NO. 32274-9-II

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.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Case No. No.: 03-2-01698-2
Honorable Paula Casey

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Marilou Rickert did not violate RCW 42.17.530. Sen. Sheldon's voting with respect to Mission Creek was the subject of legitimate political disagreement and was thus not capable of a definitive "true" or "false" description. Even if the Statement can be characterized as false for purposes of the Statute, Rickert did not harbor the serious doubt required under the actual malice standard.

Alternatively, the Statute violates the First Amendment to the United States Constitution, and the pronouncement of the Washington Supreme Court in State ex rel. Public Disclosure Commission v. 119 Vote No! Committee, that the state has no business regulating the truth or falsity of statements made in political campaigns. The current version of the Statute results in a patch-work regulatory scheme in which public officials—those best able to protect themselves against attacks on their reputation—are awarded special status. This results in a law that is both not narrowly tailored and frighteningly reminiscent of a sedition law.

II. DISCUSSION

A. THE STATEMENT CAN BE INTERPRETED AS ACCURATE, AND THEREFORE IS NOT FALSE

1. The innocent construction rule controls.

There is no good reason to reject the rule that where a statement is

capable of both a true and an inaccurate interpretation, courts give speakers—particularly those engaging in political speech—the benefit of the doubt and find the statement to be true. Courts in Oregon and Ohio have noted its particular relevance in the context of political speech, where speakers are given wider latitude. *See* Committee of One Thousand to Re-elect Brown v. Eivers, 296 Ore. 195, 205, 674 P.2d 1159 (1983); Briggs v. Ohio Elections Comm., 61 F.3d 487, 494 (6th Cir. 1995). Justice Talmadge's concurrence in Public Disclosure Commission v. 119 Vote No! Committee, 135 Wn.2d 618, 957 P.2d 691 (1998), also endorsed this rule.

In adopting the innocent construction rule, Eivers noted that a narrow construction of the term "false statement of material fact," (*i.e.*, one that would find statements with possible accurate constructions to not be false) was appropriate, given "the potential impact [of the statutory language] on political speech." Eivers, 296 Ore. at 205. Eivers rejected an approach that would allow the jury to decide which of the two meanings of a statement were operative, saying that in the context of political speech such an approach was inappropriate. Id. Applying that standard to the Statement yields the conclusion that it is capable of an accurate construction, and therefore, not false.

2. The phrase "voted to close" has multiple meanings in the context of a political debate over contrasting governmental philosophy.

The PDC insists that the only possible meaning of the phrase "voted to close Mission Creek" is a vote in favor of SB 6387 in 2002. In the context in which the Statement was made, however, the phrase can just as easily mean "acted in the legislature in a manner that closed Mission Creek." As explained above, Rickert does not have the burden of proving that her interpretation is the most plausible one, or the one that most voters drew from the language. She only needs to show that it is a possible interpretation, and there is ample evidence to support that contention.

The Statement itself does not refer to SB 6387 or to the state budget. When asked at the PDC hearing whether a particular bill regarding Mission Creek had been a campaign issue, Rickert testified: "Not so much with regard to a particular bill. The general tenor [of] his voting behavior with respect to that facility did become an issue." AR 356. She testified that "I'm not referring to a single vote" in the Statement:

> there are many different types of votes that are taken. Some are recorded, some aren't. There are procedural votes that may result in a bill either dying or being brought to the floor or being resurrected that may or may not be, be recorded. There are votes in committee, there are votes outside of committee. There are a number of different ways that a legislator can vote and so when I made that statement I was relying on a lobbyist of, I believe more than 10 years,

> [who] advocates for severely mentally retarded people who would of course be present at any of those sessions. And I understood him to have said that Senator Sheldon voted in a way that resulted in the closure of Mission Creek. However, I did not have a specific bill in mind when I made that statement.

(AR at 357.) One of the recent bills relating to Mission Creek was SB 6155 from 2001, a biennial budget bill that included an appropriation of $2 million to operate Mission Creek. Sen. Sheldon voted against it. (*See* http://www.leg.wa.gov/pub/billinfo/2001-02/Senate/6150-6174/6155_rollcall.txt, last accessed March 25, 2005 (attached as **Appendix A-1** hereto).) From votes like this, and from Sen. Sheldon's unwillingness to use his influence to make deals that would have retained Mission Creek in the 2002 supplemental budget, he earned a reputation as a legislator who would not use his vote to ensure funding for Mission Creek.

In light of these facts, a political opponent could fairly argue that Sen. Sheldon's pattern of votes caused closure of Mission Creek. Sen. Sheldon could fairly argue the opposite. Neither of them would be making false statements of fact; both of them would be making debatable statements of political opinion. "An opinion is not subject to the statute's reach." 119 Vote No!, 135 Wn.2d at 655 (Talmadge, J., concurring). In determining whether a statement is fact or opinion—a question of law—"the court should consider the entire communication, not particular portions

of it." Id. Rickert's advertisement taken as a whole, reflects a clash of political opinions, where Rickert argued that Sen. Sheldon was more conservative than the voters of the district wanted. The same is true of the Statement taken in isolation. It is capable of a truthful interpretation.

Appellant's Opening Brief (at pp. 23-24) gave examples of how "vote for," and "vote against," are not self-defining terms. Another recent example illustrates this point. The United States Congress recently passed S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Because the bill was perceived as effecting a hardship on the average person while benefitting more wealthy creditors and credit card companies, Democratic Senators such as Joseph Lieberman voiced public opposition and voted against the final version of the bill. However, it was debatable whether it was accurate to say that "Senator Lieberman voted against the bill". It may be equally accurate to say that "Senator Lieberman voted for the bill," because the critical vote with respect to the bill was not the final vote but rather the cloture vote, which would have extended debate on the bill, and delayed or prevented its consideration. As noted by one commentator:

> **the best chance to stop the bankruptcy bill was not on the final vote. The decisive vote was an earlier cloture vote**. And Lieberman voted yes on that. Probably, after passage was inevitable, he switched from yes to no in order

to spare himself more criticism from the left.

Jonathan Chait, TALKING POINTS MEMO, March 14, 2005 (<http://www.talkingpointsmemo.com/archives/week_2005_03_13.php#005154>, last viewed March 15, 2005 (emphasis added) (attached as **Appendix A-2** hereto).) New York Times commentator Paul Krugman also thought that Sen. Lieberman's final vote did not indicate his true stance:

> But many Democrats chose not to take that stand [in favor of consumers]. And **Mr. Lieberman was among them: his vote against the bill was an empty gesture**. On the only vote that opponents of the bill had a chance of winning — a motion to cut off further discussion — he sided with the credit card companies. **To be fair, so did 13 other Democrats. But none of the others tried to have it both ways.**

Paul Krugman, The $600 Billion Man, THE NEW YORK TIMES (op-ed), March 15, 2005 (emphasis added) (attached as **Appendix A-3** hereto).

In this present case, Sen. Sheldon similarly wants to have it both ways. Sen. Sheldon voted in a manner that was contrary to the interests of Mission Creek by opposing its funding in 2001, but when his record became a campaign issue, he wanted to proclaim support. Rickert was entitled to form an opinion with respect to this politically disputed issue and express it to voters.

3. Mission Creek can be accurately described as a facility for developmentally challenged individuals.

The PDC acknowledges PDC investigator Sally Parker's testimony

that the term "developmentally challenged" is not a term of art, and does not have an accepted meaning. (Response, p. 5.) The PDC then quotes Ms. Parker as saying that "Mission Creek was not a facility for the developmentally challenged." (Id.) If the term does not have an accepted meaning it would not be possible to say whether or not the term applied to Mission Creek. Notwithstanding Ms. Parker's testimony, the legislature of the State of Washington clearly considered Mission Creek to be a facility for developmentally disabled individuals as well as juvenile delinquents. Section 020 of Chapter 28A.190 refers to Mission Creek as "[a facility] established by the department of social and health services for the diagnosis, confinement and rehabilitation of juveniles committed by the courts **or for the care and treatment of persons who are exceptional in their needs by reason of mental and/or physical deficiency**." (*See* RCW § 28A.190.020 (emphasis added).) Similarly, the legislature established the Department of Children and Youth services to provide for:

> every child with behavior problems, mentally and physically handicapped persons, and hearing and visually impaired children . . . such care, guidance and instruction, control and treatment as will best serve the welfare of the child or person and society; to insure nonpolitical and qualified operation, supervision, management, and control of . . . Mission Creek Youth Camp.

RCW § 72.05.010. For purposes of characterization of Mission Creek, the definition used by the state legislature should control. At worst, the

legislative designation should be given weight as an alternative definition.

B. THE PDC MISAPPLIES THE ACTUAL MALICE STANDARD

1. The issue on appeal involves the accusation of reckless disregard.

The New York Times v. Sullivan standard, as codified by RCW 42.17.505, defines "actual malice" as either actual knowledge of falsity or reckless disregard as to truth or falsity. Judge Casey's order refused to affirm the PDC's finding of actual knowledge. (CP 33.) The PDC did not assign error to this refusal. Therefore, the only way to find actual malice in this case is on a theory of reckless disregard.

On appeal of the reckless disregard issue, this court is not bound by the trial court findings. It must conduct a searching independent review of the record "in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed. 502 (1984); *see also* State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004).

2. Failure to investigate is not equivalent to reckless disregard.

The PDC argues that it satisfies its burden if it shows that Rickert failed to adequately investigate the underlying facts—*i.e.*, that the PDC is not required to satisfy a subjective element. For example, the PDC faults Rickert for "guess[ing] what kind of facility [Mission Creek] was," and for

"her reliance on published news articles," while failing to investigate those articles. (Response, p. 22.) This analysis fails to capture the appropriate standard. A speaker acts with reckless disregard when there are subjective doubts about accuracy that are ignored in a rush to publish. (Opening Brief, pp. 26-27.)

Washington courts have adopted the "actual malice" standard articulated by the United States Supreme Court in New York Times v. Sullivan. *See, e.g.*, Margoles v. Hubbart, 111 Wn.2d 195, 200, 760 P.2d 324 (1988) (citing St. Amant v. Thompson, 390 U.S. 727 (1968)). The legislature expressly incorporated this standard into the Statute, amending the Statute in 1998 to require actual malice. Laws of 1988, ch. 199, § 1. This line of cases interpreting the actual malice standard repeatedly reject the PDC's assertion that actual malice can be satisfied by showing that the speaker negligently failed to verify her sources. In St. Amant, a case following New York Times v. Sullivan, the Court explicitly rejected the negligence standard, and held that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 730, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); *see also* Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 507 (3d Cir. 1978) ("the Supreme Court has made it clear that the "recklessness" component of

"actual malice" cannot be inferred simply from the failure to act in conformity with the conduct of a prudent or reasonable person"). St. Amant expressly held that actual malice in this context contained a subjective component. The Court required "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. To the extent that the PDC rejects this standard (*see* Response, p. 22), it is wrong. (*See* Opening Brief, p. 26 (citing Margoles, 111 Wn.2d at 205).)

The evidence cited by the PDC only points to Rickert's supposed lack of diligence in investigating the Statement. The PDC does not put forth any evidence that Rickert either entertained serious doubts regarding the veracity of the Statement or that Rickert harbored any ill will towards Sen. Sheldon that would have caused her to deliberately lie. The PDC argues that Rickert could not point to a specific vote by Sen. Sheldon that resulted in the closure of Mission Creek, and that Rickert read several news articles regarding Sen. Sheldon's role in the closure of Mission Creek. (Response, pp. 20-21.) Those articles presented his role in the closure of Mission Creek as a disputed issue, and could hardly form the basis for Rickert's knowledge of the alleged falsity of the Statement. If anything, the articles *support* Rickert's position that she reasonably believed that Sen. Sheldon had responsibility for closing the facility. *See* section 3, below.

This case is therefore indistinguishable from Faxon v. Michigan Republican State Central Committee, which noted how "actual malice in this specific legal context [*i.e.*, political campaigns] has a particularly narrow meaning." Faxon v. Michigan Republican State Central Committee, 244 Mich. App. 468, 474, 624 N.W.2d 509 (Mich. Ct. App. 2001) (citing Harte-Hanks, Inc v Connaughton, 491 U.S. 657, 667 (1989)). Faxon arose in a similar context to this case. A third party made statements about Faxon, a former state legislator, that were intended to inform voters about Faxon's abuse of his legislative immunity. The speakers relied on news articles and testified that they did not bother to verify the content of the articles. Faxon held that reliance "on a variety of news articles" was sufficient to insulate the speaker. Id. The court noted that the "failure to investigate the articles before including them in the brochure [did] not constitute the reckless disregard that underlies actual malice." Id. Although scrupulous application of this test may result in some individuals being left without a remedy for damaging speech, Faxon noted that this was a result mandated by the balance struck by the Court in New York Times v. Sullivan. Id. Applying that standard requires reversal of the PDC decision.

3. The Record contains ample evidence of third party belief that Sen. Sheldon failed to save Mission Creek.

The PDC does not rebut the evidence in the Record that third parties

believed that Sen. Sheldon failed to save the facility. These third parties include: (1) members of Sen. Sheldon's own party; (2) newspaper reporters; and (3) a lobbyist personally known to Rickert. The PDC does not cast doubt on the veracity or motives of any of these persons. Nor does it put forth evidence that Rickert had any reason to doubt them.

The PDC admits that "[c]ertain constituents in the 35th District did not feel that Sen. Sheldon had sufficiently used his leverage to obtain funding for Mission Creek." (Response, p. 6.) The "certain constituents" referred to by the PDC includes Stacia Bilsland, **the Chairperson of Sheldon's own party**. (AR at 249-53.) The sentiment that Sen. Sheldon did not do everything he could have to save Mission Creek was so widely held, that it was printed in three different local newspaper articles. (AR at 244-27; AR at 249-53; AR at 255-59.) A portion of one article is worth quoting in full:

> Wood and the 35th-district Democrats' chairwoman, Stacia Bilsland of Elma, now are blaming Sheldon for not saving the Mission Creek Youth Camp near Belfair from closure.
>
> Budget cuts approved last month by lawmakers will eliminate more than two dozen jobs at the camp.
>
> Wood noted with some relish that jobs are supposed to be the top goal of Sheldon, who heads the Mason County Economic Development Council.

. . . .

> Wood suggested Sheldon is unable to negotiate for his district's best interest on budget issues because he is uncooperative on other issues.
>
> **Wood would rather see Sheldon act like Republican Sen. Alex Deccio of Yakima, who traded his budget vote for assurances of money for nursing homes this year, or Republican Sen. Shirley Winsley of Fircrest, who traded her vote for aid to cities**. "There is no way Alex Deccio would have lost the Mission Creek camp," Wood said.

Brad Shannon, Sheldon Detractors Try New Tack, THE OLYMPIAN, April 12, 2002 (emphasis added). (AR at 251-52.) Rickert relied on the substance of these articles, and had no reason to doubt their veracity. Given the widely held sentiment that Sen. Sheldon failed to "trade . . . his budget vote" to save Mission Creek, and the PDC's failure to show that Rickert was plagued with any doubts regarding the veracity of the Statement, there is no actual malice.

C. PENALIZING RICKERT FOR THE STATEMENT VIOLATES RICKERT'S FIRST AMENDMENT RIGHTS

Construing the Statute as described above (with an innocent-construction rule and a correct interpretation of actual malice) will result in a reversal of the judgment and avoid the need to consider the constitutionality of the Statute. Clark v. Martinez, __ U.S. __, 125 S. Ct.

716, 724-25, 160 L. Ed. 2d 734 (2005) (noting that "when deciding which of two plausible statutory constructions to adopt . . . [the court should avoid the construction which] would raise . . . constitutional problems"). If the Court concludes that the question cannot be avoided, it should find the Statute unconstitutional.

1. The Statute does not cure the constitutional problem identified in 119 Vote No!.

The PDC claims that the Statute serves a legitimate interest of preserving the integrity of the electoral process (Response at 23), presumably by insuring that voters are not exposed to any campaign statements that the PDC considers to be untrue. The problem with this argument is that a majority of the Washington Supreme Court in 119 Vote No! rejected governmental regulation of campaign speech as a constitutional means to that end. The parties describe the various opinions in 119 Vote No! differently, but a careful review of the decision leaves no doubt that five members of the court reject the PDC's argument.

The lead opinion by Justice Sanders (joined by Justices Dolliver and Smith) held that the state had no business judging the truth or falsity of campaign statements.

> Particularly in the religious and political realms, "the tenets of one man . . . seem the rankest error to his neighbor."

> Therefore, the Supreme Court has recognized that to sustain our constitutional commitment to uninhibited political discourse, the State may not prevent others from "resorting to exaggeration, to vilification of men who have been, or are, prominent in church and state, and even to false statement." At times such speech seems unpalatable, but the value of free debate overcomes the danger of misuse.

135 Wn.2d at 625 (citations omitted). Justice Madsen (joined by Justice Alexander) concurred, agreeing that the statute was unconstitutional on its face because the state had no business telling the voters what they should believe.

> There must be no impediment to free and open debate regarding such [campaign] issues. For unlike the case where the societal interest in individual reputations is at stake, there is no competing interest sufficient to override our precious freedom to vigorously debate the wisdom of enacting a measure, even if that debate contains falsehoods as well as truths.

Id. at 635-36. The only justification the PDC proffers for this speech-restrictive law is to ensure clean elections, but that justification has already been ruled improper by a clear majority of the Court. Logically, that reasoning applies equally to initiative campaign as to electoral campaigns, since in both settings the voters have a responsibility to inform themselves and vote accordingly.

Justice Madsen's concurrence contained dictum suggesting that there was a "societal interest in individual reputations." In its brief, the

PDC does not assert that as a primary interest. It does not claim that the protection of Sen. Sheldon's reputation justifies invoking the machinery of the state. But even if one assumes for purposes of argument that this is the primary justification underlying the Statute, it would be insufficient to justify the Statute's restriction on speech.

Justice Madsen's pronouncement that the state could enact a version of the Statute directed solely to statements about other candidates is dictum. Justice Madsen agreed with the opinion of Justice Sanders yet went on to opine on the possible contours of a future statute not before the Court and not yet enacted. 119 Vote No! Comm., 135 Wn.2d at 635 (acknowledging that "[the Court] need not . . . decide [the] issue" of whether a Statute restricting statements about candidates is constitutional). As such, Justice Madsen's statements are not binding on this Court. "Dictum carries little precedential weight when it originates in Washington courts." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 873, 93 P.3d 108 (2004). In any event, that dictum is questionable.

Justice Madsen reasoned that since defamatory speech can subject the speaker to liability via a civil lawsuit for damages, the state can proscribe such speech under the Statute. But this conclusion does not necessarily follow. The state's interest and the individual interest are

distinct. As noted by the United States Supreme Court in a slightly different context, "[t]he state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods." Brown v. Hartlage, 456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982). As acknowledged by the PDC, the candidate that is the subject of an allegedly false statement does not benefit from the PDC's action. The candidate receives no portion of the fine. Additionally, the PDC's decision to bring an enforcement action is unrelated to whether a candidate decides to pursue a defamation action. In the present instance, Sen. Sheldon testified that he had not brought any defamation action. (AR at 353.) The PDC does not put forth any justification—much less a compelling one—for why the state needs a Statute to protect the reputation of public figures who already have the ability to bring a tort action. Justice Madsen's conclusion also ignores the procedural protections available to a defamation defendant that are not available to the respondent in a PDC proceeding. As noted in Rickert's initial brief, these procedures are constitutionally necessary. (Opening Brief, pp. 47-49.)

2. Donohoe is inapposite.

In re Donohoe, 90 Wn.2d 173, 580 P.2d 1093 (1978), heavily relied upon by the PDC, does not affect the analysis. First, Donohoe was a bar

discipline case. In regulating lawyer conduct, courts exercise their inherent supervisory power over attorneys to ensure adequate functioning of the judicial system. As a result, the Rules of Professional Conduct impose many regulations on speech that would never be upheld if they were applied to the public at large. *See, e.g.*, RPC 3.6 (attorneys restricted in their public comments about judicial proceedings); RPC 7.1 through 7.5 (limiting attorney advertising and solicitation of business). By contrast, the Statute applies to any person who sponsors political advertising, not just attorneys.

Second, the conduct in Donohoe was far different than the conduct here. The lawyer in Donohoe made a variety of different false statements, and repeated them multiple times. She doctored a letter written by one of her opponents and circulated copies of the altered letter with his signature attached, to create a false impression that it was the original. The Court considered this forgery to be "reprehensible and a fraud." 90 Wn.2d at 182. By contrast, Rickert published a single campaign advertisement that presented an overall truthful message that her platform differed considerably from that of her opponent. She listed dozens of differences between her positions and Sen. Sheldon's, and only one fragment of one sentence in her advertisement is alleged to be inaccurate.

Third, Donohoe is of limited value because it may not survive intervening changes in the law. As Justice Sanders noted in 119 Vote No!,

"the continuing viability of [Donohoe] is questionable in light of more recent authority which prompted 1995 revisions to the Code of Judicial Conduct." 135 Wn.2d at 631 (citing Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993) (finding restriction on judicial campaign speech unconstitutional)). Donohoe also preceded most of the federal cases recognizing a greater degree of First Amendment protection for attorney speech. *See*, *e.g.*, Gentile v. State Bar Of Nevada, 501 U.S. 1030, 1056, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

3. By selectively penalizing campaign speech that least requires state regulation, the Statute is under-inclusive and viewpoint-based.

The peculiar scope of the Statute as amended has an almost gerrymandered feel. Speech by any person outside of a political advertisement (such as a candidate's stump speech, a media interview, a news article, an editorial, or a letter to the editor) is unregulated. Advertising about initiative elections (that is, elections that will directly affect the law of the state) is unregulated. Advertising about candidate elections that will select the persons who make law (and hence only indirectly affect the law) are subject to certain types of regulation. No person is allowed to advertise fictitious claims of incumbency, RCW 42.17.530(1)(b), or fictitious endorsements from non-consenting third parties, RCW 42.17.530(1)(c). No person may make a false statement

about a candidate in political advertising, except that candidates may lie about themselves in such advertisements. RCW 42.17.530(1)(a). Every person, candidate or non-candidate, may lie about all other subjects in political advertisements, including the political parties, the law, private citizens, or elected officials not currently running for office.

What governmental interests could possibly served by this Swiss-cheese scheme, bearing in mind the high burden that the state must demonstrate in a case involving fundamental rights enjoying the maximum First Amendment protection? The interest asserted most prominently by the PDC is to ensure clean campaigns in which voters are not exposed to statements the PDC thinks are false. As described above, 119 Vote No! establishes that this is not a valid governmental purpose. The other possible interest is protection of candidates' individual reputations. This interest is also invalid, because office-holders (and by extension candidates for office) are public figures who are least deserving of special governmental protection for their reputations.

Indeed, if the goal of the law is to protect the reputation of public figures, it is little different than the notorious Sedition Act of 1798, which made it illegal to criticize the President or members of Congress. Monetary fines (as authorized by RCW 42.17.530) or imprisonment were the result if any person were to "write, print, utter or publish . . . any false, scandalous

and malicious writing or writings against the government of the United States, or either house of the Congress. . ., or the President . . ., with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." 1 Stat. 596. As explained in New York Times v. Sullivan, 376 U.S. 265, 273-76, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Sedition Act is recognized as a bleak moment in our nation's history, unpopular at the time and repudiated ever since. A sedition law is inevitably viewpoint-based, because it selectively forbids criticism of public figures.

The PDC argues that it may selectively punish criticism of public figures under Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed. 2d 535 (2003), because defamation of candidates for office is the worst kind of defamation. This misreads and misapplies Black. Black did not purport to overrule R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), which held that a law could be unconstitutionally viewpoint-based even if it applied to speech that in other circumstances is not protected by the First Amendment. Both cases acknowledged that the government could, without engaging in viewpoint discrimination, regulate the worst-of-the-worst within certain categories of speech. For example, threats of violence against the President may be subject to a special statute

because "the reasons why threats of violence are outside the First Amendment ... have special force when applied to the person of the President." Black, 538 U.S. at 362 (quoting R.A.V., 505 U.S. at 388). Hence, a law against cross-burning with intent to intimidate is not viewpoint-based, since the unique history of cross-burning is special danger to the nation, and intimidation through cross-burning is not invariably linked to a single viewpoint. Black, 538 U.S. at 352-57.

A false statement about a public-figure candidate for office made in the heat of an active political campaign is not by any stretch of the imagination the worst kind of defamation. Far from having "special force" in this context, the logic of defamation law has greatly diminished force. The First Amendment grudgingly allows a private tort action for defamation in order to compensate individuals for injuries done to them. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Even in a run-of-the-mill private defamation suit, the cause of action is strictly limited to avoid constitutional problems. *See, e.g.*, Bose Corp., 466 U.S. at 502-03. But the constitution insists that public figures like political candidates should receive less protection for their reputation under New York Times v. Sullivan. In requiring a higher standard of proof by a public figure or public official plaintiff bringing a defamation action, the United States Supreme Court noted that "[p]ublic officials and public

figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater . . . . An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs." Gertz, 418 U.S. at 344. The Statute does not serve the compensatory function for which the constitution permits (some) defamation actions to proceed, since it does not compensate anyone. Yet the Statute gives a special level of governmental protection exclusively to political candidates, a group of people who as a matter of well-established constitutional law are least deserving of that protection. Under the Statute, candidates' viewpoints about themselves are privileged over other viewpoints.

At its core, the Statute is designed to protect politicians. Unlike the original Public Disclosure Act, which was passed by citizen initiative, the various versions of RCW 42.17.530 have all been enacted by the legislature to protect the interests of the class of persons who will join the legislature. And because the law is so under-inclusive, it does not serve this (illegitimate) purpose very well. Rickert could have given a speech on live television filled with false statements about herself and about Sen. Sheldon

without violating the Statute. Yet the Statute is being used to punish Rickert, tarnish her reputation, and deprive her of property because of alleged inaccuracies in one part of one sentence in a lengthy text advertisement that all parties agree is otherwise accurate and whose overall message is a truthful comparison of the different political philosophies of the two candidates. The Court should have no qualms about setting aside a statute this poorly tailored to any valid governmental interest.

III. CONCLUSION

The Statute's paternalistic view of the voters is that they cannot be trusted to evaluate political advertisements for themselves. The PDC argues that the truth is so fragile that the authority of the state is required to make a rebuttal that could not be accomplished through speech alone. (Response, pp 36-38.) This is not the premise of our constitution, which insists that the remedy for speech one dislikes is "more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring). "[T]he ultimate good desired is better reached by free trade in ideas, [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J.,

dissenting).

DATED this 28th day of March, 2005.