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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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Filed 
Washington State Supreme Court

MICHAEL HENNE,

Respondent,

v.

CITY OF YAKIMA, a municipal corporation,

Appellant.

MAY - 8 2014

Ronald R. Carpenter
Clerk 

**BRIEF OF *AMICI CURIAE* ALLIED DAILY NEWSPAPERS OF
WASHINGTON; COWLES COMPANY; EVENING TELEGRAM CO.
D/B/A MORGAN MURPHY MEDIA; GANNETT CO., INC.; KIRO-TV,
INC.; THE MCCLATCHY COMPANY; SEATTLE TIMES
COMPANY; SINCLAIR BROADCAST GROUP, INC.; SOUND
PUBLISHING, INC.; WASHINGTON NEWSPAPER PUBLISHERS
ASSOCIATION; AND WASHINGTON STATE ASSOCIATION OF
BROADCASTERS IN SUPPORT OF APPELLANT**

Bruce E.H. Johnson, WSBA # 7667
Eric M. Stahl, WSBA #27619
Ambika K. Doran, WSBA # 38237
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone/(206) 757-7700 Fax
Attorneys for *Amici Curiae*

 ORIGINAL

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I. INTRODUCTION

Amici curiae, identified in the Appendix, are members and representatives of the print, broadcast and online news media, comprising the vast majority of news organizations in the state.¹ News organizations are “prime beneficiaries” of anti-SLAPP statutes, *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 37 Cal. App. 4th 855, 863, 44 Cal. Rptr. 2d 46, 51 (1995), because newsgathering is quintessential “conduct in furtherance of the exercise of the constitutional right of free speech” that such laws protect. RCW 4.24.525(2)(e); *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164, 1 Cal. Rptr. 3d 536, 541 (2003).

Amici urge this Court to reverse the Court of Appeals decision, because it threatens to undermine the intent and efficacy of Washington’s 2010 anti-SLAPP statute, RCW 4.24.525 (the “Act”). This brief focuses on two primary grounds for reversal.

First, both the trial court and Court of Appeals in this case erred by sidestepping the Act, which is meant to provide an “efficient, uniform and comprehensive” mechanism for early dismissal of lawsuits targeting speech and petition rights. Laws of 2010, ch. 118, § 1(2)(b). The Act’s provisions are mandatory whenever a defendant files a “special motion to strike.” RCW 4.24.525(4). This case, the first under the Act to reach this

¹ *Amici* have filed, concurrently, a motion for leave to file this brief.

Court, presents an opportunity to instruct lower courts on the Act's proper operation. *Amici* urge the Court to make clear that courts may not disregard the Act's broad provisions, plain language, and mandate of liberal construction. *See* Section II.

Second, the Court should hold that a plaintiff faced with an anti-SLAPP motion cannot evade the Act's remedies by simply amending his complaint. *See* Section III. This maneuver, endorsed by both the trial court and Court of Appeals in this case, strikes at the Act's core purpose: sparing a party "the expense of defending a lawsuit brought to quell free expression. That purpose is thwarted if a plaintiff can amend his complaint to avoid payment" of the fees and penalties mandated by the Act. *Henne v. City of Yakima*, 177 Wn. App. 583, 599, 313 P.3d 1188 (2013) (Fearing, J., dissenting in part).

II. THE ACT SETS FORTH A MANDATORY PROCEDURE TO PROTECT FREE SPEECH AND PETITION RIGHTS

A. Background on Anti-SLAPP Legislation

To assist the Court in this case of first impression, *amici* offer the following background on anti-SLAPP statutes such as the 2010 Act.

"Strategic Lawsuits Against Public Participation," or SLAPPs, are civil lawsuits targeting speech or petition activity on issues of public concern. Typically, such lawsuits aim to chill a defendant's speech

through costly litigation.² SLAPPs “are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense [and] harassment.” Laws of 2010, ch. 118 § 1(1)(b).

Today, 28 states, plus the District of Columbia and Guam, have some form of anti-SLAPP legislation.³ Washington was the first state to pass any sort of anti-SLAPP law, enacting a precursor to the Act in 1989. *See* RCW 4.24.510.⁴ As amended, that statute provides absolute immunity from civil liability, but only for a limited type of expressive activity — namely, statements made directly to a government body “regarding any matter reasonably of concern” to it. *Id.* Unlike the 2010 Act (discussed below), RCW 4.24.510 offers no protection for other types of speech, and no procedure for securing expedited dismissal of SLAPPs.

In 1992, California became the first state to enact a much more expansive anti-SLAPP law. Cal. Civ. Proc. Code § 425.16. Directed to the “disturbing increase in lawsuits” brought to chill free speech and

² *See* George W. Pring & Penelope Canan, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 8-11 (Temple University Press 1996); Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse & Democracy*, 87 WASH. L. REV. 495, 502 (2012). The term “SLAPP” appears to have been first coined by Professors Pring and Canan. *Id.* at 496 n.9.

³ Johnson & Duran, *supra* note 2, 502 n.48 (citing statutes).

⁴ The statute was dubbed the “Brenda Hill bill,” after a Vancouver mother who was sued by a Realtor for defamation after reporting him to state officials for failing to pay excise taxes on home sales. Though Hill won at trial, she endured a six-year legal battle that forced her into bankruptcy. Johnson & Duran, *supra* note 2, 510-11.

petitioning activities, the statute is triggered by *any* cause of action arising not only from a defendant's statements to officials, but also from any public statement on "an issue of public interest," or by "any other conduct in furtherance of the exercise of the...constitutional right of free speech in connection with a public issue or an issue of public interest."

Id. § 425.16(a), (e). Its purpose is to "nip SLAPP litigation in the bud" through an early summary judgment-like procedure. *Id.* § 425.16(a); *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1042, 61 Cal. Rptr. 2d 58, 61 (1997). If a defendant establishes that it was engaged in activity protected under the statute, the burden shifts to the plaintiff to establish a probability of success on the merits. Cal. Civ. Proc. Code § 425.16(b).

In 1997, California amended its law to state it "shall be construed broadly." *Id.* § 425.16(a); *Briggs v. Eden Cncl. for Hope & Opportunity*, 19 Cal. 4th 1106, 1119, 969 P.2d 564, 572, 81 Cal. Rptr. 2d 471, 479 (1999). The amendment legislatively overruled several early appellate decisions that had limited the statute's reach. *Id.*, 969 P.2d at 573.

B. Washington's Legislature Intended the Act To Apply Broadly To Lawsuits Aimed at Chilling Free Speech

In 2010, Washington followed suit with a new, equally expansive anti-SLAPP law. The Act is modeled on California's statute, and contains many of the same provisions. *Compare* Cal. Civ. Proc. Code § 425.16

with RCW 4.24.525. Courts interpreting the Act have noted that it “mirrors” California’s anti-SLAPP statute, and have looked to California decisions as “persuasive authority.” *Dillon v. Seattle Deposition Reporters, LLC*, __ Wn. App. __, 316 P.3d 1119, 1132 n.21 (Div. I, Jan. 21, 2014), *pet. for rev. filed*, No. 899614 (Wash. Mar. 4, 2014); *see also Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010); *Spratt v. Toft*, __ Wn. App. __, 2014 WL 1593133 at *4-5 (Div. I, Apr. 21, 2014).

The Legislature set out a clear statement of the Act’s intent:

The legislature finds and declares that: (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; (b) Such lawsuits...are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities; (c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues; (d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and (e) An expedited judicial review would avoid the potential for abuse in these cases.

2010 ch. 118 § 1(1). To provide for “expedited” review, the Act establishes “an efficient, uniform, and comprehensive method for speedy adjudication” of SLAPPs. *Id.* § 1(2)(b). Finally, just as California did (five years after first enacting its anti-SLAPP law), Washington’s

Legislature declared the Act “shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” *Id.*, ch. 118 § 3.

The importance of broad anti-SLAPP laws – to *amici*, to others who report and comment on public issues, and to citizens who speak out in order to hold officials accountable – cannot be overstated. Such statutes protect speech and petition on matters of public concern, which “occupies the highest rung of the hierarchy of First Amendment values.” *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (citation omitted). They are rooted in the central concern underlying *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): burdensome lawsuits chill public debate. *See id.* at 279 (self-censorship results when “critics of official conduct may be deterred from voicing their criticism...because of doubt whether it can be proved in court or fear of the expense of having to do so”). Strong anti-SLAPP laws have in practice enabled the press and citizens to avoid abusive reprisal lawsuits based on acts of public participation. To cite a few examples:

- Directors of a local food co-op were sued in retaliation for the co-op’s decision to boycott goods from Israel, in protest of policies of that nation. Boycott opponents threatened “burdensome and expensive” litigation if the boycott was not rescinded. They later sued, seeking damages from individual directors and an anti-boycott injunction. Finding the boycott fully protected First Amendment expression, the trial court granted defendants’ anti-SLAPP motion, and Division One recently affirmed. *Davis v. Cox*, ___ Wn. App. ___, 2014 WL 1357260 (Div. I, Apr. 7, 2014).

- Applying Oregon’s anti-SLAPP statute, the Ninth Circuit affirmed dismissal of defamation claims against author Ann Rule and the publisher of her true-crime book reporting on plaintiff’s killing of her husband – a crime to which plaintiff had pled guilty. The court found plaintiff failed to show any statement in the book was false or defamatory. *See Northon v. Rule*, 637 F.3d 937 (9th Cir. 2011).
- Applying the Act, the Western District of Washington dismissed defamation claims against the Better Business Bureau based on a consumer warning it issued in response to radio ads promising audition opportunities for child performers. The BBB urged parents to be cautious in dealing with any talent agency requiring advance payment. The court granted BBB’s anti-SLAPP motion, finding the warning contained no false or actionable statement. *N.Y. Studio, Inc. v. Better Bus. Bureau*, 2011 WL 2414452 (W.D. Wash. June 13, 2011).
- The Western District also granted an anti-SLAPP motion and dismissed misappropriation claims against the producers of *Sicko*, an Academy Award-nominated documentary about the healthcare system. The court held plaintiff failed to show a likelihood of prevailing because his likeness was used in an expressive work on a matter of public interest that was fully protected by the First Amendment. *Aronson*, 738 F. Supp. 2d at 1112-13.
- Applying Louisiana’s anti-SLAPP act, a court dismissed a doctor’s libel suit against *The New York Times* and Pro Publica over a Pulitzer Prize-winning article about alleged euthanasia by hospital staff during Hurricane Katrina. The doctor failed to rebut defendants’ showing that the report was not substantially false, nor published with negligence. *Armington v. Fink*, 2010 WL 743524, at *1, *5 (E.D. La. Feb. 24, 2010).

Without robust anti-SLAPP laws, such cases would have led to protracted litigation, even though the claims lacked merit and targeted protected speech. By applying anti-SLAPP laws correctly, the courts disposed of these abusive suits efficiently, in a manner likely to deter future SLAPPs.

C. The Courts in this Case, and in Others, Disregarded the Act's Language and Intent

Unfortunately, some courts have resisted the anti-SLAPP Act's mandatory terms, and refused to apply it in the broad manner intended by the Legislature. In this case, by finding Yakima's anti-SLAPP motion "moot" because plaintiff amended his complaint after the motion had been filed (177 Wn. App. at 587-88), both the trial and appellate courts ignored the key purpose of the Act: "[t]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 193, 106 P.3d 958, 967, 25 Cal. Rptr. 3d 298, 308 (2005).

Once a plaintiff sues a defendant on a SLAPP claim that is challenged by a "special motion to strike," the Act *requires* the court to rule on that motion. RCW 4.24.525(5)(b) ("The court shall render its decision as soon as possible"). Filing the motion triggers the Act's procedural requirements. A plaintiff cannot evade them by a subsequent amendment (as discussed further in Section III); rather, the court *must* assess the merits of the motion and award the mandated remedies if the motion is granted. RCW 4.24.525(4)-(6).

The Court of Appeals in this case erroneously read additional requirements into the Act. The court found it relevant that the City had

not filed an answer, warned the plaintiff that his claim violated the Act, or engaged in discovery. 177 Wn. App. at 588. But the Act allows a special motion to strike regardless of whether the movant has answered: the only requirement is that the motion be filed within sixty days of service of the complaint. RCW 4.24.525(5)(a). Nor does the Act require pre-filing notice. Such a requirement would undermine the Act because, again, the harm the Act is intended to prevent occurs once the lawsuit is filed. The fact that no discovery had occurred also is of no moment: the Act specifically provides that all discovery is automatically stayed while the special motion to strike is pending. RCW 4.24.525(5)(c).

Unfortunately, other Washington courts likewise have been reluctant to apply the new and expansive anti-SLAPP statute as written – construing it narrowly, imposing hurdles not found in the law itself, or otherwise failing to apply the required analysis. For example, some courts have granted dismissal solely under CR 12, while refusing to decide the defendant’s special motion to dismiss (thus improperly denying the defendant recovery of fees and penalties allowed under Section 6 of the Act). *See, e.g., U.S. Mission Corp. v. KIRO TV, Inc.*, 172 Wn. App. 767, 770-71, 784, 292 P.3d 137 (2013) (trial court dismissed claim but declined

to reach anti-SLAPP motion).⁵ Other courts have ignored the mandate to construe the Act liberally. One recent case denied an anti-SLAPP motion on the ground that the Act's protection for statements "in furtherance of the exercise of the constitutional right of petition" (RCW 4.24.525(2)(e)) reaches only petition rights under the *state* constitution, and not those under the First Amendment. *Dillon*, 316 P.3d at 1135-36.⁶ In another recent case, the Court of Appeals reasoned that the Act did not apply to a lawsuit brought by a city against an attorney who sought public records in support of unrelated litigation, because the lawsuit did not, in itself, suppress the defendant's ability to exercise his rights of petition. *City of Seattle v. Egan*, ___ Wn. App. ___ 317 P.3d 568, 570 (Div. I, Feb. 3, 2014) ("[t]here was no question that Egan retained his right to bring an action"); *pet. for rev. filed*, No. 901368 (Wash. Apr. 17, 2014). But a SLAPP need not literally bar a defendant from speaking or petitioning in order to be subject to the Act. Rather, the statute requires only that the defendant

⁵ Such dismissals deprive defendants of the legislatively prescribed remedies for being "victimized by meritless, retaliatory SLAPP lawsuits." *Wright Dev. Grp. LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010).

⁶ Division One found this distinction material on the ground that the federal petition right includes access to courts, whereas the state right supposedly does not. *Dillon*, 316 P.3d at 1136-37. Under this holding, statements made in support of litigation are outside the Act's protections – a conclusion that is contrary to (i) Act's the mandate of liberal construction (Laws of 2010, ch. 118 § 3); (ii) legislative history indicating lawmakers intended the Act to protect petitions under the "First Amendment to the United States Constitution" (House Bill Report SSB 6395); and (iii) California anti-SLAPP cases, which recognize that litigation-related activities are protected as acts "in furtherance of the exercise of the constitutional right of petition." *See, e.g., Gallanis-Politis v. Medina*, 152 Cal. App. 4th 600, 604, 610-11, 61 Cal. Rptr. 3d 701, 703, 708-09 (2007).

demonstrate the lawsuit is “based on” an act of public participation or petition. RCW 4.24.525(4)(b).

It is perhaps not surprising that some courts have been reluctant to embrace RCW 4.24.525. The Act is new (in Washington), expansive, and somewhat complicated. The same thing happened in California, in the early years of its anti-SLAPP statute, with courts reading the law narrowly and inventing reasons to not apply it as written.⁷ As noted above, California’s Legislature responded by amending its statute, five years after initial passage, to assure courts would construe it “broadly.” Cal. Civ. Proc. Code § 425.16(a); *Briggs*, 969 P.2d at 572. Subsequently, California courts relied on the “broad construction” amendment to resolve close cases in favor of protecting expressive conduct, and to overrule earlier decisions taking a narrow view of the law.⁸ In Washington, the Legislature included a mandate of broad construction when it passed the Act. Laws of 2010, ch. 118 § 3. It thus falls on this Court to assure the Act is applied liberally, and in compliance with its plain terms.

⁷ One study found that in the California statute’s first 18 months, courts denied 22 of 49 anti-SLAPP motions. Pring & Canan, *supra* note 2, at 198.

⁸ See, e.g., *Briggs*, 969 P.2d at 573 (noting cases overruled by 1997 amendment); *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1425, 103 Cal. Rptr. 2d 174, 194 (2001) (anti-SLAPP law’s purpose “promoted by construing that statute broadly to permit a *pro se* SLAPP defendant” to recover fees); *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 477, 102 Cal. Rptr. 2d 205, 211 (2000) (under “mandate that we broadly construe the anti-SLAPP statute, a single publication does not lose its ‘public forum’ character merely because it does not provide a balanced point of view”).

D. In Deciding This Case, the Court Should Provide Clear Guidance for Interpreting and Applying the Act

In light of this background, and because this will be the Court's first opinion under the Act, *amici* urge the Court to establish clear guidelines for courts to follow in reviewing anti-SLAPP motions. Such guidance is particularly appropriate and necessary to implement the Legislature's directive for a "uniform" and "comprehensive" method for speedy adjudication of SLAPPs. 2010, ch. 118 § 1(2)(b). This Court should recognize that a "special motion to strike" must be addressed as follows:

1. An anti-SLAPP motion triggers a two-step process, as stated in Section 4 of the Act. In the first step, the moving party "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b); *Aronson*, 738 F. Supp. 2d at 1110.

The Act defines "public participation" in Section 2. The definition includes (but is not limited to) any statement made to or in connection with specified official proceedings (RCW 4.24.525(2)(a)-(c)); any statement "in a place open to the public or a public forum in connection with an issue of public concern" (*id.* § (2)(d)); and "[a]ny 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.” *Id.* § (2)(e). Each of these definitions must be construed broadly, in accordance with the legislative intent. Thus, sections 2(e) covers **all** lawful exercises of free speech and petition rights, and sections 2(a)-(d) cover acts of public participation and petition **broader than** the constitutional rights.

In determining whether a claim is “based on” an act of public participation, the court may look to the “*principal thrust* or *gravamen* of the plaintiff’s cause of action.” *Dillon*, 316 P.3d at 1134 (quoting *Martinez v. Metabolife Int’l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)). The movant may satisfy its burden by showing the claim “‘targets conduct that advances and assists’ the defendants’ exercise of a protected right.” *Davis*, 2014 WL 1357260, at *4 (quoting *Greater L.A. Agency on Deafness, Inc. v. Cable News Network*, 742 F.3d 414, 423 (9th Cir. 2014)). Courts also may look to “the remedy sought” by plaintiff. *Davis*, 2014 WL 1357260, at *5 (request for permanent injunction against continued boycott clearly demonstrated suit targeted protected activity). Courts, however, may not confine their review to the pleadings but instead “shall consider...supporting and opposing affidavits stating the facts upon which the liability or defense is based.” RCW 4.24.525(4)(c).

2. The second step in deciding an anti-SLAPP motion is as follows: “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.” RCW 4.24.525(4)(b) (emphasis added); *Aronson*, 738 F. Supp. 2d at 1110. The court’s role at this stage is “akin to the trial court’s role in deciding a motion for summary judgment.” *Dillon*, 316 P.3d at 1142. Again, the court “shall” consider the underlying facts in making its decision. RCW 4.24.525(4)(c). If the responding party fails to meet its burden under the heightened “clear and convincing” standard, the special motion to strike must be granted.

3. The remedies set out in the Act are mandatory: if the movant prevails “in whole or in part” on its anti-SLAPP motion, the court “shall award” costs and reasonable fees, and a penalty of \$10,000 per movant. These remedies are a critical feature of the Act: they “discourage [SLAPPs] by imposing the litigation costs on the party” seeking to chill the exercise of constitutional rights. *Ketchum v. Moses*, 24 Cal. 4th, 1122, 1131, 17 P.3d 735, 104 Cal. Rptr. 2d 377 (2001).

4. A special motion to dismiss triggers two mandatory procedures meant to assure a speedy and efficient remedy. First, “[a]ll discovery and any pending hearings or motions in the action shall be stayed” once the special motion to strike is filed. RCW 4.24.525(5)(c). (Discovery may be allowed on a showing of “good cause,” under the same terms as apply for obtaining additional discovery in the face of a summary

judgment motion under CR 56(f). *Davis*, 2014 WL 1357260, at *9-10.)

Second, an order granting or denying a special motion to strike is subject to an immediate, “expedited” appeal. RCW 4.24.525(5)(d).

5. Finally, this Court should emphasize that the foregoing steps must be applied broadly, in furtherance of the Legislature’s goal of protecting public participation from costly lawsuits. Laws of 2010, ch. 118 §§ 1, 2. The Act must be “applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” *Id.* § 3. This mandate requires courts to resolve close questions in favor of protecting acts of public participation and petition, and an expansive right of recovery.

Here, the trial and appellate courts followed none of these statutory directives. They never allowed the City to establish whether plaintiff’s claim was “based on” an act of public participation or petition or, if it did, whether plaintiff was likely to prevail on the merits. The Court of Appeals ignored the statute’s mandatory discovery stay, instead construing the lack of discovery against the City. The courts also failed to recognize the Act’s purpose and the mandate of liberal construction. For all of these reasons, this Court should reverse the Court of Appeals.

III. AN ANTI-SLAPP MOTION CANNOT BE AVOIDED BY AMENDING THE COMPLAINT AFTER THE MOTION IS FILED

On the issues presented by Petitioner City of Yakima, *amici* urge this Court to hold that a plaintiff facing a “special motion to dismiss” may not avoid a decision on the motion, or the Act’s remedial provisions, by simply dropping his SLAPP causes of action. With little analysis, the Court of Appeals found that Plaintiff Henne’s request to amend his complaint to omit his retaliatory investigation claim – a month after the City’s anti-SLAPP motion was filed – relieved the court of the need to decide the motion. 177 Wn. App. at 587-88. This holding is wrong as a matter of law, for at least four distinct reasons.

First, the move is not allowed under the anti-SLAPP statute. As detailed above, the Act sets for a “uniform and comprehensive method” that courts must follow when a special motion to strike is filed. Laws of 2010, ch. 118 § 1(2)(b); RCW 4.24.525(4). That method does not include allowing amended pleadings as a substitute for responding to a motion to strike. To the contrary, if the defendant files an anti-SLAPP motion, the court “shall” render a decision as soon as possible. RCW 4.24.525(5)(b). Further, if the movant meets its initial burden and the plaintiff fails to show by “clear and convincing evidence” that it is likely to prevail, the court “shall” award the movant costs and a statutory penalty. *Id.* § (6)(a).

The issue here is not one of adequate pleading. Unlike a CR 12 motion to dismiss, a special motion to strike tests the underlying merits of a lawsuit, not just the allegations on the face of the complaint. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073, 112 Cal. Rptr. 2d 397 (2001). In responding to the motion, the plaintiff cannot rely on the allegations in his pleadings, and the court does not simply accept those allegations as true. *Id.* (anti-SLAPP motion “pierces the pleadings and requires an evidentiary showing”); RCW 4.24.525(4)(c) (court “shall consider...affidavits stating the facts upon which the liability or defense is based,” and if movant meets initial burden, plaintiff must present “clear and convincing *evidence*” supporting claim). An amendment cannot cure a plaintiff’s inability to meet his burden, or to answer the assertion that he has hauled the defendant into court on a SLAPP claim.⁹

Second, allowing such gamesmanship would completely undermine the statute’s clear purpose, by making an amended complaint a

⁹ To be clear, the Act does not prohibit amended pleadings. But amendments may not be used to evade a motion asserting that the defendant has been victimized by a meritless SLAPP lawsuit. See *Wright Dev. Grp.*, 939 N.E.2d at 396. Were this permissible, the plaintiff could escape the consequences of filing a retaliatory SLAPP suit through artful re-pleading. *Simmons*, 92 Cal. App. 4th at 1073. That risk is particularly pronounced in Washington because the state has rejected the federal “facial plausibility” pleading standard, and instead allows complaints to proceed if “it is *possible* that facts could be established to support the allegations.” *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (rejecting federal *Iqbal/Twombly* standard). It would undermine the Act’s intent if a plaintiff could escape an anti-SLAPP motion by simply amending his complaint to make the SLAPP allegations vaguer.

cheap, quick, and easy way for a plaintiff to avoid his burden under the

Act. As Judge Fearing aptly noted in his partial dissent below:

The key concern of anti-SLAPP laws is to spare the moving party from the expense of defending a lawsuit brought to quell free expression. *That purpose is thwarted if a plaintiff can amend his complaint to avoid payment of those fees.* One can argue that, if the case is quickly dismissed by an anti-SLAPP motion, the fees incurred by the defendant are minimal such that they should not be shifted to the claimant. But the fees will not always be minimal. Preparing the motion involves analysis of facts and claims as well as legal research and writing. Because of the importance of exercising free speech and the worth of a discussion of matters of public concern, the statute considers any fees too high. *The one exercising its rights should not bear any costs.*

177 Wn. App. at 599 (Fearing, J., dissenting in part) (emphasis added).

Rather than deterring SLAPPs as the Legislature intended, the decision below invites SLAPP plaintiffs who cannot meet the burden of showing likely success on the merits “to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading.” *Simmons*, 92 Cal. App. 4th at 1073. Allowing such amendments would enable a plaintiff to achieve indirectly what the Act prohibits directly – forcing a defendant to engage in ongoing litigation before unmasking and dismissing SLAPP claims. *Id.* at 1074.

Third, in California, “there is a history of case law setting forth the rule that a party cannot amend around a SLAPP motion.” *City of Colton v. Singletary*, 206 Cal. App. 4th 751, 775, 142 Cal. Rptr. 3d 74, 95 (2012).

These decisions (which are “persuasive authority,” *see supra*, Section II.B) recognize that allowing amendment after an anti-SLAPP motion is filed would “totally frustrate the Legislature’s objective of providing a quick and inexpensive method of unmasking and dismissing such suits.” *Simmons*, 92 Cal. App. 4th at 1073-74 (statute “makes no provision” for post-motion amendment, and “we reject the notion that such a right should be implied” in light of statute’s purpose). In a case involving facts and claims similar to those in this case, the Court of Appeal held that a public employee could not avoid dismissal of his retaliatory investigation claims by amending his complaint after the employer-agency had brought its anti-SLAPP motion. *Hansen v. Dep’t of Corr. & Rehab.*, 171 Cal. App. 4th 1537, 1547, 90 Cal. Rptr. 3d 381 (2008). Numerous other California opinions are in accord.¹⁰ Under this authority, a plaintiff has no right to circumvent a special motion to strike by amending his complaint.

¹⁰ See *JKC3H8 v. Colton*, 221 Cal. App. 4th 468, 477-78, 164 Cal. Rptr. 3d 450, 457 (2013) (plaintiff “may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint...in response to the motion”); *Law Offices of Andrew L. Ellis v. Yang*, 178 Cal. App. 4th 869, 880, 100 Cal. Rptr. 3d 771, 778-79 (2009); *Schaffer v. City & Cnty. of San Francisco*, 168 Cal. App. 4th 992, 1005, 85 Cal. Rptr. 3d 880, 890 (2008) (under *Simmons*, plaintiff “cannot escape the anti-SLAPP procedures by simply amending her complaint”); *Salma v. Capon*, 161 Cal. App. 4th 1275, 1294, 74 Cal. Rptr. 3d 873, 889 (2008) (*Simmons* applies where amendment filed before ruling on anti-SLAPP motion); *Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1055, 18 Cal. Rptr. 3d 882 (2004) (rejecting plaintiff’s argument that amending complaint rendered anti-SLAPP motion moot); *Navellier v. Sletten*, 106 Cal. App. 4th 763, 772, 131 Cal. Rptr. 2d 201 (2003) (“plaintiff cannot use an eleventh-hour amendment to plead around a motion to strike under the anti-SLAPP statute”); *Thomas v. L.A. Times Commc’ns, LLC*, 189 F. Supp. 2d 1005, 1017 n.11 (C.D. Cal. 2002).

Fourth and finally, under the Legislature's mandate that the Act be "applied and construed liberally," any doubt on the question presented must be resolved in favor of "protecting participants in public controversies from an abusive use of the courts." 2010, ch. 118 § 3. California's similar "broad construction" amendment has "permitted resolution of many knotty problems and has been explicitly relied on by a significant number of courts as a key to their decisions." Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 740 (2003). In applying other statutes' "liberal construction" provisions, Washington courts "view with caution any interpretation of the statute that would frustrate its purpose." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 289-90, 44 P.3d 887 (2002) (citation omitted) (discussing Public Record Act's liberal construction provision, RCW 42.56.030). Because the Act does not permit evasion of a special motion to strike by amending the pleadings, and because allowing this maneuver would frustrate the Act's purpose, it should not be permitted.

IV. CONCLUSION

For the foregoing reasons, the decision below should be reversed.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

Davis Wright Tremaine LLP
Attorneys for *Amici Curiae* Allied Daily
Newspapers of Washington; Cowles
Company; Evening Telegram Co. d/b/a
Morgan Murphy Media; Gannett Co.,
Inc.; KIRO-TV, Inc.; The McClatchy
Company; Seattle Times Company;
Sinclair Broadcast Group, Inc.; Sound
Publishing, Inc.; Washington Newspaper
Publishers Association; and Washington
State Association Of Broadcasters

By



Bruce E.H. Johnson, WSBA # 7667
Eric M. Stahl, WSBA # 27619
Ambika K. Doran, WSBA # 38237
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: 206-757-8030
Fax: 206-757-7030
E-mail: brucejohnson@dwt.com
ericstahl@dwt.com
ambikadoran@dwt.com

APPENDIX

Identity and Description of *Amici Curiae*

1. **Allied Daily Newspapers of Washington**, a Washington not-for-profit association representing 24 daily newspapers serving Washington and the Washington bureaus of the Associated Press.
2. **Cowles Company**, a family-owned corporation based in Spokane. Its subsidiary Cowles Publishing Co. publishes *The Spokesman Review* and its subsidiaries KHQ Inc. and Cowles Montana Media operate television stations in Washington, Montana and California, including **KHQ-TV (Spokane), KNDO-TV (Yakima), and KNDU-TV (Kennewick)**, as well as their respective websites.
3. **Evening Telegram Company, d/b/a Morgan Murphy Media**, on behalf of television stations **KXLY-TV (Spokane), KAPP-TV (Yakima) and KVEW-TV (Kennewick)** and their respective websites.
4. **Gannett Co., Inc.**, which owns and operates television stations **KING-TV (Seattle), KONG-TV (Seattle), KREM-TV (Spokane), KSKN-TV (Spokane) and NorthWest Cable News** and their respective websites.
5. **KIRO-TV, Inc.**, on behalf of television station **KIRO-TV (Seattle)** and its website.

6. **The McClatchy Company**, publisher of *The News Tribune* (Tacoma), *The Olympian*, *The Bellingham Herald*, *Tri-City Herald*, *The Peninsula Gateway* (Gig Harbor), and *The Herald* (Puyallup) and their respective websites.

7. **Seattle Times Company**, publisher of *The Seattle Times*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *The Issaquah Press*, *Sammamish Review* and *Newcastle News* and their respective websites.

8. **Sinclair Broadcast Group, Inc.**, which owns and operates **KOMO-TV** (Seattle), **KIMA-TV** (Yakima), **KEPR-TV** (Tri-Cities), and Seattle news radio stations **KOMO-1000** and **KVI-570** and their respective websites.

9. **Sound Publishing, Inc.**, publisher of newspapers serving over 100 communities in Washington state, including the print and online versions of the *Everett Daily Herald*, the *Peninsula Daily News* (Port Angeles), *Seattle Weekly*, and over 30 other community newspapers and business journals across the state.

10. **Washington Newspaper Publishers Association**, a not-for-profit association representing 105 community newspapers in Washington, most serving rural or suburban communities.

11. Washington State Association of Broadcasters, a not-for-profit trade association made up of approximately 25 television stations and 148 radio stations licensed by the Federal Communications Commission to communities within the state of Washington.

DECLARATION OF SERVICE

I, Christine Kruger, hereby declare under penalty of perjury under the law of the State of Washington that on this 29th day of April 2014, I served the foregoing document on the following attorneys in the manner indicated.

Robert C. Tenney
Mark David Wilson
Attorneys at Law
P. O. Box 22680
Yakima, WA 98907-2680

VIA EMAIL AND
OVERNIGHT MAIL

Peter McGillis Ritchie
Meyer, Fluegge & Tenney, P.S.
230 S. 2nd Street
Yakima, WA 98901-2865

VIA EMAIL AND
OVERNIGHT MAIL

Lish Whitson
Kristy Lee Shell
Lish Whitson PLLC
2121 5th Avenue
Seattle, WA 98121-2510

VIA MESSENGER

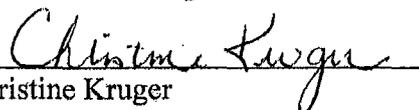
Milton G. Rowland
Foster Pepper PLLC
422 W. Riverside Avenue, Suite 1310
Spokane, WA 99201-0302

VIA EMAIL AND
OVERNIGHT MAIL

George M. Ahrend
Attorney at Law
16 Basin Street S.W.
Ephrata, WA 98823

VIA EMAIL AND
OVERNIGHT MAIL

Executed this 29th day of April 2014 at Seattle, Washington.


Christine Kruger

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 29, 2014 11:25 AM
To: 'Kruger, Christine'
Cc: Stahl, Eric
Subject: RE: Henne v. City of Yakima; Washington State Supreme Court No. 89674-7

Rec'd 4-29-14

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.

From: Kruger, Christine [mailto:ChristineKruger@DWT.COM]
Sent: Tuesday, April 29, 2014 11:24 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Stahl, Eric
Subject: Henne v. City of Yakima; Washington State Supreme Court No. 89674-7

Dear Clerk:

Attached for filing with the Court are the following documents:

1. Motion of Amici Curiae Allied Daily Newspapers of Washington, Cowles Company, Evening Telegram Co. d/b/a Morgan Murphy Media, Gannett Co., Inc., KIRO-TV, Inc., The McClatchy Company, Seattle Times Company, Sinclair Broadcast Group, Inc., Sound Publishing, Inc.; Washington Newspaper Publishers Association, and Washington State Association of Broadcasters to File Brief in Support of Appellant
2. Brief of Amici Curiae Allied Daily Newspapers of Washington, Cowles Company, Evening Telegram Co. d/b/a Morgan Murphy Media, Gannett Co., Inc., KIRO-TV, Inc., The McClatchy Company, Seattle Times Company, Sinclair Broadcast Group, Inc., Sound Publishing, Inc., Washington Newspaper Publishers Association, and Washington State Association of Broadcasters in Support of Appellant

These documents are being submitted by:

Eric M. Stahl
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Telephone: 206-757-8148
Email: ericstahl@dwt.com

Thank you for your assistance.

Christine Kruger | Davis Wright Tremaine LLP
Legal Secretary
1201 Third Avenue, Suite 2200 | Seattle, WA 98101
Tel: (206) 757-8534 | Fax: (206) 757-7700
Email: christinekruger@dwt.com | Website: www.dwt.com

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | Seattle | Shanghai | Washington, D.C.

