NO. 1010231

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Petitioner,

v.

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

Respondent.

PRAECIPE REGARDING BALLARD TERMINAL RAILROAD CO., L.L.C.'S ANSWER TO CITY OF SEATTLE'S PETITION FOR REVIEW

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FG:100489997.2

On July 15, 2022, Respondent Ballard Terminal Railroad Co., L.L.C. filed with the Court BALLARD TERMINAL RAILROAD CO., L.L.C.'S ANSWER TO CITY OF SEATTLE'S PETITION FOR REVIEW. The following edits have been made to the Answer and attached as Attachment 1.

- Table of Authorities inserted after Table of Contents. See Declaration of Nikea Smedley.
- Page 1, footnote 1: moved to the end of the sentence.
- Page 5, footnote 11: italics removed from number 11.
- Page 9, first paragraph: the word "round" changed to "around."
- Page 13, first paragraph under INTRODUCTION heading, second sentence: the word "interpreting" changed to "interpreted."
- Page 14, heading A: "RCW 13.4(b)(1)" corrected to "RAP 13.4(b)(1)."
- Page 19, sentence that begins "This Court in *Leishman* also stated…": "section 510" corrected to "Section .510."
- Page 21, last paragraph: period deleted before "BTRC incurred time…"

DATED this 18th day of July, 2022.

Respectfully submitted,

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Attachment 1

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I. INTRODUCTION

Seattle' Petition fails to demonstrate that it meets the standards for discretionary review in RAP 13.4(b). Seattle's Petition does not even cite RAP 13.4(b) until page 19, and even then it does not cite to a specific subsection. On page 25 Seattle cites to subsection .4(b)(4) for the first and only time, and pages 27 and 28 include Seattle's only citations to subsections .4(b)(1) & (2).

Subsection 13.4(b)(1) authorizes discretionary review "If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." There is no such conflict because Division I's decision relies on and applies this Court's decision in *City of Seattle v Burlington Northern Railroad Co.* ("*Seattle v. BNSF*"). [1]

Subsection 13.4(b)(2) authorizes discretionary review "If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals." Seattle does not cite a single such decision and no such conflict exists.

Subsection 13.4(b)(4) authorizes discretionary review "If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The only "issue" Seattle cites in its discussion of RAP 13.4(b)(4), Petition at 23 – 25, is Federal preemption of franchise agreements that interfere with railroad operations. That issue

[1] 145 Wash. 2d 661, 41 P.3d 1169 (2002).

was resolved in 2002 by this Court in *Seattle v. BNSF*.

To the extent Seattle impliedly seeks to create an issue of substantial public interest by asserting that review is needed because Division I's interpretation of the Operating Agreement and its decision regarding the Franchise "left the City with no recourse to close the Missing Link in the middle," Petition at 8, such assertions are belied by Seattle's own web page[2] which includes multiple bullet points stating it is moving forward to complete the Missing Link *without relocating the railroad*, *e.g.*:

- "We have refined the…Missing Link design to …allow us to start construction as soon as [2022].
- The design refinements adjust the project…, *such as eliminating the need to relocate railroad tracks on Shilshole Ave NW and NW 45th St.*

Seattle fails to meet any standard in RAP 13.4(b) and its Petition should be denied because it seeks only to relitigate arguments rejected by both the Superior Court and Division I.

II. STATEMENT OF THE CASE

The *entire record*, not just Seattle's version, shows the parties never reached agreement in the Operating Agreement regarding the future

[2] https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/bgtmissinglink (emphasis added).

location of the Missing Link[3] and that Seattle refused to negotiate the Franchise: as Mr. Montagne, Seattle's then-franchise attorney, confirmed in 1997:

> …I note that you are asking for changes to the City's *franchise boilerplate*. I am not authorized to negotiate changes to the City's *franchise ordinance*….[4]

Seattle "grants" franchises, it does not negotiate them, and since 1903 Seattle has granted nearly identical boilerplate franchises to railroads using City rights-of-way. Comparing the 1903 Franchise Ordinance 9119[5] at issue in *Seattle v. BNSF* with BTRC's 1997 Franchise Ordinance 118734, and with a contemporaneous 1997 BNSF Franchise Ordinance 11859,[6] shows that Seattle's franchises are non-negotiable, boilerplate documents as confirmed by Seattle's own lawyer, Mr. Montagne.

The *entire* context evidence shows the parties' intent[7] and supports the Superior Court's and the Division I's decisions denying Seattle's appeals. BTRC did not agree in the Operating Agreement or the Franchise to waive its right as a railroad to be regulated by the STB, and Seattle fails to provide any evidence or authority for this Court to reach different factual conclusions than the courts below.

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[3] CP 757:43-44 (Exhibit D to Operating Agreement showing location where BTRC understood Seattle would build the Missing Link); *see also* CP 847 (Memo confirming Missing Link location consistent with Exhibit D).
[4] CP 2458 (emphasis added).
[5] CP 2462-2477.
[6] CP 2479-2489.
[7] *Berg v. Hudesman*, 115 Wash. 2d 657, 667, 801 P.2d 222, 229 (1990).

III. ARGUMENT

A. Seattle Cannot Meet the Standard in RAP 13.4 to Obtain Review.

"To obtain discretionary review in this court, [Seattle] must demonstrate that the Court of Appeals Decision conflicts with a decision of this court or with a published Court of Appeals decision, or that [the City] is raising a significant constitutional question or an issue of substantial public interest, RAP 13.4(b)," [8] none of which it has done. Instead of showing how it meets the RAP 13.4 standards warranting review, Seattle is attempting to relitigate its losses in the Superior and Appellate Courts by rehashing arguments already twice considered and rejected.

B. Responding to Seattle's Argument B.1

Seattle's argument B.1 does not identify which subsection of RAP 13.4(b) it seeks to satisfy, and in fact no subsection of the Rule is implicated by Seattle's argument.

Seattle argues that Division I's decision is in "conflict" with the decisions of the Surface Transportation Board ("STB") and the Federal courts, but a conflict with Federal law is not a ground for discretionary review under RAP 13.4(b).[9]

The Federal cases that Seattle cites also are inapposite. They are

[8] *Matter of Williams*, 197 Wash. 2d 1001, 484 P.3d 445, 446 (2021).
[9] *Matter of Arnold*, 190 Wash. 2d 136, 152–53, 410 P.3d 1133, 1141 (2018).

cases involving railroads *voluntarily* trying to move/relocate tracks, *not being forced* to do so by a local government applying a local law.[10]

Or they are old cases that interpret Federal law as it existed before 1995,[11] when Congress enacted the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101, *et seq.*, and created the STB, and thus do not reflect Congress' intent to further consolidate railroad regulation in the STB by preempting local laws. Modern case law interpreting and applying the ICCTA shows Seattle's argument is meritless.[12]

This Court in *Seattle v. BNSF* analyzed the consequences of the enactment of the ICCTA, concluding:

> When the *ICCTA* was adopted in 1996, the federal regulatory scheme for interstate railroad operations was 'changed significantly.' 'The purpose of the Act was to ... significantly reduce regulation of surface transportation industries.' *The ICCTA placed with the STB " 'complete jurisdiction, to the exclusion of the states, over the regulations of railroad operations.' "*[13]

And went on to state:

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[10] *E.g., Detroit/Wayne Cnty. Port Auth. v. I.C.C.,* 59 F.3d 1314 (Port authority challenged railroad's plan to build new tunnel); *Union Pac. R.R. Co.*, 1998 WL 525587 (Railroad voluntarily sought reactivation of abandoned line to meet surge in construction demand); *CSX Transp., Inc.,* 2008 WL 3971091 (Private easement agreement).

[11] Petition, pages 13 and 14 *citing Texas & P. Ry. Co.* and *Railroad Comm'n of California,* which predate the ICCTA by nearly 70 years.

[12] *E.g., Friberg v. Kansas City S. Ry. Co.* 267 F.3d 439, 440 (5th Cir. 2001) ("The language of the statute could not be more precise, and it is beyond peradventure that regulation of train operations, *as well as the* construction and *operation of the tracks*, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise.")(emphasis added).

[13] 145 Wash. 2d 661, 665–66, 41 P.3d 1169, 1171 (2002)(emphasis added).

> The express language of the ICCTA imparts to the STB broad federal authority over all interstate and intrastate railroad activities and operations. The FRSA preempts local regulations that impact interstate and intrastate railroad safety. The City's ordinance that reserves to it the authority to control railroad activities that interfere with city traffic is subject to preemption under the ICCTA and the FRSA.[14]

This Court rejected Seattle's arguments twenty years ago regarding Federal preemption of local law, and even if this Court had not done so, alleging a conflict with Federal law is not a ground for discretionary review under RAP 13.4(b).

C. <u>Responding to Seattle's Argument B.2</u>

Seattle's argument in Section B.2 concludes by citing RAP 13.4(b) for the first time at page 19, but Seattle *still does not cite* to a specific subsection, and its argument is not relevant to any standard for discretionary review in those subsections.

Instead, Seattle makes a statutory construction argument about two provisions of the ICCTA, 49 U.S.C. § 10501(b) and § 10901, in an effort to create an issue of fact regarding "as-applied preemption." Petition at 19.

Division I correctly concluded that 49 U.S.C. § 10501(b) grants broad and exclusive jurisdiction to the STB to regulate nearly all facets of railroad operation, whereas 49 U.S.C. § 10901(a) requires a STB-

[14] 145 Wash. 2d at 674 (2002).

regulated railroad to obtain a permit in certain circumstances including extending a railroad line into new territory. Division I then applied this distinction to undisputed facts:

> Neither Seattle nor BTRC is seeking a certificate to authorize the relocation of tracks—instead, Seattle is seeking to use its governmental authority to require BTRC to relocate its tracks. This is the kind of local regulation that is not permitted by 49 U.S.C. § 10501(b). The cases to which Seattle cites indicate that the STB authorization is not required for the relocation of tracks. *However, they do not establish that Seattle may use its governmental authority to require this relocation.*[15]

And in footnote 5, the Court of Appeals specifically rejected Seattle's "as applied" argument:

> Seattle also contends that the superior court improperly analyzed the categorical preemption claim as an "as applied" claim and made factual assessments about the effect of Seattle's proposal on BTRC. Seattle is correct that an as applied preemption claim involves questions of fact, including about the impact of the relocation on the railroad, that the parties agreed were not before the court on summary judgment. However, because our review is de novo and there is no dispute of material fact relevant to our determination that the franchise is categorically preempted, we need not address this issue.[16]

Seattle is simply repeating arguments rejected for good reason by both the trial court and Division I, but even if Seattle were correct, disagreements about the construction of Federal statutes and an asserted issue of fact regarding as-applied Federal preemption are not standards for

[15] *City of Seattle v. Ballard Terminal R.R. Co., L.L.C.*, 509 P.3d 844, 851 (Div. 1, 2022) (emphasis added).
[16] *Id.* at 851 n.5.

discretionary review.

To obtain review, the question is not whether Division I properly interpreted and applied Federal case law or a statue as Seattle asserts in this argument, but whether Division I's decision *conflicts* with a decision of this Court or of another appellate court division, which showing is completely absent.

D. Responding to Seattle Argument C.

Seattle's Section C argument does not identify which subsection of RAP 13.4(b) is at issue, but it necessarily is subsection 13.4(b)(1) because Seattle asserts that Division I's decision conflicts with this Court's 2002 decision involving a similar Seattle franchise in *Seattle v. BNSF*, where this Court held that a franchise is a law that can be preempted like any local law:

> Here, the City's claim that it is entitled to regulate based upon its franchise ordinance is not persuasive. Burlington concedes that it operates under a franchise agreement under Ordinance No. 9119, which was passed in 1903. The agreement is nonetheless an ordinance--that is, a law. Like any state law, a local ordinance is subject to Congressional preemption.[17]

Seattle attempts to get around this holding by repeatedly asserting, contrary to the record, that BTRC's Franchise was "negotiated" and therefore is not a law subject to preemption, e.g.: "this Franchise emerged

[17] 145 Wash. 2d at 673.

from months of negotiations . . .” Petition at 21.

Nothing in the record supports such assertions. The record instead demonstrates that the Operating Agreement was negotiated and Seattle refused to negotiate the Franchise as Seattle’s then-franchise attorney confirmed in 1997:

> …I note that you are asking for changes to the City’s franchise boilerplate. *I am not authorized to negotiate changes to the City’s franchise ordinance*….[18]

In *Seattle v. BNSF*, this Court confirmed that a railroad franchise is a law subject to preemption like any other law, and Division I applied this holding to the similar railroad Franchise in this case. Seattle claims that in doing so Division I created a “bright-line rule,” but the only bright line is the one that is inherent in our legal system: local laws, which include franchises, are subject to preemption by State and Federal laws.

Seattle also claims that Division I somehow “did not properly rely on” *Seattle v. BNSF* because it is somehow “distinguishable,” Petition at 23, from the current case. Being “distinguishable” is not one of the required standards to obtain review pursuant to RAP 13.4.

Seattle cannot obtain discretionary review by mischaracterizing the record: the Franchise was *granted*, not negotiated, which Seattle’s then-attorney confirmed in 1997. Seattle’s extended discussion of how

[18] CP 2458 (emphasis added).

voluntary agreements cannot be preempted is irrelevant. There is no evidence in the record that BTRC *voluntarily* agreed to waive its rights and protections under federal law; and this Court's ruling that a franchise is a law subject to preemption controls.

E. Responding to Seattle Argument D.

Seattle's recent public statements – that it can complete the Missing Link without relocating BTRC's railroad tracks – refute its claim in Argument D that this Court should grant review because this case somehow involves an issue of "substantial public interest." Seattle's statements include, for example:

> The design refinements adjust the project to meet changing conditions along the corridor, *such as eliminating the need to relocate railroad tracks* and minor changes to reduce the amount of paving needed.[19]

Seattle has publicly confirmed it intends to complete the Missing Link *without* having to remove and relocate BTRC's railroad, and it cannot base a claim of "substantial public interest" on the pros and cons of the Missing Link itself.

And Seattle's claim that the Division I Decision "could deprive all governments in this state of the right to exercise any relocation rights under any franchise agreement with any railroad," Petition, page 24, is

[19] https://sdotblog.seattle.gov/2021/11/01/levy-dollars-at-work-refined-burke-gilman-trail-missing-link-design-allows-us-to-move-this-safety-project-forward-and-resume-construction-as-soon-as-next-year/

specious. It is this Court's decision in *Seattle v. BNSF* that determined the nature and extent of Federal preemption of railroad franchises, not Division I's application of such preemption to an almost-identical Franchise here.

F. <u>Responding to Seattle's Argument E.</u>

Despite finally citing to RAP 13.4(b)(1) & (2), Petition at 27-28, Seattle again fails to provide a citation to an appellate decision that conflicts with Division I's decision.

Instead, Seattle mischaracterizes the decision by claiming that Division I "declined to apply [certain principles of] contract interpretation…to the Operating Agreement and Franchise …" and instead "…determined that the Franchise was not a contract for purposes of applying [these] principle[s]." Petition at page 26.

But Division I actually said:

> Here, although the operating agreement and franchise ordinance are related to the same transaction, *the terms of the franchise ordinance may not be read into the operating agreement*. Seattle's argument that we must interpret the franchise ordinance and operating agreement together relies on case law involving two contracts. *Seattle cites no case suggesting that the terms of a preempted ordinance should be read into a valid contract.* Furthermore, even if the franchise ordinance may " ' assist[] in determining the meaning intended to be expressed by'" the operating agreement, the terms that give Seattle the unequivocal right to make BTRC relocate its tracks are part of the franchise ordinance, not the operating agreement. *Contrary to Seattle's argument, it is not a contradictory reading of the two documents to note that the franchise ordinance states something that the operating agreement does not.* Therefore, the franchise

> ordinance's provisions do not require a different reading of the operating agreement.[20]

In so ruling, Division I correctly determined that the Franchise included terms the Operating Agreement did not; that those terms were preempted by federal law; and that those terms could not be unilaterally read into the Operating Agreement because there is no case law, precedent or requirement to do so.

The only case Seattle cites, *Burns v. City of Seattle*, Petition at 27, does not conflict with Division I's decision. The *Burns* case says that a franchise is a contract that can be granted, not compelled.[21] That conclusion does not conflict with this Court's determination in *Seattle v. BNSF* that a franchise *also* is a law subject to federal preemption. Moreover, the franchises at issue in *Burns* related to Seattle's provision of electricity to other municipalities, which is not an area of law preempted by Federal law. This Court in *Seattle v. BNSF* and Division I in this case correctly concluded that Seattle cannot use a local franchise to regulate a railroad because that is an area of regulation Congress reserved in the ICCTA to the STB. There is no conflict with *Burns*.

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[20] 509 P.3d at 851 (Div. 1, 2022) (internal citations omitted; emphasis added).
[21] *Burns v. City of Seattle*, 161 Wash. 2d 129, 142, 164 P.3d 475, 482 (2007)("Indeed, a franchise is a contract. A city has statutory authority to "grant" a franchise, not to "require" one.").

BTRC's PETITION FOR REVIEW

I. INTRODUCTION

BTRC requests the Court grant review of Division I's denial of BTRC's anti-SLAPP claim because that decision, relying on Division III's decision in *Emmerson v. Weilep,*[22] conflicts with this Court's recent decision in *Leishman v. Ogden Murphy Wallace, PLLC.*[23] Both Division I and III interpreted RCW 4.24.510 to require a "civil action for damages" as a prerequisite to maintaining an anti-SLAPP claim where no such prerequisite exists in Section .510 and where the judicial imposition of such a condition is contrary to the public policy of the statute, as explained at length in this Court's analysis in *Leishman*. Review is thus proper pursuant to RAP 13.4(b)(1). Review also is warranted under RAP 13.4(b)(3) & (4) because the Division I and III cases raise significant questions of law under Washington's Constitution and involve issues of substantial public interest by narrowing the scope and applicability of Washington's anti-SLAPP statute. RAP 13.4(b)(3) & (4).

II. ISSUES

A. Whether Division I's and III's decisions conflict with this Court's decisions by creating a "civil action for damages" prerequisite in RCW 4.24.510 where none exists and where this Court has never

[22] 126 Wash. App. 930, 937, 110 P.3d 214 (Div. 3, 2005).
[23] 196 Wash. 2d 898, 904, 479 P.3d 688, 692 (2021), *reconsideration denied* (Aug. 19, 2021), *as amended* (Aug. 19, 2021).

required one? RAP 13.4(b)(1).

B. Whether Division I's and III's decisions raise significant questions of law under Washington's Constitution and involve issue of substantial public interest by narrowing the scope and applicability of Washington's anti-SLAPP by creating a "civil action for damages" barrier to obtaining the broad immunity granted by RCW 4.24.510? RAP 13.4(b)(3) & (4).

III. STATEMENT OF THE CASE

Seattle overreached when it sued BTRC to enjoin and restrain BTRC from exercising its Constitutional right to oppose the Missing Link before the STB and in the courts.

After BTRC filed a Petition with the STB asking it to preemptively bar Seattle from forcing BTRC to remove and relocate its railroad tracks, Seattle convinced the STB that resolution of that issue turned on issues of state contract law, leading the STB to hold BTRC's Petition in abeyance while those state-law issues were resolved.[24] Seattle then sued BTRC in Superior Court seeking to enjoin and restrain BTRC from pursuing its claims.

[24] CP 2179 ("*Issues involving federal preemption can be decided either by the Board or the courts in the first instance*. It is possible, therefore, that the [King County Superior] court will address preemption after it resolves the contract dispute.")(internal citations omitted; emphasis added).

Seattle's lawsuit would not have involved Washington's anti-SLAPP statute had Seattle simply sought interpretation of the parties' Operating Agreement and the Franchise. But in its Complaint Seattle asked *six separate times* that the lower court *enjoin and restrain* BTRC from further challenging or appealing Seattle's efforts to complete the Missing Link, beginning with section 5.3:

> 5.3 The City is entitled to a declaration that:.. (4) BTRC cannot take actions to preclude, prohibit, or interfere with the Missing Link's construction. The City is also entitled to an *order pursuant to RCW 7.24.190 restraining BTRC* from taking any further action inconsistent with such a declaration.[25]

Seattle made similar requests for declaratory and injunctive relief against BTRC in sections 6.4, 7.4 and 8.2[26] of its Complaint and these requests conclude with sections 8.3 and 8.4 where Seattle requested:

> 8.3 A declaration that … (4) BTRC cannot take actions to preclude, prohibit, or interfere with the Missing Link's construction; together with an *order restraining BTRC* from taking any further action inconsistent with such a declaration.
>
> 8.4 An injunction *enjoining* BTRC from taking any further action to preclude, prohibit, or interfere with the Missing Link's construction.[27]

BTRC, in its Response to Seattle's first motion for summary judgment, specifically asserted its constitutionally-protected rights to oppose the Missing Link:

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[25] CP 12:13-21.
[26] CP 13:6-7 and 18-21 and CP 14:11-12.
[27] CP 14:7-12 (emphasis added).

> BTRC has a right, protected by the petition clause of the First Amendment, to petition the government for redress of grievances by voicing its opposition to the City's actions regarding the Missing Link, by appealing SDOT's actions to the Hearing Examiner and to the Court, and by filing its STB Petition. The City's actions, including its request that this Court declare that BTRC is contractually prohibited from taking any action to interfere with the Missing Link's constriction violates BTRC's First Amendment rights….[28]

In response to a later City motion for summary judgment, the superior court dismissed BTRC's anti-SLAPP claims, which Division I affirmed.

IV. ARGUMENT

A. Division I's Decision Conflicts With *Leishman v. Ogden Murphy Wallace, PLLC* and the strong public policy at work in the anti-SLAPP statute.

Division I denied BTRC's anti-SLAPP claim "because Seattle did not sue for damages, as required under *Emmerson,"* and because BTRC did cite any "authority overruling" that case.[29] *Emmerson* is a Division III case that held:

> The term 'civil liability' should not be read in isolation, but construed within the context of the statute's intent and purpose to mean a civil action for damages.[30]

RCW 4.24.510 provides in pertinent part:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government, …is immune from *civil liability* for claims based upon the

[28] CP 388:21-23 and CP 389:1-4.
[29] 509 P.3d at 854 (Div. 1, 2022)
[30] *Emmerson v. Weilep*, 126 Wash. App. 930, 937, 110 P.3d 214, 217 (Div. 3, 2005).

> communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.[31]

Section .510 does not contain the words "civil action for damages." Instead, those are in the "Purpose" section .500:

> …The legislature finds that the threat of *a civil action for damages* can act as a deterrent to citizens who wish to report information to federal, state, or local agencies….[32]

This distinction is critical because the "…provision later in the chapter prevails if it is more specific than the provision occurring earlier in the chapter," and "[s]ignificantly, statutory policy statements do not give rise to enforceable rights and duties."[33] As this Court concluded in *Bailey v. State*:

> RCW 4.24.510 is the more specific provision because it sets out the requirements for obtaining immunity, while RCW 4.24.500 sets forth the findings and purpose of the legislation. *As a policy statement, RCW 4.24.500 does not detail requirements or limitations regarding a right conferred by a provision that is positioned later in the enactment*.[34]

Despite these provisions for statutory interpretation, Division III in *Emmerson* interpreted Section .510 by reading into it language from Section .500. In doing so, Division III created a prerequisite to immunity under RCW 4.24.510 that Division I relied upon but is not found in the statute itself and cannot be reconciled with *Leishman*.

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[31] RCW 4.24.510 (emphasis added).
[32] RCW 4.24.500 (emphasis added).
[33] *Bailey v. State*, 147 Wash. App. 251, 262–63, 191 P.3d 1285, 1291 (Div. 3, 2008).
[34] *Bailey, supra,* 147 Wash. App. at 263 (emphasis added).

This Court has consistently interpreted RCW 4.24.510 broadly and without a damages prerequisite, including just last year in *Leishman* wherein this Court explained:

> The immunity applies to any person who communicates a complaint or information to the government—not only those good faith speakers genuinely exercising their right to free speech or to petition the government but also those who make their communications in bad faith. Those who make their communications in bad faith may not receive statutory damages, but they will be immune from the suit based on the communication. Thus, RCW 4.24.510 tolerates some degree of over inclusiveness: in order for the immunity to protect against the burden of litigation that would deter people from reporting information to the government, any person who communicates information reasonably of concern to the government must be immune to suit based on the communication.[35]

This Court in *Leishman* also stated, when discussing Section .510, that:

> . . . we must refrain from adding words where the legislature has chosen not to include them.[36]

Division I's decision not only adds words to Section .510 ("civil action for damages") but the decision conflicts with the very meaning of the statute as explained by this Court, which is to provide immunity "to any person who communicates a complaint or information to the government."[37]

Section .510 is not limited to affording immunity only from "civil actions for damages" as Division I held: instead its plain words afford

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[35] 196 Wash. 2d at 908.
[36] *Id.* at 905 (internal citations omitted).
[37] *Id.* at 908.

immunity "from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization."[38] Only by reading words into Section .510 that are not there, contrary to *Leishman*, can Section .510 say what Division I concluded it says.

Providing further context regarding how Section .510 must be interpreted and applied, this Court continued in *Leishman*:

> Although legislative history is not necessary to interpret this unambiguous term, the history of Washington's anti-SLAPP statute is instructive on this point…[The 2002 amendments] broadened the protections of the immunity in order to make RCW 4.24.510 a more effective remedy for a SLAPP target… The immunity applies to any person who communicates a complaint or information to the government—not only those good faith speakers genuinely exercising their right to free speech or to petition the government but also those who make their communications in bad faith…[And again,] [w]e must refrain from adding words where the legislature has chosen not to include them… The plain language of RCW 4.24.510 includes no limitation regarding the purpose of the communication, the published intent of the statute states that communications are protected "regardless of content or motive," and the legislative history demonstrates that the legislature deliberately removed the good faith requirement. *The legislature could hardly have made it any clearer that this is an immunity with broad application.*.. If the legislature decides that this immunity should apply more narrowly…the legislature has the power to amend the statute. *It is not for this court to narrowly construe an unambiguously broad statute in order to make it comport with our vision of who anti-SLAPP statutes should protect*.[39]

Even though *Emmerson* was decided in 2005, this Court declined

[38] RCW 4.24.510.
[39] 196 Wash. 2d at 907-09 (citations omitted; emphasis added).

to read a "civil action for damages" limitation into Section .510 when interpreting that section in 2021. This Court's *Leishman* decision also is consistent with its earlier ruling in *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council* that only requires a three-part test to maintain an anti-SLAPP defense that does not include any civil action for damages prerequisite:

> A SLAPP primarily involves 'communications made to influence a governmental action or outcome.' The communications result 'in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations ... on (c) a substantive issue of some public interest or social significance.'[40]

Division I's decision, based upon Division III's decision, conflicts with this Court's decisions and merits review.

B. Division I's Decision Merits Review Pursuant to RAP 13.4(b)(3) & (4).

The Division I decision raises significant questions of law under Washington's Constitution and involves issues of substantial public interest because it creates a "civil action for damages" barrier to obtaining the broad immunity granted in RCW 4.24.510. The effect of the decision is that government agencies can now seek to enjoin the exercise of the constitutional right to petition the government for redress of grievances so long as they do not seek civil damages. In this case Seattle sued BTRC seeking *injunctive* relief to stop BTRC from exercising its right to oppose

[40] 146 Wash. 2d 370, 382, 46 P.3d 789, 795 (2002).

Seattle's public land use project—the Missing Link bike trail—before the STB and in the courts. Had Seattle prevailed, BTRC would have been preemptively prohibited from petitioning its government for redress.

It also is false to claim BTRC has not suffered damages responding to the City's attempt to enjoin it: BTRC incurred time, expense and attorneys' fees.[41] And had Seattle prevailed, the City would have charged BTRC nearly *$700,000*.00 to remove and relocate the rail tracks to accommodate the Trail, thereby likely bankrupting the railroad.[42]

V. CONCLUSION

BTRC respectfully requests the Court deny Seattle's Petition because it fails to meet the standards in RAP 13.4(b) but grant BTRC's Petition because it does meet these standards.

This document contains 4,927 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of July, 2022.

[41] *Chicago Title Ins. Co. v. Landry*, 95 Wn.App. 1044 (Div. 1, 1999)(unreported decision cited pursuant to GR 14.1); *see also Country Side Villas Homeowners Assn. v. Ivie*, 193 Cal. App. 4th 1110, 1118, 123 Cal. Rptr. 3d 251, 258 (2011)(" While it is true Country Side seeks declaratory relief regarding the interpretation of the association's governing documents, it also seeks damages in the form of attorney fees from Ms. Ivie.").
[42] CP 1947:12-18; *also* CP 2194-2197.

Respectfully submitted,

BROWER LAW PS

By *s/Joshua C. Allen Brower*
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FOSTER GARVEY PC

By *s/Patrick J. Schneider*
Patrick J. Schneider, WSBA No. 11957
Attorneys for Respondent Ballard Terminal Railroad Co., L.L.C.

DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on July 18, 2022, I caused to be served:

1. PRAECIPE REGARDING BALLARD TERMINAL RAILROAD CO., L.L.C.'S ANSWER TO CITY OF SEATTLE'S PETITION FOR REVIEW

Patrick Downs, WSBA #25276 Asst. Seattle City Attorney Office of the Seattle City Attorney PETER S. HOLMES 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7097 Telephone: 206-684-8615 Email: patrick.downs@seattle.gov eric.nygren@seattle.gov *Attorneys for Appellant/Cross Respondent City of Seattle*	☐ via hand delivery ☐ via first class mail, postage prepaid ☐ via facsimile ☐ via e-mail ☒ via ECF
Dale N. Johnson, WSBA No. 26629 Tadas A. Kisielius, WSBA No. 28734 Clara Park, WSBA No. 52255 Van Ness Feldman LLP 1191 Second Avenue, Suite 1800 Seattle, WA 98101 Telephone: 206-623-9372 Email: dnj@vnf.com tak@vnf.com cpark@vnf.com aka@vnf.com *Attorneys for Appellant/Cross Respondent City of Seattle*	☐ via hand delivery ☐ via first class mail, postage prepaid ☐ via facsimile ☐ via e-mail ☒ via ECF

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

DATED this 18th day of July, 2022, at Ephrata, Washington.

s/Nikea Smedley
Nikea Smedley, Legal Practice Assistant

NO. 1010231

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Petitioner,

v.

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

Respondent.

DECLARATION OF NIKEA SMEDLEY

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Attorneys for Respondent Ballard Terminal Railroad Co., L.L.C.

FG:100440838.4

Nikea Smedley, declares as follows:

1. I am a resident of the State of Washington, over the age of eighteen years, and competent to be a witness herein.

2. I am a Legal Practice Assistant at Foster Garvey PC.

3. On July 15, 2022 I asked our Document Processing department to prepare a Table of Authorities for the Answer to Petition for Review. Document Processing Technical Specialist Michelle Asay informed me that she was unable to insert the Table of Authorities on Friday afternoon because she received the error message attached to this declaration and the error could not be resolved in time for the 4:59 p.m. deadline for filing. The error was resolved by our Document Processing department today, Monday, July 18.

4. Michelle Asay is out of the office for a few days and not available today to sign a declaration of her own.

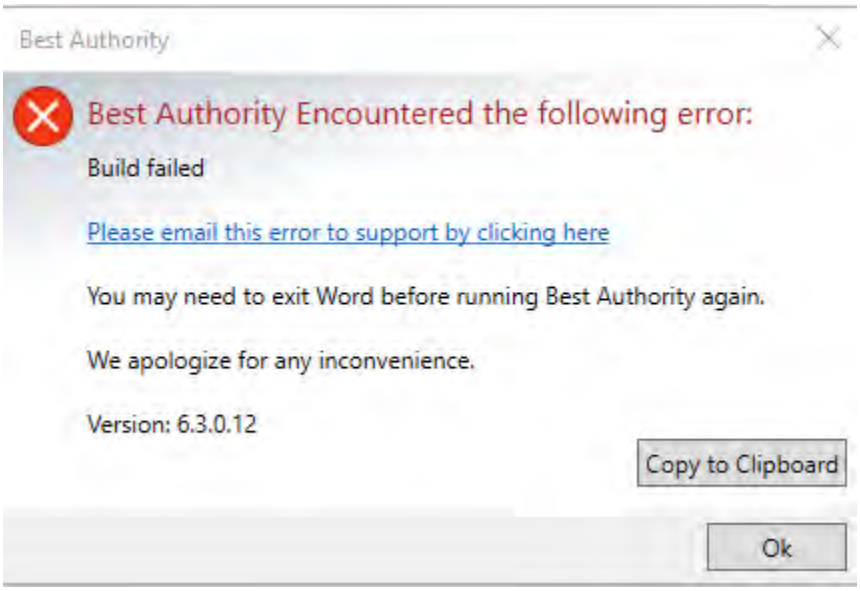
I hereby certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED at Ephrata, Washington, this 18th day of July, 2022.

Nikea Smedley

Nikea Smedley

Attachment



LevitJames.Core.LJException: Build failed ---> System.NullReferenceException: Object reference not set to an instance of an object.
at LevitJames.BestAuthority.AuthorityFormatter.TextRangeForOutput(Authority auth, IRichTextRendererItem output, SubgroupPosition effectiveSubgroupPosition, Boolean formatForLeftMarginText, TextRange emptyParagraphRtf, TextRange icon, LineEndType lineEndType, Boolean fixSmallCaps, Boolean outputForScreen)
at LevitJames.BestAuthority.ToaBuilder.WriteGroupAuthorities(TextRange outputRange, ToaGroup grp, AuthorityFormatter authorityFormatter, IList`1 authoritiesForOutputForGroup, IProgress`1 reporter)
at LevitJames.BestAuthority.ToaBuilder.WriteGroupsAndAuthorities(TextRange tRng, IList`1 authoritiesForOutput, IProgress`1 reporter)
at LevitJames.BestAuthority.ToaBuilder.WriteToa(IProgress`1 reporter)
at LevitJames.BestAuthority.ToaBuilder.WriteToRtf(IProgress`1 reporter)
at LevitJames.BestAuthority.Output.ToaDocumentWriter.BuildToaItem(ToaOutputItem outputItem, IProgress`1 reporter)
at LevitJames.BestAuthority.Output.ToaOutputManager.BuildCore(ToaDocumentWriter documentWriter, ProgressInfo progress)
at LevitJames.BestAuthority.Output.ToaOutputManager.Build(ProgressInfo reporter)
--- End of inner exception stack trace ---
at LevitJames.BestAuthority.Output.ToaOutputManager.Build(ProgressInfo reporter)
at LevitJames.BestAuthority.Transactions.BuildTransaction.DoTheBuild(ProgressInfo progress)
at LevitJames.BestAuthority.Transactions.BuildTransaction.RunBuild()
at LevitJames.BestAuthority.Transactions.BuildTransaction.OnInitiate()
at LevitJames.AddinApplicationFramework.AddinAppTransactionBase.Initiate()
at LevitJames.AddinApplicationFramework.TransactionManager.ExecuteTransaction(AddinAppTransactionBase transaction)

at LevitJames.AddinApplicationFramework.TransactionManager.ExecuteTransaction(TransactionMetadata metadata)
at LevitJames.AddinApplicationFramework.TransactionManager.ExecuteQueuedTransaction(AddinAppDocument activeDocument)

DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on July 18, 2022, I caused to be served:

1. DECLARATION OF NIKEA SMEDLEY

Patrick Downs, WSBA #25276 Asst. Seattle City Attorney Office of the Seattle City Attorney PETER S. HOLMES 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7097 Telephone: 206-684-8615 Email: patrick.downs@seattle.gov eric.nygren@seattle.gov *Attorneys for Appellant/Cross Respondent City of Seattle*	☐ via hand delivery ☐ via first class mail, postage prepaid ☐ via facsimile ☐ via e-mail ☒ via ECF
Dale N. Johnson, WSBA No. 26629 Tadas A. Kisielius, WSBA No. 28734 Clara Park, WSBA No. 52255 Van Ness Feldman LLP 1191 Second Avenue, Suite 1800 Seattle, WA 98101 Telephone: 206-623-9372 Email: dnj@vnf.com tak@vnf.com cpark@vnf.com aka@vnf.com *Attorneys for Appellant/Cross Respondent City of Seattle*	☐ via hand delivery ☐ via first class mail, postage prepaid ☐ via facsimile ☐ via e-mail ☒ via ECF

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

DATED this 18th day of July, 2022, at Ephrata, Washington.

s/Nikea Smedley
Nikea Smedley, Legal Practice Assistant

FOSTER GARVEY PC

July 18, 2022 - 3:16 PM

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