Division II, Docket No. 32274-9

SUPREME COURT OF THE STATE OF WASHINGTON

MARILOU RICKERT, an individual

Respondent,

v.

STATE OF WASHINGTON, PUBLIC DISCLOSURE COMMISSION, and SUSAN BRADY, LOIS CLEMENT, EARL TILLY, FRANCIS MARTIN, AND MIKE CONNELLY, MEMBERS OF THE PUBLIC DISCLOSURE COMMISSION,

Petitioners.

PETITION FOR REVIEW

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The State of Washington, the Public Disclosure Commission, and Members of the Public Disclosure Commission Susan Brady, Lois Clement, Earl Tilly, Francis Martin, and Mike Connelly respectfully request this Court to review the Court of Appeals decision terminating review.

COURT OF APPEALS DECISION

Rickert v. State of Washington, Court of Appeals Div. II. No. 32274-9-II, 119 P.3d 379 (2005). The decision was filed September 7, 2005. A copy of the decision is attached as Appendix A.

ISSUE PRESENTED FOR REVIEW

RCW 42.17.530(1)(a) prohibits political advertising that contains a false statement of material fact about a candidate for public office. To violate the statute, a person must act with actual malice—that is, act with knowledge of falsity or with reckless disregard as to truth or falsity. A violation must be proven by clear and convincing evidence. Does the ban on false political advertising in RCW 42.17.530(1)(a) violate the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

This case concerns false political advertising in an election for office. RCW 42.17.530(1) provides:

> It is a violation of this chapter for a person to sponsor with *actual malice*:
>
> (a) Political advertising that contains *a false statement of material fact* about a *candidate for public office*. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself[.]

RCW 42.17.530(1)(a)[1] (emphasis added).

The phrase "actual malice" means "to act with knowledge of falsity or with reckless disregard as to truth or falsity". RCW 42.17.505(1). A violation of RCW 42.17.530(1)(a) "shall be proven by clear and convincing evidence". RCW 42.17.530(2). The relevant statutes are set out in Appendix B.

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[1] RCW 42.17.530(1) was amended in 2005 to add the phrase "or an electioneering communication". RCW 42.17.530 now provides:

> (1) It is a violation of this chapter for a person to sponsor with actual malice:
>
> (a) Political advertising *or an electioneering communication* that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself[.]

(Emphasis added) (Laws of 2005, ch. 445, § 10, p.1899). The amendment is not relevant to this petition

In the 2002 election for the office of state senator, respondent Marilou Rickert challenged incumbent Senator Tim Sheldon. Rickert mailed out a brochure that outlined her view of the differences between Senator Sheldon and herself. One section stated that Senator Sheldon "voted to close a facility for the developmentally challenged in his district". Administrative Record (AR) at 10. Senator Sheldon filed a complaint with the Public Disclosure Commission (PDC) claiming that this statement violated RCW 42.17.530(1)(a).

After an investigation and a hearing, the PDC issued a final order that Rickert violated the statute. The PDC found that the "brochure contained two false statements . . . (a) Senator Sheldon voted to close the Mission Creek Youth Camp, and (b) that Mission Creek was a facility for the developmentally challenged". AR at 410 (Final Order, Finding of Fact (FOF) 7). The PDC found that the "false statements were material in the campaign [and that Rickert] acted with actual malice or reckless disregard in sponsoring the false statements in the brochure". AR at 410-11 (FOF 8, 9). Finally, the PDC found that the "staff met its burden to establish that [Rickert] violated RCW 42.17.530 by clear and convincing evidence". AR at 411 (FOF 10). The PDC imposed a penalty of $1,000. AR at 411. Rickert sought judicial review, and the superior court affirmed the PDC's final order. CP at 117-19.

Rickert appealed to the Court of Appeals, which reversed. The court held that RCW 42.17.530(1)(a) "violates the first amendment of the U.S. Constitution in that it is not limited to defamatory speech because it does not require that the candidate be damaged by the false statements". *Rickert v. State of Washington*, No. 32274-9-II, slip op. at 2 (Wash. Ct. App. Sept. 7, 2005) (footnote omitted). The court reasoned that "[b]ecause the statute is not limited to defamatory speech, it is protected speech." *Id.* As protected speech, the court applied strict scrutiny. The court concluded that RCW 42.17.530(1)(a) is not narrowly tailored—and is, therefore, unconstitutional—for two reasons. First, the court found that "the statute, while purporting to punish malicious falsehoods about candidates by their opponents, permits the candidates to proclaim falsehoods about themselves without penalty". *Rickert*, slip op. at 2. Second, the statute "is not limited to speech made during election campaigns that causes serious adverse consequences to the public. Thus, the statute is unconstitutionally overbroad in that it would pertain to every false, malicious, material statement whether it constitutes libel or slander, and it permits dishonesty in political speech by candidates." *Id.*

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations governing acceptance of review are set out in RAP 13.4(b). This case meets three of those considerations.

1. This Case Presents A Significant Issue Of Law Under The United States Constitution

The primary reason to grant review is that this case presents "a significant question of law under the Constitution . . . of the United States". RAP 13.4(b)(3). The case presents the question whether RCW 42.17.530(1)(a), which prohibits lying about an opponent in a campaign for public office, violates the First Amendment of the United States Constitution.

This question is significant because application of the First Amendment to false campaign advertising is unsettled in Washington. The Court of Appeals adopted "the plurality opinion's rationale" in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998). *Rickert*, slip op. at 18. *119 Vote No! Committee* is the last case where this Court considered the application of the First Amendment to false political advertising. The Court struck down the prior version of RCW 42.17.530. But the Court was divided—there were four opinions and none commanded a majority.

Prior to its amendment in 1999 (in response to *119 Vote No! Committee*), RCW 42.17.530(1)(a) applied to any false statement of material fact in political advertising. Laws of 1999, ch. 304, § 2, p. 1290. Thus, it applied to political advertising for both campaigns for public

office and ballot measures. In *119 Vote No! Committee*, a complaint was filed with the PDC claiming that the opponents of Initiative 119 violated RCW 42.17.530(1)(a) by making false statements about the effects of the initiative. The 119 Vote No! Committee argued that the statute violated the First Amendment.

The plurality opinion, adopted by the Court of Appeals in this case, was written by Justice Sanders and joined by Justices Dolliver and Smith. In the view of the plurality, "the First Amendment operates to insure the public decides what is true and false with respect to governance". *119 Vote No! Comm.*, 135 Wn.2d at 625. Therefore, "even false statements make valuable contributions to debate by bringing about the clearer perception and livelier impression of truth, produced by its collision with error". *Id.* The plurality rejected the state's reliance on the law of defamation because "defamation concerns statements made by one person against another and is designed to protect the property of an individual in his or her good name". *Id.* at 629. Thus, the "legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them for defamatory falsehood". *Id* at 630.

Justice Madsen, joined by then Justice Alexander, concurred. Justice Madsen agreed "that RCW 42.17.530 is facially unconstitutional because it sweeps protected First Amendment activity within its

provisions by penalizing political speech, even if knowingly false, regarding an initiative measure". *119 Vote No! Comm.*, 135 Wn.2d at 633 (Madsen, J., concurring). However, Justice Madsen was "not convinced that the same is true where a statement contains deliberate falsehoods about a candidate for public office". *Id.* The "interest in reputation is what distinguishes speech concerning an initiative measure, which the majority correctly holds is protected even if knowingly false, and speech regarding individuals". *Id.* at 634. In Justice Madsen's view "statements about candidates for public office made with actual knowledge of falsity or with reckless disregard of whether they are true or false are not protected under the First and Fourteenth Amendments". *Id.* at 635. For this reason, it "is reasonable to contend that the Legislature could enact a law prohibiting a person from sponsoring with actual malice political advertising containing false statements of material fact about a candidate for public office". *Id.* However, since the issue of false statements about a candidate for office was not before the Court at that time, there was no need to decide it.

Justice Talmadge, joined by Justice Charles Johnson, concurred in the result but disagreed with the plurality opinion. Justice Talmadge stated that the "Supreme Court has unequivocally and repeatedly refused

to extend First Amendment protection to *deliberate lies*". *119 Vote No! Comm.*, 135 Wn.2d at 640-41 (Talmadge, J., concurring). Thus, despite the "mountain of United States Supreme Court and state court authority to the contrary, the majority decides the First Amendment condones deliberate falsehoods in campaigns". *Id.* at 644. Justice Talmadge rejected the plurality's defamation analysis because "there are numerous valid restrictions on the content of speech that do not involve personal, reputational interests". *Id.* at 647. Thus, Justice Talmadge would have upheld the statute, because "the First Amendment does not protect calculated lies". *Id.* at 654. Even if there was First Amendment protection for lying, Justice Talmadge concluded that "the State has a compelling interest to ensure no deliberately false statements of fact are disseminated in the course of a campaign involving candidates or ballot measures". *Id.* at 652. Although Justice Talmadge would have upheld the statute, he concurred in the result, because he believed that the statements at issue did not violate RCW 42.17.530(1)(a). This is because the advertising at issue did not contain statements of material fact but rather "debatable assertions of opinion regarding the impact of the Initiative from the perspective of the Initiative's opponents". *Id.* at 656.

Justice Guy, joined by Chief Justice Durham, also concurred in the result but disagreed with the plurality opinion. Justice Guy agreed "with

the majority and Justice Talmadge's concurrence that the advertisement before us from the 119 Vote No! Committee does not violate RCW 42.17.530(1)(a)". *119 Vote No! Comm.*, 135 Wn.2d at 633. However, Justice Guy "disagree[d] with the majority and Justice Madsen's concurrence that the statute on its face violates the First Amendment". *Id.*

After *119 Vote No! Committee* was decided, the Legislature responded to the decision by amending RCW 42.17.530(1)(a) to limit the application of RCW 42.17.530(1)(a) to false material statements about candidates for public office. Laws of 1999, ch. 304, § 2, p. 1290. The Legislature found "that a review of the opinions indicates that a majority of the Supreme Court may find valid a statute that limited such a prohibition on sponsoring with actual malice false statements of material fact in a political campaign to statements about a candidate in an election for public office". Laws of 1999, ch. 304, § 1(2), p. 1290.

The Court of Appeals disagreed with the Legislature's view that this Court would uphold an amended RCW 42.17.530(1)(a). However, the decision in *119 Vote No! Committee* is so fractured that it provides little guidance about this important question of law. This is a significant constitutional issue that must be resolved by the Supreme Court.

2. The Court Of Appeals Decision Conflicts With This Court's Decision In *In Re Donohoe*

RAP 13.4(b)(1) provides that a petition for review will be accepted if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court". The Court of Appeals decision in this case conflicts with this Court's decision in *In re Donohoe*, 99 Wn.2d 173, 580 P.2d 1093 (1978). The thrust of the plurality decision in *119 Vote No! Committee* adopted by the court below is that political advertising that contains false statements of material fact about a candidate for public office is protected by the First Amendment, unless the candidate is damaged by the false statements. However, a unanimous Court in *In re Donohoe* reached the opposite conclusion. *In re Donohoe* was an attorney disciplinary proceeding in which the appellant was reprimanded for violating the Code of Professional Responsibility, which "provides that a lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office and a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer. (CPR) DR 8-102(A) and (B)." *In re Donohoe*, 90 Wn.2d at 180. The Court sustained the reprimand because "[t]he hearing

officer concluded that appellant had engaged in an intentional and deliberate pattern of making false statements of fact [and the Court found] substantial support in the record for that conclusion." *In re Donohoe*, 90 Wn.2d at 182.

The appellant argued "that the rules pursuant to which she was disciplined violate her constitutionally guaranteed right to freedom of speech". *Id.* at 181. This Court rejected that argument, stating:

> [*W*]*e do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign.* Such speech is not beneficial to the public and is generally harmful to the person against whom it is directed. The only beneficiary of the comment is the utterer thereof. On balance, *such statements are not deserving of constitutional protection.*

Id. at 181 (emphasis added).

The plurality in *119 Vote No! Committee* suggested that "the continuing viability of [*Donohoe*] is questionable in light of more recent authority". *119 Vote No! Comm.*, 135 Wn.2d at 631. However, the Court has never overruled the decision.

The court below attempted to distinguish *In re Donohoe*. First, by stating that it "addressed only false statements made with *knowledge* of falsity; the court did not find that statements made with reckless disregard for truth or falsity is unprotected by the First Amendment". *Rickert* slip op. at 14. Thus, RCW 42.17.530(1)(a), which "sanctions statements made

with either knowledge or reckless disregard of falsity, [was] broader than the Code provision at issue in *In re Donohoe*". *Rickert* slip op. at 14. However, the Court of Appeals does not explain why this difference is material or that it would have reached a different result if RCW 42.17.530(1)(a) were narrowed. The Court's reasoning about the lack of damages suggests that the result would not be different. Second, the court below distinguished *In re Donohoe* because "the Code provision at issue in *In re Donohoe* was promulgated by the court, i.e., the legal profession, not the legislature, to maintain the 'respect' and 'dignity' due the courts of justice". *Rickert*, slip op. at 14. The fact that the rule was adopted by the Court and not the Legislature cannot be relevant. The First Amendment applies to both branches of government.

The decision below conflicts with *In re Donohoe*. The Court of Appeals held that "only *defamatory* statements made in violation of the statute are not constitutionally protected speech. Specifically, there must be an element of injury before the speech is undeserving of First Amendment protection." *Rickert*, slip op. at 12. *In re Donohoe* stated that "*we do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign. . . . [S]uch statements are not deserving of constitutional protection.*" *In re Donohoe*, 90 Wn.2d at 181 (emphasis added). This

Court should grant review to resolve the conflict between the decision below and *In re Donohoe*.

3. This Case Involves An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court

RAP 13.4(b)(4) provides that a petition for review will be accepted if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court". The application of the First Amendment to false material statements in campaigns for public office not only presents an important constitutional question, it is an issue of substantial public interest. First, this question is one of state-wide significance. RCW 42.17.530(1)(a) applies to campaigns for public office throughout the state.

Second, this is not the only case in which the PDC has imposed a penalty for violating RCW 42.17.530(1)(a). In *In re Jefferson County Republican Central Committee*, PDC No. 04-288, the PDC imposed a $1,000 penalty on the Jefferson County Republican Central Committee for violating RCW 42.17.530(1)(a). Judicial review of this case is pending in Thurston County. *Jefferson County Republican Central Committee v. Washington State Public Disclosure Commission, Michael Connelly, Jeanette Wood, Francis Martin, Earl Tilly, and Jane Noland, Commissioners of the Washington State Public Disclosure Commission in*

their individual capacities, and Vicki Rippie, Executive Director of the Washington State Public Disclosure Commission, in her individual capacity, Thurston County Superior Court No. 05-2-00300-3.

Third, the significance of this issue is also demonstrated by the fact that truth in politics is a national issue—not one limited to Washington State. As the Court of Appeals notes in the decision below, at least 17 other states have enacted election laws similar to RCW 42.17.530(1)(a). *Rickert*, slip op. at 12.

The national significance of the issue is also demonstrated by the scholarly comment on the application of the First Amendment to false political speech. *See* William P. Marshall, *False Campaign Speech And The First Amendment*, 153 U. Pa. L. Rev. 285 (Nov. 2004); Becky Kruse, *The Truth In Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 Cal. L. Rev. 129 (Jan. 2001); Thomas Kane, *Malice, Lies, And Videotape: Revisiting New York Times v. Sullivan In The Modern Age Of Political Campaigns*, 30 Rutgers L.J. 755 (Spring 1999); Carlton F.W. Larson, *Bearing False Winess*, 1089 Yale L.J. 1155 (Mar. 1999); Charles Fried, *The New First Amendment Jurisprudence: A Threat To Liberty*, 59 U. Chi. L. Rev. 225 (Winter 1992).

This Court should grant review to resolve this significant public issue.

CONCLUSION

This Court should grant review for the reasons stated above and reverse the Court of Appeals decision that RCW 42.17.530(1)(a) violates the First Amendment of the United States Constitution and affirm the final order of the Public Disclosure Commission.

RESPECTFULLY SUBMITTED this 7th day of October, 2005.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARILOU RICKERT, Appellant, v. STATE OF WASHINGTON, PUBLIC DISCLOSURE COMMISSION, and SUSAN BRADY, LOIS CLEMENT, EARL TILLY, FRANCIS MARTIN and MIKE CONNELLY, MEMBERS OF THE PUBLIC DISCLOSURE COMMISSION, Respondents.	No. 32274-9-II PUBLISHED OPINION

BRIDGEWATER, J. — Marilou Rickert appeals from the superior court's affirmance of the Washington State Public Disclosure Commission's (PDC) decision that she violated RCW 42.17.530(1)(a) when she made false statements about Senator Tim Sheldon's voting record in the 2002 general election.

We hold that the statute violates the first amendment of the U.S. Constitution[1] in that it is not limited to defamatory speech because it does not require that the candidate be damaged by the false statements. Although the stated intent of the legislature was to "provide protection for candidates for public office against false statements of material fact sponsored with actual malice," the statute does not require any element of damage to the reputation of the maligned candidate. In point of fact, Senator Sheldon does not claim any damage by the alleged false, material, malicious statements, and he won the election by an overwhelming majority. Because the statute is not limited to defamatory speech, it is protected speech. We then subject the statute to a strict scrutiny analysis. It fails.

The statute is not narrowly tailored to advance a compelling state interest. The PDC's interest is in promoting integrity and honesty in the elections process; but the statute, while purporting to punish malicious falsehoods about candidates by their opponents, permits the candidates to proclaim falsehoods about themselves without penalty. Of equal importance, we hold that the statute is unconstitutional in that it is not limited to speech made during election campaigns that causes serious adverse consequences to the public. Thus, the statute is unconstitutionally overbroad in that it would pertain to every false, malicious, material statement whether it constitutes libel or slander, and it permits dishonesty in political speech by candidates. We reverse.

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[1] In pertinent, part the first amendment of the U.S. Constitution states as follows: "Congress shall make no law. . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. CONST. amend. I.

This case arises from the PDC's sanction of a political candidate under RCW 42.17.530(1)(a), which provides that it is a violation of chapter 42.17 RCW for a person to sponsor with actual malice "[p]olitical advertising that contains a false statement of material fact about a candidate for public office."[2] This case presents the first reported challenge to that statute.

During the 2002 election year, Senator Tim Sheldon, the incumbent Democrat, and Marilou Rickert ran against each other for the office of state senator for the 35th Legislative District. Rickert ran as a member of the Green Party.

Between October 16 and October 28, 2002, Rickert sponsored a political brochure that was mailed to voters in the 35th District. The brochure was mailed in a printed wrapper entitled, "THERE IS A DIFFERENCE!" Administrative Record (AR) at 10. The wrapper compared Senator Sheldon's and Rickert's positions on various issues. The comparison giving rise to this litigation stated:

> [Rickert:] Supports social services for the most vulnerable of the state's citizens.
> [Sheldon:] Supported revenue measures that have forced reductions in services to the mentally ill, developmentally challenged, and their families; *voted to close a facility for the developmentally challenged in his district* and is advocating for the site to be turned into a prison.

AR at 10 (emphasis added).

Senator Sheldon was re-elected in the November 5, 2002 general election by approximately 79 percent of the vote. On November 19, 2002, Senator Sheldon filed a

[2] Under RCW 42.17.505(1), "[a]ctual malice" means to "act with knowledge of falsity or with reckless disregard as to truth or falsity."

complaint with the PDC, alleging that Rickert's statement that he had "voted to close a facility for the developmentally challenged" was a false statement of material fact. AR at 13.

On May 5, 2003, the PDC charged Rickert with violating RCW 42.17.530. The notice of administrative charges alleged that Rickert had "sponsored with actual malice political advertising that contained a false statement of material fact about Senator Tim Sheldon." AR at 33.

The PDC held a hearing on July 29, 2003. At the hearing, Rickert testified that the "facility" she had referred to in the wrapper was the Mission Creek Youth Camp, which is located within the 35th District near Belfair, Washington. AR at 338.

In March 2002, the legislature passed the 2002 budget act, which eliminated funding for Mission Creek. Senator Sheldon twice voted against ESSB 6387, the appropriation bill specifically mandating Mission Creek's closure.

Sally Parker, the PDC investigator assigned to Rickert's case, testified that Rickert's statement was false because Senator Sheldon had not voted in the state legislature to close Mission Creek and because Mission Creek was not a facility for the "developmentally challenged" but for juvenile offenders. AR at 328. Parker stated that she learned that Senator Sheldon had voted against the 2002 budget act by reading "newspaper articles" and by verifying his voting record in the "budget notes." AR at 328. In addition, she contacted administrators from the Department of Social and Health Services (DSHS) and conducted "research on the Internet" in order to verify the character of Mission Creek. AR at 330. Parker further testified that, during her investigation, Rickert had admitted that her characterization of Mission Creek as a facility for the disabled was false.

David Griffith, the assistant to the division director of institution programs for DSHS, testified that Mission Creek opened in 1961 and was a minimum security institution for juvenile offenders. He stated that Mission Creek's mission was to protect and provide rehabilitation services to juvenile offenders while serving their sentence and that it was "[a]bsolutely not" a facility for the developmentally disabled. AR at 342.

Senator Sheldon testified that he did not vote to close a facility for the developmentally challenged in the 35th District. Additionally, he stated that he had visited Mission Creek "several times" and that it was a medium security facility for juvenile offenders, with "high fences" and "barbed wire." AR at 351.

Rickert denied having ill will toward Senator Sheldon. She testified that she had based her statements on conversations with a lobbyist and thought that her statements were true when she made them.

The PDC found that both Rickert's statement that Senator Sheldon had voted to close Mission Creek and that Mission Creek was a facility for the developmentally challenged were false statements of material fact. The PDC further found, by clear and convincing evidence, that Rickert acted with "actual malice or reckless disregard" in sponsoring the brochure because she had actual knowledge through review of newspaper articles in *The Olympian* and the *Belfair Herald* that Senator Sheldon had not voted to close Mission Creek and she had failed to "make even a cursory check" of Senator Sheldon's voting record. AR at 411. It imposed a $1,000 fine on Rickert.

Rickert petitioned for review to the Thurston County Superior Court. Following a hearing, the superior court entered an order affirming the PDC's decision. However, it made no

determination regarding whether the PDC erred in finding that Rickert had acted with actual knowledge of the statement's falsity. Additionally, the superior court upheld the constitutionality of RCW 42.17.530(1)(a).

On appeal, Rickert asserts that RCW 42.17.530(1)(a) is unconstitutional on its face and as it was applied to her. The basis of Rickert's argument is that the statute permits the government to impose sanctions on a candidate for engaging in constitutionally protected speech. She also argues that the statute violates procedural due process and is overbroad and viewpoint-based. This is an issue of first impression before this court.

Constitutionality of RCW 42.17.530(1)(a)

A. *History of RCW 42.17.530(1)(a)*

When first enacted in 1984, RCW 42.17.530 provided that a person "shall not sponsor political advertising which contains information that the person knows, or should reasonably be expected to know, to be false." Laws of 1984, ch. 216, § 3. In 1988, the state legislature amended the statute to incorporate the "[a]ctual malice" standard set forth in *New York Times*.[3] Laws of 1988, ch. 199, § 1. As revised, the statute made it unlawful for a person "to sponsor with actual malice . . . [p]olitical advertising that contains a false statement of material fact." Laws of 1988, ch. 199, § (2)(1)(a).

Our Supreme Court, in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998), addressed the constitutionality of former RCW 42.17.530(1)(a) (1998). A three-justice plurality opinion held that the statute was facially unconstitutional because it "chill[ed] political speech, usurp[ed] the rights of the electorate to

determine the merits of political initiatives without fear of government sanction, and lack[ed] a compelling state interest in justification." *119 Vote No!*, 135 Wn.2d at 632.

The plurality opinion reasoned that the public, not the state, should determine truth and falsity in public debate, stating "'In this field *every person* must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.'" *119 Vote No!*, 135 Wn.2d at 625 (quoting *Meyer v. Grant*, 486 U.S. 414, 419-20, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)). Rather, a "campaign's factual blunder is most likely noticed and corrected by the campaign's political opponent." *119 Vote No!*, 135 Wn.2d at 626 (citing *Brown v. Hartlage*, 456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982)).

Additionally, the plurality opinion found unpersuasive the State's reliance on defamation cases to justify intrusion into public debate. *119 Vote No!*, 135 Wn.2d at 629. It reasoned that the statute restricted political speech absent the competing interest in defamation cases—i.e., the legitimate state interest in compensating individuals for harm to their reputation—and, unlike a defamation suit, "creates a cause of action for the government to pursue against a private person." *119 Vote No!*, 135 Wn.2d at 630. The plurality opinion cited a law review article stating that, "[T]he First Amendment precludes punishment for generalized 'public' frauds, deceptions and defamation. In political campaigns the grossest misstatements [and] deceptions . . . are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed." *119 Vote No!*, 135 Wn.2d at 629 (citing Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992)).

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[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

The plurality opinion concluded that former RCW 42.17.530(1)(a) was "patronizing and paternalistic" in assuming that "the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate." *119 Vote No!*, 135 Wn.2d at 632. But it left unanswered whether the State may constitutionally prohibit false statements directed at another candidate. *119 Vote No!*, 135 Wn.2d at 627, 631.

Justices Madsen and Alexander agreed with the plurality opinion's analysis, making a majority of five justices finding the statute facially unconstitutional. However, Justice Madsen, with Justice Alexander concurring, wrote separately, "I am not convinced that the same is true where a statement contains deliberate falsehoods about a candidate for public office." *119 Vote No!*, 135 Wn.2d at 633 (Madsen, J., concurring). Justice Madsen reasoned that, because states may permit recovery of damages for defamation to public officials where the *New York Times* actual malice standard is satisfied, it is "reasonable to contend" that the legislature could enact a law prohibiting a person from sponsoring with actual malice political advertising containing false statements of material fact about a candidate for public office. *119 Vote No!*, 135 Wn.2d at 635 (Madsen, J., concurring).

Following the court's decision in *119 Vote No!*, the legislature amended former RCW 42.17.530(1)(a) to its current form. Laws of 1999, ch. 304, § 2. RCW 42.17.530 provides in relevant part:

> (1) It is a *violation of this chapter for a person to sponsor with actual malice*:
>
> (a) *Political advertising that contains a false statement of material fact about a candidate for public office.* However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself.
>
> . . . .

> (2) Any violation of this section shall be proven by *clear and convincing evidence.*

(Emphasis added).

In addition, the legislature made the following findings in support of the 1999 amendment:

> (2) The legislature finds that a review of the opinions indicates that a majority of the supreme court may find valid a statute that limited such a prohibition on sponsoring with actual malice false statements of material fact in a political campaign to statements about a candidate in an election for public office.
>
> (3) It is the intent of the legislature to amend the current law to *provide protection for candidates for public office against false statements of material fact sponsored with actual malice.*

Laws of 1999, ch. 304, § 1 (emphasis added).

B. *Analysis*

The facial constitutionality of a statute is a question of law requiring de novo review. *119 Vote No!*, 135 Wn.2d at 623. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First Amendment. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). The First Amendment to the U.S. Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. CONST. amend. I. If the challenged law burdens First Amendment rights, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and is narrowly tailored to serve that interest. *Eu*, 489 U.S. at 222.

The U.S. Supreme Court has "recognized repeatedly that 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our

Constitution.'" *Eu*, 489 U.S. at 223 (citing *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). Such discussions are afforded the "broadest protection" in order to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley*, 424 U.S. at 14. Thus, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office"; a highly paternalistic approach limiting what people may hear is "generally suspect." *Eu*, 489 U.S. at 223 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)).

The First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). In *New York Times*, the Court declared, "[E]rroneous statement is inevitable in free debate, and [] it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times*, 376 U.S. at 271-72 (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d. 405 (1963)). Accordingly, we consider this case against the background of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270.

The PDC contends that we should "analogize to the law of defamation as a basis for authorizing [the] state to prohibit false statements in political campaigns." Br. of Resp't at 30. It argues that under *New York Times* and its progeny, "knowing and deliberate lies," even when

they occur during political debate, are not protected by the First Amendment.[4] Br. of Resp't at 24.

As aptly pointed out by the plurality opinion in *119 Vote No!*, the *New York Times* Court's determination that defamatory statements made with actual malice are not protected by the First Amendment was made in the context of a defamation suit—wherein the Court balanced the individual's right to recover for damage to his or her reputation against the speaker's First Amendment rights. *New York Times*, 376 U.S. at 279-80. A defamation plaintiff must establish four essential elements: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) *damages*. *Herron v. KING Broad. Co.*, 109 Wn.2d 514, 521-22, 746 P.2d 295 (1987). Here, as with former RCW 42.17.530(1)(a) (1998), RCW 42.17.530(1)(a) restricts political speech absent the competing interest in a defamation suit. RCW 42.17.530(1)(a) imposes no requirement of harm to a candidate's reputation; indeed, Senator Sheldon raised no claim that Rickert's statement injured his good name.

Furthermore, *New York Times* held only that a public official may "recover[] damages" in tort for a defamatory statement made with actual malice; it did not speak to an action by the government against private individuals. *New York Times*, 376 U.S. at 279. In light of these substantial differences and our great reverence for free and open debate in political campaigns, we will not apply only a portion of the elements of the law of defamation to find that any false statement of material fact about a candidate made with actual malice under RCW

[4] The PDC also cites *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

42.17.530(1)(a) is undeserving of First Amendment protection. Rather, we hold that, under *New York Times*, only *defamatory* statements made in violation of the statute are not constitutionally protected speech. Specifically, there must be an element of injury before the speech is undeserving of First Amendment protection.

A review of other states' case law is also useful. At least 17 other states have enacted election laws similar to RCW 42.17.530(1)(a), including Alaska, Montana, Nevada, and Oregon.[5] Some of these statutes are identical to RCW 42.17.530(1)(a), while others require a mental state greater than actual malice or a particular type of statement about a candidate. *See* NEV. REV. STAT. § 294A.345(1) (2004) (a person shall not publish with actual malice a false statement of fact concerning a candidate); COLO. REV. STAT. § 1-13-109 (2004) (no person shall knowingly make a false statement relating to any candidate); and MISS. CODE ANN. § 23-15-875 (2005) (no person shall deliberately make a false statement regarding a candidate's honesty, integrity, or moral character).

In *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1116 (2001), the court reviewed Hawaii State's Code of Fair Campaign Practices. At issue were provisions prohibiting campaign material that "'misrepresents, distorts, or otherwise falsifies the facts regarding [a] candidate'" and statements amounting to "personal vilification [and] character defamation." *Ancheta*, 135 F. Supp. 2d at 1117, 1121. In determining whether speech subject to the Code was protected under

[5] ALASKA STAT. § 15.56.012 (2005); COLO. REV. STAT. § 1-13-109 (2004); FLA. STAT. § 104.271 (2005); LA. REV. STAT. § 18:1463(C) (2005); ANN. LAWS MASS. ch. 56, § 42 (2005); MINN. STAT. § 211B.06 (2004); MISS. CODE ANN. § 23-15-875 (2005); MONT. CODE ANN. § 13-35-301, 302 (2004); NEV. REV. STAT. § 294A.345(1) (2004); N.C. GEN. STAT. § 163.274(8) (2005); N.D. CENT. CODE § 16-1-10-04 (2005); OHIO REV. CODE ANN. 3517.21(B) (2005); OR. REV. STAT. §

the First Amendment, the court noted that "defamatory speech is undeserving of First Amendment protections." *Ancheta*, 135 F. Supp. at 1122. However, because the Code was not limited to sanctioning defamatory speech made with actual malice against a public candidate, the court determined that "the Code regulat[ed] speech that is protected under *New York Times*." *Ancheta*, 135 F. Supp. at 1122.

And in *Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 296 Or. 195, 674 P.2d 1159 (1983), the Oregon Supreme Court considered whether the defendant had violated a provision of the Oregon Corrupt Practices Act prohibiting a person from publishing any "false statement of material fact relating to [a] candidate." *Eivers*, 296 Or. at 197. While the constitutionality of the provision was not at issue, Justice Linde, writing separately, stated that the court's ruling did not imply that the statute itself was constitutional and noted that the statute was "not confined to defamatory or even critical statements about a candidate, nor to a remedy for injury to reputation." *Eivers*, 296 Or. at 206, n.1. (Linde, J., concurring).

However, the PDC argues that in *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 150 Mich. App. 617, 623, 389 N.W.2d 446 (1986), the court stated that misleading or false statements are not constitutionally protected free speech. And in *In re Donohoe*, 90 Wn.2d 173, 181, 580 P.2d 1093 (1978), our Supreme Court ruled that false statements do not fall within the protection of the First Amendment. In *In re Donohoe*, the appellant, a candidate for judicial office, was disciplined for violating a provision of the Code of Judicial Conduct prohibiting persons from publishing a "statement with knowledge of its falsity

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260.532 (2003); TENN. CODE ANN. § 2-19-142 (2005); UTAH CODE ANN. § 20A-11-1103 (2005); W.VA. CODE § 3-8-11(c) (2005); WIS. STAT. § 12.05 (2004).

during the course of a judicial campaign." *In re Donohoe*, 90 Wn.2d at 182. In rejecting the appellant's contention that the provision violated her constitutional right to freedom of speech, the court stated, "[w]e do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign. Such speech is not beneficial to the public." *Donohoe*, 90 Wn.2d at 181.

In re Donohoe is distinguishable from the instant case. First, it addressed only false statements made with *knowledge* of falsity; the court did not find that statements made with reckless disregard for truth or falsity is unprotected by the First Amendment. Thus, RCW 42.17.530(1)(a), which sanctions statements made with either knowledge or reckless disregard of falsity, is broader than the Code provision at issue in *In re Donohoe*. Second, the Code provision at issue in *In re Donohoe* was promulgated by the court, i.e., the legal profession, not the legislature, to maintain the "respect" and "dignity" due the courts of justice. *In re Donohoe*, 90 Wn.2d at 180. *See In re Kaiser*, 111 Wn.2d 275, 295, 759 P.3d 392 (1988) (in the context of a judicial campaign, there are other competing societal concerns that override the need for unrestrained freedom of speech). Furthermore, to the extent that these cases suggest that speech beyond that proscribed by *New York Times* is not protected by the First Amendment, we find them unpersuasive.

In sum, the U.S. Supreme Court has narrowly defined the permissible occasions for sanctioning an individual who speaks on matters of public concern and political discourse. We agree that under *New York Times*, the government may sanction false speech made with actual malice that defames a public official; it appears that the legislature intended to adopt the *New York Times* standards in 1988. But the PDC points to no convincing authority suggesting that we

should apply only a portion of the law of defamation to the instant case or determine that materially false statements *alone* under RCW 42.17.530(1)(a), regardless of whether they are defamatory, are not constitutionally protected. Accordingly, we hold that the statute regulates protected speech and now consider whether it survives strict scrutiny.

Regulation of protected speech based on its content is presumptively unconstitutional. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The state bears the burden of showing a compelling interest to justify the burden placed on protected speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

The PDC asserts a compelling state interest in promoting the honesty and integrity of the elections process. [6] Rickert responds that, in accordance with the plurality opinion's holding in *119 Vote No!*, we should find that political truth should be determined solely by the citizenry and not the state. She argues that a majority of the *119 Vote No!* Court held that the "official regulation of truth-telling" in political campaigns was not a legitimate state purpose. Br. of Appellant at 45.

But the *119 Vote No!* plurality opinion did not hold that the government may never regulate protected political speech to protect the integrity of elections; its decision was limited to the statute at issue. *See 119 Vote No!*, 135 Wn.2d at 624-25, 627-28, 632. Moreover, the U.S. Supreme Court has stated that a state's interest in preventing *fraud* and *libel* "carries special

[6] The PDC does not rely on the statement of legislative intent that the act was intended to protect candidates—this is not a compelling state interest, it is a private interest wherein the candidate is protected by the law concerning defamation. Instead, the PDC correctly attempts to rely on the compelling state interest in promoting honesty and integrity of the elections process.

weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

The Ninth Circuit recently analyzed an election statute under *McIntyre*. *See Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004). In *Heller*, the court held unconstitutional a Nevada provision requiring groups or entities publishing "'any material or information relating to an election, candidate or any question on the ballot'" to reveal the names and addresses of the publication's financial sponsors. *Heller*, 378 F.3d at 981. In rejecting the state's asserted interest in preventing fraud and libel, the court found that the Nevada statute was not limited to speech "'during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.'" *Heller*, 378 F.2d at 996 (quoting *McIntyre*, 514 U.S. at 349).

The court reasoned that the statute was (1) temporally ill-adapted to the "special concerns" regarding fraud or libel during an election campaign because it could prevent speech "far removed from the thrust and parry" of a campaign and (2) substantively ill-adapted because it imposed no requirement that any member of the pertinent electorate be exposed to, or influenced by, the publication. *Heller*, 378 F.3d at 996. Further, the statute provided an exception for communications by candidates and political parties; the court stated, "[n]o reason appears why candidates and political parties are less likely to engage in election-related fraud than other groups; if anything, one would expect the opposite to be the case." *Heller*, 378 F.3d at 996. The court concluded that the statute was not narrowly tailored to further the state's interest in libel and fraud prevention. *Heller*, 378 F.3d at 997.

As well, RCW 42.17.530(1)(a) is not limited to speech made "during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre*, 514 U.S. at 349. It is not temporally limited to statements made close in time to an election when a candidate might be unable to defend against the statements before the public.

Furthermore, as with the Nevada provision, RCW 42.17.530(1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate him or herself. The PDC presents no compelling reason why a candidate would be less likely to deceive the electorate on matters concerning him or herself and compromise the integrity of the elections process. The PDC has therefore failed to establish that RCW 42.17.530(1)(a) is narrowly tailored to further its interest in preventing dishonesty in elections.

Moreover, RCW 42.17.530(1)(a) is unconstitutionally overbroad in that it covers every false statement of material fact made with actual malice—regardless of whether it is defamatory. *See 119 Vote No!*, 135 Wn.2d at 627-28. Thus, RCW 42.17.530(1)(a)'s prohibition against *any* false statement of material fact about a candidate chills protected political speech.

Nevertheless, the PDC contends that the courts of other states have upheld the constitutionality of statutes similar to RCW 42.17.530(1)(a), citing *Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981) and *Commonwealth v. Wadzinski*, 492 Pa. 35, 422 A.2d 124 (Pa. 1980). In *Snortland*, the North Dakota State Supreme Court, in analyzing a violation of a provision of the state election statute, construed the use of the term "knowingly" in the statute to mean that the trier of fact must apply the actual malice standard of *New York Times*. *Snortland*, 306 N.W.2d at 623. The court stated, "[I]t is difficult to conclude that an equally stringent safeguard

is not necessary in the instant case which also . . . affects precious rights under the First Amendment far broader than one's reputation." *Snortland*, 306 N.W.2d at 623. However, the court did not analyze the constitutionality of statute and thus adds little to our analysis.

In *Wadzinski*, the Pennsylvania State Supreme Court stated that "state regulation whose scope is limited to false campaign statements knowingly or recklessly made *may* be sustained." *Wadzinski*, 492 Pa. at 45 (emphasis added). The court further stated, "[I]t is clear that *some* regulation of campaign speech designed to protect other than reputational interests may be sustained"; however, "[W]e hasten to add . . . that [government interest in preventing corruption in the political process] will not justify any law that places a substantial burden on protected political speech." *Wadzinski*, 492 Pa. at 46 (emphasis added). But *Wadzinski* is not binding precedent and offers no specific guidance concerning the issues raised in this case. Moreover, to support its claim, the court relied upon case law immaterial to our analysis. *Buckley*, 424 U.S. 1 dealt with campaign finance. *See also 119 Vote No!*, 135 Wn.2d at 629, n.8.

In conclusion, we adopt the plurality opinion's rationale in *119 vote No!* and follow the Ninth Circuit's reasoning in *Heller*, and we hold that RCW 42.17.531(1)(a) is not narrowly tailored to the PDC's interest in promoting integrity and honesty in the elections process and chills protected political speech. Accordingly, we need not reach Rickert's other arguments that the statute is viewpoint-based and that it violates procedural due process protections because it fails to provide for determination of liability by a jury. As well, we do not address the application of the statute to Rickert's statements to determine whether she violated the unconstitutional statute.

Reversed.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, A.C.J.

APPENDIX B

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RCW 42.17.505

The definitions set forth in this section apply throughout RCW 42.17.510 through 42.17.540.

(1) "Actual malice" means to act with knowledge of falsity or with reckless disregard as to truth or falsity.

(2) "Sponsor" means the candidate, political committee, or person paying for the advertisement. If a person acts as an agent for another or is reimbursed by another for the payment, the original source of the payment is the sponsor

(3) "Incumbent" means a person who is in present possession of an elected office.

RCW 42.17.530

(1) It is a violation of this chapter for a person to sponsor with actual malice:

(a) Political advertising that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself;

(b) Political advertising that falsely represents that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent;

(c) Political advertising that makes either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement.

(2) Any violation of this section shall be proven by clear and convincing evidence.

RCW 42.17.540

(1) Except as provided in subsection (2) of this section, the responsibility for compliance with RCW 42.17.510 through 42.17.530 shall rest with the sponsor of the political advertising and not with the broadcasting station or other medium.

(2) If a broadcasting station or other medium changes the content of a political advertisement, the station or medium shall be responsible for any failure of the advertisement to comply with RCW 42.17.510 through 42.17.530 that results from that change.