibitions in LD 157, while a town of fewer than 15,000 must choose to have its candidates for municipal office governed by these provisions of Title 21-A. *See* 30-A M.R.S. §2502.

**ISSUES RAISED / AMENDMENTS PROPOSED AT PUBLIC HEARING:**

- **Sponsor's proposed amendment.** At the public hearing, the sponsor suggested amending the bill to permit a candidate who formerly held an office to use the title of that office in campaign communications, even if that candidate is not the current incumbent. Under this proposed amendment, for example, if Joshua Chamberlain were alive and sought to regain the office of Governor, he would be permitted to write "Governor Chamberlain" on his campaign materials but he would not be permitted to write "re-elect" Joshua Chamberlain on those materials.

- **First Amendment Concerns**: In written testimony, the Executive Director of the Commission on Governmental Ethics and Election Practices expressed concern that the bill may be challenged on First Amendment grounds and suggested the committee consult with the Attorney General's Office.

**ADDITIONAL INFORMATION:**

- **First Amendment / Free speech issues**: As the U.S. Supreme Court has repeatedly explained:

> Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment . . . has its fullest and most urgent application . . . to the conduct of campaigns for political office.

*McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346-47 (1995). Because LD 157 "burdens core political speech" regarding a campaign for political office, if challenged it will be held unconstitutional unless a court concludes it is both "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Mowles v. Comm'n on Govt'l Ethics and Election Practices*, 2008 ME 160, ¶20.

Does LD 157 serve a compelling government interest?

On the one hand, the Supreme Court has held that a state's general "interest in providing the electorate with relevant information" is insufficient to justify infringing core First Amendment rights. *McIntyre*, 514 U.S. at 348-49 (this "informational interest" is insufficient to prohibit anonymous campaign literature); *see also Mowles*, 2008 ME 160 at ¶24 ("The mere possibility of voter confusion is insufficient to establish a compelling state interest.") (citations and internal quotation marks omitted).

On the other hand, the Supreme Court "has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Indeed, the Court has held that a state's "interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre*, 514 U.S. 334, 349 (1995).

LD 157 is not limited to statements that are false, however. Although potentially confusing when used in the context of a campaign between a current and former office holder, "re-elect" accurately describes the act of voting for the candidate who formerly held the office. *See Make Liberty Win v.*

*Cegavske*, 2020 WL 6545869 (D. Nev. Nov. 6, 2020) (concluding that one "correctly us[es] the term 're-elect'" in the context of a former office holder's campaign to regain that office). In an analogous case involving a Maine statute that prohibited the use of a political endorsement—even an accurate and truthful use of that endorsement—unless the endorser explicitly authorized its use, the Maine Supreme Judicial Court held that if an election law:

> captures far more speech within its grasp than it can legitimately hold as a fraud-preventing measure, it cannot be sustained by the State's special interest in preventing false statements in an election where time does not allow for such statements to be counterbalanced by the truth.

*Mowles*, 2008 ME 160 at ¶31 (noting that, under the facts of that case, the challenged endorsement had in fact been made during a previous election cycle and was not being used fraudulently).

By contrast, to the extent that LD 157 prevents use of the term "re-elect" or an office title by a candidate who has never held the office, it arguably advances the State's interest in preventing election fraud. *See Make Liberty Win*, 2020 WL 6545869 (refusing to find unconstitutional this aspect of the Nevada law).

Is LD 157 necessary and narrowly tailored to achieve a state interest?

Because LD 157 as currently drafted includes within its scope statements that are neither false nor fraudulent, a court is unlikely to conclude that it is narrowly tailored to serve a compelling governmental interest. *See Mowles* 2008 ME 160 at ¶31. **It is less clear whether LD 157 would withstand a First Amendment challenge if it were amended only to prohibit statements of incumbency by candidates who have never held the office they seek**.

In *United States v. Alvarez*, the U.S. Supreme Court rejected the assertion that false statements are not protected by the First Amendment and explained that, under the First Amendment, the preferred "remedy for speech that is false is speech that is true." In *Alvarez*, the Court concluded that the Stolen Valor Act, under which the defendant had been prosecuted for falsely claiming he received the Congressional Medal of Honor, was unconstitutional. Although it recognized that the government's interest in protecting the integrity of the Medal of Honor was "beyond question," the Court nevertheless concluded the government could not meet its burden of demonstrating that the Stolen Valor Act was either necessary or the least restrictive means of protecting the medal's integrity. Creation of a searchable government database of Medal of Honor recipients could, for example, have easily exposed the falsity of defendant's claim that he received the medal without curtailing his First Amendment rights. *Id.* at 727-29.

One could argue under the logic of *Alvarez* that an amended version of LD 157 is unconstitutional because is not the least restrictive means of achieving the State's interest in preventing fraudulent assertions of incumbency. Instead, the bill's goal could be achieved through either truthful counter-speech revealing that the candidate never held the office or the creation of a database of past office holders. *See Magda*, 58 N.E. 3d at 1205 (concluding that Ohio's law prohibiting use of an office title by a candidate who has never held that office was unconstitutional, at least in part because false statements of incumbency "could have been debunked readily and obviously" through truthful statements).

Yet, in the *Alvarez* decision, the U.S. Supreme Court observed in passing that not all false statements enjoy First Amendment protection: "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the government may restrict speech without affronting the First Amendment." 567 U.S. at 723. Accordingly, if a court characterizes a false statement of incumbency by a candidate who has never held the office as "fraudulent" and interprets the *Alvarez* decision as signaling an acceptance of broad restrictions on such speech, then an amended version of LD 157 might be upheld as constitutional even though it is not the least restrictive means of protecting the State's interest in election integrity. *See Make Liberty Win*, 2020 WL 6545869 at *5-*6 (refusing to conclude that a Nevada law prohibiting use of an office title by a non-incumbent candidate who had never held the office was facially unconstitutional because such "fraudulent" statements are "not protected" by the First Amendment).

- **Other state laws prohibiting false statements of incumbency**: As the attached chart demonstrates, at least 9 states (CA, IN, MI, MN, NV, OH, OR, TX and WA) have enacted statutes prohibiting false statements of incumbency. The statutes in at least 3 of these states (MN, NV, and OH) have been held unconstitutional either in their entirety or when specifically applied to a candidate who formerly held the office sought. In addition, although Washington prohibits several types of false communications about candidates, including electioneering communications "that falsely represent[] that a candidate is the incumbent for the office sought," the statutory prohibition only includes statements "constituting libel or defamation per se" made with actual malice. Because "a person cannot defame himself or herself," the Washington statute expressly does **not** apply to any communication about incumbency made by the affected candidate or an agent of the candidate.

## TECHNICAL ISSUES

- **Definition of communication**: The definition of "communication" in LD 157 (p.1, lines 31-33) cross-references several types of electioneering communications described in 21-A M.R.S. §1014. Three of the types of communication cross-referenced in the bill—*see* §1014(6)(A), (B) and (C)—are made by individuals "who are acting independently of and without authorization by a candidate [or] candidate's authorized campaign committee" and thus categorically could not have been "finance[d] or authorize[]" by the candidate or candidate's authorized political committee within the meaning of LD 157. The committee may therefore want to consider excluding these cross-references from the bills' definition of "communication."

## FISCAL IMPACT

- Not yet determined.

**State Laws Prohibiting False Statements of Incumbency**

| State | Statutory Text |
|---|---|
| **California**<br><br>Cal. Elec. Code § 18350(a)(1)<br><br>*An opposing candidate may bring a civil action to enjoin a violation of this section.* | **Implication that candidate is incumbent or acting in capacity of public officer; misdemeanor; injunction**<br><br>(a) A person is guilty of a misdemeanor who, with intent to mislead the voters in connection with his or her campaign for nomination or election to a public office, or in connection with the campaign of another person for nomination or election to a public office, does either of the following acts:<br><br>(1) Assumes, pretends, or implies, by his or her statements, conduct, or campaign materials, that he or she is the incumbent of a public office when that is not the case. . . . |
| **Indiana**<br><br>Ind. Code § 3-9-3-5<br><br>*Punishable by a civil penalty of not more than $500.* | **Advertising or campaign material falsely representing candidate as current or former office holder**<br><br>(a) This section does not apply to the following: (1) A communication relating to an election to a federal office. (2) A person whose sole act is, in the normal course of business, participating in the preparation, printing, distribution, or broadcast of the advertising or material containing the false representation.<br><br>(b) As used in this section, "officeholder" refers to a person who holds an elected office.<br><br>(c) A person may not knowingly or intentionally authorize, finance, sponsor, or participate in the preparation, distribution, or broadcast of paid political advertising or campaign material that falsely represents that a candidate in any election is or has been an officeholder. |
| **Michigan**<br><br>Mich. Comp. Laws Ann. §168.944<br><br>*Punishable by up to 90 days' imprisonment and a fine of $500.* | **False designation of incumbency; penalties**<br><br>Any person who advertises or uses in any campaign material, including radio, television, newspapers, circulars, cards, or stationery, the words incumbent, re-elect, re-election, or otherwise indicates, represents, or gives the impression that a candidate for public office is the incumbent, when in fact the candidate is not the incumbent, is guilty of a misdemeanor punishable as provided in section 934. |
| **Minnesota**<br><br>Minn. Stat. Ann. § 211B.03 [2] | **Use of the term reelect**<br><br>A person or candidate may not, in the event of redistricting, use the term "reelect" in a campaign for elective office unless the |

[2] According to an NCSL article, a district court has ruled that this Minnesota statute violates the First Amendment and is unenforceable. *See* M. Listes & W. Underhill, *Campaign Fair Practice Laws (Is there a Right to Lie?)* (Oct. 29, 2014), at https://www.ncsl.org/research/elections-and-campaigns/campaign-fair-practice-laws-is-there-a-right-to-lie.aspx.

| State | Statutory Text |
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| *Punishable by a civil fine of up to $5,000 or may be prosecuted as a misdemeanor.* | candidate is the incumbent of that office and the office represents any part of the new district. |
| **Nevada**<br><br>Nev. Rev. Stat. § 294A.330<br>Nev. Rev. Stat. § 294A.340<br><br>*Punishable by a civil fine of up to $10,000 in a civil action brought by the Secretary of State.*<br><br>In *Make Liberty Win v. Cegavske*, 2020 WL 6545869 (D. Nev. Nov. 6, 2020) a federal district court held these statutes unconstitutional as applied to a candidate who formerly held the office but did not find the statutes facially unconstitutional because they might properly be applied to a candidate who never held the office. | **§ 294A.330. Use of term "reelect" in campaign**<br><br>A person shall not use the term "reelect" in any material, statement or publication supporting the election of a candidate unless the candidate:<br><br>1. Was elected to the identical office with the same district number, if any, in the most recent election to fill that office; and<br><br>2. Is serving and has served continuously in that office from the beginning of the term to which the candidate was elected.<br><br>**§ 294A.340. Creating implication that candidate is incumbent**<br><br>A person shall not use the name of a candidate in a way that implies that the candidate is the incumbent in office in any material, statement or publication supporting the election of a candidate unless:<br><br>1. The candidate is qualified to use the term "reelect" pursuant to NRS 294A.330; or<br><br>2. The candidate:<br><br>(a) Was appointed to the identical office with the same district number, if any, after the most recent election to fill that office; and<br><br>(b) Is serving and has served continuously in that office since the date of appointment. |
| **Ohio**<br><br>Ohio Rev. Code Ann. § 3517.21(B)<br><br>*Punishable by up to 6 months' imprisonment and a $5,000 fine.*<br><br>In *Magda v. Ohio Elections Comm., 58 N.E.3d 1188, 1206 (Ohio Ct. App. 2016)*—a case where the candidate never held the office sought—the court held that this provision is unconstitutional and unenforceable, in part because truthful counterspeech could feasibly remedy | **Unfair political campaign activities**<br><br>…<br><br>(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:<br><br>(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he or she is a candidate;<br><br>. . . |

| State | Statutory Text |
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| any harm to election integrity caused by a false claim of incumbency. | |
| **Oregon**<br><br>Or. Rev. Stat. § 260.550<br><br>*Punishable by civil penalty of up to $1,000.* | **Use of term "incumbent"**<br><br>(1) No person shall describe a candidate as the incumbent in the office to which the candidate seeks nomination or election in any material, statement or publication supporting the election of the candidate, with knowledge or with reckless disregard that the description is a false statement of material fact.<br><br>(2) For purposes of this section, a candidate shall be considered an "incumbent" if the candidate:<br><br>(a) Was elected to the identical office in the most recent election to fill that office and is serving and has served continuously in that office from the beginning of the term to which the candidate was elected; or<br><br>(b) Was appointed to the identical office after the most recent election to fill that office and is serving and has served continuously in that office from the date of appointment.<br><br>(3) If district boundaries have changed since the previous election or the appointment, a candidate shall be considered an "incumbent" if the candidate:<br><br>(a) Was elected to an office of the same name as the office to which the candidate seeks nomination or election at the most recent election to fill that office and is serving and has served continuously in that office from the beginning of the term to which the candidate was elected; or<br><br>(b) Was appointed to an office of the same name as the office to which the candidate seeks nomination or election after the most recent election to fill that office and is serving and has served continuously in that office from the date of appointment.<br><br>(4) This section does not apply to any words or statements required by law to be included in any statement produced by a filing officer or listed on a ballot. |
| **Texas**<br><br>Tex. Elec. Code Ann. § 255.006(a)-(c)<br><br>*Punishable by up to one year's imprisonment and a $4,000 fine.* | **Misleading Use of Office Title**<br><br>(a) A person commits an offense if the person knowingly enters into a contract or other agreement to print, publish, or broadcast political advertising with the intent to represent to an ordinary and prudent person that a candidate holds a public office that the candidate does not hold at the time the agreement is made.<br><br>(b) A person commits an offense if the person knowingly represents in a campaign communication that a candidate holds |

| State | Statutory Text |
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| | a public office that the candidate does not hold at the time the representation is made.<br><br>(c) For purposes of this section, a person represents that a candidate holds a public office that the candidate does not hold if:<br><br>(1) the candidate does not hold the office that the candidate seeks; and<br><br>(2) the political advertising or campaign communication states the public office sought but does not include the word "for" in a type size that is at least one-half the type size used for the name of the office to clarify that the candidate does not hold that office. |
| **Washington**<br><br>Wash. Rev. Code § 42.17A.335<br><br>*Punishable by a civil penalty of up to $10,000 or punishable by up to 90 days' imprisonment and a $1,000 fine.*<br><br>*Additionally, if a court finds the violation "probably affected the outcome of any election," the "election may be held void and a special election held within sixty days of the finding."*<br><br>*Candidate affected may also sue for damages in a defamation action.* | **Political advertising or electioneering communication--Libel or defamation per se**<br><br>(1) It is a violation of this chapter for a person to sponsor with actual malice a statement constituting libel or defamation per se under the following circumstances:<br><br>…<br><br>(b) Political advertising or an electioneering communication that falsely represents that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent;<br><br>(2) For the purposes of this section, "libel or defamation per se" means statements that tend (a) to expose a living person to hatred, contempt, ridicule, or obloquy, or to deprive him or her of the benefit of public confidence or social intercourse, or to injure him or her in his or her business or occupation, or (b) to injure any person, corporation, or association in his, her, or its business or occupation.<br><br>(3) It is not a violation of this section for a candidate or his or her agent to make statements described in subsection (1)(a) or (b) of this section about the candidate himself or herself because a person cannot defame himself or herself. . . .<br><br>(4) Any violation of this section shall be proven by clear and convincing evidence. If a violation is proven, damages are presumed and do not need to be proven. |