NO. 77769-1

SUPREME COURT OF THE STATE OF WASHINGTON

MARILOU RICKERT,

Respondent,

v.

STATE OF WASHINGTON, PUBLIC DISCLOSURE COMMISSION,

Petitioner.

SUPPLEMENTAL BRIEF OF MARILOU RICKERT

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I. INTRODUCTION

This case represents an attempt by the Public Disclosure Commission of the State of Washington ("PDC") to micromanage a candidate's political speech for the same paternalistic reasons this Court rejected in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998). The Court of Appeals was correct to find RCW 42.17.530 (the "Statute") unconstitutional. Therefore, Marilou Rickert respectfully asks the Court to affirm the decision of the Court of Appeals, either on the grounds stated by the Court of Appeals or on other grounds argued in the lower courts.

Our election system requires vigorous debate on the candidates and issues, but debate cannot be vigorous if candidates must constantly fear that their statements will be subjected to after-the-fact hairsplitting by the PDC. Courts are skeptical of government regulation of political speech – particularly criticism of government officials – because of the government's inherent inability to remain a neutral arbiter. *119 Vote No!* forcefully explained that the voters are a far better arbiter of political truth than a panel of governmental appointees.

This case illustrates why the government should allow voters to make their own political judgments. The PDC used the Statute to punish a

minor-party candidate for making a statement that criticized an entrenched incumbent. The PDC found supposed technical inaccuracies in Rickert's campaign advertisement, notwithstanding ample evidence that her statement was a disputed matter of political opinion that was arguably true. Because the Statute and the PDC's enforcement efforts impermissibly chill candidate speech, the decision of the Court of Appeals should be affirmed.

II. STATEMENT OF THE CASE

A. THE 2002 LEGISLATIVE CAMPAIGN

Marilou Rickert ran as a Green Party candidate for the position of State Senator from Washington's 35th Legislative District in the November 5, 2002 General Election. (AR at 408.) As part of her campaign, Rickert sponsored a mailing which consisted of a brochure comparing her positions with those of incumbent Senator Tim Sheldon, a conservative Democrat who drew no Republican opponent. The brochure noted many policy differences between Rickert and Sheldon. The truthfulness of the vast majority of the brochure has never been questioned. However, the italicized portion of the following comparison (the "Statement") gave rise to this litigation:

> **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.

The PDC considered it untrue for Rickert to call Mission Creek (the facility referenced in the Statement) a "facility for the developmentally challenged." 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.)

Rickert had several sources for the Statement, including Dave Wood (a lobbyist for Action for Residential Habilitation Centers, an advocacy group), who 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 a matter of public dispute widely covered in the media. For example, one newspaper noted "Wood and the 35th District Democrats' Chairwoman . . . are blaming Sheldon for not saving the Mission Creek Youth Camp near Belfair from closure." *See* Brad Shannon, *Sheldon Detractors Try New Tack*, THE OLYMPIAN, April 12, 2002 (AR at 249-53.)

All of Rickert's statements had to do with Senator Sheldon's activities as State Senator. (AR at 145.) At no point in her campaign did

Rickert make any statement regarding Senator Sheldon's personal life or imputing any improper motives to him or his voting record. Senator Sheldon was reelected with about 79% of the vote. (AR at 388, line 16.)

B. THE DECISION OF THE COURT OF APPEALS

Division II examined the history of the Statute against the backdrop of this Court's opinion in *119 Vote No!*. The Court of Appeals noted this Court's inherent distrust of "patronizing and paternalistic" laws regulating candidate speech. *Rickert v. Public Disclosure Commission*, 129 Wn. App. 450, 456, 119 P.3d 379 (2005). The PDC argued that the legislature had the power to regulate speech that could subject a candidate to liability for defamation. The Court of Appeals found the PDC's defamation analogy unpersuasive. *Id.* at 460. The court noted that the tort of defamation requires a showing of damage to reputation, which is not required by the Statute: "[the Statute] imposes no requirement of harm to a candidate's reputation; Senator Sheldon raised no claim that Rickert's statement injured his good name." *Id.* To the extent the Statute was intended to be a form of protection against defamation – which is the purpose set forth in the legislature's findings – it failed to incorporate the necessary elements. *Id.* at 461.

The court then addressed the primary justification asserted by the

PDC on appeal – that the Statute preserved the integrity of the election. The court noted the Statute was both "temporally" and "substantively" "ill-adapted" to serve the purported compelling interest. *Id.* at 463. The Statute was not restricted to speech made during election campaigns. Thus, it was not restricted to speech that is likely to affect the integrity of the elections process. *Id.* The court also pointed out that the Statute exempted speech made by candidates about themselves: "[t]he PDC present[ed] no compelling reason why a candidate would be less likely to deceive the electorate on matters concerning him or herself and compromise the integrity of the elections process." *Id.* As a speech restriction that fails to serve its purported purposes, the Statute was unconstitutional. *Id.*

III. ARGUMENT

Laws regulating debate on the qualifications of candidates are subject to exacting scrutiny. *119 Vote No!*, 135 Wn.2d at 628; *see also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989); *ACLU of Nev. v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004). Accordingly, "[t]he State bears the 'well-nigh insurmountable' burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the State's asserted

interest." *119 Vote No!*, 135 Wn.2d at 628. The Court of Appeals correctly applied this standard and found that the Statute failed this test.

A. *119 VOTE NO!* COMPELS AN OUTCOME IN RICKERT'S FAVOR

A clear majority of five justices held in *119 Vote No!* that the predecessor statute purporting to ban all allegedly false political advertising statements was unconstitutional on its face. *See* Rickert's Opening Brief at 3-6. The statute the legislature passed in response – purporting to ban all allegedly false political advertising statements about candidates – is at least as bad. Candidates for public office already have a cause of action for defamation, although *New York Times v. Sullivan* requires it to be very narrow. Unlike a tort suit, the Statute does not provide any compensation to the allegedly injured candidate. *119 Vote No!*, 135 Wn.2d at 630. More importantly, it does not incorporate the extensive constitutional and common law protections that keep defamation actions from serving as a privately enforced sedition law. These defects are even more pronounced when enforced by the government itself.

1. The Court of Appeals properly recognized that *119 Vote No!* forecloses the PDC's arguments.

Justice Madsen's concurring opinion in *119 Vote No!* left as an open question whether the legislature could enact a statute regulating

candidate speech to the extent the speech was proscribable as defamation under the standards articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Rickert believes that Justice Madsen's question should be answered "no." The core of the *119 Vote No!* decision was its recognition that "the people of this state … determine for themselves the truth or falsity in political debate," 135 Wn.2d at 632 (plurality), and that "the voters in this state are able to make an informed choice based upon freely advanced competing ideas, sorting the wheat from the chaff." *Id.* at 636 (Madsen, J., concurring). These observations apply with equal force to the current Statute.

In any event, as recognized by the Court of Appeals, the Statute goes beyond the constitutionally permitted bounds of defamation actions. *Rickert*, 129 Wn. App. at 460. Indeed, the PDC admitted in the Superior Court that "[t]he statute is **not** designed to mirror the requirements of a defamation claim." (*See* PDC Sup. Ct. Brief (CP 23), p. 11 n.9 (emphasis added).) The Court of Appeals correctly noted that the Statute does not conform to *New York Times* because of the absence of the element of damages. "RCW 42.17.530(1)(a) imposes no requirement of harm to a candidate's reputation; indeed, Senator Sheldon raised no claim that Rickert's statement injured his good name." *Id.* at 465. Protecting the

reputations of public figures is at best a suspect basis for legislation (*see* section B.1.), but at the very least there is no reason to punish criticism of public figures that does not injure their reputations.

2. Other jurisdictions recognize that mischaracterization of an opponent's voting record is not *per se* defamatory.

The Court of Appeals implicitly recognized that saying a candidate voted a certain way is not necessarily defamatory, even if it is false. A misrepresentation of an opponent's vote must contain something more, such as insinuation of improper vote-buying, bribery or a conflict of interest. For example, the plaintiffs in *Tatur v. Solsrud*, 174 Wis. 2d 735, 741, 498 N.W.2d 232 (1993), were incumbent candidates who alleged defamation based on misrepresentations of their voting records. The court rejected the notion that misrepresentation of a candidate's voting record is *per se* defamatory. The court also held that loss of votes due to an alleged misrepresentation of voting record does not amount to damage sufficient to support a defamation claim:

> a plaintiff seeking to prove defamation must show more than the fact that a misrepresentation caused the candidate to lose votes. Specifically, a plaintiff must show that the misrepresentation was defamatory on its face.

Id. at 741. A decision by the Kansas Supreme Court endorses a similar view. In *Hein v. Lacy,* 228 Kan. 249, 262, 616 P.2d 277 (Kan. 1980), the

plaintiff claimed that he had been defamed by defendant's statement alleging that plaintiff "favored 'pot and gays'." *Id.* at 252. Although *Hein* found the statement to be a matter of political opinion, the court pointed out that "[t]aken as a whole, [it did not] interpret the brochure as an attack on the personal integrity or character of the plaintiff, it attack[ed] only his views and voting record . . . ." *Id.* at 259-260.

3. Jurisdictions similarly recognize that alleged affiliation with a party is not *per se* defamatory.

Similar decisions hold that an allegation about a candidate's affiliation with a political party is not defamatory. In *Frinzi v. Hanson*, 30 Wis. 2d 271, 278, 140 N.W.2d 259 (Wis. 1966), plaintiff alleged defamation based on (among other statements) the statement that "[plaintiff,] by stating that he is considering running as an independent has thrown away all pretense at being a Democrat." The court held this was not defamatory:

> Being charged with being a good, lukewarm or nonmember of a political party is not libelous. We do not think the statement considered as a charge that [plaintiff] was only pretending to be a Democrat is libelous. It might be argued that such statement would cause some Democrats not to vote for [him] in the primary, but unless the statement is libelous on its face it is not made so because of the effect or damage it might have on [his] candidacy. . . . The degree of allegiance one has to a political party is not libelous.

Frinzi, 30 Wis. 2d at 274.

In *Cox v. Hatch*, 761 P.2d 556, 562 (Utah 1988), the plaintiff sued a senator for publishing a picture of the senator with the plaintiff. The court found no defamation, holding that membership or affiliation with a mainstream political party or politician was not defamatory. *Cox* acknowledged the plaintiff may feel affront from being wrongly identified with a political party. The court nevertheless rejected the claim:

> [plaintiff's] subjective perceptions and sensibilities have little to do with reputation, since reputation is based on a collective judgment of a large group of people.

Cox, 761 P.2d at 558 (collecting cases).

4. The Statement did not ascribe an improper motive to Senator Sheldon's vote.

In this case the Statement did not attack Senator Sheldon's character, integrity, or his personal life. Rickert did not say that Senator Sheldon cast the vote for any improper or unethical purpose (*e.g.*, he was bribed or improperly influenced), or even that there was any conflict of interest underlying Senator Sheldon's decision. The Statement characterized the vote as a bad policy choice, nothing more. The Record lacks any evidence Senator Sheldon's reputation was damaged by the Statement. The import of the Statement is identical to the statements

found not actionable in *Frinzi*, *Cox,* and the other cases cited above: At worst, the Statement is nothing more than a "generalized public fraud," which the Court held could not be regulated in the political arena. *119 Vote No!,* 135 Wn.2d at 628.

B. THE STATUTE IS UNDERINCLUSIVE AND UNSUPPORTED BY A COMPELLING INTEREST

1. Statutes protecting government officials from criticism – reminiscent of the Sedition Act – are invalid.

In enacting the current Statute after *119 Vote No!*, the legislature expressed its intent "to amend the current law to provide protection for candidates for public office . . . ." Laws of 1999, ch. 304, § 1. The Statute expressly excludes "statements made by a candidate or the candidate's agent about the candidate himself or herself." *Id.* Given that candidates will likely make flattering statements about themselves while their opponents will seek to denigrate them, the Statute essentially operates to protect the reputations of candidates for public office. Protecting the reputation of an incumbent candidate – such as Senator Sheldon – is no different from prohibiting criticism of government.

The Statute is thus akin to the notorious Sedition Act of 1798, which made it illegal to criticize the President or members of Congress. As explained in *New York Times*, the Sedition Act is recognized as a

"bleak moment" in our nation's history, unpopular at the time and repudiated ever since. *New York Times* cited to the Report on the Virginia Resolutions (drafted by James Madison) (the "Report"), which articulated distrust of regulation of criticism of the government and of other public officials. The Report also articulated how stifling criticism of officials and candidates strikes at the very essence of self-governance:

> It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct.
> . . . .
> the right of electing 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 of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively

New York Times, 376 U.S. at 275 n.15 (quoting 4 J. Elliot, *Debates on the Federal Constitution 575* (1861)). Like the Sedition Act, the Statute exists to insulate government officials and candidates from political criticism. This is improper under the First Amendment. *See New York Times*, 376 U.S. at 273-76 (rejecting "injury to official reputation" as a valid reason for repressing speech).

2. The Statute is ill-suited to serve the asserted state interest.

During this litigation, the PDC has not primarily justified the Statute by reference to reputational interest asserted by the Legislature, but instead relied on a general claim that the Statute preserves the integrity of elections. The Court of Appeals rightly concluded that this justification fares no better.

Courts view with skepticism any regulation which "leaves appreciable damage to [a] supposedly vital interest unprohibited." *Florida Star v. B. J. F.*, 491 U.S. 524, 541-542, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989). In *Florida Star* the Court struck down a regulation prohibiting publication (via mass media) of information identifying a victim of a sexual offense. The fact that the state could not identify why these types of statements were particularly harmful (*i.e.*, the statute's "facial underinclusiveness") undermined the asserted state interest. *Florida Star*, 491 U.S. at 537. A recent Ninth Circuit decision illustrates the same judicial rigor in enforcing the fit between the asserted state interest and the chosen means of regulating expression. *See Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 3900 (U.S. May 15, 2006). *Chaker* struck down a regulation prohibiting false allegations made against a peace officer during an internal investigation. The state – like

the PDC in this case – asserted an interest in maintaining the integrity of the misconduct process. However, the statute penalized only false statements made against a peace officer, and not false statements made in support of a peace officer. This violates the longstanding rule that "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *RAV v. City of St. Paul, Minnesota,* 505 U.S. 377, 383-84, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). In the same way, the law in *Chaker* supposedly encouraged truth-telling, but left falsehoods favorable to public officials untouched. *Chaker*, 428 F.3d at 1226.

The Court of Appeals issued its decision shortly before *Chaker*, but it invoked the same principle. It noted: "the PDC presents no compelling reason why a candidate would be less likely to deceive the electorate on matters concerning him or herself and compromise the integrity of the elections process." *Rickert,* 129 Wn. App. at 466. Indeed, "[n]o reason appears why candidates . . . are less likely to engage in election-related fraud than other groups and entities; if anything, one would expect the opposite to be the case." *Heller,* 378 F.3d at 996. The Statute could achieve the absurd result of allowing a candidate to make a self-aggrandizing statement but preventing his or her opponent from

pointing out the misstatement.

C. THE STATEMENT CONCERNS A MATTER OF DISPUTED OPINION

1. Courts recognize political speech should be given breathing room.

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. *119 Vote No!*, 135 Wn.2d at 633 (Guy, J., concurring); 656-57 (Talmadge, J., concurring). Cases from other jurisdictions affirm the view that political speech statutes should not penalize statements that contain political hyperbole. For example, the Oregon Supreme Court held 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"). 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,* 158 Ohio App. 3d 769, 777, 822 N.E.2d 424

(Ohio Ct. App. 2004) (construing a similar Ohio statute); *see also Herbert v. Oklahoma Christian Coalition, Inc.*, 1999 OK 90, 36, 992 P.2d 332 (Okla. 1999) (dismissing claim based on statements in a voter guide on the basis that the statements were "rhetorical hyperbole often present in vehement debate").

2. The Statement is capable of an accurate construction.

The PDC alleged the Statement contained two falsities: (1) Mission Creek was not a facility for the developmentally challenged and (2) Senator Sheldon did not vote to close Mission Creek. Both are reasonably disputable. In the context of a political race, where candidates must be given breathing room, neither characterization can be false as a matter of law.

a. Mission Creek was a facility for developmentally challenged individuals

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) 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. The PDC's characterization of Mission Creek should not trump these legislative declarations.

b. Senator Sheldon played a role in the closure of Mission Creek

Reasonable people believed that Senator Sheldon could have saved Mission Creek 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. (*See, e.g.,* 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").) While he may have cast a "no" vote on the budget bill that would close Mission Creek, 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).) Thus, the Statement falls outside the Statute because it addresses "sufficiently debatable [political issues and] fall[s] within the wide latitude [the] Court has traditionally given to political speech." *119 Vote No!*, 135 Wn.2d at 657; *Hein*, 228 Kan. at 259-260; *Herbert*, 1999 OK at 36.

Rickert's statement could be viewed as false only by an observer not aware of the complexity of the legislative process. *See generally*, *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); Opening Brief at 19-22; Reply Brief at 3-6. A politician's single vote does not necessarily indicate the politician's stance on a law or issue. Politicians often cast symbolic votes. The procedural maneuvering leading up to the vote is often more important the actual floor vote. Often a piece of legislation addresses several issues; a politician voting for the legislation may be forced to do so due to his or her support for the larger issue, notwithstanding disagreement with a portion of the legislation.
All of these points are illustrated in a recent campaign statement that U.S. Rep. Dave Reichert supported a proposal to drill for oil in the Arctic National Wildlife Refuge. Reichert voted against the parliamentary maneuver that allowed Arctic drilling to be included in a House defense

appropriations bill, but voted for the bill as amended. As a letter to the editor makes clear, it is a fair subject for debate whether Reichert should be considered a proponent of Arctic drilling. Reichert's opponents complained (rightly) that he voted in favor of a bill that contained drilling language, while his supporters believed (also rightly) that it would be "scurrilous" to charge Reichert with favoring drilling simply because he "could not bring himself to oppose an appropriation supporting soldiers in the field." *See* http://seattlepi.nwsource.com/opinion/270553_ltrs18.html (attached as **Appendix A** hereto).

Another recent example involves a radio advertisement by U.S. Senatorial candidate Mike McGavick alleging incumbent U.S. Senator Maria Cantwell "voted to 'offer' Social Security benefits to illegal immigrants on immigration votes." *See* http://blog.seattletimes.nwsource.com/davidpostman/archives/2006/05/the_new_mcgavick_ad.html (attached as **Appendix B** hereto). The article discussing the advertisement notes "[t]here are legitimate differences in the candidates' positions on immigration and it should be fair game to point that out." Senator Sheldon's vote on Mission Creek – like Representative Reichert's vote with respect to Arctic drilling and Senator Cantwell's vote on immigration and social security – is similarly

ambiguous. Like those votes, Senator Sheldon's vote should be subject to vigorous public debate. The Statute, and the PDC's enforcement efforts under the Statute, squelch this debate.

D. RICKERT ASSERTS SEVERAL ALTERNATE EQUALLY VALID BASES FOR AFFIRMANCE

In addition to the arguments highlighted in this Supplemental Brief, this Court could affirm on other grounds explained in Rickert's Court of Appeals briefs:

- Rickert lacked actual malice as the term is used in this context – i.e., Rickert lacked a subjective belief in the falsity of the Statement (*See* Opening Brief, pp. 25-32; Reply Brief, pp. 8-13);
- The Statute provides for non-jury determination of liability for speech, thus violating the right to jury trial on the issue of whether the Statement was defamatory (*See* Opening Brief, pp. 47-49); and
- The Statute effects impermissible viewpoint discrimination (*See* Opening Brief, pp. 43-47; Reply Brief, pp 21-24).

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

DATED this 1st day of June, 2006.