

SENATE BILL REPORT

SB 5843

As Reported by Senate Committee On:
State Government & Elections, February 2, 2022

Title: An act relating to public officials and candidates who knowingly make false statements and claims regarding the election process and results.

Brief Description: Making it unlawful for public officials and candidates to knowingly make false statements and claims regarding the election process or results of elections conducted within the state. [**Revised for 1st Substitute:** Concerning public officials and candidates who knowingly make false statements and claims regarding the election process and results.]

Sponsors: Senators Frockt, Kuderer, Hunt, Keiser, Lovelett, Nguyen, Nobles, Salomon and Wilson, C.; by request of Office of the Governor.

Brief History:

Committee Activity: State Government & Elections: 1/28/22, 2/02/22 [DPS, DNP].

Brief Summary of First Substitute Bill

- Prohibits candidates or elected officials from knowingly, recklessly, or maliciously making false statements regarding the election process or election results to produce lawless action, undermine election processes or results, or falsely claim entitlement to public office, punishable as a gross misdemeanor.
- Causes any elected official convicted of the offense to vacate their office.

SENATE COMMITTEE ON STATE GOVERNMENT & ELECTIONS

Majority Report: That Substitute Senate Bill No. 5843 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Hasegawa.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Do not pass.

Signed by Senators Wilson, J., Ranking Member; Hawkins.

Staff: Samuel Brown (786-7470)

Background: Incitement and Defamation. While the First Amendment guarantees the freedom of speech, courts recognize very limited circumstances when government may permissibly restrict speech based on its content. One such example is speech with the potential to incite violence. In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the United States Supreme Court held that states may only forbid or limit speech advocating force "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Government may also restrict defamation—speech that is false and harms another person's character or reputation. In the case *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), speech concerning public figures constitutes actionable defamation only if the statements were made with actual malice, "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." In the 2007 case *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 848-49 (2007), the Washington Supreme Court struck down a statute which barred false statements about candidates on the grounds that the statute barred statements which were not defamatory.

Defamatory political advertising made with actual malice which contains a false statement of material fact about a candidate for office, falsely represents that a candidate is the incumbent in an election, or falsely states or implies a candidate is supported by a person or organization is prohibited.

Vacating Elective Office. An elected official may be forced to vacate their elective office before completing their term under certain circumstances:

- the official's death, resignation;
- voter recall;
- ceasing to be a registered voter in their jurisdiction or district;
- conviction of a felony offense or other violation of the official's oath of office;
- refusal or neglect to take the oath of office or deposit any required bond;
- breach of a condition of an official bond; or
- when voided by court order.

Filing for Office. Candidates for public office must file a declaration of candidacy with the appropriate elections official. On the declaration of candidacy form, the candidate must declare that they are a registered voter in the correct jurisdiction, indicate the position for which the candidate is filing, state a party preference if applicable, indicate the amount of the filing fee for the office, and sign the form, attesting to the truth of the information and affirming to support state and federal laws and constitutions.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (First Substitute): Gross Misdemeanor for False Statements About Elections. A gross misdemeanor is committed by any elected official or candidate who has filed for office when that person makes a false statement or claim regarding the legitimacy or integrity of the election process or results which:

- is intended to and actually does incite or produce lawless action which harms a person or property;
- is made to undermine the election process or results; or
- falsely claims entitlement to an office that the official or candidate did not win after lawful challenges and certification of election results.

An official or candidate is guilty of the gross misdemeanor if the official or candidate:

- was aware of facts or circumstances that would lead a reasonable person to believe that the statements or claims were not true;
- disregarded, in a gross deviation from how a reasonable person would act, a substantial risk that a wrongful act would occur; or
- made the statements or claims with malice.

Statements or claims which undermine the election process or results include false statements regarding:

- the accuracy of voting systems, equipment, practices or procedures;
- the official conduct of election officials and staff; or
- the legitimacy of particular votes cast.

The totality of the official or candidate's statements or claims are considered to determine whether a reasonable person would believe the speaker intended listeners to believe the statements or claims.

Vacating Office. Conviction of this gross misdemeanor will cause an elected official to immediately vacate their office unless removal is beyond the power of the state.

Filing for Office. Candidates for office must affirm on their declaration of candidacy that they will comply with the requirements of this act.

Other Provisions. The bill contains a severability clause.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on First Substitute: PRO: This is a hard to meet standard about speech that actually leads to physical violence in the real world. There should be accountability for those who spread lies, not just those who believe them. Election disputes should be resolved in court, under oath, with evidence. Politicians do not have a right to foment violence and degrade our democracy by knowingly lying about election results. The horrific insurrection we witnessed at the U.S. Capitol is a harbinger of what is to come. This bill is pro-democracy and neutral, because it applies to every politician, regardless of party. It is carefully written to protect the First Amendment. Diminished acceptance of election results threatens our system of government and the people who serve. We are confronting a massive crisis arising from lies about the last election. These are exceptional times and I believe this language addresses First Amendment concerns. As a law enforcement officer who responded to the January 6 riot, I knew it was possible for that to happen, but I didn't expect it to. My duty to protect everyone's right to peacefully protest doesn't include violence

CON: This proposal violates the First Amendment. It is a reckless and unnecessary bill designed to create further division and break down free speech. There are reasonable causes for concern in election integrity worth discussing. This creates more suspicion when folks can't debate election outcomes honestly. You can't force people to accept the outcome of an election. Nobody should fear voicing an opinion about an election or its status, and voters should be allowed to sort out different viewpoints. This punishes anyone who questions the official narrative. There has yet to be a court hearing allowing evidence of these supposed false claims to be heard. Will my local officials be violating the the law if they simply repeat something I told them I saw? Candidates should be free to discuss these issues.

Persons Testifying: PRO: Senator David Frockt, Prime Sponsor; Jay Inslee, Governor's Office; Catherine J. Ross; Patrick Schreiber.

CON: Kory Slaathaug; Laurie Buhler; Steven Duenkel; Jerrod Sessler; Eric Pratt; Daniel Orr; Paul Guppy, Washington Policy Center; Tamborine Borrelli, Washington Election Integrity Coalition United (WEiCU); Margaret Tweet.

Persons Signed In To Testify But Not Testifying:

CON: Jeff Pack; Laurie Layne; Pete Serrano, Silent Majority Foundation.