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; JESSICAN LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WHILHELM,
Respondents.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

A constitutionally-valid anti-SLAPP[1] statute protects rights of speech and public participation by creating an early mechanism to dispose of frivolous or sham claims filed solely to silence protected speech. But such statutes must steer clear of impairing the equally important rights to access the courts and to assert meritorious legal claims. Washington's anti-SLAPP statute, RCW 4.24.525, sweeps away both frivolous and legally viable claims. It applies an exacting procedure requiring a plaintiff to make a showing higher than that sufficient to survive summary judgment. As a result, the statute impairs rights of speech and petition rather than protecting them, and is unconstitutional on multiple grounds.

Respondents' arguments in defense of the statute are a house of cards, dependent almost entirely on the assertion that RCW 4.24.525 employs the same procedures as a motion for summary judgment. This premise is false, however, and once one accepts that the anti-SLAPP statute is materially different than a motion for summary judgment, one must also accept that the statute interferes with rights to trial by jury and access to the courts. In fact, the Court of Appeals recognized this in

[1] "A strategic lawsuit against public participation-otherwise known as a 'SLAPP' suit-is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights." *City of Seattle v. Egan,* 179 Wn. App. 333, 337, 317 P.3d 568 (2014).

Dillon,[2] which is why it attempted to rewrite the statute to equate to summary judgment. Because the statute cannot be rewritten, however, the statute conflicts with the court rules, in violation of separation of powers. Finally, since claims which might survive summary judgment cannot survive the anti-SLAPP statute, this Court should conclude that the statute bars meritorious claims, in violation of rights of speech and petition.

II. INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including free speech and the right to petition. ACLU-WA supports laws protecting individuals exercising free speech and petition rights from SLAPP suits, but not at the expense of impairing meritorious suits to vindicate civil rights and liberties. ACLU-WA has participated in several cases involving SLAPP issues, both as *amicus curiae* and as counsel to parties. *See, e.g., Right-Price Recreation LLC v. Connells Prairie Comm. Council*, 146 Wn.2d 370, 46 P.3d 789 (2002) (ACLU-WA supported anti-SLAPP protection under Washington statutes prior to enactment of RCW 4.24.525, since they

[2] *Dillon v. Seattle Deposition Reports, et al.*, 179 Wn. App. 41, 68, 316 P.3d 1119 (2014), *review granted,* 180 Wn.2d 1009, 325 P.3d 913 (2014).

protected free speech and petition rights without impairing rights under the usual rules of civil procedure); *Henne v. City of Yakima*, Case #89674-7, and *Dillon v. Seattle Deposition Reporters*, Case #89961-4 (ACLU-WA amicus briefs noted concerns with unconstitutionality of RCW 4.24.525).

Likewise, ACLU affiliates around the country have supported anti-SLAPP protection under other states' statutes, so long as that protection does not violate other important constitutional rights like the right to a jury trial and right of access to the courts, and does not prematurely terminate meritorious suits. As an organization dedicated to protection of free speech and petition rights, and an organization that frequently must utilize the courts to defend constitutional and other civil rights, ACLU-WA is especially well-suited to assist the Court by explaining how RCW 4.24.525 actually impairs those fundamental rights, rather than protects them.

III. ISSUES TO BE ADDRESSED BY *AMICUS*

1. Whether the anti-SLAPP statute unconstitutionally restricts a plaintiff's right to access the courts and right to trial by jury?

2. Whether the anti-SLAPP statute violates separation of powers because it unconstitutionally conflicts with the civil court rules?

3. Whether the anti-SLAPP statute and application of the gravamen test unconstitutionally screens meritorious claims out of court in violation of the rights of speech and petition?

IV. STATEMENT OF THE CASE

The following facts are taken from the parties' briefs and the lower court opinion. Certain members of the nonprofit Olympia Food Cooperative ("Co-op") brought this derivative action on behalf of the Co-op asserting that the Co-op Board of Directors' decision to adopt a boycott of Israeli goods violated the Co-op's internal rules and procedures.[3] CP 6-18. The members further alleged on behalf of the Co-op that the Board members had violated their fiduciary duties in enacting the boycott. *Id.*

Respondents moved to dismiss Appellants' derivative action and filed a special motion to strike Appellants' claims under the anti-SLAPP statute, RCW 4.24.525. CP 245-74. In response, Appellants sought relief from the automatic discovery stay imposed by RCW 4.24.525(5)(c) and opposed the motion to strike. CP 362-66, 378-403. The trial court denied Appellants' request for discovery and granted Respondents' motion to strike and to dismiss the case. CP 1238-42, 1246-61. The trial court further ordered Appellants to pay a statutory $10,000 penalty to each of the 16 individual Respondents, as well as Respondents' reasonable

[3] Amicus takes no position on the boycott at issue.

litigation fees and costs. *Id.* The total judgment entered by the trial court was $221,846. CP 1246-61.

The Court of Appeals affirmed in *Davis et al. v. Cox et al.*, 180 Wn. App. 514, 325 P.3d 255 (2014). Relying on its prior opinion in *Dillon*, the Court of Appeals held the procedure for deciding anti-SLAPP motions is "similar to that used in deciding a motion for summary judgment." *Id.* at 528 (quoting *Dillon*, 179 Wn. App. at 68). The *Dillon* court based the adoption of this framework on *Nexus v. Swift*, 785 N.W.2d 771, 781 (Minn. App. 2010), in which the Minnesota appellate court analyzed the Minnesota anti-SLAPP statute, which also contains a "clear and convincing" standard. *Dillon*, 179 Wn. App. at 87-88.

Applying this summary judgment framework, the Court of Appeals then applied the two step test under RCW 4.24.525. *Davis,* 180 Wn. App. at 528. The court held that because the "principal thrust or gravamen" of Appellants' claims was to cause the Board to cease engaging in activities protected by the First Amendment, the claims targeted activity "involving public participation and petition," satisfying the first prong of the anti-SLAPP test. *Id.* at 530-32. The Court of Appeals also held that Appellants failed to establish by "clear and convincing evidence a probability of prevailing on their claims," satisfying the second prong of the test. *Id.* at 533-36. The Court of Appeals also addressed the

constitutionality of the anti-SLAPP statute and rejected Appellants' arguments that RCW 4.24.525 violates separation of powers principles, the right of access to the courts and is unconstitutionally vague. *Id.* at 541-48. The Court's reasoning in rejecting these constitutional arguments was based in part on the reasoning that the procedures governing anti-SLAPP motions to strike were consistent with the summary judgment procedures in the civil rules. *Id.*

The Court heard oral argument in *Dillon* on September 30, 2014. Following oral argument, on October 9, 2014, the Court asked the parties in that case to submit supplemental briefing on the issue of the constitutionality of the anti-SLAPP statute. In his brief, Dillon requested the Court grant re-argument on this issue. This Court has stayed further proceedings in *Dillon* pending argument in this case.

V. ARGUMENT

A. RCW 4.24.525 Violates the Right to Jury Trial and the Right of Access to the Courts.

"The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (quoting *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). As written, the anti-SLAPP statute conflicts with the right of access to the courts and to trial

by jury because it precludes meritorious claims through its burden-shifting procedures.

Respondents attempt to avoid these issues by relying on "precedents" interpreting the Washington anti-SLAPP statute procedure as akin to the procedure on summary judgment. Resp.'s Br. at 11. Respondents continue to propound this argument because they agree it is "necessary in order to preserve the plaintiff's right to a trial by jury." *Dillon*, 179 Wn. App. at 89. In other words, if the statute is not treated as the equivalent of a motion for summary judgment, it allows the disposal of claims with merit that could otherwise survive summary judgment. *See LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989) ("When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial.") (Emphasis added).

But the Washington cases that equate the Washington anti-SLAPP statute to a motion for summary judgment emanate from the same source -- the Court of Appeals decision in *Dillon* (which is on review before this Court). *See Spratt v. Toft*, 180 Wn. App. 620, 637, 324 P.3d 707 (2014)

(citing *Dillon*); *Davis*, 180 Wn. App. at 528 (citing *Dillon*); *Dillon*, 179 Wn. App. at 88-89.[4]

In turn, the sole authority that the Court of Appeals cited in *Dillon* to import the summary judgment standard has been overruled. The *Dillon* Court of Appeals relied on Minnesota law, and in particular the Minnesota Court of Appeals decision in *Nexus v. Swift,* 785 N.W.2d 771, 781 (Minn. App. 2010). The crux of the decision in *Nexus* was as follows:

> [The] 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.

Nexus, 785 N.W.2d at 782 (emphasis in original).

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[4] Respondents also cite *Akrie v. Grant*, which makes a passing reference to California law in a footnote. 178 Wn. App. 506, 513, n.8, 315 P.3d 567 (2013). *Akrie* is also on review before this Court. 180 Wn.2d 1008, 325 P.3d 913 (2014). The two federal cases cited by Respondents rely entirely on California law. *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941 (9th Cir. 2013); *AR Pillow Inc. v. Maxwell Payton, LLC*, No. C11-1962RAJ, 2012 WL 6024765, at *2 (W.D. Wash. Dec. 4, 2012). But California authority confirms that the California anti-SLAPP statute does not directly equate to summary judgment. *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010). Moreover, although "the revised [Washington] Act is modeled after the California law, Washington applies a higher burden at the second stage. RCW 4.24.525(4)(b) ("clear and convincing evidence of a probability of prevailing")." *Maxwell Payton, LLC*, 2012 WL 6024765, at *2.

In *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 233 (Minn. 2014), the Minnesota Supreme Court rejected the reasoning of *Nexus*. The Minnesota Supreme Court held that the summary judgment standard could not be reconciled with the standard on the face of the anti-SLAPP statute:

> While *Nexus* suggests that the summary-judgment standard should apply to some anti-SLAPP motions, the summary-judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent. For summary judgment motions, a court evaluates the evidence to determine whether there are any genuine issues of material fact and whether either of the parties is entitled to judgment as a matter of law. An anti-SLAPP motion, by contrast, requires the court to make a finding about whether "the responding party has produced clear and convincing evidence that the acts of the moving party" are not immune.

Leiendecker, 848 N.W.2d at 231 (comparing Minn. R. Civ. P. 56.03 with Minn.Stat. § 554.02, subd. 2(3)) (citations omitted) (emphasis added). "Accordingly, the court rejected the Minnesota Court of Appeals' statement in *Nexus v. Swift* that, 'if a party brings a motion for summary judgment asserting anti-SLAPP immunity, the responding party is only 'required to produce clear and convincing evidence in light of the Rule 56 standard for granting summary judgment.'" *State Bank of Bellingham v.*

BancInsure, Inc., No. 13-CV-0900 SRN/JJG, 2014 WL 4829184, at *14 (D. Minn. Sept. 29, 2014) (citing *Leiendecker*, 848 N.W.2d at 230).[5]

In so doing, the Minnesota Supreme Court also recognized the concern that the Washington Court of Appeals recognized in *Dillon*: namely, that failure to import summary judgment standards might result in the statute, as written, conflicting with the right to trial by jury. *Dillon*, 179 Wn. App. at 89. But the Minnesota court rejected the premise that this concern gave it license to rewrite the statute:

> The constitutional-avoidance canon provides a "presumption ... that a statute is constitutional, and we are required to place a construction on the statute that will find it so *if at all possible*. In this case, it is not "possible" to adopt a construction of the anti-SLAPP statutes that relieves those responding to an anti-SLAPP motion of the burden to produce evidence. As described above, the anti-SLAPP statutes unambiguously require the responding party to produce evidence and the district court to make a finding on whether "the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03." It is neither reasonable nor "possible" to adopt any other construction of the statute.

Leiendecker, 848 N.W.2d at 232-33 (citations omitted, emphasis in original).

[5] For further discussion of why *Leiendecker*'s conclusion is correct under Washington law, see the ACLU of Washington's Brief of *Amicus Curiae* filed in *Dillon*, at pp. 12-15.

This Court should also decline to equate the anti-SLAPP statute with CR 56 because the two procedures are irreconcilable. *See Al Bahlul v. United States*, 767 F.3d 1, 15 (D.C. Cir. 2014) ("If, after applying ordinary principles of textual analysis, the statute is not genuinely open to two constructions, the 'canon of constitutional avoidance does not apply.'") (quoting *Gonzales v. Carhart,* 550 U.S. 124, 154, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)). Instead, this Court should affirm that the statute, as written, materially differs from summary judgment, and as a result violates the rights of trial by jury and access to the courts.

B. The Anti-SLAPP Statute Violates Separation of Powers Principles.

This Court should similarly conclude that the anti-SLAPP statute violates the rule of separation of powers.

"The separation of powers is implicit in our state constitution and arises from 'the very division of our government into different branches.'" *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)); *see also Putman*, 166 Wn.2d at 980 (stating the division of government into different branches has given rise "to a vital separation of powers doctrine"). This doctrine ensures "that the fundamental functions of each branch remain inviolate, and that the actions of one branch do not threaten

the independence or integrity or invade[] the prerogatives of another." *Gresham*, 173 Wn.2d at 428 (internal quotations omitted).

This Court has held it is an "inherent power of the judicial branch" to prescribe rules for practice and procedure in the courts which flows from Article IV, section 1 of the Washington Constitution. *Id.* (internal citations omitted); *see also Putman*, 166 Wn.2d at 980 (holding same). Although the Court will attempt to harmonize a statute with a conflicting court rule, if the statute and rule "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putman*, 166 Wn.2d at 980 (internal citation omitted).

Like the statute at issue in *Putman* governing prerequisites to the filing of a medical malpractice action, RCW 4.24.525 is a procedural statute purporting to establish the process through which a court will analyze whether a party may proceed on a given claim. *Putman*, 166 Wn.2d at 984-85. Respondents urge a narrow reading of *Putman*, but as in that case, the provisions of RCW 4.24.525 "encroach on the judiciary's power to set court rules" by establishing additional (and substantial) procedural requirements for a claim to survive. *Id.* at 979-80.[6] And, as in

[6] The Court of Appeals avoided the issue of separation of powers by holding that RCW 4.24.525's burden-shifting mechanism equates to a substantive burden of proof. But as *Raleigh v. Ill. Dep't of Revenue* makes clear, a burden of proof is only substantive when it is "an essential element

Putman, the plaintiff is denied the ability to engage in the normal discovery process to pursue a meritorious claim. This Court has held, "practice and procedure pertain to the essentially mechanical operation of the courts by which substantive laws, rights, and remedies are effectuated" as opposed to substantive law which "creates, defines, and regulates primary rights." *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). The anti-SLAPP statute is procedural and is inconsistent with the civil rules. *See Nguyen v. Cnty. of Clark*, 732 F. Supp. 2d 1190, 1193 (W.D. Wash. 2010) (holding anti- SLAPP statute is procedural because it "changes the procedure that [plaintiffs] must adhere to in proving their claim").

Once again, Respondents attempt to avoid a constitutional infirmity by equating the anti-SLAPP statute with procedures already established within the civil rules. Resp.'s Br. at 16 (referring back to earlier argument equating statutory procedures with summary judgment). But RCW 4.24.525 cannot be harmonized with the civil rules. As

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of the claim itself." 530 U.S. 15, 21, 120 S. Ct. 1951 (2000). Here, the burden of proof is not specific to any particular claim or right of action. Rather, it changes the procedure for granting summary judgment and applies to any claim challenged under the anti-SLAPP statute regardless of the nature of the claim or its underlying burden. Moreover, the heightened burden applies only to surviving the procedural motion, after which the plaintiff's burden reverts to the normal, substantive burden of proof faced at trial.

discussed above, in vacating the foundation for the *Dillon* Court's reliance on summary judgment standards, "[t]he Minnesota Supreme Court in *Leiendecker*... recently explained the discrepancy between this [SLAPP] standard and the summary judgment standard." *State Bank of Bellingham*, 2014 WL 4829184, at *14 (emphasis added). Respondents' contention that the motion to strike process can be equated to summary judgment does not resolve separation of powers concerns because "the summary-judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent." *Leiendecker*, 848 N.W.2d at 231. Again, Respondents ignore the fact that the foundation of the Court of Appeals decision in *Dillon* has been vacated, and instead continue to argue that the anti-SLAPP statute and the civil rules "can exist side by side." Resp.'s Br. at 15. For the reasons identified above, the Court should reject this premise and conclude that the statute offends separation of powers.

C. The Anti-SLAPP Statute Violates Rights of Speech and Petition.

Finally, the anti-SLAPP statute violates the rights of speech and petition under the Washington Constitution because it mandates the

dismissal of claims not only that have merit, but also that would survive summary judgment.[7]

In the words of the Court of Appeals, "it is clear that the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity." *Akrie*, 178 Wn. App. at 513, n.8.[8] It does so

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[7] "Although the right to free speech and the right to petition are separate guarantees, they are related and generally subject to the same constitutional analysis." *In re Marriage of Meredith*, 148 Wn. App. 887, 896, 201 P.3d 1056 (2009). "[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough of Duryea, Pa. v. Guarnieri*, _ U.S. _, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011). The Court of Appeals in *Dillon* suggested that Washington's right of petition does not encompass petition to the judiciary. 179 Wn. App. at 79-80. As *Dillon* notes elsewhere, however, this Court has applied Wash. Const. article I, section 4 synonymously with the First Amendment right of petition, which does encompass petitioning the courts. *Id.* at n.28. But even if *Dillon* is correct, that article I section 4 does not apply to petitioning the courts, then the same activity is protected by Wash. Const. article I, section 10, and the same result should entail based on the analysis of rights to jury trial and access to the courts in section V.A, *supra*.

[8] The Court of Appeals recognized a similar concern in *Spratt*, 180 Wn. App. at 632 & n. 19: "Ironically, had Toft sued Spratt, Spratt would arguably have had a cause of action under that same statute for Toft's claims. We are not unmindful of the absurdity of such a circumstance and recognize, but do not decide, the conundrum presented by the statute in this situation.... The trial court appeared to recognize the dilemma that Toft's efforts to combat Spratt's challenges may have violated Spratt's right to petition by awarding fees and penalties in dismissing the suit at the outset." The "dilemma" is real, as a party bringing a non-frivolous lawsuit has as much a right to immunity for their valid petitioning activities. *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643-44 (9th Cir. 2009) (internal citations and quotations omitted) ("The *Noerr–Pennington* doctrine derives from the Petition Clause of the First Amendment and

because, while there is no constitutional right to bring frivolous claims, "the anti-SLAPP statute does not sanction and frustrate only claims that are frivolous. Rather, the statute mandates dismissal of all claims based on protected activity where the plaintiff cannot prove by clear and convincing evidence a probability of prevailing on the merits." *Id.* Put another way, "analyzing whether the burden to prove the claim by 'clear and convincing evidence' has been met is vastly different from an inquiry into frivolity." *Id.* at 571, n.8. And this burden must be met without the benefit of discovery.

As the Court of Appeals recognized in *Akrie*, where a statute imposes a content-based restriction on constitutionally protected speech, that statute is subject to the highest level of scrutiny:

> "[A]ny statute that purports to regulate such [protected first amendment activity] based on its content is subject to strict scrutiny." *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d 843, 848, 168 P.3d 826 (2007). Under the strict scrutiny standard, a statute that burdens the right to petition is only valid if it "'is necessary to serve a compelling state interest

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provides that those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. Recognizing that the right to petition extends to all departments of the government and includes access to courts, the Supreme Court extended the doctrine to provide immunity for the use of the channels and procedures of state and federal courts to advocate causes.")

> and ... is narrowly drawn to achieve that end.' " *Rickert,* 161 Wn.2d at 843, 168 P.3d 826 (internal quotation marks omitted) (quoting *Burson v. Freeman,* 504 U.S. 191, 198, 112 S. Ct. 1846, 119 L.Ed.2d 5 (1992)).

Akrie, 178 Wn. App. at 513, n.8 (brackets in original); *see also Collier v. City of Tacoma*, 121 Wn.2d 737, 748-49, 854 P.2d 1046 (1993) ("Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny.").

The Court of Appeals' supposition appears to have been that treating the anti-SLAPP statute as equivalent to a motion for summary judgment satisfied strict scrutiny. Respondents argue similarly that, in part because the statute uses a summary judgment standard, "the anti-SLAPP Act does not preclude meritorious claims." Resp.'s Br. at 15. Once again, however, the statute is entirely distinct from and contrary to the summary judgment procedure. And, even assuming the statute as written is necessary to serve a compelling state interest, it is anything but narrowly tailored.

To the contrary, the statute is vastly overbroad. "A strategic lawsuit against public participation… is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights." *Egan*, 179 Wn. App. at 337 (emphasis added). The statute, on the other hand, burdens any case where the "gravamen" or "principal thrust" of the claims relates to

any of the broad categories of conduct specified in the statute (and without regard for the suit's motivation), even those with merit that do overcome a premature, heightened burden. *Bevan v. Meyers*, _ Wn. App. _, 334 P.3d 39, 43 (Wash. Ct. App. 2014); *Davis*, 180 Wn. App. at 529; RCW 4.24.525(2).[9] Under this test, the statute has already interfered with petitioning activity ranging from a corporate derivative suit (the present case), to a claim for retaliatory employment actions (*Henne v. City of Yakima*, 177 Wn. App. 583, 313 P.3d 1188 (2013), *review granted*, 179 Wn.2d 1022, 320 P.3d 718 (2014)), to a property line boundary dispute (*Bevan*, 334 P.3d at 41). Once the statute is found to apply, the plaintiff then bears the burden of proof to make a heightened showing that he or she will prevail, presumptively without the benefit of discovery. *Bevan*, 334 P.3d at 44 (citing RCW 4.24.525(4)(b)). In this way, the statute has become not merely a means to weed out true SLAPP filings but, to quote the title of an upcoming seminar, an "early test to plaintiff's claims with dire consequences to the unwary."[10]

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[9] While at some stage objective lack of merit may substitute for a showing of intent to chill, *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63, 52 P.3d 685 (2002), the Washington statute is not limited to those cases that objectively lack merit.

[10] *The New Sheriff in Town: Washington's Anti-SLAPP Statute Provides Early Test to Plaintiff's Claims with Dire Consequences to the Unwary.* http://www.lawseminars.com/detail.php?SeminarCode=15PRAWA&

It is also self-evident that more narrowly tailored options exist to protect against true SLAPP actions, such as a mechanism for dismissal that requires a finding that an actions is frivolous, a sham, or motivated solely to silence protected speech. While this Court need not articulate the precise constitutional boundary for anti-SLAPP protection, it should conclude that Washington's anti-SLAPP statute, one of the most if not the most restrictive provision on the books, fails constitutional scrutiny.

VI. CONCLUSION

"A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it." *United States v. Alvarez*, 132 S. Ct. 2537, 2545, 183 L. Ed. 2d 574 (2012). Contrary to protecting speech, Washington's anti-SLAPP statute has become a vehicle to restrict it by preventing meritorious claims from advancing in the courts. The anti-SLAPP statute conflicts with the right of trial by jury and access to the courts, violates the separation of powers doctrine and restricts the constitutional right to speak and petition the courts for relief. Amicus ACLU-WA respectfully requests that the Court hold the anti-SLAPP statute unconstitutionally bars meritorious claims, and operates in

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violation of the state constitutional rights of speech and petition. Wash. Const. Art. 1, sections 4 and 5.

RESPECTFULLY SUBMITTED this 6th day of December, 2014.

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