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NO. 90233-0

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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 AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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ORIGINAL

The Rules of Appellate Procedure allow amicus briefs where "additional argument is necessary on ... specific issues." RAP 10.6(b). The memorandum of Amicus Curiae Washington State Association for Justice Foundation ("WSAJF") does not provide "necessary" or even helpful argument. Instead, it summarizes the Court of Appeals' decision and catalogs the issues raised by Petitioners, while failing to provide meaningful analysis. The Court should pay no heed to the brief, which contains just four pages of "Argument" purporting to detail five arguments, and does not (as WSJAF asserts) "add to the scholarship and analysis before the Court." *See* WSJAF July 7, 2014 Letter.[1]

First, WSAJF claims "it is difficult to discern" why the Court of Appeals found the "gravamen" of Petitioners' claims targets First Amendment conduct, yet that conclusion could not be clearer from the complaint, which sought to enjoin a boycott, conduct even WSAJF does not argue is outside the First Amendment. WSAJF relies on *Dillon v. Seattle Deposition Reporters LLC*, 179 Wn. App. 41, 316 P.3d 1119 (2014), Memo at 6 n.6, to argue the "gravamen" test is ambiguous, but that case is inapposite. There, the Court of Appeals found the complaint

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[1] *See also, e.g.*, *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (striking amicus brief with "no information or arguments that the Appellees did not already provide to the Court"); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (rejecting amicus brief that "does not tell us anything we don't know already"; briefs that "duplicate the arguments made in the litigants brief ... should not be allowed"); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 33 (D.D.C. 2002) (denying motion for leave to file amicus brief where party "presented no unique information or perspective that can assist the court in this matter"), *rev'd on other grounds*, 539 U.S. 461 (2003).

targeted the transcription of a phone call, not the subsequent filing of the transcript in court. *Id.* at 1134. There is no analogous distinction in this case. No matter how it is viewed, this lawsuit plainly targets the boycott.

Second, WSAJF faults the Court of Appeals for its "apparent" holding that whether an act is "other lawful conduct" is "subsumed" within the question whether Petitioners' claims implicate the First Amendment. The Court of Appeals correctly held that the "other lawful conduct" requirement is satisfied so long as the challenged conduct is not "illegal as a matter of law." Op. at 11. *See also* Ans. to Pet. at 12-13. There is no allegation, much less evidence, that Respondents acted illegally. WSAJF does not explain why this commonsense ruling is error.

Third, WSAJF claims the court erroneously relied on the California law. But Washington modeled its statute on California's law, and courts have therefore consistently relied on California cases to interpret RCW 4.24.525. *See, e.g.*, *Alaska Structures, Inc. v. Hedlund*, 323 P.3d 1082, 1085 (Wash. Ct. App. 2014) ("California cases may be considered persuasive authority when interpreting RCW 4.24.525."); *Spratt v. Toft*, 324 P.3d 707, 712 (Wash. Ct. App. 2014) ("we can look to California cases for aid in interpreting the act"); *AR Pillow Inc. v. Maxwell Payton, LLC*, 2012 WL 6024765, at *1 (W.D. Wash. Dec. 4, 2012) ("courts have applied California law as persuasive authority in interpreting the Act"); *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416, at *6 (W.D. Wash. July 25, 2011) ("courts have applied California law as

persuasive authority in interpreting Washington's Act"), *aff'd in part sub nom. Phoenix Trading, Inc. v. Loops, LLC*, 732 F.3d 936 (9th Cir. 2013).

Finally, WSAJF argues the statute's procedure is incompatible with summary judgment and violates separation of powers and the right of access to the courts. But WSAJF fails to rebut Respondents' thorough analysis showing the law is fully compatible with the Washington Constitution and Civil Rules. *See* Ans. to Pet. at 16-19.[2]

WSAJF purports to be dedicated to promoting meritorious lawsuits. It is unfortunate that it now opposes a statute that curbs *only* meritless claims, like those of Petitioners.[3] Petitioners believe (and WSAJF apparently agrees) it is in the public interest to threaten and then drag Respondents through "complicated, burdensome, and expensive" litigation, including repetitive appeals to this Court, merely because they heeded a call to boycott Israeli products. *See* CP 303-05.

On the contrary, as the Legislature has found, "[i]t is in the public interest for citizens to participate in matters of public concern," a fundamental policy that requires prompt termination of this protracted and

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[2] WSAJF argues that the Court of Appeals found the anti-SLAPP motion is a "special proceeding" within the meaning of CR 81(a). It did no such thing. Instead, it cited a case finding that a limitation on discovery in a statute governing special proceedings was constitutional because it allowed the trial court discretion to allow it on a showing of good cause. Op. at 25 (citing *In re Estate of Fitzgerald*, 172 Wn. App. 437, 294 P.3d 720 (2012)). The decision did *not* turn on the nature of the proceedings, and the Court of Appeals did not say that an anti-SLAPP motion is a special proceeding.

[3] Petitioners' claims are not only meritless but likely frivolous, for it is well-established by law and the Co-op's bylaws that the Co-op board has plenary authority to direct the company's affairs, *see* RCW 24.03.095, 5 Fletcher Cyc. Corp. § 2100—including the decision to adopt a boycott.

utterly meritless litigation, which was explicitly designed to put these Respondents "to great expense, harassment, and interruption of their productive activities." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). The Court of Appeals' decision honors this legislative intent. Respondents therefore respectfully request that the Court deny review.[4]

RESPECTFULLY SUBMITTED this 22nd day of July, 2014.

Davis Wright Tremaine LLP
Attorneys for Respondents

By ______________________________
Bruce E.H. Johnson, WSBA #7667
Ambika K. Doran, WSBA #38237
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[4] Sadly, Respondent Suzanne Shafer died on July 15, 2014. Respondents intend to promptly move to substitute her Estate.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 22, 2014, I caused Answer to Amicus Curiae Memorandum of 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 22nd day of July, 2014.

Ambika K. Doran

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Subject: RE: No. 90233-0 - Kent L. and Linda Davis, et al. v. Grace Cox, et al. - Answer to Amicus Curiae Memorandum of Washington State Association for Justice Foundation

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: No. 90233-0 - Kent L. and Linda Davis, et al. v. Grace Cox, et al. - Answer to Amicus Curiae Memorandum of Washington State Association for Justice Foundation

Attached for filing is Respondents' Answer to Amicus Curiae Memorandum of Washington State Association for Justice Foundation.

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Thank you, Lesley Smith, Secretary to Ambika Doran

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