NO. 32274-9-II

**COURT OF APPEALS FOR DIVISION II**
**STATE OF WASHINGTON**

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.

# BRIEF OF RESPONDENTS

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## II. COUNTER-STATEMENT OF THE CASE

### A. Procedural History

On November 19, 2002, the Public Disclosure Commission (hereafter PDC) staff received a complaint against the Appellant, Marilou Rickert (hereafter Rickert), alleging that she violated RCW 42.17.530(1) by making a false statement of material fact against her opponent in the 2002 election, Senator Tim Sheldon (hereafter Senator Sheldon). AR 1, 3, 11-13.[1]

Following its investigation, PDC staff charged Rickert with violating RCW 42.17.530(1) because she sponsored a false statement in a political advertisement mailed shortly before the November 5, 2002 general election. AR 31-34. The statement at issue is ". . . [Sheldon] voted to close a facility for the developmentally challenged in his district . . .". AR 10, 31-34.

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[1] References to the Administrative Record are referred to as "AR" followed by the page number provided on the record supplied by the PDC. References to the Clerk's Papers shall hereafter be referred to as "CP" followed by the page number provided by the superior court.

The PDC conducted an administrative hearing on July 29, 2003. AR 108-09, 317-405.[2] Following the hearing, the PDC entered a Final Order making specific factual findings and conclusions of law, and determined that Rickert had committed a single violation of RCW 42.17.530 by sponsoring a political advertisement containing a false statement of material fact with actual malice. In finding actual malice, the PDC decided that Rickert acted with actual knowledge of the falsity of her statement, and with reckless disregard of the truth or falsity of her statement. Accordingly, the PDC imposed a $1,000 penalty. AR 406-13; Appendix A to this Brief.

Rickert filed a timely appeal of the Final Order on August 27, 2003. CP 4-7. Following a hearing on April 23, 2004, the Superior Court entered an order affirming the PDC's Order. CP 117-19; Appendix B to this Brief. Rickert timely filed this appeal. CP 120-27.

**B. Counterstatement of Facts**

During the 2002 election year, Rickert and Senator Sheldon were candidates for the office of State Senator for the 35th Legislative District. AR 32, 38, 84, 347, 355, and 408 (Finding of Fact 1). Senator Sheldon

[2] The hearing transcript is contained within the Administrative Record at AR 317-405.

was re-elected on November 5, 2002. AR 32, 346-47, and 409 (Finding of Fact 7).

During the course of Rickert's campaign, she sponsored a mailing to voters in the 35th District. AR 327, 356, 373, and 409 (Finding of Fact 5). A portion of the mailing, which is labeled "THERE IS A DIFFERENCE," was the subject of the enforcement proceeding before the PDC. *Id.*; AR 10, 32. The mailing was a brochure, around which was wrapped one letter-sized page that outlined Rickert's view of the significant differences between herself and Senator Sheldon. AR 10, 372. It reads, in relevant part to these proceedings, that Senator Sheldon "voted to close a facility for the developmentally challenged in his district . . .". AR 10, 32, and 409 (Finding of Fact 5). The mailing was subject to the requirements of RCW 42.17.530, which provides that it is a violation of state law for a person to sponsor, with actual malice, political advertising that contains a false statement of material fact about a candidate for public office.

The PDC determined that Rickert's statement was false for two reasons. AR 410 (Finding of Fact 7). First, the vote she references in the mailing was Senator Sheldon's vote on the 2002 state budget act, namely, Senate Bill 6387 and Engrossed Senate Bill 6387. AR 159-60

(Hrg. Exh. F), 162 (Hrg. Ex. G), 164-66 (Hrg. Ex. H), 328-29, 348, 350, 357, 360-61. The budget bill eliminated funding for a juvenile rehabilitation facility located in the 35th District. *Id.* Senator Sheldon voted "No" on both bills. AR 164, 165, 350, 360-61, and 409 (Finding of Fact 4).

Second, the facility referenced by Rickert in her mailing is not a facility for "developmentally challenged" persons. It was, in fact, a facility that housed juvenile felony offenders, Mission Creek Youth Camp (Mission Creek). AR 330, 334, 338-39, 351, 356, 380, and 408 (Finding of Fact 3). Dave Griffith from the Department of Social and Health Services (DSHS) testified that Mission Creek had been open since 1961 and its primary missions were to "provide part of the continuing care" required for the juvenile offenders while in DSHS custody, and to keep the juvenile offenders "protected from the community." AR 339. Additionally, Griffith stated that the juvenile offenders received rehabilitative services to "reduce their anti-social behavior so they can return to the community and not continue to commit crimes." AR 339.

PDC investigator Sally Parker testified her investigation showed that Mission Creek's population had few juvenile offenders that suffered from disabilities. "[A]s far as identifying that as a large portion of their

population, 'or even significant,'" Parker said that was not the fact. AR 333. Griffith also testified that he did not know what the term "developmentally challenged" meant (AR 342), but that all adolescents are challenged in some respect and then reiterated that Mission Creek was not a facility for the developmentally disabled. AR 342; *see also*, AR 345 (". . . somebody who had significant developmental issues such as a developmental disability would have a very difficult time to really participate in the programs that Mission Creek had to offer"). Rickert did not provide any evidence to support her statement. Even Rickert's own witness, Dave Wood, did not agree that Mission Creek's mission was to serve the developmentally disabled population. AR 262, 358-59 ("Q: So he told you it wasn't one for the developmentally challenged? A: That's right.").

As to the issue of materiality, Rickert admitted that Senator Sheldon's vote on the 2002 state budget and the closure of Mission Creek were material campaign topics. AR 356, 358. She personally selected the topics for her mailing, and included this topic because of community reaction to the closure of Mission Creek. AR 360.

Substantial evidence presented at the hearing supported the PDC's conclusion that Rickert acted with actual knowledge that her statement

was false, or with reckless disregard for its truth. Rickert read several news articles prior to issuing her campaign mailing that included references to Senator Sheldon's vote on Mission Creek. AR 363. The first was an article from April 2002, which included a statement that "As for his budget vote, Sheldon says he may be the only Democrat in the Legislature who voted against the Mission Creek closure." AR 252; *see also* April 18, 2002 article at AR 255 ("Sheldon says his vote against the budget was the only vote in the Legislature to save the Mission Creek Youth Camp."); May 24, 2002 article at AR 136 ("State Senator Tim Sheldon of Potlatch was the only Democrat to vote against the budget proposal, in part because of the proposed Mission Creek closure, he said."). Rickert testified that these articles formed the basis for her decision to challenge Senator Sheldon. AR 363; AR 250-53 (Hrg. Ex. 2).

The news articles accurately reflected Senator Sheldon's vote. Certain constituents in the 35th District did not feel that Senator Sheldon had sufficiently used his leverage to obtain funding for Mission Creek. Nevertheless, the article contained the truth about Senator Sheldon's vote – that he voted "No" on the bill that closed Mission Creek. AR 136, 250-53, 255.

Following the election, Dave Wood told Rickert that she had mischaracterized the "kind of facility that [Mission Creek] was." AR 358-59. Rickert acknowledged her mistake in a letter to the editor for several local newspapers: "[Mission Creek] was a youth rehabilitation center, not a facility for the developmentally challenged." AR 142-43; *see also* AR 359.

In summary, Rickert admitted that she read news articles that accurately described Senator Sheldon's vote prior to deciding to run for the Senate. Rickert also had resources available to her to assess the accuracy of her statement, including a campaign volunteer to do research. AR 328, 353, 355, 375.

## III. STANDARD OF REVIEW

Judicial review in an Administrative Procedure Act (APA) case is governed by RCW 34.05.570. Under the "error of law" standards, RCW 34.05.570(3) (a), (b), (c) and (d), the court engages in *de novo* review of the PDC's legal conclusions. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). However, the court should give substantial weight to the PDC's interpretation of the Public Disclosure Act. *Peacock v. Public Disclosure*

*Commission,* 84 Wn. App. 282, 928 P.2d 427 (1996), *review denied* 131 Wn.2d 1022, 937 P.2d 1102 (1997).

When addressing a constitutional challenge to a statute, the court reviews the matter *de novo. Timberline Air Serv. Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 311, 884 P.2d 920 (1994). A "statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000), *cert. denied,* 532 U.S. 920 (2001); *Leibbrand v. Employment Sec. Dept.*, 107 Wn. App. 411, 417, 27 P.3d 1186 (2001).

In order to challenge the PDC's decision as "not supported by substantial evidence", Rickert must first assign error to those PDC findings of fact that she contends are not supported by substantial evidence. RCW 34.05.570(3)(e); *Terry v. Employment Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). Rickert erroneously sets forth the standard of review for reviewing findings of fact. *See* Brief of Appellant at 13 (citing to a "clearly erroneous" standard of review in light of the entire record.) The correct test is the "substantial evidence" standard, under which an agency's finding of fact will be upheld if supported by "evidence that is substantial when viewed in light of the

whole record before the court". RCW 34.05.570(3)(e). The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Products Co. v. Washington Utils. and Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The reviewing court will not weigh the evidence or substitute its view of the facts for that of the agency. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510, *review denied* 132 Wn.2d 1004 (1997).

The court is to review the whole record and if there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld. This is so even if the reviewing court would make a different finding from its reading of the record. *Id.* In this case, Rickert fails to assign error to any of the PDC's findings. Therefore, this court should treat all finding as verities on review. RCW 34.05.546; *Fuller v. Employment Sec. Dep't.*, 52 Wn. App. 603, 762 P.2d 367 (1988).

Finally, when reviewing a determination that a statement was made with actual malice, the court determines, as a question of law, whether the evidence in the record supports the finding of actual malice. *McKimm v. Ohio Elections Commission,* 89 Ohio St. 3d 139, 147, 729 N.E.2d 364 (2000), *cert. denied* 531 U.S. 1078 (2001) (citing *Harte-Hanks*

*Communications, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S. Ct. 2678, 2694, 105 L. Ed. 2d 562, 587 (1989)).

## IV. SUMMARY OF ARGUMENT

In April 2002, Senator Sheldon voted "No" on a bill that called for the closure of Mission Creek, a facility for juvenile offenders. Rickert ran against Senator Sheldon in the November 2002 election. In a campaign mailing, Rickert stated that Senator Sheldon "voted to close a facility for the developmentally challenged in his district." The PDC correctly determined that this was a false statement of material fact. The PDC also correctly determined that, given that Rickert had read newspaper articles containing the truth, she made this statement knowing it to be false, or with reckless disregard for the truth.

Contrary to Rickert's assertion, RCW 42.17.530(1)(a) is constitutional. The United States Supreme Court has held that the First Amendment does not protect false statements of fact made knowingly, or with reckless disregard for the truth. States have a compelling interest in the integrity of their elections, and are permitted to enact a narrowly tailored law prohibiting this category of speech that does not enjoy First Amendment protection. A majority of the Washington Supreme Court has recognized that this narrow category of speech lacks constitutional

protection. Similarly, courts from other states have recognized this principle when reviewing similar statutes enacted in other states. Finally, RCW 42.17.530(1)(a) contains all of the required procedural protections.

## V. ARGUMENT

### A. The Commission Correctly Concluded that Rickert Violated RCW 42.17.530(1)(a) When She Stated That Her Opponent Voted to Close a Facility for the Developmentally Challenged.

#### 1. False statements of material fact made with actual malice are prohibited by RCW 42.17.530(1)(a).

Where regulation of political speech is subject to specific and narrow limitations, it passes constitutional muster, as discussed in detail in Section V (B) and (C) below. Those limitations are contained in RCW 42.17.530(1)(a). RCW 42.17.530(1) requires proof, by clear and convincing evidence, that Rickert sponsored "with actual malice" political advertising that contained a false statement of material fact[3] about Senator Sheldon. Actual malice is defined as acting with knowledge of falsity or with reckless disregard as to the truth or falsity of the statement. RCW 42.17.505.

Based on substantial evidence from the administrative hearing, the unchallenged findings of the PDC, and the fact that Rickert's statement is

[3] Rickert does not dispute that her statement regarding the closure of Mission Creek was a material issue to the 35th District during this race. AR 356.

susceptible to only one interpretation, the PDC correctly concluded that 1) Rickert's statement that her opponent "voted to close a facility for the developmentally challenged" was a false statement of material fact; 2) Rickert sponsored the statement, and 3) Rickert knew her statement was false, or recklessly disregarded the truth or falsity of her statement.

Additionally, the PDC properly determined that a penalty was appropriate. Rickert did not assign error to the value of the penalty assessed against her in this case. Therefore, once the court affirms the PDC decision, the penalty should stand.

**2. Senator Sheldon did not vote to close a facility in his district.**

Rickert's statement that Senator Sheldon voted to close a facility for the developmentally challenged in his district is false. Contrary to Rickert's argument, the statement that Senator Sheldon "voted" to close the facility is not subject to any other interpretation, let alone an "innocent construction". Rickert admits that 1) there was a vote cast by Senator Sheldon (AR 327); 2) the "vote" at issue pertained to the 2002 budget bills, SB 6387 and ESB 6387 (AR 327, 329, 330); and 3) the facility she referred to in her mailing was Mission Creek (AR 330). She also agrees that SB 6387 and ESB 6387 contained provisions that eliminated all funding for Mission Creek and thus, if passed, would close Mission Creek.

AR 130-31, and 409 (Finding of Fact 4). It is irrefutable that Senator Sheldon voted against both bills. AR 133, 134, 135, 350, and 409 (Finding of Fact 4). Rickert admitted this in her testimony. AR 361 (Q: Would you also agree that Tim Sheldon voted against that bill? A: Yes.) Additionally, Rickert could not point to any vote taken, formally or informally, where Senator Sheldon voted in any other way. AR 361. Therefore, Senator Sheldon's vote was against closing Mission Creek.

Rickert argues that her statement should be considered a reasonable interpretation of the facts, and thus not a violation of RCW 42.17.530(1)(a). *See* Brief of Appellant at 22. While Rickert contends that her statement could be construed in several ways, it is really only susceptible to one meaning. Even if Washington had an "innocent construction" rule as espoused by Rickert, there is no other legitimate reading of her statement but that Senator Sheldon voted to close Mission Creek. However, that is a false statement and by making it, Rickert violated state law.

No case in Washington examines the application of RCW 42.17.530(1)(a) to specific facts. While it may be appropriate to consider cases from other jurisdictions that have similar statutory schemes,

Rickert's reliance on them is misplaced. Even under those cases, Rickert's statement, when evaluated using an objective standard examining the undisputed facts, would be deemed false.

In two cases finding falsity and actual malice, the Ohio Supreme Court determined that where a statement is susceptible to only one reasonable interpretation that is false, liability attached to the speaker. In *McKimm v. Ohio Elections Commission,* 89 Ohio St. 3d 139, 729 N.E.2d 364 (2000), the defendant argued that his speech was subject to an innocent interpretation, and therefore, not in violation of law.[4] 729 N.E.2d at 372. The Court determined that the political cartoon at issue was susceptible to only one "reasonable" interpretation - that the political candidate against whom it was offered had committed an illegal act.[5] *Id.* Therefore, the Court made a finding that the political ad was false, and then determined that it was published with actual malice. *Id.* at 374.

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[4] The rule in Ohio is that if an allegedly defamatory statement is subject to two meanings, one that is defamatory and one that is innocent, then the innocent meaning will be adopted.

[5] The political cartoon portrayed a human hand extended towards the reader from underneath the corner of a table, holding a bundle of cash, with small lines drawn so as to give the appearance of motion. *McKimm* at 366-68.

In *SEIU District 1199 v. Ohio Elections Commission,* 158 Ohio App. 3d 769, __ N.E.2d __ (2004)[6], the Ohio Supreme Court reiterated that a false statement is one that "sets forth matters which are not true," are "statements without grounds in truth or fact," and must have "some truth" in it to escape prosecution.[7] *Id.* at ¶18.

In Oregon, if a campaign statement is subject to any reasonable inference that would make the statement factually correct or merely an expression of opinion, then it is not false under Oregon's statute prohibiting false campaign statements. *Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers,* 296 Or. 195, 674 P.2d 1159, 1163 (1983). The Oregon courts require an examination of the "words in question to see whether, in any accepted way, the words can be said to be factually correct". *Id.* For example, in *Committee to Retain Judge Jacob Tanzer v. Lee*, 270 Or. 215, 527 P.2d 247 (1974), the Court considered a statement accusing an appellate judge of "making the decision" when the

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[6] This case is only recently published in the Ohio state reporter. It has not yet been published in the N.E.2d reporter. For the court's convenience, a copy of the opinion is contained in the Appendix to this Brief and all citations will be to the paragraph numbers in the case.

[7] The statement at issue in *SEIU* concerned the cost associated with the passage of a levy and was that passage of a ballot measure would cost homeowners an extra 60% in property taxes. The actual impact of the measure was that there would be a 60% increase in the amount of the health and human services tax, not in the total property tax assessment. The Court determined that the "reasonable reader" would interpret the statement to mean that all property taxes would be raised 60%, not just the health and human services tax. *Id.* at ¶20.

judge was only one judge on a panel. The Court determined that "[I]t is true, of course, that the 'decision' was that of the Court of Appeals, but it is *common practice* to refer to the judge who wrote the opinion for the court as the judge who 'decided' the case." 527 P.2d at 248-49. "The most that could be said about defendant's advertisement . . . is that the statements were ambiguous and might have permitted an erroneous inference to have been drawn therefrom." *Id.* at 249. In contrast to these Oregon cases, Rickert's statement is susceptible to only one meaning.

There is no other inference that can be drawn from the plain language of Rickert's statement, but that Senator Sheldon voted yes on the bill that closed Mission Creek. Rickert offers no reasonable argument for another reading. This case is unlike *Tanzer,* where the judge who authors a court decision is commonly viewed as having decided the case; or *Eivers*, where the end result of the proposed constitutional amendment could be an increase in property taxes. The only reasonable meaning of Rickert's statement was that Senator Sheldon cast a vote for a bill that closed Mission Creek.

In attempting to add either ambiguity or some portion of truth to her statement, Rickert argues that the word "vote" carries with it meanings that are simply not believable. Rickert's statement was made about an

elected Senator. When the average citizen thinks of a legislator "voting", no other definition comes to mind but that of the vote cast for or against a particular bill or law. The first definition of "vote" in *Webster's II New Riverside University Dictionary* is:

> A formal expression of preference for a candidate for office or for a proposed resolution of an issue.

*Id.* at 1295 (1988). The first definition of "vote" in *Webster's Seventh New Collegiate Dictionary* is "formal expression of opinion or will in response to a proposed decision." *Id.* at 998 (1965). When applied to Rickert's statement, these definitions lead to only one conclusion: Senator Sheldon cast a vote to close a facility for the developmentally challenged. There are no other reasonable readings of the language Rickert used than this false meaning.

**3. Rickert's statement was also false in describing the facility as serving the developmentally challenged.**

In addition to falsely stating that her opponent voted "Yes" on a bill when he had in fact voted "No," Rickert made a false statement about the Mission Creek facility. The PDC determined, based on the uncontroverted testimony, that the facility referred to in Rickert's statement is the Mission Creek Youth Camp and that Mission Creek was not a facility for the developmentally challenged. Mission Creek actually

housed criminally convicted juvenile offenders during the time it was open. AR 330, 338-39. Rickert acknowledged the falsity of her description shortly after the election and at the hearing. AR 142-43, 359.

Rickert testified that she got her information about Mission Creek from lobbyist Dave Wood, a man she had not met prior to the campaign. AR 357. Mr. Wood is an advocate for the developmentally disabled in Washington. AR 376-77. He testified that he was familiar with Mission Creek and did not believe that community members would call Mission Creek a facility to assist developmentally disabled individuals. AR 380; see also AR 357. He also told Rickert that she had mischaracterized Mission Creek. AR 168.

Rickert cites statutes in an attempt to support her argument about the purpose of Mission Creek. *See* Brief of Appellant at 24. These statutes do not support her argument, however. Chapter 28A.190 RCW sets forth educational programs under the supervision of the Department of Social and Health Services. Mission Creek is listed as a residential school under this program that is required to provide a program of education for its population. This statute has no bearing on the type of population housed at Mission Creek. Additionally, Chapter 72.05 RCW

provides the statutory framework for the juvenile rehabilitation program within the Department of Social and Health Services; it does nothing more than echo the testimony of Griffith. AR 341-42. More importantly, it was not information Rickert had before her when she published her statement. *Flannery v. Ohio Elections Commission*, 156 Ohio App. 3d 134, 804 N.E.2d 1032, 1039 (2004).

Given the undisputed facts in this case, when considered in light of the guidance provided in the Oregon and Ohio cases, the Court should affirm the PDC's determination that when Rickert stated that Senator Sheldon had voted to close Mission Creek, she made a false statement of material fact.

**4. Rickert's statement was made with actual malice.**

Once this Court concludes that her statement is a false statement of material fact, it must next evaluate whether the evidence supports the PDC's determination of actual malice. Actual malice is statutorily defined for the purposes of the campaign finance laws as acting with knowledge of falsity or with reckless disregard as to the truth or falsity of the statement. RCW 42.17.505. In this case, the PDC correctly found clear and convincing evidence of both actual knowledge by Rickert of the falsity of

her statement, and reckless disregard for the truth or falsity of her statement.

Actual malice is determined by an individualized analysis of the speaker's view and is determined as a matter of law. *McKimm, supra,* 729 N.E.2d at 373. In analyzing the speaker's view, the courts are mindful that self-serving testimony should not be allowed to "subvert the standard." *Id.* at 373-74. "[T]he defendant's ability to avoid liability with self-serving testimony is nevertheless limited." *SEIU 1199 v. Ohio Elections Commission, supra,* 158 Ohio App. 3d at_ (¶22).

> The fact finder must determine that the defendant's publication of a false statement was made in good faith. *Id.*
>
> A defendant lacks good faith to make a statement shown to be false where there is either no basis in fact for the statement or no information upon which the defendant could have justifiably relied in making the statement.

*Id.*

Rickert, by her own testimony, knew that Senator Sheldon had not voted to close Mission Creek. She testified that she relied on news articles when drafting her mailer, and that she read newspaper articles from April of 2002. AR 363-66. Each of these articles stated that Senator Sheldon voted against closing Mission Creek. AR 136, 250-553, 255. One article specifically states:

> As for his budget vote, Sheldon says he may be the only Democrat in the legislature who voted against the Mission Creek closure.

AR 252, 255. These articles, coupled with her reliance on them, demonstrate that she had actual knowledge of the fact that Senator Sheldon did not vote in favor of the bill that closed Mission Creek.

What Rickert argues at this time is simply an attempt to rewrite her false statement. Even community members she claims support her view do not. AR 245, 251. Her supporters say what Rickert could have said and not run afoul of the statute, i.e., that Senator Sheldon's actions or inactions surrounding the vote led to the closure of Mission Creek. *Id.* But that is not what Rickert printed in her mailer.

Rickert also testified, when asked by one Commissioner, that she actually knew of no vote taken either formally or informally by Senator Sheldon to close Mission Creek. AR 361. Based on this evidence, Rickert can hardly say that she did not know which way Senator Sheldon voted. Ample evidence exists to demonstrate that she had actual knowledge of Senator Sheldon's vote but printed just the opposite.

In addition to demonstrating Rickert had actual knowledge of the truth, Rickert's actions constitute reckless disregard as to the truth of her statement. Given that she knew how Senator Sheldon voted by her

reliance on published news articles, her mailer stating the opposite amounts to the recklessness that the statute prohibits.

Rickert appears to argue that the PDC staff had to prove that she was "plagued with serious doubts" as to the truth in order to satisfy its burden. The "actual "malice standard" does not require this showing, as set forth above. Despite her self-serving statements that she believes the truth of her statement, the weight of the evidence demonstrates that Rickert knew how Senator Sheldon voted, and acted with actual knowledge and reckless disregard, when she published the false statement about his vote.

Additionally, Rickert's description of Mission Creek as a facility for the developmentally challenged was made with reckless disregard of its truth. The evidence shows that Rickert did not know what Mission Creek was when she read about it in the newspaper. She guessed what kind of facility it was, given that constituents were upset about its closure and that Dave Wood was involved with advocating for those with disabilities. It was reckless to sponsor a statement under these circumstances.

The PDC correctly determined that Rickert's actions in publishing her false statement constitute actual malice as defined by RCW 42.17.505.

## B. RCW 42.17.530(1)(a) is Consistent with the First Amendment.

The State has a compelling interest in the integrity of its elections. The First Amendment does not protect false statements of material fact uttered with actual knowledge of falsity or with reckless disregard for the truth. RCW 42.17.530(1)(a) is narrowly tailored to prohibit only those calculated false statements that fall outside First Amendment protection.

### 1. The state has a compelling interest in promoting the integrity of its elections.

States have "a legitimate interest in preserving the integrity of their electoral processes." *Brown v. Hartlage,* 456 U.S. 45, 52, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 349, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Dewine v. Ohio Elections Commission,* 61 Ohio App. 2d 25, 399 N.E.2d 99, 103 (Ohio App. 1978) (it is a very compelling state interest to promote honesty in the election of public officers).

Washington State has promoted election integrity through many means, including through the vote of the people in favor of Initiative 276 in 1972. Initiative 276 was enacted as chapter 42.17 RCW . One of the public policies served by Washington's Public Disclosure Act is: "[T]he people have the right to expect from their elected representatives at all

levels of government the utmost of integrity, honesty and fairness in their dealings." RCW 42.17.010(2).

A statute that regulates political speech is reviewed under an exacting scrutiny analysis. *Public Disclosure Commission v. 119 Vote No! Committee,* 135 Wn.2d 618, 624, 957 P.2d 691 (1998) (hereafter "*119 Vote No!*").

**2. The First Amendment does not protect falsehoods made with actual malice.**

The First Amendment generally prevents government from proscribing speech. However, restrictions on the content of speech are permitted in a few limited areas "which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

"Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). In *Garrison*, the Court reiterated that knowing and deliberate lies are not protected by the First Amendment:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity ... Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.

379 U.S. at 75.

Ten years later, in *Gertz v. Robert Welch, Inc.,* the Court again confirmed that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues...". 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Even when speech occurs in political debate, deliberate falsehoods lack protection under the First Amendment. "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution."

> For the use of the known lie as a tool 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*, 379 U.S. at 75. Instead of encouraging the free flow of political speech, false speech "seeks to poison the stream, to deprive voters of free choice by diverting the intended exercise of the franchise to an unintended result." *Tomei v. Finley*, 512 F. Supp. 695, 698 (N.D. Ill. 1981).

Numerous United States Supreme Court decisions reiterate this principle: calculated falsehoods do not merit First Amendment protection. *See 119 Vote No!,* 135 Wn.2d at 641-43 (Talmadge concurring, and court cases cited therein.)[8]

Thus, the courts have rejected the First Amendment analysis Rickert makes in this appeal. Rather than providing blanket protection for all false statements, the courts have adopted a different approach. In order to ensure that protected speech about public figures is not "chilled," the courts allow some regulation of speech, but have set high standards of intent and proof. In order to lose First Amendment protection, there must be clear and convincing evidence that a false statement of fact relating to a public figure was made with actual knowledge of its falsity or with reckless disregard for its truth or falsity. *New York Times v. Sullivan*, 376

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[8] *Brown v. Hartlage, supra,* 456 U.S. 45, at 60; *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 52, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) ("Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech'"); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) ("But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function); *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) ("Neither lies nor false communications serve the ends of the First Amendment."); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) ("[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."); *Vanasco v. Schwartz*. 401 F. Supp. 87, 93 (S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 630 (1976) ("[W]e can agree with the Board's argument that calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected.").

U.S. 254, 271-72, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Garrison, supra,* 379 U.S. at 74; *Gertz v. Welch, supra,* 418 U.S. at 334.

> "[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 ....only those false statements made with the high degree of awareness of their probable falsity ... may be the subject of either civil of criminal sanctions.

*Garrison*, 379 U.S. at 74-75 (quoting *New York Times v. Sullivan*, 376 U.S. at 271-72) (emphasis added). There are, therefore, evidentiary hurdles that must be overcome to punish false statements: a high standard of proof, i.e., clear and convincing evidence; a statement of fact, not of opinion; and knowing or reckless disregard for the truth. The "breathing space" left by this high standard means some false statements will go unpunished. However, it is this "breathing space" that protects citizens' First Amendment right to engage in open debate. Contrary to Rickert's argument, the First Amendment allows states to penalize false statements, so long as the state law imposes this high standard of proof and the requirement to show "actual malice", i.e., knowing or reckless disregard for the truth.

### 3. A majority of the Washington Supreme Court recognized that deliberate falsehoods lack First Amendment protection in *Public Disclosure Commission v. 119 Vote No! Committee.*

The Washington Supreme Court addressed false campaign speech in *Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998). That case dealt with the previous version of RCW 42.17.530, and the PDC's determination that a political committee violated the statute when it published a flyer opposed to a ballot measure. The Court was in agreement that the political committee had not violated RCW 42.17.530.[9] However, the members of the Court did not agree on how to apply the First Amendment to RCW 42.17.530. The Court issued four separate opinions, taking different views on the constitutional issue. The lead opinion, representing the view of three justices and authored by Justice Sanders, is sometimes referred to as the "majority" opinion.[10] However, the lead opinion – which concluded that the First Amendment prohibits the Washington Legislature from penalizing campaign related falsehoods under any circumstances – was not the majority view of the Court with respect to the First Amendment.

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[9] *See* Justice Talmadge's concurring opinion, concluding that the Committee did not violate RCW 42.17.530, because it made a statement of opinion, not of fact. 135 Wn.2d at 656.

[10] *See, e.g.*, Justice Guy's concurring opinion, 135 Wn.2d at 633.

In his concurring opinion, Justice Guy, joined by Justice Durham, stated that:

> Calculated lies are not protected political speech. The elected representatives of the people have a right to pass laws which make malicious lying illegal in political campaigns; we have no constitutional duty to strike down such laws.

135 Wn.2d at 633.

Justice Talmadge (joined by Justice Johnson) set forth in detail the United States Supreme Court cases holding that deliberate lies have no First Amendment protection. 135 Wn.2d at 641-43. This opinion adopted the same conclusion as every court in the nation to consider the issue: that there is no First Amendment protection for calculated lies, so long as the rigorous protections of *New York Times v. Sullivan* are present. *See* 135 Wn.2d at 636.

Justice Madsen, joined by Justice Alexander, wrote that, while she believed RCW 42.17.530(1)(a) as applied to initiative measures was facially unconstitutional:

> I am not convinced that the same is true where a statement contains deliberate falsehoods about a candidate for public office. . . . [t]here is merit to the contention that the Legislature may constitutionally penalize sponsorship of political advertising of such a nature by enacting a narrower statute than RCW 42.17.530.

135 Wn.2d at 633. Justice Madsen analyzed Supreme Court opinions which allowed public figures to bring defamation suits. *Id.* at 634-35. Based on these opinions, she concluded that "there is merit to the contention that the Legislature may constitutionally penalize sponsorship of political advertising" containing "deliberate falsehoods about a candidate for public office":

> Thus, 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. A state, in short, may allow recovery of damages for defamation to public officials, including candidates for public office, provided that the *New York Times* actual malice standard is satisfied. Accordingly, although there is no case directly on point, 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.

135 Wn.2d at 635.

Thus, four justices expressly stated that deliberate falsehoods about a political candidate are not protected. Justices Madsen and Alexander's opinion stated that it is reasonable to analogize to the law of defamation as a basis for authorizing a state to prohibit false statements in political campaigns. Thus, a majority of the Washington Supreme Court concluded that the Legislature may, consistent with the First Amendment, prohibit

citizens from sponsoring deliberate false statements about candidates for political office.

Rickert's position relies to an unwarranted extent on Justice Sanders' opinion in the Washington Supreme Court's decision in *119 Vote No!*. That opinion attracted the vote of only three of the nine justices on the issue here: whether the First Amendment allows states to ban calculated falsehoods about candidates in political campaigns. 135 Wn.2d at 632. Nevertheless, Rickert's brief cites to Justice Sanders' First Amendment analysis as if it were the holding of the case. *See* Brief of Appellant at 33-35, 36-38, 42, 50. Rickert's argument in this regard ignores the fact that six justices disagreed with Justice Sanders' analysis of the First Amendment.

**4. The current version of RCW 42.17.530 meets exacting scrutiny.**

In 1999, the Legislature amended RCW 42.17.530 in response to the *119 Vote No!* decision. RCW 42.17.530(1)(a) is now limited to candidates, and does not apply to ballot measures. The Legislature adopted the following findings with regard to the 1999 amendment:

> (1) The Washington supreme court in a case involving a ballot measure, *State v. 119 Vote No! Committee*, 135 Wn.2d 618 (1998), found the statute that prohibits persons from sponsoring, with actual malice, political advertising containing false statements of material fact to be invalid

> under the First Amendment to the United States Constitution.
>
> (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.

In addition to the fact that RCW 42.17.530(1)(a) is now limited to candidates, it continues to impose the high standards of proof demanded by the First Amendment jurisprudence set forth above: first, a clear and convincing evidence standard; and second, a requirement to prove actual knowledge of falsity or reckless disregard for the truth. Furthermore, the statute applies only to false statements of material fact.

The First Amendment analysis adopted by the three concurring opinions in *119 Vote No!* is consistent with an earlier Washington Supreme Court decision that knowing false statements are not protected by the First Amendment. *In re Donohue*, 90 Wn.2d 173, 181, 580 P.2d 1093 (1978), concluded with regard to statements about candidates in judicial elections:

> [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 . . . On balance, such statements are not deserving of constitutional protection.

The Court disciplined Donohue under the Rules of Professional Conduct for attorneys, not for misleading statements, but only for her "intentional and deliberate pattern of making false statements of fact." 90 Wn.2d at 182.

As amended, RCW 42.17.530 meets the constitutional criteria required by the United States and Washington Supreme Courts when addressing issues of false statements about public figures in political campaigns.

**5. Other states' statutes prohibiting deliberate false statements have been upheld as constitutional.**

At least seventeen other states have enacted laws similar to RCW 42.17.530.[11] In constitutional challenges to these state statutes, the courts have accepted the principle established by the United States Supreme Court: calculated false statements of fact, when made with

[11] Alaska Stat. §15.56.012; Colo. Rev. Stat. Ann. §1-13-109; Fla. Stat. Ann. §104.271; La. Rev. Stat. Ann. §18:1463(C); Mass. Gen. Laws ch. 56, §42; Minn. Stat. §211B.06; Miss. Code Ann. §23-15-875; Mont. Code Ann. §13-35-234, amended by Mont. Code Ann. §13-35-301,302; Nev. Rev. Stat. Ann. §294A.345(1); N.C. Gen. Stat. §163.274(8); N.D. Cent. Code §16.1.10.04; Ohio Rev. Code Ann. §3517.21(B); Or. Rev. Stat. §260.532; Tenn. Code Ann. §2-19-142; Utah Code Ann. §20A-11-1103; W.Va. Code §3-8-11(c); Wis. Stat. §12.05.

actual malice or reckless disregard for the truth, are not entitled to protection even when such statements are made in political campaigns.

In litigation involving an Ohio statute, the courts have recognized that states may prohibit this narrow category of speech. *Briggs v. Ohio Elections Commission*, 61 F.3d 487, 494 (6th Cir. 1995); *Pestrak v. Ohio Elections Commission*, 926 F.2d 573, 577 (6th Cir. 1991); *Dewine v. Ohio Elections Commission*, 61 Ohio App. 2d 25, 399 N.E.2d 99, 103 (Ohio App. 1978). An early version of the Ohio statute did not have the necessary high standard of proof, clear and convincing evidence. *Pestrak*, 926 F.2d at 578. In *Briggs*, the court found the campaign statement to be ambiguous, and therefore not within the prohibition of the statute. 61 F.3d at 494. However, in a recent case, the constitutionality of the current version of the Ohio statute was assumed when the Ohio Supreme Court affirmed a reprimand issued by the Ohio Elections Commission for a false campaign statement. *McKimm v. Ohio Elections Commission*, 89 Ohio St. 3d 139, 729 N.E.2d 364, 373 (2000).

There are additional authorities which have recognized that statutes similar to RCW 42.17.530 are constitutional: *Committee to Elect Gerald D. Lostracco v. Fox*, 150 Mich. App. 617, 389 N.W.2d 446, 449 (Mich. App. 1986) (knowing misrepresentations are not constitutionally protected

speech); *Snortland v. Crawford*, 306 N.W.2d 614, 623 (N.D. 1981) (statute prohibiting false campaign statements must contain an actual malice standard comparable to that set forth in *Garrison v. Louisiana);* and *Commonwealth v. Wadzinski*, 492 Pa. 35, 422 A.2d 124, 129-30 (Pa. 1980) (a court may sustain the validity of a statute if its scope is limited to false campaign statements knowingly or recklessly made).

Finally, in *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988), the United States Supreme Court seemed to approve of Colorado's statute prohibiting false statements. While finding unconstitutional the statute at issue in that case (Colorado's statute banning the use of paid initiative petition circulators), the Supreme Court stated that other Colorado statutory provisions were sufficient to minimize improper election conduct. In particular, Colorado's statute prohibiting the use of false statements was one of several provisions "adequate to the task of minimizing the risk of improper conduct." 486 U.S. at 427. The Court made a similar suggestion in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 & n.12, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), in support of its decision to strike down as unconstitutional an Ohio statute prohibiting anonymous political leaflets.

These court decisions from outside of Washington State are consistent with the Washington Supreme Court's *In Re Donohue* decision, and the First Amendment analysis adopted by the majority of the court in *119 Vote No!*. This court should adopt, in this case, the analysis that has been consistently applied in Washington and other states, and uphold the constitutionality of RCW 42.17.530(1)(a).

### C. Rickert's Arguments Fail to Show a Constitutional Infirmity.

#### 1. Rebuttal is not an effective method of counteracting false statements, nor is it constitutionally required.

Rickert argues that more speech is the only constitutionally permissible remedy for false campaign statements. *See* Brief of Appellant at 33, 34, 37. This argument ignores the cases discussed above, which held that deliberate falsehoods fall outside the protection of the First Amendment.

Moreover, the United States Supreme Court has recognized that rebuttal is sometimes not effective: "[A]n opportunity for rebuttal seldom suffices to undo harmful defamatory falsehood. Indeed, the law of defamation is rooted in our experience that *the truth rarely catches up with the lie.*" *Gertz v. Welch, supra*, 418 U.S. at 345 & n.9 (emphasis added).

Rather than rely on speculation that rebuttal might offer a solution to false statements, the Legislature has found that rebuttal is an inadequate

solution for the electorate. The opponent may be initially unaware of the false statement. The opponent may be unable to rebut false statements made at the last minute. The respondent may simply feel that effective rebuttal is impossible to achieve. *See Gertz*, 418 U.S. at 345 & n.9.; *see also* Jack Winsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 Emory L.J. 853, 889-91 (1987).

In support of her argument, Rickert cites to a concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 2d 430 (1945). This case relates to a Texas statute requiring labor organizers to obtain a license. The Supreme Court reversed a state court restraining order issued against a national union president who had traveled to Texas to give a speech, but had not obtained a Texas state license. *Thomas v. Collins* does not support Rickert's argument here, because it did not relate to deliberate false statements, a category of speech that does not enjoy the same kind of protection as the speech at issue in *Thomas*.

Rickert also relies on a law review article, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992). This article did not explain how its viewpoint was consistent with United State Supreme Court jurisprudence such as *New York Times v. Sullivan, Gertz v. Robert Welch,* or *Garrison v. Louisiana,*

*supra.* *See* Justice Talmadge's concurring opinion in *119 Vote No!*, 135 Wn.2d at 645-46 ("then-Professor Fried did not discuss the rationale for his assertion...."). This article does not deserve any particular deference or weight as compared to articles by other authors. For example, another commentator has reached a different conclusion based on an analysis of court decisions. *See* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. Pa. L. Rev. 285, 287 (2004) ("Generally, deliberately false statements have been held not to raise First Amendment concerns.").

Rebuttal is frequently an ineffective means of achieving honest elections. The First Amendment allows states to enact laws prohibiting deliberate false statements as a means to promote integrity and honesty in state elections.

**2. RCW 42.17.530 is not "under inclusive" or "viewpoint based."**

Rickert's argument in this regard is premised on the incorrect notion that a candidate in Washington "can freely make false statements about herself." *See* Brief of Appellant at 44. This argument is incorrect. Subsections (1)(b) and (1)(c) of RCW 42.17.530 prohibit two types of statements a candidate could make about herself, namely that she is an incumbent, or that she has received an endorsement. Therefore, the

Legislature has identified some types of false campaign speech that are prohibited regardless of whether they are made about oneself or one's opponent.

Furthermore, Rickert's argument rests on a misinterpretation of *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Contrary to Rickert's argument, if a state wishes to regulate unprotected speech, the Constitution does not require the state to prohibit the entire category of unprotected speech. "We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content – based discrimination within a proscribable area of speech." *Virginia v. Black*, 538 U.S. 343, 361, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Rather, the United States Supreme Court has specifically stated that some types of content discrimination do not violate the First Amendment. *Virginia v. Black*, 538 U.S. at 361. In an area of unprotected speech –like calculated falsehoods – a state may choose to prohibit only a subset of that unprotected speech. This principle holds true so long as the state does not single out and prohibit only "specified disfavored topics". *R.A.V.*, 505 U.S. at 391; *Virginia v. Black*, 538 U.S. at 362.

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged

> neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

*Virginia v. Black*, 538 U.S. 361-62, quoting *R.A.V.*, 505 U.S. at 388.

Thus, it is constitutional to ban only those threats of violence that are directed at the President; or only that obscenity which is the most offensive. *Virginia v. Black*, 538 U.S. at 362. Similarly, it is constitutional to make it a crime to engage in one kind of intimidation - cross burning:

> Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages ... a State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.

538 U.S. at 363.

Like obscenity and threats of bodily harm, calculated falsehoods about public figures, made with actual malice, are not protected by the First Amendment. The First Amendment does not require the Washington Legislature to prohibit all calculated campaign falsehoods, as Rickert suggests. The Legislature has made two statements of policy regarding Chapter 42.17 RCW and RCW 42.17.530. The first is that elected representatives should have the utmost honesty, fairness, and integrity. RCW 42.17.010(2). The second is "protection for candidates for public office against false statements of fact sponsored with actual malice."

Legislative Findings, Laws of 1999, ch. 304, §1(3) (interpreting the views of a majority of justices in *119 Vote No!*).

The Legislature's rationale in adopting RCW 42.17.530 is the same rationale used by the United States Supreme Court when it excludes calculated falsehoods from First Amendment protections. First, "[t]he known lie as a tool is ... at odds with the premises of democratic government." *Garrison v. Louisiana, supra,* 379 U.S. at 75. Second, even public figures may be protected from falsehoods made with actual malice or with reckless disregard for the truth. *New York Times v. Sullivan, supra*, 376 U.S. at 279-80.

RCW 42.17.530 is neither under inclusive nor viewpoint based. It favors neither incumbents nor their opponents. It does not favor those who have held public office over those who have not. It does not favor some topics of public debate over another. It does not prohibit speech based on the identity of the speaker. What RCW 42.17.530 does is identify three types of false campaign statements that, in the Legislature's view, are the most harmful to honest elections and candidates' interests: statements about others made with actual malice, statements about incumbency, and statements about endorsements. The First Amendment allows the Washington Legislature to make the determination that it will

prohibit only certain types of campaign falsehood. The Legislature, therefore, consistent with the Constitution, may determine that lies about opponents pose the greater risk to election integrity when compared to lies about oneself.

This court should reject Rickert's attempt to put at issue in this appeal a recent PDC decision in a different case. *See* Brief of Appellant at 44-45, discussing *In Re Jefferson County Republican Central Committee*, PDC No. 04-288 (2004). The correctness of that PDC decision must be determined by judicial review on the record of that case.[12] Moreover, Rickert does not correctly state the facts of that case: she fails to mention that the PDC found, after a fact finding hearing, that candidate Rose wrote articles for the Los Angeles Times, when his opponent's ad stated that "all he did was write a letter to the editor." Moreover, Rickert's argument attempts to equate lies with "self aggrandizing statements." Lies are false statements of fact, and are subject to the prohibition of RCW 42.17.530(1)(a) "Self aggrandizing statements" are different than lies; opinions and hyperbole are not statements of fact and, therefore, not within the scope of RCW 42.17.530(1)(a). Contrary to Rickert's description of the *Jefferson County Republicans* case, Rose's opponents

[12] RCW 34.05.558 and .570. This court does not have the PDC Final Order or the fact finding hearing record for the *Jefferson County Republicans* case.

were free to point out that Rose's statements were exaggerations, as long as they did so truthfully. However, the PDC determined that Rose's opponents made a false statement of fact, knowing the statement to be false or with reckless disregard as to its truth. That is why the PDC found a violation of RCW 42.17.530(1)(a).

The First Amendment, as interpreted by the United States Supreme Court, does not require the Washington Legislature to prohibit all types of deliberate campaign false statements. Rickert's argument to that effect must fail.

### 3. The 1999 amendment narrowed RCW 42.17.530 in response to *119 Vote No!*, but is not required to incorporate all features of defamation law.

Justice Madsen's opinion in *119 Vote No!* concluded, given that the First Amendment allows defamation actions by public officials, that it is reasonable to prohibit political advertising containing false statements of fact made with actual malice made about political candidates. This opinion was the model for the 1999 amendment to RCW 42.17.530, in which the Legislature attempted to narrow the statute to comply with the views of the court's majority. *See* Laws of 1999, ch. 304, §1(3). Rickert makes an unwarranted leap of logic when she argues that every feature of a defamation lawsuit must be present in RCW 42.17.530.

Rickert argues that "speech that defames no one should not be regulated." *See* Brief of Appellant at 41. However, the two citations provided by Rickert do not state that proposition.[13] Moreover, the citation to *Simon & Schuster v. New York Crimes Victim Board* is to a concurring opinion that was not adopted by a majority of the court.

Contrary to Rickert's argument, courts have approved the regulation of false political speech where there was no defamation, relying on precedent holding that deliberate falsehoods do not enjoy First Amendment protection. Even though not defamatory, because no one's reputation was impugned by the false statements, courts have held such speech is not constitutionally protected. The Washington Supreme Court did so in *In re Donohue, supra*, 90 Wn.2d 173, 178-79 (false statements of fact concerning incumbent judge's rulings.) Courts in other states have made similar decisions. *Dewine v. Ohio Elections Commission, supra*, 399 N.E.2d 99, 101 (false statements regarding opponent's record as a prosecutor); *Committee to Elect Gerald D. Lostracco v. Fox, supra*, 389 N.W.2d 446, 447 (candidate falsely implied he was an incumbent circuit court judge); *Tomei v. Finley, supra*, 512 F. Supp. 695, 696-97

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[13] *R.A.V. v. City of St. Paul, supra,* 505 U.S. at 382-83; *Simon & Schuster v. New York Crimes Victim Board,* 502 U.S. 105, 126-28, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

(false representation about a candidate's party affiliation); *Schmitt v. McLaughlin,* 275 N.W.2d 587, 590 (Minn. 1979) (false claim of party endorsement).

Rickert argues she must be tried by a jury, as she would be if she were a defendant in a defamation lawsuit.[14] However, a PDC enforcement action and a defamation action are not identical. A plaintiff in a defamation suit sues for damages. The potential for large, multiple defamation judgments is a major factor that may chill speech. *New York Times v. Sullivan*, 376 U.S. at 277-78. The PDC imposes a monetary penalty far less than the potential defamation damages.[15]

Rickert argues that the PDC should not decide false speech cases because administrative agencies are "political organs." *See* Brief of Appellant at 48-49. It is true that many federal and state agency heads serve at the pleasure of a president or governor. PDC commissioners, however, are insulated from pressure – political or otherwise – in the respect that they may not be removed from office at will.[16] Moreover,

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[14] Rickert's citation to *Ross v. Bernhard*, 396 U.S. 531, 535, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970), in this regard is misleading. *Ross* was not a defamation action.

[15] Rickert's penalty was $1,000. The PDC's maximum penalty authority is $1,000 per violation. RCW 42.17.395(4). If the PDC believes that a penalty should be higher than $1,000, it is authorized to refer the matter to the Attorney General, who may then file an enforcement action in court. RCW 42.17.395(3); *see also* RCW 42.17.400.

[16] Members "may be removed by the governor, but only on grounds of neglect of duty or misconduct in office." RCW 42.17.350(2).

Rickert's argument relies on, and cites selectively to, only a portion of a law review article to make this point. The article actually supports the PDC here, because the article acknowledges that administrative agency fact finding is constitutionally sufficient if a party has access to counsel, cross-examination, and judicial review based on the agency's record. Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 524, 526, and 531 (1970). All of these protections are part of any PDC enforcement proceeding.

Rickert argues that an administrative agency should not decide false speech cases and cites *Pestrak v. Ohio Elections Commission, supra,* and *Vanasco v. Schwartz,* 401 F. Supp. 87 (E.D. and S.D. N.Y. 1976), *summarily aff'd* 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 630 (1976). *See* Brief of Appellant at 48. Both cases are distinguishable, however. Neither the Ohio nor New York statutes at issue in those cases had the procedural protections present in RCW 42.17.530(1)(a). Unlike RCW 42.17.530(1)(a), the Ohio statute did not impose a clear and convincing evidence standard of proof. In *Pestrak,* the court's concern was not solely that an administrative agency made decisions; rather, it was that the agency would not use the high standard of proof required by *New York Times v. Sullivan. Pestrak,* 926 F.2d at 578. The New York statute

contained many infirmities: it was overbroad, because it prohibited misrepresentation and did not require "actual malice"; it did not impose a high standard of proof; and it lacked a clear path to judicial review. 401 F. Supp. at 96-99. In contrast, RCW 42.17.530(1)(a) applies only to false statement of fact; is subject to judicial review (RCW 42.17.397(5)); and requires proof of actual malice (RCW 42.17.505) by a clear and convincing standard (RCW 42.17.530). Rickert has cited no authority that concludes that decision-making by an agency is, standing alone, sufficient to strike down a state law prohibiting false statements in political campaigns.

A person charged with violating RCW 42.17.530(1)(a) has the right to a fact finding hearing, and a clear path to appeal administrative decisions to the state courts. There is, therefore, no constitutional infirmity, and this Court should uphold the constitutionality of RCW 42.17.530(1)(a).

## VI. CONCLUSION

Rickert violated RCW 42.17.530(1)(a) when she sponsored a mailing stating that Senator Sheldon had voted to close Mission Creek, when, in fact, Senator Sheldon had voted "no" on the bill that closed the facility.

The First Amendment does not protect Rickert's false statement of fact. Rickert made the false statement with actual knowledge of and reckless disregard for its truth. The State of Washington may, consistent with the First Amendment, penalize Rickert for this false statement of fact.

For the foregoing reasons, this court should affirm the PDC's decision in its entirety.

RESPECTFULLY SUBMITTED this 22 day of February, 2005.

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