NO. 90233-0
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

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, FOREST VAN SISER SHAFER as personal representative for the ESTATE OF SUZANNE SHAFER, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

Bruce E.H. Johnson, WSBA #7667
Ambika K. Doran, WSBA #38238
Angela Galloway, WSBA #45330
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Facsimile: (206) 757-7069

Barbara Harvey (*pro hac vice* motion pending)
Cooperating Attorney
Center for Constitutional Rights
1394 East Jefferson Avenue
Detroit, MI 48207
(313) 567-4228

Steven Goldberg (*pro hac vice* motion pending)
Cooperating Attorney
Center for Constitutional Rights
3525 SE Brooklyn St.
Portland, OR 97202
(971) 409-2918

Maria C. LaHood (*pro hac vice* motion pending)
Senior Staff Attorney
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6430

Attorneys for Respondents

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I. INTRODUCTION

The Israeli-Palestinian conflict has been the subject of public debate for decades. But when the Olympia Food Co-op board of directors voted to boycott Israeli goods, they became targets of a retaliatory lawsuit, which petitioners promised to make "complicated, burdensome, and expensive." Three years later, respondents, former and current Co-op directors, remain mired in costly litigation. Petitioners, also Co-op members, claim respondents violated the Co-op's Boycott Policy. They did not, but in any event, the Co-op Bylaws and Washington law gave them plenary authority to manage the Co-op's affairs.

Recognizing this, the Superior Court and Court of Appeals dismissed the claims under Washington's Act Limiting Strategic Lawsuits Against Public Participation ("SLAPPs"), which protects citizens from "abuse of the judicial process"—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. (Wa. 2010). The Act facilitates early dismissal of SLAPPs, promoting important public policies by enabling citizens to "speak out on public issues" without fear of "groundless" litigation that causes them "great expense, harassment, and interruption of their productive activities." *Id.*

SLAPP plaintiffs dislike the act because it stops them from achieving their ultimate goal—silencing opponents. They challenge the constitutionality of the law's discovery stay and burden of proof. This Court need not decide those challenges because the Superior Court

dismissed petitioners' claims as a matter of law based on the plain language of the Bylaws and well-established corporate governance law.

Further, the challenges rest on two mistaken premises: that the act bars meritorious claims, and that the Legislature may not identify and set standards for dismissing meritless claims that threaten speech and petition rights. In fact, the anti-SLAPP law preserves meritorious claims by requiring plaintiffs to survive summary judgment; if they show disputed issues of material fact, their claims proceed. The Legislature is not only entitled to but is tasked with passing laws to promote the public interest. Petitioners have failed to show the act is unconstitutional in any respect, and certainly have not done so beyond a reasonable doubt.

The Court should affirm dismissal of petitioners' lawsuit and put an end to the constitutional challenges to the anti-SLAPP law.

II. ARGUMENT

A. The Anti-SLAPP Act Bars Petitioners' Claims.

RCW 4.24.525(4)(b) bars a claim if (1) the defendant shows by a preponderance of the evidence that it is based on an "action involving public participation and petition" and (2) the plaintiff fails to show by clear and convincing evidence a "probability of prevailing." The Superior Court and Court of Appeals correctly held that both prongs were satisfied and that the anti-SLAPP act bars this lawsuit.

1. Petitioners sought to enjoin a boycott.

Respondents are former and current members of the Olympia Food Co-op, whose mission includes "encourag[ing] economic and social justice." CP 53.[1] To achieve this goal, the Co-op has adopted many boycotts. CP 46. In July 2010, its board of directors decided to divest from Israel and boycott Israeli-made products, and avoid dealing with others selling products or services to Israel "used to violate the human rights of Palestinians." CP 123. The decision followed two failed attempts at consensus by Co-op staff. CP 44-45, 111-19, 121-24.

The board invited dissenters (including petitioners) to put its decision to a membership vote, but no one did. CP 182, 239. Instead, three of the petitioners ran for board election on an anti-boycott platform, but lost. CP 181. Petitioners next sent a letter demanding that respondents (five of whom defeated them in the election) rescind the boycott and threatening to "hold each of you personally responsible" and make the process "considerably more complicated, burdensome, and expensive." CP 303-05. When respondents declined, petitioners filed this lawsuit, alleging respondents had acted *ultra vires* and breached their fiduciary duties, and seeking a judgment that the boycott was void, an order enjoining it, and damages from respondents individually. CP 6-18. Petitioners served each respondent with discovery requests effectively seeking all documents relating to boycotts of or divestment from Israel and boycotts of other

[1] On July 15, 2014, respondent Suzanne Shafer died. On July 31, 2014, Forest Van Sise Shafer, personal representative of her estate, was substituted pursuant to RAP 3.2(a).

countries' products considered by the board. CP 582-83. They later served notices to take each respondent's videotaped deposition. CP 777-812.

On November 1, 2011, respondents filed a motion to strike the complaint under the anti-SLAPP act. CP 245-295. On December 1, 2011, petitioners filed a motion for discovery, CP 814, which the court denied. CP 934. On February 27, 2012, the court granted the motion to strike. CP 935. Petitioners unsuccessfully sought direct review from this Court, lost in the Court of Appeals, and now ask this Court to reverse.

2. This lawsuit targets public participation, meaning the anti-SLAPP law applies.

The first step of the anti-SLAPP motion requires "an initial *prima facie* showing that the claimant's suit arises from an act in furtherance of the right of petition or free speech." *Spratt v. Toft*, 180 Wn. App. 620, 624, 324 P.3d 707 (2014). A court must not accept plaintiffs' characterizations of their claims, as the law applies "to any claim, ***however characterized***, that is based on an action involving public participation and petition," and requires courts to look beyond the pleadings, *i.e.*, they "shall consider ... supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c).

Thus, in deciding whether an action targets protected activity, courts focus on "the principal thrust or gravamen" of the suit, as the Court of Appeals recognized. *Davis v. Cox*, 180 Wn. App. 514, 529, 325 P.3d 255 (2014) (quoting *Dillon v. Seattle Deposition Reporters LLC*, 179 Wn. App. 41, 72, 316 P.3d 1119 (2014)). If a claim "targets conduct that

advances and assists the defendant's exercise of a protected right, then [it] targets the exercise of that protected right." *Davis*, 180 Wn. App. at 530.

Petitioners' lawsuit targets public participation and petition, as the Court of Appeals also correctly held. *Davis*, 180 Wn. App. at 523. The board's adoption of the boycott fits within the act's definition of "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." RCW 4.24.525(2)(e). A boycott is "essential political speech lying at the core of the First Amendment." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982). And the Israeli-Palestinian conflict is undoubtedly a matter of public concern. *Davis*, 180 Wn. App. at 531.

The Court of Appeals found it obvious petitioners' suit targeted public participation because they sought to "enjoin the Directors from continuing the boycott." 180 Wn. App. at 530. For this reason alone, the court's conclusion is correct. But it is also supported by the evidence that petitioners set out to pressure the board to drop the boycott by threatening "complicated, burdensome, and expensive" litigation, claiming damages against respondents personally, and demanding extensive discovery, including sixteen videotaped depositions. *See also* S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010) (mandating law be "construed liberally").

Petitioners claim their action targets respondents' alleged "breach of fiduciary duties." Pet. at 11. This is not surprising. A paradigmatic characteristic of a SLAPP is "camouflage," a pretense enabled by abuse of liberal pleading standards. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656

(1992), *aff'd*, 202 A.D.2d 104 (1994). For this reason, courts interpreting California's anti-SLAPP law have rejected plaintiffs' efforts to re-characterize their claims to avoid the statute. *See, e.g.*, *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 423-24 (9th Cir. 2014) (rejecting effort "to elude the scope of the anti-SLAPP statute" by "attempt[ing] to frame [the] action as targeting CNN's 'refusal to caption its online videos' rather than 'CNN's presentation ... of the news'"). This Court should do the same. Otherwise, plaintiffs could evade the act merely by alleging a defendant committed some unlawful act, as petitioners did here. Given that SLAPP plaintiffs by definition seek to abuse the judicial process, they are likely to do just that.

3. Petitioners failed to meet their burden under the anti-SLAPP act.

Once respondents showed the anti-SLAPP act applied, petitioners had "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). This requires "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). In this second step, courts "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"; they do not "weigh credibility or compare the weight of the evidence." *Nygard, Inc. v. Uusi–Kerttula*, 159 Cal. App. 4th 1027, 1036

(2008). *See also infra* Section II.B.1. The courts below applied these principles to correctly hold petitioners' claims fail as a matter of law.

Petitioners sued the board because it made a management decision, expressly within its plenary authority. The Co-op's Bylaws state "the business and affairs of the Cooperative shall be directed by the Board of Directors." CP 58. Under Washington law, "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. In any corporation, but especially a non-profit whose mission is to "encourage economic and social justice," CP 53, a decision about boycotting goods is well within the board's authority.

Moreover, petitioners' theory is foreclosed as a matter of law by the (also longstanding) business judgment rule: "Unless there is evidence of fraud, dishonesty, or incompetence ... courts generally refuse to substitute their judgment for that of the directors." *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). Both courts below correctly held that petitioners' claims fail as a matter of law.

B. The Anti-SLAPP Act is Constitutional.

Perhaps recognizing their suit falls in the heart of the anti-SLAPP act, petitioners challenge its constitutionality, and in particular, the burden to defeat a motion to strike and the act's presumptive discovery stay. Petitioners cannot challenge the law as applied here because their claims fail as a matter of law. But even if the Court reaches petitioners'

challenges (and those raised in three other pending cases[2]), it should reject them. All the challenges are based on two flawed premises. First, the law's opponents misread the act as precluding meritorious claims; it does not. Second, they argue the Legislature cannot constitutionally enact a statute to identify, dismiss, and deter SLAPPs, but this is well within its authority to protect the public interest.

These arguments fall well short of the "heavy burden" to overcome the presumption of constitutionality and to show the anti-SLAPP act is unconstitutional "beyond a reasonable doubt." *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). They also violate the settled principle that the Court "will adopt a construction which will sustain a law's constitutionality if at all possible." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003) (quotation marks omitted).

1. Petitioners have no basis to challenge the anti-SLAPP act as applied to them.

While petitioners primarily assert facial challenges to the constitutionality of the anti-SLAPP act, *see* App. Br. at 32-43, they also argue the presumptive discovery stay and plaintiffs' burden under the statute are unconstitutional as applied in this case, *id.* at 38-39, 43-44. Petitioners have no grounds to assert such "as applied" challenges here.

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[2] *Akrie v. Grant, et al.*, No. 89820-1, *Dillon v. Seattle Deposition Reporters, LLC, et al.*, No. 89961-4, and *Henne v. City of Yakima*, No. 89674-7.

Petitioners moved for discovery, as the act allows. RCW 4.24.525(5)(c). But they failed to show good cause, making only generalized demands without explaining what they expected discovery to show or why they needed it to respond to the pending motion. *Davis*, 180 Wn. App. at 540-41. The Superior Court correctly applied the same standard as CR 56(f) and did not abuse its discretion in denying petitioners' motion. *Id.* at 539-40 (noting California courts have applied the same principles; *see, e.g.*, *Sipple v. Found. For Nat'l Progress*, 71 Cal. App. 4th 226, 247 (1999)). *See also Tellevik v. Real Property*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (CR 56(f) decision reviewed for abuse of discretion). More importantly, no amount of discovery could change the fact that the board had plenary authority to set or change policy, and its decisions are subject to deference under the business judgment rule.

Regarding the burden of proof, the Superior Court "clearly applied the correct standard." *Davis*, 180 Wn. App. at 536 n.8. The court did not require petitioners to ***prove*** their claims by clear and convincing evidence, but recognized their burden of establishing a "probability of prevailing" by clear and convincing evidence was less than their ultimate burden at trial. *Id.* at 548. *See id.* (unlike trial, "at the motion stage[,] the trial court must credit the evidence presented by the plaintiffs").[3] In addition, because

[3] The Court of Appeals concluded the Superior Court erroneously weighed evidence and drew inferences in respondents' favor by finding the boycott was "nationally recognized" within the meaning of the Boycott Policy, and that the staff's lack of consensus created an "organizational conflict" that the Board could resolve under the Bylaws. 180 Wn.

petitioners' claims fail ***as a matter of law*** (as both courts held below), they had ***no*** probability of prevailing, irrespective of what standard applies.

Petitioners cannot challenge the constitutionality of the anti-SLAPP act as applied here. They are left with only facial challenges, "the most difficult challenge[s] to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). They have not done this.

2. The anti-SLAPP act does not preclude meritorious claims.

Petitioners and others claim the anti-SLAPP act by design or in effect bars meritorious claims. *See* Pet. at 9. But this argument is based on a contorted reading of the statute. The law does not require plaintiffs to prove their claims to defeat a motion to strike, permit trial courts to weigh evidence, or preclude discovery. Instead, just as on summary judgment, if plaintiffs' claims have merit, they survive.

A 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). This probability requirement mirrors the California anti-SLAPP act, which was enacted in 1992, was the model for Washington's law, and has consistently been construed to create a

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App. at 533-34. But as the Court of Appeals recognized, any "error was harmless" because the "Boycott Policy does not bind the Board." *Id.*

summary judgment standard. Courts interpreting other states' similar anti-SLAPP laws have construed them the same way. *See, e.g.*, *Lamz 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"); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013) (interpreting D.C. law, requiring court to grant motion "unless the responding party demonstrates that the claim is likely to succeed on the merits," as akin to summary judgment).

The Court of Appeals correctly recognized in this case that RCW 4.24.525 establishes a standard and process similar to summary judgment. *Davis*, 180 Wn. App. at 528. Every other case on this issue under Washington's law has reached the same conclusion. *See Spratt*, 180 Wn. App. at 637; *Dillon*, 179 Wn. App. at 88-89; *Akrie v. Grant*, 178 Wn. App. 506, 513 n.8, 315 P.3d 567 (2013); *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941-42 (9th Cir. 2013); *AR Pillow Inc. v. Maxwell Payton, LLC*, 2012 WL 6024765, at *2 (W.D. Wash. Dec. 4, 2012).

Opponents of the anti-SLAPP act ignore these precedents, perhaps because they must recognize summary judgment does not infringe constitutional rights. *LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989). Instead, they claim the law requires a court to weigh evidence and decide fact issues. *See* App. Br. at 41, 43. The act says nothing of the sort, as both courts below recognized. And it is illogical to suggest the Legislature intended such a result, given the longstanding

interpretation of RCW 4.24.525's antecedents in California and other states as creating a summary judgment-like process.

Petitioners also claim the "clear and convincing evidence" standard creates "a heightened burden of proof" "greater than the claimant would face at trial." App. Br. at 41, 42. In fact, the law requires a plaintiff to provide clear and convincing evidence of "a probability of prevailing on the claim." RCW 4.24.525(4)(b). This is ***less*** than the ultimate burden of proving claims by a preponderance. The plaintiff need only show a ***probability*** of prevailing with evidence of sufficient clarity, *i.e.*, fact issues remain and the defendant is not entitled to judgment as a matter of law. The Superior Court correctly understood this. RP Feb. 27, 2012 at 18:20-19:3 ("[p]robability ... means less than the preponderance standard").

The Court of Appeals also recognized that "clear and convincing evidence" and a "probability of prevailing" are "common standards," and there is "little risk that, when considered together, confusion will abound." 180 Wn. App. at 548. Courts routinely decide summary judgments "through the prism" of the clear and convincing standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986). As this Court noted, "holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury." *Margoles v. Hubbart*, 111 Wn.2d 195, 210-11, 760 P.2d 324 (1988) (emphasis added) (quotation marks omitted). This is because it "does not materially alter the normal standard for deciding motions for summary judgment." *Herron v. KING Broad. Co.*, 112 Wn.2d

762, 768, 776 P.2d 98 (1989). "[T]he evidence is still construed in the light most favorable to the nonmoving party," and a court may not weigh evidence or assess credibility. *Id.; Anderson*, 477 U.S. at 255.

A "clear and convincing evidence" standard does not render the anti-SLAPP act unconstitutional, but is instead consistent with (and sometimes demanded by) the First Amendment. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (reversing claim where proof of defamation element "lack[ed] the convincing clarity which the constitution[] demands") (emphasis added). As this Court has held, when First Amendment rights are at stake, "summary procedures are even more essential" and "assur[ing] freedom from the harassment of lawsuits" more important because, otherwise, those who are targeted by such suits "will tend to become self-censors." *Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 635 P.2d 1081 (1981). The anti-SLAPP law's preliminary "clear and convincing" standard is consistent with requirements for other claims that also may infringe free speech rights. *See, e.g., Herron*, 112 Wn.2d at 768 (to avoid summary judgment, defamation plaintiff must offer sufficient evidence to establish *prima facie* case of actual malice with "convincing clarity").[4]

[4] Many immunities in the First Amendment context require clear and convincing evidence to overcome them. *See, e.g., Bender v. City of Seattle*, 99 Wn.2d 582, 601, 664 P.2d 492 (1983) ("proof of an abuse of a qualified privilege must be established by clear and convincing evidence, not simply by a preponderance of the evidence"). *See also* RCW 5.68.010(2) (conditional journalist privilege defeated by "clear and convincing evidence").

Petitioners also challenge the anti-SLAPP act's provision staying discovery absent "good cause shown." RCW 4.24.525(5)(c). The stay is important, for "the purpose of the statute would be frustrated if the plaintiff could drag on proceedings ... by claiming a need to conduct additional investigation." *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16 (1995). *See also* S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010) (act designed to reduce "costs associated with defending [SLAPP] suits"). Petitioners argue the stay conflicts with CR 26(c) and violates separation of powers and the right of access to courts. As the Court of Appeals found, it does not. *Davis*, 180 Wn. App. at 542-44. It mirrors CR 56(f), which allows a party opposing a summary judgment motion to obtain discovery upon a showing of need—"a rule applied without constitutional controversy for many years." *Id.* at 543. *See also Armington v. Fink*, 2010 WL 743524, at *3 n.2 (E.D. La. Feb. 24, 2010) (provision in Louisiana anti-SLAPP law is "similar to the relief afforded by Rule 56(f)").

The act also does not violate *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979-80, 216 P.3d 374 (2009), on which petitioners principally rely. *Putman* struck down a Washington law requiring plaintiffs to submit a medical expert's "certificate of merit" before filing malpractice complaints because it required supporting evidence before filing. 166 Wn.2d at 983. But the anti-SLAPP law imposes ***no*** preconditions to filing suit and ***permits*** appropriate discovery. The act's discovery provisions are similar to ones in the Trust and Estates Dispute Resolution Act, RCW ch. 11.96A ("TEDRA"), which have been

upheld. *See In re Estate of Fitzgerald*, 172 Wn. App. 437, 449-50 & n.8, 294 P.3d 720 (2012) (limits on discovery for estate claims does not violate separation of powers because law permits discovery "on a showing of good cause," RCW 11.96A.115). *Davis*, 180 Wn. App. at 543-44; *see also Spratt*, 180 Wn. App. at 635-36 (same with respect to anti-SLAPP act); *Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1129 (2006) (rejecting separation of powers challenge to California anti-SLAPP law).

In fact, the analysis in *Putman* underscores that the anti-SLAPP act is constitutional. When a party asserts a conflict between court rules and a statute, this Court first "attempt[s] to harmonize them and give effect to both." 166 Wn.2d at 980 ("if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters," *see infra* Section II.B.3). The Court need go no further here—the anti-SLAPP act does ***not*** conflict with the Civil Rules. As is true of California's law, the motion to strike and fee provisions "can exist side by side" with Rules 8, 12, and 56, "each controlling its own intended sphere of coverage without conflict." *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (quote omitted).

In sum, the anti-SLAPP act does not preclude meritorious claims. Reading the act as written and in light of how courts have interpreted other anti-SLAPP laws, petitioners' challenges are baseless. Because the law "utilizes a summary judgment-like standard in deciding a motion to strike," it "does not violate the right to trial by jury." *Dillon*, 179 Wn. App. at 89. Because it does not preclude discovery, it does not violate the

right of access to the courts. *Davis*, 180 Wn. App. at 544; *Spratt*, 180 Wn. App. at 635. More generally, it is constitutional because it "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." *Equilon Enters., Inc. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63 (2002); *see also Lee v. Pennington*, 830 So. 2d 1037, 1043 (La. Ct. App. 2002) (Louisiana anti-SLAPP law creates "a procedural screen for meritless suits... a question of law for a court to determine at every stage of a legal proceeding").[5]

3. The Legislature appropriately exercised its authority in enacting the anti-SLAPP law.

Plaintiffs and other opponents of the anti-SLAPP act also argue the Legislature lacks authority to set standards to identify and create immunity from SLAPPs. This premise, too, is flawed.

Petitioners first assert that "[a]nti-SLAPP laws are procedural" and therefore the act violates separation of powers because it conflicts with the Civil Rules. App. Br. at 34, 40. Again, the statute does not conflict with the Civil Rules. *See supra* Section II.B.2; *Spratt*, 180 Wn. App. at 635 ("there is no real conflict" between the anti-SLAPP act and the Civil Rules). Moreover, petitioners based this argument on federal law addressing rules of decision in diversity cases under *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938). As this Court said in *Putman*, "[n]either the

[5] Petitioners did not assert challenges based on jury trial rights and vagueness in the Superior Court, CP 317-23, so the Court should not address them. Regardless, the Court of Appeals rejected both arguments. *Davis*, 180 Wn. App. at 547-48. Nor do petitioners challenge the statutory damages award as unconstitutional.

test [under the *Erie* doctrine] nor its underlying rationale apply to this court when determining whether a state statute is substantive or procedural for a separation of powers analysis." 166 Wn.2d at 985 n.4.[6]

Regardless, the anti-SLAPP act is not "procedural." The act creates substantive rights "in the nature of immunity: [I]t protect[s] the defendant from the burdens of trial, not merely from ultimate judgments of liability." *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (California act). The Legislature can create or revise claims, defenses and immunities. "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, *amended by* 780 P.2d 260 (1989). This includes the power to establish or alter burdens of proof. *Davis*, 180 Wn. App. at 545 ("burden of proof" is

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[6] Indeed, to the extent *Erie* cases offer guidance, most recognize anti-SLAPP acts are substantive. *See, e.g.*, *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012) ("[i]t was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences"), *aff'd*, 736 F.3d 528 (D.C. Cir. 2013); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 808 (N.D. Ill. 2011) (Illinois law is "substantive" because it "created a new category of conditional legal immunity against claims premised on a person's '[a]cts in furtherance of' his First Amendment rights.") (quoting 735 Ill. Comp. Stat. 110/15); *Price v. Stossel*, 2008 WL 2434137, at *6 (S.D.N.Y. June 4, 2008) ("[T]he motion-to-strike provision of the California Anti-SLAPP Statute is substantive..."). In fact, the federal appellate courts to decide the issue have applied state laws' anti-SLAPP motions to strike. *Godin v. Schenks*, 629 F.3d 79, 86 (1st Cir. 2010) (Maine); *Newsham*, 190 F.3d at 972 (California); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168-70 (5th Cir. 2009) (Louisiana); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 143-44 (2d Cir. 2013) (California). The primary case on which petitioners rely, *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026 (N.D. Ill. 2013), is an outlier and on appeal to the Seventh Circuit, No. 13-3148 (7th Cir. Sept. 30, 2013).

"'substantive' aspect of a claim") (quoting *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000)).

In claiming the anti-SLAPP act violates the right of access, petitioners misunderstand that right. *See* App. Br. at 36-38; Pet. at 9-10. The right "does not carry with it any guaranty of success, but … must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules." *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1992). *See also 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 936, 6 P.3d 74 (2000) (constitution does not guarantee a remedy at law because Legislature may change common law claims and remedies). Otherwise, the Legislature could ***never*** revise claims or create defenses or immunities.

The right of access also does not create a right to assert ***any*** claim. "[B]aseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983); *accord Bakay v. Yarnes*, 2005 WL 2454168, at *7 (W.D. Wash. Oct. 4, 2005) ("No one has an absolute right to sue under all circumstances."). The Washington anti-SLAPP act, like California's, is not unconstitutional because "[t]he right to petition is not absolute, providing little or no protection for baseless litigation." *Equilon Enters.*, 29 Cal. 4th at 64. As the Court of Appeals held, "'[t]he argument that a state statute stiffens the standard of proof of a common law claim does not implicate' the right of access to courts." *Davis*, 180 Wn. App. at 546 (quoting *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004)).

Petitioners claim "other courts have recognized the right of access to courts cannot be trumped by an anti-SLAPP statute," and "[c]ourts often avoid invalidating ... anti-SLAPP laws by limiting their application." App. Br. at 32, 37. But they cite cases interpreting laws far different from RCW 4.24.525. *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935 (1998), and *Nader v. Maine Democratic Party*, 41 A.3d 551 (Me. 2012), interpret Massachusetts' and Maine's laws. But those laws focus solely on the defendant's petitioning activity; a plaintiff can defeat a motion only by showing the petitioning was devoid of legal and factual support and caused the plaintiff injury. *See* Mass. Gen. Laws ch. 231, § 59H; Me. Rev. Stat. tit. 14, § 556. Unlike the Washington or California acts, those laws do not allow the plaintiff to proceed by showing a probability of prevailing. They are thus "not apposite." *Navellier v. Sletten*, 29 Cal. 4th 82, 92, n.9 (2002) (rejecting *Duracraft* in interpreting California anti-SLAPP law).

"The legislature is vested with a wide discretion not only to determine what the public interest requires, but also to adopt measures necessary for such protection." *McDermott v. State*, 197 Wash. 79, 83, 84 P.2d 372 (1938). To date, courts in the thirty jurisdictions with anti-SLAPP statutes have rejected every constitutional challenge presented,[7]

[7] *See Nexus v. Swift*, 785 N.W.2d 771, 778-79 (Minn. Ct. App. 2010) (the "anti-SLAPP statutes that have been challenged have been upheld"); Thomas R. Burke, ANTI-SLAPP LITIGATION § 2.9 (2014) (cataloging cases rejecting challenges to California statute); Bruce E.H. Johnson & Sarah K. Duran, *A View*

recognizing that such laws ***protect*** free speech and petition rights, and it is well within legislatures' authority to do so. This Court should do the same.

III. CONCLUSION

The pernicious effect of SLAPPs is "enormous." *Gordon*, 590 N.Y.S.2d at 656. "Persons who have been outspoken on issues of public importance targeted in such suits ... will often choose ... to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *Id.* This case is a quintessential SLAPP. Petitioners filed their lawsuit to block the boycott and chill respondents' exercise of their constitutional rights. The Court should affirm dismissal. It need not reach the constitutional issues, but if it does, it should uphold RCW 4.24.525 so future SLAPPs may be dismissed promptly.

RESPECTFULLY SUBMITTED this 21st day of November, 2014.

Davis Wright Tremaine LLP
Attorneys for Respondents

By _____
Bruce E.H. Johnson WSBA #7667
Ambika K. Doran, WSBA #38237
Angela Galloway, WSBA #45330

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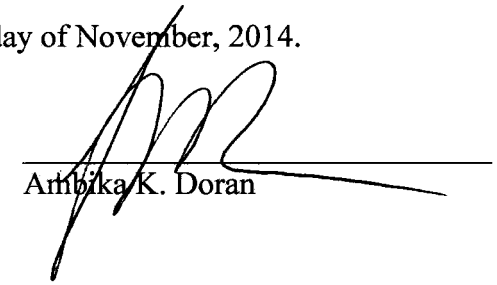
from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy, 87 WASH. L. REV. 495, 502 (2012).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 21, 2014, I caused the foregoing Respondents' Supplemental Brief to be served by the manner identified below in the above-captioned matter upon the following counsel of record:

Robert M. Sulkin, WSBA #15425 Avi J. Lipman, WSBA #37661 MCNAUL EBEL NAWROT & HELGREN PLLC One Union Square 600 University, 27th Fl. Seattle, WA 98101-3143 Email: RSulkin@mcnaul.com ALipman@mcnaul.com Attorneys for Petitioners	☐ ☑ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via FedEx Via Facsimile Via E-Mail
George M Ahrend, WSBA #25160 AHREND ALBRECHT, PLLC 16 Basin St SW Ephrata, WA 98823-1865 Email: gahrend@trialappeal.com	☐ ☑ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via FedEx Via Facsimile Via E-Mail
Bryan Patrick Harnetiaux, WSBA #05169 Attorney at Law 517 E 17th Ave. Spokane, WA 99203-2210 Email: bryanpharnetiauxwsba@gmail.com Attorneys for Amicus Curiae, WA State Association for Justice Foundation	☐ ☑ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via FedEx Via Facsimile Via E-Mail

Stated under oath this 21st day of November, 2014.



Ambika K. Doran