

No. 98731-9

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SUPREME COURT OF THE STATE OF WASHINGTON

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CHRIS REYKDAL, ET AL.  
Petitioners-Respondents

vs.

MAIA ESPINOZA, ET AL.  
Defendants-Appellants,

and

KIM WYMAN, SECRETARY OF STATE,  
Nominal Party.

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

To ensure the State's voters' pamphlet remains a fair and trusted source of election information, RCW 29A.32.090 prohibits candidates from making statements against an opponent that are false and defamatory in nature. While the proper role of government in regulating false speech on the campaign trail remains a debated issue, there is no dispute the State may regulate the contents of its own election guide this way. Here, Appellant Maia Espinoza (Espinoza) submitted a pamphlet statement that accused Respondent Chris Reykdal (Reykdal), the current Superintendent of Public Instruction, of championing the teaching of sexual positions to fourth graders. This attack was false and defamatory, both on its face and in fact.

Espinoza's appeal confuses the applicable legal standards and misstates the facts. She defends her smear by trying to link Reykdal to two cartoons in a reference book by a third party, based on what she admits is a mere "trail of bread crumbs." The connection is contrived, flimsy, and makes a mockery of RCW 29A.32.090 and the interests it serves. Further, the offered explanation provides no support for the message Espinoza's accusation conveys to voters, which is what matters.

Espinoza also argues that RCW 29A.32.090 requires proof of actual malice. This ignores the text, context, and purpose of the statute, which provides that any false attack that tends to expose a candidate to contempt

or ridicule is “defamation per se” for this purpose. Regardless, the record makes clear Espinoza acted with actual malice. Her explanation of her attack is so groundless, contrary to the very documents she relies upon, and disconnected from the language of her statement, that actual malice should be inferred. The record confirms Espinoza’s calculated misrepresentation began to harm Reykdal’s reputation, as it was designed to do.

In sum, Espinoza’s attack against Reykdal violated the standards for Washington’s voters’ pamphlet. The trial court was thus correct to remove it. This Court should affirm.

## **II. STATEMENT OF ISSUES**

1. Whether the State may exclude from its own official election guide statements that are false and defamatory in nature.

2. Whether RCW 29A.32.090, which includes a special definition of per se defamation, allows for the removal of false or misleading statements that are either defamatory on their face or likely qualify as defamation in fact.

3. Whether Espinoza’s pamphlet statement to voters accusing Superintendent Reykdal of championing a policy that teaches sexual positions to fourth graders was false and misleading.

4. Whether Espinoza’s accusation was defamatory on its face or likely qualified as defamation in fact.

### **III. STATEMENT OF THE CASE**

#### **A. The Washington State Voters' Pamphlet**

The purpose and requirements surrounding Washington's voters' pamphlet are set forth in Chapter 29A.32 RCW. The pamphlet is the State's official election guide, a collection of relevant information the State publishes to fairly and honestly inform voters of the relevant issues and candidates appearing on the upcoming ballot. *See generally* ch. 29A.32 RCW. In even-numbered years, candidates for state office may submit statements for inclusion in the pamphlet. RCW 29A.32.031. Unlike the process for ballot measures, which includes back-and-forth arguments, *see* RCW 29A.32.060, candidate statements are not disclosed until all statements for a given office have been submitted, *see* RCW 29A.32.100.

Candidates are prohibited from including "false or misleading statements about the candidate's opponent" in their pamphlet statements. RCW 29A.32.090(2). The Legislature has recognized that such attacks "misinform the voters," "deter individuals from seeking public office," and "add to voter alienation by fostering voter cynicism and distrust of the political process." Laws of 2009, ch. 222, § 1. The statute allows anyone who "may be defamed" by a candidate's statement to petition for its removal. RCW 29A.32.090(2), (3)(a).

### **B. Espinoza’s challenged statement**

For the fall 2020 election cycle, the deadline for submitting candidate statements to the Secretary’s Office was May 22, 2020. On June 12, 2020, Reykdal received a letter from the Secretary’s Office giving “official notice per RCW 29A.32.090” that Espinoza’s statement named him and noting that he had “the option to petition the Superior Court of Thurston County to require the statement to be rejected.” CP 18. A copy of Espinoza’s submitted statement was attached, including her accusation against Reykdal: “*The incumbent ignored parents and educators by championing a policy that teaches sexual positions to 4th graders!*” *Id.* at 20 (italics in original).

### **C. ESSB 5395 and the “3Rs” curriculum**

As reported in the local media, Espinoza and her campaign initially defended her statement in the voters’ pamphlet by asserting that “Reykdal supported a new comprehensive sex education law.” CP 81. This new law, Engrossed Substitute Senate Bill 5395 (ESSB 5395), addresses sexual health education in Washington public schools. CP 27-33. The original bill was drafted by the Office of the Superintendent of Public Instruction (“OSPI”) as agency-requested legislation. CP 22-25. Neither ESSB 5395 nor the original legislation OSPI drafted authorizes or makes any references to teaching sexual positions.

Espinoza also defended her statement by asserting that one of the curricula that could be used under the law showed “different sexual positions.” CP 81. The curriculum Espinoza was referring to is called *Rights, Respect, Responsibility (3Rs)*, and is distributed by the organization Advocates for Youth. *E.g.*, CP 92-100. Advocates for Youth is an independent third party unaffiliated with Reykdal or OSPI. *Id.* Nowhere does the curriculum include any lesson or teaching about sexual positions. *See id.* The curriculum includes a lesson accompanied by a handout that references a separate book called *It’s Perfectly Normal*, but that handout is not part of the teaching curriculum. CP 96. Rather, it is a supplement, designated for parents—not teachers—and it lists the book as one potential reference tool for answering questions children raise at home about puberty. *Id.* Like ESSB 5395 and the 3Rs curriculum, the reference book does not include any teaching or instruction about sexual positions. *See* CP 175-76.

Espinoza admitted that she reviewed OSPI’s website before making her statement. CP 54. The site lists curricula that have been subjected to an initial screening process and been found, on the whole, to be consistent with state law requirements. CP 136-45. The site makes clear that OSPI enlists experts to review entire curricula for overall features such as medical accuracy, alignment with academic standards, and coverage of pertinent topics such as “abstinence” and “consent.” CP 147-72. Nowhere do these

materials suggest OSPI considers sexual positions an appropriate subject for any students. Nor do they suggest OSPI reviews external reference books. On the pages Espinoza has admitted reviewing, *see* CP 49, 54, OSPI repeatedly states that it “does not ‘approve’ or recommend curricula or other instructional materials,” that school districts should “review all instructional materials before adoption/use to ensure their suitability for use,” and that the various “comments and scores” on each curriculum should be reviewed in more detail before potential adoption or implementation. CP 136, 139.<sup>1</sup>

#### **D. Procedural history**

On June 18, 2020, Reykdal filed a petition in Thurston County Superior Court to remove Espinoza’s defamatory sentence from the pamphlet pursuant to RCW 29A.32.090. CP 1-11. Although Espinoza initially filed no response, her campaign made public statements defending what she submitted for inclusion into the voters’ pamphlet. CP 71, 81-82. Reykdal filed a reply to those public comments and Espinoza subsequently filed an opposition to Reykdal’s petition. CP 40-46, 62-68. Lastly, Reykdal filed a supplemental reply. CP 124-29.

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<sup>1</sup> Under ESSB 5395 and more broadly, OSPI’s role is not to approve or decide on any school district’s curricular materials. CP 7-8. OSPI establishes grade-level learning standards for each subject area taught in schools, without defining lesson plans or specific teacher content. *Id.* For sexual health education in particular, school districts decide which materials to use, drawn either from curricula that have passed OSPI’s initial screening process, or from any other curricula the district has reviewed and selected “in consultation with” OSPI. CP 30-31 (Laws of 2020, ch. 188 § 1(6)).

The trial court held a telephonic hearing on the petition on June 26, 2020. At the conclusion of the hearing, the court granted Reykdal’s petition in an oral ruling and written order. The court began by recognizing the special constitutional weight of political speech and the importance of exercising “caution” before removing a sentence from an electoral document. VRP at 22 (June 26, 2020). The court then said it would apply the standards “found in the statute,” specifically that a statement may be removed from the pamphlet only if the court determines it is “untrue” and that the petitioner “has a very substantial likelihood of prevailing in a defamation action.” *Id.*

The court concluded these standards were met. It noted Espinoza’s disputed sentence was “untrue because of its specificity” and defamatory on its face. *Id.* It clarified that each phrase used—“championing a policy,” “that teaches,” “sexual positions,” and the particular grade—gave the statement “a sense of truthfulness” as a factual proposition, as opposed to a mere expression of political opposition to controversial legislation. *Id.* at 22-24. The court issued a written order concluding that Espinoza’s statement was “untrue,” that Reykdal had a “very substantial likelihood of prevailing in a defamation action,” and directing the sentence be removed from the pamphlet. CP 111-12.

The trial court entered its order on June 26, 2020. *Id.* Espinoza filed requests for expedited and direct review in this Court on July 8, 2020. The Court granted the requests on July 13, 2020.

#### **IV. ARGUMENT**

##### **A. The Court’s standard of review is de novo.**

This Court’s review of the trial court’s decision in this case is de novo. Questions of law, including issues of constitutional and statutory interpretation, are reviewed under this standard. *See State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Likewise, when this Court reviews an entirely written record of modest size and complexity, as here, it sits in the “same position” as the trial court and thus conducts “an independent review.” *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

##### **B. The State may regulate its own election guide by excluding attacks that are false and defamatory in nature.**

Espinoza fails to acknowledge the constitutional standards that apply to this case. She insists the removal of her attack against Reykdal from the state voters’ pamphlet violates her free speech rights. *See Br. of App.* (“Br.”) at 23. The pamphlet, however, is a limited forum subject to reasonable and neutral speech restrictions. Further, RCW 29A.32.090 provides reasonable protection for political speech, by prohibiting only false or misleading attacks, and allowing for removal of such attacks only if challenged and judicially determined to be untrue and defamatory in nature.

While the government’s ability to regulate falsehoods on the campaign trail is hotly debated, there is no dispute it may regulate the contents of its own pamphlet this way.

When adjudicating “a free speech challenge” that arises in a forum “controlled by the government,” as here, the Court “will engage in a forum analysis to determine the level of judicial scrutiny that applies to the restriction.” *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn.2d 858, 878, 409 P.3d 160 (2018). The question is whether the forum is a traditional public forum for free expression, a forum the government has designated as a public forum, or instead a limited forum subject to reasonable and neutral regulation of speech. *See, e.g., City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 349-50, 96 P.3d 979 (2004).

As multiple courts have held, an official voters’ pamphlet is a limited forum subject to reasonable and neutral speech regulations, so long as the importance of political speech is respected. *See, e.g., Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003) (noting a “voters’ guide constitutes a limited public forum”); *Huntington Beach City Council v. Super. Ct.*, 94 Cal. App. 4th 1417, 1427, 115 Cal. Rptr. 2d 439 (2002) (same). Such a pamphlet is a publicly subsidized government publication, subject to specific standards and procedures designed to provide voters with

fair and honest information on each election, not a traditional forum for the unrestricted exchange of ideas such as a sidewalk or park.

Washington law confirms that our voters' pamphlet has not been designated a public forum. The pamphlet is created under chapter 29A.32 RCW, to provide voters across the state with reliable information on elections that is "clear and concise" and prepared according to established procedures. RCW 29A.32.010, .031, .040, .060, .070. The Secretary of State oversees its preparation and contents. *See* RCW 29A.32.010, .031(7). Judicial review is expressly made available to ensure certain elements, including explanatory and candidate statements, comply with applicable standards. *See* RCW 29A.32.040, .090.

Washington's scheme for regulating candidate statements in the voters' pamphlet is reasonable and neutral. In relevant part, the law prohibits false or misleading attacks against an opponent, which undermine the purpose of the pamphlet to provide fair and reliable information to voters. RCW 29A.32.090(2). There is a special procedure for judicial review to remove challenged statements, which must be found both untrue and likely defamatory. RCW 29A.32.090(3). Attacks that on their face tend to expose a candidate to contempt or ridicule—i.e., those especially likely to do harm—constitute defamation per se for this purpose. RCW 29A.32.090(2). In all, these are more than adequate safeguards to protect

legitimate speech, and no distinction is made based on the identity, political party, or opinions of the candidate. The scheme is thus reasonable, viewpoint neutral, and constitutional.

Espinoza ignores these provisions. She insists the pamphlet is a public forum because “the Legislature has not elected to impose any limits” other than “length” and “exclusion of speech with no First Amendment protections.” Br. at 21. This puts the cart before the horse, falsely assuming the scheme imposes no special restrictions to argue that no special restrictions may be imposed. There are robust standards and procedures governing the pamphlet, including candidate statements in particular.

More broadly, and regardless of the type of forum, Espinoza insists the State cannot exclude any statements from the pamphlet based on falsity or anything short of fully proved defamation in fact. Br. at 21-23. But the three cases she cites disprove her argument. They involve dissimilar circumstances and only confirm the State may exclude *from its own election guide* statements that are both false and defamatory in nature—as Espinoza’s attack against Reykdal was here.

First, in *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), the U.S. Supreme Court upheld a ban against electoral speech near polling places. A four-justice plurality reasoned that the sites included “sidewalks and streets,” and thus a traditional public forum was at

issue, but the ban withstood scrutiny because of the government’s interests in preventing voter confusion and election fraud. *Id.* at 193, 196-200 & n.2. Justice Scalia opined in a concurrence that the restriction was instead a reasonable, viewpoint-neutral regulation of a nonpublic forum, because “streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate.” *Id.* at 214-15 (emphasis in original). Here, streets and sidewalks are not at issue. Instead, this case concerns a governmentally curated and published voters’ pamphlet, from which false or defamatory attacks against opponents have been excluded in some fashion for decades. *See, e.g.*, Laws of 1965, c. 9 § 29.80.030.

Second, in *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012), the Court struck down a federal criminal law barring anyone from falsely claiming they had received a military medal. A four-justice plurality held that such a ban—applicable “at any time, in any place, to any person”—was overbroad, because it was not confined to “official matters” with “the formality and gravity necessary” to remind the speaker of the need for honesty, nor was it based on “legally cognizable harm” such as from defamation or invasion of privacy. *Id.* at 719-22, 729. Two concurring justices argued restrictions on false speech should be subject to intermediate scrutiny, and similarly found the criminal law at issue had no “limiting features”—such as a specific context or type of

statement “particularly likely to produce harm”—and that there was insufficient justification for its breadth. *Id.* at 730-336. Here, there is no such freestanding criminal prohibition, only the removal of attacks that are both false and defamatory from the State’s election guide, to prevent voter misinformation and respect the dignity of candidates for public office.

Third and finally, in *Rickert v. Pub. Disclosure Comm’n*, 161 Wn.2d 843, 168 P.3d 826 (2007), this Court struck down a statutory scheme authorizing the Public Disclosure Commission (PDC) to impose monetary penalties for false campaign speech against an opponent. A four-justice plurality applied strict scrutiny and found the scheme did not pass muster, because it only required falsity for sanctions and allowed “censorship by a group of unelected government officials” rather than independent judicial review. *Id.* at 848-55 & n.8. In a one-paragraph concurrence, Chief Justice Alexander reasoned the scheme was invalid because it broadly penalized “nondefamatory” speech. *Id.* at 856-56. In a dissent by Justice Madsen, the remaining four justices criticized the decision as “an invitation to lie with impunity,” reasoning that a “calculated falsehood” is not protected speech and that requiring actual malice was an adequate safeguard. *Id.* at 857-60. In contrast to *Rickert*, the instant case concerns removal of false and defamatory attacks from the voters’ pamphlet, based on judicial review, not the PDC’s punishment of false speech on the campaign trail.

A difficult issue these cases implicate is whether the government may broadly penalize false speech. This issue has been the subject of heated debate among judges and commentators alike in recent years. Some have argued that the rapidly changing “media ecosystem” and increasingly effective methods of voter deception, often targeted at minority and disadvantaged populations, demand allowing increased levels of government oversight or intervention. *See, e.g.*, Philip M. Napoli, *What if More Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55 (2018); Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010). And some, echoing Justice Madsen’s dissent, have argued this Court’s *Rickert* decision was incorrect and went too far. *See, e.g.*, Harvey Gilmore, *When We Lie to the Gov’t, It’s a Crime, but When the Gov’t Lies to Us, It’s ... Constitutional?*, 30 BUFF. PUB. INT. L.J. 61, 76-77 (2011-12).<sup>2</sup>

Regardless of whatever position one takes in this debate, however, this case falls well beyond it. No court has questioned the government’s

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<sup>2</sup> As appropriate legal frameworks, some scholars have suggested lesser scrutiny should apply when a restriction concerns “the election domain” versus the broader “domain of public discourse,” with official campaign speech falling into the former category. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 170, 214-22, 226-28 (2018). Others have proposed intermediate scrutiny for restrictions on false speech, or treating campaign speech as more akin to commercial speech. *See, e.g.*, Jason Zenor, *A Reckless Disregard for the Truth? The Const’l Right to Lie in Politics*, 38 CAMPBELL L. REV. 41 (2016).

ability to regulate false speech for purposes of a voters’ pamphlet or other limited forum—much less speech that is both untrue and defamatory in nature, with a targeted remedy, and enforcement through independent judicial review, as here. Indeed, the above cases all indicate that a restriction on false political speech in a limited forum will be subjected to far lesser scrutiny, and so long as there are reasonable safeguards, upheld. *See, e.g., Burson*, 504 U.S. at 199 (plurality op.) (finding interests in preventing voter confusion and fraud to be compelling); *id.* at 214 (Scalia, J., concurring) (upholding restriction on political speech in limited forum); *Alvarez*, 567 U.S. at 719-22, 729 (plurality op.) (discussing with approval restrictions on false speech in “official” contexts or based on defamatory injury); *id.* at 731, 734-36 (Breyer, J., concurring) (same, also noting “election regulations” are subject to lesser scrutiny); *Rickert*, 161 Wn.2d at 851 & n.8, 854 (plurality op.) (suggesting restriction could apply to speech that is defamatory in nature and with judicial review).

Consistent with these opinions, courts that have addressed prohibitions against false political statements in limited forums have upheld such restrictions as reasonable and viewpoint neutral—even without a defamation requirement. *See, e.g., Huntington Beach*, 94 Cal. App. 4th at 1427-28, 1435-36 (striking false portion of pamphlet argument that used “absolutist words” that “certainly [would] mislead[]” voters); *Am. Freedom*

*Def. Init. v. King Cnty.*, 796 F.3d 1165, 1170-72 (9th Cir. 2015) (reasoning that exclusion of false statements from transit ads was reasonable and viewpoint neutral). Here, the State has added many limits and safeguards, including a defamation element and judicial review.<sup>3</sup>

Espinoza’s final argument is that removing false attacks from any forum constitutes impermissible “censorship of the *content*” of speech and fails to qualify as “*viewpoint neutral*” regulation. Br. at 19-20 (emphases in original). This ignores that falsity is distinguishable from content or viewpoint for purposes of constitutional speech analysis. *See, e.g., Alvarez*, 567 U.S. at 721 (“Some false speech may be prohibited even if analogous true speech could not be.”); *Am. Freedom*, 796 F.3d at 1171 (reasoning that exclusion of inaccurate speech is “viewpoint neutral” because equivalent inaccuracies may be present in messages with different views). It also ignores that reasonable content discrimination is permissible in a limited forum, so long as it “preserves the purposes” of the forum. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

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<sup>3</sup> In adding a defamation requirement for removing false pamphlet statements—which is not constitutionally required—the State is not bound by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). That case held proof of actual malice is constitutionally required “to award damages in a libel action brought by a public official” because “the threat of damages suits would otherwise inhibit” public debate. *Id.* at 256, 282. As shown above, and in the language and reasoning of *Sullivan*, this does not apply to mere exclusion or removal of false speech from a limited forum such as a voters’ pamphlet—and the Legislature has not adopted it here, *see infra*, Section IV.C.

After *Rickert*, the State’s ability to maintain minimum standards of fairness and honesty in its voters’ pamphlet is not only reasonable but of significant importance. The State’s interests in an informed electorate and effective election process are compelling. *See, e.g., Burson*, 504 U.S. at 199. The pamphlet is intended to be a unique and reliable source of clear information for voters, in a time of increasing misinformation. *See* RCW 29A.32.010, .070; *see also* RCW 29A.32.020 (prohibiting publication of any “deceptively similar” guide to avoid confusion). The pamphlet also carries the imprimatur of the State, and voters might easily assume any messaging has been vetted, or at least is reliable. Allowing false and defamatory attacks would devalue the pamphlet, promote misinformation, reduce public confidence in the electoral process, deter potential candidates from running for office, propagate injurious falsehoods about persons who do, and disrupt “the citizenry’s ability to willfully choose its own direction.” *Zenor*, *supra* n.2, 38 CAMPBELL L. REV. at 47-49; *see also Rickert*, 161 Wn.2d at 866-67 (Madsen, J., dissenting). In sum, Washington’s regulation of its voters’ pamphlet is constitutional.

**C. RCW 29A.32.090 allows for the removal of false or misleading attacks that are either defamatory on their face or likely qualify as defamation in fact.**

Espinoza pairs her flawed constitutional arguments with a misreading of the governing statute. She brushes off an entire provision as

superfluous, insisting it should not “distract” from the rest of the statute. Br. at 20. But ignoring statutory language is directly contrary to this Court’s established principles of construction. And the text, context, and purpose of the entire law make clear that the statute authorizes the removal of false or misleading attacks that are either defamatory on their face or that likely qualify as defamation in fact.

When interpreting a statute, this Court seeks to “give effect to the intent of the legislature,” and determines intent when possible from “the plain language of the statute, considering the text of the provision, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *State v. Stevens Cnty. Dist. Ct. Judge*, 194 Wn.2d 898, 906, 453 P.3d 984 (2019). The statute must be “construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The Court also interprets statutes “consistent with their underlying purposes while avoiding constitutional deficiencies.” *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010).

The process and standards for challenging candidate statements in the voters’ pamphlet are set forth in RCW 29A.32.090. Regarding false attacks, the statute allows anyone who believes they have been defamed to seek judicial review in Thurston County Superior Court. RCW

29A.32.090(2), (3)(a). The court is directed to remove a challenged statement, in whole or in part, only if the court “concludes 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). This process and standard have been in place since 1999. *See* Laws of 1999, ch. 260 § 8.

In 2009, the Legislature added a key provision to the statute. *See* Laws of 2009, c. 222. The original bill, which was in direct response to *Rickert*, did not address the voters’ pamphlet at all; it only authorized the PDC to penalize false and defamatory candidate attacks made with actual malice. HB 1286 (2009). A substitute bill added the new voters’ pamphlet provision, *see* SHB 1286 (2009), now codified at RCW 29A.32.090(2). This provision prohibits “false or misleading” attacks against opponents in the pamphlet and provides that any such statement “shall be considered ‘libel or defamation per se’” if it “tends to expose the candidate to hatred, contempt, ridicule, or obloquy,” to deprive them of “the benefit of public confidence or social intercourse,” or to injure them in their “business or occupation.” RCW 29A.32.090(2).

The new statutory provision accomplishes two things. First, it makes clear that for purposes of the voters’ pamphlet, a statement may be found “untrue” because it is materially “misleading” to voters. RCW 29A.32.090(2), (3)(b). This is consistent with Washington defamation law,

under which a “false impression” may be actionable. *E.g., Seaquist v. Caldier*, 8 Wn. App. 2d 556, 565, 438 P.3d 606 (2019) (defamation plaintiff must show “either a statement was false” or “left a false impression” (citing *Mohr v. Grant*, 153 Wn.2d 812, 823, 108 P.3d 768 (2005))).

Second, the new provision also establishes a category of false or misleading statements that constitute defamation per se in this context. In particular, false or misleading attacks against an opponent that on their face tend to incite “contempt,” “ridicule,” or similar reputational harm are treated as defamation per se. RCW 29A.32.090(2). Defamation “per se” means “libelous in itself without other proof.” *Lamanna v. Scott Pub. Co.*, 48 Wn.2d 683, 690, 296 P.2d 321 (1956) (internal quotes omitted). It follows that a candidate subjected to this type of attack has “a very substantial likelihood of prevailing in a defamation action,” as required under the statute. RCW 29A.32.090(3)(b).

Absent defamation per se, a petitioning candidate must show defamation in fact. Again, the standard of proof is a “very substantial likelihood” of defamation. RCW 29A.32.090(3)(b). The most analogous authorities have used this phrase when evaluating likelihood of success on the merits for a preliminary injunction. *See, e.g., In re Reliance Acceptance Group, Inc.*, 235 B.R. 548, 553 (D. Del. 1999) (noting preliminary injunction was kept in place given “very substantial likelihood” or

prevailing on the merits); *Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 843 (S.D. Ind. 1997) (noting party had provided “substantial evidence” that showed a “very substantial likelihood of succeeding on the merits”). This is consistent with the truncated nature of a voters’ pamphlet challenge, which offers only forward-looking relief and is given “priority” on the court’s calendar. RCW 29A.32.090(5). Due to the short timelines for the pamphlet, and the limited resources of most campaigns, discovery or a trial usually will not be feasible. RCW 29A.32.090(5).

Espinoza insists the Court should not allow subsection (2) to “distract” from the “clear direction” of subsection (3)(b). Br. at 20. But this flips the Court’s principles of construction on their head, under which “all the language” must be given effect, with “no portion” rendered a nullity. *Whatcom Cnty.*, 128 Wn.2d at 546. Espinoza’s attempt to bypass subsection (2) is especially problematic given that it was separately and subsequently added to the statute—to accomplish specific purposes. *See* Laws of 2009, c. 222 § 3. As explained above, the provision clarifies, rather than distracts from, the operative judicial standards of review.

Espinoza similarly insists separate proof of actual malice is required, but again, this ignores the terms of the statute. The provision establishing defamation per se does not mention or require separate proof of actual malice. As noted above, establishing defamation “per se” means further

proof, including of malice, is not required. *See Lamanna*, 48 Wn.2d at 690. This is consistent with Washington common law—from which the statutory language is drawn—which specifically inferred malice in cases of defamation per se. *See, e.g., Farrar v. Tribune Pub. Co.*, 57 Wn.2d 549, 559, 358 P.2d 792 (1961) (“[A] publication libelous *per se* was pleaded and proved, in consequence of which the law presumes malice.”); *Hollenbeck v. Post-Intelligencer Co.*, 162 Wash. 14, 18, 297 P. 793 (1931) (“The rule in this state” is that “malice is immaterial . . . when the article necessarily tends to expose [someone] to hatred, contempt, ridicule, or obloquy,” deprive them “of the benefit of public confidence,” or “injure” them in their “business or occupation.”).

Related statutory provisions further confirm that separate proof of actual malice is not required in cases of defamation per se under the statute. In stark contrast to the lone section on the voters’ pamphlet that was added to the 2009 law, the rest of the enactment included repeated references to actual malice, and the need to prove actual malice in a PDC enforcement action. *See, e.g.,* Laws of 2009, c. 222 § 1 (noting PDC chapter was being amended to address statements “made with actual malice and [that] are defamatory”), § 2 (separately establishing defamation per se “[f]or the purposes of” PDC enforcement, and expressly requiring actual malice). This reflects an intended difference between the PDC’s general regulation

of campaign activities versus the targeted standards for judicial review of voters' pamphlet statements. *See, e.g., King Cnty. v. King Cnty. Water Dists.*, 194 Wn.2d 830, 855, 453 P.3d 681 (2019) (noting the “elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”) (internal quotes omitted).

Moreover, Espinoza also overlooks that even when a candidate must show defamation in fact under the statute, only a very substantial likelihood of showing actual malice is required. Under Washington law, actual malice can “be inferred from circumstantial evidence,” including “failure to properly investigate,” evidence of “intent to avoid the truth,” or when “allegations are so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation.” *Duc Tan v. Le*, 177 Wn.2d 649, 669, 300 P.3d 356 (2013). As explained below, Reykdal has established defamation per se *and* sufficient evidence of actual malice, so this distinction does not affect the outcome of this case.

**D. Espinoza’s accusation that Reykdal advocated for teaching sexual positions to grade school students was baseless, misleading, and demonstrably false.**

Cutting through her various misstatements on the law, Espinoza’s defense ultimately is that her statement was true. She calls it a “terse and accurate distillation” of the facts. Br. at 21. But her statement—accusing

Reykdal of “*championing a policy that teaches sexual positions to 4th graders!*”—is demonstrably false. Rather than being true or the “gist” of the truth as she alleges, Br. at 12, each portion of the statement is unsupported by any evidence of record. The statement is both false and misleading.

1. Reykdal has never supported a policy to teach sexual positions.

To begin with, Espinoza fails to identify any evidence Reykdal himself made any statements in support of a policy to “teach sexual positions” to fourth graders. Nor can she. Reykdal has never—in any personal or professional capacity—advocated for teaching sexual positions to students of any grade level, let alone ever “championed” such a policy. CP 13-14. Reykdal has never approved of teaching sexual positions to students, supported any curriculum that does so, or urged local school districts or teachers to adopt any curriculum with that type of instruction. Championing, advocating, or supporting teaching sexual positions to students would be inappropriate and fall well outside Reykdal’s role as the head of OSPI. CP 14. The plain text of Espinoza’s statement in the voters’ pamphlet falsely says he has done so. The statement is literally false.

Moreover, in analyzing whether a statement is false and defamatory, “a court considers it as a whole and construes it by its ordinary meaning to a person reading it.” *Seaquist*, 8 Wn. App. 2d at 565; *see also Farrar*, 57 Wn.2d at 550-51 (noting “the writing as a whole must be considered and

the ultimate test is the sense in which it would ordinarily and reasonably be understood by the readers”). In this context, Espinoza is wrong that the trial court erred in finding her statement “too specific.” Br. at 3. The use of specific words is relevant because it can suggest specific conduct. *See Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 44-45, 515 P.2d 154 (1973) (evidence of falsity was sufficient because “use of the word ‘repayment’” implied impropriety).

Here, the plain and unambiguous meaning of “champion” is not benign. It means a “militant advocate or defender,” and “to act as militant supporter of” something. WEBSTER’S THIRD NEW INT’L DICT. at 372 (1993). Similarly, “teach” means “to cause to know how,” and especially relevant in this context, “to present in a classroom lecture or discussion.” *Id.* at 2346. Under these common definitions, an ordinary person reading Espinoza’s statement is led to believe that Reykdal is a militant advocate of instructing fourth graders on how to engage in certain sexual positions. This, of course, is outrageous. Espinoza’s allegation is false.

2. ESSB 5395 does not permit teaching sexual positions to students.

Espinoza’s suggestion that ESSB 5395 advances the teaching of sexual positions to students is also baseless. Enacted during the 2020 Legislative Session, the new law addresses sexual health education in

Washington public schools. CP 27-33. As passed by the Legislature, the law requires every public school to “provide comprehensive sexual health education to each student by the 2022-23 school year.” CP 28. For students in grades 4-12, ESSB 5395 requires instruction on “physiological, psychological, and sociological developmental processes,” the “development of meaningful relationships and avoidance of exploitative relationships,” and “responding safely and effectively” to risks of violence. CP 32-33. Nothing in the plain text of the law authorizes, requires, or advocates teaching sexual positions to fourth graders.

The text of the original legislation for the new law also fails to support Espinoza’s claim. Under Reykdal’s leadership, OSPI drafted the initial legislation to require comprehensive sexual health education. CP 13, 22-25. Like the law enacted by the Legislature, the original bill mandated that such comprehensive sexual health education “be consistent with the Washington state health and physical education K-12 learning standards and the January 2005 guidelines for sexual health information and disease prevention” developed by the Washington Department of Health and OSPI. CP 23. No provision of the original bill makes any references to teaching sexual positions to any student, at any grade level. Espinoza’s suggestion that the law advances a policy of teaching sexual positions is false.

3. OSPI has not promoted teaching sexual positions.

Espinoza’s statement is false for the additional reason that OSPI also has never championed teaching sexual positions to students. Initially, Reykdal has never disclaimed responsibility for the work and policy positions of the agency he leads. Espinoza’s contrary assertion is a strawman. Br. at 6. In any event, Espinoza’s allegations are false with respect to OSPI. There is nothing in the record to support her claim that OSPI, under Reykdal, championed, supported, or otherwise advocated for a policy to teach sexual positions to fourth graders.

As before the trial court, Espinoza’s argument rests entirely on the fact that a prior version of the “3Rs” curriculum was subjected to OSPI’s internal review process and listed on the agency’s website. Br. at 8-10. On this basis, Espinoza urges the Court to conclude OSPI has approved not only the curriculum itself, but the entirety of every separate publication listed as a potential reference within the curriculum. *Id.* There is nothing in the record to support this claim. Indeed, OSPI expressly states it conducts only initial screenings of curricula—not reviews of separate external publications referenced in those materials. CP 136, 139, 147, 156. Importantly, OSPI makes plain that local school districts must conduct more detailed review for “suitability” before adopting or implementing any given materials. CP 136, 139.

Espinoza’s dismissal of the multiple disclaimers regarding the curricula listed on OSPI’s website as “misdirection” only highlights the falsity of her statement. The disclaimers make clear that the agency does not “approve,” “endorse,” or “recommend” any curricula for adoption, much less an external book listed in a supplemental handout for parents. CP 136, 139. But despite the express disclaimers that OSPI *does not endorse* the 3Rs curriculum, Espinoza asserts that Reykdal is nonetheless a “champion”—a militant advocate—of that program *and every reference* material listed within it. This defies common sense and is false.

4. The 3Rs curriculum and single reference book do not support Espinoza’s claim.

Espinoza also cannot defend her statement as true based on the 3Rs curriculum itself. The curriculum is developed and published by a third party, independent of Reykdal and OSPI. CP 92-100. It is not a policy; no one would refer to it that way. And despite the extensive effort to tie OSPI to the curriculum, Espinoza never claims that the curriculum includes anything regarding teaching sexual positions. Br. at 10-12. The reason for this omission is because the 3Rs curriculum simply does not address that topic. The lesson at issue covers “changes that take place during puberty.” CP 92. Nowhere does the curriculum include any lesson, instruction, depictions, or teachings about sexual positions.

Instead, Espinoza bases her entire claim—that Reykdal has championed a policy that teaches sexual positions to fourth graders—on a separate book, referenced in a separate handout that comes with the 3Rs curriculum. Br. at 10-11. But the book itself fails to support her attack. The separate book is intended to be used as a potential tool for parents that might be useful for answering questions children raise at home about puberty. CP 96. Espinoza admits the book is not part of the 3Rs teaching curriculum itself. Br. at 10-11. Espinoza admits the book is a supplement designated for parents and caregivers—not teachers. *Id.* She admits the book covers puberty, reproduction, and sexual abuse. *Id.* And she admits the book itself *does not teach* about sexual positions. *Id.*

Rather, Espinoza argues that Reykdal championed teaching sexual positions based on two cartoon depictions of sex included in the book. Br. at 11. But even these two drawings do not teach students sexual positions. They are included to help make the age-appropriate subjects more approachable. CP 57-61. There is no discussion, description, or reference to sexual positions included with the cartoons. *Id.* Moreover, as Reykdal’s testimony shows, teaching sexual positions is not a part of any school curricula and is not being taught to students. CP 13-14.

Espinoza’s attempt to justify her allegation against Reykdal in the state voters’ pamphlet based on so thin a reed makes a mockery of RCW

29A.32.090 and the compelling public interests it serves. The accusation that Reykdal championed teaching sexual positions to fourth graders is not supported by anything he has said or done, the text of the new law, the work of OSPI, or the 3Rs curriculum itself. Instead, Espinoza urges this Court to “follow[] the trail of bread crumbs” to two cartoon drawings within a single book that itself is not a part of a teaching curriculum and regardless, does not provide any instruction on sexual positions. CP 43. The connection to Reykdal is so tangential and tenuous as to be absurd.

5. Crediting Espinoza’s defense would render the voters’ pamphlet a circus.

At bottom, Espinoza’s defense boils down to only a single bread crumb, with no real connection to Reykdal, to support what is a sweeping and outrageous attack against him. If this were enough to withstand review under RCW 29A.32.090, the statute would be rendered toothless and serve no purpose. Anyone could support a false and defamatory attack with some intricate connect-the-dots explanation, no matter how tenuous, weak, or absurd. But that is not the law. Instead, attacks that are false or misleading—including by giving a false impression—are subject to removal. *See* RCW 29A.32.090(2), (3)(b); *see also, e.g., Seaquist*, 8 Wn. App. 2d at 565.

Espinoza argues that readers of the voters’ pamphlet will parse through the trail of breadcrumbs to discover what she purports is the truth.

Br. 8-10. But this misconstrues Washington law. As set forth above, in deciding whether a statement is false and defamatory, “a court considers it as a whole and construes it by its ordinary meaning to a person reading it.” *Seaquist*, 8 Wn. App. 2d at 566; *see also Yelle v. Cowles Pub. Co.*, 46 Wn.2d 105, 109, 278 P.2d 671 (1955) (“In determining whether the words spoken were defamatory, they must be construed in the sense in which they would ordinarily be understood by persons hearing them.”). An ordinary person reading Espinoza’s statement cannot be expected to understand that the true meaning of her accusation is not that Reykdal or OSPI supports such a policy, but that a third party reference book happens to depict two couples in bed. Indeed, an ordinary reader would fairly be left with only one impression: Reykdal supports teaching sexual positions to fourth graders. This constitutes a false statement under Washington law.

Espinoza’s similar attempt to defend her statement as true because she believes it is merely a “terse” description of her tortured explanation should likewise be rejected. Br. at 6. Again, the statement conveys that Reykdal has championed the teaching of sexual positions to children, which is untrue. If Espinoza meant to convey something other than what was written, she should have used different language. In this context, referring to the statement as “terse” and a “distillation” is simply another way of acknowledging it is false and misleading.

Espinoza claims that while not “literally true,” her statement is nonetheless permissible because it was made in the “campaign context,” citing *Seaquist*. Br. at 12. But this misreads *Seaquist*, which is distinguishable on numerous grounds. First, that case considered the “campaign context” only for the specific purpose of determining whether disputed statements were mere opinions rather than expressly or impliedly factual. *See* 8 Wn. App. 2d at 566-67. This included, for example, a candidate’s statement about what she “felt like.” *Id.* at 568. In contrast, Espinoza does not claim her statement was mere opinion. To the contrary, she insists it is true as a matter of fact, which is what would be conveyed to voters if the statement were included in the pamphlet. Br. at 6-11. As the trial court correctly observed, the statement is too specific in its choice of words to be viewed otherwise. VRP at 23-24.

Second, *Seaquist* concerned general messaging on the campaign trail, not a candidate statement in the voters’ pamphlet. *See* 8 Wn. App. 2d at 568-72. Especially in light of the purpose and standards governing the pamphlet, voters do not expect the same kind of “mischaracterizations, rhetoric, and exaggerations” as might be found on social media, television ads, or mailers. Br. at 12. The pamphlet is an official publication of the State, presenting information to fairly and honestly inform the public about the upcoming election. In furtherance of this purpose, candidate statements

are not exchanged, not disclosed until all have been received, and are prohibited from containing “false or misleading statements about the candidate’s opponent.” RCW 29A.32.090(2), .100. Voters therefore will not expect to find typical mudslinging in the pamphlet because that is not its intended purpose and it is specifically designed to exclude such content.

Third and finally, *Sequist* involved allegations that were in fact substantially true, unlike here. The candidate’s opponent in that case admitted to “taking pictures” of her “after she got into her car” and while no one else was around. 8 Wn. App. 2d at 568. It was thus defensible for the candidate to state in campaign messaging that her opponent was taking pictures of her “as [she] got into” her car, that this was done “secretly,” and that her privacy had been invaded. *Id.* at 568-69. The “sting” and “gist” of the candidate’s factual statements were true. *Id.*

In contrast, the “sting” and “gist” of Espinoza’s statement are exactly what is false and misleading, by design. The sting of her accusation comes from Espinoza’s distinct choice of words, which falsely invoke an inappropriate subject allegedly being taught to school students. *See Herron v. KING Broad. Co.*, 112 Wn.2d 762, 772, 776 P.2d 98 (1989) (statement in news report “added a distinct and separate implication” that was false). There is not a shred of accuracy in her statement that could support it, and the “gist” remains distinctly false and misleading regardless. *See id.*

**E. Espinoza’s attack against Reykdal was defamatory on its face, reckless, and designed to tarnish his reputation.**

In addition to being false and misleading, Espinoza’s accusation against Reykdal is defamatory on its face. Under RCW 29A.32.090, a false or misleading attack against an opponent is defamation per se if it tends to expose them to “contempt,” “ridicule,” or loss of “public confidence.” RCW 29A.32.090(2). This standard is met here. It is beyond dispute that accusing a candidate for the office of Superintendent of Public Instruction of championing a policy to teach sexual positions to school children will subject that person to contempt, ridicule, and loss of public confidence. Espinoza does not dispute her accusation had this impact. Indeed, she admits her statement was designed to “sting” in this manner. Br. at 12.

Reykdal has personally experienced the harsh impacts of these types of false and defamatory accusations. As he has testified, Espinoza’s statement is of the kind that engenders hatred, contempt, and ridicule, chips away at public understanding and confidence in governmental offices, harms the community, and undercuts the public standing of the targeted officials. CP 14. Evidence that Espinoza’s pamphlet statement had begun to have this effect is also in the record. Immediately after Espinoza’s campaign spoke to the press about her accusation, online reader comments in the news

article were replete with attacks on Reykdal for his purported advocacy of teaching children sexual positions. CP 85-90.

Reykdal has also proved actual malice, i.e., knowledge or reckless disregard as to falsity. *Bender v. Seattle*, 99 Wn.2d 582, 601, 664 P.2d 492 (1983). Actual malice can be inferred from circumstantial evidence, including that a person reviewed materials that “directly rebutted” their allegation, *Herron*, 112 Wn.2d at 776-77, or where the allegation is “so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation,” *Duc Tan*, 177 Wn. 2d at 669. Here, each of these grounds for inferring actual malice is present, demonstrating more than a very substantial likelihood of defamation in fact.

First, Espinoza asserted she “researched what was available on the OSPI website” and conducted a “review” of pertinent materials before submitting her statement. CP 54. But even a cursory review of OSPI’s website shows that neither Reykdal nor OSPI ever championed a policy of teaching sexual positions to students. The pages Espinoza claims to have reviewed expressly state OSPI does not “approve,” “endorse,” or “recommend” any given curriculum. CP 136, 139. And OSPI’s review materials do not reflect any approval of teaching sexual positions. CP 136-72. More broadly, there is not a single policy or even material Espinoza identifies—including the 3Rs curriculum and reference book for parents

that are the sole basis for her claim—that actually teaches about sexual positions. Having reviewed this evidence, Espinoza could not plausibly conclude that Reykdal was a “champion” of teaching sexual positions to children. Espinoza’s recklessness can be inferred from the mountain of contrary evidence she ignored. *See Herron*, 112 Wn.2d at 776 (fact that defendant reviewed evidence contrary to his allegation showed he “entertained serious doubts as to the truth” of his publication).

Second, actual malice can be further inferred from the absurdity of the “bread crumb” theory on which Espinoza’s appeal relies. Again, her claim is not that Reykdal personally championed teaching sexual positions. She does not argue ESSB 5395 permits such instruction. Nor does she assert OSPI supported teaching that subject through its own advocacy. And she cannot argue that any content of the 3Rs curriculum itself supports her allegation. Undaunted by this lack of support, she relies on two cartoons found in a reference book for parents, that is listed in a handout on puberty, that accompanies a curriculum OSPI explicitly stated it did not endorse. The absurdity of this defense for her false and misleading attack against Reykdal in the voters’ pamphlet establishes actual malice, and therefore defamation.

## V. CONCLUSION

In her voters’ pamphlet statement, Maia Espinoza made a sweeping and outrageous attack against Superintendent Reykdal that was false,

misleading, and defamatory on its face and in fact. This baseless and injurious attack does not belong in the State's official voters' pamphlet. Reykdal respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 24th day of July, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of July, 2020, I electronically filed the foregoing document with the Supreme Court of the State of Washington ECF system, which will send notification of such filing to all counsel of record.

Dated this 24th day of July, 2020.

*s/ Thien Tran*  
Thien Duc Tran, Paralegal/Legal Assistant

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**Subject:** Chris Reykdal et al. v. Maia Espinoza et al. - WSSC No. 98731-9 - Respondents Brief

Good afternoon,

Since the Court's e-filing system is down, attached please find Respondents' Brief in the above-referenced matter. Should you have any questions please do not hesitate to contact us.

Thank you,

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