NO. 90233-0
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

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, FOREST VAN SISER SHAFER as personal representative for the ESTATE OF SUZANNE SHAFER, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, AND WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. INTRODUCTION

Amici curiae American Civil Liberties Union, Washington State Association for Justice Foundation, and Washington Employment Lawyers Association ask this Court to do something no court in the country has done: find an anti-SLAPP statute unconstitutional. Similar laws—including those with the same structure, burden of proof, and discovery stay—have faced constitutional challenges, and courts across the country have rejected those challenges each time.[1] To advocate a different outcome here, amici paint an extreme caricature of the Washington statute, asking the Court to construe it in unprecedented and untenable ways. But bedrock separation of powers principles require the opposite: Where possible, the Court construes legislation to make it pass constitutional muster, honoring the will of the people's elected representatives. Because it is not only possible, but logical, to do so here, this Court should decline to find the anti-SLAPP statute unconstitutional.

Petitioners and amici primarily challenge the anti-SLAPP law's requirement that a party asserting a claim based on public participation or petition show a probability of prevailing on the merits, as well as its presumptive discovery stay. But the Superior Court correctly treated these provisions as creating a procedure materially identical to the one for summary judgment motions, which is undisputedly constitutional. Thus,

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[1] *See* Brief of Amicus Curiae Reporters Committee for Freedom of the Press and 29 Others in Support of Respondents Grace Cox *et al*.

to reverse, the Court would not only have to read the anti-SLAPP statute as creating a standard more burdensome than the summary judgment standard, but also find error in the court's dismissal using a summary judgment standard—even though well-established principles of corporate law required dismissal, without regard to the anti-SLAPP law.

To accept amici's arguments, the Court would also have to disregard the Legislature's considered policy decision about how to deter meritless lawsuits that target speech and petition rights. WELA claims the Legislature's judgment merits scant deference because the anti-SLAPP law is subject to strict scrutiny. To do so, it relies on inapposite law and dicta from a footnote in a Court of Appeals decision that the Court currently has under review. In fact, the U.S. Supreme Court has never applied strict scrutiny to similar statutes, and courts routinely apply rational basis review to uphold laws limiting meritless lawsuits, including anti-SLAPP laws. RCW 4.24.525—designed to ***protect*** First Amendment rights, not infringe them—is not subject to strict scrutiny.

At bottom, amici ask the Court to take the unprecedented step of declaring the anti-SLAPP law facially unconstitutional, notwithstanding the Court's longstanding practice of interpreting a statute to ***avoid*** constitutional infirmities, and the Legislature's enactment of a severability clause. They ask the Court to reverse Washington's policy decision to join the majority of states that have enacted anti-SLAPP laws. Respondents respectfully ask the Court to affirm the Superior Court's decision and decline to hold the anti-SLAPP law invalid.

II. ARGUMENT

A. This Court Should Confine Its Review to the Issues Presented and Preserved by the Parties.

This Court need not and should not consider most of the constitutional challenges presented by amici and petitioners.

First, petitioners have waived any challenges other than those they asserted in the trial court, i.e., that the burden of proof placed on a non-moving party and the statute's presumptive discovery stay each violates the right of access and separation of powers. CP 317-22. On appeal, petitioners raised two new arguments: that the statute's burden of proof violates the right to a jury trial, and that the $10,000 damage award violates due process—the latter argument raised for the first time in this Court. *See* Pet. Supp. Br. at 17-19.[2] But this Court "will not consider a theory as ground for reversal unless ... the issue was first presented to the trial court." *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819

[2] Respondents have had no opportunity to respond to petitioners' untimely due process challenge to the $10,000 damage award, which the Legislature modeled on RCW 4.24.510. Petitioners cite no authority for this argument, and it is wrong. A statutory damage award is unconstitutional only where it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) (affirming award of statutory damages 113 times greater than actual losses). *See also Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 588 (6th Cir. 2007) (affirming statutory damages 44 times greater than actual damages); *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 533, 286 P.3d 46 (2012) (court must award $500 per plaintiff per violation for violations of Farm Labor Contractors Act, RCW 19.30.170(2); the "legislature can and does provide for fixed statutory damages awards in an array of statutory provisions, many of which create awards that are nondiscretionary and 'automatic.'"). Petitioners have not shown the $160,000 award is "so severe and oppressive" that it is "obviously unreasonable." It amounts to $32,000 per petitioner; even the Court of Appeals in *Akrie v. Grant*—the only court to suggest a large anti-SLAPP award ***may*** raise constitutional concerns—found an award of $25,000 per plaintiff does not violate due process. 178 Wn. App. 506, 513 n.8, 315 P.3d 567 (2013), *rev. granted*, 180 Wn.2d 1008 (2014).

P.2d 370 (1991) (citation omitted). It should decline to consider these untimely arguments.

Second, this Court should disregard the myriad challenges raised only by amici, i.e., that the statute violates the right of petition, fails to satisfy strict scrutiny, and is overbroad and vague. Each argument fails, *infra* at II.B, II.C, II.D. But the Court should not consider them at all. A "case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). "[C]laims raised only by amicus are not considered." *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 255 n.2, 4 P.3d 808 (2000).

Third, the Court should disregard challenges to the statute's burden of proof, discovery stay, and jury trial right, on the separate ground that none affected the trial court's decision to dismiss this lawsuit. As the Court of Appeals noted, the court properly interpreted the standard under RCW 4.24.525(4)(b) as "not dissimilar" to "the summary judgment standard under Civil Rule 56." 180 Wn. App. 514, 536 n.8, 325 P.3d 255 (2014) (quoting RP 2/27/2012 at 19:4-7). It denied petitioners' request for discovery because the discovery sought was "broad-ranging" and "not focused," RP 2/23/2012 at 20:2, a finding that compels the same result under CR 56(f)—and one that is reviewed for abuse of discretion. *See* CR 56(f) (party opposing summary judgment and seeking continuance for discovery must identify facts "***essential*** to justify his opposition") (emphasis added); 180 Wn. App. at 539. As the trial court correctly

recognized, petitioners' discovery demands amounted to a Micawberish plea that "something will turn up." Further, petitioners neither demanded nor were entitled to a jury trial. *Infra* at II.D.2. These allegedly unconstitutional statutory provisions had no effect on the trial court decision. The Court should refuse to consider their constitutionality.

By presenting challenges that the parties did not raise and that were not essential to the trial court's rulings, amici seek an advisory opinion that the statute is facially unconstitutional. Such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (internal quotation marks omitted). The Court should adhere to this fundamental principle here.

B. The Anti-SLAPP Statute Is a Permissible Exercise of the Legislature's Authority to Deter Meritless Claims.

Even if the Court does consider these challenges, it should reject them. As respondents (and others) have explained, the anti-SLAPP statute is a legitimate exercise of the Legislature's authority to enact laws to deter meritless lawsuits. *See, e.g.*, Resp. Supp Br. at 16-20; WA AG Br. at 6-13. WELA and the ACLU argue that RCW 4.24.525 is subject to strict scrutiny because it burdens First Amendment rights. WELA Br. at 5-8; ACLU Br. at 16-17. But no court has ever held an anti-SLAPP law

subject to strict scrutiny. And contrary to WELA's claims, limits on meritless litigation are ***not*** the constitutional equivalent of speech restrictions, much less content-based speech restrictions that must satisfy strict scrutiny. Courts routinely uphold anti-SLAPP statutes and other limits on filing lawsuits as a legitimate exercise of the state's interest in deterring baseless litigation.

To argue that strict scrutiny applies to the anti-SLAPP statute, WELA relies on the syllogism that (i) strict scrutiny applies in speech cases, (ii) free speech and the right to petition are subject to the same First Amendment analysis, and (iii) therefore strict scrutiny must apply to statutes burdening the right to petition, including the anti-SLAPP law. WELA Br. at 5. This argument fails at each turn.

First, courts have rejected the assertion that "[a]ny restriction of First Amendment rights is subject to strict scrutiny." WELA Br. at 2. Rather, under well-established law, the level of review depends on the nature of the speech and the scope of the restriction. *E.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968) (expressive non-speech conduct may be limited by narrowly focused means to protect substantial state interest); *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014) (rational basis review applies to laws with incidental effect on speech); *Kitsap Cnty. v. Mattress Outlet*, 153 Wn.2d 506, 511-12, 104 P.3d 1280 (2005) (commercial speech limits subject to intermediate scrutiny); *Collier v. City*

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of Tacoma, 121 Wn.2d 737, 753, 854 P.2d 1046 (1993) ("time, place, and manner" speech restrictions subject to intermediate scrutiny).[3]

Second, the U.S. Supreme Court has stated that the analyses under the free speech and petition clauses of the First Amendment are ***not*** the same. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (rights of speech and petition are "not identical"). Respondents have located ***no*** decision applying strict scrutiny to restrictions on the right of petition. Instead, the U.S. Supreme Court has applied rational basis review in cases concerning access to courts, balancing individuals' rights to pursue claims against state interests. *See, e.g.*, *Borough of Duryea v. Guarnieri*, __ U.S. __, 131 S. Ct. 2488, 2490 (2011) (in claim that employer retaliated against police chief for filing union grievance, infringing his right of petition, "the employee's First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs"); *Lewis v. Casey*, 518 U.S. 343, 361 (1996) (applying "deferential standard" to regulation allegedly limiting prisoners' right of access to courts by not providing adequate research facilities; refusing to apply strict scrutiny); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326, 334-35 (1985) (upholding law imposing $10 limit on fees for lawyers representing veterans seeking death

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[3] The cases WELA cites overturn laws imposing a "categorical exclusion" of speech. WELA Br. at 7 (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010) (striking statute criminalizing "depiction of animal cruelty")). Although strict scrutiny applies to such claims, anti-SLAPP laws are not limits on speech and do not categorically deny access.

or disability benefits; rejecting claim that law denied access to courts, according "great weight" to government interest).

Consistent with these principles, courts have refused to apply a heightened standard to constitutional challenges to anti-SLAPP statutes. As the California Court of Appeal held, "[t]here is no fundamental First Amendment right to petition the courts by filing a SLAPP….'The right to petition is not absolute, providing little or no protection for baseless litigation.'" *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 365-66 (2004) (quoting *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 64 (2002)). The *Bernardo* court rejected a claim that California's anti-SLAPP statute impermissibly chills the right to petition because the law "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits[.]" 115 Cal. App. 4th at 358. Indeed, *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331 (2011), rejected a similar claim:

> While the law at issue is related to suppression of meritless petitions, ***the First Amendment does not protect baseless litigation***. Thus, the law is unrelated to suppression of legitimate First Amendment activity. Indeed, the purpose of the law is to protect such activity exercised by the SLAPP targets. To the extent section 425.16, subdivision (c) might chill some legitimate petitioning activity, it is settled that the right of petition may be restricted by a narrowly drawn regulation designed to protect others' exercise of protected rights.

Id. at 1348 (emphasis added) (citations omitted). As another court put it, an anti-SLAPP law does "not in essence impinge upon or implicate the

fundamental right of free speech. Its classification does not withhold the right to exercise free speech to anyone." *People v. Health Labs. of N. Am.*, 87 Cal. App. 4th 442, 449 (2001) (applying rational basis review to equal protection challenge). *See also Castello v. City of Seattle*, 2011 WL 219671, at *5 (W.D. Wash. Jan. 24, 2011) ("the assertion that the Anti-SLAPP Act is unconstitutional is questionable given that California's Anti–SLAPP Act, which is substantially similar … has been litigated multiple times and not held unconstitutional").

WELA does not cite any cases applying strict scrutiny to an anti-SLAPP statute. Instead, like the ACLU (ACLU Br. at 14-17), it relies on dicta from a footnote in *Akrie v. Grant*, 178 Wn. App. 506, 513 n.8, 315 P.3d 567 (2013), *rev. granted*, 180 Wn.2d 1008 (2014). But the parties in *Akrie* neither briefed nor argued the right of petition issue, and the court itself refused to decide the question. *Id.* ("We are not called upon to address" the constitutional issue). Further, the dicta is incorrect and rests on inapposite cases.[4]

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[4] None of the three cases cited involves an anti-SLAPP statute, and none even mentions "strict scrutiny." *See* 178 Wn. App. at 513 n.8. *In re Marriage of Meredith*, 148 Wn. App. 887, 896, 201 P.3d 1056 (2009), held an order forbidding the petitioner from contacting any agency about his ex-wife violated his speech and petition rights. *Campbell v. PMI Food Equipment Group Inc*., 509 F.3d 776 (6th Cir. 2007), states that a tort claim for malicious interference with the right to petition the government "is subject to the same analysis applied to a claim arising under the Speech Clause" but held the interference claim failed on the facts presented. *Id.* at 789. And *Gunter v. Morrison*, 497 F.3d 868, 872 (8th Cir. 2007), states only that an employment retaliation claim based on a plaintiff's lawsuit against a public employer is subject to the same analysis as a retaliation claim based on the employee's speech.

If WELA were right, every statute and court rule aimed at deterring abusive litigation would be subject to strict scrutiny. Yet courts routinely uphold reasonable limitations on vexatious lawsuits using a more deferential standard. *See, e.g.*, *Wender v. Snohomish Cnty*., 2007 WL 3165481, at *3-4 & n.2 (W.D. Wash. Oct. 24, 2007) (upholding Washington malicious prosecution law using rational basis review; the statute "does not proscribe speech" or "target a particular viewpoint," and "[t]he First Amendment provides no immunity from liability for bringing baseless claims"); *Wolfe v. George*, 486 F.3d 1120, 1125 (9th Cir. 2007) (applying rational basis review to uphold California vexatious litigant statute); *Hall v. Callahan*, 727 F.3d 450, 456 (6th Cir. 2013) (refusing to apply strict scrutiny to Ohio vexatious litigant statute because it "targets baseless litigation"). Courts also defer to legislatively imposed conditions on prisoners' abilities to file lawsuits. *See, e.g.*, *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315-16 (3d Cir. 2001) (upholding 28 U.S.C. § 1915(g), precluding prisoner from filing *in forma pauperis* if prior suits dismissed for failure to state a claim); *White v. Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998) (same); *Vanderberg v. Donaldson*, 259 F.3d 1321 (11th Cir. 2001) (applying rational review to uphold law allowing district court to dismiss prisoner's claim *sua sponte* for failure to state a claim).

These cases reflect the broader rule that a state "may set the terms on which it will permit litigations in its courts." *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 552 (1949) (upholding as reasonable statute requiring plaintiff to post security as a precondition to filing

shareholder action). "[I]t cannot seriously be said that a state makes such unreasonable use of its power as to violate the Constitution when it provides liability and security for payment of reasonable expenses if a litigation of this character is adjudged to be unsustainable." *Id.* The same is true of anti-SLAPP statutes, which function as "screening mechanism[s] for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact." *Health Labs.*, 87 Cal. App. 4th at 449 (citation, quotation omitted).

Nor does a legislature infringe the right to petition if it limits, or even abolishes, common law tort claims. Instead, "it is well within the Legislature's power to subject such claims to qualifications, limitations, or defenses." *Guam Greyhound, Inc. v. Brizill*, 2008 WL 4206682, at *4-6 (Guam Sept. 11, 2008) (upholding Guam's anti-SLAPP statute against right of petition claim). Thus, as one court held, "[t]he right to petition … is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (right to petition not violated by act barring certain civil actions against gun manufacturers). The Washington anti-SLAPP statute does not even do that. Instead, it subjects to dismissal only those claims that lack merit.

In sum, to the extent the anti-SLAPP statute implicates plaintiffs' First Amendment rights at all, the standard is rational basis review. Even if it were not, as amici concede, the Legislature intended RCW 4.24.525 to "protect[] the individual right to free speech and petition the government,"

WELA Br. at 6, a compelling state interest. The statute is narrowly tailored to serve that interest by allowing claims to proceed only if they survive a special motion to strike. The law is precisely the sort of restriction the Legislature may enact "without impermissibly infringing on the right of petition for redress of grievances." *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 196 (2002).

C. Amici's Arguments Are Based on a Misreading of the Anti-SLAPP Statute.

Most of amici's remaining arguments rest on a presumption that the anti-SLAPP statute permits dismissal of ***meritorious*** claims because it imposes a burden of proof on the non-moving party greater than the one on summary judgment and requires a court to weigh evidence and resolve disputed facts. *See, e.g.*, ACLU Br. at 6-11; WSAJF Br. at 10-11.[5] But as other courts have concluded, and respondents have explained, the phrase "clear and convincing evidence of a probability of prevailing" does not allow a court to weigh evidence or decide disputed facts. *See* Resp. Supp. Br. at 10-16. Instead, a plaintiff opposing a special motion to strike need only provide some evidence of a "probability" of success at trial. In other words, just as the Court of Appeals ruled, the trial court "must view the

[5] WSAJF also argues that the statute requires a plaintiff to provide evidence sufficient to defeat a moving party's affirmative defense. *See* WSAJF Br. at 9, 12. It says no such thing, and California courts have ruled the opposite. *See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 676 (2005) ("[A]lthough [California anti-SLAPP law] places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.").

facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." 180 Wn. App. at 533 (quotation marks, citation omitted).

Washington modeled its anti-SLAPP statute on the California law, which also requires a non-moving party to prove a "probability of prevailing" on its claims, and which courts have interpreted to be the same as the summary judgment evidentiary standard. Cal. Civ. Proc. Code § 425.16. As the California Supreme Court has held, "although by its terms section 425.16 … calls upon a court to determine whether the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim," this does ***not*** mean the court weighs "conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim"; instead, the law creates "a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities." *Taus v. Loftus*, 40 Cal. 4th 683, 714 (2007). *See also Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005) (standard requires "evaluat[ing] the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation"); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679 (2010) (plaintiff must make "a prima facie showing of facts … admissible at trial … sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment").

As this Court has held, "the California Supreme Court's opinion is especially important" where California's law "was a model for our own." *Eggleston v. Pierce Cnty.*, 148 Wn.2d 760, 772 n.8, 64 P.3d 618 (2003)

(looking to California law interpreting California Constitution takings clause, the model for its Washington analog). *See also Henne v. City of Yakima*, 177 Wn. App. 583, 589 n.2, 313 P.3d 1188 (2013), *rev. granted*, 179 Wn.2d 1022 (2014) ("Because Washington's anti-SLAPP statute was modeled after California's statute, California cases are persuasive authority for interpreting the Washington statute.") (citing *Aronson v. Dog Eat Dog Films, Inc*., 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010)). *See also Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986) (federal cases persuasive to interpret state statute patterned on Civil Rights Act of 1964).

Other courts have heeded this basic principle, applying California law to interpret RCW 4.24.525 as creating a summary judgment-like standard. *See Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 86-89, 316 P.3d 1119, *rev. granted*, 180 Wn.2d 1009 (2014); *Spratt v. Toft*, 180 Wn. App. 620, 636-37, 324 P.3d 707, 715 (2014); *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941-42 (9th Cir. 2013) (the "burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment") (quoting *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 53 Cal. Rptr. 3d 752, 763 (2007)).[6]

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[6] One unpublished federal trial court decision states that the Washington statute "radically alters a plaintiff's burden of proof" as compared to the California statute, which "essentially creates an early opportunity for summary judgment." *Jones v. City of Yakima Police Dep't*, 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012). This case is an outlier. The quoted language is dicta, and the court provided no reason for its assertion or explanation as to what the "radically" different burden would require.

Courts have held that "probability" requirements in other states' anti-SLAPP statutes likewise create a summary judgment standard. Three states have such a requirement. *See* Nev. Rev. Stat. § 41.660 (court must "determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim"); Or. Rev. Stat. § 31.150(3) ("establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case"); La. Code Civ. Proc. Ann., art. 971 ("unless the court determines that the plaintiff has established a probability of success on the claim"). Courts have held two of them—Louisiana and Oregon—create summary judgment standards; the third, Nevada, has not been interpreted. *Or. Educ. Ass'n v. Parks*, 291 P.3d 789, 794 (Or. Ct. App. 2012) (court evaluates "what a reasonable juror could infer from particular evidence" just as "in the summary judgment setting."); *Lamz v. Wells*, 938 So. 2d 792, 796 (La. Ct. App. 2006) (anti-SLAPP motion is a "specialized defense motion akin to a motion for summary judgment"). In fact, courts have interpreted the District of Columbia anti-SLAPP statute, which requires a non-moving party to demonstrate his claim is "***likely*** to succeed on the merits"—an arguably more stringent standard—to be akin to summary judgment because the law was modeled on California's statute. *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 13 (D.D.C. 2013) (emphasis added).

The ACLU and WSAJF say almost nothing about these states' or California's laws, except (in a footnote) that "California authority

confirms that the California anti-SLAPP statute does not directly equate to summary judgment." ACLU Br. at 8 n.4. But the single (federal) case the ACLU cites illustrates that the inquiry in fact resembles the summary judgment inquiry. In *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010), the Ninth Circuit held a non-moving party must show "the complaint is both legally sufficient and supported by a sufficient ***prima facie*** showing of facts to sustain a favorable judgment ***if the evidence submitted by the plaintiff is credited***." *Id.* at 902 (emphasis added) (quoting *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517, 527 (2006)). The court characterized the test as "similar to the one courts make on summary judgment, though not identical." *Id.* It did not explain its qualification (i.e., "not identical"), and California cases find the inquiry is the same as on summary judgment.

Rather than address this authority, the ACLU and WSAJF rely on dicta in a case from the Minnesota Supreme Court interpreting that state's anti-SLAPP law, *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224 (Minn. 2014). ACLU Br. at 8-10; WSAJF Br. at 12 n.18 (Minnesota law is "somewhat similar" to Washington); WELA Br. at 16 n.7 ("The Minnesota statute is one of the most similar to Washington's."). But the Minnesota statute (which the ACLU has twice argued is constitutional[7]) is different. It requires a party responding to an anti-

[7] *See Dillon v. Seattle Deposition Reporters et al.*, No. 89961-4, Pet. Resp. Br. Amici Curiae WSAJF and ACLU Regarding Washington Act Against Strategic Lawsuits Against Public Participation, App. A, E (ACLU amicus briefs).

SLAPP motion to "produc[e] clear and convincing evidence that the acts of the moving party are not immunized from liability." Minn. Stat. § 554.02(3). The responding party also "has the burden of proof, of going forward with the evidence, and of persuasion on the motion." *Id.* § 503.03(2). As *Leiendecker* held, "[t]he burden of persuasion… describes the obligation to persuade the trier of fact of the truth of a proposition." 848 N.W.2d at 231. Thus, "the responding party bears the burden to persuade the trier of fact—here, the district court—of the truth of a proposition—here, that the acts of the moving party are not immune." *Id.*

But *Leiendecker* rests on two provisions of the Minnesota law not in Washington's law. First, the Minnesota law requires proof by clear and convincing evidence, ***not*** proof ***of a "probability"*** by clear and convincing evidence. The Superior Court correctly recognized these are different, stating "[c]lear and convincing evidence of a probability is certainly more unique than clear and convincing evidence of a fact. Probability … means less than the preponderance standard." RP 2/27/2012 at 18:22-18:24. Second, the Minnesota law places the burden of persuasion on the non-moving party. The Washington law does not. Thus, the interpretation of Minnesota's anti-SLAPP law in *Leiendecker* does not provide valuable guidance in interpreting RCW 4.24.525. California law does.

The second prong of Washington's law differs from California's law in one respect: it requires that "probability" be shown by "clear and convincing evidence." RCW 4.24.525(4)(b). But settled law shows the

“clear and convincing evidence” standard is compatible with summary judgment. In *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), for example, the Supreme Court held a defamation plaintiff at the summary judgment stage can be required to meet the “clear and convincing evidence” standard imposed by *New York Times v. Sullivan*, 376 U.S. 254 (1964), to establish actual malice: “When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*.” 477 U.S. at 254. But the court does not weigh the evidence or decide credibility; instead, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id*. at 255. If the evidence would permit a jury to find actual malice by clear and convincing evidence at trial, the plaintiff survives summary judgment. Thus, as the Court of Appeals correctly held, “because—at the motion stage—the trial court must credit the evidence presented by the plaintiffs, it is not true that the same quantum of evidence that would prevail at trial might not prevail in opposing the motion… The heightened burden, therefore, was not unconstitutional as applied to [petitioners].” 180 Wn. App. at 548.

Although amici make much of the “clear and convincing” standard, it “is no stranger to the civil law.” *Woodby v. INS*, 385 U.S. 276, 285 (1966). This Court has held the standard does not “materially alter the normal standard for deciding motions for summary judgment. While the issue turns on what the jury could find, and while the court must keep in

mind that the jury must base its decision on clear and convincing evidence, ***the evidence is still construed in the light most favorable to the nonmoving party***." *Herron v. KING Broad. Co*., 112 Wn.2d 762, 768, 776 P.2d 98 (1989) (emphasis added). Thus, this Court found summary judgment proper where a plaintiff failed to provide evidence sufficient to meet the "clear and convincing" standard on a state-law claim. *See, e.g.*, *Mark v. Seattle Times*, 96 Wn. 2d 473, 496-97, 635 P.2d 1081 (1981) (affirming summary judgment where plaintiff failed to prove prima facie case by clear and convincing evidence); *Margoles v. Hubbart*, 111 Wn.2d 195, 205, 760 P.2d 324 (1988) ("No rational trier of fact could find by clear and convincing evidence that the articles in question, in whole or part, were published with reckless disregard of their truth or falsity."). These courts did not weigh evidence; they merely "kept in mind" the quantum of proof.

Even if the burden of proof in the anti-SLAPP statute were ambiguous, "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." *State ex rel. Herron v. Browet, Inc*., 103 Wn.2d 215, 219, 691 P.2d 571 (1984). In light of this principle, the Court should read the statute to create a summary judgment standard, as other courts have. *See, e.g.*, *Hung v. Wang*, 8 Cal. App. 4th 908, 929-30 (1992) (construing California statute requiring plaintiff alleging conspiracy between lawyers and clients to show a "reasonable probability of prevailing" as requiring enough evidence as on summary judgment").

D. The Anti-SLAPP Statute Is Constitutional Under the Doctrines Asserted.

The anti-SLAPP statute, properly construed, is constitutional because it creates an early summary judgment-like motion. But even so, each challenge fails for the following, independent reasons.

1. The law does not violate separation of powers.

Amici claim the anti-SLAPP statute violates separation of powers because the probability standard supposedly conflicts with Civil Rule 56. The "harmonious cooperation among the three branches is fundamental to our system of government." *Wash. State Council of Cnty.& City Emps., Council 2 v. Hahn*, 151 Wn.2d 163, 168, 86 P.3d 774 (2004) (internal quotation marks and alteration omitted). "Where a court rule and a statute conflict, we will attempt to read the two enactments in such a way that they can be harmonized." *Id.* at 169. "If they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). The anti-SLAPP statute does not conflict with any court rules, and in any event, it creates a substantive rule.

A court rule and statute cannot be harmonized "only when the statute ***directly and unavoidably*** conflicts with the court rule." *Hahn*, 151 Wn.2d at 169 (emphasis added). Here, as explained above, the anti-SLAPP statute does not directly and unavoidably conflict with CR 56. Nor does it conflict with CR 12, as WSAJF claims: a defendant may bring and a plaintiff may defend against a motion for judgment on the pleadings.

WSAJF Br. at 15. Amici's reliance on *Putman*, 166 Wn.2d 974, is misplaced. *Putman* invalidated a statute requiring a medical expert's certificate of merit before ***filing*** a malpractice action. *Id.* at 982-83. Unlike the law in *Putman*, the anti-SLAPP law imposes no pre-suit conditions.

Even if CR 56 did conflict with the anti-SLAPP statute, the statute's protections are substantive and must prevail. "Although a clear line of demarcation cannot always be delineated between that is substantive and what is procedural," this Court uses the "following general guidelines": "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). Under this standard, the anti-SLAPP law is substantive. The purpose of the law, like those in other states, is to "free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights." *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 178 (5th Cir. 2009). It thus "provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute." *Id.* *See also Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (California anti-SLAPP statute creates immunity from suit, not just from ultimate judgment); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 751 (5th Cir. 2014) (right under Texas statute "is

not simply the right to avoid ultimate liability in a SLAPP case, but rather is the right to avoid trial in the first instance").

Amici argue the anti-SLAPP statute is procedural because it creates a method and burden of proof. WSAJF Br. at 15-16; ACLU Br. at 13. But "[l]egislation prescribing methods and standards of proof has been upheld as not within the exclusive domain of the judiciary." 1 Sutherland Statutory Construction § 3:28 (7th ed.).[8] This Court as well has recognized the Legislature's prerogatives. In *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007), the Legislature's creation of a three-day waiting period for a landlord to commence an unlawful detainer action was substantive and thus not subject to the court rule excluding weekends and holidays from time periods of less than seven days. *See also In re Marriage of Lemon*, 118 Wn.2d 422, 823 P.2d 1100 (1992) (court rule requiring party to file affidavit of prejudice "as soon as the presenting party has knowledge that the case has been assigned to that judge" conflicted with statute requiring such affidavit any time before judge makes a ruling, rendering rule invalid). The mere fact that a statute

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[8] The ACLU argues the burden of proof is substantive only when it is "an essential element of the claim itself." ACLU Br. at 12-13 n.6 (citing *Raleigh v. Ill, Dep't of Revenue*, 530 U.S. 15 (2000)). In fact, the decision it cites underscores that, "[g]iven its importance to the outcome of cases, ***we have long held the burden of proof to be a 'substantive' aspect of a claim***." 530 U.S. at 20-21 (emphasis added). The ACLU argues the burden of proof here is not "essential" because it is "not specific to any particular claim or right of action." But it is specific to claims that target public participation and petition, and the ACLU cites no authority for the proposition that the Legislature cannot change the burden of proof on a class of claims, as opposed to specific causes of action.

affects the course of litigation does not make it procedural for separation-of-powers purposes.[9] Because the anti-SLAPP statute creates immunity from meritless litigation, it is substantive and prevails over any conflicting court rule.

2. The law does not violate the right of access or the right to a jury trial.

Amici also argue RCW 4.24.525 violates the rights of access to courts and to trial by jury. ACLU Br. at 6-10, WSAJF Br. at 9-12, 17-18, 20-25. But to begin with, petitioners neither demanded nor were they entitled to a trial by jury. Petitioners claim respondents, as directors of the Co-op, violated the Co-op's own rules, acting *ultra vires*, in breach of their fiduciary duties. *See* CP 9-12. A claim for breach of fiduciary duty is by its very nature "an equitable claim—perhaps the quintessential equitable claim." *QC Commc'ns Inc. v. Quartarone*, 2013 WL 1970069 (Del. Ch. May 14, 2013). *See also Goodwin v. Castleton*, 19 Wn.2d 748,

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[9] Rather than focus on cases applying the separation-of-powers doctrine, amici draw from other sources, including cases deciding whether federal or state law applies in federal court, whether statutes are remedial and therefore can be applied retroactively, and federal due process. *See* ACLU Br. at 13 (citing *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1194 (W.D. Wash. 2010) (retroactivity)), WSAJF Br. at 16 (same; also citing *Greenhalgh v. Dep't of Corr.*, 180 Wn. App. 876, 324 P.3d 771 (2014) (federal due process). *See also* Pet. Supp. Br. at 12 (citing *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026 (N.D. Ill. 2013) (federal *Erie* doctrine)). None of these tests applies. Indeed, this Court has held "[n]either the test [under the *Erie* doctrine] nor its underlying rationale apply to this court when determining whether a state statute is substantive or procedural for a separation of powers analysis." *Putman*, 166 Wn.2d at 985 n.4. Further, even if *Erie* did apply, *Intercon Solutions* is on appeal to the Seventh Circuit, and "[e]very circuit that has considered the issue has agreed … that anti-SLAPP statutes like California's confer substantive rights under *Erie*." *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1184 (9th Cir. 2013). *See, e.g.*, *Adelson v. Harris*, __ F.3d __, 2014 WL 7234557, at *4 (2d Cir. Dec. 19, 2014) (application of Nevada anti-SLAPP statute in federal court, identical to Washington law, "seems to us unproblematic").

766-67, 144 P.2d 725 (1944) (describing derivative suit on behalf of corporation as equitable). Where, as in this case, an action "is purely equitable in nature, there is no right to a trial by jury." *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 399, 400-01, 663 P.2d 104 (1983).

But even so, amici's arguments (again) largely rest on the flawed conclusion that the "probability" standard creates a burden different from that on summary judgment or permits the trial court to weigh evidence. It does not. It merely provides for permissible "gatekeeping judicial determinations" that "prevent submission of claims to a jury's judgment ***without*** violating the Seventh Amendment." *Tellabs, Inc. v. Makor Issues & Rights, LTD*, 551 U.S. 308, 327 n.8, 329 (2007) (emphasis added) (statute requiring plaintiff in securities litigation to "demonstrate that it is more likely than not that the defendant acted with scienter," and judge to weigh competing inferences from alleged facts in adjudicating motion to dismiss, does not violate Seventh Amendment).

The ACLU claims the "sole authority" for applying a summary judgment standard in SLAPP cases is a Minnesota case that has been overruled. ACLU Br. at 8-9. This argument is disingenuous. First, the ACLU all but ignores California law, which (unlike Minnesota law) is the source of RCW 4.24.525. *See Taus*, 40 Cal. 4th at 714; *supra* at II.C. Second, *Leiendecker*—the Minnesota case ACLU relies on—did ***not*** find the anti-SLAPP statute violated the jury trial right, "declin[ing] to address the constitutionality of the anti-SLAPP statutes." 848 N.W.2d at 232.

Further, the anti-SLAPP statute does not violate the constitutional right to a trial, because that right exists only with respect to disputed issues of fact. *See, e.g.*, *Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-20 (1902) (grant of summary judgment does not violate the Seventh Amendment). The same is true of summary judgment motions applying the "clear and convincing" standard. *Liberty Lobby*, 477 U.S. at 255. Thus, every case to consider whether anti-SLAPP procedures violate jury trial rights has rejected the argument out of hand. *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855 (1995); *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 746 (1994); *Sandholm v. Kuecker*, 962 N.E.2d 418, 434-35 (Ill. 2012); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61-62 (R.I. 1996); *Lee v. Pennington*, 830 So. 2d 1037, 1043 (La. Ct. App. 2002). Like California's statute, RCW 4.24.525 "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits." *Equilon*, 29 Cal. 4th at 63. This is not unconstitutional. *See also Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 740 n.8 (2003) (California Supreme Court "ha[s] considered and rejected" suggestion that anti-SLAPP statute unduly burdens access to courts).

WSAJF argues that by altering a SLAPP plaintiff's burden of proof, the Legislature exceeded its authority and infringed the purview of the jury to decide issues of fact. WSAJF Br. 20-25. This argument rests on the same misreading of RCW 4.24.525. But again, even if a plaintiff's burden of proof is different under the anti-SLAPP statute, the Legislature

has every right to alter that burden. "It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711, *amended by* 780 P.2d 260 (1989). WSAJF argues *Sofie* does not support "the view that the Legislature has plenary authority to create a mechanism that screens out potentially meritorious claims." WSAJF Br. at 22. But the statute does not do this; its remedies apply only when the plaintiff fails to demonstrate a prima facie "probability" that it has a meritorious claim. RCW 4.24.525(4)(b).[10]

And in any case, the Legislature does have the power to eliminate claims recognized at common law, as well as to modify elements, including by imposing a heightened standard of proof or requiring plaintiffs to make an early showing that the claim has probable merit. "[A] state may freely alter, amend, or abolish the common law within its jurisdiction." *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Mktg. Ass'n*, 276 U.S. 71, 89 (1928); *see also Spratt*, 180 Wn. App. at

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[10] Amici imply that a SLAPP is limited to a "frivolous or sham claim[] filed solely to silence protected speech." ACLU Br. at 1, 19; WELA Br. at 6. But other states' anti-SLAPP statutes (including Washington's 1989 anti-SLAPP law, RCW 4.24.510) are not so limited. Nor is it correct that the Legislature is limited to restricting "sham" claims. *E.g.*, WELA Br. at 8 n.1. If it were, the Legislature could never impose fee-shifting rules for unsuccessful (but non-frivolous) suits, yet it does so routinely, and such laws are constitutional. *See, e.g.*, *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 799-800, 973 P.2d 1081 (1999) (upholding imposition of attorneys' fees and costs under RCW 4.84.370 against party unsuccessfully appealing local land use decision); *Shroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 197 (2002) (mandatory fee provision of California anti-SLAPP act is not unconstitutional, and "frivolousness is not an invariable perquisite to … constitutional validity").

636-37 (burden of proof is substantive and "within the realm of the legislature's authority to impose"). Contrary to WSAJF's argument, exercise of this power "'does not implicate' the right of access to courts.'" 180 Wn. App. at 546 (quoting *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 938 (6th Cir. 2004)); *see supra* section II.B.

3. The law is not overbroad or vague.

Consistent with its "kitchen sink" approach, WELA asserts RCW 4.24.525 is overbroad and its use of the phrase "lawful conduct" is unconstitutionally vague. WELA Br. at 9-15. Neither petitioners nor any other amici join this argument. Nor has any court held an anti-SLAPP statute unconstitutional on overbreadth or vagueness grounds. Instead, courts have flatly rejected such challenges. *See Bernardo*, 115 Cal. App. 4th at 357-58, 363-64 (rejecting claim law was vague or overbroad); *Schroeder*, 97 Cal. App. 4th at 195 (rejecting overbreadth argument); *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1213-14 (R.I. 2000) (overbreadth and vagueness); *see also Dixon*, 30 Cal. App. 4th at 746 n.12 (declining to consider vagueness and overbreadth challenge that was unsupported by plaintiff). This Court should follow suit.

The overbreadth doctrine does not apply. Under this doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected ***speech***." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis added). *In re Detention of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011) (refusing to apply doctrine to civil commitment statute because it

did "not criminalize or regulate speech"). Put more simply, the doctrine "applies only to the Free Speech Clause and not the other provisions of the First Amendment." Luke Meier, *A Broad Attack on Overbreadth*, 40 Val. U. L. Rev. 1, 113 n.1 (2005). Respondents have located no cases in which a court applied the overbreadth doctrine to a claim that a statute prohibited filing a lawsuit. The doctrine does not apply.

But even if it did, a statute is overbroad only if it "reaches a ***substantial*** amount of constitutionally protected conduct." *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989) (emphasis added) (citation omitted). RCW 4.24.525 does not burden ***any*** constitutionally protected activity, much less a substantial amount. As set forth above, it reaches only those claims for which plaintiff cannot make a prima facie showing that the case has merit. Meritless claims receive no constitutional protection. *Bernardo*, 115 Cal. App. 4th at 358.

Finally, even overbroad laws "will be invalidated *only if* the court is unable to limit sufficiently its standardless sweep by a limiting construction." *State v. Pauling*, 149 Wn.2d 381, 386, 391, 69 P.3d 331 (2003) (imposing limiting construction to uphold overbroad extortion statute). For reasons set forth above, this court can and should construe RCW 4.24.525 as incorporating an early summary-judgment-like

procedure—a construction that, like summary judgment itself, avoids any conceivable overbreadth concerns. *See also* section II.F.[11]

WELA's vagueness argument fares no better. This challenge, too, is facial. WELA Br. at 12-13. But as with an overbreadth challenge, a party may maintain a facial vagueness challenge only against statutes that regulate free speech. "Washington courts now limit a facial challenge to statutes that implicate free speech rights." *State v. Harrington*, 181 Wn. App. 805, 826, 333 P.3d 410 (2014). *See, e.g.*, *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990) (criminal nuisance statute could be challenged for vagueness only "as applied," not facially).[12] Because the anti-SLAPP statute does not restrict (and in fact promotes) free speech rights, amici cannot assert a facial challenge.

Even if this Court considers WELA's facial challenge, it must reject it. A party bringing a facial vagueness claim must prove the law is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates*

[11] WELA suggests a "specific intent" clause is required to keep the statute from being overbroad. WELA Br. at 10. But the case it cites for that proposition involved a criminal law. *City of Seattle v. Slack*, 113 Wn.2d 850, 855, 784 P.2d 494 (1989) (upholding prostitution loitering ordinance on ground it could be construed to require specific criminal intent). This holding reflects the hornbook principle that "[e]very crime must contain… a mens rea." *State v. Edwards*, 171 Wn. App. 379, 388, 294 P.3d 708 (2012). No "specific intent" is required for civil statutes. *See, e.g.*, *State v. Conte*, 159 Wn.2d 797, 811, 154 P.3d 194 (2007) (noting distinction in context of civil and criminal statutes governing campaign finance). Moreover, imposing a "specific intent" requirement on RCW 4.24.525—opening a plaintiff's subjective motives to discovery and litigation—would undermine the law's purpose to establish a speedy procedure for disposing of meritless SLAPPs. 2010 ch. 118 § 1(1), § 1(2)(b).

[12] The cases WELA cites illustrate the point. *See, e.g.*, *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001) (considering— but rejecting—facial challenge to statute limiting use of languages other than English in public schools).

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v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). The doctrine does not require "impossible standards of specificity." *Douglass*, 115 Wn.2d at 179. A law is impermissibly vague only if it leaves "persons of ordinary intelligence … to guess as to what conduct the [law] proscribes." *Id.* The anti-SLAPP statute does not do this.

WELA challenges a single phrase in RCW 4.24.525(2)(e), which is part of the statute's definition of an "action involving public participation and petition." WELA argues the term "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech" is impermissibly vague because "it is too much to expect members of the public to … intuit" what the term "lawful" means in this context. WELA Br. at 13-14. These fears are misplaced. In evaluating vagueness claims, courts do not read the challenged provision "in a vacuum"; instead, "the language used in the enactment is afforded a sensible, meaningful, and practical interpretation." *Douglass*, 115 Wn.2d at 180-81. Here, the term "other lawful conduct" appears at the end of a list of five, non-exclusive categories that describe what the law covers: among other things, speech and petition to government entities, in connection with public proceedings, or about matters of public concern. RCW 4.24.525(2)(a)-(d). A person of ordinary intelligence can discern that the term "other lawful conduct" likewise refers to conduct in furtherance of similar rights.

WELA argues California cases are unpersuasive because California's anti-SLAPP statute does not require the conduct at issue be "lawful." WELA Br. at 14 (citing Cal. Civ. Proc. Code § 425.16). In

fact, California has the same requirement in practice. That state's statute applies to lawsuits that target "valid" exercises of speech and petition rights. Cal. Civ. Proc. Code § 425.16(a). Interpreting this provision, the California Supreme Court has held the anti-SLAPP statute does not apply where the defendant's activity is "illegal," i.e., criminal. *Mendoza v. ADP Screening & Selection Servs., Inc.*, 182 Cal. App. 4th 1644, 1654 (2010). The inclusion of the word "lawful" before "conduct" in the Washington anti-SLAPP statute codifies this limitation—with greater clarity than California's law. The provision, which the Court of Appeals properly construed, consistent with California cases, as meaning "criminal as a matter of law," 180 Wn. App. at 532 (quotation marks, citation omitted), is not impermissibly vague.[13]

Finally, just as with the overbreadth doctrine, an otherwise vague statute is valid if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wn.2d 792, 794, 698 P.2d 554 (1985). Even if the phrase

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[13] As WELA concedes, criminal statutes that refer to "lawful order" may or may not be vague. WELA Br. at 14-15; *see State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (phrase "without legal authority" did not render kidnapping statute void for vagueness). But this Court has rejected the general proposition that "what is 'lawful' is not something a person of common understanding can comprehend." *State v. Smith*, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). Further, as WELA admits, criminal statutes are subject to heightened review for vagueness. WELA Br. at 11. WELA identifies no case in which a court found a civil statute or rule of procedure void for vagueness. Indeed, the Court of Appeals refused to hold a civil statute—which permits courts to enjoin a Public Records Act request by inmates in certain circumstances—impermissibly vague, even though it does "not precisely define what evidence is sufficient to satisfy the moving party's burden." *King Cnty. Dep't of Adult & Juvenile Detention v. Parmelee*, 162 Wn. App. 337, 355-56, 254 P.3d 927 (2011). Significantly, the court noted the statute "does not prohibit a prisoner from making PRA requests," but simply provides a remedy if certain conditions are met. *Id.* at 356-57. The same is true here.

"other lawful conduct" were vague (and it is not), interpreting it as a limitation assuring that indisputably criminal activity is not protected by the statute (as in California) would quell any vagueness concern.

E. Invalidating the Law Would Undercut the Clearly Expressed Will of the Legislature and Leave Washington Behind in the Battle Against SLAPPs.

In 1989, Washington became the first state to pass an anti-SLAPP law, RCW 4.24.510, protecting statements made to government officials. Other states (including California) followed by enacting broader statutes that weed out meritless claims targeting the exercise of First Amendment rights. Just last month, an Ohio appellate court called on its state to "join the majority of states" by enacting an anti-SLAPP statute. *See Murray v. Chagrin Valley Publ'g Co*., 2014 WL 6983432, at *12 (Ohio Ct. App. Dec. 11, 2014). Such laws, the court found, "provide for quick relief from suits aimed at chilling protected speech," which "can be devastating to individual defendants or small news organizations and act to chill criticism and debate." *Id.*

Washington's statute—which the Legislature designed to accomplish exactly this purpose—has done just that. It has provided a means for early dismissal of meritless lawsuits attempting to subject defendants to liability for their exercise of free speech and petition rights. These include: (1) claims based on a report by a neighbor to King County about another's violation of county code, *Bevan v. Meyers*, 183 Wn. App.

177, 334 P.3d 39 (2014)[14]; (2) consumer protection claims by an attorney who objected to a lawyer-rating website using his image and providing a mistaken address and practice area, *Davis v. Avvo, Inc*., 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012); (3) claims against a Better Business Bureau branch based on a press release warning consumers to stay away from a company, *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington*, 2011 WL 2414452 (W.D. Wash. June 13, 2011); and (4) claims based on use of a clip in *Sicko*, a health care documentary, *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010).

Amici claim the anti-SLAPP statute has "already interfered with petitioning activity," citing this case, *Henne*, and *Bevan*. ACLU Br. at 18; *see also* WELA Br. at 10 n.3. But they do not plausibly argue *Bevan* was wrong on the merits—because the claims there were deficient under not only RCW 4.24.525, but also the absolute immunity of RCW 4.24.510. As for *Henne*, the Court of Appeals found the anti-SLAPP law did ***not*** bar the claims because the plaintiff amended his complaint before the motion was decided. 177 Wn. App. 583. And here, the Superior Court correctly

[14] Amici characterize *Bevan* as a mere property line boundary dispute. ACLU Br. at 18; WELA Br. at 10, FN 3. In fact, the claims struck in *Bevan* were based on Bevan's report to King County about his neighbor's improper installation of a septic tank on Bevan's property. 183 Wn. App. at 44 (the alleged damages "flow from the actions of [King County Health Department]" in response to the report). A report to the government is exactly the type of conduct the Legislature sought to encourage with both the 1989 anti-SLAPP statute and the 2010 law.

found the claims barred as a matter of law. Amici cannot point to any decisions dismissing meritorious claims under the anti-SLAPP statute.

If this Court declares the statute unconstitutional, it will set Washington back 25 years and put it behind numerous other jurisdictions with anti-SLAPP statutes—in defiance of the Legislature's intent. WELA calls this argument "disingenuous" because "[t]he provisions and standards of these statutes vary widely," with some states imposing a lower standard to survive a motion and others defining protected conduct narrowly. WELA Br. at 16. But it is WELA's brief that is disingenuous, by asserting that the Minnesota anti-SLAPP law "is one of the most similar to Washington's." *Id.* at 16 n.7. In fact, the closest analogs to Washington's statute are California, Oregon, Nevada, and Louisiana. And laws in Louisiana and California, two of the nation's oldest (with California serving as the model for Washington), have survived many challenges. *See, e.g.*, *Bernardo*, 115 Cal. App. 4th 322 (rejecting vagueness, due process, equal protection, and petition rights challenges); *Dixon*, 30 Cal. App. 4th at 746 (due process or right to trial by jury); *Lafayette Morehouse*, 37 Cal. App. 4th at 865-67 (right to trial by jury, equal protection, and due process); *Equilon*, 29 Cal. 4th at 63 (petition); *Pennington*, 830 So. 2d at 1042-43 (equal protection and due process). The outcome should be the same here.[15]

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[15] In fact, four states and one territory have statutes that place an even greater burden on a nonmoving party, and none has been declared unconstitutional. In two, the nonmoving

F. If this Court Finds the Statute Constitutionally Infirm, It Must Enforce the Law's Severability Clause.

It bears repeating that amici must prove the anti-SLAPP statute is unconstitutional beyond a reasonable doubt. *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). They have not done that. But even if this Court were to hold the anti-SLAPP statute's burden of proof or discovery stay unconstitutional, it must sever the offending clause rather than strike the statute in full.

This Court uses a two-part test to decide the severability of constitutional and unconstitutional provisions of legislation, looking to (1) "whether the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other" and (2) whether "the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Gerberding v. Munro*, 134

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party bears "the burden of proof, of going forward with the evidence, and of persuasion on the motion," and must produce "clear and convincing evidence that the acts of the moving party are not immunized from liability." Minn. Stat. Ann. § 554.02; 7 Guam Code Ann. § 17106. In two others, the nonmoving party must "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code Ann. § 27.005; Okla. H.B. NO. 2366. And in the District of Columbia, dismissal is required unless the nonmoving party "demonstrates that the claim is likely to succeed on the merits." D.C. Code § 16-5502.

In arguing litigants are abusing the anti-SLAPP statute, WSAJF claims similar problems spurred amendments to the California statute creating certain exemptions. WSAJF Br. at 19-20. But this is hardly an argument for holding the Washington statute unconstitutional. If the Legislature finds litigants are abusing the anti-SLAPP statute (and again, there is no evidence this is the case), then the Legislature (not this Court) may enact exemptions.

Wn.2d 188, 197, 949 P.2d 1366 (1998). The first requirement is satisfied by a severability clause. *Id.* With respect to the second, "[t]he invalid provision must be grammatically, functionally, and volitionally severable." *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002) (footnote omitted). The Court "routinely excise[s] select words from a sentence to honor legislative intent and preserve an otherwise valid statute, regulation, or ordinance." *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 839, 92 P.3d 243 (2004); *see also State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001) (severing single word in statute).

Here, both requirements are met. The Legislature directed that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances ***is not affected***." Laws of 2010, ch. 118, § 5 (emphasis added). Further, the allegedly unconstitutional provisions are not all so "intimately connected with the balance of the statute as to make it useless to accomplish the purposes of the legislature." The Legislature intended RCW 4.24.525 to "[e]stablish an efficient, uniform, and comprehensive method for speedy adjudication of [SLAPPs]" and to "[p]rovide for attorneys' fees, costs, and additional relief where appropriate." Even absent the presumptive discovery stay, a SLAPP defendant would still be entitled to speedy dismissal of claims and his attorneys' fees. Further, even absent the language "clear and

convincing evidence," the statute would require the court to evaluate, early on, the merit of a claim targeting public participation and petition.[16]

III. CONCLUSION

Petitioners' lawsuit lacks any merit and is a prime example of a SLAPP—a lawsuit designed to be "complicated, burdensome, and expensive" (CP 303-05), and brought to silence respondents' exercise of their speech and petition rights to adopt a boycott. Although the anti-SLAPP statute promises prompt resolution of such cases, petitioners have fought dismissal at every turn, and respondents remain mired in expensive, time-consuming litigation. Respondents respectfully ask the Court to affirm the Superior Court's and Court of Appeals' decisions and reject amici's attempts to invalidate the anti-SLAPP statute.

RESPECTFULLY SUBMITTED this 8th day of January, 2015.

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[16] This approach is also mandated by the Legislature's instruction that the provisions of the statute "be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 8, 2015, I caused the foregoing

RESPONDENTS' RESPONSE TO BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, AND WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

to be served by the manner identified below in the above-captioned matter

upon the following counsel of record:

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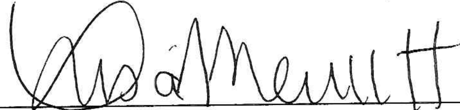
Stated under oath this 8th day of January, 2015.



Lisa Merritt

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