

SB 5843, to impose speech limits on criticizing the election process or the results of elections

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Key findings:

1. **The governor's office has requested legislation, SB 5843, to make certain political statements about the election process or election results a gross misdemeanor.**
2. **The proposed bill would target a particular kind of speech on a narrowly-selected topic, disputing election outcomes.**
3. **The bill targets "officials and candidates for office" even though "incitement to violence" by anyone is already illegal under content-neutral standards.**
4. **The bill would violate the First Amendment; the courts have consistently ruled that censoring political speech is unconstitutional.**
5. **The bill recalls disputes about Washington's past close elections when there was extensive commentary about results announced days or weeks after election day.**
6. **Limiting access to political views blocks voters from making informed decisions and holding elected officials accountable.**
7. **Free speech is at the core of democracy. Making certain political statements a gross misdemeanor is harmful to democracy in Washington state.**

Introduction

Governor Jay Inslee announced in early January that he would propose a bill to make it illegal to make statements the state considers a "false statement" or "a lie."

The proposal would make this form of speech punishable as a gross misdemeanor and would apply to elected officials and candidates for public office. The bill provides that any official convicted of "a gross misdemeanor for knowingly making false statements regarding the election process or results" as described in the bill shall be removed from office.

Reports indicate the bill was drafted by the governor's office and given to friendly state lawmakers to introduce in the current session as governor-request legislation.¹ The bill has been introduced by Senators Frockt and Kuderer as SB 5843.²

In his announcement the governor said the new restriction is needed due to perceived "threats to democracy" linked to "knowledge of potential to create violence."³ "It should not be legal in the state of Washington for elected officials or candidates for office to willfully lie about these election results," Inslee said.⁴

1 "Inslee says lying about elections should be a crime," by Austin Jenkins, *Northwest News Network*, January 6, 2022, at <https://www.nwnewsnetwork.org/2022-01-06/inslee-says-lying-about-elections-should-be-a-crime>.

2 SB 5843, "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," introduced by Senators Frockt and Kuderer, by request of the Office of the Governor, Washington state legislature, 2022 Regular Session, January 13, 2022, at <https://app.leg.wa.gov/bills/summary?BillNumber=5843&Year=2021>.

3 "Associated Press Legislative Preview," Rachel La Corte, moderator, TVW, January 6, 2022, at <https://tvw.org/video/associated-press-legislative-preview-022011020/?eventID=2022011020&startStreamAt=7142>.

4 "Inslee says 'stop the steal' election lies from WA lawmakers should be a crime," Associated Press and Herald staff, *The Tri-City Herald*, January 7, 2022, at <https://www.tri-cityherald.com/news/politics-government/article257113707.html>.

Violating the First Amendment

The proposed bill would target a particular kind of speech on a narrowly selected topic, election outcomes. The proposal's focused drafting raises questions about the intent of the legislation, and whether it is designed to silence particular views expressed by political opponents.

Incitement to violence by anyone is already illegal under state law. Current law is content-neutral and applies equally to all persons and all topics in all situations, without singling out particular groups, views or discussion of politics and elections.

The courts consistently uphold free political speech rights

Under the First Amendment, the courts have recognized limits on specific types of speech based on neutral standards that apply equally to everyone. Libel, slander, defamation, obscenity, criminal conspiracy, public endangerment and commercial fraud are all areas in which speech rights can be limited by law.

The courts treat political speech differently. Recognizing the need for voters to have the widest possible access to information, and for the public to judge for themselves the truth of what political actors say, the courts have struck down several attempts to limit political speech.

Here are four examples. In *Citizens United v. Federal Elections Commission*, the U.S. Supreme Court struck down a law passed by Congress as imposing unconstitutional restrictions on speech during political campaigns.⁵ In *Cohen v. California* the U.S. Supreme Court ruled that even political speech that is considered disturbing, obscene or offensive is protected under the First Amendment.⁶

In 1998, the Washington state supreme court ruled in favor of political advertising

against a ballot proposal to legalize doctor-assisted suicide, even though the ad's opponents claimed the ad was materially false and done with malice.⁷

In 2007, the Washington state supreme court struck down a law that gave state agencies the power to impose censorship on political statements. In that case, the state's highest court reached the following conclusions:⁸

“The United States and the Washington Constitutions both protect the right of free speech, and political speech is the core of that right.”

The court noted that the unconstitutional law “wrongly presupposed the state possesses an independent right to determine truth and falsity in political debate.”

“The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment.”

National and state courts have made it clear that efforts by state officials to censor political speech violate the First Amendment.

Unequal application of the law

The legislation would also raise questions about the equal protection of the laws. SB 5843 would create two classes of people: private citizens who would retain full political speech rights, and a newly-defined class of “elected officials or candidates for office” whose speech rights would be restricted. Only those in the second group would be subject to penalties under the bill.

5 *Citizens United v. Federal Elections Commission*, United States Supreme Court, 558 U.S. 310, January 21, 2010, at <https://supreme.justia.com/cases/federal/us/558/310/>.

6 *Cohen v. California*, United States Supreme Court, 402 U.S. 15, June 7, 1971, at <https://supreme.justia.com/cases/federal/us/403/15/>.

7 *State of Washington v. 119 Vote No! Committee*, 135 Wn. 2d 618, Supreme Court of Washington, June 11, 1998, at <https://caselaw.findlaw.com/wa-supreme-court/1006411.html>.

8 *Rickert v. State of Washington, Public Disclosure Commission, et al.*, 168 P.3d 826, Supreme Court of Washington, October 4, 2007, at <https://caselaw.findlaw.com/wa-supreme-court/1379647.html>.

Public debate over close election outcomes would be restricted

Since Washington moved to an all mail-in balloting system the state has experienced several tightly-contested legislative races, the outcome of which involve recounts and are commonly resolved weeks after election day. Washington is unusual in that, in addition to mail-in ballots that arrive by election day, ballots that are postmarked by election day but arrive days afterward are also counted.

Under the proposed legislation, public comment by elected officials and political candidates about ballot collection, the counting process and the eventual announced outcome would be subject to regulation by the state. Fear of prosecution would have a suppressing effect on public statements, news interviews or other efforts to air legitimate concerns about the election process.

The proposed bill's two-tier classification system, which targets a narrowly-defined group of speakers, would give it particular intimidating force. No public official or candidate for office wants to be charged with a gross misdemeanor.

Raising past election controversy

The effort to control speech critical of an election result recalls the months-long controversy over the 2004 Washington state gubernatorial election, when one candidate won on election night, won on the first recount, but was declared defeated by 129 votes a month later on a third ballot count.

Under the proposed bill, much of the criticism, commentary and public debate at the time could have run afoul of the gross misdemeanor charge. The two candidates for governor would have been under particular scrutiny since they both would have qualified under the proposed speech restriction bill as "candidates for office."

Since the sitting governor at the time had endorsed one of the candidates, a perception about equal application of the law would likely have arisen, if the public statements of one candidate were held to strict scrutiny, while

those of the governor-friendly candidate were interpreted with greater latitude.

Critics say the bill is intended to silence the governor's political opponents. Analysis of the bill text, however, shows its restrictions would extend further. The bill's prohibition is directed against members of both parties or no party. For example, Democrats have questioned or rejected the results of the 2000, 2004 and 2016 national elections.⁹ In 2018, the losing Democratic candidate in another state said the election was "stolen from the voters."¹⁰ If these statements were made about Washington state elections, the speakers would be subject to scrutiny under the provisions of SB 5843.¹¹

Conclusion – Free speech is at the core of democracy

Critics of open speech and debate say people should not be allowed to hear dissenting views and they frequently call for new laws to restrict political expression. Such proposals are often designed to silence political opponents. A confident society based on open self-government has no need of such laws. In a healthy democracy, the public has a right to hear all views, regardless of party or of no party.

Proposing a special law directed at certain people is designed and intended to have a chilling effect on free speech, making the targeted groups, in this case, "elected officials and candidates for office," afraid to express their true views. Threatening the free speech of public figures blocks voters from getting honest information about where those officials and candidates stand on the issues.

Limiting access to political views makes it impossible for voters to make informed

9 "Did Democrats object the last three times a Republican won the White House?" The Dispatch Fact Check, The Dispatch, January 5, 2021, at <https://factcheck.thedispatch.com/p/did-democrats-object-the-last-three>.

10 "Stacey Abrams repeats claim 2018 election was stolen from her under questioning from Ted Cruz," Rudy Takala, Mediaite, MSN News, April 20, 2021, at <https://www.msn.com/en-us/news/politics/stacey-abrams-repeats-claim-2018-election-was-stolen-from-her-under-questioning-from-ted-cruz/ar-BB1fRG7i>.

11 Text of SB 5843, Section 2.

decisions and to hold elected officials accountable. Speech restrictions also make it harder to decide whether a particular candidate should hold office in the first place, or whether a sitting official should be removed from office.

Free speech is at the core of democracy. The public should always be allowed to hear what officials and candidates have to say about elections, politics and policy ideas. For that reason, the proposed legislation to make certain political statements a gross misdemeanor would be harmful to democracy in Washington state.

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