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No. 1010231  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

Petitioner,

v.

BALLARD TERMINAL RAILROAD CO., L.L.C.,

Respondent.

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**PETITIONER'S REPLY BRIEF**

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## I. INTRODUCTION

Ballard Terminal Railroad Company's ("BRTC") petition for review asks this Court to review Division I's decision concluding that the anti-SLAPP statute did not apply to the City's action because the action did not seek money damages and was limited to seeking declaratory and injunctive relief. Division I's decision is consistent with case law from all three divisions of the Court of Appeals and the statute's legislative history, as well as case law and anti-SLAPP statutes from other jurisdictions across the country.

BTRC's claim of conflict with this Court's decision in *Leishman v. Ogden Murphy Wallace, PLLC* is unavailing because *Leishman* did not address the anti-SLAPP statute's applicability to actions that do not seek damages. This Court should deny review of the anti-SLAPP issue because Division I's decision was correct and does not implicate any of the considerations governing acceptance of review under RAP 13.4(b).

## II. FACTUAL REPLY

BTRC initiated this dispute—not the City. In 2018, BTRC filed a petition for declaratory order before the Surface Transportation Board (“STB Petition”). BTRC sought to preemptively prohibit the City from reconfiguring portions of BTRC’s rail track and force the City to relocate and redesign the Missing Link. CP 1004–11. The City prevailed on its argument before the STB that the issue was more appropriately viewed as a contractual dispute that should be resolved by a court rather than the STB. CP 313.

Because, as the STB rightly found, this was a contract dispute, the City filed a complaint in King County Superior Court on January 17, 2019. CP 6–7. In its complaint, the City only sought declaratory and injunctive relief to enforce the Operating Agreement and Franchise and require BTRC to meet its contractual obligation to cooperate with trail construction. *Id.* The STB agreed to hold its case in abeyance until the contract dispute was resolved. CP 312. The City never requested

damages, but rather asked the court to determine the rights and obligations of the parties per the Operating Agreement and Franchise. CP 14, 122. BTRC filed counterclaims for damages and attorney fees, arguing *inter alia* that the City's lawsuit was prohibited under the anti-SLAPP statute. CP 119–23. The superior court dismissed BTRC's claim on summary judgment. CP 3022–24. The court made no findings indicating the City engaged in retaliatory action or infringed on BTRC's constitutional rights. CP 1105, 3022–24.

The Court of Appeals affirmed the superior court's decision. The decision cited consistent longstanding precedent that the anti-SLAPP statute is not implicated when there is no claim for damages, noted that BTRC failed to cite to any authority overturning this precedent, and concluded that because the City never brought a claim for damages, the anti-SLAPP statute did not apply. *City of Seattle v. Ballard Terminal R.R. Co., LLC*, 509 P.3d 844, 854 (2022).



### III. ARGUMENT IN REPLY

**A. RAP 13.4(b)(1) does not apply—Division I’s decision does not conflict with *Leishman v. Ogden Murphy Wallace, PLLC*.**

BTRC relies on a tortured, overly broad reading of the Supreme Court’s decision in *Leishman v. Ogden Murphy Wallace, PLLC* to suggest that Division I’s decision conflicts with *Leishman*. 196 Wn.2d 898, 904, 479 P.2d 688 (2021), *recons. denied* (Aug. 19, 2022), *as amended* (Aug. 19, 2022). *Leishman* concerned a different issue, different statutory language, and no conflict exists.

In the decision below, Division I analyzed the relevant two provisions of the anti-SLAPP statute: RCW 4.24.500 and .510. *City of Seattle*, 509 P.3d at 854. RCW 4.24.500 provides that the purpose of the anti-SLAPP statute is to “protect individuals who make good-faith reports to appropriate governmental bodies” because the “threat of a *civil action for damages* can act as a deterrent to citizens who wish to report information[.]” (emphasis added). RCW 4.24.510 provides in part that a person

“is immune from *civil liability* from claims based upon the communication to the agency organization regarding any matter reasonably of concern to that agency or organization.” (emphasis added.).

Division I cited a Division III opinion, *Emmerson v. Weilep*, which held that the term “civil liability” in RCW 4.24.510 needed to be “construed within the context of the statute’s intent and purpose [as expressed in RCW 4.24.500] to mean a civil action for damages.” 126 Wn. App. 930, 937, 110 P.3d 214 (2005). Therefore, to implicate the anti-SLAPP statute, the action must include a claim for damages. This Court denied review of *Emmerson*. *Emmerson v. Weilep*, 155 Wn.2d 1026, 126 P.3d 820 (2005). Moreover, before *Emmerson*, Division II reached the same conclusion in an earlier case, *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 445, 979 P.2d 917 (1999). Consistent with this precedent, Division I held that the anti-SLAPP statute did not apply here because the City’s action did not involve a claim for damages. *City of Seattle*, 509

P.3d at 854.

Division I's decision does not conflict with *Leishman* because *Leishman* did not address whether the anti-SLAPP statute could apply to claims seeking relief other than damages. Instead, the issue in *Leishman* was whether a government contractor and associated employees constituted "persons" within the meaning of RCW 4.24.510. *Leishman*, 196 Wn.2d at 908. This Court did not interpret whether RCW 4.24.510 applied to actions that do not seek damages and did not purport to overrule longstanding Court of Appeals' precedent. *Id.*

The Supreme Court's analysis in *Leishman* centered on the Legislature's 2002 amendments to RCW 4.24.510 that eliminated the good faith requirement for immunity.<sup>1</sup> While the Court noted that the Legislature's amendments "broadened the

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<sup>1</sup> Former RCW 4.24.510 (Laws of 1989, ch. 234, § 2) provided immunity to "[a] person who *in good faith* communicates a complaint or information" to the government. (emphasis added.). The 2002 amendment deleted the phrase "in good faith." Laws of 2002, ch. 232, §§1, 2.

protections of the immunity in order to make RCW 4.24.510 a more effective remedy for a SLAPP target,” the Legislature did not make any amendments regarding the phrase “civil liability” in RCW 4.24.510. *Leishman*, 196 Wn.2d at 908.

The Legislature’s inaction on this subject is significant. Three years before the 2002 amendments, Division II analyzed the anti-SLAPP statute’s scope in *Port of Longview*, 96 Wn. App. at 445. Relying on the legislative intent stated in RCW 4.24.500, Division II concluded that RCW 4.24.500 and .510 did not apply to an action for declaratory or injunctive relief—only to an action for civil damages. *Id.* at 445–46.

The Legislature’s 2002 amendments, interpreted by this Court in *Leishman*, came after the *Port of Longview* decision. Laws of 2002, ch. 232 §§ 1, 2. The Legislature is presumed to be familiar with judicial interpretations of statutes. *Pudmaroff v. Allen*, 138 Wn.2d 55, 64–65, 977 P.2d 574 (1999). “Indeed, legislative inaction following a judicial decision interpreting a statute is often deemed to indicate legislative acquiescence in or

acceptance of the decision.” *State v. Stalker*, 152 Wn. App. 805, 813, 219 P.3d 722 (2009) (internal citations omitted). Accordingly, “[w]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Id.* (internal citations and quotation marks omitted). Here, the Legislature’s inaction following not only the *Port of Longview* decision, but also subsequent decisions over the years reaching the same interpretation should be deemed as legislative acquiescence in Washington’s precedent. *See, e.g., Emmerson*, 126 Wn. App. at 937; *Lindell v. Bocook*, No. 32106-1-III, 196 Wn. App. 1023, 2016 WL 5799430, at \*1 (Oct. 4, 2016) (unpublished, cited per GR 14.1) (“The [anti-SLAPP] statute applies only to suits for damages, not injunctive relief” (citing *Emmerson*, 126 Wn. App. at 937)).

In sum, Division I’s decision does not conflict with *Leishman* because that case did not concern the requirement for damages in the anti-SLAPP statute’s application. Similarly, this

Court’s interpretation of the Legislature’s 2002 amendments to the anti-SLAPP statute creates no conflict because the amendments did not eliminate or alter the Legislature’s intent to limit the statute’s application to “a civil action for damages.” BTRC has not met the criteria for review under RAP 13.4(b)(1).

**B. RAP 13.4(b)(2) does not apply because there is no conflict amongst the Court of Appeals.**

Every single appellate decision confronted with the issue of whether RCW 4.24.510 applies to claims for declaratory or injunctive relief has found it does not. *See, e.g., Emmerson*, 126 Wn. App. at 937; *Lindell*, 2016 WL 5799430, at \*1; *Port of Longview*, 96 Wn. App. at 445. Therefore, there is no conflict amongst the Court of Appeals’ decisions. BTRC appears to concede this point—its petition does not cite RAP 13.4(b)(2), nor does it cite any authority referencing a conflict amongst Court of Appeals’ decisions.

In its discussion of RAP 13.4(b)(1), BTRC cites *Bailey v. State*, 147 Wn. App. 251, 262–63, 191 P.3d 1285 (2008), a decision from Division III, and incorrectly characterizes it as a

decision of the Washington Supreme Court. BTRC Br. at 17. To the extent BTRC claims a conflict with *Bailey*, no such conflict exists because, like *Leishman*, *Bailey* did not concern the damages component of the anti-SLAPP statute.

As in *Leishman*, Division III's decision in *Bailey* focused on the Legislature's 2002 amendments eliminating the good faith requirement. *Bailey*, 147 Wn. App at 262–63. Division III did not claim to overrule its prior decision in *Emmerson*. *Id.* Therefore, *Bailey* cannot appropriately be read as in conflict with *Emmerson* or any other division's conclusion that RCW 4.24.510 does not apply to claims for declaratory or injunctive relief.

In *Bailey*, the anti-SLAPP defendant argued that the claimant did not satisfy the good faith language contained in RCW 4.24.500, which states that “the purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.” *Id.* at 262. *Bailey* was decided six years after the Legislature's 2002 amendments, and the court held that because the amendments to RCW

4.24.510 were enacted later in time and specifically removed the good faith requirement, they were controlling and prevailed over RCW 4.24.500's inconsistent good faith language. *Id.* at 262–63. Like *Leishman*, *Bailey* is readily distinguishable because the Legislature did *not* amend or remove RCW 4.24.510's application to “civil liability,” construed to mean a “civil action for damages” consistent with RCW 4.24.500.

Division I's decision does not conflict with any Court of Appeals decision—in fact, it is consistent with every decision across the three divisions on this issue—and review under RAP 13.4(b)(2) is not warranted.

**C. The decision below does not implicate significant questions of constitutional rights or involve any issue of substantial public importance.**

BTRC cannot meet the standards under RAP 13.4(b)(3) and (4) because the Court of Appeals' decision does not involve issues of constitutional law or of substantial public importance. As discussed above, the decision comports with the long-recognized principle, consistently applied by Washington courts



and accepted by the Legislature, that RCW 4.24.510 only applies to claims for damages.

Moreover, Washington’s anti-SLAPP statute is far from unique in limiting its application to cases involving money damages. Courts across the country have interpreted various anti-SLAPP statutes as only applying to actions for damages,<sup>2</sup> while other jurisdictions have adopted anti-SLAPP statutes that, like Washington’s, limit the statute’s applicability to actions for damages.<sup>3</sup> And as this case illustrates, this limitation serves an

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<sup>2</sup> See, e.g., *Marlin v. Aimco Venezia, LLC*, 154 Cal.App.4th 154, 162, 64 Cal.Rptr.3d 488 (2007) (holding that the anti-SLAPP statute did not apply to a prayer for injunctive relief); *Guessous v. Chrome Hearts, LLC*, 179 Cal.App.4th 1177, 1187, 102 Cal.Rptr.3d 214 (2009) (holding that a cause of action for prospective declaratory and injunctive relief was not subject to the anti-SLAPP statute); *Moschenross v. St. Louis Cty.*, 188 S.W.3d 13, 24 (Mo. Ct. App. E.D. 2006) (declining to dismiss action under anti-SLAPP statute because the statute “effectively limits relief to actions seeking money damages”); *Garabedian v. Westland*, 796 N.E.2d 439, 444–45 (Mass. Ct. App. 2003) (“The declaratory judgment action asserted no wrongdoing on the part of the defendants; it asked for no damages.”).

<sup>3</sup> See, e.g., Neb. Rev. Stat. § 25-21, 241; N.M. Stat. Ann. § 38-2-9.1; Tenn. Code Ann. § 4-21-1002.

important public purpose. Under BTRC's theory, the anti-SLAPP statute could be used to preclude governments and other parties from seeking to interpret or enforce contracts through declaratory or injunctive relief. The Legislature did not intend to provide the public with immunity from contract enforcement actions, as evidenced in the statute's application to "a civil action for damages." RCW 4.24.500.

BTRC's claim of potential damages from the City's request for injunctive relief is also meritless. First, the case BTRC cites in support of its argument, *Chicago Title Ins. Co. v. Landry*, is an unreported decision from 1999, and therefore not properly cited before this Court. *See* BTRC Br. at 21 n.41; *see also* GR 14.1 (allowing only unpublished decisions issued after March 1, 2013 to be cited). Second, the California case that BTRC cites supports the City's position, not BTRC's—the case confirms that California's anti-SLAPP statute, which is similar to Washington's, does not apply to claims for declaratory and

injunctive relief.<sup>4</sup> Further, the alleged \$700,000 in relocation costs that BTRC cites would have resulted only if the court had found that BTRC had breached its contractual obligations. CP 39–40. Those costs would not have arisen from or related to any of BTRC’s communication to any agency.

Finally, BTRC’s anti-SLAPP claim does not implicate constitutional issues. The anti-SLAPP statute does not apply “when the allegations referring to arguably protected activity are only *incidental* to a cause of action based essentially on nonprotected activity[.]” *Dillon v. Seattle Dep. Reps., LLC*, 179 Wn. App. 41, 72, 316 P.3d 119 (2014) (emphasis added). The City’s action to resolve a private contractual dispute is not an

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<sup>4</sup> *Country Side Villas Homeowners Assn. v. Ivie*, 193 Cal. App. 4th 1110, 1118, 123 Cal. Rptr. 3d 251 (2011) (concluding that the anti-SLAPP statute applied to the subject action because the action sought damages in addition to declaratory relief); *see also Marlin*, 154 Cal.App.4th at 162 (holding that the anti-SLAPP statute did not apply to a prayer for injunctive relief); *Guessous*, 179 Cal.App.4th at 1187 (holding that a cause of action for declaratory and injunctive relief was not subject to the anti-SLAPP statute).

issue that the anti-SLAPP statute aims to protect—it was merely an action to enforce provisions of the Operating Agreement and the Franchise, based on nonprotected activity (breach of contract).

In short, there is no reason for this Court to grant review of an issue that has been consistently addressed in Washington and other jurisdictions, particularly when the underlying action arises from and concerns nonprotected activity.

**D. This Court should disregard BTRC’s citations to extra-record evidence in its answer.**

In its Answer to the City’s Petition, BTRC refers to matters not in the appellate record. Specifically, BTRC’s brief includes links to websites regarding the City’s plans for the Burke-Gilman Trail in some places, and in other places makes statements without any supporting citation. BTRC Br. at 2 n.2 & 10 n.19 (stating “Seattle has publicly confirmed it intends to complete the Missing Link *without* having to remove and relocate BTRC’s railroad” without citation). *Id.* at 10. BTRC’s brief provides no citation to the record, and these matters are not

in the record. The City respectfully requests that this Court disregard all statements and matters outside the record and strike those portions of BTRC's brief. *Snedigar v. Hodderson*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990) ("A record on appeal may not be supplemented by material which has not been included in the trial court record").

#### IV. CONCLUSION

BTRC's claim for damages and fees under the anti-SLAPP statute has no merit and does not meet any of the criteria for acceptance of review under RAP 13.4(b). We respectfully request that this Court deny BTRC's petition for review and strike the portions of BTRC's answer that are not supported by the record.

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Respectfully submitted this 29th day of July, 2022.

*I certify that this Reply Brief contains  
2654 words in compliance with RAP  
18.17(b).*

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## CERTIFICATE OF SERVICE

I certify that I e-filed the City of Seattle's Reply Brief through Washington State Court's Secure Access web portal to be served on all parties or their counsel of record on the date below as indicated.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this this 29th day of July, 2022, at Seattle, WA.

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