

No. 89961-4

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

JASON DILLON, an individual,

Respondent,

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,

Petitioners.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

CORRECTED

PETITIONERS' RESPONSE TO BRIEFS OF *AMICI CURIAE*
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION
AND ACLU REGARDING WASHINGTON ACT AGAINST STRATEGIC
LAWSUITS AGAINST PUBLIC PARTICIPATION

Ralph E. Cromwell, WSBA #11784
BYRNES KELLER CROMWELL LLP
1000 Second Avenue, Suite 3800
Seattle, Washington 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522

Michael B. King, WSBA #14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Stephen M. Rummage, WSBA #11168
Bruce E.H. Johnson, WSBA #7667
Ambika K. Doran, WSBA #38238
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: (206) 622-3150
Facsimile: (206) 757-7069

Attorneys for Defendants-Petitioners

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. The Legislature Passed RCW 4.24.525 Based on Settled Law, Including California’s Anti-SLAPP Statute.	2
B. This Court Should Not Consider Amici’s Constitutional Challenges.	7
C. The Washington Anti-SLAPP Statute Does Not Violate the Right to Trial by Jury.	9
1. The Statute Uses a Summary Judgment Standard.	9
2. Courts (and the ACLU) Agree That Anti-SLAPP Statutes Do Not Violate Jury Trial Rights.....	13
3. The “Clear and Convincing” Standard Does Not Make the Law Unconstitutional.....	16
III. CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Abbas v. Foreign Policy Grp., LLC</i> , 975 F. Supp. 2d 1 (D.D.C. 2013)	5
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	18
<i>AR Pillow Inc. v. Maxwell Payton, LLC</i> , 2012 WL 6024765 (W.D. Wash. Dec. 4, 2012)	10
<i>Castello v. City of Seattle</i> , 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010).....	4
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	11, 12
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932).....	13
<i>Guam Greyhound v. Brizill</i> , 2008 WL 4206682 (Guam Sept. 11, 2008).....	5
<i>Liberty Warehouse Co. v. Burley Tobacco Growers' Co- Op. Mktg. Ass'n</i> , 276 U.S. 71 (1928).....	17
<i>Phoenix Trading, Inc. v. Loops LLC</i> , 732 F.3d 936 (2013).....	10
State Cases	
<i>ACLU of Minnesota v. Tarek In Ziyad Academy</i> , No. 09-cv-00138-DWF-JJG, Dkt. 93 (Sept. 30, 2009).....	15
<i>Anderson Dev. Co. v. Tobias</i> , 116 P.3d 323 (Utah 2005).....	5

<i>Bernardo v. Planned Parenthood Fed'n of Am.,</i> 115 Cal. App. 4th 322 (2004)	5
<i>Davis v. Cox,</i> 180 Wn. App. 514, 325 P.3d 255 (2014)	10, 16
<i>Dillon v. Seattle Deposition Reporters, LLC,</i> 179 Wn. App. 41, 316 P.3d 1119 (2014)	7
<i>Dixon v. Superior Court,</i> 30 Cal. App. 4th 733 (1994)	13
<i>Duracraft Corp. v. Holmes Prods. Corp.,</i> 691 N.E.2d 935 (Mass. 1998)	5
<i>Equilon Enters., Inc. v. Consumer Cause, Inc.,</i> 29 Cal. 4th 53 (2002)	5, 6, 14
<i>Gilbert v. Sykes,</i> 147 Cal. App. 4th 13 (2007)	5
<i>Global Waste Recycling, Inc. v. Mallette,</i> 762 A.2d 1208 (R.I. 2000)	5
<i>Herron v. KING Broadcasting Co.,</i> 112 Wn.2d 762, 776 P.2d 98 (1989)	18
<i>Hometown Props., Inc. v. Fleming,</i> 680 A.2d 56 (R.I. 1996)	5, 15
<i>Jarrow Formulas, Inc. v. LaMarche,</i> 31 Cal. 4th 728 (2003)	14
<i>Lafayette Morehouse, Inc. v. Chronicle Publishing Co.,</i> 37 Cal. App. 4th 855 (1995)	13, 14
<i>Lamon v. Butler,</i> 112 Wn.2d 193, 770 P.2d 1027 (1989)	13
<i>Lamz v. Wells,</i> 938 So. 2d 792 (La. Ct. App. 2006)	5

<i>Lee v. Pennington</i> , 830 So. 2d 1037 (La. Ct. App. 2002).....	14
<i>Leiendoecker v. Asian Women United of Minnesota</i> , 848 N.W.2d 224 (Minn. 2014).....	15, 16
<i>Long v. Odell</i> , 60 Wn.2d 151, 372 P.2d 548 (1962).....	7
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081 (1981).....	18
<i>McDevitt v. Harborview Med. Ctr.</i> , 179 Wn.2d 59, 316 P.3d 469 (2013).....	8
<i>Metcalf v. U-Haul Int’l, Inc.</i> , 118 Cal. App. 4th 1261 (2004)	5
<i>Middle –Snake Tamarac Rivers Watershed Dist. v. Stengrim</i> , No. A08-0825 (Minn. July 2, 2009) (App. E)	15
<i>Morse Bros., Inc. v. Webster</i> , 772 A.2d 842 (Me. 2001).....	5
<i>Navellier v. Sletten</i> , 29 Cal 4th 82 (2002)	3
<i>Nygaard, Inc. v. Uusi–Kerttula</i> , 159 Cal. App. 4th 1027 (2008)	11
<i>Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP</i> , 133 Cal. App. 4th 658 (2005)	12
<i>Sandholm v. Kuecker</i> , 962 N.E.2d 418 (Ill. 2012)	5, 15
<i>Schroeder v. Irvine City Council</i> , 97 Cal. App. 4th 174 (2002)	6
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	17

<i>Spratt v. Toft</i> , 180 Wn. App. 620, 324 P.3d 707 (2014)	17
<i>State v. Gonzalez</i> , 110 Wn.2d 738, 757 P.2d 925 (1988)	7
<i>State v. Jorden</i> , 160 Wn.2d 121, 156 P.3d 893 (2007)	7
<i>Stewart v. Rolling Stone LLC</i> , 181 Cal. App. 4th 664 (2010)	11
<i>Taus v. Loftus</i> , 40 Cal. 4th 683 (2007)	5
<i>Tichinin v. City of Morgan Hill</i> , 177 Cal. App. 4th 1049 (2009)	5
<i>Varian Med. Sys., Inc. v. Delfino</i> , 35 Cal. 4th 180 (2005)	11
<i>Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n</i> , 141 Wn.2d 245, 4 P.3d 808 (2000)	7
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 779 P.2d 182 (1989)	11, 12
<i>Yu v. Signet Bank/Virginia</i> , 103 Cal. App. 4th 298 (2002)	5
Federal Statutes	
7 Guam Code Ann. § 17106(c) (1998)	4
State Statutes	
Ariz. Rev. Stat. § 12-752 (enacted in 2006)	4
Cal. Code Civ. P. § 425.16	3, 4

Del. Code Ann. Title 10, § 8137 (1992)	4
Fla. Stat. Ann. § 768.295(5) (2000)	4
735 Ill. Comp. Stat. 110/20(c) (2007)	4
La. Code Civ. Proc. Ann. Article 971(A)(1) (1999)	4
Mass. Gen. Laws Ann. Chapter 231 § 59H (1994)	4
Me. Rev. Stat. Ann. Title 14, § 556 (1995)	4
Minn. Stat. Ann. § 554.02(3) (1994)	4
Neb. Rev. Stat. § 25-21,245 & 246 (1994)	4
Nev. Rev. Stat. § 41.660 (1993, amended 2010)	4
Or. Rev. Stat. § 31.150(1) (2001)	4
RCW 4.24.510	3
RCW 4.24.525(2) & (3)(c)	19
RCW 4.24.525(4)(b)	4, 11
RCW 4.24.730(3)	17
RCW 5.68.010(2)	17
RCW 13.34.190(1)(a)(i)	17
Vt. Stat. Ann. Title 12, § 1041(e)(1) (2005)	4
Rules	
CR 56	9
N.Y. C.P.L.R. 3211(g)	4

Constitutional Provisions

United States Constitution, First Amendment7, 18

Other Authorities

Bruce E.H. Johnson & Sarah K. Duran, *A View from the
First Amendment Trenches: Washington State’s New
Protections for Public Discourse and Democracy*, 87
WASH. L. REV. 495, 502 (2012).....3, 4

I. INTRODUCTION

Amici curiae Washington State Association for Justice Foundation (“WSAJF”) and the American Civil Liberties Union of Washington (“ACLU”) ask this Court to declare invalid Washington’s Act Limiting Strategic Lawsuits against Public Participation and Petition (“SLAPPs”), claiming it requires the court to weigh evidence and thus infringes the constitutional right to jury trial. This case is ill-suited to address these arguments. The parties, the superior court, and the Court of Appeals agreed the Act creates a constitutionally sufficient summary judgment standard, and the superior court did not weigh any evidence in dismissing Dillon’s claims as a matter of law. But even if the Court reaches the constitutional challenge, it should reject it. As the ACLU explained in opposing a similar challenge in Minnesota, anti-SLAPP statutes create “an important procedural process to protect individuals who are exercising their federal and state constitutional rights” and “do[] not even implicate, much less violate, the plaintiff’s jury trial right.” *See* Br. Amicus Curiae at 14 n.5, *Asian Women United of Minn. v. Leiendecker*, No. A12-1978 & A12-2015 (Minn. Sept. 30, 2013) Appendix A (“*Leiendecker* Brief”).¹

The Washington Legislature modeled the anti-SLAPP Act, RCW 4.24.525, on a California law that had been in place, interpreted, and applied by courts for 18 years. The Washington Act—like the California act and several other states’ laws—requires a party responding to an anti-

¹ Excerpts of amicus briefs cited in this brief are included in the Appendix.

SLAPP motion to prove a “probability of prevailing on the merits.” Courts consistently hold this standard parallels summary judgment and uniformly reject the argument amici raise here, i.e., that it requires a court to weigh the evidence. The Washington anti-SLAPP Act, too, creates a standard similar to summary judgment, as the Court of Appeals has consistently recognized—and the parties agree.

Summary judgment does not violate parties’ rights to jury trial, a settled proposition established long before passage of anti-SLAPP laws. When a party cannot show a genuine dispute about a material fact, a court may enter judgment as a matter of law. Doing so does not infringe jury trial rights because the absence of a factual dispute leaves nothing for a jury to decide. Thus, every case that has considered whether anti-SLAPP statutes violate jury trial rights—including in California—has found they do not. This result should not differ in Washington.

The Legislature crafted the anti-SLAPP law to strike a balance between the rights of a plaintiff to bring claims and the need to protect defendants from unfounded lawsuits targeting the civil rights of speech and petition. The Court should decline to upset this balance.

II. ARGUMENT

A. The Legislature Passed RCW 4.24.525 Based on Settled Law, Including California’s Anti-SLAPP Statute.

A SLAPP is a claim “filed against individuals or organizations based on their communications to government or speech regarding an issue of public interest or concern. ... The purpose is to chill the

defendant's speech through costly and emotionally exhausting litigation.” Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 502 (2012). “Characteristically, the SLAPP suit lacks merit; it will achieve its objective if it depletes defendant's resources or energy. The aim is not to win the lawsuit but to detract [sic] the defendant from [its] objective.” Br. Amicus Curiae, *Right-Price Recreation, LLC v. Connells Cnty. Cmty. Council*, No. 25713-1-II (Jan. 23, 2001), 2002 WL 3286309, at *4 (“*Right Price Brief*”) (App. B) (quotation marks, citation omitted) (supporting application of RCW 4.24.510). As the ACLU has emphasized, it is “imperative that courts identify and dismiss” SLAPPs “at the earliest possible stage.” *Id.*

In 1989, Washington became the first state to pass an anti-SLAPP law, RCW 4.24.510. That statute granted immunity for statements to the government but did not provide any means for summarily dismissing SLAPPs. Other states enacted more protective laws that included such a procedure. California passed the first law in 1992. It creates a two-step process: first, the defendant must show the plaintiff's claim arises from defendant's speech or petition; the burden then shifts to the plaintiff to prove it has a legally sufficient claim and “a probability” of prevailing. Cal. Civ. Proc. Code § 425.16(b)(1); *Navellier v. Sletten*, 29 Cal 4th 82, 88-89 (2002). Today 28 states, the District of Columbia, and Guam have anti-SLAPP laws, many of which also create a two-step, burden-shifting

process allowing for early dismissal of SLAPPs.²

In 2010, the Washington Legislature enacted RCW 4.24.525. It sought to “[e]stablish an efficient, uniform, and comprehensive method for speedy adjudication” of SLAPPs and deter “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” S.B. 6395, 61st Leg., 2010 Reg. Sess. (2010). The Legislature modeled RCW 4.24.525 on Cal. Code Civ. P. § 425.16, intending to “create[] a procedural device to swiftly curtail any litigation found to be targeted at persons” exercising free speech and petition rights. *Castello v. City of Seattle*, 2010 WL 4857022, at *3 (W.D. Wash. Nov. 22, 2010). Just like the statute in California, Washington’s law requires a party bringing a motion to strike to “show[] by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” RCW 4.24.525(4)(b). Then “the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.” *Id.* “If the responding party meets this burden, the court shall deny the motion.” *Id.*

² Although these statutes vary in some ways, they all provide for early, expedited motions and require the plaintiff to make a showing to proceed. Johnson & Duran, *supra*, 87 Wash. L. Rev. at 502. See, e.g., Ariz. Rev. Stat. § 12-752 (enacted in 2006); Del. Code Ann. tit. 10, § 8137 (1992); Fla. Stat. Ann. § 768.295(5) (2000); 735 Ill. Comp. Stat. 110/20(c) (2007); La. Code Civ. Proc. Ann. art. 971(A)(1) (1999); Me. Rev. Stat. Ann. tit. 14, § 556 (1995); Mass. Gen. Laws Ann. ch. 231 § 59H (1994); Minn. Stat. Ann. § 554.02(3) (1994); Neb. Rev. Stat. § 25-21,245 & 246 (1994); Nev. Rev. Stat. § 41.660 (1993, amended 2010); N.Y. C.P.L.R. 3211(g) (2008); Or. Rev. Stat. § 31.150(1) (2001); Vt. Stat. Ann. tit. 12, § 1041(e)(1) (2005); see also 7 Guam Code Ann. § 17106(c) (1998).

The Washington Legislature passed RCW 4.24.525 against the backdrop of other states' anti-SLAPP acts. When presented with the issues, courts (including in California) consistently interpreted those laws to impose burdens akin to summary judgment.³ By the time Washington enacted RCW 4.24.525, courts had uniformly upheld anti-SLAPP statutes against constitutional challenges alleging vagueness, due process violations, infringement of the right of petition, prior restraint, and equal protection issues.⁴ In fact, courts had specifically rejected challenges that

³ See, e.g., *Taus v. Loftus*, 40 Cal. 4th 683, 714 (2007) (“a summary-judgment-like procedure”); *Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1062 (2009) (“a standard similar to that employed in determining nonsuit, directed verdict or summary judgment motions”); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007); *Lanz v. Wells*, 938 So. 2d 792, 796 (La. Ct. App. 2006) (anti-SLAPP motion is a “specialized defense motion akin to a motion for summary judgment.”); *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 317 (2002); *Morse Bros., Inc. v. Webster*, 772 A.2d 842, 848 (Me. 2001); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942 n.16 (Mass. 1998) (“A standard for summary judgment... is a likely source of the standard for evaluating special motions to dismiss in the Massachusetts anti-SLAPP statute.”). See also *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013) (interpreting D.C. anti-SLAPP statute, which requires court to grant motion “unless the responding party demonstrates that the claim is likely to succeed on the merits,” to be akin to summary judgment, looking to California law).

⁴ See *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322 (2004) (vagueness; due process, equal protection, petition rights); *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1214 (R.I. 2000) (vagueness and due process); *Guam Greyhound v. Brizill*, No. CVA07-021, 2008 WL 4206682, at *4-5 (Guam Sept. 11, 2008) (right of petition, prior restraint); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61-62 (R.I. 1996) (equal protection, right to a trial by jury, due process, retroactive application, separation of powers, denial of access to state courts, and bill of attainder); *Metcalf v. U-Haul Int'l, Inc.*, 118 Cal. App. 4th 1261 (2004) (equal protection); *Sandholm v. Kuecker*, 962 N.E.2d 418, 434-35 (Ill. 2012) (right to remedy and justice, freedom of speech, redress of grievances, privacy, due process, equal protection); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005) (bill of attainder); *Equilon Enters., Inc. v.*

the laws infringed the right to jury trial. *See infra* at 13-16.

Before the Legislature passed RCW 4.24.525, the ACLU routinely (and successfully) opposed challenges to anti-SLAPP laws, recognizing their importance as “safeguard[s] for freedom of speech” that “whenever possible should be construed to protect, not hinder, free expression of speech and the right to petition.” Br. Amici Curiae at 2, *Equilon Enters. LLC v. Consumer Cause, Inc.*, No. S094877 (Cal. Oct. 17, 2001) (“*Equilon* Brief”) (App. C). *See also* *Right-Price* Brief, *supra* (App. B), 2001 WL 34797870, at *4 (“the ACLU considers it imperative that courts identify and dismiss ... ‘SLAPPs’ ... at the earliest possible stage.”). The ACLU likewise successfully supported similar anti-SLAPP laws in California (*Equilon* Brief, *supra* (App. C)), Illinois (*see* Br. Amici Curiae at 3, *Sandholm v. Kuecker*, No. 111443 (Ill. May 25, 2011) (“*Sandholm* Brief”) (App. D) (advocating the “laudable policy objectives” of statute and noting ACLU’s “concern for protecting the public’s right to petition the government”)), and Minnesota (*Leiendecker* Brief, *supra* (App. A)).

In sum, Washington passed RCW 4.24.525 against the backdrop of statutes in other states, which courts had recognized (with ACLU support) as valuable and constitutionally permissible tools to fight meritless litigation aimed at deterring the exercise of constitutional rights.

Consumer Cause, Inc., 29 Cal. 4th 53, 63 (2002) (right of petition); *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 196 (2002).

B. This Court Should Not Consider Amici's Constitutional Challenges.

This case is a uniquely inappropriate vehicle to consider amici's arguments RCW 4.24.525 infringes jury trial rights.

First, Dillon did not argue the law is unconstitutional. *See* Dillon Op. Br. at 43. Only amici raise the issue, and the Court has long held a “case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court.” *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). The Court routinely declines to consider issues raised only by amici (and has done so often for issues raised by ACLU), including constitutional questions. *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 255 n.2, 4 P.3d 808 (2000) (“claims raised only by amicus are not considered”); *State v. Jordan*, 160 Wn.2d 121, 128 n.5, 156 P.3d 893 (2007) (“we are not bound to consider argument raised only by amici”).⁵

Second, the Court of Appeals did not consider amici's jury trial issue for the simple reason that no one raised it. The Court of Appeals' comments to “clarify the scope and manner of analysis” for the second step of the anti-SLAPP analysis were pure *dicta*, as the court recognized, noting the issue “is not strictly necessary for us to consider.” *Dillon v.*

⁵ Amici assert the anti-SLAPP law violates the right of access to the courts, WSAJF Br. at 19 n.15, “the First Amendment,” “separation of powers,” and “procedural due process,” ACLU Br. at 12 n.6. But Dillon did not raise these claims, nor have amici briefed them. Such “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (refusing to consider new argument by amicus) (quotation marks, alteration omitted).

Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 86, 316 P.3d 1119 (2014). See WSAJF Br. at 14. This Court should not address the issue, when the courts below have not developed it *at all*.

Third, amici admit they assert a facial challenge to the anti-SLAPP act. See WSAJF Br. at 18. This Court disfavors facial challenges, as they “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 73, n.9, 316 P.3d 469 (2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008)) (other internal quotations and citations omitted). Striking down a statute based on a facial challenge “frustrates the intent of the elected representatives of the people.” *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)).

Fourth, although amici argue that the second step of the anti-SLAPP analysis requires a plaintiff to show more than would be required to defeat summary judgment, the contention is purely hypothetical. The superior court dismissed Dillon’s action based on **both** the anti-SLAPP act **and** on summary judgment. It used routine summary judgment procedures (without weighing evidence or deciding disputed facts), held Dillon had no reasonable expectation of privacy under the undisputed circumstances, and dismissed the case as a matter of law. See CP 807-08; RP 44:6-45:10.

Amici's claim that RCW 4.24.525 requires a plaintiff to *prove* his case on a motion to strike is irrelevant here, making consideration of the constitutional issue improper.

The Court should reject amici's arguments without even reaching their substance.

C. The Washington Anti-SLAPP Statute Does Not Violate the Right to Trial by Jury.

Amici rest their jury trial argument on a reading of the anti-SLAPP statute advocated by neither the parties nor the courts below. When properly read to impose a summary judgment standard, the statute poses no constitutional issue.

1. The Statute Uses a Summary Judgment Standard.

The Court of Appeals correctly described the second step of the anti-SLAPP procedure as resembling a summary judgment motion under Rule 56. 79 Wn. App. at 89. Like CR 56, the law requires a court to consider supporting and opposing affidavits, and allows it to permit discovery on a proper showing, similar to CR 56(f). The court does not weigh evidence or evaluate credibility. Rather, it decides whether the party opposing an anti-SLAPP motion has offered sufficient evidence to establish a *prima facie* case or the moving party has established a defense precluding the claim as a matter of law. This is consistent with the longstanding interpretation of similar anti-SLAPP laws in other states. At least two federal courts, including the Ninth Circuit, have construed the

Washington anti-SLAPP statute to create a summary judgment-like standard, relying on California law. *See Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 942 (2013) (the “burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment.”) (quotation marks, citation omitted); *AR Pillow Inc. v. Maxwell Payton, LLC*, 2012 WL 6024765, at *2 (W.D. Wash. Dec. 4, 2012) (applying summary judgment standard to grant anti-SLAPP motion). And the Court of Appeals has recently confirmed this approach. *See Davis v. Cox*, 180 Wn. App. 514, 533, 325 P.3d 255 (2014).

Amici’s challenges to this interpretation are convoluted and contrived. Bending over backwards to advance its constitutional argument, WSAJF insists RCW 4.24.525 “requires the weighing of evidence and resolution of factual disputes” and requires the court to make “findings of fact.” WSAJF Br. at 8, 17. Similarly, ACLU claims (with almost no explanation) a plaintiff facing an anti-SLAPP motion “bears the burden of proof and persuasion” and “must carry those burdens” in all regards, “regardless of disputed facts.” ACLU Br. at 15. But the statute says *none* of this. As the statutory antecedents in other states make plain, the Legislature did *not* intend to require a court to weigh evidence or impose all burdens on a plaintiff opposing an anti-SLAPP motion.

RCW 4.24.525 is straightforward. In the second step of the anti-SLAPP analysis, the party responding to a motion to strike has the “burden ... to establish by clear and convincing evidence a probability of

prevailing on the claim.” RCW 4.24.525(4)(b). The “probability” requirement mirrors the California anti-SLAPP law. It means a plaintiff must make “a prima facie showing of facts ... admissible at trial ... sufficient to support a judgment in the plaintiff’s favor as a matter of law, as on a motion for summary judgment.” *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679 (2010). *See also Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005) (statute “establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation”). Courts do not “weigh credibility or compare the weight of the evidence”; rather, they “accept as true the evidence favorable to the plaintiff and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1036 (2008). The second step of RCW 4.24.525 thus calls for a summary judgment-like procedure.

In asserting that the anti-SLAPP law requires a court to weigh evidence, make findings, and decide facts (as juries do), amici misapply summary judgment principles recognized since *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 779 P.2d 182 (1989). Under those seminal cases, a defendant moving for summary judgment to dismiss a claim “bears the initial burden of showing the absence of a material fact.” *Young*, 112 Wn.2d. at 225. If the defendant makes such a showing, the burden “shifts to the party with the

burden of proof at trial, the plaintiff.” *Id.* If the plaintiff “fails to make a showing to establish the existence of an element essential to [his] case, ... then the trial court should grant the motion.” *Id.* (citing *Celotex*, 477 U.S. at 322). While the court views the evidence and inferences in the light most favorable to the non-moving party, a plaintiff cannot defeat summary judgment by relying on allegations. Instead, under *Celotex* and *Young*, it must present admissible evidence.

By its terms, the anti-SLAPP Act calls for the same process. To prevail on an anti-SLAPP motion (once the defendant shows the plaintiff’s action arises from acts of public participation or petition), the defendant must show the plaintiff’s claims fail as a matter of law—either because the plaintiff cannot establish an element of his claims or because there is a conclusive defense. The plaintiff bears the burden to show “a probability of prevailing,” which means he must present a prima facie case. He can defeat the anti-SLAPP motion by offering competent, admissible evidence showing a disputed issue of fact, just as in resisting a summary judgment motion. And contrary to WSAJF’s suggestion (WSAJF Br. at 18), if a defendant pursues an anti-SLAPP motion by contending plaintiff cannot show a probability of prevailing because of a conclusive defense, the defendant still bears the burden to prove the defense. *See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 676 (2005).

This reading of the anti-SLAPP Act disposes of amici’s

constitutional challenge. As even they admit (WSAJF Br. at 8), “summary judgment proceedings do not infringe upon a litigant’s constitutional right to a jury trial.” *Lamon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989). And “it is a cardinal principle that [a] [c]ourt will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Because it is at least “fairly possible” to read RCW 4.24.525 as creating a summary judgment-like standard, the Court should do so and avoid the constitutional issue—as courts elsewhere have done.⁶

2. Courts (and the ACLU) Agree That Anti-SLAPP Statutes Do Not Violate Jury Trial Rights.

Every court to decide whether the anti-SLAPP statute violates jury trial rights has rejected the argument out of hand, reading the statute as Petitioners advocate. In *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 746 (1994), the court held a trial court “does not weigh the evidence in ruling on [an anti-SLAPP] motion”; as a result, the statute did not infringe jury trial rights because “there was no question of fact to be decided.” 30 Cal. App. 4th at 746. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855 (1995), the court held California’s anti-SLAPP act does not permit a court to weigh evidence and requires it

⁶ Even if the Court were to find a constitutional violation, the anti-SLAPP law requires that “[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” Laws of 2010, ch. 118, § 5. Thus, for example, if the Court were to find the “clear and convincing” rubric infringes jury trial rights (which it does not), the anti-SLAPP law should be enforced in all other respects—and the trial court’s judgment reinstated.

to consider the plaintiff's affidavits only to determine if they present "sufficient evidence ... to demonstrate a prima facie case." 37 Cal. App. 4th at 867. "Thus, properly construed [California's anti-SLAPP act] does not violate the right to a jury trial." *Id.*

The California Supreme Court has endorsed these conclusions. Because California's anti-SLAPP act does not require a plaintiff to *prove* his claim to defeat a motion to strike but only to substantiate "a legally sufficient claim," that Court "has considered and rejected" the suggestion that the anti-SLAPP statute unduly burdens access to courts. *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 740 n.8 (2003). The statute "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits. This is not unconstitutional." *Equilon*, 29 Cal. 4th at 63.

Courts interpreting other states' anti-SLAPP laws have upheld them against similar challenges. The Louisiana Court of Appeals found that state's anti-SLAPP law does not infringe jury trial rights because the motion to strike offers only "a procedural screen for meritless suits, which is a question of law for a court to determine at every stage of a legal proceeding." *Lee v. Pennington*, 830 So. 2d 1037, 1043 (La. Ct. App. 2002). The Rhode Island Supreme Court likewise rejected a reading of the state's anti-SLAPP law that would infringe the "right to a trial by jury" (among other rights), noting a construction of the statute upholding its constitutionality was "not only ... possible, but is also warranted."

Hometown Props., Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996).

As the ACLU has said elsewhere, amici “do[] not cite to a single case in which an anti-SLAPP Act was found to be unconstitutional—because there are none.” *Sandholm* Brief, *supra* (App. D). Nevertheless, without citing a case to support its own position, the ACLU chides the Court of Appeals for relying on a Minnesota case that has since been overruled. ACLU Br. at 16-18. Petitioners agree the Court of Appeals erred in looking to Minnesota law because the Legislature modeled RCW 4.24.525 on California’s law—not the Minnesota statute, which is different. But the ACLU also misrepresents the Minnesota law and cases interpreting it, which *do not* hold the statute violates jury trial rights.⁷

In the case the ACLU cites (at 16-18), *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224 (Minn. 2014), the Minnesota Supreme Court expressly “decline[d] to address the constitutionality of the anti-SLAPP statutes. *Id.* at 232. Instead, it held that because the Minnesota statute “places the ‘burden of proof, of going forward with the evidence, and of persuasion on the [anti-SLAPP motion] on the party responding,” *id.* at 229 (quoting Minn. Stat. § 554.02, subd. 2(2)), a plaintiff opposing an anti-SLAPP motion must come forward with

⁷ The ACLU has *twice* argued the Minnesota anti-SLAPP law is constitutional—including in *Leiendecker* itself. *Leiendecker* Brief, *supra* (App. A) at 11-14; Br. Amicus Curiae, *Middle –Snake Tamarac Rivers Watershed Dist. v. Stengrim*, No. A08-0825 (Minn. July 2, 2009) (“*Stengrim* Brief”) (App. E). In fact, the ACLU has itself invoked the Minnesota anti-SLAPP statute. See *ACLU of Minnesota v. Tarek In Ziyad Academy*, No. 09-cv-00138-DWF-JJG, Dkt. 93 (Sept. 30, 2009) (advocating dismissal of claims under Minnesota anti-SLAPP statute).

evidence rather than rely on the allegations of his complaint. *See id.* at 229, 232-33. The interpretation of Minnesota’s anti-SLAPP statute in *Leindecker* does not govern this Court’s interpretation of RCW 4.24.525, which has different language. But even if it did, the case did *not* hold that Minnesota’s anti-SLAPP act infringed jury trial rights, as the ACLU wrongly suggests. It lends no support to amici’s positions.

3. The “Clear and Convincing” Standard Does Not Make the Law Unconstitutional.

Amici also suggest the Court should decline to follow California, cases despite the Legislature’s intent to mirror California’s law, because the Washington statute added the requirement that a plaintiff must show “a probability” of prevailing “by clear and convincing evidence.” They suggest this is “an amalgam of the clear and convincing *and* preponderance of the evidence standards,” WSAJF Br. at 12, implying that at the motion to strike phase, a plaintiff must prove his case by clear and convincing evidence, even if at trial he would only have to show a preponderance. *See id.* at 17; ACLU Br. at 14. But the statute says no such thing.⁸ It does not require a plaintiff to *prove* his case to survive a motion to strike; it requires only that plaintiff present sufficient evidence to show “a probability of prevailing,” i.e., that issues of fact remain to be decided and the movant is not entitled to judgment as a matter of law.

⁸ As the Court of Appeals recently explained in *Davis v. Cox*, 180 Wn. App. at 548, “both the ‘clear and convincing’ standard and the ‘probability’ standard are common [and] well known,” and so “there seems to be little risk that, when considered together, confusion will abound.”

Aside from their misreading, amici fail to appreciate that the Legislature has authority to create claims or preclude ones previously recognized at common law, as well as to modify elements of a claim, including by imposing a heightened standard of proof or requiring plaintiffs to make an early showing that the claim has probable merit. “It is entirely within the Legislature’s power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711 (1989). *See also Liberty Warehouse Co. v. Burley Tobacco Growers’ Co-Op. Mktg. Ass’n*, 276 U.S. 71, 89 (1928) (“a state may freely alter, amend, or abolish the common law within its jurisdiction”); *Spratt v. Toft*, 180 Wn. App. 620, 636-37, 324 P.3d 707 (2014) (noting in dicta that burden of proof is a substantive aspect of a claim and the legislature’s prerogative to determine; “we believe [the anti-SLAPP act] would prevail” on a challenge that the law “violates access to courts because it requires a heightened burden of proof”). Indeed, the Legislature has imposed a clear and convincing requirement for in a variety of contexts.⁹

The Legislature’s decision to adopt a clear and convincing standard for the second step of the anti-SLAPP motion to strike reflects

⁹ *See, e.g.*, RCW 4.24.730(3) (good faith presumption for employer’s disclosure of employee information rebuttable only on showing of “clear and convincing evidence”); RCW 5.68.010(2) (journalist work-product may be compelled only if “the party seeking such news or information” shows relevance and unavailable alternatives “by clear and convincing evidence”); RCW 13.34.190(1)(a)(i) (court may enter order terminating parental rights to a child only on “clear, cogent, and convincing evidence”). No court has found these statutes unconstitutional.

the law's genesis as a statute designed to protect First Amendment rights, which can be chilled by meritless claims. As this Court has recognized:

[i]n the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. ... Unless persons ... desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

Mark v. Seattle Times, 96 Wn.2d 473, 484-85, 635 P.2d 1081 (1981) (quoting *Smith v. People*, 361 U.S. 147, 154 (1959)). But using a “clear and convincing” standard for a claim does not alter the process or principles of summary judgment. The United States Supreme Court and this Court settled this issue in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Those cases involved defamation claims, which require a plaintiff to prove the actual malice element with “convincing clarity.” *Herron*, 112 Wn.2d at 768. *See also Mark*, 96 Wn.2d at 487. But this heightened burden “does not materially alter the normal standard for deciding motions for summary judgment.” *Herron*, 112 Wn.2d at 768. A court still must construe the evidence in a light most favorable to the non-moving party and may not weigh evidence or assess credibility. *Id.*; *see Anderson*, 477 U.S. at 255. In ruling on a summary judgment motion, the court must view the evidence “through the prism” of the clear and convincing standard, and so its inquiry about whether a genuine fact issue exists is “whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find [for] the plaintiff.” *Id.*

Thus, courts have long been accustomed to applying summary judgment principles, while taking into account heightened burdens of proof, such as clear and convincing evidence. The second step of the anti-SLAPP law does not ask courts to do anything unfamiliar. It does not ask them to decide facts. It merely asks the trial court to decide whether the plaintiff has offered clear and convincing evidence that his claims present genuine fact issues. This is not unconstitutional.

III. CONCLUSION

For these reasons, the Court should reject amici's premature and meritless constitutional challenges."¹⁰

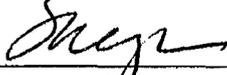
RESPECTFULLY SUBMITTED September 17, 2014.

Byrnes Keller Cromwell LLP
Attorneys for Petitioners

By Ralph E. Cromwell
Ralph E. Cromwell
WSBA #11784 *by SME*

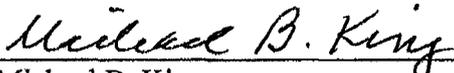
¹⁰ WSAJF also argues the Court should look only to the plaintiff's allegations to decide whether a claim targets an act involving public participation and petition. WSAJF Br. at 19-25. But the anti-SLAPP statute applies to a claim "however characterized" targeting an act involving public participation and petition and states that the court "shall" "consider pleadings and supporting and opposing affidavits" to make its decision. RCW 4.24.525(2) & (3)(c). Further, the rule proposed by WSAJF would allow plaintiffs to engage in artful pleading to avoid the SLAPP law's scope. *See* Pet. for Review at 15-16, Pet'rs Suppl. Br. at 3-11.

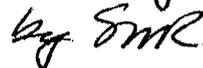
Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Bruce E.H. Johnson
WSBA #7667
Stephen M. Rummage
WSBA #11168
Ambika K. Doran
WSBA #38238

Carney Badley Spellman, P.S.
Attorneys for Petitioners

By 

Michael B. King
WSBA #14405 

CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

William Arthur Keller Moran & Keller, PLLC 600 108 th Ave NE, Suite 650 Bellevue, WA 98004 Email: billkellerlaw@gmail.com Attorneys for Jason Dillon	<input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Dennis Michael Moran Fishermen's Finest, Inc. 570 Kirkland Way, Suite 200 Kirkland, WA 98033-6270 Email: dmoran@fishermensfinest.com Attorneys for Jason Dillon	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Eugene Volokh UCLA School of Law 405 Hilgard Avenue Los Angeles, CA 90095 Email: volokh@law.ucla.edu Attorneys for Amicus Curiae Reporters Committee for Freedom of the Press and Allied Daily	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Jessica L. Goldman Katie Angelikis Summit Law Group 315 5 th Avenue S, Suite 100 Seattle, WA 98104-2682 Email: jessicag@summitlaw.com katiea@summitlaw.com Attorneys Amicus Curiae Reporters Committee for Freedom of the Press	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Matthew J. Segal
Pacifica Law Group
1191 2nd Avenue, Suite 2100
Seattle, WA 98101-2945
matthew.segal@pacificalawgroup.com
Attorneys for Amicus Curiae, ACLU

Messenger
 U.S. Mail, postage
prepaid
 Federal Express
 Facsimile
 Email

Sarah A. Dunne
Nancy Lynn Talner
ACLU of Washington Foundation
901 5th Avenue, Suite 630
Seattle, WA 98164-20008
Email: dunne@aclu-wa.org
talner@aclu-wa.org
Attorneys for Amicus Curiae, ACLU

Messenger
 U.S. Mail, postage
prepaid
 Federal Express
 Facsimile
 Email

George M. Ahrend
Ahrend Albrecht PLLC
16 Basin St. SW
Ephrata, WA 98823
Email: gahrend@trialappeallaw.com

Messenger
 U.S. Mail, postage
prepaid
 Federal Express
 Facsimile
 Email

David P. Gardner
Winston & Cashatt
601 W. Riverside Ave.
Spokane, WA 99201
Email: dpg@winstoncashatt.com

Bryan P. Harnetiaux
Attorney at Law
517 E. 17th Ave.
Spokane, WA 99203
Email:
bryanphametiauxwsba@gmail.com

Attorneys for Amicus Curiae
Washington State Association for
Justice Foundation

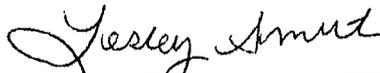
Venkat Balasubramani
FOCAL PLLC
800 Fifth Avenue, Suite 4100
Seattle, WA 98104
Email: venkat@focallaw.com
Attorneys for Amici Curiae
Washington Court Reporters
Association

Messenger
 U.S. Mail, postage
prepaid
 Federal Express
 Facsimile
 Email

Sean M. McChesney
Attorney at Law
1805 S. Lane Street
Seattle, WA 98144-2907
Email: sean.mcchesney@gmail.com
Attorneys for Amici Curiae
Washington Court Reporters
Association

Messenger
 U.S. Mail, postage
prepaid
 Federal Express
 Facsimile
 Email

Declared under penalty of perjury under the laws of the state of
Washington this 17th day of September, 2014.



Lesley Smith

APPENDIX

TAB	DOCUMENT
Appendix A	Excerpts of Brief of Amicus Curiae American Civil Liberties Union of Minnesota, <i>Leiendecker v. Asian Women United of Minnesota</i> , 848 N.W.2d 224 (Minn. 2014) (No. No. A12-1978 & A12-2015)
Appendix B	Excerpts of Brief for Amicus Curiae American Civil Liberties Union of Washington in Support of Petitioners, <i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002) (No. 25713-1-II)
Appendix C	Excerpts of Amici Curiae Brief of the American Civil Liberties Union of Northern California et al. in Support of Respondent Consumer Cause Inc., <i>Equilon Enters. v. Consumer Cause, Inc.</i> , 29 Cal.4th 53, 124 Cal.Rptr.2d 507, 52 P.3d 685 (2002) (No. S094877)
Appendix D	Excerpts of Brief of Amici Curiae American Civil Liberties Union of Illinois et al. in Support of Defendants-Appellees, <i>Sandholm v. Kuecker</i> , 962 N.E.2d 418 (Ill. 2012) (No. 111443)
Appendix E	Excerpts of Brief Amicus Curiae of American Civil Liberties Union of Minnesota, <i>Middle-Snake Tamarac Rivers Watershed Dist. v. Stengrim</i> , 784 N.W.2d 834 (Minn. 2010) (No. A08-0825)

APPENDIX A

NO. A12-1978 & A12-2015

State of Minnesota
The Supreme Court

State of Minnesota et al. Appellants (A12-1978)	
State of Minnesota et al. Respondents	
State of Minnesota et al. Respondents	
State of Minnesota et al. Appellants (A12-2015)	
State of Minnesota et al. Respondents	
State of Minnesota et al. Respondents	

OFFICE OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

1000 Hennepin Avenue, Suite 1130
Minneapolis, MN 55403
Tel: 612-209-7400 Fax: 612-209-7401

www.aclu.org
www.aclu.org/minn

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE AND STATEMENT OF FACTS2

ARGUMENT..... 2

 I. THE LOWER COURTS' UNWARRANTED SUBSTITUTION OF
 A PLEADING STANDARD FOR THE EVIDENTIARY
 STANDARD REQUIRED BY MINNESOTA'S ANTI-SLAPP
 STATUTES NEGATES THE CONSTITUTIONAL SPEECH AND
 PETITION RIGHTS PROTECTIONS THAT THE LAWS WERE
 DESIGNED TO PRESERVE.....2

 II. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE
 ANTI-SLAPP STATUTES, AND THE LEGISLATIVE PURPOSE
 OF PROTECTING FREE SPEECH FROM THE CHILLING
 EFFECT POSED BY ULTIMATELY MERITLESS BUT COSTLY
 AND TIME-CONSUMING LITIGATION, REQUIRE THAT A
 SLAPP PLAINTIFF PROVIDE CLEAR AND CONVINCING
 EVIDENCE TO SUBSTANTIATE ALLEGATIONS THAT THE
 DEFENDANT'S SPEECH IS UNPROTECTED..... 6

 III. JUST AS THE PROPER GRANTING OF A SUMMARY
 JUDGMENT MOTION DOES NOT VIOLATE ANY
 CONSTITUTIONAL RIGHT OF THE NON-MOVING PARTY TO
 A JURY TRIAL, THE ANTI-SLAPP STATUTES, CORRECTLY
 CONSTRUED TO REQUIRE ACTUAL EVIDENCE OF NON-
 IMMUNITY, DO NOT VIOLATE A SLAPP PLAINTIFF'S JURY
 TRIAL RIGHT 11

CONCLUSION 14

STATEMENT OF *AMICUS CURIAE*¹

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates with more than 8,500 members statewide. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among the rights that the ACLU-MN has litigated to protect are the U.S. and Minnesota constitutional rights to free speech and to petition the government for redress of grievances.

The ACLU-MN believes that the Minnesota's anti-SLAPP laws (§ 554.01, et seq.) provide an important procedural process that serves to protect individuals who are exercising their federal and state constitutional rights. The Court of Appeals committed reversible error when it held that Minnesota Statute section 554.02 imposes a pleading burden and not an evidentiary burden on the party seeking to overcome a motion to dismiss an alleged SLAPP lawsuit. The Court of Appeals also erred in surmising that imposing an evidentiary burden in this context would violate the constitutional right to a

¹ Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* ACLU-MN. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the ACLU-MN, which was granted leave to participate as *amicus* by this Court's Order dated September 9, 2013.

jury trial. The ACLU-MN respectfully urges this Court to reverse the decision of the Court of Appeals.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The ACLU-MN concurs with, adopts and incorporates the Petitioners'/Appellants' Statement of the Case and Statement of Facts set forth in the Petitioners'/Appellants' Joint Brief and Addendum.

ARGUMENT

I. **THE LOWER COURTS' UNWARRANTED SUBSTITUTION OF A PLEADING STANDARD FOR THE EVIDENTIARY STANDARD REQUIRED BY MINNESOTA'S ANTI-SLAPP STATUTES NEGATES THE CONSTITUTIONAL SPEECH AND PETITION RIGHTS PROTECTIONS THAT THE LAWS WERE DESIGNED TO PRESERVE.**

As this Court made clear in *Middle-Snake-Tamarac Rivers Watershed District v. Stengrim*, 784 N.W.2d 834, 838-39 (Minn. 2010) (hereafter "*Stengrim*"), Minnesota's anti-SLAPP statutory scheme, Minn. Stat. § 554.01, et seq., along with the myriad of similar anti-SLAPP statutes enacted in a majority of the United States,² is critical to ensure that those wishing to exercise their Free Speech rights in protest or dissent are not silenced by ultimately meritless but expensive and time-consuming lawsuits that the plaintiffs file not because they expect to win, but because they hope to censor their political opponents.

² See, e.g., Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1668 n.163 (2013) (noting that twenty-eight states have enacted anti-SLAPP statutes).

since all they will need to do to withstand a defendant's anti-SLAPP motion to dismiss is to pack their complaints with sufficient allegations of unprotected conduct—even though they know that they can never produce the evidence that would be necessary to prove those allegations at trial. Such a decision would turn the anti-SLAPP laws on their head.

III. JUST AS THE PROPER GRANTING OF A SUMMARY JUDGMENT MOTION DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHT OF THE NON-MOVING PARTY TO A JURY TRIAL, THE ANTI-SLAPP STATUTES, CORRECTLY CONSTRUED TO REQUIRE ACTUAL EVIDENCE OF NON-IMMUNITY, DO NOT VIOLATE A SLAPP PLAINTIFF'S JURY TRIAL RIGHT.

Just as the evidentiary standards that apply to summary judgment motions do not violate the right to a jury trial, even when the granting of such pre-trial motions is case-dispositive, the evidentiary standard required by the anti-SLAPP law does not violate the SLAPP plaintiff's jury trial right. The Court of Appeals simply got it wrong when it suggested, in a footnote (Petitioners' Addendum 6 n.2), that in order to avoid violating the SLAPP plaintiff's jury trial right, it had to substitute a non-legislatively-authorized pleading standard for the evidentiary standard that the Minnesota Legislature has plainly and unambiguously required.

Again, under the two-step analysis that the Legislature codified in the anti-SLAPP statutes, it is only *after* the SLAPP defendant has made a threshold showing that his or her speech or conduct is immunized from liability that the SLAPP plaintiff is required to produce clear and convincing evidence that the defendant's speech or conduct is *not* immunized from liability. *See* Minn. Stat. §§554.02, 554.03. However, if the SLAPP defendant's speech or conduct is indeed immune from liability because it is "genuinely

aimed in whole or in part at procuring favorable government action,” Minn. Stat. § 554.03, and thus is protected by constitutional speech or petition rights, the plaintiff *has* no competing constitutional right to proceed to a jury trial: Such a trial would, in and of itself, infringe on those First Amendment rights.

The United States Supreme Court and this Court have affirmed repeatedly that the granting of a dispositive, pre-trial, summary judgment motion does not violate the non-moving party’s jury trial right. *See, e.g., Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902) (a grant of summary judgment does not violate the Seventh Amendment right to a jury trial, which exists only with respect to disputed issues of fact); *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 413 (Minn. 1971) (because the court appropriately granted summary judgment, the non-prevailing party was not entitled to a jury trial, as “[n]o constitutional or statutory right to a jury trial exists where there is no issue of fact”); *see also Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003) (“Summary judgment is proper when no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. . . . A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. This right exists only with respect to disputed issues of fact.”).

The United States Supreme Court has further held that the same is true of summary judgment motions to which a “clear and convincing” evidence standard applies:

[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. . . . Consequently, where [a] “clear and convincing” evidence requirement applies, the trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is

such that a jury *applying that evidentiary standard* could reasonably find for either the plaintiff or the defendant.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); *cf. id.* at 267 (Brennan, J., dissenting) (objecting to the evidentiary standard that the *Anderson* majority adopted, on the ground that the weighing of evidence would raise concerns about the non-movant's right to a jury trial).

In determining that *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010), supported its decision that an evidentiary standard, as opposed to a pleading standard, would violate the SLAPP plaintiff's jury trial right, the Court of Appeals below misread that decision. The *Nexus* court explained that it had "focuse[d] on the pleadings' allegations" only because the appeal at issue arose "from the district court's decision whether to grant judgment on the pleadings." *Id.* at 781.

However, the *Nexus* court emphasized that *had* the trial court treated the anti-SLAPP motion as one for summary judgment, it could, constitutionally, have done so without violating the plaintiff's jury trial right:

Regardless of whether a motion to dismiss asserting immunity under Minn. Stat. § 544.03 is made at the stage of litigation when judgment on the pleadings may be appropriate *or when summary judgment may be appropriate*, ultimate determinations of fact are not required by the clear-and-convincing standard set forth in Minn. Stat. § 544.02, subd. 2(3). These standards require that reasonable inferences be drawn in favor of the nonmoving party, which is unchanged by the anti-SLAPP statute. The test is merely whether, *in light of those inferences and the view of evidence mandated by the standard for granting judgment on the pleadings or summary judgment*, the plaintiff has shown that the defendant's speech or conduct was tortious or otherwise unlawful. The constitutional right to a jury trial does not prevent all pretrial determinations by a judge; it provides parties with the right to have triable issues of material fact decided by the jury.

Id. at 782 (emphases added).

As the *Nexus* court explained, the anti-SLAPP statute can be construed, in accordance with its clear language, to require clear and convincing evidence, such as “depositions, answers to interrogatories, and admissions on file, together with . . . affidavits,” without implicating the right to jury trial. *Id.* at 781. If the clear and convincing evidence that the anti-SLAPP law requires establishes that there is no “genuine issue as to any material fact,” then there is no violation of the jury trial right, just as a summary judgment motion that is granted because there is no genuine issue of material fact poses no threat to the jury trial right. *Id.* at 781-82.⁵

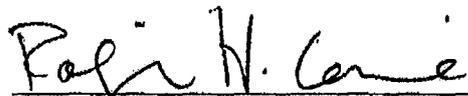
CONCLUSION

For the forgoing reasons, *amicus curiae* ACLU-MN respectfully urges this Court to reverse the decision of the Court of Appeals.

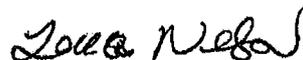
⁵ Courts in states that have anti-SLAPP laws that require the SLAPP plaintiff to produce evidence that the defendant’s speech or conduct is unprotected or face dismissal have rejected similar claims that anti-SLAPP laws infringe on the right to a jury trial. For example, the California Court of Appeal found that California’s anti-SLAPP law did not violate the SLAPP plaintiff’s jury trial right because “the right to trial by jury pertains solely to questions of fact.” *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 746 (1994). If, as in a successful summary judgment motion, the parties’ evidence leaves no disputed issues of material fact to be decided, then the successful anti-SLAPP motion does not even implicate, much less violate, the plaintiff’s jury trial right. *Id.*

Respectfully submitted by:

Dated: September 30, 2013



Raleigh H. Levine (#170254-California)
William Mitchell College of Law
875 Summit Avenue
Saint Paul, MN 55105-3076
(651) 290-7503



Teresa Nelson (#269736)
Ian Bratlie (#319454)
ACLU of Minnesota
2300 Myrtle Ave., Suite 180
Saint Paul, Minnesota 55114
(651) 645-4097 Ext. 122

ATTORNEYS FOR AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION

APPENDIX B

2002 WL 32863091 (Wash.) (Appellate Brief)
Supreme Court of Washington.

RIGHT PRICE RECREATION, LLC, Respondent,
v.
CONNELLS PRAIRIE COMMUNITY COUNCIL, et al., Petitioners.

No. 71099-6.
January 7, 2002.

Brief for Amicus Curiae American Civil Liberties Union of Washington in Support of Petitioners

Jeffrey L. Fisher Davis Wright Tremaine LLP, Attorneys for ACLU of Washington, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101-1688, (206) 622-3150 Phone, (206) 628-7699 Fax.

***i TABLE OF CONTENTS**

I. INTRODUCTION	1
III. STATEMENT OF THE CASE	1
III. INTEREST OF AMICUS	3
IIV. ARGUMENT	4
A. This Court of Appeals Erred in Declining to Decide Whether this Case Should be Dismissed	5
1. Generally Applicable Tenets of RAP 2.4(b) Require Review of the Trial Court's Denial of Defendants' Motion to Dismiss	5
2. Even if Generally Applicable Tenets of RAP 2.4(b) Did Not Allow Review of the Order Denying Dismissal, the "Immunity" Protections in RCW 4.24.510 and the Common Law Would Still Require an Appellate Decision Regarding Whether This Case Must Be Dismissed	8
B. This Court Should Dismiss this Case	10
1. Defendants Are Entitled to Qualified Immunity Under RCW 4.24.510	11
2. Defendants Are Entitled to Absolute Immunity Under the Common Law	17
a. Defendants' Statements Constituted Quasi-Judicial Petitioning Activity	17
b. Defendants' Statements Constituted Legislative Petitioning Activity	19
V. CONCLUSION	20

***ii TABLE OF AUTHORITIES**
CASES

<i>Adkins v. Aluminum Co.</i> , 110 Wn.2d 128, 750 P.2d 1257 (1988)	5, 6
<i>Allan & Allan Arts Ld. v. Rosenblum</i> , 615 N.Y.S.2d 410 (N.Y. App. 1994)	18
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	10-11
<i>BillJohnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983)	14
<i>City of Columbia v. Omni Outdoor Advertising, Inc.</i> , 499 U.S. 365 (1991)	12
<i>Computer Associates International v. American Fundware, Inc.</i> , 831 F. Supp. 1516 (D. Colo. 1993)	12
<i>Computerexpress, Inc. v. Jackson</i> , 113 Cal. App. 4th 993 (2001)	15
<i>Dang v. Ehredt</i> , 95 Wn. App. 670, 977 P.2d 29 (1999)	12
<i>DeSantis v. Employees Passaic County Welfare Association</i> , 568 A.2d 565 (N.J. Super. 1990)	20
<i>Demopolis v. Peoples National Bank</i> , 59 Wn. App. 105, 796 P.2d 426 (1990)	17
<i>Dowling v. Zimmerman</i> , 103 Cal. Rptr. 2d 174 (Cal. App. 2001)	4
<i>Engelmohr v. Bache</i> , 66 Wn.2d 103, 401 P.2d 346 (1965)	17
<i>Fox v. Sunmaster Prods.</i> , 115 Wn.2d 498, 798 P.2d 808 (1990)	6-8
<i>Franz v. Lance</i> , 119 Wn.2d 780, 836 P.2d 932 (1992)	5, 6
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	16
<i>Gilman v. MacDonald</i> , 74 Wn. App. 733, 875 P.2d 697 (1994)	12

<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	9, 14
<i>Harris v. Huntington</i> , 2 Tyl. 129 (Vt. 1802)	19
*iii <i>Jennings v. Cronin</i> , 389 A.2d 1183 (Pa. Super. 1978)	20
<i>Joseph v. Collins</i> , 649 N.E.2d 964 (Ill. App. 1995)	20
<i>Kauzlarich v. Yarbrough</i> , 105 Wn. App. 632, 650-51, 20 P.3d 946, <i>review</i> <i>dented</i> , 144 Wn.2d 1007 (2001)	8, 12
<i>Lee v. Radulovic</i> , 1994 WL 384010 (N.D. Ill. 1994)	14
<i>Logan's Super Markets, Inc. v. McCalla</i> , 343 S.W.2d 892 (Tenn. 1961)	19
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	9, 13
<i>Moore v. Smith</i> , 89 Wn.2d 932, 578 P.2d 26 (1978)	17
<i>North Coast Cable Ltd. v. Hammeman</i> , 648 N.E.2d 875 (Ohio App. 1994)	20
<i>Richmond v. Thompson</i> , 130 Wn.2d 368, 922 P.2d 1343 (1996)	14
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992)	9, 11, 13
<i>Roger Crans & Associates, Inc. v. Felice</i> , 74 Wn. App. 769, 875 P.2d 705 (1994)	15
.....	
<i>State ex rel Public Disclosure Commission v. 119 Vote Nol</i> , 135 Wn.2d 618, 957 P.2d 691 (1998)	12
<i>Story v. Shelter Bay Co.</i> , 52 Wn. App. 334, 760 P.2d 368 (1988)	18
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992)	9
<i>Twelker v. Shannon & Wilson, Inc.</i> , 88 Wn.2d 473, 564 P.2d 1131 (1977)	17
<i>Whelan v. Wolford</i> , 331 P.2d 86 (Cal. App. 1958)	20
<i>Wilcox v. Superior Court</i> , 33 Cal. Rptr. 2d 446 (Cal. App. 1994)	4
*iv CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. Const. Amend. I	8
42 U.S.C. §1983.....	8
RCW 4.24.500.....	11
RCW 4.24.510.....	<i>passim</i>
RCW 36.70C.010.....	2
PROCEDURAL RULES	
CR 12(b)(6)	2, 13
RAP 2.3(b)	19
RAP 2.4(b)	4-10
OTHER AUTHORITY	
William Blackstone, <i>Commentaries</i>	19
Sack on Defamation §2.4.13 (3rd ed. 2000)	15, 16

*1 I. INTRODUCTION

All citizens have the right to participate in government's policymaking and dispute resolution mechanisms. This right, which is indispensable to our system of self-government, can wither under the harassment of baseless collateral litigation--including such litigation's voluminous discovery requests and other pre-trial obligations. It is essential, therefore, that lawsuits seeking to punish or to deter public participation in governmental affairs be swiftly unmasked and dismissed.

This Court should hold that the Court of Appeals erred in refusing to address the issue of whether this case should be dismissed. This Court then should dismiss this case. As Defendants correctly have noted throughout this case, RCW 4.24.510 entitles citizens to qualified immunity regarding complaints that they make to governmental agencies, and the common law entitles them to absolute immunity when those agencies possess quasi-judicial or legislative powers. Because Right Price has failed to offer in its complaint--or in any other filing--any specific reason to believe that Defendants are not be entitled to these immunities, Right Price is not entitled to impose discovery or any other litigation burdens upon Defendants.

II. STATEMENT OF THE CASE

Right Price's complaint is based exclusively upon Defendants' statements to the Pierce County Council challenging Right Price's plans to develop land in Defendants' communities in Pierce County. Right Price first alleges that Defendants "slandered and commercially disparaged it by *2 maliciously, and falsely, accusing [it] of unlawful and illegal behavior" before the Council.

CP 12 ¶116. Second, it asserts that Defendants committed tortious interference by “repeatedly demanding” that Pierce County officials “refuse to honor” sewer provisions relating to Right Price’s plats. CP 13 ¶20. Third, Right Price alleges that Defendants committed tortious interference by “making demands to the [] County Council to disqualify the Hearing Examiner.” CP 15 ¶27. Fourth, Right Price alleges a civil conspiracy based on these same events. CP 15 ¶30. The lawsuit seeks to enjoin Defendants from continuing their advocacy against Right Price’s projects and requests unspecified money damages.

Immediately after Defendants exercised their statutory right to appeal the County’s decision to allow the development, *see* RCW 36.70C.010 *et seq.*, Right Price filed its complaint and demanded that Defendants produce massive amounts of information, much of which (such as membership lists and financial statements) was quite sensitive and of questionable relevance. 105 Wn. App. at 817. Defendants asserted that they were immune from this lawsuit, CP 45-62, but the trial court declined to dismiss the case, stating that although it was “concerned about citizens’ right to have access to their governmental officials and the hearing process,” it considered itself “bound by the rules of civil procedure, [a]nd in particular, ... CR 12(b)(6) ... to deny the motion to dismiss.” RP for October 28, 1999, at 2-3.

Right Price moved to compel production of its discovery requests. CP 28. As Right Price acknowledged, the Defendants contested this *3 motion on the ground they were immune from any order permitting this case to proceed, CP 40,¹ but the superior court ordered them produce all of the materials for *in camera* review. CP 233.

Defendants sought discretionary review of this order compelling production. After granting such review, the Court of Appeals reversed the order compelling discovery, but it declined to address Defendants’ primary argument that the case should be dismissed altogether on immunity grounds. 105 Wn. App 813,21 P.3d 1157 (2001).

Defendants sought review in this Court of the Court of Appeals’ refusal to dismiss this case. Right Price did not cross-petition regarding that Court’s reversal of the discovery order (nor does it raise that issue in its Supplemental Brief). Thus, the only issue before this Court is whether the Court of Appeals erred in refusing to dismiss this case altogether. *See* RAP 13.7(b) (review only of “questions raised” in petition for review).

III. INTEREST OF AMICUS

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonprofit, nonpartisan organization dedicated to the principles of individual liberty embodied in the Federal and State Constitutions. The ACLU strongly supports freedom of speech and of the press and the concomitant right to petition the government for a redress of grievances.

*4 The ACLU believes that lawsuits, such as this one, that seek to premise legal liability upon the legitimate exercise of these First Amendment rights, improperly chill and deter protected expression by forcing individuals and organizations who wish to convey their views on matters of public importance to endure the expense and burdens of defending themselves in court. For this reason, the ACLU considers it imperative that courts identify and dismiss such lawsuits--commonly known as “SLAPP’s” (*i.e.*, strategic lawsuits against public participation)--at their earliest possible opportunity.

IV. ARGUMENT

Right Price’s complaint and filings in this case give every reason to believe that this is a SLAPP lawsuit. As the California Court of Appeal has recognized, “[t]he paradigm SLAPP is a suit filed by a large land developer against ... a neighborhood association intended to chill the defendants’ continued political or legal opposition to the developer’s plans.” *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449 (Cal. App. 1994). “Characteristically, the SLAPP suit lacks merit; it will achieve its objective if it depletes defendant’s resources or energy. The aim is not to win the lawsuit but to detract the defendant from [its] objective, which is adverse to plaintiff.” *Dowling v. Zimmerman*, 103 Cal. Rptr. 2d 174, 186 (Cal. App. 2001) (internal quotations and citations omitted).

make to legislative bodies regarding issues within those bodies' purview. *Harris v. Huntington*, 2 Tyl. 129, 140-46 (Vt. 1802) (statements to state legislature regarding fitness of judge); 1 William Blackstone, *Commentaries* 143 ("all commitments and prosecutions for ... petitioning" the king or either house of parliament "are illegal"); see also *Logan's Super Markets, Inc. v. McCalla*, 343 S.W.2d 892 (Tenn. 1961) (legislative committee).

Although this Court has not addressed this issue, many states have held that statements given in situations virtually identical to this one are *20 absolutely privileged. See *Joseph v. Collins*, 649 N.E.2d 964 (Ill. App. 1995) (statements before finance committee meeting of city council); *North Coast Cable Ltd. v. Hanneman*, 648 N.E.2d 875 (Ohio App. 1994) (city council); *DeSantis v. Employees Passaic County Welfare Ass'n*, 568 A.2d 565 (N.J. Super. 1990) (unsolicited testimony before advisory commission of town board); *Jennings v. Cront*, 389 A.2d 1183 (Pa. Super. 1978) (legislative subcommittee); *Whelan v. Wolford*, 331 P.2d 86 (Cal. App. 1958) (protest filed with land use planning commission).

This Court should follow these holdings here. The County Council meeting, at the very least, was a legislative proceeding. The Defendants' statements were relevant to the Council's duties and--though it does not even matter under these cases--they were given in a hearing with significant procedural safeguards. The County Council has the authority to strike public comments that are irrelevant to any of its public meetings, PCC §1.28.050(B), and to sanction persons who "speak [during its meetings] in a slanderous, libelous, or disorderly manner." §1.28.050(G).

V. CONCLUSION

For the foregoing reasons, this Court should remand this case to the superior court with directions to dismiss it at once.

Appendix not available.

Footnotes

- 1 In its Memorandum in Support of Motion to Compel, Right Prices states that "Defendants have objected to the proposed discovery arguing that ... the activities undertaken by defendants are some how [sic] protected or privileged. Generally, the objections set forth go to the merits of and defenses of defendants case" CP 40.
- 2 In expressing concerns regarding the constitutionality of the "good faith" standard in RCW 4.24.510 and likening it to the law that this court held unconstitutional in *State ex rel Public Disclosure Comm'n v. 119 Vote Nol*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998), Defendants seem to assume that the anti-SLAPP statute creates a *cause of action* for all statements that are made without "good faith." See Pet'n for Review at 15-20; Defs' Supp. Br. at 2, 7-10. If the statute, in fact, created such a cause of action, the ACLU may well share Defendants' concerns. But the most sensible reading of RCW 4.24.510 is that it does *not* create any cause of action; it merely provides an affirmative defense against claims based on public participation. As such, to the extent that RCW 4.24.510 is inadequate to protect Defendants' common law rights to petition, this Court may--and should--hold that those rights provide Defendants with additional affirmative defenses that forecloses Right Price's claims. See *infra* section IV.B.2.
- 3 The First Amendment guarantees freedom of speech and insulates parties who "petition the Government for a redress of grievances," U.S. Const. Amend. I, from incurring any liability for any such communication that is a non-sham or is made without "actual malice." *Richmond v. Thompson*, 130 Wn.2d 368, 378, 922 P.2d 1343 (1996). Article I, section 4 of the Washington Constitution provides parallel protection. *Id.* at 383.
- 4 These cases sometimes characterize this threshold determination as deciding a motion for summary judgment (instead of a motion to dismiss) because plaintiffs may--and sometimes do--offer evidence outside of the pleadings in order to make the appropriate threshold showing. But none of these cases require the *defendants* to respond to any discovery before determining whether the plaintiff's allegations of "bad faith" raise a genuine issue regarding whether the defendants' activities were unprotected. In any event, even if this threshold determination is more appropriately rendered in the summary judgment context than in the dismissal context, Defendants here also moved for (but were refused) summary judgment in the trial court. CP 136; 105 Wn. App. at 817. Thus, either way, the proper procedural vehicle is present for reviewing the trial court's threshold conclusion regarding the adequacy of Right Price's allegations.
- 5 Right Price does not mention the issue of bad faith in any of its briefs to this Court.
- 6 Copies of the relevant provisions of the PCC are attached in the Appendix of this brief.

APPENDIX C

SUPREME COURT
FILED

OCT 17 2001

Frederick M. Oliphant, Clerk

DEPUTY

No. S094877

IN THE SUPREME COURT OF CALIFORNIA

EQUILON ENTERPRISES, LLC, Plaintiff and Appellant,

v.

CONSUMER CAUSE, INC., Defendant and Respondent.

The application of The California Anti-SLAPP Project, American Civil Liberties Union of Northern California, ACLU Foundation of Southern California, and American Civil Liberties Union of San Diego and Imperial Counties for permission to file an amicus curiae brief in support of respondent is hereby granted.


Chief Justice

No. S094877

SECOND APPELLATE DISTRICT, DIVISION 2
NO. B130701

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EQUILON ENTERPRISES, LLC,

Petitioner,

v.

CONSUMER CAUSE, INC.,

Respondent.

**AMICI CURIAE BRIEF OF THE CALIFORNIA ANTI-SLAPP
PROJECT, THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, THE ACLU FOUNDATION OF
SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL
LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES
IN SUPPORT OF RESPONDENT CONSUMER CAUSE INC.**

Mark Goldowitz (No. 96418) California Anti-SLAPP Project 1611 Telegraph Ave., Suite 1200 Oakland, California 94612 Tel: 510/835-0850 x 305 Fax: 510/465-1985	Margaret C. Crosby (No. 56812) American Civil Liberties Union Foundation Of Northern California, Inc. 1663 Mission Street, Suite 460 San Francisco, California, 94103 Tel: 415/621-2493 Fax: 415/255-8437
---	--

Attorneys for Amici Curiae
(additional counsel listed on inside front cover)

TABLE OF CONTENTS

INTRODUCTION. 1

I. INTEREST OF THE AMICI. 1

II. THE ANTI-SLAPP STATUTE DOES NOT REQUIRE
DEFENDANT TO PROVE THAT THE ACTION WAS
BROUGHT WITH AN INTENT TO CHILL THE DEFENDANT’S
EXERCISE OF FREE SPEECH OR PETITION RIGHTS 3

A. The Plain Language of the Statute Contains No Proof-of-
Intent Requirement 4

B. Imposing a Proof-of-Intent to Chill Requirement Would
Undermine the Purpose of the Statute 5

C. Imposing a Proof-of-Intent to Chill Requirement Is Contrary
to Fundamental Principles of Statutory Construction 9

D. A Proof-of-Intent to Chill Requirement Would Severely
Undermine the Effectiveness of the Anti-SLAPP Statute and
Would Be Contrary to Sound Public Policy 11

E. Caselaw Does Not Support a Proof-of-Intent Requirement 13

F. The Fee-Shifting Provision of Section 425.16 Is Not
Unconstitutional 16

1. The Fee-Shifting Provision in Subdivision (c) is Not
Punitive, but Compensatory, and is Based on Sound
Policy 16

2. Neither *California Teachers* nor the *Noerr-Pennington*
Doctrine Applies in This Case 19

CONCLUSION 21

INTRODUCTION.

This Court granted review on the single issue of whether a defendant who seeks to invoke the anti-SLAPP statute must show that the plaintiff brought the action with the intent to chill defendant's exercise of constitutional speech or petition rights. Without doubt, the answer is no.

Imposing this requirement is contrary to the plain language of the statute, the Legislature's intent in enacting, and later strengthening, Code of Civil Procedure section 425.16,¹ and fundamental principles of statutory construction. Imposing such a requirement would severely undermine the effectiveness of the statute and would be contrary to sound public policy. Finally, the argument by petitioner Equilon that such a requirement is constitutionally required is without merit.

I. INTEREST OF THE AMICI.

The California Anti-SLAPP Project (CASP) is a public interest organization dedicated to the eradication of SLAPPs (Strategic Lawsuits Against Public Participation) in California. CASP was founded in 1991. CASP worked with the Legislature in enacting the anti-SLAPP law in 1992. CASP also sponsored the 1997 and 1999 amendments to the law. (Stats. 1997, c. 271; Stats. 1999, c. 960.) Since its inception, CASP has monitored

¹ Statutory section references herein are to the Code of Civil Procedure, unless otherwise indicated.

the implementation of the anti-SLAPP law in California courts and has assisted individuals and organizations who are the targets of SLAPPs, and their attorneys. CASP's director was counsel for the successful defendant in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, and CASP filed an amicus brief in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, the previous two cases decided by this Court under the anti-SLAPP law.

The American Civil Liberties Union of Northern California, the ACLU Foundation of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties (hereafter collectively "ACLU") are the regional California affiliates of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan membership organization dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions and cognate laws. Since its inception, the ACLU has worked to safeguard freedom of expression, particularly on matters of public concern. The ACLU believes that lawsuits arising out of speech and petition activities can stifle public discourse, due to the fear of liability and the burden of protracted litigation that such lawsuits engender. The ACLU believes that California's anti-SLAPP law is an important safeguard for freedom of speech and whenever possible should be construed to protect, not hinder, free expression of speech and the right to petition.

The present case, and its companion case, *Navellier v. Sletten* (No. S095000), raise the issue of whether section 425.16 requires a defendant to show, on a special motion to strike, that the plaintiff filed the action with intent to chill the defendant's First Amendment free speech or petition rights, before the burden shifts to the plaintiff to establish a probability of prevailing on the merits. CASP and the ACLU are familiar with the issues and with the scope of the parties' presentation of the issues, and believe that additional briefing would be of assistance to the Court. Both CASP and the ACLU have extensive experience with the anti-SLAPP law. Both believe that re-writing the statute to impose on the defendant the burden of showing intent to chill would be contrary to the plain language and the legislative intent of the statute and would seriously undermine its effectiveness.

II. THE ANTI-SLAPP STATUTE DOES NOT REQUIRE DEFENDANT TO PROVE THAT THE ACTION WAS BROUGHT WITH AN INTENT TO CHILL THE DEFENDANT'S EXERCISE OF FREE SPEECH OR PETITION RIGHTS.

In *Briggs, supra*, this Court held that the anti-SLAPP statute must be construed broadly, as directed by the Legislature, and rejected an effort to limit the operative portion of section 425.16 (subdivision (e)) by reading into it language from the preamble of the statute (subdivision (a)). *Briggs* held that this result was in accordance with the plain language of the statute, discernible legislative intent, fundamental rules of statutory construction,

Finally, *City of Cotati v. Cashman* does not support Equilon's argument. Nowhere does *Cotati* state that the defendant must show the plaintiff's intent to chill; it merely states that the City of Cotati's lawsuit in that case "did not have the *effect* of chilling respondents' right to petition." (90 Cal.App.4th at p. 806 [emphasis added].)

F. The Fee-Shifting Provision of Section 425.16 Is Not Unconstitutional.

Equilon argues that the fee-shifting provision of section 425.16 "punishes" those who exercise the First Amendment right of petition by filing lawsuits, and that the provision is constitutional only if the defendant is required to show that the plaintiff filed the action with intent to chill. (EOB at 19-34.) As discussed below, this assertion is without merit.

Contrary to Equilon's assertion, section 425.16 does not prohibit a plaintiff from litigating an action which arises out of the defendant's petition or free speech activity. It only subjects to dismissal those suits in which the plaintiff is unable to show a probability of ultimately prevailing and allows the prevailing on the claims defendant to recover his or her fees. In other words, it targets those suits which have no merit. This is not unconstitutional. "The right of petition is not absolute, providing little or no protection for baseless litigation . . ." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 648, n. 4.) There is no unconstitutional interference with Equilon's right of petition.

unsuccessful litigants any right under the First Amendment to avoid payment of the prevailing party's attorneys' fees pursuant to a prevailing party fee-shifting provision.

CONCLUSION

For the foregoing reasons, the decision of the court of appeal should be affirmed. To the extent that they hold or suggest that proof of intent is required, *Foothills Townhome Association v. Christiansen, supra*, and *Paul for Council v. Hanyecz, supra*, and *City of Cotati v. Cashman, supra*, should be disapproved.

Dated: October 15, 2001 Amici Curiae California Anti-SLAPP Project,
American Civil Liberties Union of Northern
California, the ACLU Foundation of Southern
California, and the American Civil Liberties
Union of San Diego and Imperial Counties

By: Mark Goldowitz
Mark Goldowitz

APPENDIX D

No. 111443

IN THE SUPREME COURT OF ILLINOIS

STEVE SANDHOLM,

Plaintiff-Appellant,

v.

RICHARD KUEKER, ARDIS KUECKER, GLEN HUGHES, MICHAEL VENIER,
AL KNICKREHM, TIM OLIVER, DAN BURKE, DAVID DEETS, MARY
MAHAN-DEATHERAGE, NRG MEDIA, LLC, a limited liability company, GREG
DEATHERAGE, ROBERT SHOMAKER, and NEIL PETERSEN,

Defendants-Appellees.

Appeal from The Second District Appellate Court, No 2-09-1015.
There Heard on Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Lee
County, Illinois, No 08 L 19, The Honorable David L. Jeffrey, Judge Presiding.

BRIEF OF AMICI CURIAE

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,
THE ILLINOIS PRESS ASSOCIATION, THE ILLINOIS BROADCASTERS
ASSOCIATION, AND THE PUBLIC PARTICIPATION PROJECT

IN SUPPORT OF DEFENDANTS-APPELLEES

Harvey Grossman
Adam Schwartz
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Ave., Suite 2300
Chicago, IL 60601
On behalf of the ACLU amicus

Leah R. Bruno
Kristen C. Rodriguez
SNR Denton US LLP
233 S. Wacker Dr., Suite 7800
Chicago, IL 60606
On behalf of the ACLU amicus

Donald Craven
Donald M. Craven P.C.
1005 N. Seventh
Springfield, IL 62702
On behalf of the IPA and IBA amicus

Peter Kurdock
1001 Connecticut Avenue, N.W.
Suite 1100
Washington, DC. 20036
*On behalf of the Public Participation
Project amicus*

FILED

MAY 25 2011

SUPREME COURT
CLERK

POINTS AND AUTHORITIES

Page

ARGUMENT

I.	The Purpose of the CPA is To Protect Association and Petitioning.	3
A.	Prior to the CPA, Unchecked SLAPP Suits Significantly Burdened Citizens' Ability to Petition the Government.	3
	<i>Tamarack Development LLC v. Schultz,</i> No. 03 LA 235 (Cir. Ct. McHenry County, July 2003).....	3, 4
	<i>Myers v. Levy,</i> 348 Ill. App. 3d 906, 808 N.E.2d 1139 (2d Dist. 2004)	5
	<i>Meyer v. McKeown,</i> 266 Ill. App. 3d 324 (3d Dist. 1994)	4
	<i>Stevens v. Tillman,</i> 855 F.2d 394 (7th Cir. 1988).....	5
	<i>Philip I. Mappa Interests, Ltd. v. Kendle,</i> 196 Ill. App. 3d 703, 554 N.E.2d 1008 (1st Dist. 1990)	5
	<i>King v. Levin,</i> 184 Ill. App. 3d 557, 540 N.E.2d 492 (1st Dist. 1989)	6
	<i>Adreani v. Hansen,</i> 80 Ill. App. 3d 726 (1st Dist. 1980).....	4
	<i>Kirchoff v. Curran,</i> No. 90-MR-190 (20th Judicial Cir., St. Clair County).....	5
	John Etheredge, <i>Slander, Libel Lawsuit Over Oswego Project Dismissed</i> Ledger-Sentinel, Sept. 6, 2007	4
	Jason King, <i>Board Member Sued for Remarks-Developer Says Publication</i> <i>Defamed His Company,</i> Daily Herald, Feb. 12, 2005	4
	Hugh Dellios, <i>Builder's Suit Puts Clamp on Picketing Homeowners,</i> Chicago Tribune, Apr. 4, 1990	4
	Tim Poor, <i>Free Speech Fight Leaves Victor Drained,</i> St. Louis Post-Dispatch, Sept. 20, 1992	5

Del. Code Ann. tit. 10, § 8138(a)	16
Me. Rev. Stat. tit. 14 § 556.....	16
Neb. Rev. Stat. § 25-21,243(1).....	16
27 Pa. Cons. Stat. Ann. § 7707.....	16
R.I. Gen. Laws § 9-33-2(d).....	16
Wash. Rev. Code Ann. § 4.24.510	16
735 ILCS 110/15	14
735 ILCS 110/20(b).....	16
735 ILCS 110/25	16
B. California’s Anti-SLAPP Act Affords Different Protections Than The CPA.....	16
<i>Hytel Group, Inc. v. Butler</i> , 405 Ill. App. 3d 113, 938 N.E.2d 542 (2d Dist. 2010)	16
IV. The CPA is Consistent With The United States and Illinois Constitutions.	17
A. Immunities That Foreclose Certain Causes of Action Are Not Unconstitutional.....	17
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	17, 18
<i>Sandholm v. Kuecker</i> , 405 Ill. App. 3d at 835, 942 N.E.2d 544 (2d Dist. 2010)	17
<i>Defend v. Lascelles</i> , 149 Ill. App. 3d 630, 500 N.E.2d 712 (4th Dist. 1986).....	17
<i>Carson v. Block</i> , 790 F.2d 562 (7th Cir. 1986).....	17, 18
<i>Mich. Ave. Nat’l Bank v. County of Cook</i> , 191 Ill. 2d 493, 732 N.E.2d 528 (2000).....	17, 19
<i>McDonald v. Smith</i> , 472 U.S. 479 (1985)	19
<i>Troman v. Wood</i> , 62 Ill. 2d 184 (1975).....	19, 20

<i>Myers v. Levy</i> , 348 Ill. App. 3d 906, 808 N.E.2d 1139 (2d Dist. 2004)	20.
<i>Bushell v. Caterpillar, Inc.</i> , 291 Ill. App. 3d 559, 683 N.E. 2d 1286 (3d Dist. 1997)	18
<i>Best v. Taylor Mach. Works</i> , 179 Ill. 2d 367, 689 N.E.2d 1057 (1997).....	18
<i>People v. Gersch</i> , 135 Ill. 2d 384, 553 N.E.2d 281 (1990).....	18
<i>Hammond v. United States</i> , 786 F.2d 8 (1st Cir. 1986).....	18
735 ILCS 110/15	19
B. Other States' Anti-SLAPP Acts Have Withstood Similar Constitutional Attacks.....	20
<i>Nexus v. Swift</i> , 785 N.W.2d 771 (Minn. Ct. App. 2010).....	20
<i>Hometown Props., Inc. v. Fleming</i> , 680 A.2d 56 (R.I. 1996).....	20
<i>Guam Greyhound v. Brizill</i> , No. CVA07-021, 2008 WL 4206682 (Guam Sept. 11, 2008).....	21
<i>Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.</i> , 44 Cal. Rptr. 2d 46 (Ct. App. 1st Dist. 1995).....	21
<i>Duracraft Corp. v. Holmes Prods. Corp.</i> , 691 N.E.2d 935 (Mass. 1998).....	21
<i>Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County</i> , 616 So.2d 562 (Fla. Dist. Ct. App. 1993).....	22
735 ILCS 110/10	24
V. The CPA Was Correctly Applied in This Case.....	22
A. The Parents' Comments Are Quintessential Petitioning Activity That Should Be Immune Under The CPA.	22
<i>Sandholm v. Kuecker</i> , 405 Ill. App. 3d 860, 942 N.E.2d 544 (2d Dist. 2010).....	23

INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") of Illinois is a statewide, nonprofit, nonpartisan organization with 20,000 members and supporters dedicated to the principles of liberty and equality embodied in the United States and Illinois Constitutions and civil rights laws. The ACLU of Illinois has a long history of protecting individual rights, including freedoms of speech, association, and petition. Among other things, the ACLU of Illinois actively advocated for the passage of the Illinois Citizen Participation Act of 2007. *See* 735 ILCS 110 *et. seq.* (West 2008).

Both the Illinois Press Association ("IPA") and the Illinois Broadcasters Association ("IBA") are press organizations dedicated to promoting and protecting the First Amendment interests of the press and citizens before the Illinois legislature and Illinois courts. The IPA is the largest state press organization in the United States that includes nearly all of the newspapers in Illinois. The IBA is a statewide organization of broadcast companies whose reports are disseminated throughout Illinois and the surrounding states.

The Public Participation Project is based in Washington D.C. As a public interest organization, the Public Participation Project works to enact legislation to protect citizens from SLAPP lawsuits throughout the states as well as in the United States Congress.

The *Amici* have submitted this brief to assist the Court in understanding how the CPA protects the ability of citizens and organizations to exercise their right of free speech, association, and governmental participation.

INTRODUCTION

An informed electorate is vital to the democratic process. The ability of ordinary citizens to openly communicate with the electorate and with government officials in order to influence public and governmental debate must be safeguarded. Unfortunately, such speech often is threatened by retaliatory litigation brought against these speakers by the subjects of their speech. Such suits inhibit the ability of speakers to continue their advocacy on a matter of public concern by diverting their scarce resources into costly and time-consuming litigation. The threat of such suits deters other speakers from expressing their views on matters of public concern. These suits often are called Strategic Lawsuits Against Public Participation, or "SLAPPs."

In 2007, Illinois responded to this growing problem by enacting the Citizen Participation Act (the "CPA" or the "Act"), which grants a conditional immunity to individuals and organizations speaking in pursuit of government action from SLAPPs such as the lawsuit now before this Court. *See* 735 ILCS 110 *et seq.*¹ In doing so, Illinois joined a growing number of states that have enacted specific legislation to protect the First Amendment right to free speech as it relates to the process of government.² The Illinois CPA provides that any claim that is "based on, relates to, or is

¹ As explained in the Act itself, "[t]here has been a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called." 735 ILCS 110/5.

² At least 26 other states have enacted Anti-SLAPP legislation: Ariz. Rev. Stat. Ann. §§ 12-751 to 12-752, Ark. Code Ann. §§ 16-63-501 to -508; Cal. Civ. Proc. Code §§ 425.16-18; Del. Code Ann. tit. 10, §§ 8136-8138; Fla. Stat. Ann. § 768.295; Ga. Code Ann. § 9-11-11.1; Haw. Rev. Stat. Ann. §§ 634F-1 to -4; Ind. Code Ann. § 34-7-7-1 to -10; La. Code Civ. Proc. Ann. art. 971; Me. Rev. Stat. Ann. tit. 14, § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807; Mass. Gen. Laws Ann. ch. 231, § 59H; Minn. Stat. Ann. § 554.01-.05; Mo. Ann. Stat. § 537.528; Neb. Rev. Stat. §§ 25-21,241 to -21,246; Nev. Rev. Stat. Ann.

in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government . . . are immune from liability. . . *regardless of intent or purpose*, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15 (emphasis added). The Act places the burden on a plaintiff to provide "clear and convincing evidence" that the defendants' expression falls outside the Act's protection. See 735 ILCS 110/20(c).

The CPA is now under attack by SLAPP plaintiffs who, like the Plaintiff here, seek to severely limit its laudable policy objectives or nullify its protections all together. The interest of the *Amici* emanate from their collective concern for protecting the public's right to petition the government that is embodied in the CPA.

ARGUMENT

I. THE PURPOSE OF THE CPA IS TO PROTECT ASSOCIATION AND PETITIONING.

A. Prior to the CPA, Unchecked SLAPP Suits Significantly Burdened Citizens' Ability to Petition the Government.

Prior to the enactment of the CPA, people who engaged in petitioning speech by such methods as leafleting, picketing, and writing letters to the media and government officials were frequently subjected to retaliatory litigation. For example, citizen residents who petitioned local government to stop construction projects repeatedly were sued by the developers. For instance, in *Tamarack Development LLC v. Schultz*, No. 03 LA 235

§§ 41.650-.670; N.M. Stat. Ann. §§ 38-2-9.1 to -9.2; N.Y. Civ. Rights Law §§ 70-a, 76-a; N.Y. C.P.L.R. 3211(g), 3212(h); Okl. Stat. Ann. tit. 12, § 1443.1; Or. Rev. Stat. Ann. §§ 31.150-.155; 27 Pa. Cons. Stat. Ann. §§ 7707, 8301-05; R.I. Gen. Laws §§ 9-33-1 to -4; Tenn. Code Ann. §§ 4-21-1001 to -1004; Utah Code Ann. §§ 78B-6-1401 to -1405; Vt. Stat. Ann. tit. 12, § 1041; Wash. Rev. Code Ann. §§ 4.24.500-.520.

IV. THE CPA IS CONSISTENT WITH THE UNITED STATES AND ILLINOIS CONSTITUTIONS.

A. Immunities That Foreclose Certain Causes of Action Are Not Unconstitutional.

Contrary to Plaintiff's arguments (Br. at 32-34), neither the First Amendment to the U.S. Constitution nor Article I, § 12 of the Illinois Constitution guarantees a remedy for an individual who has been purportedly defamed. The tort of defamation is a creature of common law (or legislative) origin, not a "fundamental liberty interest" protected by the federal constitution. See *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (holding that defamation of one's character, by itself, is not a violation of the federal constitution).

Accordingly, as discussed previously, and as the Appellate Court noted below, *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 942 N.E.2d 544, 558-59 (2d Dist. 2010), certain common law and statutory privileges may operate to make even *per se* defamatory statements non-actionable. Such privileges do not violate the Illinois constitution, e.g., *Defend*, 149 Ill. App. 3d at 643, 500 N.E.2d 712 at 721 ("We therefore reject the defendants' argument that granting an absolute privilege . . . offends the Illinois Constitution. . . ."), nor do they violate the First Amendment, *Carson v. Block*, 790 F.2d 562, 566 (7th Cir. 1986) (stating that "[l]ibel and slander are not violations of the constitution," and collecting cases establishing absolute immunity even in spite of "malicious libel").

Moreover, the Illinois legislature has the inherent power to modify the common law by altering, amending, or even abolishing certain rights. *Michigan Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 519, 732 N.E.2d 528, 543 (2000) (holding that the "legislature has the inherent authority to repeal or change the common law and may do

away with all or part of it"); accord *Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986) ("There is no fundamental right to particular state-law tort claims."). In acting to amend or restrict common law remedies, the Illinois legislature operates under the general principles that guide all state statutory enactments: the legislation must be constitutional and must be rationally related to a legitimate government interest. See *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 406-07, 689 N.E.2d 1057, 1077 (1997); *People v. Gersch*, 135 Ill. 2d 384, 395-96, 553 N.E.2d 281, 286-87 (1990).

Here, the CPA—irrespective of whether it confers a qualified immunity, or, as Plaintiff erroneously contends, absolute immunity—is a valid exercise of the Illinois legislature's power to modify the common law defamation tort. Indeed, if it were not, then all of the other well-established immunities, *see supra* Part II(B), would be rendered unconstitutional as well. Plaintiff makes no attempt to claim that the Act, and the appellate court's interpretation extending immunity to Defendants for their purportedly defamatory statements and publications, is not rationally related to furthering the state's interest in protecting and encouraging Defendants' participation in government by petitioning for government action in response to a state employee's conduct.

Plaintiff contends that his reputational interests are more important than Defendants' rights to petition and participate in government policy-making. (See Br. at 17.) Plaintiff is mistaken. Defendants' rights protected by the Act are entitled to constitutional protection, but Plaintiff's allegedly damaged reputation is not. It is settled law that libel and slander are not violations of the Illinois or United States Constitutions. See *Paul*, 424 U.S. at 711-712; *Carson*, 790 F.2d at 566; *Bushell*, 291 Ill. App. 3d at 561, 683 N.E.2d at 1287 ("[A]bsolute privilege rests on the idea that conduct which otherwise

would be actionable is permitted to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.") (internal citations omitted.) Nor, as Plaintiff contends (Br. at 16-17), does the Supreme Court's decision in *McDonald v. Smith*, 472 U.S. 479, 485 (1985), which held that the Petition Clause *did not require* states to implement an absolute privilege for petitioners' speech, *prevent* the Illinois legislature from expanding the petitioners' privilege from liability for defamation.

By enacting the CPA, the Illinois General Assembly has balanced and calibrated both the general public's interest in petitioning speech that seeks favorable government action, and the reputational interests of people who are the subjects of such speech. Specifically, the CPA creates a conditional immunity—not an absolute immunity—that allows defamation litigation against petitioning speech to proceed, if the speech was not “genuinely aimed” at procuring favorable governmental action. *See* 735 ILCS 110/15. Illinois courts recognize that the legislature has the inherent power to balance various interests and implement reasonable changes to common law rights. *See Michigan Ave. Nat'l Bank*, 191 Ill.2d at 519, 732 N.E.2d at 543; *Best*, 179 Ill. 2d at 406-07, 689 N.E.2d at 1077.

Plaintiff relies heavily on *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975), a case unrelated to immunity and government petitioning, for his argument that the protection of one's reputation is paramount. (*See* Br. at 33.) In fact, the *Troman* court specifically stated: “Our holding in the present case is, of course, *not intended to remove any of the absolute or qualified privileges* which have heretofore been recognized in this State to the extent that the facts may warrant their application.” 62 Ill. 2d at 198, 340

N.E.2d at 299 (emphasis added). Accordingly, it is erroneous to suggest that *Troman* somehow trumps the application of a privilege now recognized by the legislature.

Similarly, Plaintiff's reliance on *Myers v. Levy*, 348 Ill. App. 3d 906, 808 N.E.2d 1139 (2d Dist. 2004), is misguided. In the *Myers* case, a group of parents successfully petitioned public school officials regarding their dissatisfaction with a coach. The parents sent a letter to the school board alleging that the coach showed little or no concern for players' injuries and sought his removal as head coach. 348 Ill. App. 3d at 910, 808 N.E.2d at 1144. The coach then sued for defamation. The Second District reversed the award of summary judgment in favor of the defendant, finding that a question of fact remained as to whether the defendant had acted with actual malice or recklessness, 348 Ill. App. 3d at 920, 808 N.E.2d at 1152, which led to lengthy, expensive discovery on remand. Decided prior to the passage of the CPA, *Myers* was actually one of the cases that spurred its enactment. See *supra* ACLU Legislative Memos.

B. Other States' Anti-SLAPP Acts Have Withstood Similar Constitutional Attacks.

Plaintiff does not cite to a single case in which an anti-SLAPP Act was found to be unconstitutional—because there are none. As the Minnesota Court of Appeals recently noted in *Nexus v. Swift*, “we do not find[] any authority holding any of these [anti-SLAPP] statutes unconstitutional. Rather, the anti-SLAPP statutes that have been challenged have been upheld.” 785 N.W.2d 771, 778-79 (Minn. Ct. App. 2010). See also *Hometown Props, Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996) (rejecting all of defendant's seven arguments for finding that the Rhode Island anti-SLAPP statute was unconstitutional); *Guam Greyhound, Inc. v. Brizill*, No. CVA07-021, 2008 WL 4206682,

at *5-6 (Sup. Ct. Guam Sept. 11, 2008) (“Even though [Guam’s anti-SLAPP statute] could in certain situations limit objectively reasonable defamation claims by declaring certain qualifying acts ‘immune from liability,’ it is well within the Legislature’s power to subject such claims to qualifications, limitations, or defenses.”) (citation omitted); *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 44 Cal. Rptr. 2d 46, 52 (Ct. App. 1st Dist. 1995) (rejecting equal protection and due process constitutional challenges to California’s anti-SLAPP law).

Also erroneous is Plaintiff’s assertion that “constitutional right to remedy provisions have been used to find Anti-SLAPP statutes unconstitutional in other states,” to which he cites *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935 (Mass. 1998). (Br. at 37.) The *Duracraft* court did *not* find the anti-SLAPP statute unconstitutional. Rather, the court found that the anti-SLAPP statute did not apply to the breach of contract claims at issue there. *Id.* at 941. In construing its state’s anti-SLAPP statute, the Massachusetts Supreme Court explained that “[t]he special movant who ‘asserts’ protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits that the claims against it are ‘based on’ the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.” *Id.* at 943. Similarly, the Appellate Court here adopted a two-step analysis to determine whether Defendants’ speech was objectively and subjectively aimed at procuring government action before granting them qualified immunity under the CPA. *Sandholm*, 405 Ill. App. 3d 835, 942 N.E.2d at 568-69. Plaintiff also cites *Florida Fern Growers Ass’n v. Concerned Citizens of Putnam County*, 616 So.2d 562 (Fla. Dist. Ct. App. 1993), as supporting his access to courts argument. (Br. at 35.) This case is clearly

distinguishable. In 1993, Florida had not adopted an anti-SLAPP statute and the case was decided in favor of following prior state precedent rather than extending the *Noerr-Pennington* doctrine to defamation and tort actions. *Id.* at 566-69. Unlike here, the court's analysis was not governed by a legislative act which expressly abrogated common law defamation remedies and which pronounced the interests it sought to protect. Thus, Plaintiff has not, and cannot, point to any authorities that question the constitutionality of anti-SLAPP statutes like the CPA.

V. THE CPA WAS CORRECTLY APPLIED IN THIS CASE.

A. The Parents' Comments Are Quintessential Petitioning Activity That Should Be Immune Under The CPA.

Here, the statute quite plainly applies to the parent Defendants' comments made on the internet and on a radio broadcast, both before *and* after these parents petitioned the Dixon High School principal, School Board, and Superintendent urging the removal of the Plaintiff from his position as the school's Athletic Director and head basketball coach.

Keucker's first letter, entitled "Hostages in the Gym," was posted online on March 9, 2008, in advance of the Board of Education meeting. The letter stated, "It is time for change. I call upon the Principal [Mr. Grady], the Superintendent [Mr. Brown], and the Board of Education to act. . . . Demonstrate to the student body and our community that [Sandholm's] bullying is excessive and will not be tolerated."⁹

A second posting, on March 10, 2008, urged: "Everyone should call Mr. Grady, Mr. Brown, or the Board to let them know how you feel . . . They need input before they can act." *Id.* That posting also urged, "If you have not called Mr. Grady, please do so.

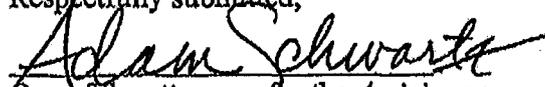
⁹ See Northern Illinois Sports Beat Forum, <http://nisbforums.proboards.com/index.cgi?board=about&action=display&thread=1144&page=1> (last visited May 11, 2011).

CONCLUSION

For the reasons stated herein, the American Civil Liberties Union of Illinois, Illinois Press Association, Illinois Broadcasters Association, and the Public Participation Project respectfully request that this Court affirm the Appellate Court's ruling that (1) the CPA provides immunity to the claims alleged by Plaintiff, and (2) the CPA is constitutional.

Dated: May 11, 2011

Respectfully submitted,


One of the attorneys for the Amici 

Harvey Grossman
Adam Schwartz
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Avenue, Suite 2300
Chicago, IL 60601-9740
(312) 201-9740 (phone)
(312) 201-9760 (fax)
hgrossman@ACLU-il.org
aschwartz@ACLU-il.org
On behalf of the ACLU amicus

Leah Bruno
Kristen Rodriguez
SNR Denton US LLP
233 S. Wacker Drive, Suite 7800
Chicago, IL 60606
(312) 876-8000 (phone)
(312) 876-7934 (fax)
leah.bruno@snrdenton.com
kristen.rodriguez@snrdenton.com
On behalf of the ACLU amicus

Donald Craven
Donald M. Craven P.C.
1005 N. Seventh
Springfield, IL 62702
(217) 544-1777 (phone)
(217) 544-0713 (fax)
don@cravenlawoffice.com
On behalf of the IPA and IBA amici

APPENDIX E

No A08-0825

STATE OF MINNESOTA
IN SUPREME COURT

Middle-Snake-Tamarac Rivers Watershed District,

Appellant,

vs.

James Stengrim,

Respondent

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION OF
MINNESOTA

Teresa Nelson #269736
Legal Counsel, ACLU-MN
445 North Syndicate Street, Suite 325
Saint Paul, MN 55101
(651) 645-4097, ext. 122

Faegre & Benson LLP
John P. Borger #9878
Leita Walker #387095
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7501

Attorneys for American Civil Liberties
Union of Minnesota
Amicus Curiae

Rinke Noonan
Gerald W. Von Korff #113232
US Bank Plaza, Suite 300
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

Murnane Brandt
Daniel A. Haws #193501
Kelly S. Hadac #0328194
30 East Seventh Street, Suite 3200
St Paul, MN 55101
(651) 227-9411

Attorney for Appellant
Middle-Snake-Tamarac Rivers
Watershed District

Attorneys for Respondent
James Stengrim

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF THE CASE</u>	1
<u>INTRODUCTION</u>	1
<u>IDENTIFICATION OF AMICI</u>	1
<u>SUMMARY OF ARGUMENT</u>	2
<u>ARGUMENT</u>	2
I. <u>THE PLAIN LANGUAGE OF MINN. STAT. § 554.01 ET SEQ. APPLIES TO CLAIMS FOR BREACH OF SETTLEMENT AGREEMENT</u>	2
II. <u>RELEVANT CANONS OF STATUTORY INTERPRETATION INDICATE THAT MINN. STAT § 554.01 ET SEQ. APPLIES TO CLAIMS FOR BREACH OF SETTLEMENT AGREEMENT</u>	6
III. <u>ANTI-SLAPP STATUTES TYPICALLY APPLY TO CLAIMS ALLEGING BREACH OF CONTRACT</u>	11
IV. <u>MINNESOTA PUBLIC POLICY SUPPORTS APPLICATION OF MINN. STAT. § 554.01 ET SEQ. TO CLAIMS FOR BREACH OF SETTLEMENT AGREEMENT</u>	14
V. <u>THIS COURT SHOULD DECLINE TO ADDRESS ANY CONSTITUTIONAL CHALLENGE TO THE ANTI-SLAPP STATUTE</u>	18
<u>CONCLUSION</u>	21

STATEMENT OF THE CASE

Introduction

Subjective fears and overt threats of costly litigation can deter speech and public participation in government on important public issues, to the detriment of the would-be speakers, participants, and the public at large. In 1994, the Minnesota Legislature sought to mitigate this problem by enacting Minn. Stat. § 554.01 *et. seq* (the “anti-SLAPP statute”). The American Civil Liberties Union of Minnesota (“ACLU-MN”) supports application of the plain meaning of the statute, including to claims for breach of settlement agreement.¹ The Court of Appeals properly remanded the case to the District Court to apply the standard set forth in § 554.02 Subd. 2(3) to Respondent James Stengrim’s (“Stengrim”) motion for summary judgment. (AA-H1-9).² This Court should affirm the decision of the Court of Appeals.

Identification of Amici

ACLU-MN is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties. It is the statewide affiliate of the American Civil Liberties Union and has more than 10,000 members in the state of

¹ Other than the identified amici and their counsel, no person has made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored the brief in whole or in part.

² “AA-__” refers to pages within the Appendix of Appellant Middle-Snake-Tamarac Rivers Watershed.

Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws.

Summary of Argument

The plain language of the anti-SLAPP statute applies to Respondent James Stengrim's motion for summary judgment on Appellant Middle-Snake-Tamarac Rivers Watershed District's ("the District") claim for breach of settlement agreement. See Section I below. Given the clarity of the statutory language, this Court need not engage in extended statutory interpretation or analyses of legislative intent and public policy. Nevertheless, relevant methods of statutory construction (see Section II below), the experience of other states with similar anti-SLAPP statutes (see Section III below) and considerations of public policy (see Section IV below) reinforce the broad statutory application of the anti-SLAPP statute to claims alleging breach of settlement agreement. The Court of Appeals therefore properly reversed and remanded the case to the District Court with instructions to apply the standard set forth in Minn. Stat. § 554.02 Subd. 2(3). Finally, the District has not raised any valid constitutional challenge to the anti-SLAPP statute. See Section V below.

Argument

I. The Plain Language of Minn. Stat. § 554.01 *et seq.* Applies to Claims for Breach of Settlement Agreement.

Chapter 554 of the Minnesota Statutes ("the anti-SLAPP statute") "applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation."

entities from treating as private data otherwise classified as public. The Court would therefore save significant judicial resources by applying the standard set forth in § 554.02 Subd. 2(3) of the statute, eliminates claims not based upon “clear and convincing evidence” that particular acts of public participation are “not immune” from suit. See Minn. Stat. § 554.02 Subd. 2(3) (2008).

Minnesota public policy, as expressed in its statutes and judicial decisions, favors (1) protecting public participation from the threat of lawsuits that would chill such advocacy; (2) maintaining unrestricted access to data properly classified as public under the Minnesota Data Practices Act; and (3) promoting judicial efficiency and preventing a waste of judicial resources. Applying the anti-SLAPP statute to claims for breach of settlement agreements furthers all three policies.

V. The District Has Not Presented a Valid Constitutional Challenge to the Anti-SLAPP Statute.

The District argues that the statute impairs “the inherent power of Article III courts” to enforce “a party’s constitutional right to a meaningful remedy” (App. Br. at 23)⁵ in the context of the Noerr-Pennington doctrine, as extended to judicial access in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The Court of Appeals considered and rejected that argument, explaining that the Noerr-Pennington doctrine “has no bearing on whether a party can bring a defensive motion to dispose of a

⁵ The District’s reference to “Article III courts” confuses the legal analysis. Federal courts are established pursuant to Article III of the Federal Constitution. Minnesota state courts are established by Article VI of the Minnesota Constitution.

lawsuit already filed.” Stengrim, 2009 WL 367286, at *3 n.2 (citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 57–58 (1993)). Appellant’s Brief makes no attempt to address that refutation.

Beyond Noerr-Pennington, it is hard to determine what the District’s constitutional challenge to the anti-SLAPP statute might be. Although the District’s Petition for Review primarily contended that the Court of Appeals decision had drastically altered the judicial approach to anti-SLAPP motions, it articulated a confusing statement of the legal issue presented that alluded to constitutional problems with the statute. The District compounded that confusion with its Notice to Attorney General (AA-M-1–3) that claimed the Court of Appeals decision “potentially raises the constitutionality of the application” of Chapter 554 (emphasis added). Appellant’s Brief appears to mount an oblique assault on the statute’s constitutionality,⁶ and its Appendices G (a district court decision) and L (an article in Hennepin Lawyer) reproduce discussions from the 1990s on the constitutional question, suggesting that the statute’s procedures improperly interfere with a plaintiff’s right to a jury trial (as distinct from a general right of access to courts).

⁶ Compare App. Br. at 18 (“Section 554 is rendered constitutional precisely because it incorporates the responding parties [sic] rights.”), with id. at 4 (noting that the Court of Appeals opinion “upsets the delicate balance of constitutional protections” in the anti-SLAPP law), 23 (“To [apply the anti-SLAPP statute to this case] would impair a party’s constitutional right to a meaningful remedy and impair the inherent power of Article III courts to enforce that remedy.”), and 29–31 (contending that application of Chapter 554 to breach of contract claims “raises significant constitutional and statutory issues” and that § 554.05 “has both statutory and constitutional foundations”).

The hysteria in some quarters that arose after the statute's passage in 1994 has subsided considerably as courts have applied the statutory protections without seismic repercussions. See, e.g., Special Force Ministries v. WCCO Television, 576 N.W.2d 746 (Minn. 1998); In re Conditional Use Permit & Preliminary Planned Unit Dev. Applications of Living Word Bible Camp, Nos. A06-1734, A06-1850, A07-1231, 2008 WL 2245708, at *4-5 (Minn. Ct. App. June 3, 2008); Marchant, 694 N.W.2d at 94-96; Am. Iron & Supply Co., 1999 WL 326210, at *2-4; Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998); Hoyt v. Spangenberg, No. C9-97-1527, 1998 WL 74286, at *4 (Minn. Ct. App. Feb. 24, 1998). Fifteen years of actual experience should trump speculative claims about the statute's supposed interference with rights to a jury trial (rights which in any event are not absolute, as demonstrated by motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law).

The present case is a particularly poor vehicle for a broad, ambiguous, and oblique constitutional challenge to the anti-SLAPP statute, because it was neither raised nor addressed by the courts below. Appellate courts will not review the constitutionality of a statute if the lower courts did not address that issue below. See In re Stadsvold, 754 N.W.2d 323, 327 (Minn. 2008) (“[A]n appellate court must generally consider only those issues that were presented and considered below.”); Hoyt, 1998 WL 74286, at *4 (“Because the constitutionality of the anti-SLAPP statute was not passed on by the district court, it is not before this court.”). A reviewing court “must limit itself to a consideration of only those issues which the record shows were, or had to be, presented

and considered by the trial court in deciding the matter before it.” Butt v. Schmidt, 747 N.W.2d 566, 578 (Minn. 2008). The trial court was not presented with, did not consider, and was not required to rule on the anti-SLAPP statute’s constitutionality, and the Court of Appeals addressed only the Noerr-Pennington argument.

Conclusion

This Court should affirm the Court of Appeals and remand the case to the District Court for application of the standard set forth in Minn. Stat. § 554.02 Subd. 2(3). The plain language of the statute, as well as proper statutory interpretation, the experience of other states, and Minnesota public policy, all confirm that Minnesota’s anti-SLAPP statute should apply to Stengrim’s motion for summary judgment on the District’s claim for breach of settlement agreement.

Dated: July 2, 2009

FAEGRE & BENSON LLP



John P. Borger #9878
Leita Walker #387095
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7501

Teresa Nelson #269736
Legal Counsel, ACLU-MN
445 North Syndicate Street, Suite 325
Saint Paul, MN 55104
(651) 645-4097, ext. 122

Attorneys for American Civil Liberties
Union of Minnesota, *Amicus Curiae*