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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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MICHAEL SEGALINE

Petitioner,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR & INDUSTRIES, et al.

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS

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I. INTRODUCTION

The present case affords this Court with its first opportunity to examine both the scope and applicability of Washington's anti-SLAPP statute since a key 2002 amendment. That amendment arose from the legislature's frustration that courts were allowing "SLAPPs," or "strategic lawsuits against public participation," to proceed into unnecessary discovery by refusing early dismissal. LAWS OF 2002, ch. 232, § 1. Moreover, this case allows the Court to reinforce the legislature's intent that government agencies need a free flow of information to adequately serve the interests of Washingtonians, and any lawsuit targeted at thwarting that flow must be stopped at its origin.

For the reasons which follow, undersigned amicus curiae writing on behalf of the Washington State Association of Municipal Attorneys (WSAMA), advocates this Court affirm the Court of Appeals in two key respects. First, consistent with statutory construction principles and decisions from our sister state of California, this Court should hold that the term "persons" in RCW 4.24.510 encompasses government agencies. Second, this Court must give full effect to the legislature's 2002 amendment, enacted "to remove the requirements that the communication be made in good faith" for immunity to apply." FINAL BILL REP., SHB 2699, 57th Leg. (Wash. 2002) at 2.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSAMA is a non-profit organization of municipal attorneys in Washington. Washington has 281 cities and towns, ranging from Seattle at over half a million citizens to Krupp, with a population of about 60. WSAMA members represent municipalities throughout the state, as both in-house counsel and as private, outside legal counsel. WSAMA associate members include attorneys who consistently communicate with other government agencies on a variety of matters, such as employment, law enforcement, and licensing. As such, WSAMA has an interest in the outcome of this case.

III. STATEMENT OF THE CASE

The parties' briefs both adequately outline the facts. However, a point must be made in regards to *which* facts are germane to specific issues. On this point, some discussion of the appellate rules is necessary. In non-administrative review cases, the only components of the record on review are (1) reports of proceedings, (2) trial exhibits, and (3) the clerk's papers. RAP 9.1(a). For purposes of summary judgment, only the latter category—clerk's papers—are relevant to appellate review. *Cf.* CR 56(c) (summary judgment decided on written submissions). When the appellate court reviews an order granting or denying summary judgment, the more specific RAP 9.12 applies and limits the appellate court's review to "only

[that] evidence called to the attention of the trial court.” RAP 9.12. It is for this reason that summary judgment orders must specifically “designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.” *Id.* The rule exists to facilitate the doctrine that the appellate court sits in the same position as the trial court when reviewing summary judgment orders. *Mithoug v. Apollo Radio*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996).

WSAMA raises this point because the anti-SLAPP issue arose only in the State’s original motion for summary judgment, filed June 15, 2006. CP at 16-35. Accordingly, for purposes of considering the issues discussed by WSAMA, the Court must focus solely on evidence filed before August 4, 2006, the date on which the Thurston County Superior Court granted summary judgment to the State. CP at 500-02.¹ To this end, the only relevant facts are as follows.

Despite several years of transactions without incident, several employees of Respondent Department of Labor & Industries’ (“L&I” or

¹ Both the Court of Appeals and parties cited material from the record that was filed after the trial court’s first summary judgment order in their respective discussions on the anti-SLAPP issue. *E.g.*, Pet. for Review at 13; *Segaline v. Dep’t of Labor & Indus.*, 144 Wn. App. 312, 321 n.1, 182 P.3d 480 (2008) (quoting CP at 426). Though another defendant, Alan Croft, subsequently sought his own summary judgment on different grounds, that motion involved different submissions other than those filed before the trial court’s order on the anti-SLAPP issue. *See, e.g.*, CP at 353-476. In cases such as this, where there are multiple summary judgment orders, the appellate court must segregate the record and consider only that evidence called to the trial court’s attention for purposes of the specific summary judgment motion being reviewed. Otherwise, non-moving parties would be able to rely on evidence submitted after a trial court’s summary judgment order to create an issue of fact on that motion, which would contravene CR 56’s burden shifting scheme.

“State”) became fearful of Petitioner Michael Segaline in 2003. CP at 131, 141, 174. Though Segaline, a business owner required to obtain numerous permits from L&I, disputes the reasonableness of these employees’ fears, CP at 174-75, it is not disputed that some actually feared him. The turmoil in 2003 came to a head on June 19, when Segaline met with Alan Croft and David Whittle at the State’s offices. CP at 175. Croft was L&I’s Regional Safety and Health Manager and Whittle was the Electrical Program supervisor. CP at 51-52. The purpose of the meeting to address Segaline’s behavior in dealing with L&I employees. CP at 71. According to Croft, L&I had “concerns . . . for employee safety and security,” primarily because “employees felt intimidated or harassed or felt like business was being disrupted.” *Id.*

Segaline admits that he, Croft, and Whittle “did not communicate well” that day. CP at 175. When Segaline refused to leave the building despite several requests, Croft called 911. CP at 52, 175. The police responded, but Segaline was no longer on the premises. CP at 175. Based on this incident and prior interactions, Segaline was served 11 days later with a “no trespass” notice by an East Wenatchee police officer. CP at 54.

Roughly three weeks later, Segaline returned to L&I’s offices. CP at 55. Segaline began “causing a disturbance in the lobby and refus[ed] to leave,” *id.*, which prompted L&I employees to call 911 again, CP at 136.

After the police arrived, Segaline was ordered to leave. CP at 162-63. Segaline continued to refuse, at which point Officer Michael Schulz arrested him. CP at 163. Prosecutors initially filed trespassing charges against Segaline, but later voluntarily dismissed. CP at 176. Segaline then brought the underlying complaint against L&I, claiming negligence, malicious prosecution, and violations of his civil rights. CP at 3-6. L&I alleged among other affirmative defenses that it was immune under Washington's anti-SLAPP statute, RCW 4.24.510. CP at 14.

The trial court granted summary judgment to L&I, and the Court of Appeals affirmed. *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 182 P.3d 480 (2008). This Court then granted review. 165 Wn.2d 1044, 205 P.3d 132 (2009).

IV. ISSUES PRESENTED

(1) Whether a public entity is a "person" under RCW 4.24.510 when the legislature deliberately chose to use the term statutorily defined to include public corporations in lieu of the more restrictive terms "individual" or "citizen" in the statute's corresponding intent section.

(2) Whether the 2002 amendment to RCW 4.24.510 removed the requirement that good faith be shown in order for anti-SLAPP immunity to apply.

V. ARGUMENT

The Court of Appeals' decision should be affirmed in two key respects. First, the court correctly followed the well-reasoned analysis from *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 374, 85 P.3d 926 (2004), to hold that government entities are "persons" entitled to invoke the protections of RCW 4.24.510. Second, the court correctly concluded that a 2002 amendment to RCW 4.24.510 eliminated the requirement that a communication be in good faith in order for immunity to apply.

A. Washington's anti-SLAPP statute, the broadest of its kind in the nation, applies to communications between government agencies.

RCW 4.24.510 grants immunity to any "person who communicates a complaint or information to any branch or agency of federal, state, or local government" provided that the subject matter of the communication is "reasonably of concern to that agency or organization." If the immunity applies, then there is no "civil liability for claims based upon the communication" *Id.* At issue is whether L&I and/or local government entities, such as those represented by WSAMA members, are "person[s]" entitled to invoke the statute's protections.

As with any statute, this Court's goal is to ascertain the legislature's intent and to give effect to that intent. *HomeStreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The primary

means of accomplishing this task is to examine the statute's text. *Id.* If the language is plain, the Court's inquiry ends, *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009), because the Court "presume[s] the legislature says what it means and means what it says," *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (citations omitted).

Three reasons support the result reached by the Court of Appeals. First, there is no meaningful way to extend RCW 4.24.510 to private corporations and not public agencies without straining the statute's text. Second, a recent California Supreme Court decision persuasively holds that governments are entitled to raise anti-SLAPP immunity. Finally, the entire basis underpinning one court's expression that RCW 4.24.510 does not apply to government entities rests on an erroneous quotation.

1. RCW 1.16.080 applies in its entirety because no legislative basis exists to incorporate only part of the general definition of "person."

Both parties acknowledge RCW 1.16.080(1), which provides: "The term 'person' may be construed to include the United States, *this state*, or any state or territory, *or any public or private corporation* or limited liability company, as well as an individual." (Emphasis added). Segaline notes, correctly, that RCW 1.16.080(1) uses the permissive "may," meaning that the court is not obligated to adopt the full definition. *Accord In re Brazier Forest Prods., Inc.*, 106 Wn.2d 588, 595, 724 P.2d

970 (1986). Yet *Brazier Forest* also makes clear that when there is no statutory definition, the proper course to determine legislative intent is to look to the common law definition. *Id.* Under *Brazier Forest*, whether the Court uses the statutory definition from RCW 1.16.080 or the common law definition, “the term ‘person’ includes both natural and artificial persons, and therefore corporations.” *Id.* The Revised Code of Washington is devoid of any indicia that “person” would encompass a “private corporation” but not a “public . . . corporation.”

a. Because private corporations are “persons” under Washington’s anti-SLAPP statute, public entities are as well.

To this end, it is notable that no party seems to dispute that *private* corporations are “persons” under Washington’s anti-SLAPP law. *Accord Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 374-75, 46 P.3d 789 (2002). *Right-Price* ordered the dismissal of a defamation action against two non-profit corporations under Former RCW 4.24.510 (1999), holding the plaintiff’s case could not survive the statutory immunity. *Id.* at 383-84. Though *Right-Price* simply assumed without analysis that non-profit corporations *could* invoke RCW 4.24.510, that conclusion is consistent with precedent and logic.

Washington became the first state in the nation to enact anti-SLAPP legislation in 1989. LAWS OF 1989, ch. 234. Its purpose was to

remove the threat of civil action as a deterrent to communicating with federal, state, and/or local agencies. *Id.*, § 1, *codified at* RCW 4.24.500. Over time, 26 other states would follow suit and enact their own anti-SLAPP legislation. *See* California Anti-SLAPP Project, *Other States: Statutes and Cases*, at <http://www.casp.net/statutes/menstate.html> (May 29, 2009) (listing states). Most of those states have limited the application of their anti-SLAPP laws to only those defendants who claim the suit against them arose out of them exercising their constitutional right to either petition the government or speak freely.² Conversely, Washington has never limited RCW 4.24.510 in a similar fashion. Since its original enactment in 1989, RCW 4.24.510 applied to *all* “communicat[ions]” to government agencies (provided the subject matter was of reasonable concern to the agency). No reference of any kind is made to the exercise of federal or state constitutional rights. *See* U.S. CONST. amend. I; CONST. art. I, §§ 4, 5. *Compare* LAWS OF 1989, ch. 234, § 2, *with* RCW 4.24.510.

² *See, e.g.*, GA. CODE ANN. § 9-11-11.1(b) (lawsuit against defendant must be “act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia”); ME. REV. STAT. ANN. tit. 14, § 556 (“When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party’s exercise of the moving party’s right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss”); MASS. GEN. LAWS, ch. 231, § 59H (suit against defendant must arise out of “said party’s exercise of its right of petition under the constitution of the United States or of the commonwealth”); R.I. GEN. LAWS § 9-33-2 (“A party’s exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims.”).

To this end, it is noteworthy that our state constitution grants “[e]very *person* [the right to] speak, write and publish on all subjects, being responsible for the abuse of that right.” CONST. art. I, § 5. And there is no question that private corporations are “persons” within the meaning of article I, section 5. *E.g.*, *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 123, 937 P.2d 154 (1997).

It logically follows that *at a minimum*, any “person” who can invoke his, her, or *its* constitutional right to speak or petition the government is entitled to anti-SLAPP protection. Not surprisingly then, all parties seem to concur that artificial entities such as private corporations may invoke RCW 4.24.510 immunity. And if there were any doubt, it was resolved by the latest amendment to the statute: “SLAPP suits, involve communications made to influence a government action or outcome *which results in a civil complaint or counterclaim filed against individuals or organizations* on a substantive issue of some public interest or social significance.” LAWS OF 2002, ch. 232, § 1 (emphasis added). Clearly, artificial persons are “persons” entitled to invoke RCW 4.24.510.

But the analysis does not stop there. Statutorily, the legislature has drawn no distinction of any kind between private and public corporations. *See* RCW 1.16.080(1). The interpretation proposed by Segaline is sustainable only if there was some *other* legislative basis to incorporate

private entities into the term “person” while simultaneously excluding public entities.

The reality is that no such basis exists. Quite the contrary, the legislature has consistently treated both private and public entities the same on the issue of the ability to sue or be sued. *Compare* RCW 23B.03.020(2)(a) (corporations) *and* RCW 25.05.130 (partnerships), *with* RCW 28A.320.010 (school districts); RCW 35.21.010(1) (cities and towns); RCW 36.01.010 (counties); *and* RCW 52.12.021 (fire protection districts); ch. 4.92 RCW (state and its departments). While the equal opportunity to haul another or be hauled into court is by no means dispositive of the present issue, it does indicate legislative intent to treat private artificial entities no differently than public artificial entities.

b. The legislature’s use of term “person” reveals its intent that the term is broader than “individual” or “citizen.”

The primary argument advanced by Segaline in opposition to employing RCW 1.16.080 hinges on the anti-SLAPP intent section, RCW 4.24.500. Segaline takes the position that because RCW 4.24.500 references “[i]nformation provided by *citizens*” and “protect[ing] *individuals*,” the legislature intended to limit application of RCW 4.24.510 to “citizens” and “individuals.” *See* Suppl. Br. of Pet’r at 8-9.

This assertion directly conflicts with the “fundamental rule of statutory construction . . . that the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005) (citations omitted) (holding that the phrase “in a reckless manner” from the state’s vehicular homicide and assault statutes was different from the statutory definition of “reckless driving” “[b]ecause the legislature chose different terms”). Here, though the legislature wrote the intent section with the words “citizens” and “individuals,” it employed the broader term “person” in the operative section. *Compare* RCW 4.24.500 *with* RCW 4.24.510.

Illustrative on this point of law is *State v. Cooper*, 156 Wn.2d 475, 128 P.3d 1234 (2006). In *Cooper* the defendant was convicted of child endangerment. *Id.* at 477. The statute prohibited any “person” from exposing children to methamphetamine, which Cooper did by operating a methamphetamine lab in his girlfriend’s home in front of her children. *Id.* at 477 (quoting RCW 9A.42.100). Cooper claimed that he was not a “person” under the child endangerment statute because the intent section of the chapter 9A.42 RCW, “focuse[d] on parents, custodians, or caregivers,” which he was not. *Id.* at 479. Thus, similar to Segaline here, Cooper argued that the statute barring any “person” from child

endangerment did not apply to him because his status was not encompassed within the categories referenced in the intent section. *Id.*

This Court disagreed: “Cooper ignores the obvious – [the statute] unequivocally states that a ‘person’ is guilty of the crime of child endangerment *without* limiting the term ‘person’ to a parent, caregiver, or physical custodian.” *Id.* (italics in original). Segaline’s argument is identical to the same claim advanced by Cooper that this Court found to “ignore[] the obvious.” *Id.* Just like RCW 9A.42.100, RCW 4.24.510 “unequivocally states that a ‘person’ is [entitled to immunity] *without* limiting the term ‘person’ to a[n individual or citizen].” *Cooper*, 156 Wn.2d at 479 (italics in original).

When RCW 1.16.080 is juxtaposed against RCW 4.24.510, there is no sound reason consistent with statutory construction principles to incorporate only part of the general definition of “person” (i.e., private corporations) and exclude the remainder (i.e., “state” and “public corporations”). Consequently, RCW 1.16.080(1) applies wholesale, meaning both the state and public corporations are “person[s]” entitled to invoke RCW 4.24.510.

2. The California Supreme Court, in a well reasoned decision, construed its anti-SLAPP statute to apply to communications made by government agencies.

Notably, the issue confronting this Court was addressed recently by the California Supreme Court in *Vargas v. City of Salinas*, 46 Cal. 4th 1, 205 P.3d 207, 92 Cal. Rptr. 3d 286 (2009). *Vargas* arose out of a ballot measure seeking to repeal a local utility tax. *Id.* at 210. The City conducted an internal analysis to determine the budgetary effects of a repeal, and then posted this information on its website and in a newsletter mailed to city residents. *Id.* at 211-13. After the mailing, a group supporting the tax repeal sued the City, prompting the City to invoke California's anti-SLAPP statute. *Id.* at 214. That statute subjected any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . to a special motion to strike." CAL. CIV. CODE § 425.16.

The plaintiffs argued that the City was not entitled to claim anti-SLAPP immunity, but the trial court, California Court of Appeal, and Supreme Court all disagreed. *Vargas*, 205 P.3d at 214-16. The Supreme Court looked to the statutory definition of an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," and noted its

broad application to a myriad of communications. *Id.* at 216 (quoting CAL. CIV. CODE § 425.16(e)). The court recognized that the statute “does not purport to draw any distinction between (1) statements by private individuals or entities . . . and (2) statements by governmental entities or public officials acting in their official capacity.” *Id.* The court continued to hold the definition “is most reasonably understood as providing that the statutory phrase in question includes *all* such statements, without regard to whether the statements are made by private individuals or by governmental entities or officials.” *Vargas*, 205 P.3d at 216.

Like the California statute, RCW 1.16.080 and RCW 4.24.510 make no attempt to distinguish different types of “person[s] who communicates a complaint or information.” *Id.* This Court should follow the well reasoned *Vargas* decision and hold Washington’s anti-SLAPP statute applies to “*all* such [communications], without regard to whether the [communications] are made by private individuals or by government entities or officials.” *Id.*

3. The judicial basis for refusing to extend anti-SLAPP immunity to government agencies rests on dictum that has been misinterpreted.

Division Three of the Court of Appeals opined in *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 707 (2004), that “the action [against which the RCW 4.24.510 defense is asserted] must be against a

nongovernment individual or organization.” *Id.* at 758. Both the Court of Appeals below and L&I expressed that the language from *Skimming* was “dicta” and therefore not entitled to precedential value. *Segaline*, 144 Wn. App. at 324, ¶ 26; Suppl. Br. of Resp’t at 11-12. This is correct. However, a piece of the history behind this judicial quip is lacking from both the lower court’s and L&I’s discussions. Further examination of the statement’s true origins confirms beyond any doubt that it is entitled to zero precedential weight.

The statement first appeared in *Right-Price* where this Court quoted a book by Professors George Pring and Penelope Canan. *Right-Price*, 146 Wn.2d at 382. The book analyzed a 1994 “nationwide study of SLAPPs” that the professors dubbed the “Political Litigation Project.” GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT X* (1999). What both the *Right-Price* and *Skimming* courts failed to mention is that the “nongovernment” language came not from any definition of a SLAPP, but rather an introductory passage in which Professors Pring and Canan described the parameters of their study:

To qualify as a SLAPP *for our study*, then, we required that a lawsuit meet one primary and three secondary criteria. Primarily, it had to involve communications made to influence a governmental action or outcome, which, secondarily, resulted in (a) a civil complaint or counterclaim (b) *filed against nongovernment individuals or organizations (NGOs)* on (c) a substantive issue of some public interest or social significance.

Id. at 8-9 (emphasis added).³ *Right-Price* quoted this language, which led *Skimming* to express that anti-SLAPP defenses are limited to “nongovernment individuals or organizations.” *Right-Price*, 146 Wn.2d at 382; *Skimming*, 119 Wn. App. at 758. There is no basis to conclude that our legislature based the applicability of RCW 4.24.510 on the factors used by Pring and Canan to define their sample, particularly because the study was conducted five years *after* RCW 4.24.510 was first enacted. Compare LAWS OF 1989, ch. 234, with PRING & CANAN, *supra*.

Precedent that originates in dicta does not become correct over time simply because courts continue to repeat it. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 530-32, 79 P.3d 1154 (2003) (overruling cases from the Court of Appeals because of incorrect precedent that “originated in dicta”). This Court should clarify its quotation from Professors Pring and Canan and note that the statement does not, and cannot, define “person” as that word appears in RCW 4.24.510.

B. In order to give effect to the 2002 amendment to RCW 4.24.510, this Court must find that good faith is not a prerequisite to immunity.

Once again, the statute at issue here provides in relevant 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 communication to the agency or

³ The cited excerpts from this text are reproduced in Appendix C for convenience.

organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510. Broken down, RCW 4.24.510 requires four elements for immunity: (1) a “person,” (2) a “communic[ation] [of] a complaint or information,” (3) “to any branch or agency or federal, state, or local government,” (4) “the communication . . . regard[s] any matter reasonably of concern to that agency or organization.” *Id.* If all elements are present, there is immunity “from civil liability for claims based upon the communication.” *Id.* The Court of Appeals correctly found that there was no fifth element—good faith—implied in the statute.

Segaline still argues that good faith is required before an anti-SLAPP defendant can invoke RCW 4.24.510 immunity. This is not correct. In 2002 the legislature passed Substitute House Bill 2699 because courts had been denying early dismissal based on plaintiffs’ ability to create issues of fact on the issue of good faith. *See* LAWS OF 2002, ch. 232, § 1 (recognizing that the former version of the statute “has, in practice, failed to set forth clear rules for early dismissal review”). The original bill introduced in January 2002 deleted the “good faith” language from RCW 4.24.510 and changed the last sentence to read a prevailing defendant “is entitled to recover expenses and reasonable attorneys’ fees” instead of “shall be entitled to recover reasonable attorneys’ fees.” HB 2699, § 1, 57th Leg. (Wash. 2002). Various amendments to the original

bill were submitted, and it was the Senate's amendment that carried the day. See SEN. BILL REP., SHB 2699, 57th Leg. (Wash. 2002), at 1-2 (discussing differences between original and amended bills). The legislature therefore considered and rejected whether to keep good faith as a prerequisite to immunity: "The requirement that the communication must be made in good faith is removed. Instead of 'costs,' a prevailing defendant may recover statutory damages of \$10,000 unless the complaint or information is communicated in bad faith." *Id.* at 2.

Decisions that construed RCW 4.24.510 to require good faith examined only pre-2002 versions. *E.g., Right-Price*, 146 Wn.2d at 375 (construing 1999 version). The 2002 amendment is plain: good faith is now relevant *only* when a trial court decides whether "[s]tatutory damages *may* be denied." RCW 4.24.510 (emphasis added). Thus, a trial court has discretion to deny statutory damages only when it "finds that the complaint or information was communicated in bad faith." *Id.* But there is no discretion to deny immunity if the communication is of reasonable concern to the agency to which it is directed. RCW 4.24.510.

The legislature has determined that the state's public policy is best furthered by ensuring immunity with the free flow of information to the government. Any debate on this policy's wisdom is "for the legislature to resolve, not the courts." *Costich*, 152 Wn.2d at 479.

VI. CONCLUSION

“In order for any legislation to be effective, the definition of covered parties and actions must be sufficiently broad to encompass the greatest possible number of potential SLAPP situations.” Jennifer E. Sills, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547, 579 (1993). Ms. Sills is correct. RCW 4.24.510 exists to promote the free flow of information to all levels of government agencies. The legislature has never attempted to restrict RCW 4.24.510’s scope, and this Court should not accept Segaline’s invitation to do so here.

WSAMA respectfully asks this Court to affirm the Court of Appeals and hold that public entities are “persons” under RCW 4.24.510. And because “[t]he court must not add words where the legislature has chosen not to do so,” *State v. Christensen*, 153 Wn.2d 186, 194, ¶ 19, 102 P.3d 789 (2004), this Court should affirm that RCW 4.24.510 no longer requires good faith as a prerequisite to immunity.

RESPECTFULLY SUBMITTED this 17th day of September, 2009.

/s/ Daniel G. Lloyd

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APPENDIX A

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune 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. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510

APPENDIX B

Legislative History Regarding
Substitute House Bill 2699 (2002)

FINAL BILL REP., SHB 2699, 57th Leg. (Wash. 2002)

SEN. BILL REP., SHB 2699, 57th Leg. (Wash. 2002)

FINAL BILL REPORT

SHB 2699

C 232 L 02

Synopsis as Enacted

Brief Description: Providing immunity for communications with government agencies and self-regulatory organizations.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Lantz, Ahern, Benson, Crouse, Morell, Miloscia, Schindler, Dunshee and Esser).

House Committee on Judiciary
Senate Committee on Judiciary

Background:

In 1989 the Legislature passed a law to help protect people who make complaints to government from civil suit regarding those complaints. The law was a request from the Governor and Attorney General to address concerns that arose from a situation where a citizen reported a tax violation to a state agency, and the person who was in violation of the tax law sued the citizen for defamation. This type of suit is referred to as a SLAPP suit. SLAPP stands for "Strategic Lawsuit Against Public Participation." SLAPP suits are instituted as a means of retaliation or intimidation against citizens or activists for speaking out about a matter of public concern. Typically, a person who institutes a SLAPP suit claims damages for defamation or interference with a business relationship.

The anti-SLAPP law passed in 1989 provides that a person who in good faith communicates a complaint or information to any federal, state, or local governmental agency is immune from civil liability for any claim relating to that communication. An individual who prevails with the immunity defense is entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. This provision is also applicable to communications made to a self-regulatory organization that regulates persons in the securities or futures business and that has been delegated authority by a government agency and is subject to oversight by that agency.

Under appellate court interpretation of this statute in cases involving defamation actions, the court has held that the plaintiff has the burden of showing that the communication was not made in good faith, by showing that the communication was made with knowledge that it was false or with reckless disregard for its truth. A recent appellate court case found that the statute's application to communications made to a government "agency" includes communications made to the courts.

Summary:

A legislative finding and intent section is provided stating that: SLAPP suits are intended to intimidate the exercise of First Amendment rights and rights granted under Article I, Section 5 of the Washington Constitution; the anti-SLAPP law has failed to set forth clear rules for early dismissal of these kinds of suits; and United States Supreme Court precedent has established that as long as government petitioning is aimed at having some effect on government decision-making, the petitioning is protected, regardless of content or motive, and the case should be dismissed.

The anti-SLAPP law is amended to remove the requirements that the communication be made in good faith and to cover communications to a branch of the federal, state, or local government. In addition, the law is amended to allow a person who prevails on the defense to recover expenses,— as opposed to costs,— incurred in establishing the defense and statutory damages of \$10,000. The court may deny statutory damages if it finds the communication was not made in good faith.

Votes on Final Passage:

House 97 0
Senate 47 0 (Senate amended)
House 94 0 (House concurred)

Effective: June 13, 2002

SENATE BILL REPORT

SHB 2699

As Reported By Senate Committee On:
Judiciary, February 26, 2002

Title: An act relating to communications with government branches or agencies and self-regulatory organizations.

Brief Description: Providing immunity for communications with government agencies and self-regulatory organizations.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Lantz, Ahern, Benson, Crouse, Morell, Miloscia, Schindler, Dunshee and Esser).

Brief History:

Committee Activity: Judiciary: 2/25/02, 2/26/02 [DPA].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Kastama, Vice Chair; Costa, Hargrove, Long, McCaslin, Poulsen, Thibaudeau and Zarelli.

Staff: Lisa Ellis (786-7421)

Background: In 1989, the Legislature enacted a Strategic Lawsuit Against Public Participation (SLAPP) statute to help protect people who make complaints to government from civil suit regarding those complaints. A SLAPP suit is instituted as a means of retaliation or intimidation brought against individuals or organizations for speaking out on issues of public concern. Typically, a person who institutes a SLAPP suit claims damages for defamation or interference with a business relationship.

Summary of Amended Bill: An intent section clarifies the SLAPP suit definition, specifies that SLAPP suits are designed to intimidate the exercise of free speech, and identifies the purpose of the bill.

A person who communicates a complaint to: (1) any branch or federal, state, or local government agency or (2) any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency is immune from civil liability for any claim relating to that communication.

A prevailing defendant is entitled to expenses, reasonable attorneys' fees, and statutory damages of \$10,000 unless the complaint or information was communicated in bad faith.

Amended Bill Compared to Substitute Bill: An intent section is created to clarify the SLAPP suit definition, specify that SLAPP suits are designed to intimidate the exercise of

free speech, and identify the purpose of the bill. The requirement that the communication must be made in good faith is removed. Instead of "costs," a prevailing defendant may recover statutory damages of \$10,000 unless the complaint or information is communicated in bad faith.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (For Amendment) SLAPP suits involve the intention of intimidating individuals who speak out in front of public bodies. Existing law should be strengthened to protect individuals in SLAPP suits. The amendment would bring this bill into conformity with a recent U.S. Supreme Court opinion regarding petitioning government. The original bill is problematic because the "good faith" requirement is used as a defense in litigation.

(For the Bill) SLAPP suits can involve an elected official who is not acting within the scope of his or her elected duties. There is no immunity for elected officials if there is a question about the elected official's role. The "good faith" requirement is an important component to the bill. The award of costs, reasonable attorneys' fees, and expenses can prevent voices from being silenced.

Testimony Against: None.

Testified: PRO ORIGINAL BILL: Representative Patricia Lantz, prime sponsor; PRO STRIKING AMENDMENT: Shawn Newman, Citizens for Leaders with Ethics and Accountability Now (CLEAN); Steve Buckner, Metropolitan Mortgage and Securities Corporation; Phil Watkins, Taxpayers for Accountable Government.

APPENDIX C

Cited excerpts from
GEORGE W. PRING & PENELOPE CANAN,
SLAPPS: GETTING SUED FOR SPEAKING OUT (1999)

SLAPPS

GETTING SUED FOR
SPEAKING OUT

George W. Pring
AND
Penelope Canan



TEMPLE UNIVERSITY PRESS

Philadelphia

Temple University Press, Philadelphia 19122
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⊕ The paper used in this book meets the requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48–1984
Text design by Gary Gore

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Pring, George W. (George William), 1942–
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1. Freedom of speech—United States. 2. Petition, Right of—United States. I. Canan, Penelope, 1946– II. Title.
KF4770.P75 1995
323.47'0973—dc20 95-13610

Chapter 6: Excerpts from the June 19, 1990, study "Public Attitudes Toward Siting Residences for People with Chronic Mental Illness: A Study Conducted for the Robert Wood Johnson Foundation Program on Chronic Mental Illness" are used by permission of DYG, Inc.

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Preface

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The court perceives this [lawsuit], with a great deal of alarm, as part of a growing trend of what have come to be known as "SLAPP suits." (The term . . . was coined by two University of Denver . . . professors, Penelope Canan and George W. Pring.) . . . The filing of such suits has seen increasing use over the past decade. . . . The wholly lawful exercise, by citizens in a community, of the right to petition their local government to follow a certain course of action . . . should be vigorously protected and should not expose individuals to suit by persons unhappy with the results of such petitioning.

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—U.S. District Judge Charles R. Norgle Sr.
in *Westfield Partners, Ltd. v. Hogan*,
740 F. Supp. 523, 524–26 (N.D. Ill. 1990)

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Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

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—N.Y. Supreme Court Judge J. Nicholas Colabella
in *Gordon v. Marrone*,
155 Misc. 2d 726, 736,
590 N.Y.S. 2d 649, 656 (Sup. Ct. 1992)

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Great discoveries often come from an unexpected shock. Our discovery of SLAPPs came when they dropped—like Newton's apple—on our own heads in the late 1970s. For the environmental lawyer in Denver, it was the shock of having the tables turned and his environmental clients sued by the governments and polluters they opposed. For the sociologist then in Hawaii, it was the shock of having herself and her university threatened with a lawsuit for criticizing a publicly funded research program.

As it turned out, these were not unique experiences. We discovered case after case in which people were being sued just for talking to gov-

ernment, circulating a petition, writing a letter to the editor, speaking at a school board meeting, or testifying in a public hearing. We observed what happens to committed, public-spirited citizens suddenly confronted with a lawsuit, summonses, depositions, attorneys, and the trauma of a multi-million-dollar damage claim hanging over their lives. We saw the "role reversals" as community leaders were frightened into silence, supporters dropped out, resources drained away, campaigns foundered, and community groups died.

Our paths converged at the University of Denver. In 1983 we were introduced by law professor Joyce Sterling, a colleague and an expert in both our disciplines, who delighted in seeing "a lawyer and a sociologist interested in the same lawsuits." The more we shared our common concern, the more excited we became about this unstudied type of case. Initially, we saw such suits as attacks on traditional "free speech" and regarded them as just "intimidation lawsuits." As we studied them further, an even more significant linkage emerged: the defendants had been speaking out in government hearings, to government officials, or about government actions. Spurred by a prescient student article in the *Michigan Law Review*,¹ we realized this was not just free speech under attack. It was that other and older and even more central part of our Constitution: the right to petition government for a redress of grievances, the "Petition Clause" of the First Amendment. This refocused us dramatically, and from that time on we have concentrated on just that one subset of intimidation litigation: the cases we have named "Strategic Lawsuits Against Public Participation" in government, or "SLAPPs."

With that focus, we saw these lawsuits as more than an unaddressed legal phenomenon. We began to see their more ominous social and political implications, not only for the individuals and organizations under attack, not only for the issues and communities involved, but also for the future of "citizen involvement" or "public participation" in American democracy. Why were they happening? Who was filing them and against whom? Who was being sued? What was motivating them? Were they a new phenomenon? If so, why suddenly now? How numerous were they? How widespread? Were they increasing? Were they succeeding? If so, we began to wonder, could they not threaten that greatest of all democratic safeguards—the core reason for the First Amendment—an informed and involved citizenry?

To answer these questions, we initiated the Political Litigation Project at the University of Denver in 1984. With funding from the Hughes Research and Development Fund and the National Science Foundation, we carried out the first nationwide study of SLAPPs. We wanted to learn all

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we could about their legal aspects and their nonlegal aspects as well—their psychological, sociological, economic, and political ramifications. Our research approach therefore had to be interdisciplinary, multifaceted (combining both quantitative/statistical and qualitative/interview methods in hundreds of cases), and pioneering (amazingly, no one had ever studied lawsuits threatening the right to petition or communicate one's views to government). We examined hundreds of cases and interviewed nearly a thousand participants—on all sides—to get a complete, balanced view. We transformed that information into detailed computer coding and ran extensive comparative analyses of the participants, political activities, substantive issues, legal claims, judicial processing, and outcomes of the SLAPPs.

Phase I was a thorough statistical analysis of a diverse range of 100 SLAPPs. We studied the key legal documents, court filings, exhibits, and media coverage available in each case, and coded all information about participants, issues, claims, judicial processing, and outcomes. These computerized data gave us the basic "legal statics" of SLAPPs, characteristics that have remained virtually unchanged by the subsequent addition of hundreds more cases to the database and the almost daily telephone calls from SLAPP parties, legal counsel, government officials, researchers, and journalists over the past 10 years. Phase II involved in-depth interviews with 93 SLAPP filers, targets, and observers in 11 high-profile cases, chosen to represent the diversity of issues, communities, and participants we had found in the legal statics. These data enabled us to create a "model" of cross-institutional (political-legal) disputing. Phase III tested the model in 241 cases, through telephone interviews and lengthy follow-up questionnaires covering 268 filers, targets, observers, and a control group. We explored the causes and effects of SLAPPs through direct survey questions and cross-checked by using hypotheticals or "vignettes." (Annotated details of the study methodology, findings, and conclusions are provided in the Appendix.)

On the basis of our years of study, we conservatively estimate that thousands of SLAPPs have been filed in the last two decades, tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat. We found that the legal system is not effective in controlling SLAPPs. We found that SLAPPs profoundly affect the outcomes of future political disputes as well as those that trigger them. We found that filers of SLAPPs rarely win in court yet often "win" in the real world, achieving their political agendas. We found that SLAPP targets who fight back seldom lose in court yet are frequently devastated and depoliticized and discourage others from speaking out—"chilled" in the

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The Onslaught of SLAPPs

We shudder to think of the chill . . . on . . . freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society . . . is beyond calculation. . . . Competing social and economic interests are at stake. To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and, in the process, destroy the free exchange of ideas which is the adhesive of our democracy. . . . It is exactly this type of debate which our federal and state constitutions protect; debate intended to increase our knowledge, to illustrate our differences, and to harmonize those differences. . . . We see this dispute . . . as . . . more properly within the political arena than in the courthouse.

—West Virginia Court of Appeals
in *Webb v. Fury*,
282 S.E. 2d 28, 43 (W.Va. 1981)

A new breed of lawsuits is stalking America. Like some new strain of virus, these court cases carry dire consequences for individuals, communities, and the body politic. Americans by the thousands are being sued, simply for exercising one of our most cherished rights: the right to communicate our views to our government officials, to "speak out" on public issues. Today, you and your friends, neighbors, co-workers, community leaders, and clients can be sued for millions of dollars just for telling the government what you think, want, or believe in. Both individuals and groups are now being routinely sued in multimillion-dollar damage actions for such "all-American" political activities as circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, peacefully demonstrating, or otherwise attempting to influence government action. And even though the vast majority of such suits fail in court, they often succeed in the "real

pore.⁴⁷ Their message is unmistakable: There is a price to be paid for voicing one's views to the government. The price can be a multimillion-dollar personal lawsuit, which, even if successfully defended, can mean enormous expense, lost time, insecurity, risk, fear, and all the other stresses of extended litigation. That is an ominous message for every American, because SLAPPs threaten the very future of "citizen involvement" or "public participation" in government, long viewed as essential in our representative democracy.⁴⁸

The Definition: What Are "SLAPPs"?

Most lawsuits intimidate. Many are strategic, not just tactical. Many are motivated by retaliation, or filed to stop particular behavior, punish certain speech, or counter political activities. And many pressure tactics other than lawsuits are used to suppress political behavior. Our first challenge, then, was to decide exactly what we meant by "SLAPPs": what we wanted our study to cover and what not. To focus our research, we devised a clear-cut, objective definition. The key to defining SLAPPs, we found, did not lie either with the parties' subjective motives or good faith or with who was right or wrong on the merits. Contrary to what one might expect, we found "good" people who file SLAPPs without intending to harm constitutional rights, and "bad" people who get SLAPPED yet still merit constitutional protection.

We asked, "Why do we care about these cases?" The answer, we concluded, lay in their cause and effect: we care about them because they happen when people participate in government, and they effectively reduce future public participation. It is the single element of reaction to political action that distinguishes SLAPPs from the everyday retaliatory lawsuits seen in the business, labor, contract, and other arenas. Our definition focuses on that key factor: whether defendants were engaged in activity covered by the Petition Clause, which is both the cause and the effect that should concern us. Our definition thus avoids subjective judgments about "motives" or "intent," "good or bad faith," "truth or falsity," "rightness or wrongness." The real value at stake is, quite simply, whether our nation will continue to encourage, to protect, and to be a government "of the people, by the people, and for the people."

To qualify as a SLAPP for our study, then, we required that a lawsuit meet one primary and three secondary criteria. Primarily, it had to involve communications made to influence a governmental action or outcome, which, secondarily, resulted in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations (NGOs) on

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(c) a substantive issue of some public interest or social significance. These criteria provide a neutral, manageable, easily applied definition whereby even opponents can agree whether a case is a SLAPP or not. Although the Petition Clause covers even more (criminal cases, government officials, private interest petitioning), this four-part definition captures the core of "self governance" that our Constitution's drafters sought hardest to protect (see Chapter 2).

Here are the rationales for our criteria. *Lawsuits only*: We recognize that there are other tactics for suppressing political opposition—employment sanctions (the "whistleblower" syndrome, for example), boycotts, societal shunning, physical violence, and many other pressure tactics can be used and have been studied—but what surprised and intrigued us was that no one had studied the use of litigation to achieve political intimidation. *Petition Clause only*: Certainly lawsuits are used to attack many other forms of constitutionally protected actions and beliefs—rights of speech, press, association, religion, equal protection, due process, on and on—but these have been extensively studied, whereas no one had empirically examined the use of lawsuits against Petition Clause-protected activities. *Civil cases only*: Criminal prosecutions can be similarly used to suppress political activity, and individuals have contacted us about their "criminal SLAPPs." They are beyond the scope of what we could accomplish in this research but certainly merit study. *NGOs only*: Government officials and employees are also protected by the Petition Clause, but other citizens are far less protected. Government personnel have different and more diverse legal protections, in-house legal resources, public financial backing, social supports, job expectations, differing career impacts. Moreover, lawsuits against government personnel have already been extensively studied. *Substantive issues only*: By focusing on "issue" politics, we exclude election campaigns for political office, but do so only to keep the study manageable; many election-to-office SLAPPs came to our attention, making this another area that deserves study. *Public issues*: Concededly, the Petition Clause also protects the self-interested (even venal and greedy) seeker of private, personal advantage, and concededly, in many cases it is hard to distinguish between self-interest and public interest. Our personal sympathies, however, are with the effect of litigation on issues of societal and political significance, more common to us all, and without being overly compulsive about it, we have attempted to focus on the cases that evidence attributes beyond simple self-interest.⁴⁹

To denote SLAPP parties we have found it clarifying to use the terms "filers" (rather than "plaintiffs") and "targets" (rather than "defendants") for, respectively, the initiators and the objects of SLAPPs. The majority of

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CERTIFICATE OF SERVICE

I certify that on or before the date below, I mailed (via first class mail, postage prepaid) a copy of the foregoing document to each and every attorney of record herein, as identified below:

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DATED on September 17, 2009.

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