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NO. 71360-4-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION I

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

Appellants/Plaintiffs,

v.

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

Respondents/Defendants.

ANSWER TO AMICUS CURIAE BRIEF OF THE LAWFARE PROJECT

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ORIGINAL

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I. ARGUMENT

Respondents respectfully oppose the legal arguments advanced in the amicus brief filed by The Lawfare Project ("the Project"). The Project's brief, like this lawsuit, attacks sixteen citizens who are current and former Board members (and one staff member) of the Olympia Food Cooperative (the "Co-op") because they joined a national and international boycott of Israeli goods and expressed their solidarity with Palestinians in the context of a humanitarian and political debate. Indeed, the amicus submission confirms the widespread ramifications of Respondents' efforts, and is a reminder of the significant matters of public concern at the heart of this appeal.

The Project is dedicated, in its own words, to fighting "the effort by enemies of the State of Israel to delegitimize Israel and impair its ability to defend itself." *Zivotofsky v. Clinton*, U.S. Sup. Ct. No. 10-699, Brief Amicus Curiae of The Lawfare Project in Support of Petitioner, Exhibit A.[1] If anything, the Project's sudden involvement in this action

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[1] This Court may properly consider public records, newspaper articles, court filings, and the Project's own admissions on its website. *See, e.g., State v. McCuistion*, 174 Wn.2d 369, 395 n.7 (2012) (permitting party responding to amicus brief an opportunity to "counter the factual assertions" therein); ER 201(f) (judicial notice may be taken "at any stage of the proceeding"); *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of facts in newspaper articles) (citing *Agee v. Muskie,* 629 F.2d 80, 81 n.1 (D.C. Cir. 1980) (same)); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (taking judicial notice

shows that this blunderbuss lawsuit is, in fact, about silencing speech and intimidating Respondents, the majority of whom were not involved in the decision to boycott.[2] By inserting itself into this appeal, the Project appears to identify these sixteen ordinary Olympia citizens among its "enemies"—an interesting position for a professed amicus.

As the trial court found below, this lawsuit constitutes a prototypical Strategic Lawsuit Against Public Participation ("SLAPP"), that is, an action targeting speech and petition activities on matters of public concern. Such matters "occup[y] the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. ---, 131 S. Ct. 1207 (2011) (quotation marks, citation omitted). The Project's amicus brief confirms that this appeal concerns core First Amendment values,

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of proceedings in other courts); ER 901 (authenticity of records). *Cf.* ER 801(d)(2) (out-of-court statements by party opponent, such as those on the Project's website, in court filings, and in press releases, are not hearsay); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 859 (2013) (statement by party opponent "exempt from exclusion as hearsay").

[2] Only six of the 16 Respondents served on the Board when it approved the boycott, and only five Respondents actually took part in the decision. CP 1173. Respondents who served on the Board at the time of the boycott vote were Jackie Krzyzek, Jessica Laing, Suzanne Shafer, Joellen Reineck Wilhelm, Harry Levine, and John Nason. CP 7-8; CP 121. Mr. Levine did not participate in the vote. CP 1173; CP 45; CP 120-124. Further, nine of the Respondents served on the Board at the time Appellants filed this lawsuit, but did not serve on the Board when it approved the boycott resolution. They are Rochelle Gause; Erin Genia; T.J. Johnson; Jayne Kaszynski; Ron Lavigne; Eric Mapes; John Regan; Rob Richards; and Julia Sokoloff. CP 7-8. Respondent Grace Cox did not serve on the Board either when the resolution was approved or when Respondents sued. CP 467; CP 1173.

even as it is plainly wrong on the law and misstates facts in the record.

A. The Filing of the Amicus Brief Underscores That This Lawsuit Targets Protected Speech.

The Project misrepresents itself to this Court as an unbiased and neutral organization allegedly focused on "the predatory filing of meritless lawsuits to impede the exercise of free speech rights" with "knowledge of anti-SLAPP legislation." Amicus Br. at 1-2. By all objective accounts, this description is completely false, and its brief is instead a reflection of the organization's support of Israeli government policy.[3]

The Project's website reveals that it is devoted almost singularly to supporting the policies of the Israeli government.[4] It has posted many articles in this regard, ranging from "The Legal Fiction of Palestinian Statehood" to "Can You Be Sued for Boycotting Israeli Companies?"[5] Its own examples of such "lawfare" focus largely on efforts to hold Israel accountable for violations of international law.[6]

Of particular interest here, the Project vigorously opposes boycotts

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[3] Curiously, the conclusion to the Project's brief states that "the ACLU" requests that this Court reverse the trial court's rulings in support of Respondents' free speech rights. Presumably, the ACLU's appearance in the Project's brief is the result of a typographical error. Amicus Br. at 16.

[4] *See* http://www.thelawfareproject.org/. The Project's filings with the Internal Revenue Service (Form 990 public records, available at www.guidestar.org) show that it operates at a loss, but provide no detail as to who funds the Project.

[5] *See* http://www.thelawfareproject.org/Table/Articles-by-LP-Staff/.

[6] *See* http://www.thelawfareproject.org/what-is-lawfare.html.

of Israeli goods, which it claims "potentially violat[e] various state anti-discrimination laws" and "are part and parcel of a lawfare campaign to mischaracterize Israel as an 'apartheid' state that violates Palestinian human rights," "fueled" by "anti-Israel and anti-Semitic ideals."[7] The Project takes credit for a Brooklyn food co-op's decision not to boycott Israeli goods because it asserted to the co-op that doing so would violate New York law.[8] It has called upon Congress to "censure" the boycott movement.[9] On its website, the Project boasts about its aggressive, take-no-prisoners approach to other American "enemies" who dare to engage in free-speech activities that it opposes. For example, the American Studies Association ("ASA"), a group of university scholars, recently decided to join a controversial academic boycott of Israel. The Project immediately struck back against the ASA by contributing to an IRS "whistleblower complaint challenging the ASA's 501(c)(3) tax-exempt status," and demanding that the United States Government strip the ASA of its tax exemption because ASA's boycott decision is allegedly "anti-

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[7] *See* http://www.thelawfareproject.org/Press-Releases/for-immediate-release-lawfare-project-cited-in-complaint-challenging-asas-tax-exempt-status.html

[8] *See* http://www.thelawfareproject.org/Articles-by-LP-Staff/can-you-be-sued-for-boycotting-israeli-companies.html. Note that the Park Slope Food Coop did not, in fact, vote against a boycott, but voted against putting a boycott to a vote. *See, e.g.*, Kirk Semple, *Food Co-op Rejects Effort to Boycott Israeli-Made Products*, THE NEW YORK TIMES, March 27, 2012.

[9] *See* http://www.thelawfareproject.org/BDS_Analysis.pdf.

educational," and "based explicitly on national origin in violation of the public policy against such discrimination" because its roots are directly traced to "the anti-Jewish sentiment of the Palestinian boycott movement."[10]

In view of these facts, the Project's amicus brief here appears to be an extension of its campaign against organizations that boycott Israeli goods or services, this time filed under the guise of protecting Washington nonprofit corporations from allegedly "rogue actions" by their corporate boards. Amicus Br. at 9.

B. The Project's Proposed Interpretation of the Anti-SLAPP Statute Has No Merit and Has Been Rejected by Other Courts.

A boycott, by the Project's own admission, is quintessential First Amendment conduct. Amicus Br. at 12 n.15. The Project's and Appellants' effort to attack the Olympia Food Co-op's boycott therefore targets freedom of speech and public participation and petition, triggering application of the anti-SLAPP statute, RCW 4.24.520. The Project nonetheless argues the anti-SLAPP statute has no applicability here because Respondents' conduct—boycotting Israeli goods purportedly in violation of corporate bylaws—is neither "lawful" nor a "valid" exercise

[10] *See* http://www.thelawfareproject.org/Press-Releases/for-immediate-release-lawfare-project-cited-in-complaint-challenging-asas-tax-exempt-status.html.

of speech rights.[11] The Court should reject this illogical and unsupported emasculation of the law.

As an initial matter, the Project's argument that the Co-op's boycott vote was somehow "unlawful" is not properly before this Court.[12] Appellants failed to adequately raise it at the trial court, and appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *Karlberg v. Otten*, 167 Wn. App. 522, 531-32 (2012). The same principle applies to issues raised for the first time in amicus briefs. *See Protect the Peninsula's Future v. City of Port Angeles,* 175 Wn. App. 201, 217 (2013) ("this court does not consider new issues raised for the first

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[11] The Project's brief focuses mainly on the facts in this case, a subject that is already discussed in the parties' briefs to the trial court and here. It is bereft of citations to the record, and contains numerous unsupported or erroneous assertions. For example, the Project erroneously claims that the Co-op Board "failed to satisfy two requirements, as stipulated by the Bylaws, to lawfully adopt" the boycott. Amicus Br. at 5. As shown in Respondents' brief, this unsupported statement of alleged fact is inaccurate. *See* Respondents' Br. at 17-20; CP 56-60 (Olympia Food Co-op Bylaws, available at http://www.olympiafood.coop/bylaws.html). The Project also erroneously alleges "widespread opposition" to the boycott, which is objectively false from undisputed materials in the record. The record shows exactly the opposite. *See, e.g.,* CP 253 (observing that no Co-op members, including Appellants, initiated a member ballot to oppose the boycott); CP 181-82, at ¶¶ 20-24; CP 214-15 (meeting minutes showing member support—not opposition—for the boycott); CP 229-32 (showing that in Co-op elections, members who supported the boycott and who had support of the local BDS movement were elected, and those who opposed it—including several Appellants—were not elected). Accordingly, Respondents respectfully urge the Court to view the Projects' version of the facts with several grains of salt.

[12] *See* discussion of Appellants' waiver of this issue in Respondents' brief on appeal, at 14.

time in an amicus brief"). Appellants waived this novel argument by not adequately addressing it in the trial court. It should be rejected.

Even if the issue were properly before the Court, the allegations of "unlawful" conduct misapprehend the scope of the anti-SLAPP law. The anti-SLAPP statute was enacted to curb "lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech" (*i.e.*, SLAPPs). S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010). The law outlines a two-step process to decide whether to strike a claim. First, "[a] moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing 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). Second, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the responding party fails to do this, the court must grant the motion.

The First Amendment and Washington's anti-SLAPP statute protect actions involving "public participation and petition," including certain specified conduct and "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). The Project claims

this language does not protect Respondents from this lawsuit because Respondents' non-criminal conduct (a peaceful boycott) is neither "lawful" nor a "valid" exercise of their rights.

The Project's argument places the cart before the horse. If a court must consider whether conduct is "lawful" or "valid" ***before*** deciding whether the anti-SLAPP statute applies, it need not proceed to the second prong of the statute, *i.e.*, to decide whether the SLAPP plaintiff has shown a probability of prevailing on the merits. If the conduct is "lawful," the plaintiff will have failed to show a probability of prevailing on the merits, and the court will dismiss the claim. If the conduct is "unlawful" or "invalid," the claim will survive.

Recognizing this problem, California courts have rejected the same specious argument with respect to that state's law, which targets lawsuits brought to "chill the **valid** exercise of the constitutional rights of freedom of speech and petition," and applies to "conduct in furtherance" of those rights. Cal. Code Civ. P. § 425.16(a), (e) (emphasis added).[13] As the

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[13] California courts have found that the anti-SLAPP statute does not apply where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected ... activity" is criminal. *M.F. Farming, Co. v. Couch Distrib. Co.*, 207 Cal. App. 4th 180, 196-97 (2012) (citations omitted). The inclusion of the word "lawful" before "conduct" in the Washington anti-SLAPP statute codifies this exception, which is inapplicable here. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-18 (1982) (extended discussion of scope and breadth of boycotts as protected activity, as opposed to criminal and unlawful violence).

state's highest court found, "a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and ***then*** permit the parties to address the issue in the second step of the analysis, if necessary." *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089, 114 Cal. Rptr. 2d 825 (2001) (emphasis added). "Otherwise, the second step would become superfluous in almost every case." *Id.*; *see also Navellier v. Sletten*, 29 Cal. 4th 82, 94-95 (2002).

Thus, the California Court of Appeal rejected a plaintiff's argument that the anti-SLAPP statute did not apply to its claim that its former in-house counsel disclosed confidential information because the counsel had "no First Amendment right" to disclose such information. *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305 (2001). By analogy, it reasoned, "[t]he same argument could be made by the plaintiff in a defamation suit—the defendant has no First Amendment right to engage in libel or slander. Yet, defamation suits are a prime target of SLAPP motions." *Id.*; *see also* Thomas R. Burke, *Anti-SLAPP Litigation* (The Rutter Group 2013) § 3:148 ("The merits of a plaintiff's claim (or lack thereof) are ***not*** considered in prong one.... The defendant need show only the existence of a legitimate issue as to whether the speech or petition activity is constitutionally protected."), Exhibit B; *M.F. Farming, Co. v. Couch Distrib. Co.*, 207 Cal. App. 4th 180, 195 (2012)

("Case after case makes clear that the validity of the speech or petitioning activity is ordinarily not a consideration in analyzing the 'arising from' prong").

Further, a California appellate court recently reaffirmed that allegedly invalid conduct does not nullify the anti-SLAPP law's protection. In *Hunter v. CBS Broadcasting Inc.*, 221 Cal. App. 4th 1510, 1521 (Cal. Ct. App. 2013), the plaintiff alleged that CBS's failure to hire him as a weather anchorman constituted age and gender discrimination. Similar to Appellants' claims here, Hunter asserted that this allegedly illegitimate conduct (*i.e.* age and gender discrimination) disqualified CBS from seeking relief under the anti-SLAPP law. *Id.* at 1517-18. The Court disagreed, finding that selecting and hiring a weather anchor, even if conducted improperly, qualified as conduct in furtherance of the exercise of free speech, *i.e.*, protected activity. It noted: "When assessing whether claims arise from protected activity, *courts must distinguish between the acts underlying a plaintiff's causes of action and the 'claimed illegitimacy of [those] acts[, which] is an issue ... the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.*'" *Id.* at 1521-22 (internal citations omitted, italics added). Here, the fact that the Project falsely alleges "rogue actions" in the manner that the Board

enacted the boycott does not eviscerate the anti-SLAPP law's protection. *See* Amicus Br. at 8-10. Respondents' vote to enact the boycott, like the boycott itself, constitutes protected activity for purposes of the anti-SLAPP statute—claims of illegitimacy notwithstanding.

In any event, as argued at length in Respondents' brief on appeal, their actions as Board members *were* both valid and lawful. *See* Respondents' Br. at 14-20 (explaining why the Co-op Board acted within its authority and pursuant to its Bylaws, *i.e.* not unlawfully, in enacting the boycott); *see also* Respondents' Br. at 16 n.11.

Finally, the Project urges this Court to look to the "principal thrust or gravamen" of a claim to decide whether the anti-SLAPP statute applies. Amicus Br. at 11 (citing *Dillon v. Seattle Deposition Reporters, LLC*, --- P.3d ---, 2014 WL 229672 (2014)). It boldly claims that "Appellants brought suit to ensure that the OFC Board's conduct complied with its governing rules," Amicus Br. at 13, and that the "mere fact that [the conduct] arises in the context of an [sic] political debate does not justify the use of the anti-SLAPP statute." *Id.* at 11.

This argument, however, seeks to artificially sever the act of voting to enact the boycott from the boycott itself. For First Amendment purposes, the two acts are inextricable. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-12 (1982) (in context of peaceful economic

boycott, the First Amendment rights of "speech, assembly, association, and petition, though not identical, are ***inseparable***") (internal quotations omitted, emphasis added). There is no serious argument refuting the fact that the thrust of this lawsuit directly targets the Co-op's boycott of Israeli goods. *See* Respondents' Br. at 15-17.

If there were any doubt about the motivation behind this lawsuit, this amicus brief removes it. The Project has as its central mission the defense of Israel, ***not*** the enforcement of organizational bylaws, Washington State's corporate governance scheme, or even free speech principles (which apply with equal force to ***all*** political speech). The brief and this lawsuit plainly target Respondents' exercise of their First Amendment right to advocate and implement a boycott. The "principal thrust or gravamen" of this suit is an attack on protected activity.

As the trial court recognized, the Co-op's boycott decision, which was fully authorized by its governing documents,[14] is part of a broad national and international movement, with significant implications for the United States government's diplomatic efforts to resolve the Israeli-Palestinian conflict. *See* Feb. 27, 2012 Oral Ruling, RP 17-18 ("[F]or four decades, the [Israeli-Palestinian conflict] has been a matter of public concern in America and debate about America's role in resolving that

[14] *See* CP 56-60 (Bylaws).

conflict"). Discussions and debates prompted by the boycott campaign appear throughout the American and Israeli media and elsewhere. As noted in an Israeli newspaper last week:

> At a time when their leaders are bitterly divided and their people are geographically fragmented, BDS[[15]] has united Palestinians like nothing else in recent memory. For the many young Palestinians fed up with both Fatah and Hamas, it offers a form of political action untainted by corruption, theocracy, collaboration and internal repression. As a nonviolent movement, it refocuses the Palestinian struggle away from the morally crippling legacy of PLO and Hamas terrorism and instead associates it with the moral grandeur of the anti-apartheid movement. And by relying on international activists—not Palestinian politicians—it universalizes the Palestinian struggle, making it almost irresistible for a global left inclined to see the Israeli-Palestinian conflict in colonial terms.

Peter Beinart, *Memo to Jewish Groups: You Can't Effectively Fight BDS if You Don't Fight Settlements Too*, HAARETZ, Feb. 5, 2014.[16] The record in

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[15] BDS is an acronym for "boycott, divestment, and sanctions."

[16] Other media accounts reflect international reactions triggered by the BDS movement. For example, Israeli Prime Minister Benjamin Netanyahu has reportedly called the BDS movement "immoral and unjust," while news stories have quoted Secretary of State John F. Kerry cautioning that Israeli intransigence will fuel the boycott movement and put it "on steroids." Isabel Kershner, *Netanyahu Criticizes Kerry Over Boycott Remarks*, THE NEW YORK TIMES, Feb. 2, 2014; Omar Barghouti, *Why Israel Fears the Boycott*, THE NEW YORK TIMES, Jan. 31, 2014 (op-ed contributor). New York Times op-ed columnist Thomas Friedman recently weighed in on the same issue. Thomas L. Friedman, *The Third Intifada*, THE NEW YORK TIMES, Feb. 4, 2014 (observing that "opponents

this matter strongly documents the national breadth of the movement in the United States at the time the Co-op enacted the boycott. *See, e.g.,* CP 466-544.

In short, these profound and longstanding political differences between the Israeli government and the Palestinian community are issues of intense public concern, whether among government ministers in Jerusalem, State Department diplomats in Washington, Dutch banks that have divested their funds from Israel, other European Union nations considering further boycott and divestment measures, or within the board of an Olympia nonprofit corporation deciding whether to sell particular products to its members.

As shown by the verdict of history, a successful boycott prompts or facilitates further speech and debate, which fulfill one of the central aims of the First Amendment. Famously, the U.S. Supreme Court has noted: "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894 (1949). In addition:

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of the Israeli occupation of the West Bank across the globe" have engaged in a "nonviolent resistance and economic boycott").

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377, 47 S.Ct. 641 (1927) (Brandeis, J., concurring).

This Court should affirm the trial court's holding that the anti-SLAPP statute applies to this case. Such a finding is consistent not only with the Legislature's mandate that the law be liberally construed, but also with the Act's legislative history, which specifically contemplated protections against lawsuits targeting boycotts such as this. *See* House Bill Report, SSB 6395 (Feb. 28, 2010) (noting that "[t]he First Amendment to the United States Constitutional [sic] provides the right 'to petition the government for a redress of grievances,'" including "filing complaints, reporting violations of law, testifying, writing letters, lobbying, circulating petitions, protesting, ***and boycotting***") (emphasis

added).

II. CONCLUSION

By all indications, Appellants and their supporters at the Project are irked by the boycott and, in response, have endeavored to inflict and promote "complicated, burdensome, and expensive" litigation against their "enemies." *See* CP 303-05. But this attempt to silence and intimidate Respondents into withdrawing the boycott cannot be squared with the First Amendment or the anti-SLAPP statute. Indeed, this is precisely the type of meritless lawsuit the statute was intended to curb.

Accordingly, the judgment of the Thurston County Superior Court should be affirmed, and Respondents awarded their reasonable attorneys' fees and costs pursuant to RCW 4.24.525 and RAP 18.1.

RESPECTFULLY SUBMITTED this 11th day of February, 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing cover sheet and amended signature page to the Answer to Amicus Curiae Brief of the Lawfare Project by the manner identified below on the 12th day of February, 2014, to the following counsel of record at the following addresses:

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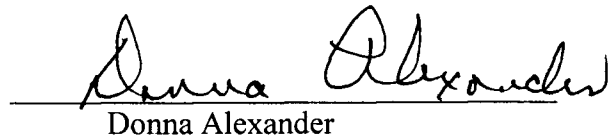

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Answer to Amicus Curiae Brief of the Lawfare Project by the manner identified below on the 11th day of February, 2014, to the following counsel of record at the following addresses:

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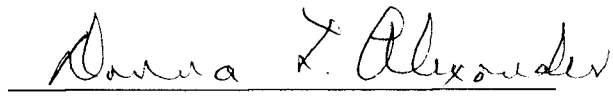

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Exhibit A

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In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

HILLARY RODHAM CLINTON, Secretary of State,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF *AMICUS CURIAE* OF THE LAWFARE PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

This brief is respectfully submitted on behalf of *amicus curiae* The Lawfare Project, a not-for-profit corporation organized under the law of Washington D.C. and based in New York, whose mission is to expose and counter "lawfare" – the abuse of legal procedures to advance undemocratic and/or terroristic goals.[1] The Lawfare Project publishes papers, engages in research projects, and assists in legal proceedings as part of its suite of activities.

One of the principal uses of lawfare – and therefore one of the principal targets of The Lawfare Project's efforts – is the effort by enemies of the State of Israel to delegitimize Israel and impair its ability to defend itself. An essential element of this campaign is the practice of wrongfully attempting to subject Israel to legal censure or legal disadvantage on a basis not applied to other nations – not even nations that engage in the direct support of terrorism and that violate accepted international norms as a matter of government policy.

The Lawfare Project respectfully submits this brief to assist the Court in deciding the second of the two issues to be heard on this petition – whether

[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court in accordance with Rule 37.3(a). Pursuant to Rule 37.6, this brief was not written in whole or in part by counsel for any party, and no party made any monetary contribution intended to fund the creation or submission of the brief.

Section 214(d) is unconstitutional because it supposedly infringes on the President's allegedly exclusive power to recognize foreign governments. We believe our focus on lawfare as the strategic manipulation of legal process, and specifically our knowledge of legal proceedings involving Israel gives us background and experience that makes our views on this question useful to the Court. While we agree with Petitioner and with the concurring Circuit Judge below that there is no merit to the "political question" defense asserted by Respondent, we confine our submission to the Section 214(d) issue.

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Court should reverse the decisions below, and direct the District Court to issue the requested writ of mandamus identifying Petitioner's birthplace as Israel.

STATEMENT OF FACTS

On May 15, 1948, the United States recognized the State of Israel on a "de facto" basis and on January 31, 1949 recognized it on a "de jure" basis. The "Israel" that was granted recognition comprised the territory shown on the map at App. 1. As is evident,

that "Israel" included a substantial portion of the city of Jerusalem – in conventional terminology, so much of Jerusalem as lies west of the so-called "Green Line." This is the demarcation line set forth in agreements entered into between February and July 1949 by the State of Israel and its Arab enemies at the conclusion of the war they had launched against the fledgling state following the United States' de facto recognition.

At all times since President Truman recognized the State of Israel, the United States has continued to recognize the State. It has never withdrawn that recognition. At all times, the State of Israel has included the territory west of the Green Line, over which Israel has exercised exclusive control.

To the knowledge of The Lawfare Project there is no country that, while recognizing Israel, disputes that Israel includes that portion of Jerusalem that lies west of the Green Line. In all of the legal proceedings involving Israel with which The Lawfare Project is familiar – many of which attack the supposed illegality of Israeli "occupation" of various areas – to our knowledge there has never been a single one that contends that Israel is illegally "occupying" that portion of Jerusalem that lies west of the Green Line. Whether Jerusalem is or is not the lawful capital of Israel – an issue not presented by this case – it is simply an undeniable physical fact that the territory west of the Green Line has at all relevant times been within the boundaries of Israel and under its exclusive and unquestioned control.

In 2002, Congress passed and on September 30 of that year the President signed into law Section 214 of Public Law No. 107-228. The first three subsections of Section 214 relate to the location of the United States Embassy in Jerusalem. These subsections are not at issue in this case. Subsection (d), the provision involved here, directed the Passport Office of the Department of State to issue passports to American citizens born in Jerusalem that identify, as the citizen's place of birth, "Israel," if so requested by the citizen. The President's signature was accompanied by a so-called "signing statement" which made no specific reference to Subsection (d) but which stated generally that the statute "impermissibly interferes" with the President's foreign affairs authority, including his power to "determine the terms on which recognition is given to foreign governments." Obviously, the President could have vetoed the legislation that supposedly denigrated his constitutional powers, but chose not to do so.

On October 17, 2002, Petitioner Zivotofsky was born in Shaare Tzedek hospital in Jerusalem, Israel. As is evident from the accompanying map, the hospital is located far west of the Green Line, in territory that has always been part of Israel, and which the State of Israel has at all times controlled since the United States' recognition of that State.

Petitioner is the son of United States citizens and is entitled to the issuance of a United States passport. In accordance with Section 214(d), Petitioner's parents asked that the passport list "Israel" as his place

of birth. However, in violation of Section 214(d), the Passport Office of the Department of State refused to identify Petitioner's place of birth on his United States passport as "Israel." Suit was brought on Petitioner's behalf by his parents to compel the issuance of a passport that conformed to the statute.

In both the District Court and the Court of Appeals for the District of Columbia Circuit, Respondent argued, and the suit was dismissed on the ground, that the case involved a non-justiciable "political question." In the Court of Appeals, Circuit Judge Edwards concurred in the dismissal, while disagreeing that the political question doctrine barred relief, on the basis that Section 214(d) unconstitutionally infringed on the President's "recognition" power.

Petitioner sought review by this Court, arguing in its petition that the political question doctrine was inapplicable for a number of reasons and the Presidential "signing statement" did not excuse the State Department's refusal to obey the statute. On May 2, 2011, this Court granted the petition. Accompanying the grant was a direction by the Court that, in addition to the political question issue, the parties should brief the constitutional issue whether Section 214(d) "impermissibly infringes on the President's power to recognize foreign sovereigns."

SUMMARY OF ARGUMENT

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Department of State cannot refuse to honor that legislation. Section 214(d) does not infringe upon the Recognition power or any exclusive power of the President. Nor can a "signing statement" accomplish what amounts to an unconstitutional line item veto. Though cloaked in the language of constitutional prerogative and foreign affairs necessity, at heart this case revolves around simple discrimination against a very specific class of U.S. citizens, and *amicus* respectfully submits that this Court should grant relief to Petitioner.

ARGUMENT

THE CLAIM THAT SECTION 214(d) IS UNCONSTITUTIONAL IS WITHOUT MERIT

With respect to Section 214(d), *amicus* respectfully submits that this case involves a simple issue of Congressional power that the Respondent, for reasons not readily fathomable, has sought to cloak in unnecessary complexity. The issue, at heart, is whether Congress can legislate with respect to the form, issuance and content of passports and, if it can, whether the Department of State can refuse to honor that legislation. *Amicus* believes that the answers are, respectively, "yes" and "no."

First, passports are a creation of Congressional enactments and the cases are literally legion in which Congressional enactments respecting the issuance of passports have been upheld by this and other courts. E.g., *Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). To our knowledge, there is no case in which the government has ever before even contended that Congress cannot legislate with respect to the issuance of passports, much less succeeded in voiding such enactments on the basis that they infringe executive branch prerogatives. Respondent's depiction of a passport as being some sort of political statement on behalf of the United States that sets forth Presidential foreign policy positions is an absurd bit of rhetorical excess, without any basis in fact or law. In particular, the claim that the manner in which the "place of

birth" line on a passport gets filled out implicates Presidential diplomatic prerogatives flies in the face of the evidence adduced by Respondent's own witnesses. As Petitioner's brief shows in detail, that information is included on a passport for purposes of identifying the passport holder, not to set forth a foreign policy position.

Second, Judge Edwards below, and the Respondent here, argues that the President's exercise of the Recognition power deprives Congress of its otherwise undoubted power to legislate with respect to passports. But this assertion of Executive branch primacy is pure *ipse dixit*. Congress legislates all the time with respect to countries the President has recognized and commits the United States to positions that limit and burden the President's ability to deal with them.

To take just a few examples from the same part of the world as Israel, Congress has adopted Nonproliferation Acts relating to Iran and Syria, the Syria Accountability Acts, and the International Religious Freedom Act as well as its amendments. Indeed, the limitations and burdens these statutes impose on the President dwarf any burden that Section 214(d) might be claimed to impose on his dealings with Israel and its neighbors. Yet, as noted, until this case the Government has never suggested that, for that reason, they are unenforceable.

None of the cases cited by Judge Edwards below substantiates that claim of Presidential exclusivity. Most of the cases he cites have to do with whether *states* may impose restrictions on, or otherwise affect, the actions of foreign sovereigns – not whether a co-equal political branch of the federal government may do so.[2] Indeed, a number of the cases he cites actually refer to the deference owing to foreign relations actions of the political branches – plural – of the federal government, references that can hardly be squared with the bold claim of executive exclusivity advanced here.[3]

Third, the claim of an infringement upon the Recognition power is particularly meritless on the facts of this case. The United States through the passage of no fewer than 12 presidencies has recognized Israel and the portion of Jerusalem in which

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[2] *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964) and *United States v. Pink*, 315 U.S. 203 (1942) involved claims brought under New York State law. *Baker v. Carr*, 369 U.S. 186 (1962), did not involve foreign relations at all, but whether a Tennessee statute violated the Fourteenth Amendment to the Constitution. Though not cited by Judge Edwards, see also *United States v. Belmont*, 301 U.S. 324 (1937) and *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126 (1938).

[3] *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. at 412, *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 380 (1948); *Williams v. Suffolk Insurance Co.*, 38 U.S. 415, 421 (1839). In a further case not cited by Judge Edwards, this Court held that a recognition of sovereignty, whether de facto or de jure, is to be determined by the legislative and executive departments. *Jones v. United States*, 137 U.S. 202, 212 (1890).

Petitioner was born is part of the "Israel" which it has recognized.[4] Section 214(d) is entirely *consistent* with the exercise of the Recognition power for well over half a century, not in conflict with it. As far as we are aware, it is unprecedented for the government to argue that a supposed presidential power is being unconstitutionally infringed by legislation that, in fact, simply gives effect to prior executive action by presidents of both parties decade after decade.

Assuming, contrary to fact, that there is any bona fide dispute about Israel's sovereignty west of the Green Line – except as it may be raised by nations who dispute the legality of Israel's existence at all – the United States has for 60 years taken the position that that territory is Israeli. Again, this issue is to be distinguished from the question whether Jerusalem is Israel's capital, a subject on which Section 214(d) does not speak. All Section 214(d) requires is that, if so requested, the State Department state on a passport what is true in fact and in accord with the President's exercise of the Recognition power – that the place where the Shaare Tzedek lies is in "Israel."

---

[4] Although peace plans proposed by the United States have varied as to the nature of Israeli land concessions, even the maximalist plans have been predicated on territory lying outside the pre-1967 boundaries, and do not affect that part of Jerusalem in which Petitioner was born.

Fourth, the unprecedented nature of the constitutional claim being made here is even more striking when it is remembered that Section 214(d) was not only passed by Congress but signed into law rather than vetoed by the President. There is no prior case we are aware of in which the government has disputed the constitutionality of a Congressional enactment signed into law by the President on executive prerogative grounds – given that the executive can protect its own alleged prerogatives by using the veto power. Past cases in which claims of executive privilege were raised such as *United States v. Nixon*[5] and *Clinton v. Jones*[6] involved disputes between the President and the Department of Justice or the judicial branch.

That a so-called "signing statement" was filed at the time of signature of this particular statute counts for nothing. Such statements have no legal significance whatsoever – except, perhaps, as they represent an attempt to make an end-run around this Court's decision in *Clinton v. City of New York*,[7] holding that the President has no constitutional power to issue a so-called "line-item" veto even were Congress to permit such an act. Moreover, the particular signing statement issued here said nothing about Section 214(d), and more plausibly related to the first three subsections of Section 214 rather than

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[5] 418 U.S. 683 (1974).

[6] 520 U.S. 681 (1997).

[7] 524 U.S. 417 (1998).

to Subsection (d). *Amicus* joins in the cogent presentation by Petitioner in his brief on this point.

Finally, the claim that the Constitution bars enforcement of Section 214(d) runs afoul of the evidence shown in Petitioner's brief that the State Department has allowed U.S. passport holders who object to having "Israel" shown as their place of birth to either leave that line blank or even to write in the names of "places" that aren't even countries – like "Palestine" or the "West Bank." Only a U.S. citizen who wants to have "Israel" identified as his or her place of birth is prohibited from doing so. This is a clear instance of anti-Israel lawfare directed by elements within the United States government against its own citizens. The idea that the Constitution forbids Congress from remedying this gross discrimination on religious and political grounds is an argument that should make its proponent blush.

CONCLUSION

For the preceding reasons, The Lawfare Project respectfully submits that granting relief to Petitioner would be fully in accord with the Constitution and this Court's own precedent, would not impermissibly enlarge the scope of Congressional power, and would not circumscribe or otherwise adversely affect the President's exercise of his powers under the Constitution or those powers duly delegated by Congress. Finally, the President signed the statute into law; an

otherwise unconstitutional line item may not become Constitutional by fiat in the form of an extralegal signing statement.

Petitioner should never have been subjected by his government to the litigation obstacle course of this case. The mandamus petition he requested should be issued.

Respectfully submitted,

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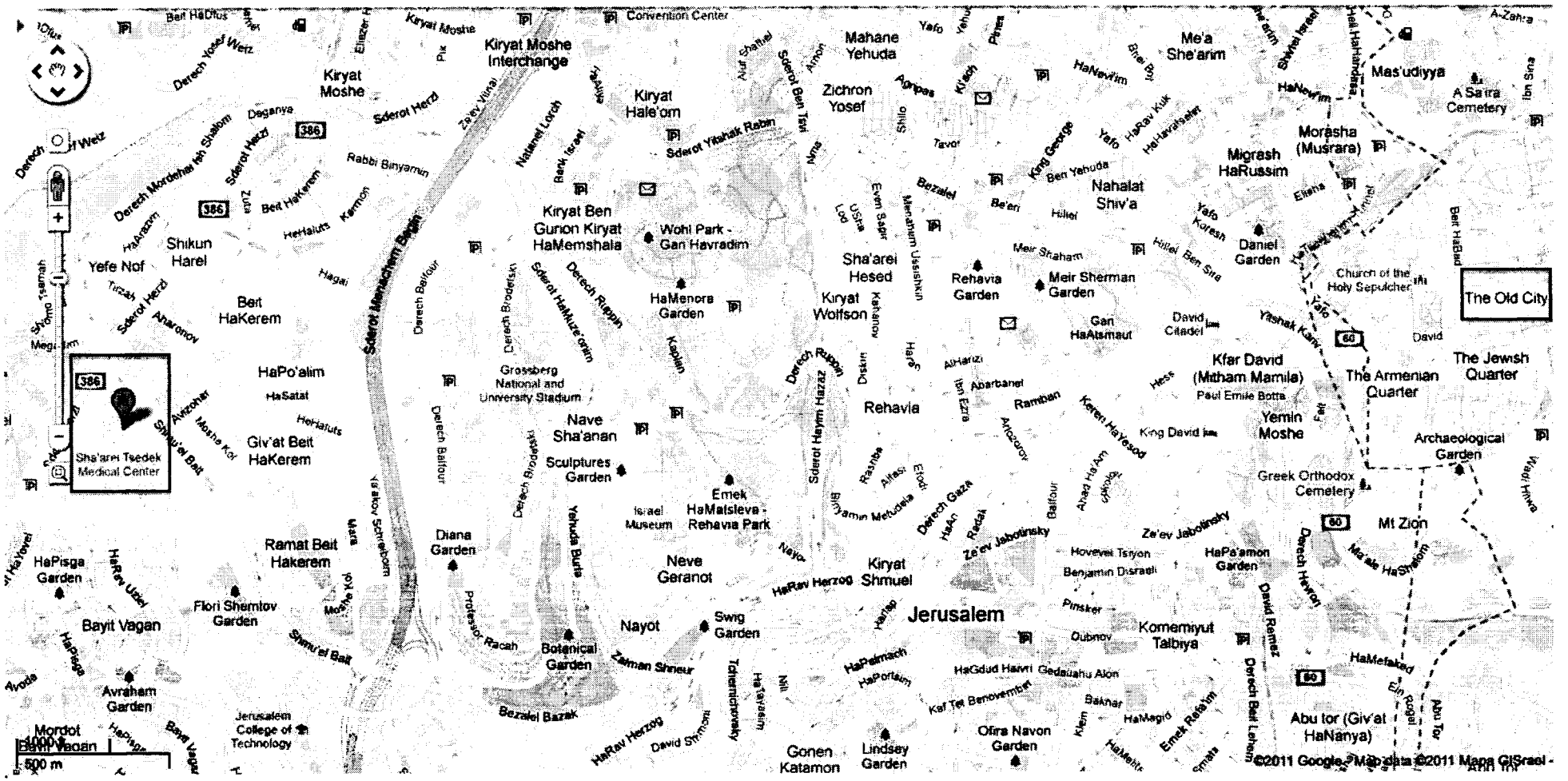
App. 1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Kiryat Moshe
Convention Center
Mahane Yehuda
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Mas'udiyya
A Sa'ira Cemetery
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Morasha (Musrara)
Migrash HaRussim
Nahalat Shiv'a
Kiryat Ben Gurion Kiryat HaMemshala
Wohl Park - Gan Havradim
Shikun Harel
Yefe Nof
Bet HaKerem
Sha'arei Hesed
Rehavia Garden
Meir Sherman Garden
Daniel Garden
Church of the Holy Sepulcher
The Old City
HaMenora Garden
Kiryat Wolfson
Gan HaAtsmaut
David Citadel
Kfar David (Mtham Mamila)
The Jewish Quarter
The Armenian Quarter
HaPo'alim
Grossberg National and University Stadium
Rehavia
Yemin Moshe
Giv'at Beit HaKerem
Nave Sha'anan
Sculptures Garden
Sha'arei Tsedek Medical Center
Emek HaMatslevá - Rehavia Park
Israel Museum
Archaeological Garden
Greek Orthodox Cemetery
Mt Zion
Ramat Beit Hakerem
Diana Garden
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Kiryat Shmuel
Jerusalem
HaPisga Garden
Flori Shemtov Garden
Bayit Vagan
Nayot
Swig Garden
Botanical Garden
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Exhibit B

ANTI-SLAPP LITIGATION

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§ 3:148 What a defendant need not prove in prong one to use the anti-SLAPP statute—Constitutional violation

The merits of a plaintiff's claims (or lack thereof) are not considered in prong one. Because the focus in prong one is whether the plaintiff's action arises from the defendant's protected petitioning or free speech activities, it is improper to consider the merits in the first prong. (*Navellier, supra,* 29 Cal. 4th at 94–95; *Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 458, 125 Cal. Rptr. 2d 534, 31 Media L. Rep. (BNA) 1161 (1st Dist. 2002) ["[t]he Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law."] The defendant need show only the existence of a legitimate issue as to whether the speech or petition activity is constitutionally protected. (*Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 828, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011); *Flatley v. Mauro*, 39 Cal. 4th 299, 311–320, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (2006); *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1027–1028 n.3, 122 Cal. Rptr. 3d 397, 98 U.S.P.Q.2d 1728 (2d Dist. 2011); see also *M.F. Farming, Co. v. Couch Distributing Co.*, 207 Cal. App. 4th 180, 195, 143 Cal. Rptr. 3d 160 (6th Dist. 2012) ["[c]ase after case makes clear that the validity of the speech or petitioning activity is ordinarily not a consideration in analyzing the 'arising from' prong."].)

§ 3:149 What a defendant need not prove in prong one to use the anti-SLAPP statute—Plaintiff intended to chill the defendant's right of petition or free speech

A defendant is also not required to demonstrate that the plaintiff *intended* to chill the defendant's constitutionally protected rights to rely on the anti-SLAPP statute. (*Equilon Enterprises v. Consumer Cause Inc.*, *supra*, 29 Cal. 4th at 66–67; *Roberts v. Los Angeles County Bar Assn.*, 105 Cal. App. 4th 604, 615, 129 Cal. Rptr. 2d 546 (2d Dist. 2003) [applying *Equilon* over plaintiff's insistence that "her suit had neither the purpose nor effect of chilling rights"]; *Dible v. Haight Ashbury Free Clinics*, 170 Cal. App. 4th 843, 851, 88 Cal. Rptr. 3d 464, 28 I.E.R. Cas. (BNA) 1502, 67 A.L.R.6th 705 (1st Dist. 2009) ["If the actionable communication fits within the definition contained in the [anti-SLAPP] statute, the motive of the communicator does not matter"]; *JSJ Ltd. Partnership v. Mehrban*, 205 Cal. App. 4th 1512, 1521, 141 Cal. Rptr. 3d 338 (2d Dist. 2012) ["The subjective intent of a