**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

December 10, 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

This letter supplements the Department's July 2, 2012 letter to Chairman Leahy presenting the Department's views on S. 1994, the "Deceptive Practices and Voter Intimidation Prevention Act of 2011" (DPVIPA), and responds to Senator Grassley's letter dated July 3, 2012, requesting that the Department address the constitutionality of this legislation. As discussed in our July 2 letter, the Department supports the enactment of legislation to combat deceptive voting practices and agrees with the goals and overall approach of S. 1994. The Department believes the DPVIPA is a facially constitutional means of accomplishing those objectives.

The DPVIPA would prohibit and criminalize certain deceptive practices in federal elections. Two provisions of the DPVIPA warrant analysis in light of *United States v. Alvarez*, No. 11-210 (U.S. June 28, 2012), which invalidated the Stolen Valor Act of 2005 ("2005 SVA"), 18 U.S.C. § 704. The first provision would prohibit "false statements regarding federal elections" that a person knows to be "materially false" and where the person has the "intent to mislead voters" or "impede, hinder, discourage, or prevent another person from exercising the right to vote in [certain federal elections]." This "false statements" provision would cover only statements related to the time and place of elections and voter qualifications or eligibility. The second provision would prohibit communicating a "materially false statement about an endorsement," knowing such statement to be false and with the intent to mislead voters.

We have examined how each of these provisions of the DPVIPA is affected by the Supreme Court's recent decision in *Alvarez*. The DPVIPA differs in materially significant ways

from the now invalidated Stolen Valor Act of 2005. As explained below, based in part on these differences, we believe the DPVIPA is consistent with the First Amendment analysis in *Alvarez* and is therefore facially constitutional.

In *Alvarez*, the Court held unconstitutional the 2005 SVA, which provided that anyone who "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." In his concurring opinion, Justice Breyer articulated the narrowest ground for the Court's decision, making his opinion controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). He applied "intermediate scrutiny" to the 2005 SVA and found it unconstitutional, but in reaching this conclusion, he made clear that the government maintains the ability to regulate certain types of false speech, including, as relevant here, regulations of false speech that concern the integrity of government processes, such as perjury statutes or statutes forbidding the impersonation of a public official. *Alvarez*, slip op. at 5-7 (Breyer, J., concurring in the judgment). Significantly, Justice Breyer explained that the 2005 SVA lacked the sort of "limiting features" that historically have accompanied constitutional regulations of false speech. *Id.* at 7.

The plurality of four Justices emphasized that there is no "general exception to the First Amendment for false statements," *Alvarez*, slip op. at 5, 10, 12 (plurality opinion); but in striking down the statute, they were careful not to imply that the "falsity of speech" had no bearing on whether the speech may be constitutionally regulated or prohibited. *Id.* at 9. Rather, the plurality identified numerous "regulations on false speech that courts generally have found permissible," and, like Justice Breyer, underlined that many such regulations "protect the integrity of Government processes." *Id.* at 8-9.

For at least two reasons identified in the analysis in *Alvarez*, we believe the false-statements provision in the DPVIPA generally can be applied constitutionally. First, the false-statements provision is the type of false-speech regulation that *Alvarez* indicates would pass First Amendment scrutiny: a targeted prohibition that seeks to address specific harms and has an express *mens rea* requirement. In particular, as noted above, the DPVIPA's "false statements" provision targets only speech concerning the time and place of elections and voter qualifications or eligibility that is made with an "intent to mislead" or to "impede, hinder, discourage, or prevent another person from exercising the right to vote."

The false statements provision is further distinguishable from the Stolen Valor Act of 2005 provisions because the DPVIPA, unlike the Stolen Valor Act, appears to employ the least-intrusive mechanism available to the government to achieve its interests. In *Alvarez*, both the plurality and the concurrence suggested that responsive government speech (counterspeech) could counteract falsehoods about military medals, *see Alvarez*, slip op. at 15 (plurality opinion); *Alvarez*, slip op. at 10 (Breyer, J., concurring in the judgment). While section 4 of the DPVIPA does authorize government counterspeech, we think it unlikely that such speech would be sufficient to prevent many of the harms addressed by the false-statements provision.

Though we also believe DPVIPA's public-endorsements provision to be facially constitutional, it presents more complex questions under *Alvarez* than the false-statements provision. Much like the false-statements provision, the public-endorsements provision differs from the statute at issue in *Alvarez* in a number of ways. Most important, unlike the 2005 SVA, the public-endorsements provision (1) only prohibits knowingly false statements made with "the intent to mislead voters" and (2) targets a specific type of false statement that causes a specific harm — statements that misrepresent that a "specifically named person, political party, or organization has endorsed the election of a specific candidate for a Federal office," thus misleading voters. Moreover, again unlike the 2005 SVA, the DPVIPA does not criminalize violations of the public-endorsements provision; rather, the statute authorizes government counterspeech and civil enforcement actions.

Despite these differences, courts may closely examine the public endorsements provision. It may be asserted that counterspeech is an effective means of preventing the harms addressed by the public-endorsements provision. Additionally, some of the statements targeted by the public-endorsements provision may not be as obviously false or easily disproved as those targeted by the false-statements provision. Thus, an argument could be made that the public-endorsements provision may have a chilling effect on speech. *See Alvarez*, slip op. at 11 (plurality opinion) (discussing chilling effects); *Alvarez*, slip op. at 3 (Breyer, J., concurring in the judgment) (same).

While courts are likely to examine the public-endorsements provision closely in light of these concerns, we believe that, given the material differences between the public-endorsements provision and the 2005 SVA, the public-endorsements provision, like the false-statements provision, is facially constitutional.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Judith C. Appelbaum
Acting Assistant Attorney General