No. 90233-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 71360-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KENT L. DAVIS ET AL.,

Petitioners,

v.

GRACE COX ET AL.,

Respondents.

APPEAL FROM THURSTON COUNTY SUPERIOR COURT
THE HONORABLE WM. THOMAS MCPHEE

BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 29 OTHERS IN SUPPORT OF RESPONDENTS GRACE COX ET AL.

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IDENTITY AND INTEREST OF *AMICI*

Media *amici* have an interest in ensuring anti-SLAPP statutes remain effective tools in protecting free speech. While all citizens who choose to speak out on public affairs benefit from anti-SLAPP statutes, which aim to deter the use of litigation to silence speech, as regular speakers news organizations have an especially strong interest in ensuring that these statutes provide meaningful relief. It is important to all *amici* that the Washington anti-SLAPP statute as well as those adopted in states nationwide is confirmed to be constitutional so as to effectively provide relief against the deterring effects of litigation.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom-of-information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act litigation since 1970.

Additional *amici* include Allied Daily Newspapers of Washington, American Society of News Editors, Association of Alternative Newsmedia, The Association of American Publishers, Inc., Bloomberg L.P., California Newspaper Publishers Association, The E.W. Scripps Company, Forbes Media LLC, Gannett Co., Inc., Hearst Corporation,

Investigative Reporting Workshop at American University, KIRO-TV, The McClatchy Company, MediaNews Group, Inc., National Press Photographers Association, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, Public Participation Project, The Seattle Times Company, Sound Publishing, Inc. d/b/a the Daily Herald of Everett, Stephens Media LLC, Time Inc., Tully Center for Free Speech, Washington Newspaper Publishers Association, and Washington State Association of Broadcasters.

INTRODUCTION

Washington's anti-SLAPP law, RCW 4.24.525, was the first part of a nationwide trend in the direction of limiting the devastating consequences which unfounded lawsuits can have on speakers. Mechanisms for early dismissal, fee-shifting provisions, and sanctions on irresponsible plaintiffs – all of which are included in RCW 4.24.525 – are common features of these laws. As the number of states enacting anti-SLAPP laws has grown, some have been challenged as unconstitutional. But *every* court to adjudicate the constitutionality of an anti-SLAPP law has found the law to be valid.[1] This Court should hold, like each court

[1] *See Guam Greyhound Inc. v. Brizill*, No. CVA07-021, 2008 WL 4206682 (Guam Terr. Sept. 11, 2008); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005); *Equilon Enters. v. Consumer Cause, Inc.*, 24 Cal. Rptr. 2d 507 (Cal. App. 2002); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996); *Sandholm v. Kuecker*, 942 N.E.2d 544 (Ill. App. Ct. 2010); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010); *Lee v.*

which has come before it, that RCW 4.24.525 is a constitutional mechanism for disposing of speech-repressive lawsuits. Petitioners Kent Davis et al.'s ("Petitioners") contentions that the burden-shifting, discovery stay, and fee-shifting and mandatory damages provisions violate the constitutional rights to petition and of access to the courts are without merit, and this Court should reject their claims. *Amici* know the Court is considering these issues in multiple cases and wish to weigh in on both the issues concerning the anti-SLAPP law raised in this case and elsewhere.[2]

STATEMENT OF THE CASE

Amici reference and incorporate herein the Statement of the Case as set forth in the pleadings of the Respondents, Grace Cox et al. ("Respondents").

ARGUMENT

I. The Washington anti-SLAPP law is consistent with a long-standing nationwide trend of protecting speakers from frivolous suits meant to silence their speech.

The phenomenon of "strategic lawsuits against public participation" ("SLAPPs") was first identified by two University of Denver professors in a series of articles in the 1980s and early 1990s. The

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Pennington, 830 So. 2d 1037 (La. Ct. App. 2002); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46 (Cal. App. 1995).

[2] *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 316 P.3d 1119, *review granted*, 180 Wn.2d 1009, 325 P.3d 913 (2014); *Akrie v. Grant*, 178 Wn. App. 506, 315 P.3d 567 (2013), *review granted*, 180 Wn.2d 1008, 325 P.3d 913 (2014) .

term is a moniker for any "attempt[] to use civil tort action to stifle political expression." George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation,* 35 SOC. PROBS. 506, 506-07 (1988). A SLAPP plaintiff typically does not seek to have legitimate rights vindicated by a court, but rather to intimidate speakers and bury defendants under the weight of litigation expenses, removing them from the public debate. *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 939-44 (1992). Indeed, SLAPPs are rarely victorious and usually dismissed, but they achieve the plaintiff's goal of chilling citizen involvement and public participation in government. *Id.* at 944.

California enacted an anti-SLAPP statute in 1992 that became a model for other jurisdictions seeking to protect citizen participation in government from suppression via civil suit. *See* Cal. Civ. Proc. Code § 425.16 (Deering 2014). In the two decades since California's enactment of its anti-SLAPP legislation, dozens of state legislatures, realizing the power of civil suits to stifle constitutionally protected activity, responded with anti-SLAPP legislation of their own. Twenty-eight states, along with the District of Columbia and the U.S. territory of Guam, have enacted

some form of anti-SLAPP legislation.[3] Moreover, courts in Colorado, Connecticut, and West Virginia – states without anti-SLAPP statutes – recognize a common-law defense to lawsuits that target acts aimed at petitioning the government for action on issues of public importance. *See Protect Our Mountain Env't v. Dist. Court*, 677 P.2d 1361, 1369 (Colo. 1984) (requiring that plaintiffs meet a "heightened standard" when evaluating a SLAPP under a defendant's motion to dismiss premised on First Amendment protection of their activities); *Royce v. Willowbrook Cemetery, Inc.*, No. X08CV010185694, 2003 WL 431909, at *2 (Conn. Super. Ct. Feb. 3, 2003) (identifying the standard in identifying and dismissing a SLAPP suit to be "objectively baseless in that no reasonable

[3] *See* Ariz. Rev. Stat. Ann. §§ 12-751–12-752 (LexisNexis 2014); Ark. Code Ann. §§ 16-63-501–16-63-508 (2014); Cal. Civ. Proc. Code § 425.16 (Deering 2014); Del. Code Ann. tit. 10, §§ 8136-8138 (2014); D.C. Code § 16-5501 (2014); Fla. Stat. Ann. §§ 720.304(4), 768.295 (LexisNexis 2014); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (2014); Guam Code Ann. tit. 7 §§17101–17109 (2014); Haw. Rev. Stat. §§ 634F-1–634F-4 (LexisNexis 2014); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (LexisNexis 2014); Ind. Code Ann. §§34-7-7-1–34-7-7-10 (LexisNexis 2014); La. Code Civ. Proc. Ann. art. 971 (2013); Me. Rev. Stat. Ann. tit. 14, §556 (2014); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2014); Mass. Gen. Laws Ann. ch. 231, § 59H (LexisNexis 2014); Minn. Stat. Ann. §§ 554.01–554.05 (2014); Mo. Ann. Stat. § 537.528 (2014); Neb. Rev. Stat. Ann. §§ 25-21, 241–25-21, 246 (2014); Nev. Rev. Stat. Ann. §§ 41.637, 41.650–41.670 (LexisNexis 2013); N.M. Stat. Ann. §38-2-9.1 (LexisNexis 2014); N.Y. Civ. Rights Law §§70-a, 76-a (Consol. 2014); N.Y. C.P.L.R. 3211(g) (Consol. 2014); Okla. Stat. Ann. tit. 12, §1443.1 (West 2013); Or. Rev. Stat. Ann. §§31.150–31.155 (West 2014); 27 Pa. Cons. Stat. Ann. §§7707, 8301–8303 (West 2014); R.I. Gen. Laws Ann. §§ 9-33-1–9-33-4 (West 2014); Tenn. Code Ann. §§4-21-1001–4-21-1004 (2014); Tex. Civ. Prac. & Rem. Code Ann. §§27.001–27.011 (Vernon 2013); Utah Code Ann. §§78B-6-1401–78B-6-1405 (LexisNexis 2014); Vt. Stat. Ann. tit. 12, §1041 (2014); Wash. Rev. Code Ann. §§ 4.24.510–4.24.525 (LexisNexis 2014). In addition, anti-SLAPP bills were introduced in the Michigan and North Carolina legislatures and the U.S. Congress in recent legislative sessions, but none has become law. *See* Citizen Participation Act, H.R. 746, 2011-2012 Leg., Reg. Sess. (N.C. 2011); Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009); H.R. 5036, 95th Leg., Reg. Sess. (Mich. 2009).

litigant could realistically expect success on the merits and … conceal[ing] an effort to interfere improperly with the defendant's rights"); *Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993) (ruling that the exercise of the constitutional right to petition the government cannot give rise to liability unless a plaintiff can show the defendant acted with actual malice).

In particular, the scope of protection offered by California's anti-SLAPP law expands the protection to include not just speech aimed at government bodies, but statements made in public forums on matters of public concern. This influence seems to be reflected in Washington's statute. *Compare* Cal. Civ. Proc. Code §425.16(b)(1) (subjecting to the special motion to strike any action "arising from … the [defendant's] right of petition or free speech") *with* RCW 4.24.525(2), (2)(e) (applying to any claim involving "public participation and petition," defined, in relevant part, as any "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").

While California's extension of an anti-SLAPP legislative remedy to speech as well as petition activity has been influential, Washington was the first state in the nation to enact anti-SLAPP legislation. Acting in response to a retaliatory lawsuit by a real estate company against a young

mother who reported the company's hundreds of thousands of dollars in unpaid taxes, the state legislature passed the Brenda Hill Bill in 1989. *See* Act of May 5, 1989, 1989 Wash. Sess. Laws 1119 (codified as amended at RCW 4.24.510 (2014)). This early anti-SLAPP law provided immunity from civil liability to those who "in good faith communicate[]" complaints to a federal, state or local agency "reasonably of concern" to that agency. 1989 Wash. Sess. Laws 1119-20.

While the Brenda Hill Bill did not include a mechanism for the early dismissal of SLAPPs, it did contain a burden-shifting mechanism that would be incorporated into later anti-SLAPP laws. In *Gilman v. MacDonald*, 74 Wn. App. 733, 738-39, 875 P.2d 697 (1994), the Court of Appeals analogized the immunity granted by the Brenda Hill Bill in a defamation case to a common law qualified privilege. The Court held that when a defendant in a defamation suit claims immunity under the statute, "the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith." *Id.* In effect, the plaintiff was required to show by clear and convincing evidence that the defendant acted with actual malice – "they knew of the falsity of the communications or acted with reckless disregard as to their falsity." *Id.*

Various gaps in the law's protection were corrected, most recently in 2010 with the enactment of RCW 4.24.525. This latest iteration of the

state's anti-SLAPP statute has three critical features which allow courts to expeditiously dispose of SLAPPs.

First, the law provides for a motion to strike lawsuits arising out of protected speech or petition activity upon an initial preponderance showing by the defendants. The judge will grant the motion to dismiss the complaint unless plaintiffs can show by clear and convincing evidence a probability of success on the merits. RCW 4.24.525(4). Second, a defendant's filing of a special motion to strike triggers a stay of discovery until the court rules on the special motion to strike, although the court may order specified discovery "for good cause shown." RCW 4.24.525(5)(c). Third, service of a special motion to strike the complaint triggers an expedited schedule of judicial review, which the court will hear within 30 days "unless the docket conditions of the court require a later hearing." RCW 4.24.525(5)(a). The court must then issue its decision within seven days after the hearing. RCW 4.24.525(5)(b). The special motion, discovery stay and expedited review schedule ensures that both the court system and SLAPP defendants have the opportunity to quickly and efficiently dispose of meritless cases before expending resources complying with costly and time-consuming discovery orders and addressing pending motions.

II. The mechanisms that the statute provides to dispose of meritless SLAPP suits are constitutionally sound.

The mechanisms in RCW 4.24.525 work in concert to relieve defendants subject to SLAPP lawsuits arising out of constitutionally protected activity from the burdensome financial strain of defending the suit. As states across the country have recognized, anti-SLAPP laws are a judicially efficient means of protecting the rights of speakers and of protecting the misuse of the courts. They do not inhibit the First Amendment rights of plaintiffs because a SLAPP – by definition – is a meritless lawsuit which a plaintiff has no right to bring. Washington's law, and anti-SLAPP laws more broadly, are instead a valuable shield to be used to protect the First Amendment rights of speakers. Petitioner Davis's contentions that the burden-shifting, discovery stay, and fee-shifting/sanctions provisions violate his First Amendment rights are without merit and should be rejected.

A. RCW 4.24.525's burden-shifting provision does not violate separation of powers or the right of access to the courts.

Amici note that Respondents have ably established the constitutionality of the burden-shifting provision of RCW 4.24.525. We write additionally to emphasize that the requirement of the plaintiff to "establish by clear and convincing evidence a probability of prevailing" in

order to proceed with the SLAPP suit is not unprecedented. Petitioners make much of the conjunction of the "clear and convincing" and "probability" standards to claim that that provision is both void for vagueness and violates the right of access to courts and trial by jury. Furthermore, the plaintiffs in *Dillon* and *Akrie* argue that the "clear and convincing" standard was unconstitutional because it was too high.[4] On the contrary, both the "clear and convincing" and probability standards are commonly used in the evidentiary standards of other immunities, specifically in the First Amendment realm, to the point where it is not confusing or unconstitutional to use them together, as the Court of Appeals in *Dillon* was able to do and as the Court of Appeals considering this case understood. *See Dillon*, 179 Wn. App. at 86; *Davis v. Cox*, 180 Wn. App. 514, 546-47, 325 P.3d 255 (2014).

The important privileges protected by the First Amendment require that a rigorous evidentiary threshold be reached before the privileges can be overcome. The seminal case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established a requirement of "convincing clarity which the

[4] *See* Joint Brief of Dillon and Akrie RE Constitutionality of RCW 4.24.525at 6, *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 316 P.3d 1119 (2014), *Akrie v. Grant*, 178 Wn. App. 506, 315 P.3d 567 (2013). It should also be noted that Dillon and Akrie also singled out a statement of the Reporters Committee in the amicus brief filed in that case, stating that because *amici* had stated that RCW 4.24.525 disposes of *weak* cases as early and cost-effectively as possible, *amici* were admitting that the statute barred not only sham cases but non-sham cases that were weak. *See id.* at 12. They misconstrue *amici*'s meaning. *Amici* equate the meaning of "weak" with the meanings "sham" and "meritless."

constitutional standard demands" before a defamation defendant may be found to have actual malice and therefore be liable. *Id*. at 285-86. Subsequent cases interpreted *New York Times v. Sullivan* to call for "clear and convincing proof" that the defendant acted with knowledge of falsity or reckless disregard for the truth. *See, e.g., Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974). That standard has been applied consistently in federal court and in similar state laws governing defamation ever since. *See, e.g.*, *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 169-70, 736 P.2d 249 (1987) (requiring clear and convincing evidence to prove actual malice). There are also many examples of how Washington has adopted the "clear and convincing" standard for laws of its own implicating the First Amendment. One such law is RCW 42.17A.335, which governs liability for sponsoring political advertising made with actual malice. Violation of that section must be proven with clear and convincing evidence. *See* RCW 42.17A.335 (LexisNexis 2014).

It is nothing new for legislatures and courts to protect the privileges of the First Amendment by requiring clear and convincing evidence to overturn them. That well-established standard is not difficult for courts to understand even when combined with the "probability of prevailing" standard. RCW 4.24.525 should not be struck down on these grounds.

B. RCW 4.24.525's discovery stay does not infringe the rights of petition or of access to the courts.

Petitioners' argument rests on the premise that Cox's use of the anti-SLAPP statute forces plaintiff to make a pre-discovery showing of a likelihood of success on its claim by clear and convincing evidence. But this argument is unavailing. The lack of discovery does not necessarily signal denial of a constitutional right. *See State v. Karas*, 108 Wn. App. 692, 32 P.3d 1016 (2001) (rejecting a petitioner's argument that a conviction for violating a protection order violated his procedural due process rights because the order was put in place without discovery).

In *Karas*, the Court of Appeals considered the constitutionality of the Domestic Violence Prevention Act, Chapter 26.50 RCW ("DVPA"). The DVPA allowed for a petition for an order of protection in cases of domestic violence. *See Karas*, 108 Wn. App. at 696-98. The petition was required to be accompanied by a sworn affidavit in support. *Id.* After service on the other party, the court would then hold a hearing within 24 days, at which both parties could testify but for which no discovery was provided. *Id.* at 698. The petitioner in *Karas* violated the protection order and was convicted.

The Court of Appeals rejected Karas's argument that the lack of discovery at the petition hearing created a constitutional defect in the

protection order which would void his later conviction. *Id.* Initially, the Court noted that nothing in the statute prevented Karas from seeking discovery, although it was not provided for, which is similarly true for the discovery stay in the anti-SLAPP statute. *Compare id.* ("Further, we note that the Act does not preclude a party from seeking discovery"), *with* RCW 4.24.525(5)(c) ("Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted."). The Court also looked to the broader social value served by the DVPA: preventing the violence and substance abuse caused directly and indirectly by domestic abuse situations. *Karas*, 108 Wn. App. at 698-700. Considering this strong public interest in conjunction with the fact that Karas had been given notice of the order, a hearing wherein he could challenge it, and the right to move for a modification of the order and to appeal, the Court held that the absence of discovery was of no concern and did not violate Karas's due process rights. *Id.* at 698-702.

Karas is instructive in this case. There, the granting of a protection order imposed a legal duty upon Karas not to enter a residence; violation of that legal duty was subject to criminal sanctions. *Id.* at 694. Yet, the Court held that that duty could be constitutionally imposed even absent discovery. Similarly here, it is of no constitutional concern that the anti-

SLAPP statute includes a stay of discovery, particularly because the court is granted discretion to allow certain discovery on good cause shown. *See* RCW 4.24.525(5)(c). Forcing SLAPP plaintiffs to come forth early in the case with evidence to support their claim before the "war of attrition" that is discovery begins does not violate the constitutional rights of a plaintiff. It serves to preserve the rights of the defendant.

C. RCW 4.24.525's fee-shifting and mandatory damages provisions do not violate the rights of petition or of access to the courts because there is no right to bring a meritless lawsuit.

RCW 4.24.525 is a constitutional mechanism for disposing of speech-repressive lawsuits expeditiously and efficiently, created through a validly enacted statute, and the fee-shifting and sanctioning provisions do not violate the First Amendment right to petition. While the right to petition through access to the courts is a core protection of the First Amendment, that right does not go so far as to embrace "illegal and reprehensible practice[s] which may corrupt the…judicial proces[s]." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525-26 (2002) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)) (internal quotations omitted). The right to file a lawsuit is not absolute, and laws which stiffen the burden of proof in order to weed out meritless suits are constitutional.

Petitioners assert that RCW 4.24.525 deters plaintiffs from accessing courts and violates their right to petition the government for redress of grievances. In many ways, these alternative constitutional roots are different articulations of the same argument. The constitutional basis for the right of access to courts is multi-dimensional, having been rooted in a number of constitutional provisions.[5] But whatever its constitutional anchor, right of access cases fall into one of two categories, neither of which encompass this case. The first involves "claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time." *Christopher v. Harbury*, 536 U.S. 403, 412-13 (2002). These cases involved, for example, financial barriers to prisoners or indigents in navigating the legal system. *See, e.g.*, *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961) (filing fees for habeas petitions). The second category includes legal claims which "cannot now be tried (or tried with all material evidence), no matter what official action may be in the future." *Harbury*, 536 U.S. at 413-14. These cases tend to involve official misconduct which impairs a plaintiff's ability to gather evidence for her claim. *See, e.g.*, *Foster v. Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994)

[5] *See, e.g., Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907) (Privileges and Immunities Clause); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (the First Amendment Petition Clause); *Murray v. Giarratano*, 492 U.S. 1, 11, n. 6 (1989) (plurality opinion) (the Fifth Amendment Due Process Clause); *Pa. v. Finley*, 481 U.S. 551, 557 (1987) (the Fourteenth Amendment Equal Protection Clause); *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) (Due Process Clause).

(public officials' abuse of discovery in civil litigation against them does not violate *clearly established* right for qualified immunity purposes). RCW 4.24.525 falls into neither of these categories.

To the contrary, the United States Supreme Court has recognized in both the antitrust and labor relations areas that meritless lawsuits are outside the scope of the Petition Clause. *See Cal. Motor Transp.*, 404 U.S. at 511 (recognizing that the antitrust laws can prohibit anticompetitive "sham" lawsuits); *Bill Johnson's Restaurants*, 461 U.S. at 743 (National Labor Relations Board may enjoin a state lawsuit as an unfair labor practice if the litigation lacked a reasonable basis in fact or law). Indeed, the conceptual predecessor of the anti-SLAPP defense is often considered to be antitrust law's *Noerr-Pennington* doctrine. *See* Michael Johnson, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation"*, 38 GONZ. L. REV. 263, 269-73, 274-75 (2003). In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Supreme Court declined to find that the Sherman Act prohibited a coalition of railroad companies, enlisting the help of a public relations firm, from lobbying the Pennsylvania legislature to pass legislation which would benefit railroads at the expense of truckers. To do so, particularly absent an indication of congressional intent to apply the antitrust laws to

political activity, would implicate the constitutional petition right. *See id.* at 137-38. However, the Court expressly reserved the possibility that a campaign ostensibly aimed at petitioning the government could in fact be nothing more than a "mere sham" to cover anticompetitive activity which the Sherman Act could in fact reach. *Id.* at 144. The holding of *Noerr* was affirmed in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.").

The Supreme Court expounded upon the non-absolute nature of the petition right once more in *California Motor Transport*, where the Court wrote that the Petition Clause does not necessarily entail immunity from the antitrust laws. 404 U.S. at 513-14. The Court noted that the petition right necessarily includes the right of access to the courts. *Id.* at 612. But the Court nonetheless recognized that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' … which the legislature has the power to control." *Id.* at 515 (quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963)) (internal citations omitted). And the Court went further, noting that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *Id.* at 514 (citing *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949)). It does not follow

that simply because lawsuits as a general proposition fall within the ambit of the Petition Clause, that there is a parallel protection for *meritless* lawsuits. "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants*, 461 U.S. at 743 (internal citations omitted).

Courts have upheld as constitutional far more drastic limitations on the ability to file a lawsuit than that presented here. California, Texas, and Hawaii have all implemented vexatious litigant statutes, which generally limit the ability to file lawsuits of plaintiffs known to have a history of making frivolous claims. In California, a defendant can move to have a plaintiff declared a vexatious litigant if the plaintiff has, among other things, filed in *propria persona* in the last seven years five lawsuits which have been resolved against him, or unjustifiably remain pending for at least two years without trial or hearing. Cal. Code Civ. Pro. § 391.1(b)(1) (Deering 2014). If the court determines that a plaintiff is vexatious and that "there is no reasonable probability that the plaintiff will prevail in the [current] litigation," the court "shall" order the plaintiff to provide security in an amount to be determined by the court. *Id.* § 391.3. If the plaintiff does not furnish security, the case is dismissed. *Id.* § 391.4. The defendant can make this motion "at any time" in the litigation, including

prior to discovery. *Id.* § 391.1. This law has been held not to violate the right to petition. *See Wolfgram v. Wells Fargo Bank*, 61 Cal. Rptr. 2d 694, 703-05 (Cal. App. 1997) ("[T]he vexatious litigant statute does not impermissibly 'chill' the right to petition and does not 'penalize' the filing of unsuccessful, colorable suits."). Texas and Hawaii have similar vexatious litigant statutes. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 11.001-11.104 (2013); Haw. Rev. Stat. Ann. §§ 634J-1 – 634J-7 (LexisNexis 2014).[6]

It should be noted that, if the Court does open the door to challenging Washington's anti-SLAPP law, the standard for examining the law should be whether there is a rational basis for the statute, as it was when the Ninth Circuit analyzed the California vexatious litigant statute discussed above. *See Wolfe v. George*, 486 F.3d 1120, 1125 (9th Cir. 2007). Contrary to what the Court of Appeals suggested in *Akrie*, 178 Wn. App. at 513 n. 8, the standard should not be strict scrutiny. As this Court has held on numerous occasions, mirroring the United States Supreme Court's standard of review, "[a] law that does not interfere with fundamental rights and liberty interests is subject to rational basis review." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 32 P.3d

[6] Hawaii's law is in fact arguably more restrictive because it requires that a judge dismiss a lawsuit with prejudice if the vexatious plaintiff fails to furnish security. Haw. Rev. Stat Ann. § 634J-5.

1016 (2008) (applying rational basis review to a statute barring smoking in a place of employment). As discussed above, RCW 4.24.525 does not interfere with the right to petition or access to the courts. Nor does it discriminate based on viewpoint — its protections against meritless litigation are content-neutral. This Court has repeatedly held that "[c]ontent-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny." *See Collier v. City of Tacoma*, 121 Wn.2d 737, 748-49, 854 P.2d 1046 (1993). RCW 4.24.525 is not susceptible to interpretations that it either interferes with fundamental rights or imposes content-based restrictions on speech. Rational basis is the correct standard of review.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court hold the Washington anti-SLAPP law constitutional.

Respectfully submitted this 12th day of December, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 12th day of December, 2014.

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