NO. 90233-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 71360-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KENT L. and LINDA DAVIS, JEFFREY and SUSAN TRININ, and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,

Appellants/Petitioners,

v.

GRACE COX, ROCHELLE GAUSE, ERIN GENIA, T.J. JOHNSON, JAYNE KASZYNSKI, JACKIE KRZYZEK, JESSICA LAING, RON LAVIGNE, HARRY LEVINE, ERIC MAPES, JOHN NASON, JOHN REGAN, ROB RICHARDS, SUZANNE SHAFER, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND COURT OF APPEALS DECISION

The Court of Appeals recognized this lawsuit for what it is: retaliation against 16 individuals for participating in a political boycott. Brought under the guise of alleged corporate misconduct, Petitioners, members of the Olympia Food Co-op, claim Respondents, Co-op Board members, unlawfully approved a boycott of Israeli goods and investments. Petitioners first tried to stop the Boycott by running against Respondents for positions on the Board. They lost. They then sent Respondents a letter threatening "complicated, burdensome, and expensive" litigation. This lawsuit, though burdensome and expensive, is ultimately not complicated. The trial court dismissed the claims, and the Court of Appeals affirmed. The Court of Appeals' decision does not conflict with this Court's or its own opinions, and rather than undermine constitutional rights or the public interest, it vindicates them. Review is unnecessary and inappropriate.

First, the Court of Appeals correctly found that Washington's Act Limiting Strategic Lawsuits Against Public Participation ("SLAPPs") applies to this lawsuit. The law protects "public participation," including the exercise of First Amendment rights. A boycott is just that. Whether Petitioners sought to enjoin the boycott because they wanted to enforce the Board's Bylaws is irrelevant. It is the gravamen of a claim—not a plaintiff's purported motive—that triggers the anti-SLAPP statute's protections. Application of the law to claims challenging a boycott promotes the public interest the statute was designed to preserve.

Second, the Court of Appeals properly affirmed the trial court's decision granting the anti-SLAPP motion, which is identical in all material respects to a motion for summary judgment. Although Petitioners fault Respondents for violating the Co-op's Boycott Policy, that staff policy did not bind Respondents. Under settled law, a board of directors has plenary authority to manage all the affairs of a corporation unless governing documents state otherwise. The Boycott Policy is not a governing document, and the Co-op's Bylaws, rather than limit the Board's powers over boycott decisions, reiterate its power to manage the Co-op's affairs. No amount of discovery could change those undisputed, dispositive facts.

Finally, the Court of Appeals correctly rejected Petitioners' claims that the anti-SLAPP law is unconstitutional under *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009). The Legislature designed the anti-SLAPP law to promote, not infringe, constitutional rights. Although the statute presumptively stays discovery, unlike the law in *Putman*, it does not impose any pre-suit requirements: A party needing discovery to oppose an anti-SLAPP motion is entitled to it.

The Court of Appeals recognized the important interests advanced by the anti-SLAPP statute. This Court should, too, by declining review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the public interest is threatened by a decision finding that the gravamen of a lawsuit seeking to enjoin advocacy and implementation of a boycott of Israel in solidarity with the Palestinian

cause targets an act of public participation or petition, thereby triggering application of the anti-SLAPP statute, RCW 4.24.525.

2. Whether the public interest is threatened by a decision dismissing a lawsuit brought against a nonprofit corporation's board of directors for approving a boycott, where Washington law and the corporation's own bylaws direct the board to "manage" its affairs.

3. Whether the Court of Appeals' decision involves a "significant" constitutional question by finding the anti-SLAPP statute is constitutional because it, in effect, provides a tool for early summary judgment on meritless claims targeting public participation and petition.

4. Whether the public interest is threatened by an attorneys' fee award to prevailing parties under the anti-SLAPP law, even if such an award might not otherwise be available, given the anti-SLAPP law's imposition of the award "without regard to any limits under state law."

III. STATEMENT OF THE CASE

A. The Co-op Adopted a Boycott of Israel, Prompting Petitioners, Disgruntled Members, to Threaten "Complicated, Burdensome, and Expensive" Litigation.

Respondent Olympia Food Co-op ("the Co-op") is a nonprofit dedicated to "encourag[ing] economic and social justice." CP 40, 53. Its Bylaws task its Board of Directors with "manag[ing]" "[t]he affairs of the cooperative." CP 46, 58. The Bylaws outline but do not provide an exhaustive list of the Board's "major duties," including to "adopt major policy changes" and "resolve organizational conflicts." *Id.* 41, 58.

With Board oversight, the Co-op has long advocated for civil rights, equality, and social justice through written statements, letters, posters, donations, and boycotts. CP 40. For example, it has approved boycotts against South Africa to support the anti-apartheid movement, grape growers to support union organizing, and boycotts against Nestle, Del Monte, Dole, Coca-Cola, and yellowfin tuna. CP 46. Since 1989, the Co-op Board itself has engaged in social, political, and environmental advocacy acts at least 20 times, on issues from labeling genetically modified food to funding for public transportation. CP 41.

In March 2009, a Co-op cashier proposed a boycott of Israeli goods ("Boycott"). CP 44. A staff merchandise team deliberated for more than a year. *Id.* Deadlocked, it referred the matter to the Board. *Id.* At its May 20, 2010 meeting, the Board returned the proposal to the staff to attempt unanimous consensus. CP 44-45, 111-19. The staff remained deadlocked. CP 45, 121-24. At its next meeting, the Board agreed to support the Boycott. CP 45. It advised dissenters they could put its decision to a vote. CP 181-82, 239. No one did. CP 182.

In fall 2010, the Co-op held Board elections. CP 181. Petitioners Kent L. Davis, Linda Davis and Susan Trinin ran, campaigning on their opposition to the Boycott. *Id.* Boycott supporters endorsed five candidates, each of whom won by a wide margin. *Id.* [1]

[1] Primarily a symbolic gesture, the Boycott caused the Co-op no discernible adverse business consequences. The discontinued merchandise amounted to 0.075 percent of the

In May 2011, Petitioners' lawyer sent a letter demanding Respondents rescind the Boycott, or his clients would "hold each of you personally responsible." CP 303-05. He claimed the Board had violated the Co-op's Boycott Policy. *Id.* He closed: "If you do what we demand, this situation may be resolved amicably and efficiently. If not, we will bring legal action against you, and this process will become considerably more ***complicated, burdensome, and expensive***." *Id.* (emphasis added).

The Boycott Policy creates a procedure for member- and staff-initiated proposals to support boycotts. CP 106-07. It does ***not*** cede the Board's authority, or amend any governing documents. *Id.* Although the Policy requires staff consensus for staff-initiated boycotts, it does not address how the Board should address a lack of staff consensus. CP 106. Nor does it purport to be the sole method for approving boycotts. *Id.*

B. The Trial Court Dismissed the Lawsuit, this Court Refused to Take Direct Review, and the Court of Appeals Affirmed the Trial Court's Decisions.

On September 2, 2011, Petitioners filed suit. CP 6-17. They alleged Respondents acted *ultra vires* and breached their fiduciary duties, and sought a declaratory judgment that the Boycott was null and void, an injunction preventing its enforcement, and damages from each defendant. *Id.* Petitioners served discovery and demanded videotaped depositions of each defendant, for a total of five weeks of depositions. CP 555, 565-67.

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wholesale value of Co-op inventory and no investments. Co-op receipts and membership enrollments have steadily increased since the Board approved the Boycott. CP 48.

On November 1, 2011, Respondents filed a special motion to strike the complaint under RCW 4.24.525. CP 245-95. Petitioners opposed the motion and sought discovery. CP 362-66, 378-403. The trial court denied the request for discovery and granted the motion to strike. CP 1192-96. *See also* Report of Proceedings, February 27, 2013 ("RP") 26-27, 32. It ordered Petitioners to pay $221,846.75, including attorneys' fees and $10,000 in statutory damages to each Respondent. CP 1246-48. Petitioners sought direct review by this Court, which it denied August 6, 2013. No. 87745-9. The Court of Appeals affirmed on all grounds.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court will accept review of an appeal "only ... if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court ... [or] another decision of the Court of Appeals," if "a significant question of law under the Constitution of the State of Washington or of the United States is involved," or "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4. Petitioners have not satisfied any of these standards.

The Legislature has declared "[i]t is in the public interest for citizens to participate in matters of public concern." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). To further that interest, it enacted RCW 4.24.525 to curb "lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech and petition..." (i.e., "Strategic Lawsuits Against Public Participation," or SLAPPs). S.B.

6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). SLAPPs "are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities," deterring them from "fully exercising their constitutional rights." *Id.* Because this is precisely such a lawsuit, the Court of Appeals correctly affirmed the trial court's dismissal.

Petitioners claim application of the anti-SLAPP statute will chill (baseless) lawsuits like theirs. Pet. at 3. That is exactly what it was meant to do. The claims target free speech and lack merit. Denying review would advance—not undermine—free speech through expedited dismissal of this punitive lawsuit brought to chill constitutional rights.

A. The Court of Appeals' Decision *Promotes* the Public Interest By Applying the Anti-SLAPP Statute to a Lawsuit Seeking to Enjoin a Boycott.

Under the anti-SLAPP law, "[a] moving party ... has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b); *see also Alaska Structures, Inc. v. Hedlund*, __ Wn. App. __, 323 P.3d 1082, 1085 (2014). This "includes" any "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). The Legislature directed that the law be "construed liberally." S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010).

Petitioners do not challenge the Court of Appeals' finding that a boycott is protected First Amendment activity. Op. at 9. (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982)). Nor do they (or could they) disagree that a boycott of Israel involves "an issue of public concern." Op. at 10.[2] Petitioners asked the courts to "permanently enjoin the ... Board from enforcing or otherwise abiding by the ... Boycott." CP 16. In other words, they sought to stop a boycott, a boycott they admit is an exercise of First Amendment rights on a matter of public concern. *See* Op. at 9-10. The anti-SLAPP law—designed to deter lawsuits "brought ***primarily*** to chill the valid exercise of the constitutional right[] of freedom of speech"—plainly applies. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (directing "courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context").

The undisputed facts reinforce this conclusion. The Board approved the Boycott in July 2010. CP 45. Although it invited dissenting members to challenge the decision, no one did. CP 181-82, 239. That fall, Petitioners lost their bid for seats on the Board after advocating an anti-Boycott platform, to candidates who supported the Boycott. CP 181. Angered, they threatened "complicated, burdensome, and expensive"

[2] Indeed, since the 2010 Co-op vote, the boycott movement has grown. Just a week ago, the Presbyterian Church (U.S.A.) voted at its general assembly to divest from three U.S. companies that supply Israel with equipment used to enforce the occupation of Palestinian territories. Laurie Goodstein, *Presbyterians Vote to Divest Holdings to Pressure Israel*, N.Y. Times, June 20, 2014, at A1.

litigation and to hold each director personally liable. CP 303-05. When Respondents refused to rescind the Boycott, this litigation ensued. Plainly the Boycott is the target and gravamen of Petitioners' lawsuit.

Petitioners do not dispute that the Court of Appeals used the correct test, i.e., looking to the gravamen or thrust of their claims. Instead, they claim it misapplied the standard, because "the gravamen" was that Respondents "fail[ed] to follow [the corporation's] governing rules, procedures, and principles." Pet. at 11. Petitioners also argue the Court of Appeals "disregard[ed] key allegations in the complaint." Pet. at 11. But the anti-SLAPP statute requires just that and applies to all claims, "however characterized," targeting public participation and petition. RCW 4.24.525(2). It provides that "the court ***shall*** consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c) (emphasis added).[3]

Moreover, looking to the "gravamen" or "principal thrust" of a claim requires looking ***beyond*** the face of the complaint, as the Court of Appeals did here. If, as Petitioners claim, a court were bound by their allegations and proffered basis for their lawsuit, Pet. at 11, no one would qualify for protection under the anti-SLAPP law. A clever plaintiff need allege only a defendant committed an unlawful act to evade the statute.

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[3] Petitioners cite *Henne v. City of Yakima*, 177 Wn. App. 583, 586, 313 P.3d 1188 (2013), *review granted*, 179 Wn.2d 1022 (2014), to argue the anti-SLAPP law does not apply here, just as it did not apply in that case. But *Henne* concerns an officer's claims about his demotion. This lawsuit concerns a boycott, undisputedly an exercise of free speech.

Given that SLAPP plaintiffs by definition seek to abuse the judicial process, they are likely to tailor their pleadings to avoid the law.

California courts have rejected similar tactics.[4] For example, the California Court of Appeal applied the California anti-SLAPP statute to an employee's claims that CBS discriminated against him based on gender and age when it failed to make him a weather anchor. *See Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510 (2013) (reversing denial of anti-SLAPP motion; remanding for decision on probability of prevailing). The plaintiff claimed "the 'gravamen' of his claims 'was discrimination rather than free speech.'" *Id.* at 1517, 1521-22. The court found this argument "confuses the conduct underlying Hunter's claim—CBS's employment decisions—with the purportedly unlawful motive underlying that conduct—employment discrimination." *Id.* at 1522. "[W]hen assessing whether claims arise from protected activity, courts must distinguish between the acts underlying a plaintiff's causes of action and the claimed illegitimacy of those acts, which is an issue the plaintiff must raise ... to provide a prima facie showing of the merits." *Id.* (alterations omitted).

The same is true here. Petitioners claim they are not targeting the Boycott, but the Board's alleged failure to follow its own rules in adopting it. *See* Pet. at 11. As in *Hunter*, this confuses the underlying act—the Board's adoption of the Boycott—with the purported illegitimacy of the

[4] Washington modeled its anti-SLAPP statute after California's law, and its courts look to California law to interpret RCW 4.24.525. *See Alaska Structures*, 323 P.3d at 1085; *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010).

Boycott—its authority to adopt the Boycott. Because the Boycott is an act of public participation, the anti-SLAPP law applies. *See Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014) (rejecting effort "to elude the scope of the anti-SLAPP" law with "attempts to frame [] action as targeting CNN's 'refusal to caption its online videos' rather than '[its] presentation ... of the news'").

In a burst of hyperbole, Petitioners claim the Court of Appeals "[i]n effect ... ruled that corporate directors have unfettered power to disregard an entity's rules and procedures if" protected speech is involved. Pet. at 12. As the *Hunter* court reasoned, "[t]his argument ... is predicated on the fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense." 221 Cal. App. 4th at 1525. But the law in fact allows all claims with merit to proceed. RCW 4.24.525(4)(b).

Petitioners also argue the Court of Appeals erred in finding the anti-SLAPP law applies by failing to "infer[] ... that Board [sic] knew its original action was unauthorized and unlawful," Pet. at 13, in conflict with the requirement in *Dillon v. Seattle Deposition Reporters, LLC* that the court view all facts in their favor, 179 Wn. App. 41, 90, 316 P.3d 1119, 1132 (2014), *review granted*, 180 Wn.2d 1009. Pet. at 12-13. Even if this is true (it is not[5]), even assuming *Dillon* stood for this proposition (the

[5] To support this claim, Petitioners argue that the Board later attempted to amend the Boycott Policy to affirm its authority. Pet. at 13. As the Court of Appeals found, many

language cited is *dicta*, 179 Wn. App. at 90), and even if this Court might endorse that view, it does not matter here. The Board's subjective belief about whether it could approve a boycott has no bearing on the applicability of the anti-SLAPP statute: What ***does*** matter is whether the Boycott was in furtherance of the right of free speech on a matter of public concern. Undisputedly it was. Thus, even assuming someone on the Board later had concerns about its authority to approve the Boycott, the anti-SLAPP law would still apply.

Nor did the Court of Appeals err by finding Respondents' acts were "lawful" within the meaning of "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." *See* Pet. at 13. As the court noted, the term "lawful" does not require an assessment of the merits when deciding, initially, whether the anti-SLAPP law applies: "If, as part of our review under the first step, we accepted the Members' invitation to consider whether the Directors improperly adopted the boycott, the second step would be rendered superfluous and the burden of proof would be improperly shifted." Op. at 11 (citing *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089 (2001)). *See also Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833-34, 74 P.3d 115 (2003) (counseling against "readings of statutes that result in unlikely, absurd, or strained consequences"). But

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reasons could have motivated such discussions—including the desire to avoid conflicts. *See* ER 407 ("subsequent measures" not admissible to prove "culpable conduct").

even if "lawful" ***did*** require an assessment of the merits, Respondents had the legal authority to adopt the Boycott under the Co-op's governing documents, as the Court of Appeals found. *See infra* at IV.B.

Petitioners find it "confusing[]" that the Court of Appeals relied on California law to find "lawful" excludes only conduct that is "illegal as a matter of law" because the California statute, unlike Washington's, does not use the word "lawful." Pet. at 13-14. But the California law applies to the "valid" exercise of constitutional rights, and it is in that context that courts have repeatedly rejected the same argument made here—that a court must decide whether speech or conduct is "valid" before applying the law. *Navellier v. Sletten*, 29 Cal. 4th 82, 94-95, 52 P.3d 703 (2002). This would "plac[e] the cart before the horse" and "confuse[] the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits." *M.F. Farming, Co. v. Couch Distrib. Co.*, 207 Cal. App. 4th 180, 195-96 (2012) (citations omitted).

B. The Court of Appeals' Decision *Promotes* the Public Interest By Dismissing a Meritless Claim Targeting Protected Speech.

Because the Boycott is an act of public participation, RCW 4.24.525(b)(4) required Petitioners to show by "clear and convincing evidence" a "probability" of prevailing on their claims. *See also Aronson*, 738 F. Supp. 2d at 1112. Washington and California courts have likened this burden to summary judgment. *Spratt v. Toft*, __ Wn. App. __, 324

P.3d 707, 715 (2014) ("the clear and convincing evidence of a probability of prevailing on a claim is applied in a manner similar to the summary judgment standard"); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679 (2010). Petitioners failed to adduce any evidence, let alone clear and convincing evidence, sufficient to survive summary judgment.

Petitioners claim the Board was obligated but failed to follow the Boycott Policy. Pet. at 15-19. Even assuming this were true (it is not), the Board had no such obligation. This follows from two well-established—indeed, centuries-old—principles of corporate governance.

First, the decision to approve the Boycott is a management decision within the exclusive province of the Board. Pursuant to the Washington Nonprofit Corporation Act, "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. *See also* RCW 24.03.005(7) (defining board of directors as "the group of persons vested with the management of the affairs of the corporation"). It is therefore hornbook corporate law that the "the authority of the directors is ***absolute*** when they act within the law, and ***questions of policy … are***, in the absence of nonfeasance, misfeasance, or malfeasance, ***left wholly to their decision***." 5 Fletcher Cyc. Corp. § 2100.

The Co-op's Bylaws reinforce this conclusion. "[I]n interpreting … bylaws, [courts] will apply general principles of contract law, including the principle that words used therein will be given their ordinary meaning unless a different meaning is clearly intended." *Davenport v. Elliott Bay*

Plywood Mach.s Co., 30 Wn. App. 152, 154, 632 P.2d 76 (1981) (citation omitted).[6] The Bylaws state: "the business and affairs of the Cooperative shall be directed by the Board of Directors." CP 58. Adoption of a boycott is a "business" or "affair." Moreover, the Bylaws provide a list of "major duties" "included" in the Board's responsibilities. One of those duties is to "adopt major policy changes." Thus, the Board had the power to adopt, amend, or rescind its Boycott Policy.

Violating core tenets of the business judgment rule, Petitioners demand a ruling that Respondents misinterpreted the Bylaws' "major policy change" provision and two others: the duty to "promote achievement of the mission statement and goals" of the Co-op, and the staff's duty to "carry out Board decisions." As the Court of Appeals found, none of these provisions says anything about, much less "mandate[s,] that the board comply with adopted policy changes." Op. at 14.[7] Nor does the Boycott Policy itself "contain any language that obligates the board to adhere to it once adopted." *Id.* Thus, "although adopting the Policy presented an opportunity for staff involvement, the board did not relinquish its ultimate authority to adopt boycotts pursuant to its general authority to manage the Co-op." *Id.* at 15.

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[6] The case Petitioners cite for the proposition that bylaw interpretation "presents questions of fact," *Save Columbia CU Committee v. Columbia Community Credit Union*, 134 Wn. App. 175, 181, 139 P.3d 386 (2006), merely confirms that "[i]n interpreting an organization's bylaws, [courts] apply contract law."

[7] To the contrary, the Boycott *furthers* the Co-op's mission "to encourage economic and social justice." CP 56 (Bylaws); CP 53 (mission statement).

Second, because the Bylaws grant the Board plenary authority to manage the Co-op's business, a court cannot interfere with its judgment that it had the authority to adopt the Boycott. "Unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence), courts generally refuse to substitute their judgment for that of the directors." *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). The Court of Appeals correctly found Petitioners had failed to allege or "present any evidence of fraud, dishonesty, or incompetence by the board." Op. at 15. Petitioners argue they "did present [such] evidence," Pet. at 17, but they do not cite it. Nor could they, since they have always argued the Board's acts were unlawful because they were unauthorized. *See, e.g.*, CP 311-317.

Petitioners are upset with the Boycott. Their remedy is to vote "board members off of the board." Op. at 14-15. They know this: Before filing suit, they tried and failed to do just that. CP 181. They also could try to bring the Boycott decision to a membership vote, but they have not. CP 181-82, 239. The Court of Appeals properly rejected their attempt to achieve through a SLAPP what they could not do by legitimate means.

C. The Anti-SLAPP Law, Unlike the Law in *Putman*, Does Not Impose Pre-Suit Conditions and is Constitutional.

Faced with the inescapable conclusion that the anti-SLAPP statute bars their claims, Petitioners argue the law is unconstitutional. Pet. at 7-10. RCW 4.24.525(5)(c) stays discovery upon the filing of a motion to strike. A nonmoving party must show a probability of prevailing on the

merits by clear and convincing evidence and may obtain discovery "on motion and for good cause shown." *Id.* Petitioners claim these provisions violate separation of powers and the right of access, and the proof standard is vague. The court need not reach these constitutional challenges because Petitioners' claims fail as a matter of law, without discovery. Even if it does, the Court of Appeals correctly rejected these arguments, recognizing that to prevail, Respondents would have to "show[] the statute is unconstitutional beyond a reasonable doubt." Op. at 22 (quoting *Ringhofer v. Ridge*, 172 Wn. App. 318, 327, 290 P.3d 163 (2012)).

The anti-SLAPP law does not violate separation of powers. Under this doctrine, where a court rule and statute directly conflict, rules prevail in procedural matters and the statute in substantive ones. *Spratt*, 324 P.3d at 714-15. In *Putman*, 166 Wn.2d at 979-80, this Court struck down a statute requiring plaintiffs to submit a medical expert's certificate of merit ***before*** filing a malpractice claim. The court found the statute conflicted with CR 11(a) by requiring an attorney "to submit additional verification of the pleadings," and CR 8 by requiring more than a "short and plain statement of the claim." *Id.* at 983. The anti-SLAPP law does neither, nor does it impose other rules that would prohibit a plaintiff from filing suit.

Petitioners claim the anti-SLAPP statute also conflicts with CR 12(b), 15, 26-34, and 56, but provide no explanation. Pet. at 7. RCW 4.24.525 does not change the standard for stating a claim under Rule 12, amendment under Rule 15, the procedures for taking or compelling

discovery pursuant to CR 26-34, or for summary judgment. To the contrary, just like CR 56, the law allows the trial court to order discovery for good cause. RCW 4.24.525. *Spratt*, 324 P.3d at 715. *Compare* CR 56(f) (allowing party opposing summary judgment motion to seek discovery "essential to justify his opposition"). Thus, the Ninth Circuit, finding California's statute applicable in federal court, "conclud[ed] that [the special motion to strike and fee] provisions and Rules 8, 12, and 56 'can exist side by side ... each controlling its own intended sphere of coverage without conflict.'" *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999). Even if there were a conflict, the creation of a defense to meritless lawsuits that chill speech is a substantive legislative decision that trumps procedural rules. *See* Op. at 26 ("burden of proof" is "'substantive' aspect of a claim").

Nor does the anti-SLAPP law violate Petitioners' right of access to the courts. Pet. at 9. Unlike the statute in *Putman*, the anti-SLAPP statute imposes no preconditions to filing a lawsuit. The decision *In re Estate of Fitzgerald*, 172 Wn. App. 437, 449, 294 P.3d 720 (2012) is therefore on point. There, the Court of Appeals, applying *Putman*, found the limits on discovery under the Trust and Estate Dispute Resolution Act—allowing, as the anti-SLAPP law does, discovery on a "showing of good cause"—were constitutional because "[t]he trial court retains the discretion to permit discovery—in appropriate circumstances." *Id.* at 449 & n.8.

The anti-SLAPP law affords nonmoving parties ample chance to obtain discovery. Petitioners made a motion for discovery and lost. CP 1192-93. Although they assign error to this decision, too, Pet. at 18, no discovery could change the legal result here: that the Board had no legal obligation to adhere to the Boycott Policy and cannot be liable for its alleged failure to do so. *See supra* at IV.B. *See also Tutor-Saliba Corp. v. Herrera*, 136 Cal. App. 4th 604, 618 (2006) (denying discovery where discovery sought would not affect resolution of SLAPP motion).

Finally, Petitioners argue that the anti-SLAPP law's burden of proof is unconstitutionally vague. Pet. at 10. The Court of Appeals correctly rejected this argument, too. A law is impermissibly vague when it is "framed in terms so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). The terms "clear and convincing" and "probability" are well-established. Petitioners argue that "clear and convincing evidence of a probability" is vague, Pet. at 10, but provide no explanation, examples, or authority.

D. Imposition of the Anti-SLAPP Remedies Promotes the Public Interest and Free Speech.

The anti-SLAPP statute mandates an attorneys' fee award and $10,000 in statutory damages for each moving party. Petitioners disingenuously argue the Co-op, not they, should pay Respondents' fees because Petitioners purportedly brought their suit as a representative of the

Co-op and, alternatively, the Washington Nonprofit Act, RCW 24.03.040, does not provide for a fee award. These arguments border on frivolous.

First, Petitioners, ***not*** the Co-op, pushed this litigation. As Respondents argued in the trial court, Petitioners did not even have standing to bring a derivative suit. CP 258-67. Petitioners opposed the Boycott, running for election to the Board on an anti-Boycott platform. CP 181. They lost, *id.*, but then brought this meritless SLAPP against the Board, purporting to represent the interests of the Co-op.

Second, the anti-SLAPP law states the court "shall" award attorneys' fees to the prevailing party "without regard to any limits under state law." RCW 4.24.525(6)(a)(i). This does not conflict with RCW 24.03.040, which contains no language about fees. To the extent it does, the Legislature has made its wishes known: that the anti-SLAPP remedies are mandatory, "without regard to any limits under state law," and that the law be "construed liberally." S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010).

V. CONCLUSION

For four years, Petitioners have dragged Respondents through meritless litigation in the trial court, this Court, the Court of Appeals, and again in this Court, all to chill speech. The anti-SLAPP law's promise—in fact, the Legislature's explicit pronouncement of the "the public interest"—was to put an early end to such claims, which are "dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities." The Court should fulfill that promise by denying review.

RESPECTFULLY SUBMITTED this 30th day of June, 2014.

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By _____
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 30, 2014, I caused Answer to Petition for Review to be served by the manner identified below in the above-captioned matter upon the following counsel of record:

Robert M. Sulkin, WSBA No. 15425 Avi J. Lipman, WSBA No. 37661 MCNAUL EBEL NAWROT & HELGREN PLLC One Union Square 600 University, 27th Fl. Seattle, WA 98101-3143 Email: RSulkin@mcnaul.com ALipman@mcnaul.com	☑ ☐ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via FedEx Via Facsimile Via E-Mail

Stated under oath this 30th day of June, 2014.

Ambika K. Doran