Testimony of

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Hearing on
Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: S.453
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Senator Cardin and distinguished members of the Committee, My name is Richard Briffault, and I am a professor of law at Columbia Law School, specializing in election law issues. I am honored to have the opportunity to testify today about S. 453, the Deceptive Practices and Voter Intimidation Prevention Act of 2007.

In my testimony, I will make two points. First, Congress plainly has the authority to adopt laws vindicating the integrity of federal elections and the rights of federal voters. Second, the bill is entirely consistent with the First Amendment's protection of freedom of speech. Indeed, by protecting voters from false statements intended to deceive voters or prevent voters from voting, the bill actually promotes the values of political participation and personal autonomy that are at the heart of the First Amendment.

On the first point, I can be brief. The Constitution gives Congress broad authority to regulate federal elections and protect the rights of federal voters. The "time, place, and manner" clause of Article I, Section 4 specifically provides that power with respect to elections for Senators and Representatives. The Supreme Court has found in Article II an inherent Congressional power to act to "preserve the purity of presidential and vice presidential elections." Burroughs & Cannon v. United States, 290 U.S. 534 (1934). Federal laws intended to prevent fraud, intimidation, and corruption in federal elections date back almost a century and a half to the years after the Civil War. More modern laws, such as the Voting Rights Act of 1965 and its amendments, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002, continue to demonstrate federal power to protect voting rights in federal elections.

The second point requires a little more discussion. Although the First Amendment provides its greatest protection to political speech, S. 453 is entirely consistent with the First Amendment. S. 453 is aimed solely at the intentional dissemination of falsehoods - false statements of fact concerning the time, place or manner of a federal elections; false statements of fact concerning the qualifications for or restrictions on voter eligibility in federal elections; and false statements of fact concerning the endorsement of a candidate running in a federal election. The Supreme

Court has repeatedly held that the First Amendment simply does not protect intentionally false statements of fact.

As the Court has explained, "there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). This is the case even when the false statement concerns a political matter. "That speech is used as a tool for political ends does not automatically bring it under the protective mantel of the Constitution. For the use of the known lie is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Garrison v. Louisiana, 379 U.S. 64, 75 (1964). Accord, Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) ("calculated falsehood should enjoy no immunity"); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("[s]preading false information in and of itself carries no First Amendment credentials").

Moreover, S. 453 promotes the compelling governmental interest in electoral integrity. The Supreme Court has repeatedly indicated that the state may restrict even constitutionally protected speech when "protecting the right of its citizens to vote freely for the candidates of their choice." Burson v. Freeman, 504 U.S. 191, 198 (1992). Congress has a "compelling interest in protecting voters from confusion and undue influence" and in "ensuring that an individual's right to vote is not undermined by fraud in the election process." Id. at 199. In Burson, the Court relied on these interests to uphold the constitutionality of a state law prohibiting electioneering activity near polling places. Similarly, in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), the Court in dictum indicated that the state had a compelling interest in preventing "the making of false statements by unscrupulous prevaricators" in the context of an election. Id. at 351. As the McIntyre Court observed, the general public interest in preventing false statements "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." Id. at 349.

The only significant constitutional issue in the regulation of false election communications is the requirement that the law be narrowly tailored to avoid impinging on or chilling constitutionally protected speech. S. 453 clearly satisfies the narrow tailoring requirement. First, S. 453 is limited to the communication of falsehoods that the speaker knows to be false and which the speaker communicates in order to prevent another person from voting. This is actually significantly tighter than the constitutional test for the regulation of false statements adopted by the Supreme Court. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Court held that a defamation action against a public official is constitutionally permissible when the speaker knows his statement is false or he speaks in reckless disregard of the statement's truth or falsity. This is the so-called "actual malice" standard which the Court has applied to other areas dealing with the regulation of false statements. By limiting liability to knowing falsehoods intended to influence an election, S. 453 is even more narrowly tailored than New York Times requires. Innocent, negligent, and even reckless mistakes are not restricted.

Second, S.453 is limited to a very constrained set of false statements of fact - statements dealing with the time, place, or manner of voting; with eligibility to vote; and with explicit endorsements by persons or organizations. These involve simple statements of fact that do not remotely deal with matters of opinion, or the issues, ideas, or political views that make up an election campaign. By targeting very specific set of facts that deal primarily with the mechanics of an

election, the bill would not affect the ability of any person to discuss the actions, statements, official decisions, voting record, policies, or personalities of any candidate. The targeted statements "are no essential part of any exposition ideas." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The bill would have no impact on the constitutionally protected elements of an election campaign.

Indeed, the particular statements targeted by the bill are especially pernicious in the electoral context. False statements concerning the time, place, or manner of an election can serve only to confuse a voter as to the date of an election, the hours a polling place is open, or the location of the polling place, with the effect of denying the voter the opportunity to vote. The dissemination of false statements concerning eligibility to vote can have the effect only of confusing the voter as to whether he or she is entitled to vote, again with the result of discouraging the voter from exercising his or her rights. The communication of false statements concerning endorsements can only undermine the ability of the voter to cast a ballot in accord with his or her political preferences. Such a false statement concerning an endorsement necessarily interferes with the "right to vote freely for the candidate of one's choice [which] is of the essence of a democratic society." Reynolds v. Sims, 377 U.S. 533, 555 (1964). To the extent that these communications are aimed at lower income groups, the less educated, or racial minorities, they will tend to systematically undermine the ability of the election to represent the views of the entire community.

Moreover, given that their goal is to sow confusion among the voters, the effects of these statements are unlikely to be corrected by the usual First Amendment remedy - more speech. If an organization hands out flyers asserting a false election day or polling place, and another organization counters with flyers providing the right information the result may be only to confirm voter uncertainty about the most basic facts about the election, with the predictable effect of discouraging voting.

Finally, the bill provides a tight temporal limit for its restrictions. The prohibitions on knowing communication of false information apply only during the 60 days before an election. Like the other provisions of the bill, this operates to minimize any potential chilling effect on protected political speech.

Approximately eighteen states have adopted laws prohibiting false or deceptive campaign statements. See Rickert v. State Public Disclosure Commission, 119 P.3d 379 (Wash. App. 2005). See also Becky Kruse, "The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes," 89 So. Cal. L. Rev. 129, 132 (2001) (citing seventeen states). State courts have generally had little difficulty enforcing prohibitions on intentional false statements of material fact in elections, see Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446 (Mich. App. 1986); McKimm v. Ohio Elections Comm., 729 N.E.2d 364 (Ohio 2000), cert. denied, 531 U.S. 1078 (2001), although some statutes have been invalidated because they reach more broadly than the New York Times standard would allow, see, e.g., Vanasco v. Schwartz, 401 F. Supp. 87, 93-95 (S.D.N.Y. 1975), aff'd mem., 423 U.S. 1041 (1976). Although the Supreme Court has never directly ruled on the constitutionality of false statement law that meets the New York Times standard, the Court, as I previously noted, in dictum spoke positively about the anti-false statement provisions of the Ohio Election Code in

McIntyre v. Ohio Elections Commission. Only one state supreme court has invalidated an election false statements law that satisfied the New York Times standard, see State ex rel Public Disclosure Commission v. 119 Vote No! Committee, 957 P.2d 691 (Wash. 1998). That decision involved a law broader than S. 453; it lacked S. 453's restriction to knowing falsity, its temporal limitation, and its targeting of just three categories of falsehoods. In any event the Washington state decision is out of step with the larger body of First Amendment doctrine which denies protection to knowing falsehoods and permits narrowly tailored restrictions on communications that are justified by the compelling interests in protecting the integrity of elections.

In conclusion, S. 453 is a constitutionally legitimate addition to the arsenal of federal laws which operate to prevent fraud and intimidation, to protect the rights of voters, and to promote the integrity of federal elections. By prohibiting a narrowly defined set of communications that, by their nature, can have as their only intent the confusion of voters -- deceiving some to vote against their political preferences, and leading others not to vote at all -- S. 453 vindicates the right to vote and the ability of voters to make informed decisions. By protecting political participation and voter autonomy, S. 453 is not only consistent with the First Amendment, but it actually advances First Amendment values.

Thank you again for inviting me to testify today.