No. 77769-1

WASHINGTON STATE SUPREME COURT

MARILOU RICKERT,

Respondent,

v.

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

Petitioners.

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE WASHINGTON CHAPTER

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INTRODUCTION

Once again this Court is asked to consider the constitutionality of a little-changed version of the statute it has already struck down as unconstitutional in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998). As the Court of Appeals correctly determined, the changes wrought on RCW 42.17.530 have not rescued the statute from having a chilling effect on speech. Despite the Legislature's efforts, the statute still facially violates the First Amendment. While the States have an interest in circumscribing the dissemination of false statements in political campaigns, the United States Supreme Court has determined that libel laws, which have more stringent standards than RCW 42.17.530, are the appropriate vehicles for such regulation. Additionally, it is questionable, considering the inscrutable processes of modern lawmaking, that Rickert's statement violated RCW 42.17.530.

In applying these considerations, however, it will be imperative for this Court to resist the notion that Rickert is simply arguing for a constitutional right to lie. Rather, the issue before this Court is the weighing of competing societal interests. One is the constitutional imperative that speech on political matters remain wide-open, vital, and uninhibited. *See New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct.

710, 11 L. Ed. 2d 686 (1964). The Supreme Court has recognized, however, that even this bedrock principle of American governance may be trumped by an individual's property interest in maintaining his or her good name. *See 119 Vote No!,* 135 Wn.2d at 629. This has been one of the very few governmental interests that the Supreme Court has recognized as being sufficiently compelling to overcome the damage to free speech caused by its application. It has never, however, permitted this interest to be furthered by governmental prosecution. Instead, it has traditionally been the province of the courts in the context of libel and defamation claims, and not prosecution by the Executive Branch, which have determined when speech has crossed the line from being fully protected to being an actionable harm. In that regard, there is a substantive, *constitutional* difference between recognizing a person's right to bring a defamation civil suit when a deliberate falsehood has caused damage to their reputation and having the government prosecute an individual for lying in a political advertisement *when the government need not prove any damages to the complaining candidate.* In such circumstances, this Court's jurisprudence, and that of the Supreme Court, is clear that the constitutional imperative of open political speech must trump the State's interest in protecting candidates from lies about them or in promoting honesty in campaigns.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice Washington Chapter is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. For fifteen years, the Institute's national office has litigated freedom of speech cases throughout the country and has filed amicus curiae briefs in important cases nationwide.

The Institute's Washington Chapter ("IJ-WA"), which opened in 2003, litigates the same issues as the national office but places a special emphasis on vindicating those rights protected by the Washington Constitution. This case involves the fundamental right of Washingtonians to freedom of political speech during campaigns. As such, it is of vital interest to IJ-WA.

STATEMENT OF THE CASE

IJ-WA adopts the Statement of the Case contained in the Brief of Appellants filed in the Court of Appeals, and provides the following to highlight and expand upon those facts provided.

Rickert was the 2002 Green Party candidate for state senator in the 35th Legislative District. She ran against the incumbent Democrat, Senator Tim Sheldon, who raised over six times as much in campaign

funds and easily won re-election with 79 percent of the vote. During the campaign, Rickert sponsored a brochure entitled "THERE IS A DIFFERENCE!" which read in part that Senator Sheldon had "voted to close a facility for the developmentally challenged in his district." Shortly after being re-elected, Senator Sheldon filed a complaint with the Public Disclosure Commission ("PDC") alleging that the brochure's statement was a false statement of material fact in violation of RCW 42.17.530.

The version of RCW 42.17.530 that was held to be facially unconstitutional by this Court in *119 Vote No!* made it unlawful for a person "to sponsor with actual malice . . . political advertising that contains a false statement of material fact." Laws of 1988, ch. 199, § (2)(1)(a). Following this Court's decision, the Legislature amended RCW 42.17.530 to read as follows, in relevant part:

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

Laws of 1999, ch. 304, § 2.

The Legislature appeared to be reacting in part to Justice Madsen's concurrence in *119 Vote No!*, joined by then-Justice Alexander, where she

wrote that RCW 42.17.530, as originally written, may have been constitutional "where a statement contains deliberate falsehoods about a candidate for public office." *119 Vote No!*, 135 Wn.2d at 633 (Madsen, J., concurring). However, RCW 42.17.530 still contains no requirement that any damages be proven.

It was determined at the PDC's hearing that the "facility" Rickert referred to in her brochure was for juvenile offenders, not the developmentally challenged, and that Senator Sheldon had twice voted against appropriations bills that would have closed the facility. As a result, under RCW 42.17.530, the PDC found that Rickert's statement was a false statement of material fact made with actual malice or a reckless disregard for the truth. Significantly, Senator Sheldon has not alleged any damages as a result of Rickert's brochure.

ARGUMENT

This Court has already held a previous iteration of RCW 42.17.530 unconstitutional. *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618. In that decision, this Court made it clear that "[i]n political campaigns the grossest misstatements [and] deceptions . . . are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed." *Id.* at 629 (plurality opinion). Not only does RCW 42.17.530's regulation of false statements of material fact

chill constitutionally protected political speech today, it would have wreaked havoc with our nation's rough-and-tumble history of political speech in a way akin to the Sedition Act of 1798. As such, it must be held facially unconstitutional.

I. The Statute Has An Unconstitutional Chilling Effect On Speech.

In pertinent part, the First Amendment to the U.S. Constitution prohibits any law "abridging the freedom of speech, or of the press." U.S. CONST., amend. I. The United States Supreme Court has recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) (citing cases). In effect, if a given regulation discourages protected speech in its pursuit of unprotected speech, the regulation is unconstitutional unless there is a compelling governmental interest in proscribing the speech in question and the regulation is narrowly tailored. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 192, n. 12, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

RCW 42.17.530 as currently worded seeks to prohibit "false statements of material fact" made against candidates for office with

"actual malice." But because what is "false" and what is "truth" in politics is often an open question, the statute would have the unavoidable effect of unconstitutionally chilling protected political speech.

A. Political Speech Is At The Heart Of The First Amendment.

First, it is important to note that political speech of the kind engaged in by Rickert "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 346, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995). "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." *Roth v. United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (citation omitted). Such a stance "no more than reflects 'our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley v. Valeo*, 424 U.S. 1, 14, 94 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (quoting *Sullivan*, 376 U.S. at 270). Indeed, "the constitutional guarantee has its fullest and most

urgent application precisely to the conduct of campaigns for political office." *Id.* at 15.

Rickert's brochure stands squarely in the "core" of the First Amendment's protection. In fact, as the Supreme Court recognized, "handing out leaflets in the advocacy of a politically controversial viewpoint [] is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347. This distinguishes Ms. Rickert's pure political speech from campaign contributions, an expression of political association that is sufficiently attenuated from actual political speech to allow some amount of regulation to address a compelling governmental interest in avoiding corruption or the appearance thereof. *See*, *e.g.*, *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003); *Buckley v. Valeo*, 424 U.S. 1.

As such, RCW 42.17.530 attempts to regulate and punish speech that is at the very heart of American government, and which is precisely the kind of speech that the First Amendment was meant to safeguard.

B. Washington Statute Would Have Chilled Legal Political Speech In America's History.

The rough-and-tumble landscape of American political history has featured speech far more odious and factually reckless than anything

Rickert put in her brochure, and yet our country has managed to survive and prosper without laws like RCW 42.17.530 making that speech illegal.

Playing fast and loose with the truth could be considered an American tradition in politics. Thomas Jefferson was known to have employed the services of James Callender, a well-known scandalmonger, to savage Jefferson's Federalist opponents. Callender had little regard for truth or moderation in his invective, calling then-President John Adams a "corrupt and despotic monarch" and regularly savaging other Federalists with a wide variety of salacious rumors. Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* 259 (1996). He made no apologies about his work, and when Jefferson failed to make him postmaster for Richmond, he responded with the famous threat, "Sir, you know that by lying I made you President, and I'll be damned if I do not unmake you by telling the truth." *Id.* at 260.

America's recent presidential election featured statements by President George W. Bush and Senator John Kerry that were, to put it charitably, reckless with the truth. Senator Kerry repeatedly accused President Bush of having "a plan to cut Social Security benefits" by "30 to 45 percent" when President Bush had repeatedly said that he would not cut benefits for anyone currently receiving them, and the 30 to 45 percent "cut" was actually a Congressional Budget Office estimate of what would

be the effect of holding starting benefits at their current levels adjusted only for inflation. Annenberg Political Fact Check, The Whoppers of 2004, http://www.factcheck.org/article298.html. Meanwhile, President Bush accused Senator Kerry of advocating a hike of the gasoline tax, when Senator Kerry had never voted for or sponsored any such bill, and had not voiced support for a gas tax increase in ten years. *Id.* These are but two of many examples, and it is hard to conceive of a presidential election in which not one outright lie was told. And yet, elections have not been compromised or threatened.

While politicians may express frustration over having to deal with lies spread about their positions and record, trusting enforcement agencies to regulate this speech has had dangerous consequences. The most notable example of this is the Sedition Act of 1798, described by some scholars as "perhaps the most grievous assault on free speech in the history of the United States." Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 19 (2004). This much-reviled legislation was enacted by Federalists (who controlled Congress and the White House at the time) to suppress criticism and dissent from members of the opposition Republican Party like Thomas Jefferson. The Act made it a criminal act to produce or sponsor "false, scandalous and malicious writing . . . with intent to defame [any part of

the government,] . . . or to bring [the government] into contempt or disrepute." Act July 14, 1798, c. 74, 1 Stat. 596. As is clear from this language, the breadth of RCW 42.17.530 practically mirrors that of the Sedition Act, in that both punish false speech in broad language without any requirement that damages be shown. The Sedition Act of 1798 was rendered inoperative before it was held to be unconstitutional, but subsequent Supreme Court opinions have roundly rejected the Act's premise that the government has the authority to punish false speech. *See*, *e.g.*, *Sullivan*, 376 U.S. at 273. Unfortunately, before its exit, the Sedition Act was used repeatedly to throw dissenters into jail, running the gamut from professional political operatives like James Callender (who received nine months in jail) to drunken babblers. Stone, 62, 66, n*.

Obviously, the Sedition Act had the effect of chilling political speech. Although RCW 42.17.530 does not permit violators to be jailed, its fines would still discourage speech that has always been a part of the national election dialogue, and it would be in error for this Court to uphold what amounts to a throwback to one of the most infamous laws in American history.

C. The Statute Will Turn Elections Into Endless Lawsuits Contests.

The practical effect of RCW 42.17.530 is that it can be used as a sword against anyone who criticizes a candidate for public office, either during a campaign in order to score political points, or after a campaign in order to exact revenge. Even frivolous reports of alleged "false statements of material fact" can be used to devastating effect against candidates without the resources to properly defend themselves—especially third-party candidates like Rickert. Faced with the threat of investigations by the PDC, people will be less willing to criticize candidates for office. The obvious result is an unconstitutional chilling of political speech.

It is important to note at the outset that Rickert was fined by the PDC for what amounts to a twelve-word sentence fragment.[1] Out of all the campaign materials disseminated, all of her personal statements, and statements made on behalf of her campaign during the course of the 2002 Washington senate elections, the PDC decided to exert its power and punish Rickert over what amounts to a fairly innocuous, if erroneous, comment. For a governmental body to find "actual malice" over such an insignificant sentence fragment leads to the conclusion that RCW 42.17.530 can and will be used as a fine-toothed comb by angry or politically-motivated candidates to seek out the slightest questionable

[1] The Court of Appeals determined that the offending speech was the accusation that Senator Sheldon had "voted to close a facility for the developmentally challenged in his district". *Rickert v. Public Disclosure Committee, et al.*, 129 Wn. App. 450, 453, 119 P.3d 379 (2005).

statements made against them during a campaign and subject their opponents to, if not prosecution, at least time-consuming and expensive governmental scrutiny.

It is conceded that "there is 'no constitutional value in false statements of fact,'" but only in the context of libel laws. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)). In fact, "[t]he First Amendment *requires* that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341 (emphasis added). As the Court noted, "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Id.* at 340. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Sullivan*, 376 U.S. at 271 (citation omitted). Such an "[a]llowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." *Id.* at 279.

In other words, declaring open season on falsehoods goes too far and risks silencing protected speech. To some extent, lies that do not cause personal damages to an individual must be protected in order for the First Amendment to be properly enforced. The Supreme Court has determined that, "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72 (citation omitted). One federal court noted that, "[c]ases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . Errors of fact, particularly in regard to a man's mental states and processes, are inevitable." *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (*accord*, *Sullivan*, 376 U.S. at 272).

This is not to say that the Supreme Court has given a free pass to false statements, even those in a political campaign. The proper line for the protection against false speech, as advanced by the Court, is through libel laws, not regulations on political speech. "The state interest in preventing fraud and libel stands on a different footing. We agree . . . that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre*, 514 U.S. at 349. In *Keeton*, the Court

specifically upheld a state's libel law as applied against "false statements of fact" shown to cause "injury" to the residents of the state. 465 U.S. at 776. The Court has never allowed a statute that punished false statements of fact merely for being false, or knowingly false.

The Washington statute at issue in this case does not require a finding of damages, in contrast to Washington's own libel law. *Herron v. KING Broad. Co.*, 109 Wn.2d 514, 521-22, 746 P.2d 295 (1987). As such, it is not as narrowly tailored as the libel law in combating false speech. Without a showing of damage being necessary, any false speech, no matter how inconsequential or *de minimis*, may be punished, in contradiction to the Supreme Court's repeated reminder that some false speech must be protected in order for the First Amendment to be realized.[2] The practical result of RCW 42.17.530, therefore, is to encourage an exacting examination of every snippet of speech that dares criticize a candidate for public office. If the slightest allegation or sentence fragment can be found to be untruthful, as in this case, the PDC may investigate and hand out fines that could spell doom for financially-strapped campaigns like those of most third-party candidates such as Rickert. Democrats and

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[2] The chilling effect is magnified, not restricted, by the term "material fact." What is a "material fact" in the context of a political campaign? It could be argued that, with Senator Sheldon having won the election with almost 80% of the vote, Rickert's statement was not material to anything. It seemed to be as ineffective as the rest of her campaign and thus was not "material" to the election or to Senator Sheldon's standing with his constituents.

Republicans will also feel the pinch, as enough complaints with the PDC will bog down and distract any well-financed campaign, even if the complaints are frivolous. Because the opposing campaign doesn't have to foot the bill for the investigation—the Washington government does that—there is practically no reason not to use a well-timed complaint to the PDC as yet another weapon on the campaign trail.

Without requiring a showing of damages, RCW 42.17.530 punishes more speech than the U.S. Supreme Court has allowed. It could also lead to a spate of PDC investigations and lawsuits engineered for a campaign's advantage rather than an actual defense of truth or character. The practical effect of this truth regime would be to chill protected speech. The Supreme Court has held that some false speech must be protected in order for the First Amendment to be realized. Although candidates may wish to have an easy method to defend themselves against speech they feel is knowingly deceptive, their recourse is through correcting the falsity with their own speech, or, if they are damaged, bringing a libel action. Anything more violates the freedom of the speech that lies at the core of the First Amendment and our system of government.

II. Senator Sheldon's Vote Was Ambiguous.

Although Rickert's sentence fragment accusing Senator Sheldon of having "voted to close a facility for the developmentally challenged in his

district" could be seen as factually incorrect because Senator Sheldon wound up voting against the appropriations bill that would have closed the Mission Creek facility, the processes of legislating are arcane and confusing enough that Senator Sheldon's "vote" should not be taken as if it were a vote to preserve the facility. In other words, legislative votes tend to be far more ambiguous than the PDC implies, and Rickert's characterization of that vote should not be seen as factually incorrect.

To attempt to divine the intent of a legislator when it comes to a particular vote is considered by many scholars to be impossible. "Intent is empty. Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest, but they disagree about where that lies. Some strive for re-election, catering to interest groups and contributors. Most do a little of each. And inside some heads you would find only fantasies challenging the disciples of Sigmund Freud." Frank H. Easterbrook, *Text, History, and Structure In Statutory Interpretation*, 17 Harv. J.L. Pub. Pol'y 61, 68 (Winter 1994). The reason a legislator may vote for or against a particular bill often has little to do with the content of the bill itself. *See generally* Kenneth A. Shepsle, *Congress is a 'They,' not an 'It': Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (June 1992). "In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a

significant number of senators or representatives were present for the floor debate, or read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 32 (1997).

Modern examples of the ambiguity of legislator voting abound. Perhaps the most famous recent example is Senator Kerry's statement, made during the 2004 presidential primaries, "I actually did vote for the 87 billion dollars [in emergency funding for the troops in Iraq] before I voted against it." Annenberg Political Fact Check, "Bush Ad Twists Kerry's Words on Iraq," http://www.factcheck.org/article269.html. Senator Kerry voted for the $87 billion appropriation in an earlier bill that included repeals of some of President Bush's tax cuts, which failed on a 57-42 vote, but then voted against the later bill that passed without those repeals. *Id.* Therefore, it would be technically a false statement of "material fact" to say that Senator Kerry voted *for* the appropriation (since he voted against the final bill), and it would be false to say he voted *against* the appropriation (since he voted for it in an earlier bill). In such cases, the wiser thing to do for a cash-strapped campaign fearing an investigation would be to not talk about the issue.

Due to the confusing nature of legislative intent and wrangling and the inherent difficulty in using one specific vote as a representation of a legislator's position, statements regarding legilative positions are far too ambiguous to provide the basis of a prosecution.

CONCLUSION

The State has failed to provide sufficient reasons for this Court to abandon the "well-nigh insurmountable"[3] protections for political speech contained in the Constitution. For the above reasons, this Court should affirm the decision of the Court of Appeals.

RESPECTFULLY submitted this 30th day of May 2006.

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[3] *119 Vote No!,* 135 Wn.2d at 624 (quoting *Meyer v. Grant,* 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)).

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On May 30, 2006, I caused to be served a true copy of the foregoing *Amicus Curiae* Brief upon the following:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 30th day of May 2006 at Seattle, Washington.

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