

## SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 21, 1998 Revised: \_\_\_\_\_

Subject: Elections; Political Advertising and Campaigning

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Fox</u>	<u>Bradshaw</u>	<u>EE</u>	<u>Fav/1 amendment</u>
2.	<u>Wyrough</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable/CS</u>
3.	<u>                    </u>	<u>                    </u>	<u>WM</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

### I. Summary:

This CS provides that any candidate, paid campaign worker, or other paid agent of the candidate who willfully charges a candidate with a violation of the election code, when the person knows that such charge is false or malicious, commits a felony of the third degree. Such person is disqualified from holding office until the restoration of the person's civil rights.

The CS also provides that any candidate, paid campaign worker, or other paid agent of the candidate who makes or causes to be made any statement about a candidate which he or she knows, or reasonably should know, is false, or which was made in negligent disregard for the truth, commits a violation of the election code and shall be personally liable for damages.

This CS substantially amends section 104.271 of the Florida Statutes.

### II. Present Situation:

Subsection (1) of s. 104.271, F.S., currently provides that a *candidate* who willfully charges an opposing candidate with a violation of the election code, which charge is known by the candidate making such charge to be false or malicious, is guilty of a felony of the third degree.

Subsection (2) of s. 104.271, F.S., currently provides that a *candidate* who in any election, with *actual malice*, makes or causes to be made any statement about an opposing candidate which is false, commits a violation of the election code, subject to a civil penalty of up to \$5,000.

### III. Effect of Proposed Changes:

The CS expands the scope of coverage of subsection (1) of s. 104.271, F.S., beyond candidates to provide that any candidate, paid campaign worker, or other paid agent of the candidate who willfully charges a candidate with a violation of the election code, which charge is known by the person making such charge to be false or malicious, commits a felony of the third degree.

The CS also expands the scope of subsection (2) of s. 104.271, F.S., beyond candidates to provide that any candidate, paid campaign worker, or other paid agent of the candidate who makes or causes to be made any statement about a candidate which he or she knows, or *reasonably should know*, is false, or which was made in *negligent disregard* for the truth, commits a violation of the election code. The CS makes the violator personally liable for civil damages of up to \$5,000.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

#### D. Other Constitutional Issues:

The CS reduces the culpability requirement applicable to political defamation and speech by public figures. There is a well-established body of federal case law on this issue grounded on the free speech clause of the U.S. Constitution.

The landmark defamation case in regulating the content of political speech is *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times*, an elected official brought a libel suit against *The New York Times* for publishing an article which allegedly misrepresented the official's activities. The court held that in order to establish libel or slander against a public figure the plaintiff must not only prove that a false statement was made, but also that such statement was made with "actual malice." In order to show "actual malice" the public figure must prove that the defendant *knew* that his or her statement was false, or that the statement was made with *reckless disregard* as to its truth or falsity.

In 1968, the case of *St. Amant v. Thompson*, 390 U.S. 727 (1968), elaborated on the “reckless disregard” component of the actual malice standard. In *St. Amant*, a candidate for political office falsely charged another public official with criminal conduct during a television interview. The court ruled that “reckless disregard cannot be shown by proof of mere negligence.” To find reckless disregard, “there must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth and demonstrates actual malice” (emphasis added).

The *New York Times* actual malice standard was explicitly recognized to include state regulation of political campaign speech in *Vanesco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975), *summarily aff’d.*, 423 U.S. 1041 (1976).

The U.S. Supreme Court has consistently applied the *New York Times* actual malice standard in defamation cases since its creation in 1964. See *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Linn v. United Plant Guard Workers of America*, 385 U.S. 53 (1966); *Bond v. Floyd*, 385 U.S. 116 (1966); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Herbert v. Lando*; 441 U.S. 153 (1979); *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984); *McDonald v. Smith*, 472 U.S. 479 (1985); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

This CS seeks to change the “actual malice” standard found in *New York Times v. Sullivan* and its progeny.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

The changes contemplated in this CS could result in additional prosecutions. The Florida Elections Commission estimates the following costs of implementation for salary and benefits, based on 80 hours of work per case:

- FY 98-99 (10 cases): \$15,882
- FY 99-00 (5 cases): \$ 8,179
- FY 00-01 (12 cases): \$20,219

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Expanding the scope of coverage to subject all persons, not just candidates, to liability for political defamation, and making violators personally liable for civil fines are both recommendations contained in a Report by the House of Representatives Ethics and Elections Committee, entitled *Deceptive and False Advertising in the Political Process* (December 1995).

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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