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THE SUPREME COURT OF WASHINGTON

DUC TAN, a single man; and VIETNAMESE COMMUNITY OF  
THURSTON COUNTY, a Washington corporation,

Petitioners,

v.

NORMAN LE and PHD LE, husband and wife; PHIET X. NGUYEN and  
VINH T. NGUYEN, husband and wife; DAT T. HO and "JANE DOE"  
HO, husband and wife; NGA T. PHAM and TRI V. DUONG, wife and  
husband; and NHAN T. TRAN and MAN M. VO, wife and husband,

Respondents.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS  
OF WASHINGTON, WASHINGTON NEWSPAPER  
PUBLISHERS ASSOCIATION, PIONEER NEWSPAPERS, AND  
THE SPOKESMAN-REVIEW

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**TABLE OF CONTENTS**

I. IDENTITY And INTEREST OF AMICI ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT AND AUTHORITY..... 2

    A. Falsity Must be Proven by Clear and Convincing Evidence. .... 2

    B. Statements that Plaintiffs are Communists or Communist  
        Sympathizers are Non-Actionable Opinion. .... 10

    C. Plaintiffs Have Not Proven Defamatory Meaning, Damage or  
        Causation For the Non-Opinion Statements. .... 16

    D. Speech Protection is Essential to Our Democracy..... 18

IV. CONCLUSION..... 20

---

**TABLE OF AUTHORITIES**

**Washington State Cases**

**Herron v. KING Broadcasting Co.**  
109 Wn.2d 514, 746 P.2d 295 (1987)..... 16

**Margoles v. Hubbart**  
111 Wn.2d 195, 760 P.2d 324 (1988)..... 16

**Mark v. Seattle Times**  
96 Wn.2d 473, 635 P.2d 1081 (1981)..... 3

**Mohr v. Grant**  
153 Wn.2d 812, 108 P.3d 768 (2005)..... 2, 4

**Tan v. Le**  
161 Wn. App. 340, 254 P.3d 904 (2011)..... 1

**Yeakey v. Hearst Communications, Inc.**  
156 Wn. App. 787, 234 P.3d 332 (2010)..... 4

**Non-Washington Authority**

**Barnett v. Denver Publ'g Co., Inc.**  
36 P.3d 145 (Colo.Ct.App.2001)..... 6

**Batson v. Shiflett**  
325 Md. 684, 602 A.2d 1191 (1992) ..... 3, 5

**Beilenson v. Superior Court**  
44 Cal.App.4th 944, 52 Cal.Rptr.2d 357 (1996)..... 15

**Blawis v. Bolin**  
358 F. Supp. 349 (D. Ariz. 1973) ..... 12

**Buckley v. Littell**  
539 F.2d 882 (2d Cir.1976)..... 5, 10

<b><u>Carr v. Bankers Trust Co.</u></b>	
546 N.W.2d 901 (Iowa 1996) .....	6
<b><u>Castello v. City of Seattle</u></b>	
2010 WL 4857022, ___F.Supp.___ (W.D.Wash., Nov. 22, 2010).....	7
<b><u>Clark v. Allen</u></b>	
415 Pa. 484, 204 A.2d 42 (1964) .....	12, 13
<b><u>Coliniatis v. Dimas</u></b>	
965 F.Supp. 511 (S.D.N.Y.1997) .....	6
<b><u>Desert Sun Publishing Co. v. Superior Court</u></b>	
97 Cal.App.3d 49, 158 Cal.Rptr. 519 (Cal. App. Ct. 1979).....	20
<b><u>Deutch v. Birmingham Post Co.</u></b>	
603 So.2d 910 (Ala.1992) .....	5
<b><u>DiBella v. Hopkins</u></b>	
403 F.3d 102 (2nd Cir. 2005).....	5, 7
<b><u>Dun &amp; Bradstreet, Inc. v. Greenmoss Builders, Inc.</u></b>	
472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).....	19
<b><u>Garrison v. Louisiana</u></b>	
379 U.S. 64, 85 S.Ct. 209 , 13 L.Ed.2d 125 (1964).....	19
<b><u>Gertz v. Robert Welch, Inc.</u></b>	
418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974).....	3, 15
<b><u>Hinerman v. Daily Gazette Co., Inc.</u></b>	
188 W.Va. 157, 423 S.E.2d 560 (1992).....	6
<b><u>Hoch v. Prokop</u></b>	
244 Neb. 443, 507 N.W.2d 626 (1993).....	5
<b><u>Koch v. Goldway</u></b>	
817 F.2d 507 (9th Cir.1987) .....	10
<b><u>Lam v. Ngo</u></b>	
91 Cal.App.4th 832, 111 Cal.Rptr.2d 582 (Cal. Ct. App. 2001).....	15

<b><u>McAndrew v. Scranton Republican Publishing Co.</u></b>	
364 Pa. 504, 72 A.2d 780 (1950) .....	12
<b><u>Milkovich v. Lorain Journal Co.</u></b>	
497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) .....	14, 16
<b><u>Nat. Ass'n, etc. v. Central Broadcasting</u></b>	
379 Mass. 220, 396 N.E.2d 996 (1979) .....	14, 15
<b><u>Nev. Indep. Broad. Corp. v. Allen</u></b>	
99 Nev. 404, 664 P.2d 337 n. 5 (1983) .....	5
<b><u>New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington</u></b>	
2011 WL 2414452, __ F. Supp. __ (W.D.Wash., June 13, 2011) .....	8
<b><u>New York Times Co. v. Sullivan</u></b>	
376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) .....	14, 16, 19
<b><u>Newman v. Delahunty</u></b>	
293 N.J.Super. 491, 681 A.2d 671 (1994) .....	3, 6
<b><u>Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL</u></b>	
418 U.S. 264, 94 S.Ct. 2770 (1974) .....	10
<b><u>Pritt v. Republican Nat'l Comm.</u></b>	
210 W.Va. 446, 557 S.E.2d 853 (2001) .....	6
<b><u>Rambo v. Cohen</u></b>	
587 N.E.2d 140 (Ind. Ct. App. 1992) .....	11
<b><u>Raible v. Newsweek</u></b>	
341 F. Supp. 804 (W.D. Pa. 1972) .....	11
<b><u>Rattray v. City of Nat'l City</u></b>	
51 F.3d 793 (9th Cir.1994) .....	7
<b><u>Robertson v. McCloskey</u></b>	
666 F.Supp. 241 (D.D.C.1987) .....	9

<b><u>Rosenauro v. Scherer</u></b>	
88 Cal.App.4th 260, 105 Cal.Rptr.2d 674 (2001).....	14
<b><u>Roth v. United States</u></b>	
354 U.S. 476 , 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).....	18
<b><u>Rutherford v. Dougherty</u></b>	
91 F.2d 707 (3d Cir. 1937).....	11
<b><u>Sall v. Barber</u></b>	
782 P.2d 1216 (Colo. Ct. App. 1989) .....	11
<b><u>Solosko v. Paxton</u></b>	
4 Pa. D. & C.2d 240 (Somerset Cty. 1954).....	12
<b><u>Thomas Merton Center v. Rockwell Intern. Corp.</u></b>	
497 Pa. 460, 442 A.2d 213 (1981).....	13
<b><u>Turner v. Devlin</u></b>	
848 P.2d 286 (Ariz. 1993) .....	12

**Statutes**

<b>RCW 4.24.525 (Appendix A) .....</b>	<b>4, 8</b>
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## I. IDENTITY AND INTEREST OF AMICI

*Amicus curiae* are newspaper associations, Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association, Pioneer Newspapers, a chain of daily and weekly newspapers spanning five states, and the *Spokesman-Review*, a daily newspaper serving Eastern Washington (collectively “Newspapers”). Additional detail about Amici can be found in the Motion to File Amicus Curiae Brief filed herewith.

This case deals with the proper standard of proof required in Washington State for claims of defamation, and the inter-relationship of alleged false factual statements stated to support a nonactionable opinion. The Newspapers and readers they serve will be directly affected by the rule established here. The Newspapers have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on all publishers in this State.

## II. STATEMENT OF THE CASE

The Newspapers adopt the Statement of the Case set forth in **Duc Tan v. Le**, 161 Wn. App. 340, 254 P.3d 904 (2011), and in the Briefs of Defendants before Division Two Court of Appeals and this Court. The Defendants hereinafter are referred to as “the Authors”. Plaintiffs are referred to collectively as The Plaintiffs.

This case asks this Court to decide the proper standard of proof for elements of defamation and to evaluate the proper tests and framework for evaluating claims of opinion about public figures when those opinions are accompanied by alleged statements of fact some of which the subjects contend are false or inaccurate. The Plaintiffs do not dispute that they are public figures or that they must demonstrate that the allegedly defamatory statements were made with actual malice.

### **III. ARGUMENT AND AUTHORITY**

#### **A. Falsity Must be Proven by Clear and Convincing Evidence.**

To prove a case of defamation, a plaintiff must show “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Restatement (Second) of Torts § 558 (1977). This Court and the lower appellate courts have condensed this list of elements at times in their opinions in a fashion that erroneously appears to remove the need for defamatory meaning and factual statement, something that of course would not have been accurate and could not have been intended. See, e.g., **Mohr v. Grant**, 153 Wn.2d 812, 822 108 P.3d 768 (2005) (identifying four elements: (1) falsity, (2) an unprivileged communication, (3) fault,

and (4) damages); and Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981) (same). For the fault element, public figure plaintiffs must prove actual malice. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974). Actual malice—knowledge of falsity or reckless disregard for the truth—must be proven by clear and convincing evidence.<sup>1</sup> Id. Several courts have held that at least in the public figure plaintiff context, all elements of defamation must be proven by clear and convincing evidence, thus including elements of defamatory meaning, whether a statement caused damage, and whether the statement was a statement of fact. See, e.g., Batson v. Shiflett, 325 Md. 684, 721, 602 A.2d 1191, 1210 (1992) (stating that public figures must prove all elements of defamation claim by clear and convincing evidence to establish defamation consistent with First Amendment); Newman v. Delahunty, 293 N.J.Super. 491, 681 A.2d 671, 674 (1994) (plaintiff must prove each of the elements of defamation claim by clear and convincing evidence when claim brought by public figure on public issue).

In 2010, Washington passed the Anti-Strategic Lawsuit Against Public Participation (“Anti-SLAPP”) Statute, requiring a defamation

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<sup>1</sup> While not the focus of this brief, Defendants and Division II are correct that the Constitution requires not only that the Plaintiffs prove actual malice by clear and convincing evidence, but also that the court perform an independent review to determine the showing was made. Plaintiffs did not meet their burden of proving the Defendants acted with actual malice as to any statement contained in the publications.

plaintiff in Washington to prove by clear and convincing evidence the likelihood of prevailing on the merits of his or her claim as a condition of allowing a defamation suit to go forward when the speech in question relates to matters of public concern. RCW 4.24.525(2)(e) (Appendix A).

Plaintiffs here, in this pre-Anti-SLAPP statute case, argue that falsity need only be proven by a preponderance of the evidence. Defendants argue falsity must be proven by clear and convincing evidence. This Court in Mohr in 2005 acknowledged that Washington had not clearly determined the appropriate test for falsity at that time:

Case law is unclear as to whether a private plaintiff facing a defense motion for summary judgment must make a prima facie showing of all of the elements of defamation with convincing clarity or by a preponderance of the evidence. This case does not require us to clarify the issue because the parties before the Court of Appeals agreed that the evidentiary standard is preponderance of the evidence. The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true.

Mohr, 153 Wn.2d at 822. One lower court in Washington stated the test as merely “probably false.” See, Yeakey v. Hearst Communications, Inc., 156 Wn. App. 787, 791-92, 234 P.3d 332, 335 (2010) (“The falsity prong of a defamation claim is satisfied with evidence that a statement is **probably** false.”) (emphasis added).

It is time that this Court squarely addresses the proper test for falsity—a matter it acknowledged was not answered in 2005 despite

previous apparent statements, all dicta, relating to the standard of proof. Washington should follow the vast majority of courts which have addressed the issue and hold the proper standard of proof for falsity to be clear and convincing evidence. See, e.g., DiBella v. Hopkins, 403 F.3d 102, 113 (2nd Cir. 2005) (“We note that several federal courts relying on New York law, including this Court, have stated-albeit in dicta and without authoritative citation-that New York requires clear and convincing proof of falsity, and that **most jurisdictions outside New York that have considered the issue have also adopted this standard of proof.**”) (emphasis added); Nev. Indep. Broad. Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 343 n. 5 (1983) (noting that “[p]ractically speaking, it may be impossible to apply a higher standard to ‘actual malice’ than to the issue of falsity”); Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir.1976), (“The appellee, a public figure, must rather have demonstrated with convincing clarity not only that the appellant's statements were false, but that appellant knew they were false or made them with reckless disregard of their truth or falsity.”); Deutesh v. Birmingham Post Co., 603 So.2d 910, 912 (Ala.1992) (holding that public figure plaintiff must prove falsity by clear and convincing evidence to succeed on a libel claim); Batson, 602 A.2d at 1210; Hoch v. Prokop, 244 Neb. 443, 446, 507 N.W.2d 626 (1993) (case brought by candidate for University of Nebraska regent,

holding “[a]s with actual malice, a public-libel plaintiff must establish falsity by clear and convincing evidence.”); **Newman**, 681 A.2d at 674; **Carr v. Bankers Trust Co.**, 546 N.W.2d 901, 905-06 (Iowa 1996) (upholding granting of summary judgment in favor of defendants, stating that a “rational finder of fact could not find by clear-and-convincing evidence the requisite elements of falsity and malice”); **Coliniatis v. Dimas**, 965 F.Supp. 511, 517 (S.D.N.Y.1997) (finding Plaintiff, former employee of airline owned by Greek government, was a public figure and stating “[w]here a plaintiff is a public official, he must prove ‘by clear and convincing evidence’ that the published material is false and that defendant published the material ‘with actual malice, i.e., with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’”); **Barnett v. Denver Publ'g Co., Inc.**, 36 P.3d 145, 147 (Colo.Ct.App.2001) (plaintiff, a political candidate, “is required to prove the article's falsity by clear and convincing evidence.”); **Pritt v. Republican Nat'l Comm.**, 210 W.Va. 446, 557 S.E.2d 853, 862 (2001) (“[i]n order for a public official or a candidate for public office to recover in a libel action, he must prove by clear and convincing evidence that ... the stated or implied facts were false.” (quoting **Hinerman v. Daily Gazette Co., Inc.**, 188 W.Va. 157, 168-69, 423 S.E.2d 560 (1992))).

The one Ninth Circuit case which adopted the preponderance of the evidence standard for falsity did so by adopting what was at the time the Second Circuit's test—a test subsequently changed as indicated by **DiBella**. **Compare Rattray v. City of Nat'l City**, 51 F.3d 793, 801 (9th Cir.1994) (stating that the Ninth Circuit “adopt[s] the holding of the Second Circuit” that falsity “need only be proven by a preponderance of the evidence”) **with DiBella**, 403 F.3d at 111 (2nd Cir. 2005) (noting the Court in **Rattray** “relied on our decision in **Goldwater**, which, as we explained above, does not represent our most recent understanding of New York law on this issue”; and holding that clear and convincing evidence was required and noting that majority of courts to review the issue also now require clear and convincing evidence of falsity). Therefore, **Rattray** is based on case law which has effectively been overturned, and the Ninth Circuit would have come to a different conclusion if it was following the Second Circuit today.

In fact, federal District Courts in Washington, applying Washington defamation law, are now integrating the requirement of clear and convincing evidence for falsity due to the requirement that Plaintiffs demonstrate a likelihood of prevailing on defamation claims by clear and convincing evidence when facing an anti-SLAPP motion. **See Castello v. City of Seattle**, 2010 WL 4857022, \*8-9, \_\_\_ F. Supp. \_\_\_ (W.D.Wash.,

Nov. 22, 2010) (requiring likelihood of prevailing on element of falsity to be proven by clear and convincing evidence in context of anti-SLAPP motion); New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington; 2011 WL 2414452, \*5, \_\_\_ F. Supp. \_\_\_ (W.D.Wash., June 13, 2011) (applying clear and convincing standard to defamation claim in Anti-SLAPP suit, and solely analyzing falsity element, stating “New York Studio is unable to establish by clear and convincing evidence a probability of prevailing on the claim of defamation.”). Anti-SLAPP motions do not require that the plaintiff be a public figure, only that the speech be related to a matter of public concern or related to one of several other enumerated grounds. RCW 4.24.525. Thus, the clear and convincing evidence requirement to survive an Anti-SLAPP motion applies to both public and private figure contexts.

[A] clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth. Finally, [the standard] has more than merely a logical or symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error.

Robertson v. McCloskey, 666 F.Supp. 241 (D.D.C.1987).

One cannot constitutionally be punished for defamation for speech that is true. Whether speech is true or false should not be left to a jury's estimation of whether something is merely "probably" false. Probably—a fifty-one percent versus forty-nine percent likelihood—is not a high enough threshold to punish speech as defamation consistent with the First Amendment to the United States Constitution and Article I § 5 of the Washington Constitution. The risk of mistakenly punishing truthful speech is simply too high with the mere preponderance of the evidence, slightly more likely than not, standard. This Court must adopt the clear and convincing evidence standard for falsity for all defamation cases.

The Plaintiffs here concede that the publications at issue contain both non-actionable statements of opinion as well as statements Plaintiffs contend are ones of fact. They argue the "facts" were used to bolster the credibility of the "opinions" and thus argue the "facts" should be actionable without the requirement of falsity or damage (discussed further below). To support a claim for defamation, Plaintiffs should have been required to identify every factual statement, prove its falsity by clear and convincing evidence, and further prove it independently carried defamatory meaning and led to damage. Plaintiffs did not meet their burden of proving false facts as an initial matter. See Petitioner's Supp.

Br. at 3-6. At best they established differences of interpretation of events or motivations. Further, the facts that were identified as false did not carry the required defamatory meaning or induce damage to support the verdict.

**B. Statements that Plaintiffs are Communists or Communist Sympathizers are Non-Actionable Opinion.**

At the heart of the publications is the claim that Plaintiffs were Communists or Communist sympathizers. Statements about one's political beliefs or philosophy cannot be proven true or false because we cannot prove true or false that which is in another's head or heart, and thus are non actionable opinion. See, e.g., Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) (holding that terms "facist," "fellow traveler," and "radical right" directed against William F. Buckley, Jr., although strong and hate-filled, constituted expressions of opinion and not statements of fact); Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL, 418 U.S. 264, 284, 94 S.Ct. 2770, 2781 (1974) (finding words like "traitor", "unfair" and "facist" in context of labor dispute as statements of opinion and not as statements of fact); Koch v. Goldway, 817 F.2d 507, 509 (9th Cir.1987) (holding mayor's query whether her political opponent was a Nazi war criminal bearing the same name to be constitutionally protected opinion). Allegations of racism and prejudice have been found to be matters of opinion and not statements of fact. See, e.g., Rutherford v.

Dougherty, 91 F.2d 707 (3d Cir. 1937) (holding that clergyman's accusations that radio broadcaster supported religious hatred and bigotry was not libelous); Sall v. Barber, 782 P.2d 1216, 1218-19 (Colo. Ct. App. 1989) (holding term "bigot" to be rhetorical hyperbole and not defamatory); Rambo v. Cohen, 587 N.E.2d 140, 147 (Ind. Ct. App. 1992) (holding statements that plaintiff was anti-Semitic were not defamatory).

In Raible v. Newsweek, Inc., the magazine published plaintiff's picture next to an article that accused the "white majority" of being "racially prejudiced," "angry, uncultured, crude," and "violence prone." 341 F. Supp. 804, 806-07 (W.D. Pa. 1972). Accepting that the article could be found to refer to the Plaintiff, the court nevertheless concluded the statements were not capable of a defamatory meaning holding that "to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel." Id. at 807. The court noted our nation's long history of robust political expression, including the use of abusive rhetoric:

Americans have been hurling epithets at each other for generations. From charging "Copperhead" during the Civil War, we have come down to "Racist", "Pig", "Facist", "Red", "Pinko", "Nigger Lover", "Uncle Tim" and such. Certainly such name calling, either express or implied, does not always give rise to an action for libel.

Id. at 808-09.

Similarly, accusations of communist associations or “communist tendencies” are not libelous. Clark v. Allen, 415 Pa. 484, 496, 204 A.2d 42, 48 (1964); McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 513-14, 72 A.2d 780, 784 (1950) (“To say a man is a communist or a socialist is not to defame him.”). In Clark, the court stated:

Americans sincerely and sharply disagree as to what actions and/or words and/or policies aid the communist cause, or what show communist tendencies, or what amounts to an ‘appeasement’ of communism, or what is a ‘pro-communist,’ or exactly what is meant by the term ‘soft on communism.’ While these words . . . often are undoubtedly intended to be derogatory, they are not libelous.” 204 A.2d at 47.

While some courts previously held it was defamatory to call someone a communist, such decisions no longer have any legal force. They were largely decided in a time when communism was illegal, starting with the Federal Communist Control Act in 1954, until 1973 when Blawis v. Bolin, 358 F. Supp. 349 (D. Ariz. 1973) ruled the Act was unconstitutional. For example, in Solosko v. Paxton, 4 Pa. D. & C.2d 240 (Somerset Cty. 1954), a statute made it a felony to be a communist so an accusation of being a communist was an accusation of being a criminal and was therefore defamatory. Today this is no longer the case and opinions regarding ones political beliefs cannot support a claim of defamation. See also, Turner v. Devlin, 174 Ariz.201, 210-11, 848 P.2d 286, 295-96 (Ariz. 1993) (Martone, J., concurring) (“Calling someone a

communist ... is not likely to be understood as factual. It is likely to be understood as ideological rhetoric. And if that were not enough, how can it be said that being a communist is provably false? What litmus test does one use to test the label? Marx? Engels? Lenin? Gorbachev? Sartre? Kazantzakis?"); **Thomas Merton Center v. Rockwell Intern. Corp.**, 497 Pa. 460, 442 A.2d 213, 214-15 (1981) (dismissing complaint, as not capable of defamatory meaning, that alleged that an Associated Press article conveyed the impression that the members of the Thomas Merton Center were Communists by stating that the Soviets were funding opposition to the B-1 bomber project and identifying the Center as a group opposed to the project that may have unknowingly received Soviet financing); and **Clark**, 204 A.2d at 47 (sustaining dismissal of defamation claim arising out of a letter expressing shock that U.S. Senator's voting record indicated that he had "Communist tendencies").

On point, in a 2001 California case the Appellate Court dismissed, on an Anti-SLAPP motion, the defamation claim of Lam, a Vietnamese refugee, who objected to statements that he was a communist and not sufficiently-anti-Communist. Lam was a City Councilman who did not get aggressively involved in an effort to force a video store owner to remove a Viet Cong flag from his store. Residents then turned their attention to Lam, picketing his restaurant and labeling him a communist:

Continuing throughout the protests, demonstrators bore numerous signs casting Lam as a communist and a traitor. They carried drawings of Lam as a horned and fanged devil with blood dripping down his mouth. They crafted a life-sized effigy of Lam tied to a gallows next to a life-sized effigy of Ho Chi Minh; a bloody axe bearing a South Vietnamese flag, coffin-like box, and the slogan “Down with the Communists” adorned their creation. The protesters also created three-dimensional effigies of Lam and Ho Chi Minh in lewd sexual positions across the street from the restaurant.

...  
The content of the signs and effigies in this case was that Lam was a communist sympathizer, and—as rather grossly expressed in the effigies—the ideological lackey of Ho Chi Minh. That these sentiments would appear to be grossly unfair to Lam—himself an immigrant who risked his life to escape from a Communist country—is beside the point. The dispositive question is whether they constituted protected rhetorical hyperbole or loose language.

On that point the answer must be yes. In context, the protesters were making a political point as to what they thought of Lam's stand on the video store controversy.

Charges of communism are part of the heat of the political kitchen. (See New York Times Co. v. Sullivan, (1964) 376 U.S. 254, 273, fn. 14, 84 S.Ct. 710, 11 L.Ed.2d 686 [observing that political figures often must face charges of “communist sympathies”]; Milkovich, supra, 497 U.S. at p. 20, 110 S.Ct. 2695 [hypothetically observing that the statement, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin” would not be actionable]; Nat. Ass'n, etc. v. Central Broadcasting (1979) 379 Mass. 220, 396 N.E.2d 996, 1002 [charge of communism against union on talk show was “most likely taken by the audience as mere pejorative rhetoric”]; see also Rosenaur v. Scherer, (2001) 88 Cal.App.4th 260, 280, 105 Cal.Rptr.2d 674 [use of words “thief” and “liar” in heated oral exchange at shopping center in the midst of “hard-fought initiative contest” held protected as loose, figurative or hyperbolic language]; Beilenson v. Superior Court (1996) 44 Cal.App.4th 944, 951,

52 Cal.Rptr.2d 357 [political mailer charging state official with having “ripped off” taxpayers because he had an outside job was, in context, protected as “rhetorical hyperbole that is common in political debate”].) As Justice Kline wrote in the Pittsburg Unified School Dist. case, “Public office is no place for the thin-skinned.” (citation omitted)

The protesters were not accusing Lam, like Chambers vis-à-vis Hiss, of being an actual member of a secret Communist cell. (See Nat. Ass'n, etc. v. Central Broadcasting, supra, 396 N.E.2d at p. 1002 [there is a difference between charging a person with “communism” and “charging him specifically with being ‘a member of the Communist Party’ ”].) In context, their statements were not susceptible to verification using a falsifiability test.

It is true, as Lam's brief reminds us, that the word “Communist” has some real sting in the Vietnamese community in Orange County, California. That community, after all, consists of many people who have actually lived under a Communist regime. Then again, such folks are in a better position to appreciate First Amendment freedoms than some of us who have not lived in a totalitarian country.

Lam v. Ngo, 91 Cal.App.4th 832, 837-851, 111 Cal.Rptr.2d 582, 587-597 (Cal. Ct. App. 2001).

As the United States Supreme Court recognized in Gertz, “There is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” Gertz, 418 U.S. at 339-340. Here, as in Lam, accusations that plaintiffs were communist or communist sympathizers were not actionable statements of fact but rather statements of opinion. Here the language used was “rhetorical hyperbole” or “loose,

figurative, or hyperbolic language” which would “negate the impression that the writer was seriously maintaining” a proposition that was “sufficiently factual to be susceptible of being proved true or false” and thus was protected. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

**C. Plaintiffs Have Not Proven Defamatory Meaning, Damage or Causation For the Non-Opinion Statements.**

Defamatory meaning cannot be imputed to true statements.

Margoles v. Hubbart, 111 Wn.2d 195, 202, 198, 760 P.2d 324 (1988). A defamation plaintiff must prove that each false fact for which he wishes to recover has a defamatory meaning. “Inaccurate reporting is not defamatory unless by altering the ‘sting’ it creates a materially different impression on the reader.” Herron v. KING Broadcasting Co., 109 Wn.2d 514, 522 746 P.2d 295 (1987). The U.S. Supreme Court has recognized that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive[.]’ New York Times Co. v. Sullivan, 376 U.S. 254, 271-72, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Rather than prove a distinct harm from the allegedly false facts, Plaintiffs instead try to compile all the statements, whether true or false, and recover for the opinion that Plaintiffs were Communists. The State

and Federal Constitutional protections of speech do not allow such collective efforts of proof. To prevail, Plaintiffs had to prove by clear and convincing evidence that a fact at issue was false and also that its falsity carried the sting of the publication. Alleged inaccuracies, such as how much of an anthem was played, characterizations of Plaintiffs' actions connected to whether (and where) a Nationalist flag would be displayed in a classroom, suppositions about motives behind acts performed, and whether or not an association was sufficiently vigorous in its opposition to Communist causes are likely not factual statements at all. Further, the impact of the statements, when compared to the true facts conceded by Plaintiffs, cannot be shown to have altered the sting of the publications.

Finally, Plaintiffs did not prove damages or causation stemming from any of these alleged factual statements. They could not point to single person who had read the publications whose opinion of Plaintiffs was diminished. They could point to no adverse action taken against them as a result of others reading the publications. The "death threat" letter that purported to come from a Defendant, not a reader of the publications, was erroneously admitted as evidence of damage and likely inflamed a jury deprived of the essential facts surrounding its receipt. Even this fact – that a Defendant may have sent the letter, or someone sent it as a hoax to frame a Defendant – is not evidence of any damage. In fact, evidence suggest

that the Defendants could have reported other undisputed true factual statements in their publications about the Plaintiffs—such as that Duc Tan kept a photo of Ho Chi Minh in his home which he showed to guests and described as Uncle Ho, which true fact did in fact lead one Defendant and her spouse to stop associating with Duc Tan. They could have truthfully reported the disparate treatment Duc Tan received from the Communists while in Vietnam from that of his other countrymen, or to his admitted signing of oath of allegiance and assignment to spy for the Communists on his neighbors prior to his defection. Instead of reciting these true facts, which likely would have harmed Plaintiffs reputations in a manner the actual publication did not and could not do, the Defendants recited a series of innocuous events upon which they based their inactionable opinion that Plaintiffs were communists.

**D. Speech Protection is Essential to Our Democracy.**

The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Considering allegedly defamatory statements made in the context of political debate “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well

include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Sullivan, 376 U.S. at 269.

“[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive[.]’” Id. at 271-72. “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”

Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964).

Our Courts have frequently reaffirmed that speech on public issues occupies the “highest rung of the hierarchy of First Amendment values,” and is entitled to special protection. Dun & Bradstreet, Inc. v.

Greenmoss Builders, Inc., 472 U.S. 749, 759, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). Further:

This “profound national commitment” encompasses the constitutionally protected right not only to make responsible, but also to make irresponsible charges against [public figures].... It is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office. At such times the line between liberty and license blurs. However, our dedication to basic principles of liberty and freedom of expression will tolerate nothing less. The alternative is censorship and tyranny.

Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (“Mad Tom”), Henry Clay a

pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy.

**Desert Sun Publishing Co. v. Superior Court**, 97 Cal.App.3d 49, 51-52, 158 Cal.Rptr. 519 (Cal. App. Ct. 1979). Today the Court must uphold the important societal values that allow the public to speak, to criticize, to opine about matters of public importance and their political views. We cannot fashion test that allow juries to punish speech because it is unpopular and unlikeable; the alternative is tyranny and censorship.

#### IV. CONCLUSION

Based on the foregoing, this Court should uphold Division Two's decision. Further, this Court should join the majority of courts that have addressed the issue and hold that falsity must be proven with clear and convincing evidence in a defamation claim.

Respectfully submitted this 31st day of January, 2012.

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APPENDIX A

STATUTES:

**RCW 4. 24. 525. Public participation lawsuits--Special motion to strike claim--Damages, costs, attorneys' fees, other relief--Definitions**

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in

connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on January 31, 2012, I delivered a copy of the foregoing Amicus Brief by email pursuant to agreement and by U.S. Mail to:

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