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No. 98731-9

SUPREME COURT OF THE STATE OF WASHINGTON

Chris Reykdal, et al.

Plaintiffs-Respondents

vs.

Maia Espinoza et al.

Defendants-Appellants,

and

Kim Wyman, Secretary of State,

Nominal Party.

Brief Of Appellants

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I. Introduction

The professional staff employed by the Washington State Office of the Superintendent of Public Instruction, an executive branch of the state headed by the current incumbent, Superintendent Chris Reykdal, reviewed the 3Rs sex ed curriculum, and on the OSPI website, stated that it meets state standards, including that it is age appropriate. CP Dkt. No. 13 (Espinoza Decl.) at 2-3; CP Dkt. No. 18 (Reykdal reply) at 4-5. The 3Rs curriculum includes a handout encouraging parents to give fourth grade students a book containing graphic depictions of sexual intercourse and masturbation. CP Dkt. No. 13 (Espinoza Decl.) at 5 and Exh. A.

Everything in those two long sentences is 100% true. Reykdal has admitted every word of it. And that truth can also be stated with equal truth, more brevity, and the punch of a political campaign accusation: ***He championed a policy that teaches sexual positions to fourth graders.***

That statement distills the admitted facts from the verbose and indirect version, and compacts it into the format of a political campaign challenge. Of equal importance, it compacts the admitted truth into a portion of the very few words available to a candidate for inclusion in the voters' pamphlet under RCW 29A.32.090. The short version is true.

Yet the Thurston County Superior Court allowed Reykdal to censor this true statement from his opponent's voters' pamphlet

statement pursuant to a statute that allows removal only of statements that are not merely false, but false and defamatory—statements as to which a challenger like incumbent Reykdal can demonstrate a **very substantial likelihood** of prevailing in a defamation suit. Reykdal made no such showing. Indeed, at argument his counsel invited error from the Superior Court when he drew a distinction between a campaign mailer and the voters’ pamphlet, asking the court to censor speech in a voters’ pamphlet that would be protected by the First Amendment if published in a different venue:

This is not a case about a candidate’s campaign mailer, TV ad, Facebook post, other stump speech in the town square. It is about the contents of the State’s official election guide, a governmental publication that the State curates, pays for, publishes, and mails out to voters under official seal.

Transcript of argument at 6:19-24. The statute, and the constitutional protections for political speech, allow no such distinction.

The protection of political speech from censorship by government is at the core of the First Amendment of the United States Constitution, and Article I, § 5 of the Washington State Constitution. This protection is built into RCW 29A.32.090, which governs actions to remove language from the statements submitted by candidates for inclusion in the Voter’s Pamphlet. Before the superior court orders removal, it must first find “that the statement is untrue **and** that the petitioner has a very substantial likelihood of prevailing in a defamation action.” RCW 29A.32.090(3)(b) (emphasis added). Here, the trial court

ruled that the statement was “too specific” and that it should be deleted. But the trial court never found that the statement was actually false, nor did the trial court analyze whether Reykdal would have a very substantial likelihood of prevailing in a defamation action. And to the extent the trial court ruled that RCW 29A.32.090 provides less First Amendment protection to a statement in a voter’s pamphlet, his interpretation is either erroneous or would violate both state and federal constitutions. Petitioner Maia Espinoza therefore seeks reversal of the judgment of the Thurston County Superior Court.

II. Statement Of Issues/ Assignments Of Error

1. Did the Superior Court err in ordering removal of language from a candidate’s Voter’s Pamphlet submission without finding “a very substantial likelihood” that the complaining party would prevail in a defamation action?
2. Does RCW 29A.32.090 unconstitutionally authorize censoring political speech that is otherwise protected by the First Amendment?

III. Statement Of The Case

In 2019 Superintendent Christ Reykdal actively promoted the adoption of SB 5395,¹ which imposed requirements on local school districts to adopt a sex education curriculum that conformed to standards issued by the Office of the Superintendent of Public Instruction (“OSPI”). OSPI had already posted on its website information

¹ See, e.g., Superintendent Reykdal’s testimony concerning SB 5395, <https://www.tvw.org/watch/?eventID=2019021211> at 57:35.

about curricula which had been reviewed by OSPI and found to meet the state standards, including that OSPI had determined these curricula were “age-appropriate.” One of the curricula listed on the OSPI website as meeting the state standards² was a curriculum published by Advocates for Youth, entitled “Rights, Respect, Responsibility: A K-12 Sexuality Curriculum,”³ and includes a 4th grade curriculum entitled “Learning About Puberty.” The written materials include a page (Exhibit A to this Petition) that recommends additional resources for parents to share with their children, including a book titled “It’s Perfectly Normal,” by Robie H. Harris. That book contains graphic cartoon illustrations of couples engaging in sexual intercourse in different positions, as well as illustrations of male and female masturbation, a girl using a mirror to inspect her genitalia, and a boy applying a condom to an erect penis.

Having viewed these pictures as part of a “resource” that had been approved for distribution for fourth grade children as part of a curriculum reviewed by OSPI, candidate Espinoza included in her Voter’s Pamphlet the statement, “The incumbent ignored parents and educators by championing a policy that teaches sexual positions to 4th graders!”

² See

<https://www.k12.wa.us/sites/default/files/public/hivsexualhealth/pubdocs/Reviewed%20Materials%20Consistent%20with%20State%20Requirements%20Rev%2005.11.2020.pdf>

³ The curriculum can be found on line at <https://3rs.org/3rs-curriculum/>.

Reykdal filed the instant action asking the superior court pursuant to RCW 29A.32.090 to strike the challenged sentence from the Voter's Pamphlet. The trial court agreed, entering the order which is attached to the Notice of Appeal.

IV. Argument

A, The Superior Court Erred in Censoring Petitioner's Speech Without Finding a "Very Substantial Likelihood" That Reykdal Would Prevail in a Defamation Action.

1. "Very Substantial Likelihood" Must Mean At Least A "High Probability."

RCW 29A.32.090 contains no definition of "very substantial likelihood." Nor is that phrase found elsewhere in the Revised Code of Washington. It is found in Washington caselaw in connection with the admissibility in criminal cases of identification evidence, which can be excluded if there is "a very substantial likelihood of irreparable misidentification." *State v. Johnson*, 132 Wn. App. 454, 132 P.3d 767 (Div. 1 2006) (internal quotation marks omitted).

In a civil context, a court has held that "very substantial likelihood" means at least "high probability." In *Horton v. U.S. Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court considered whether a veteran was entitled to reemployment based on a showing that other employees, similarly situated, had been offered employment after having been laid off. The court found that this evidence was insufficient: "We can agree with the employee that the transfer of Harrison and

Dougherty to substitute jobs from the unemployment panel illustrates that there is a **very substantial likelihood** that had he been in civilian employment in April, 1953, he, too, would have been given substitute employment. But more than a **high probability** is required.” *Id.* at 713 (emphasis added).

Here too, “very substantial likelihood” should be interpreted to mean that in order to strike the challenged sentence, the Court would be required to find that if Reykdal sued Espinoza for defamation, there was at least a high probability that Reykdal would prevail.

2. The Statement Is True: An Accurate Characterization Of The Work Of The Executive Branch Headed By Incumbent Superintendent Reykdal.

Reykdal cannot show any likelihood of prevailing in a defamation action because the statement is a terse, accurate description of the work performed by the Office of the Superintendent of Public Instruction, which he heads. Reykdal’s dissembling about the statement, while a masterpiece of misdirection, does nothing to undermine its basic truth. As shown in the court below, the OSPI which Reykdal heads publicly approved—as age appropriate—a curriculum that recommends giving fourth graders a book containing graphic depictions of sexual activity in different positions. In the more strident tones of political campaigns, he championed a policy that teaches sex positions to fourth graders.

Reykdal disclaims every word of this sentence in a way that may resonate with voters, but which does not demonstrate a word of untruth in Espinoza's statement.

First, he attempts to disclaim personal responsibility for the work of OSPI, describing the review process in passive and third-party terms, focusing on what it does not do rather than the results of the review. *See, e.g.*, CP Dkt. No. 18 at 4-5. At argument, his counsel asserted that the only plausible basis for an opponent's statements about Reykdal had to be his own personal actions, as opposed to those of his office:

Starting with the superintendent, there is no statement that the superintendent has made that Espinoza identifies here or is relying upon, nothing he has said or done. He has never advocated for teaching sexual positions to any student.

Trans. at 8:1-5. This is a distinction without a difference. Particularly in the context of political speech, the elected statewide head of this executive branch, running for re-election to that same position, can truthfully be charged with personal responsibility for the outcome of the actions of the branch. To hold otherwise, as Reykdal invites, would allow incumbent politicians to police their opponents' criticisms of their record in office. Any act the incumbent wants to run on was his great success, while anything he regrets can't be truthfully charged to his account because it was merely the staff. RCW 29A.32.090 does not permit this parsing.

Second, Reykdal disclaims that the 3Rs curriculum was actually approved by OSPI. *See, e.g.*, CP Dkt. No. 18 at 5:8-10. Again at argument, Reykdal attempted to minimize any reliance on the approval process by his office, going so far as to claim that no reasonable person would consider attaching any responsibility for the contents of approved, listed curricula to OSPI:

But that [review process] is only a process for conducting initial screenings for overall alignment of State standards, and OSPI has expressly disclaimed repeatedly that it is adopting or recommending curricula or teaching materials as part of that process, instead urging local school districts to conduct more detailed review of any specific materials before adoption or implementation. And OSPI has never indicated that it reviewed and approved in full each and every external book listed merely as a potential reference material for parents nor would that be reasonably expected by anyone.

Trans. at 8:13-24. Such misdirection. Any member of the Washington electorate can draw its own conclusions about the meaning and import of finding a curriculum listed on the OSPI website as having been reviewed by OSPI and found to meet state standards, found to be “age-appropriate.” Particularly after Reykdal actively promoted a law that gives ever greater weight to that imprimatur, making it a required condition precedent to the use of a sex ed curriculum, voters and his opponents are absolutely entitled to expect, and indeed demand, that OSPI and its elected head be responsible for the actual contents of curriculum they state are age-appropriate. Indeed, Reykdal’s claim here is that assigning him responsibility for knowing the contents of the 3Rs

curriculum necessarily constitutes defamation because no reasonable person would assume his office had reviewed the contents before posting it.

Yet, 3Rs is listed on the OSPI website. CP Dkt. No. 13 at 3. That website informs the world that his OSPI found that it meets state standards. *Id.* 3Rs can be used consistent with the requirements of the new sex ed law he propounded. *Id.* 3Rs is actually used in Washington schools.⁴ But, Reykdal disclaims, the review by his office was superficial, and still required school districts to make separate decisions on whether to use any particular curriculum. CP Dkt. No. 18 at 4-5. Again, he makes a distinction without a difference, and particularly in light of the changes he wrought to state sex ed law, making all school districts either pick a curriculum from this list, or seek his office's approval for any independently developed sex ed curriculum. His office, and his staff, under his authority, made some level of review of this particular curriculum, and tells the world that Superintendent Reykdal's OSPI says the curriculum meets state standards, including that it is age-appropriate. School districts can, and do, select it, with the imprimatur

⁴ See <http://www.k12.wa.us/sites/default/files/public/communications/2019-12-Sexual-Health-Education-Data-Survey.pdf>. Reykdal asserts that "the book has not been taught in Washington schools," Trans. at 8:15-16, but there is no reason to believe that is true. Reykdal certainly offers no support for the bare assertion, and given his disclaimers of any knowledge of or responsibility for school's teaching, there is no reason to credit his claim.

of Reykdal's OSPI. Merely that a district could instead select another curriculum that *also* has the imprimatur of the Reykdal OSPI does not in any way detract from the approval Reykdal gave this one. Reykdal is free to campaign on the principal that under his leadership, OSPI does superficial or shoddy work. But he cannot employ the courts and RCW 29A.32.090 to prevent public debate on the point. Reykdal's OSPI put this curriculum forward; it is a truthful political statement that he championed it as a policy. Reykdal urged the passage of SB 5395 which gives his office veto power over sex ed curriculum; it is a truthful political statement that he championed the policies of the curricula his office touts as meeting state standards and as being age-appropriate. He can defend his law and disclaim 3Rs in the public square, but RCW 29A.32.090 does not permit to avoid the question by having the courts rule it out-of-bounds.

Reykdal also calls the statement false because the book, which was written for fourth graders and is included as a resource that this curriculum tells parents to give to their students, is really about puberty. *See, e.g.*, CP Dkt. No. 18 at 5-6. He apparently wishes the Court to conclude that if the book is not marketed as a how-to manual for intercourse, Espinoza's statement characterizing its contents must be false. His position is an utter *non sequitur*. Espinoza's statement says nothing about the title of the book the intentions of its author, or the promotional blurbs on the back. Her statement tersely demonstrates

that the book is instructional material found in a fourth grade teaching curriculum, used by Washington schools, described by Reykdal's office as age appropriate, and contains graphic images of sex. Espinoza's statement does not need to add the context Reykdal prefers were there. Nor is it the place of the courts to select the incumbent's preferred characterization of the book over that of his challenger. Reykdal, in the ongoing campaign, is free to emphasize the puberty and human development portions of the book, or to ignore it entirely. Espinoza is as free to emphasize the graphic imagery. Neither RCW 29A.32.090 nor the state and federal constitutional protections for political speech allow her choice to be censored.

Thus, with the brevity and bite of a campaign statement, Reykdal championed a policy that teaches sex positions to fourth graders. Reykdal and the office he was elected to head are one and the same for purposes of his re-election campaign. The various curriculum that his office publicly identifies as meeting state standards and suitable for use in Washington schools are policies he champions. The 3Rs curriculum in particular encourages parents of fourth grade students to provide those students a book as a teaching resource that contains depictions of sex acts. Regardless of the remaining contents of the book, or its overarching purpose, it thereby teaches those sex positions to any student not already familiar with them. Espinoza's statement is true.

3. The Statement Is Not Provably False As Required By *Seaquist*.

For Reykdal to prevail, he would have to “show either a false statement or a statement that leaves a false impression. . . A provably false statement is one that, as either a statement of fact or opinion, falsely expresses or implies provable facts about the plaintiff.” *Seaquist v. Caldier*, 438 P.3d 606, 613 (Wn. App. Div. 2 2019). And here, in the campaign context, his burden would be quite high.⁵ As the *Seaquist* court summarized the relevant discussion:

To determine whether an opinion implies undisclosed defamatory facts, courts consider (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts. . . Statements are more likely to be opinion when in the context of a political debate. . . Further, in the context of ongoing public debate, audiences are prepared for mischaracterizations, rhetoric, and exaggerations, and are likely to view such representations with an awareness of the subjective biases of the speaker.

Seaquist, 438 P.3d at 613 (omitting internal citations to *Dunlap v. Wayne*, 105 Wash.2d 529 (Wash. 1986)). That is not the only hurdle before Reykdal. He cannot prevail because, even if not literally true in every particular, the gist of Espinoza’s statement is true, and particularly the “sting.” The *Seaquist* court again summarized:

A defendant is not required to prove the literal truth of every claimed defamatory statement. . . The gist of the story or the portion carrying the “sting” must be substantially true. . . When a defendant makes a mixture of true and false

⁵ As discussed above, it is heightened yet again by the requirement that he demonstrate a very substantially likelihood of success on the defamation claim.

statements, a false statement (or statements) affects the 'sting' of a report only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood.

Seaquist, 438 P.3d at 613 (omitting internal citations to *Mohr v. Grant*, 152 Wash.2d 812 (Wash. 2005)).

Reykdal's frantic disclaimers to the Court below are proof positive that he acutely feels the truthful sting of this statement. Running for re-election after promoting a drastic and highly controversial overhaul of the state's sex ed laws, Reykdal does not want any voter to think poorly of the new law. To that end, his campaign, his briefs to the court below, and most statements from defenders of the law focus on its vacuous text. Nothing bad could come of the law, Reykdal asserts, because it requires that curricula be "age-appropriate." CP Dkt. No 2 at 7:8-9. Of course, he says, that doesn't mean teaching sex positions to fourth graders! CP Dkt. No 2 at 7:8-9. It is evident from the text of the law, he protests, that such a statement is defamatory! CP Dkt. No 2 at 8:17-18.

For this very reason, Espinoza prefers that voters focus on the likely effect of Reykdal continuing to head the office charged with implementation of the law. What, exactly, does Reykdal consider "age-appropriate" for fourth graders? Because of Espinoza's candidate's statement, we now know. The OSPI under statewide elected executive Reykdal holds that the 3Rs curriculum is age-appropriate for fourth

graders. The graphic, sexually explicit contents of that fourth grade curriculum are apparently shocking to at least some Washington voters, and Reykdal feels the truthful sting of a statement exposing the curriculum and encouraging voters to focus on the teaching materials rather than the text of the code.

This case is indistinguishable from actual defamation cases arising from political campaigns. *Seaquist* is highly instructive. There, after one candidate took photos of another (or her car) in a public parking lot after a candidates' forum, the campaign made hay of the incident. She accused the photographing opponent of "secretly photographing [her], invading her privacy. . . . When she said this, on screen, there was a doctored graphic showing Seaquist hunched over taking a photo and text underneath stating, 'Larry Seaquist was caught secretly taking photos of Caldier.'" *Seaquist*, 438 P.3d at 613-14. As the court noted, this statement was arguably at least exaggerated: the incident had happened in public, when the candidates were relatively close to one another, and Caldier had noticed her opponent's actions immediately. Nonetheless, it was not actionable:

Seaquist did take pictures of Caldier without her permission. If Caldier had not noticed Seaquist taking the photos, seemingly no one else would have known. While Seaquist says he was not being secretive, it is not provably false to describe his actions as secretive. The phrase, 'invading her privacy,' is an opinion and is not provably false either. While the Seaquists point out that it is not illegal to take photos of someone on the street and that a person has no legal expectation of privacy when moving about in public, a person's feeling of privacy is not provably false. Caldier's

opinions and feelings about her personal privacy cannot be the basis of a defamation claim. Further, although the photoshopped image of Seaquist taking a photo is deceiving, the gist is true.

Seaquist, 438 P.3d at 614.

In reaching this holding, the court noted that “the audiences here, whether online, over the radio, through television, or in receipt of campaign mailers, would fully expect political campaign materials to be saturated with mischaracterizations, rhetoric, and exaggeration.” *Seaquist*, 438 P.3d at 613. *Contra* Reykdal’s statements to the court below, the same standard applies here, and the same analysis leads to the same result.

Reykdal heads OSPI. A campaign opponent seeking his job can legitimately tag him with the actions of that executive branch. Indeed, doing so is not even “rhetoric,” or “exaggeration,” it is simply the commonly understood language of representative democracy: those we elect as our representatives stand for re-election on the actions taken by the institutions they lead. Reykdal’s disclaimer fails.

Reykdal’s OSPI lists the 3Rs curriculum as meeting state standards and appropriate for use in Washington schools. Rhetorically, that makes it a policy of OSPI, and therefore *his* policy. Reykdal actively promoted SB 5395, which, if it is ever implemented, will give greater weight to the approval and imprimatur of his office as to 3Rs. Thus, he

championed that policy, both by reviewing and listing it, and by winning passage of a new law intended to make his approval more important.

That 3Rs curriculum encourages parents to give fourth graders a book containing graphic images of sexual intercourse. The book is teaching material, for fourth graders, showing sex positions. Whether or not the vast majority of the contents of that book and the rest of the 3Rs curriculum focuses elsewhere, the gist, the sting, of this statement is therefore true. Espinoza wants voters to focus on this detail of the contents of the curriculum. Reykdal does not. Some voters might even agree that 3Rs, as characterized by Espinoza, is age-appropriate for fourth graders.

Like the statement at issue in *Seaquist*, Espinoza's statement is sufficiently accurate to pass muster. Seaquist characterized his actions as openly photographing the convertible mechanism of Caldier's car in a public place where she had no expectation of privacy. Caldier characterized it as secretly taking her photograph in a way that invaded her privacy and made her feel as though she were being stalked. In the context of campaign statements, it was sufficient that Seaquist had taken the photograph at a location away from others. The gist of the statement was true, and the rhetorical characterization of the facts could not suffice to support a defamation claim. Here too, OSPI's actions with respect to the 3Rs curriculum are agreed facts. The two candidates differ on how to characterize those facts. Espinoza's

preferred characterization is not false, and RCW 29A.32.090 does not forbid including it in the voters' pamphlet.

4. There Is No Evidence Or Finding Of Actual Malice.

An important component of any action for defamation, when brought by a public official, is proof of "actual malice." "Actual malice" is defined as "a defendant's knowledge of the statement's falsity or reckless disregard of the truth or falsity of the statement." *Seaquist*, 438 P.3d at 565. In addition, proof of actual malice must be established "with convincing clarity." *Johnson v. Ryan*, 186 Wn. App. 562, 583, 346 P.3d 789, 798 (Div. 3 2015).

The trial court made no finding that Espinoza knew of any inaccuracy in the statement she made, nor that she acted recklessly in making the statement. Nor could there be. Reykdal presented no evidence that Espinoza knew that the challenged statement was false, nor that she demonstrated reckless disregard of truth or falsity. Instead, the evidence was that Espinoza, acting reasonably, assumed that the curricular materials listed on a website maintained by the office that Reykdal headed, and the policies that he advocated in legislative hearings, reflected the type of education that he favored. The fact that Reykdal now disclaims any responsibility for the resources his office recommended, and now expresses disapproval of the materials that were described as "age appropriate," does not establish that Espinoza

acted recklessly in attributing the recommendations of his office to Reykdal himself.

Not only did the trial court not make the requisite finding regarding actual malice, but there was—and is—no evidence in the record from which it could be inferred at all, and certainly not, as required, “with convincing clarity.” Reykdal’s unconvincing arguments to the contrary amount to no more than his statements that he personally disapproves of aspects of a curriculum his office has put forward. It is no proof of malice merely that a political opponent highlights that approval, even if Reykdal now regrets it.

B. RCW 29A.32.090 Does Not Authorize Censoring Political Speech That Is Otherwise Protected by the First Amendment

1. *Cogswell* Does Not Apply.

Reykdal urged the court below to edit the speech of his political opponent relying in part on *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2003). CP Dkt. No. 2 at 2:12-26. The plain text of RCW 29A.32.090 shows that *Cogswell* is inapplicable. In that case, *Cogswell* challenged former RCW 29.81A.030 and the Seattle ordinance implementing it, which expressly limited contents of the pamphlet statements: “Any statements by a candidate shall be limited to those ***about the candidate himself or herself.***” *Cogswell*, 347 F.3d at 812 (emphasis added).⁶

⁶ Notably, the recodification of the elections code also resulted in eliminating this restriction.

Current RCW 29A.32.090 contains no such limitation on the content of the statement. RCW 29A.32.090 only restricts speech that falls outside the protection of the First Amendment: falsehoods and defamation.

Thus, *Cogswell* may stand for the principle that the Legislature could have created a limited public forum in the voters' pamphlet, restricting speech to exclude mention of an opponent. But it did not. Espinoza may make any statement about Reykdal that falls within the length limits of RCW 29A.32.121, and within the scope of the protections of the Washington Constitution and the First Amendment.

In *Cogswell*, the Court approved a statute that limited the nature of the forum: "the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum." *Cogswell*, 347 F.3d at 815. Here, however, Reykdal seeks to exclude speech about himself, based on a statute that has no such forum limitation. If the statute forbade any mention of other candidates, the *Cogswell* analysis might apply. But Reykdal asks for censorship of the *content* of Espinoza's speech. She may mention him, he agrees, but just not in this specific text. In that respect, he seeks to create a content-based restriction, subject to heightened scrutiny. Even in a nonpublic forum, the government may not impose whatever arbitrary or discriminatory restrictions on speech it desires. *American Freedom Defense Initiative v. King County*, 904 F.3d 1126 (9th Cir. 2018).

Instead, restrictions on speech may only survive if they are “reasonable and viewpoint neutral.” *Id.* at 1132 (emphasis supplied).

The Secretary of State cannot limit the speech contained in the voter’s pamphlet merely because it demeans or disparages an individual. *Id.* at 1131. The only basis upon which speech can be regulated is if the statement is demonstrably false. As the preceding sections of this brief demonstrated, the challenged statement is true, or at a minimum non-defamatory.

2. Language About “Misleading” Speech or “Defamation Per Se” Does Not Control.

RCW 29A.32.090(2) states that a candidate’s statement “shall not contain false or misleading statements about the candidate’s opponent.” This language may appear to give the Secretary of State or the trial court authority to censor a broader range of statements that are not necessarily false, but can be said to be “misleading.” Similarly, the same section allows misleading speech to be characterized as “libel or defamation per se” if it causes damage to reputation. But this language should not distract from the clear direction of RCW 29A.32.090(3)(b), which limits the remedy that the trial court may order to striking language that is both “untrue” and which would give the petitioner “a very substantial likelihood of prevailing in a defamation action.”

3. Any Interpretation Permitting Censorship Of Espinoza's Non-Defamatory Speech Would Violate Constitutional Protections of Political Speech.

“The United States and Washington Constitutions both protect the right of free speech, and political speech is the core of that right.” *Rickert v. State, Pub. Disclosure Comm’n*, 161 Wn.2d. 843, 845 (2007). Here, just as with the law struck down in *Burson v. Freeman*, 504 U.S. 191 (1992), this “statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech.” *Id.* at 196.

The voters’ pamphlet, despite Reykdal’s claims to the contrary, is a public forum because the Legislature has not elected to impose any limits beyond length and exclusion of speech with no First Amendment protections. This statute, unlike the one at issue in *Cogswell*, does not impose so-called “time, place, and manner” restrictions, or any facially neutral restrictions such as barring any mention of an opponent. As such, the only permissible restriction is for actual defamation. “[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar,” including defamation. *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012) (internal citations omitted). Here, as shown above, the statement is a terse and accurate distillation of the agreed facts. Reykdal may not like the distillation; he may prefer

to focus voters on other issues. But he cannot evade that the book in question has images of sexual intercourse; the 3Rs curriculum recommends the book as something to give to fourth graders, and OSPI has listed the curriculum on its website as age-appropriate for Washington students.

The Thurston County Superior Court applied a plainly unconstitutional standard to strike the sentence, following Reykdal's invitation. The Court found the statement "too specific," but made no finding that its specificity resulted in a "very substantial likelihood" of Reykdal's success in a defamation suit. And indeed, by focusing the Court on the difference between campaign mailers and the voters' pamphlet, Reykdal invited that error. Here, even if the statement is false ("specific" details are inaccurate), it is non-defamatory and protected. As the Supreme Court has made clear, "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, 567 U.S. at 718. As this Court has repeatedly recognized, even before the United States Supreme Court, the state may not bar political speech merely because it is false. As this Court recognized in *Rickert*, 161 Wn.2d. 843, the state

has no interest in “protecting political candidates” or preventing falsehoods in electioneering. “[T]he PDC’s claim that it must prohibit arguably false, but nondefamatory, statements about political candidates to save our elections conflicts with the fundamental principles of the First Amendment.” *Id.* at 853. Under this correct standard, any statute that justifies banning Espinoza’s statement is constitutionally infirm. Espinoza says Reykdal “champions” something; he says his staff made a cursory and incomplete review before listing the curriculum as a resource that schools could permissibly use if they so elected. Espinoza says it teaches sexual positions to fourth graders because the book is described as an education resource to be given by parents to fourth grade students, and contains graphic images of sexual intercourse. Reykdal prefers to focus on the broader scope of the book, and that the images in question are only a small part of the total contents of the book and curriculum. The differences here come down to weighing the impact on an observer of the actions of Reykdal’s OSPI. No interpretation of the statute that allows the courts to engage in this parsing can be consistent with the Constitution.

V. Conclusion

Petitioner Maia Espinoza respectfully requests that this Court reject censorship of political speech and reverse the decision of the Thurston County Superior Court.

Respectfully submitted this 13th day of July, 2020.

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I certify under penalty of perjury under the laws of the United States of America that on July 13, 2020, I served the foregoing Brief of Appellants, Case No. 98731-9, via email per agreement between the parties on the following:

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