

NO. 98731-9

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS REYKDAL, a candidate for public office, and
FRIENDS OF CHRIS REYKDAL, his political committee,

Respondents,

v.

MAIA ESPINOZA, a candidate for public office, and FRIENDS OF
MAIA ESPINOZA, her political committee,

Appellants,

and

KIM WYMAN, Secretary of State for the State of Washington,

Nominal Defendant.

**BRIEF OF NOMINAL DEFENDANT
SECRETARY OF STATE KIM WYMAN**

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I. INTRODUCTION

Nominal Defendant Secretary of State Kim Wyman does not take a position on whether the Superior Court properly ordered deletion of a statement in Appellant Maia Espinoza's candidate statement as false and substantially likely to be defamatory under RCW 29A.32.090. If this Court concludes that the Superior Court Order complied with statutory requirements, however, it should also conclude that RCW 29A.32.090 is constitutional as applied to this case.

Contrary to Ms. Espinoza's claim, the voters' pamphlet is not a public forum and thus is not subject to strict scrutiny analysis under the First Amendment. Instead, the more limited requirements governing speech in a nonpublic or limited public forum applies, requiring only that RCW 29A.32.090 be reasonable and viewpoint neutral. RCW 29A.32.090 more than meets this lenient standard. RCW 29A.32.090's restriction on false and defamatory statements is eminently reasonable in light of the limited purpose of the voters' pamphlet to provide a brief introduction to voters of candidates running for office, while avoiding actionable defamation in a state-sponsored forum. And the statute is viewpoint neutral because it applies to all false and defamatory speech challenged under the statute and does not target Ms. Espinoza because of disagreement with her specific viewpoint. RCW 29A.32.090 is constitutional.

II. STATEMENT OF THE ISSUE

Is a statute restricting false and defamatory statements in the state voters' pamphlet a reasonable and viewpoint neutral restriction as applied to candidate statements?

III. STATEMENT OF CASE

The Secretary of State's Office publishes the statewide voters' pamphlet. *See* RCW 29A.32.010. The contents of the voters' pamphlet is dictated by statute and requires publication of, among other things, ballot measures submitted to the people, candidate statements, advisory votes, and contact information for the major parties and the Public Disclosure Commission. *See* RCW 29A.32.031, .070. Draft candidate statements submitted to the Secretary of State for publication in the voters' pamphlet are not publicly disclosed until all candidate statements are submitted. RCW 29A.32.100(1)(a).

RCW 29A.32.090 provides a mechanism for challenging a narrow range of voters' pamphlet material. The Secretary of State, for example, may file a petition in superior court seeking an order excluding any obscene matter, or matter that is otherwise prohibited from being distributed in the mail. RCW 29A.32.090(1). Opponents of candidates who believe they have been defamed in a candidate statement may also challenge inclusion of such material in the voters' pamphlet. RCW 29A.32.090(3)(a). However, "[t]he

court shall not enter such an order unless it 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).

IV. ARGUMENT

A. RCW 29A.32.090(2) is Limited

As a threshold matter, RCW 29A.32.090(2) is limited in three critical respects. First, it applies only to candidate statements that would otherwise be included in the voters’ pamphlet, which is published by the government; it does not apply to any other form of speech. Second, it does not prohibit all candidate statements that are “false or misleading”; there must also be a “very substantial likelihood” that a challenger would prevail in a defamation action. RCW 29A.32.090(3)(b). Third, such false and defamatory statements may only be removed following a judicial determination that the requirements are met; the Secretary does not have authority to reject a candidate statement on this basis. RCW 29A.32.090(3)(a).

The context of these challenges is also relevant. Candidate statements must be submitted in late May or early June. WAC 434-381-120(1); RCW 29A.24.050. Primary elections are held on the first Tuesday of August, RCW 29A.04.311, and ballots are mailed at least eighteen days earlier, RCW 29A.40.070(1). Ballots for service and overseas voters must

be mailed at least forty-five days before a primary election. RCW 29A.40.070(2). Any challenge to a candidate statement must therefore be resolved expeditiously.

B. The Statutory Restriction on False and Defamatory Statements in the State Voters' Pamphlet Does Not Violate First Amendment Requirements

1. The Washington State Voters' Pamphlet Is Not a Traditional or Designated Public Forum

Laws restricting speech are subject to differing levels of scrutiny depending on the “forum” in which the speech occurs. *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 879, 409 P.3d 160 (2018). The highest level of scrutiny applies to restrictions on speech occurring in a traditional or designated public forum. *Cornelius v. NAACP Legal Def. & Ed. Fund*, 473 U.S. 788, 799–800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). Traditional public fora are narrow categories of public property such as “streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). “Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to

achieve that interest.” *Cornelius*, 473 U.S. at 800. Such restrictions must generally be “content-neutral and narrowly tailored to serve a significant government interest” while “leav[ing] open ample alternative channels of communication.” *Perry*, 460 U.S. at 45.

Restrictions on speech in a limited or nonpublic forum, however, warrant lower scrutiny and will be upheld against a First Amendment challenge as long as the challenged restriction is “reasonable and viewpoint neutral.” *Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 651 (9th Cir. 2019); *see also Sprague*, 189 Wn.2d at 887 n.22. Courts apply this lower level of scrutiny to limited and nonpublic fora in recognition that the government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Sanders v. City of Seattle*, 160 Wn.2d 198, 210, 156 P.3d 874 (2007) (citing *Perry*, 460 U.S. at 46). Under this lower standard, restrictions on speech need only be “‘reasonable in light of the purpose served by the forum’” and “need not be the most reasonable or the only reasonable limitation.” *Sprague*, 189 Wn.2d at 879 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Cornelius*, 473 U.S. at 808)). The government may instead establish “any reasonable restriction to ensure that the forum will be reserved for its intended purpose.” *Id.* (citing *City of Seattle v. Mighty*

Movers Inc., 152 Wn.2d 343, 361, 96 P.3d 979 (2004)); *see also City of Lakewood v. Willis*, 186 Wn.2d 210, 217-18, 375 P.3d 1056 (2016) (laws restricting expression in limited or nonpublic forums “must only be viewpoint neutral and ‘reasonable in light of the purposes served by the forum.’”).¹

Here, the State voters’ pamphlet is not a traditional or designated public forum and is thus subject to the lenient reasonableness standard, not strict scrutiny. A voters’ pamphlet does not at all resemble a traditional public forum, and Ms. Espinoza has not shown that the voter’ pamphlet has been treated immemorially as a traditional public forum. *See Mighty Movers, Inc.*, 152 Wn.2d at 351 (courts have “rejected the view that traditional public forum status extends beyond its historic confines.”).

A voters’ pamphlet is also not a designated public forum. A designated public forum is one that is open to the public for “indiscriminate use and ‘almost unfettered access.’” *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 496 (9th Cir. 2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 172 L. Ed. 2d 853

¹ Appellant challenges RCW 29A.32.090 only under the First Amendment and does not argue that different or additional free-speech protections are afforded under Washington’s Constitution under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Absent a *Gunwall* analysis, this Court will not generally examine whether the Washington Constitution provides greater protection than the United States Constitution. *Sprague*, 189 Wn.2d at 876.

(2009) (government creates “‘a designated public forum’ if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose’”). “In contrast, when the government intends to grant only ‘selective access,’ by imposing either speaker-based or subject-matter limitations, it has created a limited public forum.” *Seattle Mideast Awareness Campaign*, 781 F.3d at 497.

The voters’ pamphlet includes an obvious speaker-based limitation: only certain speakers (i.e., candidates) may submit candidate statements. RCW 29A.32.031(2). It also includes subject-matter limitations, excluding submissions by the general public on all manner of expression that is not required to be included in the voters’ pamphlet by statute. *See* RCW 29A.32.031, .070. As a result, a voters’ pamphlet is not a designated public forum, as recognized by numerous courts. *See, e.g., Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003) (holding that voters’ pamphlet was limited public forum requiring that restrictions on content be reasonable and viewpoint neutral) (citing *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990) (holding that California voters’ pamphlet constitutes a limited public forum because “California created the pamphlets for the specific purpose of allowing a limited class of speakers, the candidates, to address a particular class of topics, statements concerning the personal background and qualifications of the candidate”)); *see also*

Clark v. Burleigh, 4 Cal.4th 474, 485-91, 841 P.2d 975, 14 Cal. Rptr. 2d 455 (1992) (concluding voters’ pamphlet and candidate statements are nonpublic fora given their limited purpose and scope).²

Ms. Espinoza argues that because RCW 29A.32.090 does not restrict all mention of a candidate’s opponents like the restriction at issue in *Cogswell*, the Legislature created a designated public forum. Appellant’s Br. at 19. Contrary to Ms. Espinoza’s assumption, however, the State need not affirmatively restrict content to avoid converting the voters’ pamphlet into a designated public forum. As explained by the U.S. Supreme Court, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802; *Flint v. Dennison*, 488 F.3d 816, 832 (9th Cir. 2007) (even absent limitations on the “content of campaign speech,” University did not create designated public forum in student elections where it did not “permit students or the

² In *Clark*, the California Supreme Court held that the relevant forum in a constitutional challenge to restrictions on candidate statements was “not the voter’s pamphlet as a whole but simply the candidate’s statement.” *Clark*, 4 Cal.4th at 484-85. The Court explained that the Court’s forum analysis “is not completed merely by identifying the government *property* at issue. Rather, in defining the forum we have focused on the *access* sought by the speaker.” *Id.* (emphasis in original) (citation omitted). Because the candidate sought access only to the candidate statements, the Court identified the candidate statement as the relevant forum and concluded the statement was a nonpublic forum. *Id.* However, because the “reasonableness” test governs the First Amendment analysis, whether the forum is defined as the voters’ pamphlet or the candidate statement, or as a limited versus or nonpublic forum, these issue need not necessarily be resolved in this expedited proceeding.

general public to use the ASUM election system indiscriminately.”). To determine whether the government intentionally and affirmatively opened up a forum in this manner, the court examines the “policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” *Cornelius*, 473 U.S. at 802; *see also Perry*, 460 U.S. at 47 (no public fora created in school mailboxes and interschool delivery system where fora is not “open for use by the general public,” and permission to use fora is not granted “as a matter of course to all who seek to distribute material.”).

Here, as discussed above, the State has not invited speech from the public at large, and has adopted specific limitations about the content of the voters’ pamphlet. RCW 29A.32.031, .070, .090. The voters’ pamphlet is not a traditional or designated public forum.

2. RCW 29A.32.090’s Restriction on False and Defamatory Speech is Reasonable and Viewpoint Neutral

RCW 29A.32.090’s restriction on false and defamatory statements is both reasonable and viewpoint neutral and thus meets First Amendment requirements.

a. The Restriction on False and Defamatory Speech is Reasonable

The restriction on false and defamatory speech serves the State’s purpose of providing an opportunity for candidates to provide a brief

introduction of themselves to voters, while preventing the pamphlet from becoming a vehicle for false and defamatory statements and exposing the Secretary of State to potential legal liability for publishing actionable defamation. *Cornelius*, 473 U.S. at 811 (“The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.”); *Clark*, 4 Cal. 4th at 493 (in light of specific purpose and brevity of candidate statements in voters’ pamphlet, “it is plainly reasonable for the Legislature to provide . . . the [candidate] statement should not also be used by the candidates as a partisan campaign device to attack their opponents”).

RCW 29A.32.090 reflects the Legislature’s balancing of the competing personal and legal interests at stake, including by providing a safe harbor for the Secretary of State and the State against any claim for damages from publication of any statement or argument as long as statutory notice is provided to permit a legal challenge by parties who believe they have been defamed. *See* RCW 29A.32.090(3)(d) (“If the secretary of state notifies a person named or identified in an argument or statement of the contents of the argument or statement within three days after the deadline for submission to the secretary, then neither the state nor the secretary is liable for damages resulting from publication of the argument or statement

unless the secretary publishes the argument or statement in violation of an order entered under this section.”).

Excluding false and defamatory statements is particularly reasonable here given that the candidate statements are not subject to public disclosure until all candidate statements are submitted, depriving candidates of an opportunity to respond to potentially defamatory attacks. RCW 29A.32.100(1)(a); *see also Clark*, 4 Cal.4th at 493 (upholding restrictions on candidate statements to prevent incentivizing candidates to “misuse” candidate statement “by attacking their opponents in order to avoid the possibility of unanswered attacks by others in the same forum”).

The statute’s restriction is also “reasonable” because it is “definite and objective” and includes significant safeguards against arbitrary interpretation or enforcement. *See, e.g., Am. Freedom Def. Initiative v. King Cty.*, 904 F.3d 1126, 1133 (9th Cir. 2018) (upholding transportation agency’s restriction against false and misleading statements as “definite and objective” and thus reasonable in light of purpose of transit system)); *cf. Hopper v. City of Pasco*, 241 F.3d 1067, 1077 (9th Cir. 2001) (“Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship.”). The restriction here is even more protective than the restrictions upheld in *Cogswell* or *American Freedom Defense Initiatives* because a challenged statement will not be

excluded from the voters' pamphlet absent a judicial determination that the statement is false and that the challenging party would have a "very substantial likelihood" of prevailing in a defamation action. *See* RCW 29A.32.090(3)(b). An extensive body of defamation case law guides the court's assessment, which is also subject to independent appellate review. While these safeguards are by no means necessary to comport with First Amendment requirements, their inclusion strengthens the case that RCW 29A.32.090 is constitutional.

Ms. Espinoza, like the plaintiff in *Cogswell*, argues that the defamation restriction here is unlawful because it constitutes government censorship of political speech. Appellant's Br. at 21. In rejecting this same argument, the court in *Cogswell* explained: "the [United States] Supreme Court held that 'a non-public forum by definition is not dedicated to general debate or the free exchange of ideas.' The existence of alternative channels of communication outside the forum allow political candidates to communicate information restricted by the purposes of the forum, providing other means of contact and communication with the intended audience.'" *Cogswell*, 347 F.3d at 818 (citations omitted); *Perry*, 460 U.S. at 53 (reasonableness of restrictions "supported by the substantial alternative channels that remain open" for requested communication to take place). The government is simply not required to "allow the free exchange of ideas in

the voters' pamphlet, and can restrict the content of the pamphlet as necessary to meet the purpose for which it created the forum." *Cogswell*, 347 F. 3d at 818.

Like the plaintiff in *Cogswell*, Ms. Espinoza has other fora in which she can "comment, *ad infinitum*, on the weaknesses of [her] opponents and other ideas central to political speech." *Id.* at 818. Simply because Ms. Espinoza "may feel that there are other more reasonable ways to regulate the voters' pamphlet does not render this restriction unreasonable." *Id.* at 817.

b. RCW 29A.32.090 is viewpoint neutral

The restriction on false and defamatory statements is also viewpoint neutral. As explained in *Cogswell*, "a ground rule cannot form the basis of a viewpoint discrimination claim absent evidence that the government is intending to 'suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 816 (citation omitted); *Sprague*, 189 Wn.2d at 887 ("When the government targets particular views taken by speakers on a subject, it violates the First Amendment's requirement of viewpoint neutrality.").

Here, Ms. Espinoza has provided no evidence to support a conclusion that the statutory restriction here was enacted to suppress her particular viewpoint. *Perry*, 460 U.S. at 46 (regulation is viewpoint neutral

when there is no claim or evidence that Legislature adopted regulation in “an effort to suppress expression merely because public officials oppose the speaker’s view”). Rather, the restriction applies equally to all candidates whose statements are challenged as false and defamatory under the statute. That is all that is required to establish viewpoint neutrality.

C. This Court Could Decline to Consider Ms. Espinoza’s Constitutional Challenge for Failure to Serve the Attorney General

Should this Court conclude that the challenged statement is defamatory, this Court could also decline to consider Ms. Espinoza’s counterclaim challenging the constitutionality of RCW 29A.32.090 due to her failure to serve her declaratory relief counterclaim on the Attorney General. RCW 7.24.110 requires that in any declaratory relief action in which “the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.”

The Certificate of Service on Ms. Espinoza’s Answer and Counterclaim indicates that she did not serve the Attorney General. CP at 108. Because the Attorney General has the right to be heard on the constitutionality of RCW 29A.32.090, this Court could decline to address Ms. Espinoza’s counterclaim alleging that the statute is unconstitutional as applied to this case.

V. CONCLUSION

To the extent this Court upholds the Superior Court's determination that the challenged statement in Ms. Espinoza's candidate statement is false and that Superintendent Reykdal has a very substantial likelihood of prevailing in a defamation claim, this Court should reject Ms. Espinoza's constitutional challenge to RCW 29A.32.090 as applied to this case, or decline to consider her challenge as procedurally improper.

RESPECTFULLY SUBMITTED this 24th day of July 2020.

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PROOF OF SERVICE

I hereby certify that on July 24, 2020, I caused the foregoing document to be electronically filed with the Clerk of the Court via email. True and correct copies of the foregoing documents were also served via email upon the following parties:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of July 2020.

s/ Stacey McGahey
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Good Afternoon -

Due to the Court's e-filing portal being down – attached for filing is the Brief of Nominal Defendant Kim Wyman in the above referenced matter. Please do not hesitate to contact me if there are any questions.

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