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No. 90233-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners/Plaintiffs Below,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICAN LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Respondents/Defendants Below.

PETITIONERS' CONSOLIDATED ANSWER TO BRIEFS OF AMICUS CURIAE

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I. INTRODUCTION

Pursuant to RAP 10.3(f) and Commissioner Pierce's letter to counsel of December 15, 2014, Petitioners answer the briefs of the following Amicus Curiae: (1) the State of Washington ("State"), *see infra* Section II.A; (2) the Reporters Committee for the Freedom of the Press, and Twenty-Nine Others (collectively, "Reporters Committee"), *see infra* Section II.B; (3) the Washington State Association for Justice Foundation ("WSAJF"), *see infra* Section II.C; and (4) the Jewish Voice for Peace, Palestine Solidarity Legal Support, the National Lawyers Guild, the American Muslims for Palestine, and the International Jewish Anti-Zionist Network (collectively, "JVP"), *see infra* Section II.D.

II. ARGUMENT

A. Answer to Amicus Curiae Brief of the State of Washington

The State accurately characterizes RCW 4.24.525 (".525" or the "Act") as "an entirely new ***dismissal mechanism***" and as an "additional ***tool***" to resolve claims "as a matter of law." State Amicus Br. at 16 n.8, 17 (emphases added). It thus effectively concedes Petitioners' point that the Act violates the separation of powers doctrine by infringing on the purview of Washington's judiciary to determine the "operations of the courts by which substantive law, rights, and remedies are effectuated"

under *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 984, 216 P.3d 374 (2009); *see also* Pet'rs' Supp. Br. at 11-14.

The State nonetheless argues that the Legislature acted within its general police power authority in enacting the Act, and in so doing created substantive rights in the nature of federal qualified immunity. The State's argument fails for three independent reasons. ***First***, the police power does not apply here and is, in any event, constrained by the Washington Constitution—in particular by the doctrine of separation of powers. *See generally Putman*, 166 Wn.2d at 980. ***Second***, the Act's motion to strike mechanism is procedural and not substantive. ***Third***, federal qualified immunity, in stark contrast to the Act: (a) does not impose "an entirely new procedural mechanism" for its enforcement (and indeed can only be enforced through existing procedural mechanisms, such as Fed. R. Civ. P. 56); (b) was ***judicially***-created, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); and (c) implicates "primary" rights in a way that the Act does not.

1. The Anti-SLAPP Act Is Not a Lawful Exercise of the Legislature's Police Power

The State argues that the Legislature has the authority under the Washington Constitution to define causes of action, and "[a]s part of its police power to define what shall constitute a cause of action, the

Legislature has the 'power to do away with a cause of action.'" State Amicus Br. at 6 (quoting *State v. Clausen*, 65 Wash. 156, 210-11, 117 P. 1101 (1911)). "If the Legislature has the power to completely eliminate a cause of action, it also has the authority to limit a cause of action," the State reasons. *Id.* at 6-7 (citing *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 666, 771 P.2d 711 (1989)). The Act, the State argues, is constitutional as such a "limit" on "a cause of action." *Id.* This analysis is flawed, twice over.

a. The Police Power Does Not Apply Here

As a threshold matter, and contrary to the State's premise, the Act does not "eliminate" or "limit ***a*** cause of action" (emphasis added). To the contrary, as the State concedes, the Act creates a "an entirely new dismissal mechanism" that can be used to dismiss and sanction ***any and all*** causes of action that allegedly implicate, among other things, "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." .525(2)(e).

Indeed, Division One below held that the Act applies even to causes of action grounded in corporate law, such as Petitioners' claims concerning Respondents' *ultra vires* acts and breaches of fiduciary duty. *Davis v. Cox*, 180 Wn. App. 514, 532, 325 P.3d 255 (2014), *review*

granted (Oct. 9, 2014). But in *Sofie v. Fibreboard Corporation*, this Court explained that the "Legislature's power to create and eliminate causes of action" reaches only causes of action "explicitly" identified by statute. 112 Wn.2d at 665. The *Sofie* Court rejected the notion that the Legislature could "partially" eliminate causes of action without expressly stating the causes of action to be affected. *Id.* This holding is consistent with general rule of statutory interpretation disfavoring implied repeals. *See Jenkins v. State*, 85 Wn.2d 883, 886, 540 P.2d 1363 (1975).

In short, even if the Legislature may "define," "completely eliminate," or "limit" a ***particular*** "cause of action," *Sofie,* 112 Wn.2d at 666, that is not what the Act does. Instead, the Act arbitrarily and without prior notice subjects ***any*** claim that falls within the broad ambit of .525(2) to dismissal under an elevated burden of proof (which will almost always exceed the burden of proof at trial), without discovery, and under the threat of crushing statutory sanctions and fee-shifting.

b. The Police Power Does Not Authorize the Enactment of Unconstitutional Statutes

While the "Legislature has power to shape litigation," as by enacting or eliminating causes of action, "[s]uch power ... has limits: it must not encroach upon constitutional protections." *Sofie*, 112 Wn.2d at 651. In other words, the Legislature does not have police power authority

to "eliminate" or "limit" a cause of action if doing so infringes on constitutional rights and principles. *Id.*

As to Petitioners' separation of powers challenge, simply re-framing the issue as a matter of the Legislature's police power does not allow the State to avoid the three-step analysis mandated by *Putman*: (1) Does the statute conflict with a court rule? (The Act does.) (2) If so, can the statute and the rule be harmonized? (Here, they cannot.) (3) If not, "the court rule will prevail in procedural matters and the statute will prevail in substantive matters." 166 Wn.2d at 980. By conveniently sidestepping *Putman*'s analytical framework, the State instead begins where it asks this Court to end; i.e., with the conclusion that the Legislature had authority to enact all elements of the Act as a lawful exercise of its police power. State Amicus Br. at 6-7. This reasoning fails.

Additionally, the Act cannot be a valid exercise of the State's police power if, as here, it trammels on a litigant's right of petition under the First Amendment to the United States Constitution (Petition for Review at 11), right of access to the courts (Pet'rs' Supp. Br. at 14, 17-19), and right to a jury trial (*id.*).

In *Sofie v. Fibreboard Corporation*, this Court considered whether the Legislature's police power authorizes a statutory limit on noneconomic damages recoverable by a personal injury or wrongful death plaintiff. 112

Wn.2d at 638. The underlying tort plaintiff argued on appeal that the statute restricted the essential function of the jury and a plaintiff's constitutional right to a jury trial. This Court agreed: "[B]y denying litigants an essential function of the jury, the Legislature has exceeded [the police power] limits." *Id.* at 651. In so doing, it ***rejected*** the very argument offered here by the State; i.e., that "the Legislature's greater power to abolish causes of action includes the lesser power to alter jury functions" (in that instance, determining damages). *Id.* at 652. The Court held further that "[a]s long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does." *Id.* Here, the Act violates the constitutional right to a jury trial by mandating that trial courts weigh evidence, a function reserved to juries, to determine whether a non-moving plaintiff has met its burden under .525(4)(b). *See* .525(4)(c) ("[t]he court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

2. The Washington Legislature Does Not Have "Coextensive Authority" With the Courts on All Matters of Civil Procedure

This Court has held that the power to promulgate procedural rules is essential to the independence and integrity of the judicial branch. *Putman*, 166 Wn.2d 9 at 980. Accordingly, "[i]f a statute appears to

conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.* (citing *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006)); *see also* RCW 2.04.200 (providing that "all laws in conflict" with rules promulgated by the Washington Supreme Court "shall be and become of no further force or effect").

Notwithstanding this clear mandate, the State incorrectly contends that the Legislature may enact procedural statutes—even statutes like the Act that purportedly create "entirely new procedural mechanism[s]" in addition to the Civil Rules—without raising constitutional concerns because the Legislature has "coextensive authority" with the courts on matters of civil procedure. State Amicus Br. at 14-15. The authority on which the State relies, *Sackett v. Santilli,* 146 Wn.2d 498, 506, 47 P.3d 948 (2002), does not support that proposition.

The *Sackett* Court considered whether the Washington Constitution conferred upon the Legislature exclusive authority to determine the circumstances in which a litigant may waive the right to a jury trial. *See* Wash. Const. art. I, § 21 ("The right of trial by jury shall remain inviolate, but the legislature may provide . . . for waiving of the jury in civil cases where the consent of the parties interested is given

thereto."). The *Sackett* Court explained that art. I, § 21 "should be read as a limitation on the power of the legislature" "to make provision for waiver *only* 'where the consent of the parties interested is given'" and "not [as] a grant of exclusive authority" to the Legislature to make rules concerning waiver of the right to a jury trial. 146 Wn.2d at 505 (emphasis original). With respect to this specific issue of waiver, the Court held that, "[s]ince the power to provide for waiver is not exclusively vested in the legislature, it should be viewed as coextensive between the legislature and the court." *Id.* at 506.

The Court did ***not*** conclude in *Sackett* that the Legislature has "coextensive" authority with the Judiciary over any issue of civil procedure other than waiver of jury by consent. In particular, the Court neither considered nor addressed a conflict—like those presented here—between a procedural mechanism imposed by the Legislature, *see* .525(4)(b), and procedural mechanisms already established by the Civil Rules; e.g., CR 8, 11, 12, and 56. *Putman*, however, did just that—and its holding undermines the State's position here.

3. The Anti-SLAPP Act's Motion to Strike Procedure Is Not Substantive

Substantive law "prescribes norms for ***societal*** conduct and punishments for violations thereof. It thus creates, defines, and regulates

primary rights." *City of Fircrest*, 158 Wn.2d at 394 (quoting *State v. Smith,* 84 Wn.2d 498, 501, 527 P.2d 674 (1974)) (emphases added). Procedural rules, on the other hand, "involve the '***operations*** of the courts by which substantive law, rights, and remedies are effectuated.'" *Putman*, 166 Wn.2d at 984 (quoting *City of Fircrest,* 158 Wn.2d at 394) (emphasis added).

The State argues that the Act provides a substantive right or remedy to targets of SLAPP lawsuits—rather than a procedural right or remedy—because the Act confers upon defendants an "immunity." State Amicus Br. at 7.[1] According to the State, this "immunity" is substantive because it carries with it the substantive right to be free "from the burden of litigation" where the moving party can show "by a preponderance of the evidence that the claim is based on an action involving public participation and petition" and the non-moving party cannot "establish by clear and convincing evidence a probability of prevailing on the claim." *Id.*; RCW 4.24.525(4)(b).

The State's argument proves too much. Just like the mechanism defined by .525(4), CR 12(b)(6) and CR 56 each define a procedural

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[1] The State contends that the fee-shifting and statutory damages provisions in the Act also create substantive remedies for SLAPP lawsuit targets. State Amicus Br. at 7. Whether or not those provisions are substantive has no bearing on this Court's analysis of .525(4) & (5)—the core mechanisms by which the Act operates and the targets of Petitioners' separation of powers challenge.

mechanism to dispose of claims before trial, and thereby "protect" defendants from the burdens and frustrations associated with discovery and litigation. But there is no serious argument that CR 12 and CR 56 create "primary rights" or regulate "societal conduct," and the State surely would not contend otherwise. Indeed, both mechanisms fall squarely within the authority of the judiciary to delineate the "operations of the courts by which substantive law, rights, and remedies are effectuated." *Putman*, 166 Wn.2d at 984.

Likewise, the Act's mechanism for disposing of claims before the "burden of litigation" is imposed does not create any "primary rights" or regulate "societal conduct." To the contrary, the rights the Act is intended to protect ***already exist*** under the First Amendment to the United States Constitution and art. I, § 5 of the Washington Constitution. Thus, defendants who move under the Act are not seeking to enforce ***new*** rights—they are seeking dismissal of claims that allegedly implicate rights they already had (i.e., before the enactment of the Act in 2010) to engage in petitioning activity and public participation.

Indeed, it is telling that the State supports its "substantive immunity" argument with only a single citation to authority; a case in which the Ninth Circuit compared California's anti-SLAPP statute to a "substantive immunity" statute for purposes of determining whether denial

of a special motion to dismiss should be subject to interlocutory review. *See* State Amicus Br. at 11 (citing *Batzel v. Smith*, 333 F.3d 1019, 1025 (9th Cir. 2003)). Numerous California courts, however, have squarely concluded that the California anti-SLAPP statute is procedural. *See Jarrow Formulas, Inc.* v. *LaMarche*, 31 Cal. 4th 728, 737 (Cal. 2003) ("[California's anti-SLAPP statute] is a procedural device for screening out meritless claims.") (internal citation omitted); *Brenton v. Metabolife Internat., Inc.*, 116 Cal. App. 4th 679, 684 (Cal. App. 4th Dist. 2004) ("The anti-SLAPP statute was enacted in 1992 for the purpose of providing an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims . . . .").[2] As Judge Kozinski of the Ninth Circuit Court of Appeals has explained in a concurring opinion:

> ***The [California] anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights***. The language of the statute is procedural: Its mainspring is a "special motion to strike"; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not "admissible in evidence at any later stage of the case"; and an order granting or denying the special motion is immediately

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[2] *See also Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 112 (Cal. App. 4th Dist. 2004) ("The new statute applies to lawsuits brought before its effective date because it constituted a procedural change regulating the conduct of ongoing litigation and thus triggered no retroactivity concerns.").

> appealable. *See* Cal. Civ. Proc. Code § 425.16. ***The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation***; and its only purpose is the swift termination of certain lawsuits the legislators believed to be unduly burdensome. It is ***codified in the state code of civil procedure*** and the California Supreme Court has characterized it as ***a "procedural device*** to screen out meritless claims."

Makaeff v. *Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, J., concurring) (internal citation omitted) (emphases added).[3]

Numerous other federal courts have likewise concluded that anti-SLAPP statutes—including Washington's Act—are primarily procedural in nature (often in the context of an *Erie* analysis into their applicability in federal diversity actions). *See, e.g.*, *Intercon Solutions, Inc.* v. *Basel Action Network*, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013), ("[RCW 4.24.525] cannot be applied by a federal court sitting in diversity because it is in direct conflict with Federal Rules of Civil Procedure 12 and 56."); *3M Co.* v. *Boulter*, 842 F. Supp. 2d 85, 111 (D.D.C. 2012) ("The [D.C. anti-SLAPP] Act is a summary dismissal procedure that the Defendants and

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[3] *But see U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999). In *Newsham*, the Ninth Circuit determined that California's Anti-SLAPP Act, Cal. Civ. Proc. Code § 425.16, was applicable in federal courts under an *Erie* analysis. *Id.* at 973. However, the *Newsham* Court's rationale does not support the conclusion that California's Act is "substantive" in any sense relevant to this Court's analysis. For example, the *Newsham* Court explained that the California Act should apply in federal court to discourage forum shopping and avoid inequitable administration of the law. *Id.* Those issues are not implicated here. On the other hand, tellingly, the *Newsham* Court describes California's Act as "an additional, unique weapon to the pretrial arsenal," that also includes Fed. R. Civ. P. 12 & 56.

the District seek to clothe in the costume of the substantive right of immunity—but this is largely a masquerade.").[4]

4. The State's Analogy to Qualified Immunity Is Misplaced

The State seeks to support its argument regarding "primary rights" by analogizing the Act to the federal doctrine of qualified immunity. *See* State Amicus Br. at 7-11. Qualified immunity is a judicially-created affirmative defense applicable to civil rights claims brought against certain public officials in their individual capacity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). When a state official's conduct deprives an individual of his constitutional rights, 42 U.S.C. § 1983 enables him to bring a claim for damages against the official.[5] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) provided an analogous cause of action against federal government officials.

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[4] *See also Stuborn Ltd. P'ship* v. *Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) ("I am persuaded that the [Massachusetts] Anti-SLAPP statute's special motion provision is predominantly procedural in nature, and that it directly conflicts with the Federal Rules of Procedure. Indeed, the [Massachusetts Supreme Judicial Court] itself has described the Anti-SLAPP statute as procedural.") (citations omitted); *Nader v. Me. Democratic Party*, 41 A.3d 551, 564 (Me. 2012) (Silver, J., concurring) ("Procedural mechanisms are designed to weed out meritless claims or lawsuits and prevent stale claims from being brought. The special motion to dismiss created by the anti-SLAPP statute is intended to do the same thing . . . .").

[5] Although § 1983 was enacted in 1871, its potential for use against public officials was not articulated until the United States Supreme Court's decision in *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

Neither § 1983 nor *Bivens* provide immunity—either absolute or qualified—for public officials. The United States Supreme Court developed the doctrine of qualified immunity to curtail the scope of liability threatened in § 1983 and *Bivens* by shielding government officers "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. In other words, the judicially-created doctrine of qualified immunity protects an official acting good faith even if her actions are later found to violate constitutional protections.

For several reasons, the analogy of the Act to qualified immunity fails. ***First***, unlike qualified immunity, the Act operates through procedural innovations—i.e., the special motion to strike, .525(4)(b), and the related stay of discovery, .525(5)(c). In contrast, qualified immunity did not create any new procedural mechanisms. It is an affirmative defense that can only be enforced through the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12 & 56; *Behrens v. Pelletier*, 516 U.S. 299, 307, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). Unlike .525(5)(c), discovery limitations are exercised through the discretionary authority of the courts under the Federal Rules. *Crawford-El v. Britton*, 523 U.S. 574, 597-601, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).

Second, unlike the Act, qualified immunity is a creation of the courts. Recognizing that vexatious plaintiffs could use the primary rights afforded by 42 U.S.C. § 1983 or *Bivens* to engage in meritless and distracting litigation against public officials, federal courts developed qualified immunity to expedite the "earliest possible" dismissal of claims against public officials who have performed their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The Act, by comparison, constitutes an attempt by the Washington Legislature to limit the discretion and authority of the courts to administer their own proceedings, in derogation of the separation of powers. *Putman at* 980.

Third, unlike qualified immunity, the Act does not arguably create "primary rights" extending to "societal conduct" beyond the courtroom (which Washington's Judiciary governs). Qualified immunity gives a specific category of persons—i.e., certain public officials—the right to engage in conduct that would previously have exposed them to civil liability. In other words, the legal position of this specific category of persons ***changed*** with the creation of qualified immunity by the federal courts. The same cannot be said for the Act, which simply defined a "new" (unconstitutional) "mechanism" for the enforcement of pre-existing rights.

Qualified immunity offers protection from suit that is "applicable unless the official's conduct violated a clearly established constitutional right." *Pearson*, 555 U.S. at 232. "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* Accordingly, following the judicial creation of qualified immunity, a public official could no longer be held liable or be subject to suit for his reasonable mistakes about the law or application of the law to a specific factual scenario.

For example, in *Rodis v. City, County of San Francisco*, police officers arrested the plaintiff on suspicion of counterfeiting currency in violation of federal law when Rodis attempted to use a valid bill printed in 1985 to purchase items. 558 F.3d 964, 967 (9th Cir. 2009). Rodis brought a § 1983 suit for deprivation of his Fourth Amendment rights, and the police officers responded with a motion for summary judgment claiming qualified immunity. The *Rodis* court evaluated first whether the Fourth Amendment right was "clearly established."

The court observed that there was no Ninth Circuit precedent on the issue of whether tender of a counterfeit bill provided sufficient Fourth Amendment probable cause for arrest. *Rodis*, 558 F.3d at 970. Yet, following the enactment of qualified immunity, the question had become

irrelevant: Since other Federal Circuits had held that tender of a counterfeit bill was sufficient probable cause for an arrest, the Fourth Amendment right invoked in *Rodis*, even if it existed, was not "clearly established." *Id.* Accordingly, the *Rodis* court reasoned that, under qualified immunity, the only relevant question was whether police officers were "plainly incompetent" in forming their mistaken belief that the old bill was, in fact, counterfeit. *Id.* at 970-71. The court resolved that question in the negative and dismissed the claim on qualified immunity grounds, thus shielding the police officers who—before the enactment of qualified immunity—would otherwise have been exposed to liability.

By comparison, the Act does not shield from liability defendants who would previously have been exposed. Instead, in a misguided effort to protect pre-existing constitutional rights, it disposes prematurely of meritorious claims where the non-moving party cannot meet the burden of establishing "by clear and convincing evidence a probability of prevailing." .525(4)(b).

The Act's special motion to strike procedure does not confer upon the target of a SLAPP lawsuit any "primary rights" or otherwise regulate "societal conduct" outside of the courtroom. The primary rights of public participation and petition, enshrined by the Washington and U.S.

Constitutions long before the Act was enacted, were unchanged by the Legislature's enactment of the Act in 2010.

5. The Anti-SLAPP Act's Motion to Strike Provision Is a Procedural Law That Conflicts With the Civil Rules, and Violates the Separation of Powers Doctrine

The State argues that even if the Act's motion to strike "mechanism" is procedural, the Act is nonetheless constitutional because the procedure does not "directly and irreconcilably" conflict with the Civil Rules. State Amicus Br. at 16. Adopting the conclusory analysis of Respondents, the State incorrectly reasons that since the Act "establishes a method for dismissal similar to summary judgment," there is no constitutional infirmity. *Id.*

The State's analysis is incorrect for two reasons. ***First***, as has been demonstrated by Petitioners in previous briefing, the Act fundamentally reallocates and redefines evidentiary burdens in a manner inconsistent with CR 56. Pet'rs' Supp. Br. at 11-14. To prevail on summary judgment, the moving party must demonstrate "the absence of an issue of material fact." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party carries this burden, the non-moving party must then demonstrate the existence of a "genuine issue" as to a "material fact" (regardless of the burden of proof at trial). CR 56. Just ***one*** factual dispute is enough to survive summary judgment. *Babcock v. State*, 116 Wn.2d

596, 598, 809 P.2d 143 (1991). The Act turns this standard on its head. The responding party must then establish by "clear and convincing evidence a probability of prevailing" on ***every*** element of its claims (which includes disproving even potential affirmative defenses). .525(4)(b). Just as the Court could not properly interpret a statute to mean "white" when its plain language states "black," the Court cannot read the Act's burden-shifting scheme to constitute summary judgment by a different name.

Second, even if the Court ignores the plain language of the Act and holds that it requires courts to employ a procedure "similar" to summary judgment, the Act nonetheless violates the doctrine of separation of powers because it ***supplements*** procedures described in the Civil Rules. In *Putman*, the Court "held that the addition of legislative requirements to the court rules for filing suit was unconstitutional." *Waples v. Yi*, 169 Wn.2d 152, 160, 234 P.3d 187 (2010). In other words, irreconcilable conflict exists with the Civil Rules even where the Legislature is attempting to create extra or additional procedures not set forth in the Rules.

The State does not even attempt to deny that the Act purports to add decision-making procedures to the existing Civil Rules. For example, it argues that "RCW 4.24.525 did not alter summary judgment, but instead ***created an entirely new dismissal mechanism***." State Amicus Br. at 16 n.8 (emphasis added). Elsewhere the State describes the Act's motion to

strike mechanism as "an ***additional tool*** to determine whether, as a matter of law, a claim based on public participation should be dismissed due to an immunity." *Id.* at 17. It thus flatly ignores *Waples'* interpretation of *Putman.*

For the foregoing reasons, the State has failed to undermine Petitioners' contention that the Act is unconstitutional facially and as applied under the Washington and Federal Constitutions.

B. Answer to Amicus Curiae Brief of the Reporters Committee for Freedom of the Press, *et al.*

The Amicus Curiae Brief filed by the Reporters Committee for the Freedom of the Press, and Twenty-Nine Others ("Reporters' Amicus Brief") argues that the Act is consistent with anti-SLAPP statutes in certain other jurisdictions, a number of which have been found by foreign courts to be consistent with foreign constitutions. Reporters' Amicus Br. at 3-9. In making general allusions to the constitutional jurisprudence of other jurisdictions, it transparently seeks to avoid the unique and unprecedented elements of the Act, the unique requirements of Washington constitutional law, and the unique precedent of this Court.

For example, the Reporters Committee cites repeatedly to jurisprudence applying California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, yet ignores the crucial fact that ***the California legislature***

makes that state's civil rules of procedure. Thus, there is not even conceivably a separation of powers problem when the California legislature enacts a procedural statute. *See Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1129, 52 Cal. Rptr. 3d 185 (2006). The entire separation of powers framework articulated by this Court in *Putman*, of course, turns on the fact that in Washington, this Court creates our Civil Rules. *Putman,* 166 Wn.2d at 980.

The Reporters Committee also conspicuously fails to mention significant foreign precedent that actually ***does*** bear on the analysis of Division One below; specifically, the Minnesota Supreme Court's decision in *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 231 (Minn. 2014), *reh'g granted, opinion modified,* 855 N.W.2d 233 (Minn. 2014). *Leiendecker* held in part that *Nexus v. Swift*, 785 N.W.2d 771, 781 (Minn. Ct. App. 2010), upon which Division One based its right of access analysis, was wrongly decided insofar as it failed to recognize that Minnesota's anti-SLAPP statute is "mutually inconsistent" with summary judgment. *See* Pet'rs' Supp. Br. at 13-14; ACLU Amicus Br. at 9-10. (Division One in the instant case both cited *Nexus* directly and cited its own opinion in *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 87, 316 P.3d 1119 (2014), which in turn relied on *Nexus*.) *Davis*, 180 Wn. App. at 547.

1. Washington's Anti-SLAPP Act Was Unprecedented in the U.S. and Is Infirm Under Washington Law

The Reporters Committee argues that the Act must be a legitimate exercise of the Legislature's authority under Washington law because anti-SLAPP statutes enacted by other jurisdictions, most notably California, have withstood constitutional scrutiny under foreign law. Reporters' Amicus Br. at 3-9. Its arguments disregard crucial distinctions between Washington law and that of other jurisdictions. For example, the California anti-SLAPP statute does not impose the heightened (and unconstitutionally vague) evidentiary burden on non-moving plaintiffs requiring them to present "clear and convincing evidence [of] a probability of prevailing" on the merits. *Compare* Cal. Civ. Proc. Code § 425.16 (plaintiff's burden on a motion to strike is to establish "a probability that the plaintiff will prevail on the claim") *with* RCW 4.24.525; *see generally* WELA Amicus Br.

Furthermore, as noted above, the authority to enact court rules is retained by the California Legislature—not its courts. *See* Cal. Civ. Proc. Code § 4. Under California law:

> It is now settled that without violating separation of powers principles, the Legislature may enact laws that govern the procedures and evidentiary rules applicable in judicial proceedings provided that the rules 'do not defeat or materially impair' the core functions of the judiciary.

Britts v. Superior Court, 145 Cal. App. 4th 1112, 1129, 52 Cal. Rptr. 3d 185 (2006) (citing *Le Francois v. Goel*, 35 Cal. 4th 1094, 1103, 112 P.3d 636 (2005)). The *Britts* court explained that California's separation of powers doctrine is implicated only if the Legislature attempts to "usurp" the constitutional authority of the courts "to resolve specific controversies between parties." *Id.* Accordingly, it held that there was no "interfere[nce] with this core judicial function" where the Legislature implemented a stay of discovery as part of California' anti-SLAPP statute. *Id.*

In contrast, it is well-established in Washington that "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009) (quoting *Brown v. Owen,* 165 Wn.2d 706, 718, 206 P.3d 310 (2009)). "Under our separation of powers jurisprudence, when a statute appears to conflict with one of our evidence rules and they cannot be harmonized, the statute must yield to the rule on a procedural issue." *Diaz v. State*, 175 Wn.2d 457, 471, 285 P.3d 873, 881 (2012) (citing *Putman*, 166 Wn.2d at 984); *see also Waples v. Yi*, 169 Wn.2d 152, 161, 234 P.3d 187 (2010).

2. The Burden Under "Step Two" of the Anti-SLAPP Act Is Unconstitutionally Vague

The Reporters Committee contends summarily that the Act's "requirement of the plaintiff to 'establish by clear and convincing evidence a probability of prevailing' in order to proceed with a SLAPP suit is ***not unprecedented***." Reporters' Amicus Br. at 9-10 (emphasis added). This is incorrect, and the Reporters Committee fails to support its contention with a single citation to authority. To Petitioners' knowledge, at the time the Act was enacted, no statute or rule in any U.S. jurisdiction incorporated this conflated and confusing evidentiary standard. *But see* Pet'rs' Supp. Br. at n.13; Nev. Rev. Stat. Ann. § 41.660 (enacted in 2013).

Alternatively, the Reporters Committee contends that even if Washington has no direct precedent for this standard, it is not "confusing or unconstitutional" to apprehend what this standard means because "both the 'clear and convincing' and probability standards in .525(4)(6) are commonly used in the evidentiary standards of other immunities, specifically in the First Amendment realm." Reporters' Amicus Br. at 10. This conclusory argument merely repeats that of Respondents and Division One below, and the Court need look no further than the record in this case for evidence that the risk of confusion, and thus the vagueness of the standard, are quite real. *See, e.g.*, CP 979, 984-85, 989, 990, 992, 995 (trial court holding Petitioners to an unmodified "clear and convincing"

evidentiary standard); Resp'ts' Supp. Br. at 12 (indicating that the Act's evidentiary burden must be lower than preponderance of the evidence); Resp'ts' Br. at 10 (characterizing the Act as imposing a "high burden of proof"); Reporters' Amicus Br. at 9-11 (assuming that the Act imposes a "clear and convincing evidence" burden). Indeed, based solely on the proceedings below, Respondents' own briefing, and the briefs of Amicus Curiae—not to mention briefing and argument in other anti-SLAPP litigation—it appears that no one can tell with certainty what the standard in .525(4)(b) means.

In an argument that only serves to undermine its own position, the Reporters Committee cites to federal defamation case law that imposes a burden of "clear and convincing proof" at trial. Reporters' Amicus Br. at 10-11 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). But this makes Petitioners' point. Petitioners have never contested that the "probability" and "clear and convincing" evidentiary burdens are widely applied ***independently***. The constitutional infirmity here is the Act's unprecedented ***combination*** of these evidentiary burdens into one confusing amalgam. The Reporters Committee provides no contrary authority.

3. The Anti-SLAPP Act's Discovery Stay Infringes on the Right of Access to the Courts

Petitioners have argued that the Act's mandatory discovery stay, .525(5)(c), infringes on a plaintiff's right of access to the courts and to a jury trial under the Washington and United States Constitutions, and also offends the Washington doctrine of separation of powers. Pet'rs' Supp. Br. at 16-19. The Reporters Committee dismisses those arguments, and asserts that "[t]he lack of discovery does not necessarily signal denial of a constitutional right." Reporters' Amicus Br. at 12. The Reporters Committee cites only one case for this proposition: *State v. Karas*, 108 Wn. App. 692, 32 P.3d 1016 (2001). *Karas* involved a "special proceeding" under a statute that neither limits discovery nor disposes of claims on the merits, and is therefore completely inapposite.

In *Karas*, the Court of Appeals considered a procedural due process challenge to the expedited procedures for obtaining a protective order under the Domestic Abuse Prevention Act, RCW 26.50.030 ("DAPA"). Under DAPA, a party seeking a protective order submits a petition and an affidavit to the court, whereupon the court sets a hearing fourteen to twenty-four days in the future to determine whether a protective order should issue. RCW 26.50.020(1), 26.50.030(1), 26.50.050. DAPA does not purport to allow or constrain discovery in advance of the expedited hearing. *Karas*, 108 Wn. App. at 699.

A DAPA protective order issued against Karas, and he appealed arguing that the statute violated his procedural due process rights "because the Act's procedures do not comply with the Civil Rules" in that DAPA "provides for only 14 days' notice and it does not contain any provision for discovery." *Karas*, 108 Wn. App. at 698-99. The State responded that DAPA is a special proceeding under CR 81(a) and the Legislature is free to enact procedural rules revising the Civil Rules in special proceedings. The State also argued that given the risk of irreparable harm and the emergent nature of the relief sought, DAPA procedures do not unduly burden party rights. *Karas*, 108 Wn. App. at 698-99. The court agreed with the State and upheld the protective order entered against Karas. *Id.* at 700.

Significantly, the court noted that while Karas complained that DAPA did not include specified discovery mechanisms, nothing in DAPA "preclude[s] a party from seeking discovery." *Id.* at 699. In other words, the court held that Mr. Karas was free to seek discovery under DAPA and the court would not reverse a trial court order simply because Mr. Karas failed to avail himself of discovery. That reasoning has no application here, where the Act's mandatory discovery stay imposes a blanket prohibition on discovery that can only be lifted under a showing of good cause. *See* Pet'rs' Supp. Br. at 16-17. *Karas* is further distinguishable

given the court's treatment of DAPA hearings, like TEDRA proceedings, as "special proceedings." *See* CR 81.

4. The Anti-SLAPP Act's Fee-Shifting and Mandatory Damages Provision Infringe on the Rights of Access to Courts, to Petition, and to Due Process

The Reporters Committee argues that the Act's fee-shifting and statutory-sanction provisions, set forth in .525(6)(a), do not implicate a plaintiff's First Amendment right to petition the courts because "meritless lawsuits are outside the scope of the Petition Clause." Reporters' Amicus Br. at 16 (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)). While the Reporters Committee's proposition is correct—baseless or frivolous litigation is not protected by the First Amendment, *see Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.,* 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)—that is irrelevant here because the Act's statutory sanctions are not limited to baseless or frivolous claims. *See, e.g., Akrie v. Grant*, 178 Wn. App. 506, 513, 315 P.3d 567 (2013) *review granted,* 180 Wn.2d 1008, 325 P.3d 913 (2014) ("[A]nalyzing whether the burden to prove the claim by 'clear and convincing evidence' has been met is vastly different from an inquiry into frivolity.")

A frivolous action "is one that cannot be supported by any rational argument on the law or facts." *Akrie*, 178 Wn. App. at 513 (quoting

Rhinehart v. Seattle Times, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990)). The Act, on the other hand, "mandates dismissal of all claims based on protected activity where the plaintiff cannot prove by clear and convincing evidence a probability of prevailing on the merits." *Id.* For this reason, as Division One observed, the "anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity." *Id.*

The Reporters Committee argues that the conceptual predecessor to the Act is the federal *Noerr-Penington* doctrine, which immunizes plaintiffs from civil liability for activities petitioning the government or the courts unless the petitioning activity is a "sham." Reporters' Amicus Br. at 16-18. But "sham" lawsuits constitute an even narrower category than frivolous lawsuits: A lawsuit is a "sham" only if the plaintiff fails to engage in an "objectively reasonable effort to litigate" the case, regardless of the merits of the litigation or the plaintiff's subjective belief therein. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). To the extent anti-SLAPP legislation traces its roots to the *Noerr-Penington* doctrine, it has clearly lost its way. Indeed, if that doctrine has any application to this dispute, it supports Petitioners' position that they should not have been subjected to crushing penalties for exercising their right to petition in a manner that does not approach being a "sham."

Plainly, the Act operates to impose statutory sanctions on non-sham and non-frivolous claims. Accordingly, it violated Petitioners' constitutional rights of access to the courts, to petition under the First Amendment, and to due process. *See* Pet'n for Review at 11.

5. The Anti-SLAPP Act Is Subject to Strict Scrutiny Review Because It Purports to Regulate Plaintiffs' Petitioning Activity

The Reporters Committee argues that a constitutional review of the Act should be limited to determining whether there is a "rational basis" underlying the Act. Reporters' Amicus Br. at 19-20. This is incorrect. "Strict scrutiny" should be applied when considering whether a statute infringes on a plaintiff's First Amendment right to petition the courts. *See Akrie*, 178 Wn. App. at 513. Under the strict scrutiny standard, a statute that burdens the right to petition is constitutional only when "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007).

"The anti-SLAPP statute exacts a content-based restriction on the right to petition, as it imposes a $10,000 statutory damage award only on those suits that are 'based on an action involving public participation and petition.'" *Akrie*, 178 Wn. App. at 513 (quoting RCW 4.24.525(4)(a)). "As the first amendment right to petition and the first amendment right of free

speech are generally subject to the same constitutional analysis, the standards applicable to regulation of content-based speech are equally applicable to the right to petition." *Id.* "[A]ny statute that purports to regulate such [protected first amendment activity] based on its content is subject to strict scrutiny." *Id.* (quoting *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007)).

C. Answer to Amicus Curiae Brief of the Washington State Association for Justice Foundation

WSAJF argues that "the unconstitutional provisions of the motion to strike procedure in §525(4)(b) do not meet the requirements for severability, and the statute must be struck down in its entirety." WSAJF Amicus Br. at 19. WSAJF is correct. A statute that contains an unconstitutional provision must be stricken completely if (1) "the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other" or (2) "the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008) (quoting *Gerberding v. Munro,* 134 Wn.2d 188, 197, 949 P.2d 1366 (1998)). The Act's motion to strike procedure—which unconstitutionally violates the doctrine of separation of powers, and

infringes on the rights of access to the courts and to a jury trial, *see* Pet'rs' Supp. Br. at 11-16—is the core of the Act. The rest of the Act cannot stand without it.

To be clear, Petitioners have not asserted a facial constitutional challenge to either the fee-shifting provision set forth in .525(6)(a)(i), or to the sanctions provision set forth in .525(6)(a)(ii). Petitioners have made an as-applied constitutional challenge to the sanctions provision (based on the rights to petition and due process), in light of the "extraordinarily large damage award" issued against them by the trial court. *See Akrie*, 178 Wn. App. at 513.

As to severability, however, Petitioners agree for two reasons with WSAJF that without the motion to strike procedure set forth in .525(4), "the definitions of terms in subsections (1) and (2), the limitation on use of the procedure in prosecutions in subsection (3), the other procedural provisions in subsections (4) and (5), and the remedies in subsection (6) are meaningless." WSAJF Amicus Br. at 19.

First, the Legislature's purpose in enacting .525 was to create the motion to strike procedure. Before .525 was drafted, Washington law already provided a defense to civil liability for individuals engaging in petitioning activity. *See* RCW 4.24.510. The pre-existing law even allowed a prevailing defendant to recover attorneys' fees and statutory

damages from the plaintiff. *Id.* Yet, the law did not contain any special procedural mechanism for the disposition of lawsuits. Accordingly, defendants asserted the defense through existing court procedures, such as CR 56. *See e.g., Gontmakher v. The City of Bellevue*, 120 Wn. App. 365, 369-70, 85 P.3d 926 (2004). The Legislature's professed concern in enacting .525 was to create a "method for speedy adjudication of strategic lawsuits against public participation." Laws of 2010, Ch. 118 § 1(2)(b). The Act's motion to strike procedure, as set forth in .525(4), was the tool the Legislature designed to accomplish this "speedy adjudication." Without the motion to strike procedure, the purposes of the Legislature in creating .525 would be negated; indeed, the Legislature is not likely to have enacted the Act without it.

Second, the motion to strike procedure is the foundation upon which the remainder of the Act is built. The other sections reference and incorporate .525(4)(b), and would be rendered meaningless without it. *See, e.g.*, .525(5)(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."); .525(5)(a) ("The special motion to strike may be filed within sixty days of the service of the most recent complaint . . ."). The Court cannot preserve these subsections without infringing on the authority of the Legislature to draft statutes. *Sedlacek v.*

Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014, 1019 (2001) ("[T]he drafting of a statute is a legislative, not a judicial, function."). For these reasons, and the reasons articulated by WSAJF, the Act cannot be preserved by severing the unconstitutional procedure set forth in .525(4).

D. Answer to Amicus Curiae Brief of Jewish Voice for Peace, *et al.*

The Amicus Curiae Brief filed by Jewish Voice for Peace, Palestine Solidarity Legal Support, the National Lawyers Guild, the American Muslims for Palestine, and the International Jewish Anti-Zionist Network ("JVP Amicus Brief") presents no apposite authority or argument to assist the Court in the resolution of this case. Nor does it address in any substantive way the issues actually presented. The JVP Amicus Brief should be disregarded.

In short, JVP (1) focuses the vast amount of its attention on a non-party entity which has never appeared in this case and is not mentioned once by Respondents in their submissions to this Court (or, for that matter, by any of the numerous other Amici Curiae); (2) relies on dozens of sources outside the record, most of which appear to be irrelevant internet-based citations to newspaper articles, blog posts, Youtube videos, and the like; and (3) mischaracterizes these sources as "Authorities," which they plainly are not. *See* Black's Law Dictionary (9th ed. 2009) ("primary

authority" defined as "[a]uthority that issues directly from a law-making body; legislation and the reports of litigated cases; "secondary authority" defined as "[a]uthority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article.").

Moreover, an amicus brief should only address issues also raised and preserved by the parties, as the Court will not generally address an issue raised solely by amicus. *See Long v. O'Dell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). In this instance, JVP does not even go so far as to raise new "issues." Instead, they offer a litany of new allegations—supported by little more than dozens of irrelevant website citations—in support of accusations aimed at unrelated third parties. This is wholly improper and cannot assist the Court in resolving the issues presented.

Under RAP 9.1(a), the "record on review" consists of a report of proceedings, clerk's papers, and exhibits. Under RAP 13.7(a), appellate review in the Supreme Court is limited to the record on review in the Court of Appeals. RAP 9.11 permits new evidence on appeal only under very special circumstances and subject to demanding standards. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 469, 229 P.3d 735 (2010) (reversing denial of motion to strike portions of an amicus brief as noncompliant with RAP 9.11 and RAP 10.3). JVP has not come close to meeting, or even mentioning, those standards.

III. CONCLUSION

Fort the reasons set forth above, and in Petitioners' prior briefing, Petitioners respectfully request that this Court reverse the Court of Appeals and remand this case for trial.

DATED this 8th day of January, 2015.

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DECLARATION OF SERVICE

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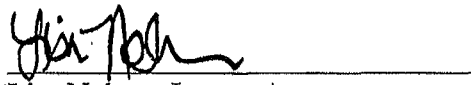
I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2015, at Seattle, Washington.



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Subject: No. 90233-0– Kent L. and Linda Davis, et al. v. Grace Cox, et al.—Petitioners' Consolidated Answer to Briefs of Amicus Curiae

Respectfully submitted in the above-referenced appeal is **Petitioners' Consolidated Answer to Briefs of Amicus Curiae**. The persons submitting this answer are Robert M. Sulkin (WSBA No. 15425) and Avi J. Lipman (WSBA No. 37661), whose email addresses are: rsulkin@mcnaul.com and alipman@mcnaul.com.

Thank you,

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