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

BRIEF OF APPELLANT

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
BY: VENKAT BALASUBRAMANI,
WSBA # 28269
505 Fifth Avenue South, Suite 610
Seattle, Washington 98104
Facsimile Number (206) 274-2801

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
AARON H. CAPLAN, WSBA # 22525

ATTORNEYS FOR MARILOU RICKERT

TABLE OF CONTENTS

I ASSIGNMENTS OF ERROR AND ISSUES 1

II INTRODUCTION 2

III STATEMENT OF THE CASE 3

A. THE STATUTE: HISTORICAL CONTEXT 3

B. PDC ENFORCEMENT ACTION AGAINST RICKERT 6

IV ARGUMENT 13

A. STANDARD OF REVIEW 13

B. RICKERT'S STATEMENT DID NOT VIOLATE THE STATUTE AS PROPERLY CONSTRUED 15

1. The Statement is not false under the innocent- construction rule. 16

2. The Record does not support a finding of "actual malice" — Rickert harbored no doubts, and reasonably believed the veracity of the Statement. 26

C. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO RICKERT 33

1. The First Amendment prohibits the state of Washington from determining the truth or falsity of political speech. 34

2. The Statute fails to provide necessary First Amendment procedural protections. 48

V CONCLUSION 50

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Washington Cases

Alpine Industries, Computers, Inc. v. Cowles Pub'g Co.,
114 Wn. App. 371, 57 P.3d 1178 (2002) 25, 32

Caruso v. Local Union No. 690 of Int'l Brotherhood of Teamsters, etc.,
100 Wn.2d 343, 670 P.2d 240 (1983) 27, 41

Cascade Nursing Servs. v. Employment Sec. Dep't,
71 Wn. App. 23, 856 P.2d 421 (1993) 13

Dep't of Ecology v. Lundgren,
94 Wn. App. 236, 971 P.2d 948 (1999) 12

Herron v. Tribune Pub'g Co.,
108 Wn.2d 162, 736 P.2d 249 (1987) 25, 26, 42

Lundgren v. Whitney's Inc.,
94 Wn.2d 91, 614 P.2d 1272 (1980) 15

Margoles v. Hubbart,
111 Wn.2d 195, 760 P.2d 324 (1988) 14, 26, 32

Mark v. Seattle Times,
96 Wn.2d 473, 635 P.2d 1081 (1981) 42

Mohr v. Grant,
117 Wn.App. 75, 68 P.3d 1159 (2003) 42

Richmond v. Thompson,
130 Wn.2d 368, 922 P.2d 1343 (1996) 14

State ex rel. Public Disclosure Commission v. 119 Vote No! Committee,
135 Wn.2d 618, 957 P.2d 691 (1998) 4, 16, 34, 35, 36, 37, 38, 43

State v. Kilburn,

151 Wn.2d 36, 84 P.3d 1215 (2004) 14

Cases from Other States

Comm. to Retain Judge Tanzer v. Lee,
270 Ore. 215, 527 P.2d 247 (1974) 18, 19

Committee of One Thousand to Re-Elect Walt Brown v. Eivers,
296 Ore. 195, 674 P.2d 1159 (1983) 17, 18

Faxon v. Michigan Republican State Cent. Comm.,
244 Mich. App. 468, 624 N.W.2d 509 (2001) 27, 29, 31

SEIU Dist. 1199 v. Ohio Elections Comm'n,
2004 Ohio 5662 (Ohio Ct. App. 2004) 17, 27, 28

Federal Cases

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) 13

Briggs v. Ohio Elections Comm'n,
61 F.3d 487 (6th Cir. 1995) 17

Buckley v. Valeo,
424 U.S. 1, 99 S. Ct. 612, 46 L. Ed. 2d 659 (1976) 38

Carey v. Brown,
447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) 47

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const.,
485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) 15

Garrison v. Louisiana,
379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) 35

Gertz v. Robert Welch, Inc.,
418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 40

Harte-Hanks Communications v. Connaughton,
491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) 26

Hustler Magazine v. Falwell,
485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) 42

Kramer v. Thompson,
947 F.2d 666 (3rd Cir. 1991) 47

Mills v. Alabama,
384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) 15

New York Times Co. v. Sullivan,
376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). 3, 25, 36, 39

Pestrak v. Ohio Elections Com.,
926 F.2d 573 (6th Cir. 1991) 48

Police Dept. of Chicago v. Mosley,
408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) 47

RAV v. City of St. Paul, Minnesota,
505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) . 41, 46

Rosenblatt v. Baer,
383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) 40

Ross v. Bernhard,
396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970) 48

Simon & Schuster v. New York Crimes Victim Board,
502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) 41

Thomas v. Collins,
323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945) 36

Vanasco v. Schwartz,
401 F.Supp. 87 (S.D.N.Y. 1975) 16, 21, 40, 48

Statutes

RCW 28A.190.020 24

RCW 34.05.570 12

RCW 42.17.350 49

RCW 42.17.530 14

RCW 72.05.010 24

Other Authorities

Annenberg Political Fact Check, The Whoppers of 2004,
<http://www.factcheck.org/article298.html> 20

Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty,
59 U. CHI. L. REV. 225 (1992) 36

Henry P. Monaghan, First Amendment "Due Process",
83 HARV. L. REV. 518 (1970) 48, 49

In Re Jefferson County Republican Central Committee, PDC No. 04-288
<http://www.pdc.wa.gov/compliance/reports/2004.asp> 44

Kelly Kunsch, Standard of Review (State and Federal): A Primer,
18 SEATTLE UNIV. L. R. 11 (1994) 13

Merriam-Webster Dictionary of Law, (1996) 23

T. Neal, NATIONAL CONFERENCE OF STATE LEGISLATURES, LAWMAKING AND THE LEGISLATIVE PROCESS (1996) 19

The American Heritage Dictionary of the English Language (4th ed. 2000)
. . . . 23

WRITINGS OF JAMES MADISON 341 (Gaillard Hunt ed., 1906) 35

I. ASSIGNMENTS OF ERROR AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The court erred by affirming the finding of the Public Disclose Commission ("PDC") that Rickert violated RCW 42.17.530 (the "Statute") by making a statement (the "Statement") that her opponent "voted to close a facility for the developmentally challenged in his district".

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Rickert's statement that her opponent "voted to close a facility for the developmentally challenged in his district" is capable of an accurate construction.

2. Whether Rickert made the Statement with actual malice, in light of her reasonable reliance on the statements of a lobbyist, numerous newspaper reports and the Chairwoman of her opponent's political party.

3. Whether the Statute violates the First Amendment in allowing the PDC to determine the truth or falsity of political speech.

II. INTRODUCTION

At issue in this case is a candidate's ability to characterize an opponent's policies, voting patterns, and stance on the issues—expression that lies at the core of a political campaign. The fate of this expression should be decided by voters at the polls and not by any governmental entity. The State of Washington seeks to regulate the statement of a state senatorial candidate, Marilou Rickert, that her opponent (incumbent

senator Tim Sheldon) voted in a manner that resulted in the closure of a facility that housed developmentally challenged individuals. Senator Sheldon did not formally vote for its closure. However, he was widely acknowledged, in the press, by a lobbyist, and by the chairwoman of the 35th District Democrats (Sheldon's own party), as being at least partially responsible for the closure of the facility by failing to use his vote at crucial stages in the legislative process that could have produced a better result. The PDC characterizes Rickert's statement as false, based on the purely semantic difference between Senator Sheldon's vote and his inaction.

The PDC's enforcement action, taken pursuant to Washington's false political advertising statute (RCW 42.17.530), ignores the rule that a statement, particularly one in a political campaign, that is capable of an accurate construction is not "false". Additionally, even if the statement can be characterized as false for purposes of the Statute, the State fails to satisfy the "actual malice" standard that the Statute requires. That standard requires proof that the speaker either knew the statement was false or harbored serious doubts with respect to its veracity. Rickert harbored no doubts with respect to the veracity of the Statement, and undertook more than reasonable efforts to verify its authenticity. Requiring more would

place an untenable burden on political campaigns, particularly on smaller campaigns such as Rickert's.

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 Statute fails to provide for necessary First Amendment protections, in allowing an appointed administrative board, rather than a jury, to determine the truth or falsity of protected expression.

III. STATEMENT OF THE CASE

A. THE STATUTE: HISTORICAL CONTEXT

When first enacted in 1984, RCW 42.17.530 provided, "A person shall not sponsor political advertising which contains information that the person knows, or should reasonably be expected to know, to be false." *See* Laws of 1984, ch. 216, § 3. The legislature amended the statute in 1988 to incorporate the "actual malice" standard of New York Times Co. v. Sullivan, 376 U.S. 254, 271, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Laws of 1988, ch. 199, § 1. As revised, the Statute made it unlawful "for a

person to sponsor with actual malice political advertising that contains a false statement of material fact." Id. While this amendment adjusted the burden of proof, it did not grapple with the central constitutional question of whether the state had a valid interest in policing political speech. Id.

That question was addressed by State ex rel. Public Disclosure Commission v. 119 Vote No! Committee, 135 Wn.2d 618, 625, 957 P.2d 691 (1998), where the PDC fined a political committee for making allegedly false statements about the legal import of a pending initiative. The court unanimously reversed the fine. 119 Vote No!, 135 Wn.2d at 632 (plurality opinion). A three-justice plurality held that the statute was unconstitutional on its face "because it chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification." Id. Two concurring justices agreed with this analysis, making a majority of five justices who found that statute "facially unconstitutional because it sweeps protected First Amendment activity within its provisions by penalizing political speech." Id. at 633 (Madsen, J., concurring). Four other justices thought the statute was constitutional, but that it was not violated by "traditional campaign hyperbole" like the

campaign materials at issue. Id. at 635 (Talmadge, J., concurring); id. at 633 (Guy, J., concurring).

After the Washington Supreme Court's decision in 119 Vote No!, the legislature amended the Statute to its current form, which bars any person from sponsoring with actual malice "[p]olitical advertising that contains a false statement of material fact about a candidate for public office." RCW 42.17.530(1)(a). "However, . . . subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself." RCW 42.17.530(1)(a). The legislature made express findings to explain the motivation behind the amendment in light of 119 Vote No!:

> (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. The legislature's position was based on Justice Madsen's concurring opinion, which identified as an open question whether the state had a valid interest in protecting the reputations of individual candidates for office. 119 Vote No!, 135 Wn.2d at 633. This concurrence acknowledged that there were no cases directly on point supporting that position. Id. at 635. The plurality opinion, meanwhile, noted that an

action by the government to penalize political speech did not resemble the constitutionally permissible tort of defamation, which is designed to compensate damaged individuals and not to uphold a government-imposed vision of political truth. Id. at 630. Rickert's case is the first application of the Statute as amended in 1999.

B. PDC Enforcement Action Against Rickert

1. The 2002 legislative campaign.

Rickert and Senator Sheldon both ran as candidates for the position of State Senator from Washington's 35th Legislative District in the November 5, 2002 General Election. (AR at 408.[1]) Sheldon, the incumbent Democrat, raised over $100,000.00 to campaign, while Rickert, running as the nominee of the Green Party, raised about $16,000.00. No Republican ran in the district. (AR at 363-64.)

Between October 16, 2002 and October 28, 2002, Rickert sponsored a mailing that her campaign either sent or delivered to most active voting households in the 35th District. (AR at 409.) The mailing consisted of a brochure with information about the Green Party and her candidacy. (AR at 409.) To save money, the mailing did not use a

---

[1] Citations to "AR" refer to the record of the proceedings in front of the PDC, transmitted to this Court in its entirety from the Thurston County Clerk's Office.

traditional envelope, but instead enclosed the brochure in a printed wrapper, entitled "There IS a Difference." (AR at 409.) The wrapper compared Senator Sheldon's positions with Rickert's on various issues. For example, it argued that Rickert "supports strong environmental protections" while Senator Sheldon "voted against strong shorelines regulations; introduced legislation to limit the Growth Management Act." (AR at 145.) Another contrast was that Rickert "runs on 'clean money'—does not accept campaign contributions from corporations and special interest 'political action committees'," while for Senator Sheldon, "more than 85% of campaign contributions are from corporations, big business, and their 'political action committees'." (AR at 145.) The statement in the wrapper that gave rise to this litigation presented the following contrast between the candidates:

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

(AR at 145.) The alleged falsehood in this statement is that Senator Sheldon "voted to close a facility for the developmentally challenged in his

district." (AR at 410.) This statement referred to the Mission Creek Youth Camp in Belfair, a facility for juvenile offenders, some of whom were developmentally disabled. (AR at 410.) Senator Sheldon and the PDC considered it untrue for Rickert to call Mission Creek a "facility for the developmentally challenged." (AR at 117.) The PDC also considered it untrue to say that Senator Sheldon "voted to close" the facility, since he ultimately voted against the budget bill that included the closure provisions. (AR at 350, lines 13-14.) No one contests that at the time of the Statement, Senator Sheldon was advocating that Mission Creek be turned into a prison, and that he had supported revenue measures that forced reductions in services to the mentally ill and the developmentally challenged and their families. (AR at 358, lines 23-24.)

Rickert had several sources for the challenged portions of her advertisement, "from the press and from what [she] had been hearing around town." (AR at 364, lines 24-25.) One of the sources was Dave Wood, a lobbyist for Action for RHCs (Residential Habilitation Centers), an advocacy group seeking services for the profoundly and severely developmentally disabled. (AR at 378, lines 15-22.) Specifically, Mr. Wood discussed Senator Sheldon's role in the closure of Mission Creek

Youth Camp with Rickert over lunch in June of 2002 and by telephone on at least one occasion thereafter. (AR at 378, lines 15-22.) Wood told Rickert that "Senator Sheldon had a very high degree of responsibility for losing Mission Creek . . . ." (AR at 378, lines 15-22.) Senator Sheldon's role in the closure of Mission Creek was widely known. Several newspaper reports noted Senator Sheldon's hand in the closure of Mission Creek, and specifically noted that the chairwoman of the 35th District Democrats and other third parties believed that Senator Sheldon did not do everything in his power to save Mission Creek. *See* Kevan Moore, Sheldon and Democrats Face Off at North County Mason Library over Politics, BELFAIR HERALD, April 18, 2003 (AR at 255-56); Brad Shannon, Sheldon Detractors Try New Tack, THE OLYMPIAN, April 12, 2002 (AR at 249-53). The Shannon article noted that "[Dave] Wood and the 35th-district Democrats' Chairwoman, Stacia Bilsland . . . are blaming Sheldon for not saving the Mission Creek Youth Camp near Belfair from closure." (AR at 251.)

The Record similarly contains testimony and evidence that Mission Creek housed a population of developmentally disabled youth. Sally Parker, Investigator for the PDC, testified that she learned during the

course of her investigation that Mission Creek in fact housed some developmentally disabled individuals. (AR at 333, lines 9-11.) Rickert noted that "[Mr. Wood] believed that [closure of Mission Creek] removed an important resource for developmentally disabled youth." (AR at 364, lines 24-31; AR at 365, lines 1-3.)

Looking at the campaign mailing as a whole, all of the statements in the mailer about Senator Sheldon had to do with his activities as State Senator and senatorial candidate. (AR at 145.) At no point in her campaign did Rickert make any statement or sponsor any advertising that contained any reference to Senator Sheldon's personal life, his family, or his activities outside the legislature, including his roles as PUD commissioner, Director of the Mason County Economic Development Council, or manager and part owner of Sheldon Properties. (AR at 039.)

The Friday before the election (November 1, 2002), Senator Sheldon telephoned Rickert at her work place. (AR at 349, line 12.) He said that he considered the mailing to be false and misleading in its entirety. Initially, he took specific issue with the statement that [Senator Sheldon] "wants to terminate people from Washington's Basic Health Plan." (AR at 039.) After a heated discussion, Senator Sheldon agreed that the

statements about him in the mailer were substantially factual, with the single exception of the statement that he "voted to close a facility for the developmentally challenged in his district." (AR at 039.) Senator Sheldon insisted that he voted against the budget bill that included closure of Mission Creek and specifically stated, in response to a question by Rickert, that he considers himself "an advocate for the developmentally disabled." (AR at 039, lines 16-17.)

The election was held on November 5. Senator Sheldon was reelected with about 79% of the vote. (AR at 388, line 16.)

2. The PDC action.

On December 2, Senator Sheldon filed a complaint with the PDC alleging violations of RCW 42.17.530. (AR at 1.) On May 5, 2003, the Director filed a "Notice of Administrative Charges," alleging that "there is clear and convincing evidence that Marilou Rickert violated RCW 42.17.530(1)(a) with reckless disregard as to truth or falsity when she distributed political advertising that made a false statement of material fact about Senator Tim Sheldon." (AR at 31-34.) Rickert challenged the constitutionality of the Statute and produced evidence that the Statement did not violate the Statute because she had no actual malice and had not

made a false statement of material fact. (AR at 56-61.)

The PDC held a hearing on July 29, 2003, and found Rickert in violation of the Statute. In relevant part, the PDC's written order stated:

> The brochure contained two false statements . . . [:] (a) Senator Sheldon voted to close the Mission Creek Youth Camp, and (b) that Mission Creek was a facility for the developmentally disabled.

(AR at 410.) The PDC also found that Rickert made the statements with actual malice. (AR at 411.) The PDC found that Rickert's challenges to the constitutionality of the statute were beyond the PDC's jurisdiction. (AR at 407.) It fined Rickert $1,000.00. (AR at 411.)

Rickert timely filed a notice of appeal, and challenged the PDC's finding that she violated the Statute, and additionally alleged that the Statute violated the constitution on its face and as applied to her. Rickert also brought a claim under 42 U.S.C. § 1983 against the PDC and its members for violation of her First Amendment rights. Judge Casey affirmed the decision of the PDC, but expressly made "[n]o determination . . . whether the [PDC] erred in finding [Rickert] acted with actual knowledge [of the Statement's falsity]". (CP 33 (Final Order dated Aug. 27, 2004).) Thus, the only finding regarding actual malice upheld by the trial court was that Rickert made the Statement with reckless disregard as

to truth or falsity. Rickert now asks this Court to reverse. However, she is solely pursuing her appeal under RCW 42.17.395(5). Rickert is no longer pursuing her claim under 42 U.S.C. § 1983.

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing an administrative decision, this Court sits in the same position as the superior court, applying the standards found in the Administrative Procedures Act (set forth in RCW 34.05.570(3)) directly to the record before the agency. With respect to issues of law, the court applies a de novo standard, and may substitute its judgment for that of the agency. Dep't of Ecology v. Lundgren, 94 Wn. App. 236, 971 P.2d 948, *review denied*, 138 Wn.2d 1005 (1999). The court reviews routine findings of fact under the "clearly erroneous" standard of review in light of the entire record. Cascade Nursing Servs. v. Employment Sec. Dep't, 71 Wn. App. 23, 29, 856 P.2d 421 (1993).

In cases involving the First Amendment, however, "an appellate court has an obligation to make an independent examination of the whole 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 of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984); *see also* Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 SEATTLE UNIV. L. R. 11, 25 (1994). The Washington Supreme Court recently reaffirmed this principle, noting that the First Amendment requires a more searching inquiry with respect to the underlying facts. State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Kilburn cautioned that appellate courts must be watchful in cases involving speech, and noted that "[i]t is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more." Kilburn, 151 Wn.2d at 49; *see also* Richmond v. Thompson, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996) (noting independent review rule in defamation cases). This Court must therefore independently review the record with respect to the "constitutional facts" of falsity and actual malice. These must be judged with a fresh eye, and the PDC bears the burden to show a violation of the Statute by clear and convincing evidence. RCW 42.17.530(2); *see also* Margoles v. Hubbart, 111 Wn.2d 195, 199, 760 P.2d 324 (1988) (noting the difference between "clear and convincing evidence" and "the less stringent 'preponderance of the evidence' burden").

B. RICKERT'S STATEMENT DID NOT VIOLATE THE STATUTE AS PROPERLY CONSTRUED

As described below, if the Statement is considered a violation of RCW 42.17.530, the Court will need to grapple with serious objections to the Statute's constitutionality. Courts are to construe statutes in a manner that will not "raise serious constitutional problems." Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988); Lundgren v. Whitney's Inc., 94 Wn.2d 91, 96, 614 P.2d 1272 (1980). The PDC sanction relies upon on a draconian interpretation in "false statement" and legally faulty interpretation of "reckless disregard of the truth." Other interpretations of these terms exist that are fully consistent with the plain language of the Statute, yet result in a finding that Rickert did not violate the Statute. Construing the Statute in this manner would allow the Court to resolve this appeal without reaching the constitutional objections.

1. The Statement is not false under the innocent-construction rule.

a. Statutes regulating political speech only cover unequivocally false statements

It is well established that "speech concerning public affairs is more than self-expression; it is the essence of self government." 119 Vote No!,

135 Wn.2d at 626 (citing Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 791, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. *This of course includes discussions of candidates* . . . ." Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) (emphasis added). As the Washington Supreme Court recognized, the constitutional guarantee of free speech has its "fullest and most urgent application" in political campaigns. 119 Vote No!, 135 Wn.2d at 624 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)). Accordingly, the Washington Supreme Court admonished that statutes potentially infringing on political speech must be applied sparingly. Id. at 635 (Talmadge, J., concurring) ("traditional campaign hyperbole" does not violate Statute); id. at 633 (Guy, J., concurring).

The concurring 119 Vote No! Justices explained that political speech statutes should only penalize statements that are unquestionably false, and should not penalize statements that contain political hyperbole, exaggerate to make a point, or assert debatable issues. Id. Under New

York Times v. Sullivan and its progeny, only "deliberate calculated falsehoods" lack constitutional protection. Vanasco v. Schwartz, 401 F.Supp. 87, 100 (S.D.N.Y. 1975), *summarily aff'd*, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 630 (1976). In light of this standard, a statute that purports to prohibit all "misrepresentation of a candidate's position" is an overbroad means for identifying "deliberate calculated falsehoods." Id.

Cases from other jurisdictions construing similar statutes make the same point about the degree of falsity. For example, the Oregon Supreme Court found that statements that are "capable of two meanings" do not fall within that state's false political advertising statute. Committee of One Thousand to Re-Elect Walt Brown v. Eivers, 296 Ore. 195, 202, 674 P.2d 1159 (1983) (campaign statement is "not 'false,' . . . if any reasonable inference can be drawn from the evidence that the statement is factually correct or that the statement is merely an expression of opinion.") (construing Oregon's political advertising statute). Similarly, the Sixth Circuit found problematic a "statute [that] proscribed a campaign billboard that is subject to different [accurate and inaccurate] interpretations." Briggs v. Ohio Elections Comm'n, 61 F.3d 487, 494 (6th Cir. 1995) (noting that the billboard in question "is not so much false as it is

ambiguous”). This rule is sometimes stated as the “innocent-construction rule,” under which “statements that are reasonably susceptible of an innocent construction are protected.” SEIU Dist. 1199 v. Ohio Elections Comm’n, 2004 Ohio 5662, *p 18 (Ohio Ct. App. 2004) (construing Ohio’s false political advertising law).

Eivers held that a campaign statement will not be deemed false if “in any accepted way, the words can be said to be factually correct.” Eivers, 296 Ore. at 202. Eivers examined a campaign statement that a candidate “introduced legislation to add a new statewide property tax.” Eivers, 296 Ore. at 201. It was argued that the statement was false, because the legislation in question proposed a ballot measure on a property tax, and by itself “would neither have established nor added a statewide property tax.” Eivers, 296 Ore. at 201. Eivers acknowledged that the statement at issue could be considered technically false. Eivers, 296 Ore. at 202. Nevertheless, Eivers recognized the nuances inherent in this kind of statement in the course of a political campaign. In this setting, “an inference reasonably can be drawn that the statements were not false” so the statute was not violated. Eivers, 296 Ore. at 205.

A similar example is found in Comm. to Retain Judge Tanzer v.

Lee, 270 Ore. 215, 217-20, 527 P.2d 247 (1974). In a campaign, a candidate made a statement that a judge running for office "decided that $72,000.00 should be paid from . . . hard-earned TAX DOLLARS for attorney's fees in a condemnation case." Tanzer, 270 Ore. at 217. This statement was accused of being false, because the judge in question sat on the Oregon Court of Appeals, and had not "decided" that this was the correct amount of fees, but instead had merely issued an opinion affirming (based on an abuse of discretion standard) the trial court's decision with respect to attorney's fees. Id. Tanzer acknowledged the ambiguity in political statements like these, and found in context that the statement was capable of an accurate and an inaccurate interpretation. Tanzer, 270 Ore. at 219. The court noted that "[w]hether the appellate judge is said to have 'decided,' 'held,' 'concluded,' or to have 'written the decision' is only a question of semantics, and to say that a judge 'decided' a certain case does not constitute a false statement." Tanzer, 270 Ore. at 219.

b. A candidate's legislative actions are often ambiguous

The cautious approach taken in these cases reflects the reality that actions taken by public office holders are often complex and susceptible to multiple interpretations. This is particularly true when characterizing the

voting record of a legislator. “For many of us, the process of lawmaking, in general and as it relates to our personal lives, is mysterious and, oftentimes, incomprehensible.” T. Neal, NATIONAL CONFERENCE OF STATE LEGISLATURES, LAWMAKING AND THE LEGISLATIVE PROCESS (1996) at vii. Two recent examples illustrate how statements about how a person “voted to do” something while in office are not always black and white.

In the most recent Presidential election, President Bush asserted that Senator Kerry had cast 98 votes to raise taxes. This figure included 43 votes on budget bills that only set targets without actually legislating higher taxes, and as many as 16 votes on a single tax bill. *See* Annenberg Political Fact Check, The Whoppers of 2004, <http://www.factcheck.org/article298.html> (last viewed December 9, 2004). In this case, there were 98 individual votes, but a legitimate difference of opinion can exist about whether these votes constituted 98 “votes to raise taxes.”

Closer to home, the 2004 Washington legislature failed to enact a bill that would amend the Washington employment discrimination statute to include protection against discrimination on the basis of sexual orientation. According to press reports, “Democrats said they had enough

votes from members of the Republican majority to pass the bill. But instead of sticking around to find out, Republican leaders abruptly adjourned for the weekend. That effectively killed the bill." Ralph Thomas, Senate Republicans Kill Anti-discrimination Bill, SEATTLE TIMES (March 6, 2004). Democrats argued that Republicans engineered the adjournment as a way to defeat the sexual orientation bill while being able to plausibly claim that they had not voted against it. In a campaign context, it would be a matter of political opinion and interpretation, rather than an unequivocal statement of fact, whether a senator "voted against" the anti-discrimination law or "voted for" adjournment.

Because legislators' voting records are so susceptible to interpretation, Courts have been reluctant to rely on the false sense of precision that may result from looking uncritically at a statement describing a yea or a nay. It is precisely this concern that motivated the court to strike down as unconstitutional a statute prohibiting "misrepresentation of a candidate's position" in Vanasco.

> It is not hard to see then, given the often difficult task of trying to define, for example, what a political candidate's "position" is on issues discussed during a campaign, that the term "misrepresentation" could be applied to almost all campaign speech. The candidate who wishes to avoid the consequences of a Code proceeding–including the adverse

> publicity such as a proceeding would generate–might very well be "chilled" from the expression of [protected speech].

Vanasco, 401 F.Supp. at 97.

c. The Statement is not unequivocally false

i Senator Sheldon was partially responsible for the closure of Mission Creek

Rickert's statement with respect to Senator Sheldon's voting record, like the statements of the defendants in Eivers and Tanzer, could be viewed as false by an observer not aware of the complexities of the legislative process. Senator Sheldon voted no on the budget bill instead of yes. Nevertheless the Statement is capable of accurate interpretations. The Record contains ample evidence that Senator Sheldon could have saved the facility if he had made it a legislative priority to use his vote on the budget to do the sort of horse trading that ordinarily goes into budget negotiations. Third parties believed that Senator Sheldon did not do all that he could do to save the facility. (AR at 378, line 18-19 (Dave Wood testifying that he told Rickert that "Senator Sheldon had a very high degree of responsibility for losing Mission Creek . . . ."); AR at 251 (newspaper article noting that "[Dave] Wood and the 35th-district Democrats' Chairwoman, Stacia Bilsland [] are blaming Sheldon for not saving the

Mission Creek Youth Camp near Belfair from closure"); AR at 255-56 (same).) The statements in Eivers and Tanzer described the actions of a legislator and a judge, respectively. Both courts acknowledged the complexity of the worlds in which those actors operate: in Eivers the legislature, and in Tanzer, the courts. In both cases, the statements at issue described the end result of the actor's actions. Both courts found the statements inoffensive because they were capable of both erroneous and accurate interpretations. Those cases relied on the context in which the statements were made, recognized the "breathing room" required to be given to political expression, and found no violations of the false political advertising statute.

The PDC's determination that the Statement was false relied on a technical definition of the word "vote," and ignored its alternate and more ordinary connotations. For example, one dictionary definition of the word "vote" is "to *choose*, endorse, decide the disposition of, defeat, or authorize by vote." Merriam-Webster Dictionary of Law (1996) (emphasis added). Another definition of the word "vote" is "to express a choice or an opinion." The American Heritage Dictionary of the English Language (4th ed. 2000). These two definitions, among others, indicate that the word

"vote" has broader, less technical definitions under which it is accurate to characterize Senator Sheldon as having "voted" for closure of the facility.

ii Mission Creek can be characterized as a facility for the developmentally challenged

The portion of the Statement that Mission Creek was a facility for the developmentally challenged is an entirely plausible construction of the facts. David Griffith, Program Administrator for Institution Programs (Department of Social and Health Services) testified individuals with various disabilities, including "mental health needs" were housed at Mission Creek. (AR at 342, lines 13-14.) Washington statutes support Rickert's understanding of Mission Creek as a facility for the developmentally challenged. One statute lists Mission Creek as one of the "residential schools" established to provide for "the care and treatment of persons who are exceptional in their needs by reason of mental and/or physical deficiency." RCW 28A.190.020. Similarly, the declared purpose of portions of RCW 72.05 (which mentions Mission Creek by name) is to "provide for every child with behavior problems, and mentally and physically handicapped persons . . . such care, guidance and instruction, control and treatment as will best serve the welfare of the child or person and society." RCW 72.05.010. In the context of a political race, where

candidates must be given breathing room, characterizing Mission Creek as a facility for the developmentally challenged cannot be false as a matter of law.

2. The Record does not support a finding of "actual malice" — Rickert harbored no doubts, and reasonably believed the veracity of the Statement.

To prove a violation of the Statute, the State must show that the statement complained of was made with "actual malice." The Statute defines actual malice as "to act with knowledge of falsity or with reckless disregard as to truth or falsity." RCW 42.17.505(1). No published cases apply the actual malice standard in the context of an action under the Statute. However, this definition of "actual malice" should be identical to the definition utilized in defamation cases under U.S. and Washington law. *See*, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. at 279-280; Herron v. Tribune Pub'g Co., 108 Wn.2d 162, 169-171, 736 P.2d 249 (1987); Alpine Industries, Computers, Inc. v. Cowles Pub'g Co., 114 Wn. App. 371, 393, 57 P.3d 1178 (2002).

The PDC believed that Rickert had actual malice because she read articles describing Senator Sheldon's record prior to deciding to run in the election, and because she failed to personally investigate the details of

Senator Sheldon's voting record. (AR at 411.) The Record does not support these conclusions. More importantly, this approach misconstrues the law.

a. Speakers may reasonably rely on information provided by third parties

"Mere failures to investigate or mistakes made in an investigation leading to a news story will not prove recklessness." Alpine Industries, 114 Wn. App. at 394. A "public figure's critics have no affirmative duty to search out the truth or to substantiate their statements, nor are they required to corroborate their sources' information." Margoles v. Hubbart, 111 Wn.2d 195, 205, 760 P.2d 324 (1988) (citations omitted).

Under the prevailing Washington caselaw, to establish "reckless disregard as to truth or falsity," it is not enough to show that "a reasonably prudent man would have . . . investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Herron, 108 Wn.2d at 171 (internal punctuation omitted) (quoting St. Amant v. Thompson, 390 U.S. 727, 730-731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)); *see also* Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 667, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) ("we have made clear

that the defendant must have made the false publication with a high degree of awareness of . . . probable falsity or must have entertained serious doubts as to the truth of his publication"). Reckless disregard for purposes of actual malice is not the same as negligence. Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, etc., 100 Wn.2d 343, 354, 670 P.2d 240 (1983).

Cases from other jurisdictions construing false political advertising statutes adhere to this view, and similarly require a showing that the defendant in fact entertained doubts with respect to the veracity of the statement:

> Proof of falsity differs significantly from proof of actual malice. In contrast with "falsity," which is judged under an objective standard using the perspective of a "reasonable reader" of a statement, "actual malice" requires proof of the defendant's subjective state of mind. . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

SEIU Dist. 1199 v. Ohio Elections Comm'n, 2004 Ohio 5662, *p 22 (Ohio Ct. App. 2004); *see also* Faxon v. Michigan Republican State Cent. Comm., 244 Mich. App. 468, 475, 624 N.W.2d 509 (Mich. Ct. App. 2001) ("Reckless disregard is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by

whether the publisher in fact entertained serious doubts concerning the truth of the statements published."). The determination of whether a statement is made with "actual malice" is inevitably tied to the defendant's bases for the statement and any reasonable bases for defendant's belief. SEIU and Faxon, both cases from other jurisdictions applying similar statutes, are instructive in this regard.

SEIU involved a statement made by the Service Employees International Union District 1199 ("SEIU") that a pending ballot measure would "cost homeowners . . . an extra 60% in property taxes every year." In fact, the pending ballot measure would have resulted in an increase by 60 percent in property taxes *paid for health and human services*. The court noted that the statement was capable of a truthful construction, but ultimately rested its decision on the absence of "actual malice" on the part of SEIU. SEIU grappled with the definition of "actual malice," and the role of a defendant's good faith belief. The court noted that a finding of actual malice is appropriate where the defendant "lacks good faith to make a statement," such as "where there is either no basis in fact for the statement or no information upon which the defendant could have justifiable relied in making the statement." SEIU, 2004 Ohio 5662, *p 23.

Because SEIU had undertaken a reasonable analysis and had determined, based on the context, that the statement was accurate, the court found no actual malice and reversed the determination of the Ohio Elections Commission. Id.

Faxon involved a statement made in the context of a state senatorial campaign that one of the candidates (Faxon) allegedly misused his legislative immunity in two instances (to avoid a speeding ticket and to avoid a civil lawsuit). Faxon brought a defamation suit and prevailed in the trial court. The Michigan Court of Appeals reversed on the basis that the evidence failed, under the clear and convincing standard, to establish actual malice. Faxon, 244 Mich. App. at 475. Specifically, the court found that defendants "relied on a variety of news articles reporting the matter," and reasonably testified that they "had no reason to doubt the truth of the allegations." According to the court, this conduct failed to rise to the level of actual malice:

> Rather, [defendants] explained that they had relied on a series of other published news articles that related the information included in the brochure. Their failure to investigate the allegations in those articles before including them in the brochure does not constitute the reckless disregard that underlies actual malice. Although we recognize that "purposeful avoidance of the truth" can constitute actual malice, there was no clear and convincing

> evidence in this case that the committee was attempting to avoid the truth when it decided not to investigate this issue. Instead, the evidence tended to substantiate the committee's claim that it was actually relying on those articles as the foundation for the brochure and had no reason, at the time, to doubt their veracity.

Id.

b. Rickert did not have any doubts and had ample third party support for the gist of the Statement

The Record does not contain even a scintilla of evidence that Rickert "was plagued with serious doubts as to the truth" of the Statement. Rickert testified that she "[did not] have any inkling of doubt at all with respect to [the Statement's] veracity." (AR at 374, lines 20-24.) Rickert's Statement was not a deliberate, calculated falsehood of the sort targeted by the Statute. To the extent the Statement was in error, it was an honest mistake. Our First Amendment cases make clear that punishing honest mistakes is too high a price for the state to impose in pursuit of truthfulness in statements about public figures.

The PDC views with a selective eye the articles reviewed by Rickert before becoming a candidate. Every single article in the Record describing Senator Sheldon's vote with respect to Mission Creek asserts some equivocation as to his involvement or responsibility for its closure.

For example, an April 22, 2002 article titled Senator Detractors Try New Track, notes that "[Dave] Wood and the 35th district Democrat's chairwoman . . . now are blaming Sheldon for not saving the Mission Creek Youth Camp." Brad Shannon, Sheldon Detractors Try New Tack, THE OLYMPIAN, April 12, 2002 (AR at 249-53). A second article in the Belfair Herald notes that Senator Sheldon himself acknowledges the view held by others that he did not save Mission Creek. The article quotes Senator Sheldon that "[t]hey want to say I didn't save [Mission Creek] . . . . [w]ell I'm sorry. Without the help of other legislators, I couldn't." Kevan Moore, Sheldon and Democrats Face Off at North County Mason Library over Politics, BELFAIR HERALD, April 18, 2003 (AR at 255-56).

A finding of actual malice through reckless disregard requires evidence that the publisher was plagued with serious doubts as to the truth of the statement, but published anyway. Like the defendants in SEIU and Faxon, Rickert reasonably relied on third party characterizations of Senator Sheldon's role in the closure of Mission Creek in making the Statement. The evidence shows that in addition to journalists, third parties (*e.g.*, Stacia Bilsland) believed this characterization. (AR at 249-253; AR at 255-259 (newspaper articles); AR 261-62 (e-mail from Dave Wood).) Rickert

testified specifically that she talked to the 35th District Democrats and Dave Wood, with respect to Senator Sheldon's involvement in the closure of Mission Creek. (AR at 364, lines 24-31; AR at 365, lines 1-3 (Dave Wood).) Dave Wood testified that he communicated to Rickert that "Senator Sheldon had a very high degree of responsibility for losing Mission Creek." (AR at 378, lines 15-20.)

The PDC merely asserts that Rickert could have investigated the matter more thoroughly. The law imposes no such requirement. Alpine Indus., 114 Wn. App. at 394; Margoles, 111 Wn.2d at 205. Given the size of the campaign and the nature of the Statement, Rickert engaged in a reasonable investigation. Anything more would place too heavy a burden on candidates and impermissibly chill political speech. The First Amendment and 119 Vote No! specifically decline to impose such a burden on a political speaker.

C. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO RICKERT

If the Court is not persuaded by the above arguments, then it must address whether the Statute is constitutional. For the reasons that follow, Rickert submits that it is not. Like the predecessor statute found unconstitutional in 119 Vote No!, the current Statute casts a pall over

political discourse in this State by threatening protracted legal proceedings and monetary fines for anyone who makes a statement that an overly stringent Commission may later decide contains an inaccuracy. The law has a chilling effect, is overbroad and viewpoint based, and will not serve its intended purpose. It invokes the machinery of the state to selectively protect the reputations of public figures, even though they are best positioned to respond to attacks without the benefit of this machinery. The Statute also lacks the procedural protections necessary before any person can be found liable for defamation.

1. The First Amendment prohibits the state of Washington from determining the truth or falsity of political speech.

The First Amendment to the United States Constitution, as interpreted by the Washington State Supreme Court in Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee, 135 Wn.2d 618, 957 P.2d 691 (1998), prohibits the State from penalizing Rickert for making political statements about Senator Sheldon, even if it the statements turned out to be inaccurate. The Washington Supreme Court in that case specifically noted the policies underlying judicial hostility to government regulation of political speech, particularly in the context of a campaign. 119 Vote No! left no doubt that "the First Amendment operates to insure

the public decides what is true and false with respect to governance." 119 Vote No!, 135 Wn.2d at 625. The fatal flaw in RCW 42.17.530—then and now—is that it places a government agency in the role of determining political truth, instead of leaving that judgment to the people. The chilling effect of this government intrusion into political speech is significant and harmful to the democratic process.

a. Political truths should be determined in the marketplace of ideas, and not by order of the State

In 119 Vote No! the Court held that the truth or falsity of statements regarding candidates and issues is for the voters and not for the State to decide:

> [u]ltimately, the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic. It assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate, and it is the proper role of the government to fill the void.

119 Vote No!, 135 Wn.2d at 632 (1998) (citations omitted). The principle that the citizenry should ascertain the truth for itself through an abundance of speech is particularly relevant in the context of political speech. As James Madison, the chief architect of the First Amendment, so ably explained,

> the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

James Madison, Report on the Virginia Resolutions, Feb. 7, 1777, in 6 WRITINGS OF JAMES MADISON 341, 397 (Gaillard Hunt ed., 1906). While public knowledge of the truth is the ultimate goal, false statements play a role in this system. False statements "make valuable contributions to debate by bringing about the clearer perception and livelier impression of truth, produced by its collision with error." 119 Vote No!, 135 Wn.2d at 625 (citing New York Times v. Sullivan, 376 U.S. at 279, n. 19).

b. The government cannot be a neutral arbiter of political discourse

The First Amendment looks unfavorably upon any government control over public debate because it inevitably results in government censorship. This concern is paramount when the government regulates political speech, as "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). "The right of free public discussion of the stewardship of public officials

was . . . in Madison's view, a fundamental principle of the American form of government." New York Times v. Sullivan, 376 U.S. at 275. The Supreme Court previously articulated this mistrust of the government as arbiter of truth in the political arena, noting that "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." Thomas v. Collins, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945). Commentators echo this distrust, noting that in "political campaigns the public must be left to sort out the truth for itself." Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. CHI. L. REV. 225, 238 (1992).

119 Vote No! relied on the threat of discriminatory enforcement and censorship that underlies this distrust: "[a]t its worst the statute is pure censorship, allowing government to undertake prosecution of citizens who, in their view, have abused the right of political debate." 119 Vote No!, 135 Wn.2d at 632. Allowing the government to oversee a public debate gives it the power to favor certain viewpoints and ultimately leaves room for censorship. For example, unpopular parties and unpopular viewpoints–viewpoints more critical of an existing administration–may be more likely to be regulated, and ultimately, silenced. This sort of

censorship is contrary to the principle that more speech, rather than less, is the best path to truth.

119 Vote No! also noted that "[the Statute] may be manipulated by candidates to impugn the electoral process rather than promote truthfulness." 119 Vote No!, 135 Wn.2d at 631. Ordinarily, if a candidate believes that an opponent has misstated the record, the correct response is to go to the public and clarify the facts. "Instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth. In the political context, a campaign's factual blunder is most likely noticed and corrected by the campaign's political opponent rather than the State." 119 Vote No!, 135 Wn.2d at 626. However, the Statute changes this balance. When a candidate publicly announces that he or she has filed charges with the PDC, the gravity of the charge of untruthfulness seems weightier; it will be weightier still if the PDC issues a fine. As the court recognized, "a well-publicized, yet bogus, complaint to the PDC on election eve . . . can create the impression that an opponent is a liar, turning the Statute itself into a vehicle for "an eleventh-hour . . . smear campaign." Id. at 626. Adding to the imbalance is that the candidate making the complaint to the

PDC would be immune from any judicial recourse under the anti-SLAPP statute. RCW 4.24.510.

c. Candidates enjoy the broadest possible First Amendment rights

119 Vote No! recognizes the longstanding American democratic principles made clear by numerous cases: that political speech enjoys the highest degree of First Amendment protection and that government regulation of political speech should not be tolerated.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court [previously] observed, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley v. Valeo, 424 U.S. 1, 14-15, 99 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam) (internal quotations and citations omitted).

Additionally, the First Amendment requires that candidates and other speakers on public issues be given wide berth, because "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable self-censorship." New York Times v. Sullivan, 376 U.S. at 279. A rule that fails to provide this wide berth may deter critics from voicing even truthful criticism "because of doubt whether [the truthfulness] can be proved in court or fear of the expense of having to do so." Id. Critics would then tend to make only statements which steer far wide of the unlawful zone. A rule that fails to provide breathing space "thus dampens the vigor and limits the variety of public debate." Id.

The present facts illustrate the chilling effect of having to defend against government enforcement actions with respect to political speech. Rickert, who ran as the nominee of the Green Party, raised about $16,000.00. This amount was less than 20 percent of the amount raised by her competitor. (AR at 363, lines 28-31; AR at 364, lines 1-6.) The threat of a government enforcement action with respect to political speech may effectively silence candidates like Rickert, or worse yet, deter them from running at all. *See* Vanasco, 401 F. Supp. at 98.

d. The legislature's analogy to defamation law is unpersuasive

With the 1999 amendment, the legislature professed to bring the Statute into line with existing defamation law. The analogy fails, because tort law serves an entirely different function than a law that gives a government commission the roving authority to punish speech it considers improper. "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them for defamatory falsehood." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (cited in 119 Vote No!, 125 Wn.2d at 630). "An action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) (cited in 119 Vote No!, 125 Wn.2d at 630). The PDC's penalty against Rickert does not compensate Senator Sheldon. He has not initiated a defamation action against Rickert, and the fine paid to the PDC by Rickert will not go to Senator Sheldon, but into the state treasury. (AR at 353, lines 28-30.) The Statute does not serve the compensatory purpose of tort law; instead, it exists only as a penalty.

Moreover, just like its predecessor, the Statute does not limit its

scope to defamatory speech. To prove defamation, a plaintiff must prove a false statement of fact, communicated without privilege and with the requisite mental state, that caused resultant injury. Caruso v. Local Union No. 690, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). The Statute does not replicate all of these elements: there need not be any showing of harm. The absence of a harm element is particularly important, because it means that the PDC is acting not to correct any actual injury, but as a roaming enforcer of its vision of political truth (which is rarely a black-and-white issue). Indeed, in this instance the PDC found false Rickert's statement that Mission Creek was a facility for the developmentally challenged. (AR at 410, lines 20-23.) That portion of the Statement had nothing to do with Senator Sheldon. It does not pertain to any candidate and is issue related—precisely the same type of speech that was unanimously protected in 119 Vote No!.

Speech that defames no one should not be regulated as if it did. RAV v. City of St. Paul, Minnesota, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); Simon & Schuster v. New York Crimes Victim Board, 502 U.S. 105, 126-28, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). Moreover, the First Amendment protects political cartoons,

hyperbole, exaggeration and other rhetorical devices that are literally false but meant to be taken figuratively. *See*, *e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 49, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (tasteless political cartoon parodying a liquor ad in Hustler magazine which depicted Jeffrey Falwell's first sexual encounter as "during a drunken incestuous rendezvous with his mother in an outhouse" not actionable). Because the Statute reaches a substantial amount of protected, non-defamatory speech, it is fatally overbroad. 119 Vote No!, 135 Wn.2d at 627-28.

In practice, a PDC investigation under the Statute is a focus on minutiae, ignoring the overall gist of the campaign statement in favor of a microscopic analysis of single sentences—or in Rickert's case, fractions of sentences—taken out of context. In a defamation action, the defendant "need not prove the literal truth of every claimed defamatory statement. A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting,' is true." Mark v. Seattle Times, 96 Wn.2d 473, 493-94, 635 P.2d 1081 (1981) (citation omitted); *accord*, Mohr v. Grant, 117 Wn.App. 75, 83, 68 P.3d 1159 (2003), *review granted*, 150 Wn.2d 1032, 84 P.2d 1229 (2004); Herron, 112 Wn.2d at 768. Here, the gist of Rickert's campaign advertising was to

show that she represented a progressive alternative to the more conservative positions of her Democratic opponent, who was running unopposed by the Republicans. It identified more than six different policy differences between the candidates. One fraction of one of the bullet points in this campaign flyer was found to be inaccurate. The flyer as a whole, however, was substantially true under any interpretation. The PDC will be hard-pressed to show how the public is served by a government agency spending taxpayer money to determine such inconsequential matters as whether the now-closed Mission Creek Youth Camp was best described as a facility for the developmentally challenged or a "residential school" as defined by RCW 28A.190.020.

e. The Statute's exception for a candidate's false statements about herself render the Statute underinclusive and viewpoint-based

The Statute has an additional flaw in that it expressly excludes "statements made by a candidate or the candidate's agent about the candidate himself or herself." RCW 42.17.530(1)(a).

As 119 Vote No! recognized, courts apply "exacting scrutiny" to statutes infringing on protected speech. 119 Vote No!, 135 Wn.2d at 620. This requires both a "compelling interest," and means that are "narrowly

tailored" to achieve that interest. Id. As stated above, the State cannot rely on protecting a candidate's reputation in defending the Statute. This leaves the protection of the voting public as the only possible rationale for the Statute. However, the fact that a candidate can freely make false statements about herself undermines this justification. The voting public will be just as harmed by a candidate's false statement about herself as it will be by a candidate's false statement about another. Thus, the Statute does not narrowly serve the truth-telling function and cannot survive exacting scrutiny.

Moreover, the Statute may create a situation in which one candidate who seeks to point out how another candidate has lied about herself could be prosecuted under the Statute while the candidate making the false self-aggrandizing statements remains immune. This is not a hypothetical concern: the PDC is currently relying on the Statute to levy a fine in precisely this circumstance. *See* In Re Jefferson County Republican Central Committee, PDC No. 04-288 (2004) <http://www.pdc.wa.gov/compliance/reports/pdf/2004.asp> (collecting pleadings) (last viewed December 14, 2004). In a 2003 election for County Commissioner, candidate Mark Rose circulated campaign literature

asserting that he had been "a journalist with the New York Times and LA Times." In fact, Rose's position with the LA Times was as a "copy messenger," not as a professional journalist. The Jefferson County Republicans ran advertising accurately criticizing Rose for telling a series of lies about himself, including this one. However, they phrased their criticism in a way that displeased the PDC: "Mark Rose claimed to be a staff member at the LA Times when all he did was write a letter to the editor." Id. The Jefferson County Republicans were fined. One candidate was allowed to make inaccurate self-aggrandizing statements about himself in advertising, but his opponents were punished for misstatements made in the course of rebutting the initial exaggeration.

A statute producing this warped result is not narrowly tailored to enhance truth telling during political campaigns–it is dramatically underinclusive. This raises a legitimate question: what is the purpose of this statute? A majority of the Washington Supreme Court in 119 Vote No! declared that official regulation of truth-telling in political campaigns was not a legitimate purpose for PDC enforcement actions to begin with. So the PDC is left to assert that the sole purpose of the Statute is to protect the reputations of candidates for public office. But this is a class of

citizens with ready access to the media to defend themselves. They are required by law under New York Times v. Sullivan to endure public criticism without reflexively asserting state power to punish their critics.

A law designed solely to protect the reputations of public figures is constitutionally dubious for another reason: it penalizes speech on the basis of viewpoint. As explained in R.A.V. v. City of St. Paul, just because a category of speech (like defamation) can be subject to tort liability does not give the State leeway to pick and choose only certain content or viewpoints within that category to punish.

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

R.A.V., 505 U.S. at 383-84 (emphasis added) (citations omitted). Even if a deliberate calculated falsehood could be the basis for a tort suit, it does

not follow that the state can select only certain falsehoods to suppress through an executive agency. There is an obvious viewpoint discrimination at work when the PDC allows candidates to lie about themselves but forbids anyone else from lying about them. The lies candidates tell about themselves will likely be self-aggrandizing; the lies others tell about candidates will likely be deprecating. As a result, the State's thumb is on the scales: political campaigns must be filled with flattering speech about all candidates. The State cannot selectively give certain speakers advantages over others, because this favors certain viewpoints over others. Carey v. Brown, 447 U.S. 455, 489, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 102, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).

2. The Statute fails to provide necessary First Amendment procedural protections.

In addition to its substantive faults, the Statute lacks crucially important procedural protections that would be present in a defamation suit. Liability under the Statute is adjudged by an appointed executive branch panel rather than a unanimous jury. American courts have long held that the defendant in a defamation action has the right to have liability determined by a jury, rather than a judge. *See* Kramer v. Thompson, 947

F.2d 666, 672 and n. 15 (3rd Cir. 1991) (discussing background and origin of American right to jury trial for defamation defendant); Ross v. Bernhard, 396 U.S. 531, 533, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). Non-jury determination of liability for political expression raises the threat of censorship. The specter is even greater when an administrative body makes a determination affecting a First Amendment claim. The Sixth Circuit found problematic a structure under which the Ohio Elections Commission, "an administrative body, act[ed] as a judicial body in issuing legally binding sanctions for political speech." Pestrak v. Ohio Elections Com., 926 F.2d 573, 578 (6th Cir. 1991); *see also* Vanasco, 401 F. Supp. at 99 (noting that a person charged under the then-existing New York statute "faces the possibility of final action . . . based on findings made not in a judicial proceeding, but rather in an administrative proceeding by a Board"). One author notes that among other reasons, one reason behind the antipathy toward administrative evaluations of First Amendment claims might be "the inherent institutional differences between courts and administrative agencies." Henry P. Monaghan, First Amendment "Due Process", 83 HARV. L. REV. 518, 519-24 (1970). Professor Monaghan goes on to note that while judges (and presumably juries) in most cases are

"free . . . from direct political pressures . . . [a]dministrative bodies, particularly at the state level, are rarely so insulated; indeed, they are often seen primarily as political organs." Id. at 522.

In the present case, the Statute impermissibly fails to provide for a determination of liability by a jury. RCW 42.17.350 establishes a "public disclosure commission which shall be composed of five members who shall be appointed by the governor, with the consent of the senate." RCW 42.17.350(1). Three of the five members constitute a quorum. RCW 42.17.350(5). Its decisions need not be as unanimous, and can be decided by a simple majority. Thus, the Statute creates a structure under which liability with respect to political expression is adjudicated by an appointed panel of as few as three people divided two to one, rather than a unanimous jury of the speaker's peers. This structure fails to adhere to the procedural safeguards required by the First Amendment with respect to persons engaging in protected expression–particularly political candidates.

V. CONCLUSION

Rickert did not violate the Statute for two reasons. First, the Statement is capable of a true interpretation, and under the innocent-construction rule should not be found to be false. Second, Rickert lacked

"actual malice," having reasonably relied on outside sources with respect to its veracity. The Statute itself, and the PDC's application of the Statute, violate the central holding of the Washington Supreme Court in 119 Vote No!, and the First Amendment to the United States Constitution. 119 Vote No! held that the State may not control the public debate. The Statute does just that. The Statute constitutes a paternalistic attempt to regulate political expression in the context of a campaign on the basis of viewpoint and raises the specter of censorship of political speech. This Court should reverse the decision of the PDC.

DATED this 20th day of December, 2004.

Respectfully Submitted,

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP

By: ______________________________
Venkat Balasubramani, WSBA # 28269

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
Aaron H. Caplan, WSBA # 22525

Attorneys for Appellant Marilou Rickert