NO. 899614

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69300-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JASON DILLON, an individual,

*Plaintiff-Appellant*,

v.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company; DAVIS WRIGHT TREMAINE, LLP, a Washington company, JAMES GRANT and Jane Doe Grant, individually and the marital community composed thereof if any,

*Defendants-Respondents*.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

# BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENTS' PETITION FOR REVIEW



Jessica L. Goldman, WSBA #21856
Summit Law Group PLLC
315 Fifth Avenue South, Ste. 1000
Seattle, WA 98104
jessicag@summitlaw.com
(206) 676-7000

Eugene Volokh, CA Bar #194464
UCLA School of Law
First Amendment Amicus Brief Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
volokh@law.ucla.edu
(310) 206-3926*

* Counsel would like to thank Samantha Booth, a UCLA School of Law student who helped write this brief.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Articles and Other Sources**

## INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that has worked since 1970 to defend the First Amendment rights of the news media.

## SUMMARY OF THE ARGUMENT

1. Lawyers and journalists routinely take notes during important telephone conversations. It would be unprofessional for them not to take notes; relying on memory may even lead to libel or malpractice liability. And when a reasonable person calls a lawyer or a journalist to offer key facts about a case, he should expect the recipient will take notes—possibly very good notes, because the recipient knows shorthand or has someone who knows shorthand sitting in on the call.

Moreover, recording and note-taking in the process of creating First-Amendment-protected speech and petitioning are themselves presumptively protected by the First Amendment. Constitutional protection for speech itself would mean little if the protection could be circumvented by banning the acts necessary to creating that speech, whether moving one's lips, writing on a notepad, typing on a keyboard, or turning on a tape recorder.

To be sure, the right to record, like other First Amendment rights, may be subject to some limitations. For example, unauthorized electronic recording of communications that are reasonably expected to be private may

well be unprotected. But manual note-taking during a conversation to which Defendants themselves were parties, under circumstances objectively suggesting no reasonable expectation of privacy, must be protected.

2. The Court of Appeals' anemic reading of Washington's anti-SLAPP provision, RCW 4.24.525, is inconsistent with that law's purpose. Dillon has, at best, a weak case that he had a reasonable expectation of privacy in communications with opposing counsel. And anti-SLAPP laws are intended to dispose of weak cases as early and cost-effectively as possible.

To this end, RCW 4.24.525 mandates that a plaintiff show a likelihood of prevailing by "clear and convincing evidence" in order to withstand a motion to strike—a standard Dillon cannot meet. Thus, properly interpreted, the anti-SLAPP statute compels a finding for Defendants.

## ARGUMENT

### I. Defendants' Note-Taking Was Legal and Constitutionally Protected

The Court of Appeals justified its decision on the ground that "[t]he act of recording"—here, by taking verbatim notes—"is not itself protected speech or petitioning activity." *Dillon v. Seattle Deposition Reporters, LLC*, __ Wn. App. __, 316 P.3d 1119, 1139 (2014). Reasoning that "[t]he act of transcription does not express anything" and is not "intended to

convey any sort of message," the court analogized the note-taking to "sitting." *Id.* at 1134 (citation omitted).

But, unlike sitting, note-taking necessarily involves the creation of a new speech product and the transmission of expression, whether the note-taker's own expression or that of the original speaker. Indeed, speech or conduct is protected even when it assembles the speech of other people.[1]

And even independently of this well-established principle, note-taking is protected because it is a necessary part of creating other speech, including petitions for redress of grievances. To offer an analogous example, a person likely does not intend to convey a message simply by placing a flyer or a complaint in a photocopy machine. Yet a ban on the "act" of photocopying would interfere with the production and dissemination of protected speech and thus thwart the freedoms of speech, press, and petition.

For the same reason, courts have held that the act of recording, whether manually or through the use of an electronic device, must also be presumptively constitutionally protected:

> The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting

[1] *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569-70 (1995) (holding that "First Amendment protection" does not "require a speaker to generate, as an original matter, each item featured in the communication"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (holding that a cable operator engages in First-Amendment-protected activity by receiving and transmitting television programming created by other speakers).

> recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected .... [B]anning photography or *note-taking* at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio or audiovisual recording.

*ACLU v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (emphasis added).[2] To be sure, the constitutional protections afforded recording may be subject to some limitations aimed at protecting reasonable expectations of privacy. *See, e.g.*, *ACLU v. Alvarez*, 679 F.3d at 605-06 (reasoning that electronic recording of conversations "that carry privacy expectations" may be barred). But the act of recording—and of note-taking—is treated as presumptively protected First Amendment activity, even if that presumption can at times be rebutted.

Indeed, contemporaneous note-taking is practically required by journalists' and lawyers' professional standards, precisely because note-taking is so essential to ensuring the accuracy and effectiveness of speech and petitioning activity. And very good note-takers who can transcribe a conversation verbatim must be as protected as ordinary note-takers. Many journalists, many legal secretaries, and some lawyers are themselves skilled at

[2] *See also Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (likewise as to filming); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (likewise as to photography); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (likewise speaking of a "First Amendment right to film matters of public interest").

shorthand; surely they cannot be required to take less efficient notes in order to avoid illegality. Moreover, any distinction between acceptably mediocre note-taking and excessively good note-taking would be either unadministrably vague or arbitrary.

Nor does the interest in protecting private conversations against clandestine electronic recording apply in this case. This case involves note-taking, not electronic recording; and it involves a conversation that a reasonable person in Dillon's shoes could not have expected to be private.

When a reasonable person calls someone else's lawyer to offer important information, that person should expect the lawyer to take notes. This is especially so when—as here—the lawyer has interests adverse to the caller's, the caller is a sophisticated businessperson, and the caller's express purpose is to supply "facts" "beneficial" to opposing counsel's case against the caller's ex-employer. CP 175, 271-74. And Defendants' Petition for Review, at 3–5, points to still more facts that show Dillon could not have had a reasonable expectation of privacy.

Thus, because note-taking is inherently expressive and because it is often integral to creating protected speech, a finding that note-taking violates RCW 9.73.030 would raise a serious question as to the constitutionality of that law. Section 9.73.030 therefore should not be construed to apply to note-taking during conversations to which the note-taker is a party.

Finally, the Court of Appeals held that *any* act of recording, public or private, through electronic or manual means, is constitutionally unprotected. *See Dillon*, 316 P.3d at 1139 ("The act of recording is not itself protected speech or petitioning activity."). This rule is fundamentally unsound, unconstitutionally overbroad, and merits review and reversal.

## II. The Court of Appeals' Opinion Undermines the Anti-SLAPP Statute's Policy of Protecting First-Amendment-Protected Activity Against Meritless Lawsuits

Plaintiff's claim is therefore, at best, weak. The anti-SLAPP statute is intended to dispose of weak claims early. Yet the Court of Appeals' decision would remand this case for a potentially long and costly trial, something the anti-SLAPP statute is intended to prevent.

The Washington Legislature intended the anti-SLAPP statute to provide broad protection. It expressly stated that the law should "be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118, § 1. The Legislature adopted a heightened "clear and convincing" evidentiary standard for plaintiffs seeking to resist a motion to strike. RCW 4.24.525(4)(b). And the Legislature modeled its law after the broadly protective California anti-SLAPP statute.[3] (Courts, including

[3] *See* Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 Loy. L.A. L. Rev. 801, 812, nn.53-54

the lower court here, have therefore often viewed California cases as persuasive authority for interpreting RCW 4.24.525.[4])

Yet the opinion below fails to provide the broad protection that the Legislature intended. First, the opinion largely reduces subsection (2)(a) to a pleading rule by holding that it applies only when a plaintiff's claim is based on a defendant's act of *filing* a document in court, and not when a claim is based on note-taking the lawyer *uses to create* that filed document.[5] But the anti-SLAPP analysis requires a court to consider not the precise action pled, but rather (as the Court of Appeals acknowledged) whether the "principal thrust or gravamen of the plaintiff's cause of action" is "based on an action involving public participation and petition." *Dillon*, 316 P.3d at 1134 (quoting *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)). Indeed, *Martinez* held that "a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as [for example] a garden variety breach of contract [or] fraud claim when in fact

---

(2000) (comparing California's anti-SLAPP law to several other states' more "typical" statutes and concluding that California's is substantially broader).

[4] *See, e.g.*, *Dillon*, 316 P.3d at 1134-35, 1138-40; *see also Davis v. Cox*, No. 71360-4-I, 2014 WL 1357260, at *4-5, 9-11 (Wash. Ct. App. Apr. 7, 2014); *City of Seattle v. Egan*, __ Wn. App. __, 317 P.3d 568, 571 (2014).

[5] *See Dillon*, 316 P.3d at 1134 ("Dillon . . . alleged in his complaint that the violations of the privacy act were [Defendants'] acts of transcribing the telephone calls without his knowledge. Dillon's complaint does not even mention that the transcripts were filed in federal court.").

the liability claim *is based* on protected speech or *conduct*." *Martinez*, 113 Cal. App. 4th at 187 (emphasis added; internal quotation marks omitted).

Thus, what matters under RCW 4.24.525 is whether the defendant is being sued because he engaged in protected speech, petitioning activity, or "'conduct that advances and assists the defendants' exercise of a protected right.'" *Davis v. Cox*, No. 71360-4-I, __ P.3d __, 2014 WL 1357260, at *4 (Wash. Ct. App. Apr. 7, 2014) (citation omitted). If that is why the defendant is being sued, "then the cause of action targets the exercise of that protected right," *id.*, and is subject to the anti-SLAPP statute. Dillon's claim is indeed based on the Defendants' exercise of a protected right—Defendants' creating constitutionally protected speech (a written transcript) for use in a judicial proceeding.

Second, the Court of Appeals wrongly concluded that the "right to petition" under subsection 2(e) does not include access to courts. Yet the Legislature expressly directed that RCW 4.24.525 be liberally construed, and under any such liberal construction, "petition" must be understood as covering lawsuits. *E.g.*, *Petition*, Merriam-Webster, http://www.merriam-webster.com/dictionary/petition, defn. 2(a) (last visited Apr. 15, 2014) (defining "petition" to include "a formal written request made to an official person or organized body (as a court)").

Third, the Court of Appeals erred by treating the items listed in RCW 4.24.525(2)(a)–(e) as rigid categories, rather than as examples of the *types* of activities to which the Legislature intended anti-SLAPP protection to apply. RCW 4.24.525 applies broadly "to any claim, *however characterized*, that is based on an action involving public participation and petition," defined to "*include*" various specific examples. RCW 4.24.525(2) (emphases added). As the term "include" indicates, the definitions listed within RCW 4.24.525(2)(a)–(e) are not meant to be exhaustive or exclusive. Thus, even if subsections (a) and (e) do not themselves apply to Defendants' note-taking, the creation and preparation of the evidentiary record in a public proceeding is clearly "include[d]" as an activity "involving . . . petition" within the meaning of RCW 4.24.525(2).

Finally, it is true that anti-SLAPP legislation does not apply where the assertedly protected activity is *illegal as a matter of law*. *See, e.g.*, *Malin v. Singer*, 217 Cal. App. 4th 1283, 1291, 1293-94, 159 Cal. Rptr. 3d 292 (2013); *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, 193 Cal. App. 4th 435, 445-46, 122 Cal. Rptr. 3d 73 (2011). An activity may "be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality." *Gerbosi*, 193 Cal. App. 4th at 446. But there is nothing even close to a conclusive showing of criminality here. The Court of Appeals itself acknowledges that there is a "triable is-

sue of fact"—not a conclusive showing—as to whether the transcribed conversations were private and therefore could not legally be recorded. *See Dillon*, 316 P.3d at 1130. Indeed, for the reasons set forth in Part I, the note-taking here was not illegal at all.

Defendants have therefore met the threshold requirement of showing that Dillon's case is based on conduct protected by RCW 4.24.525. Thus, Dillon can defeat a motion to strike only by "establish[ing] by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). Dillon cannot make such a showing, and the Court of Appeals should have therefore granted Defendants' motion to strike.

## CONCLUSION

The Court of Appeals misconstrued both the Washington recording statute and the Washington anti-SLAPP statute. These errors, if left uncorrected, have the potential to criminalize, and thus to chill, a great deal of routine behavior by journalists, lawyers, and others. *Amicus* asks this Court to grant review in order to correct these grave errors.

Respectfully submitted this 21st day of April, 2014.

By */s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
Summit Law Group PLLC
*/s/ Eugene Volokh*
Eugene Volokh, CA Bar # 194464
UCLA School of Law
Attorneys for *Amicus Curiae*

## CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals via email and U.S. mail:

Dennis Moran
William A. Keller
Moran & Keller Law Firm
600 - 108th NE, Suite 650
Bellevue, WA 98004-5110

Ralph E. Cromwell, Jr.
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104

Bruce E.H. Johnson
Ambika K. Doran
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045

Michael B. King, WSBA #14405
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010

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

DATED in Seattle, Washington, this 21st day of April, 2014.

*/s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
Summit Law Group PLLC
315 Fifth Avenue South, Ste. 1000
Seattle, WA 98104
jessicag@summitlaw.com
(206) 676-7000

## OFFICE RECEPTIONIST, CLERK

**To:** Katie Angelikis
**Subject:** RE: Dillon v. Seattle Deposition Reporters, et al. (Supreme Court Case No. 899614)

Rec'd 4/21/14

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

**From:** Katie Angelikis [mailto:katiea@SummitLaw.com]
**Sent:** Monday, April 21, 2014 1:37 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Subject:** Dillon v. Seattle Deposition Reporters, et al. (Supreme Court Case No. 899614)

Dear Clerk,

Attached for filing in the above-referenced case, please find a **Brief of *Amicus Curiae*** and a **Motion for Leave to File *Amicus Curiae* Brief** on behalf of Reporters Committee for Freedom of the Press. These documents are being filed by:

Jessica L. Goldman, WSBA #21856
Summit Law Group, PLLC
(206) 676-7000
jessicag@summitlaw.com

Please let me know if you have any questions. Please confirm your receipt of this filing.

Thank you,

**Katie Angelikis** · *Legal Assistant*
206-676-7108
katiea@SummitLaw.com

315 5th Ave S Suite 1000
Seattle, Washington 98104