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.1. 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 WILHELM,

Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

LAW OFFICES OF JEFFREY L. NEEDLE
Jeffrey L. Needle, WSBA #6346
119 First Avenue South, Suite 200
Seattle, WA 98104
(206) 447-1560

MACDONALD HOAGUE & BAYLESS
Jesse Wing, WSBA #27751
Joe Shaeffer, WSBA #33273
Tiffany Cartwright, WSBA #43564
705 Second Avenue, Suite 1500
Seattle, WA 98104-1745
(206) 622-1604

Attorneys for WELA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness is fundamental to the quality of life.

The facts of this particular case do not arise within the employment law context. The Washington Anti-SLAPP statute, RCW 4.24.525, however, does arise within the employment context. WELA recognizes a strong potential for the abuse of the anti-SLAPP statute by powerful employers to deny employees access to courts and the vindication of basic civil rights. That strong potential is reflected by the wide variety of cases in which the statute has been raised and the routine training offered for defense attorneys to aggressively apply the statute. *See* Appendix A. It is in WELA's interest to prevent the application of this statute to legitimate and well recognized employee claims. Indeed, WELA has appeared as amicus curiae in *Henne v. City of Yakima,* 177 Wn. App. 583, 313 P. 3d 1188, *review granted*, 179 Wn.2d 1022 (2014)(whether the internal investigation process of the police department constitutes "public participation," and whether the anti-SLAPP statute applies to municipal corporations).

II. SUMMARY OF ARGUMENT

The Washington anti-SLAPP statute, RCW 4.24.525, imposes a burden on the First Amendment right to petition the government for redress of grievances. Any restriction of First Amendment rights is subject to strict scrutiny; it must (1) serve a compelling governmental interest; and (2) be narrowly tailored to achieve that interest. The anti-SLAPP statute is overbroad and no apparent attempt was made to narrowly tailor it to achieve its purpose of preventing abuse of the civil justice system. As a result, the statute has been abused to punish and deter legitimate legal claims. The statute's overbreadth is compounded by its vagueness.

A statute may be challenged for facial vagueness where, as here, it implicates First Amendment rights. "Public participation" includes "*any other lawful conduct* in furtherance of the exercise of the constitutional right of free speech. . . ." RCW 4.24.525(2)(e) (emphasis added). An interpretation of this language was central to the lower court's ruling. Not only does it demonstrate the statute's overbreadth, the language is unconstitutionally vague. There exists no support for the Court of Appeal's adoption of California law for the meaning of this language, and reasonable people are left to guess at its meaning. The statute is void for vagueness.

The statute's defenders have argued that 30 states have enacted an anti-SLAPP statute and none have been found

unconstitutional. And, both the statute's defenders and the lower courts have consistently relied upon California law, which they insist is the model for Washington's statute. But a fair survey of the other states' anti-SLAPP statutes reveals a wide variety, many of which are much more narrowly tailored and much more limited in scope. Indeed, Washington's statute is one of the broadest and most extreme in the country. In particular, California's statute, which is similar in certain respects, differs in significant ways from Washington's statute. This Court should avoid relying upon California law interpreting a statute which has significantly different language, and has been amended to curtail its widespread abuse. *See* Cal.Code.Civ.Pro. 425.17(a) ("The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . .").

III. ARGUMENT

A. Strict Scrutiny and Overbreadth Standards Apply

"Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights

that he has suffered a legally cognizable injury turns to the courts for a remedy." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 642-46 (1985). The First Amendment protects the right of access to courts. *See Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) ("'[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government'") (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897 (1984)). Without the right of access to courts the vindication of all other rights would be impossible. *See Chambers v. Baltimore & Ohio Railroad,* 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . ."). It is for that reason that attempts to restrict access to courts are subject to strict scrutiny.

While it may be possible to draft a statute narrowly tailored to curtail abuse by powerful special interests, the Washington anti-SLAPP statute is not narrowly tailored. To the contrary, it is overbroad and sweeps within its reach legitimate claims not in any way motivated to deter speech.

1. The Statute Does Not Survive Strict Scrutiny

The constitutional standards applicable to the right to petition for redress of grievances are the same as the standards applicable to content-based restrictions on the First Amendment. *See Akrie v. Grant*, 178 Wn. App. 506, 513, 315 P.3d 567, 571 (2013) ("As the first amendment right to petition and the first amendment right of free speech are generally subject to the same constitutional analysis, the standards applicable to regulation of content-based speech are equally applicable to the right to petition"), *rev. granted*, 180 Wn.2d 1008, 325 P.3d 913 (2014) (citations omitted). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Such content-based prohibition is "presumptively invalid." *United States v. Stevens,* 559 U.S. 460, 468 (2010).

> Because the Act imposes a restriction on the content of protected speech, it is invalid unless [Washington] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. . . . The State must specifically identify an "actual problem" in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution, ...

Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2738 (2011) (citations omitted). *See also Rickert v. State, Pub. Disclosure*

Comm'n, 161 Wn.2d 843, 849, 168 P.3d 826, 828-29 (2007) (Statutes that regulate protected first amendment activity based on its content are subject to strict scrutiny). "That is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (Citations omitted). To satisfy this highest of constitutional standards, "the State must demonstrate that [statute] "'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 198 (1992)). *See also City of Bellevue v. Lorang*, 140 Wn.2d 19, 29-30, 992 P.2d 496 (2000) ("The burden is on the government to establish that an impairment of a constitutionally protected right is necessary to serve a compelling state interest....").

The State of Washington likely can articulate a compelling state interest; to prevent harm caused by filings of lawsuits that are frivolous or motivated solely to harass, vex, or silence legitimate criticism—the core purpose of a true Anti-SLAPP law. *Cf. Stilp v. Contino*, 613 F.3d 405, 415 (3d Cir. 2010) (finding it likely that state "has a compelling interest in preventing harm caused by frivolous or wrongful [ethics] filings" against judicial officers). But the state likely cannot show that section .525 is narrowly drawn and the least restrictive means to achieve those interests. "To the extent the state has a compelling interest in preventing

harm caused by frivolous or wrongful filings, Section 1108(k) is not narrowly-tailored to achieve that interest" because "[a] blanket prohibition on disclosure of a filed complaint stifles political speech near the core of the First Amendment . . . ." *Id.*

Washington's statute explicitly states that its purpose is to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." RCW 4.24.525. But the United States Supreme Court has pointedly rejected government proposals that "a claim of categorical exclusion should be considered under a simple balancing test." *United States v. Stevens*, 559 U.S. 460, 470 (2010). The Supreme Court declared:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.

Id. Indeed, "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.* "From 1791 to the present [] the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Id.* But the Washington legislature has made the unconstitutional judgment that conduct that it classifies

as "public participation" has greater value then the First Amendment right of access to courts, and it makes that judgment with no pretense of narrowly drawing the statute to protect access to courts.

In order to be narrowly tailored and least restrictive the statue must require a finding that the legal claim to be dismissed is frivolous, a sham, or motivated solely to silence legitimate criticism.[1] As written "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." *Akrie*, 178 Wn. App. at 513. The statute is the opposite of narrowly drawn. It applies to a wide swath of "public participation," to innumerable types of legal claims, and must be liberally construed.

Even lawsuits that are motivated solely to silence legitimate criticism—ostensibly, *the* target of the statute—survive the special motion to strike so long as the plaintiff can, without discovery, show by "clear and convincing" evidence they are likely to prevail at trial. In other words, the statute fails to dismiss lawsuits

[1] *See White v. Lee,* 227 F. 3d 1214, 1231 (9th Cir. 2000)("With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a 'sham'—i.e., 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'") (citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)).

motivated to deter free speech that are strong from the start, but dismisses all others regardless of their motive, without the benefit of discovery.[2] The Statute correlates poorly with the Legislature's stated goal and with any compelling interest of the State-- this is the opposite of a narrowly drawn statute.

2. The Statute is Substantially Overbroad

A government's overly-broad restriction on speech is invalid on its face "if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens,* 559 U.S. at 473 (citation omitted). *See also City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572, 573 (1989) ("In determining overbreadth, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct'").

"[I]t is clear that the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity." *Akrie*, 178 Wn. App. at 513; *City of Seattle v. Slack*, 113 Wn.2d 850, 856, 784 P.2d 494, 497 (1989) (Washington's Constitution, Article 1, § 5, "has already been interpreted as providing greater protection for

---

[2] Lawsuits challenging tortious conduct (e.g., tortious interference with business, defamation, malicious prosecution, discrimination, violation of privacy rights) in an exceedingly broad range of contexts ("public participation") that are merely likely to prevail *must* be dismissed under the statute. The dismissal of legitimate legal claims that would prevail at trial illustrates that the statute is not narrowly tailored. And swept into the maelstrom are large numbers of cases that are: (1) a close call; (2) at least before discovery is conducted—weak or an uphill battle under the facts or law, but are nowhere near frivolous; or (3) legitimate efforts to break new ground legally, to extend existing law to new facts, plaintiffs, or defendants, to overturn precedent, or to pursue novel theories.

speech than its federal counterpart."). Indeed, access to courts is its exclusive target. As explained above in the section on strict scrutiny, the anti-SLAPP statute mandates dismissal of a large swath of protected First Amendment activity.[3]

Notably, while "an element of specific intent" could shield a law from being overbroad, *City of Seattle v. Slack*, 113 Wn.2d 850, 856, 784 P.2d 494, 497 (1989), this statute lacks a specific intent requirement. Moreover, "[r]ewriting the statute is a job for the [] legislature, if it is so inclined, and not the court." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 249 (1989); *see also Foti v. City of Menlo Park,* 146 F.3d 629, 639 (9th Cir.1998) ("Although we must consider the City's limiting construction of the ordinance, we are not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance."). RCW 4.24.525 interferes with and chills too much protected speech to survive constitutional scrutiny.

---

[3] *Bevan v. Meyers*, 334 P.3d 39 (Wash. Ct. App. 2014) is a telling example of the overbroad application. In *Bevan*, the parties disputed who owns the land on which the defendant placed her well and removed trees. The Plaintiff filed suit seeking to quiet title to the property and sent a property survey to the County, which then halted development. But when defendant counter-claimed for quiet title and for damages, the Court found that the act of sending the survey to the County was an act of "public participation," and granted the plaintiff's anti-SLAPP motion effectively punishing the defendant for petitioning for relief from their dispute. No one could seriously contend that the counterclaim in *Bevan* was filed to deter First Amendment activity, which is the principal purpose of the anti-SLAPP statute. This case is illustrative of how the broad language of the statute is being abused to penalize the vindication of legitimate disputes.

B. Void for Vagueness - "Lawful Conduct in Furtherance of Free Speech."

The due process clause of the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). "Under the due process clause, an ordinance is unconstitutionally vague if a challenger demonstrates, beyond a reasonable doubt, either (1) that the ordinance does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) that the ordinance does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). An ordinance is unconstitutionally vague if either requirement is not satisfied. *Id.*

The degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). "[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a

more stringent vagueness test should apply." *Id.* at 499.[4] Insofar as the Washington anti-SLAPP statute creates a direct burden on the First Amendment right to petition the government for redress of grievances (access to courts), it is held to the strictest of clarity standards, even greater than the standards for criminal statutes.

A Due Process challenge on the grounds of vagueness may be facial or as applied. Where the conduct does not implicate constitutionally protected activity, the statute will survive a vagueness challenge if any of its applications are not vague so long as a "hard core" of the statute exists. Where the conduct does implicate constitutionally protected speech the statute is subject to a facial challenge even if there are applications that are not vague.

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine

[4] When a statute regulates constitutionally protected conduct, "we permit a facial challenge if a law reaches a substantial amount of constitutionally protected conduct." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001). The standard of a court's review is more stringent when, as here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin,* 439 U.S. 379, 391 (1979) (citations omitted). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989), "government may regulate in the area" of First Amendment freedoms "only with narrow specificity," *NAACP v. Button*, 371 U.S. 415, 433 (1963). *See also State v. Bahl,* 164 Wn.2d 739, 193 P. 3d 678, 685 (2008) ("when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.... For this reason, courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition.") (Citation omitted).

> the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Hoffman Estates, 455 U.S. at 494.[5] In this case, the Washington anti-SLAPP statute directly addresses First Amendment activity--the right of access to courts. The statute, therefore, is subject to a facial challenge and is unconstitutionally infirm regardless of whether it is vague in all of its applications.

Of particular concern in the Washington statute is its definition of "public participation" as "any other lawful conduct in furtherance of the constitutional right of free speech . . . ." RCW 4.24.525(2)(e). This is the language relied upon by the Defendants in support of their assertion that the boycott is an "action involving public participation." *See* Slip Opinion, at 10.

In the Court of Appeals "the Members argue[d] that adopting the boycott was not 'lawful' because the board violated the Boycott Policy in doing so." Slip Opinion at 10. In response to this argument, the Court of Appeals ruled: "[W]hen a defendant's assertedly protected activity *may or may not be* criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law." *Id.* at 11 (*citing*

---

[5] *See also City of Spokane v. Douglass,* 115 Wn.2d at 182 ("when a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness."); *State v. Hendrickson,* 129 Wn.2d 61, 917 P. 2d 563, 794 (1996)(same); *State v. Coria*, 120 Wn. 156, 163, 839 P. 2d 890 (1992)(same).

California law) (emphasis original). The Court of Appeals concluded that because the Members did not assert that the decision to boycott was illegal as a matter of law, but only in contravention of the governing rules of the Co-op, "the Directors' adoption of the boycott was 'lawful' under the first step of the anti-SLAPP statute." *Id.*

But the California anti-SLAPP statute relied upon by the Court of Appeals does not require that the conduct at issue be "lawful." Cal.Code.Civ.Pro. 425.16. The Washington statute does, and does not require that the conduct must be criminal as a matter of law. Given the language of the Washington statute, it is too much to expect members of the public seeking to vindicate civil legal claims to intuit that "lawful" really means "not criminal as a matter of law" based on California case law interpreting a statute with different language.

Within the criminal context, Washington Courts have found statutes that turn on obeying a "lawful order" (or a similar standard) unconstitutionally vague. *See City of Seattle v. Rice,* 93 Wn.2d 728, 731, 612 P. 2d 792 (1980)("The term 'lawful order' in the Seattle criminal trespass ordinance is not sufficiently specific to inform persons of reasonable understanding of what conduct is proscribed"); *Bellevue v. Miller*, 85 Wn.2d 539, 545, 536 P. 2d 603 (1975) ("Legislation which purports to define illegality by resort to

such inherently subjective terms as 'unlawful purpose' or 'alarm' . . . is vague because there can be no prior notice of what conduct an individual officer will find sufficiently suspicious to warrant arrest"); *State v. Richmond,* 102 Wn.2d 242, 243, 683 P. 2d 1093 (1984) ("We agree with the trial judge that the statute is unconstitutionally vague under the due process clause of U.S. Const. amend. because the 'without lawful excuse' element has not been sufficiently clarified by statute or case authority").

Other Washington cases have ruled a statute that defines criminal conduct in terms of obeying a "lawful command" is not unconstitutional on grounds of vagueness. *See State v. Smith*, 111 Wn.2d 1, 5-6, 759 P.2d 372, 374-75 (1988) ("None of our decisions, fairly read, establishes that the concept of 'lawfulness' is inherently unconstitutionally vague"); *State v. Aver,* 109 Wn.2d 303, 745 P.2d 479 (1987) (statute upheld which criminalizes obstructing a train which was "lawfully operated"). These cases, however, do not stand for the proposition that the use of the term "lawful conduct" is always permissible, only that it is not always impermissible. The cases cited above were upheld because the conduct at issue fell within the "hard core" of the statute. Where First Amendment rights are implicated, however, the term "lawful conduct" is unconstitutionally vague even though there are applications within its "hard core." Moreover, because none of the

cases upholding a statute based upon a standard of "lawfulness" involved First Amendment rights, less vagueness is tolerated here.

Because reasonable people are left to guess at what constitutes "lawful conduct in furtherance of free speech," the statute is void for vagueness.

C. Survey of Other States' Statutes[6]

The Defendants have argued that 30 states have passed anti-SLAPP statutes and that none have been found unconstitutional. *See, e.g.,* Resp. Supp. Br. at 19-20. This argument is disingenuous. There is no "model" statute. The provisions and standards of these statutes vary widely. RCW 4.24.525 stands out as one of the broadest and most extreme,[7] so the survival of other statutes does not implicate the validity of Washington's statute. And likewise, a ruling that section .525 is unconstitutional would not imply other statutes are invalid.

1. Lower Standards to Survive Motion

Section 525 requires a Plaintiff to prove by "clear and convincing evidence" a likelihood that she will prevail. In

[6] WELA has reviewed anti-SLAPP statutes from 29 other states. The statutory citations and the statutes themselves are in the Appendix to this brief so, for brevity, WELA lists only the states here.

[7] The **Minnesota** statute is one of the most similar to Washington's. However, the Minnesota Supreme Court has expressed doubt as to the constitutionality of that statute. *See Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 232 (Minn.), *as modified (Sept. 3, 2014), reh'g granted,* 855 N.W.2d 233 (Minn. 2014).

contrast, other statutes require the Plaintiff only to "certify" or simply state a claim is not frivolous and not brought for an improper purpose, essentially mirroring Civil Rule 11. *See* **Arkansas, Georgia, Maine, Massachusetts, Nebraska, New York, Utah.**

Other statutes demand that the *moving* party meet much more stringent standards than Washington does, or afford more lenient standards to the *non-moving* party than does Washington. *See* **Colorado** (moving party must show plaintiff's action "devoid of reasonable factual support or, if so supported, is lacking a cognizable basis in law"); **Hawaii** (affording responding party right to amend pleadings in response to motion); **Indiana** (summary judgment standard after limited discovery to defend the motion); **Louisiana** (responding party need show only a "probability" of success; no "clear and convincing evidence" requirement); **Maryland** (no statutory penalty or fees); **Missouri** (no "clear and convincing evidence" requirement);, **Oregon** (no "clear and convincing" requirement);; **Utah** (*moving* party must show "clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant").

2. Much Narrower Scope

Whereas Section 525 covers a broad range of speech and conduct, other states' statutes are limited to very specific types or contexts of speech. *See* **Arizona** (speech "made as part of an initiative, referendum or recall effort" *or* made or submitted to executive or legislative governmental body); **Arkansas** (speech pursuant to official duty, opinions and criticisms of government); **Delaware** ("public applicant" speech related to land use); **Florida** (prohibiting *only* lawsuits brought by governments against citizens for redress activities); **Hawaii** (submissions to a governmental body); **Illinois** (protects only acts "genuinely aimed at procuring favorable government action, result, or outcome."); **Maryland** (protects communications with government entities or "the public at large" regarding issue of public concern); **New York** (addresses only actions brought by "a public applicant or permittee"); **New Mexico** (limited to speech "in connection with a public hearing" or a meeting held by a state or local government entity); **Pennsylvania** (actions to enforce environmental laws or regulations); **Tennessee** (applies only to communications made "to any agency of the federal, state or local government regarding a matter of concern to that agency").

D. California vs. Washington

One state deserves particular attention, as many of the Washington appellate courts to address Section 525 have looked to California, which they typically assert was the model for Washington's law. *E.g. Henne v. City of Yakima*, 177 Wn. App. 583, 313 P. 3d 1188 (2013) (citing numerous California cases for a variety of propositions) (review granted). That assertion is only partially accurate. While California and Washington's statutes share features in common they differ in very significant respects. California's statute contains no "clear and convincing" standard. In Washington, attorney fees are awarded if the moving party prevails "in part or in whole," but not under California law. The California statute does not contain a statutory penalty, and has no discretionary provision for additional relief, including sanctions upon the responding party and its attorneys and law firms.

Moreover, two years after California enacted its anti-SLAPP statute, harmful misuse of the statute (like what is happening in Washington) became evident, so the California legislature amended the law specifically for the purpose of curtailing those abuses. *See* Cal.Code.Civ.Pro. 425.17(a) **("The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights**

of freedom of speech and petition for the redress of grievances . . . ."). In enacting an even broader law than the former California statute, the Washington legislature flat out ignored California's experience with abuses and its subsequent statute designed to reduce them. So it is not surprising that the abuses experienced in California are now being visited upon the people of Washington State.

Given the substantial differences in the statutory text between the California and Washington statutes, and California's self-recognition of the problems and abuses associated with a broad anti-SLAPP law, this Court should not rely on California case law interpreting California law in deciding the important constitutional issues in Washington.

IV. CONCLUSION

On several grounds, the Court should hold that RCW 4.24.525 is unconstitutional.

Respectfully submitted this 5th of December, 2014.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By: _____

Jeffrey L. Needle, WSBA #6346
Jesse Wing, WSBA #27751
Joe Shaeffer, WSBA #33273
Tiffany Cartwright, WSBA #43564

DECLARATION OF SERVICE

Brina Carranza states and declares as follows:

I am over the age of 18, I am competent to testify in this matter, and am a legal assistant for the Petitioner's attorney of record. I make this declaration based on my personal knowledge and belief. On December 5, 2014, I caused to be delivered via email to the following individual(s) a copy of the **BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION.**

Attorneys for Petitioners

Robert M. Sulkin, WSBA No. 15425
rsulkin@mcnaul.com
Avi J. Lipman, WSBA No. 37661
alipman@mcnaul.com
McNAUL EBEL NAWROT & HELGREN PLLC
One Union Square
600 University Street, 27th Floor
Seattle, WA 98101-3143
(206) 467-1816

Attorneys for Respondents

Bruce E. H. Johnson, WSBA #7667
brucejohnson@dwt.com
Ambika K. Doran, WSBA #38237
ambikadoran@dwt.com
Angela Galloway, WSBA #45330
angelagalloway@dwt.com
Davis Wright Tremaine LLP
1201 Third A venue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150
(206) 757-7700 Fax

Attorneys for Amicus Curiae WSAJ

Bryan P. Harnetiaux, WSBA #5169
amicus@list.justice.ORG
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890
OlD #91108

Attorneys for Amicus Curiae WSAJ

George M. Ahrend, WSBA #25160
gahrend@trialappeallaw.com
16 Basin Street SW
Ephrata, WA 98823
(509) 764-9000

Attorneys for Amicus Curiae

Robert Spitzer
rspitzer@gsblaw.com
GARVEY SCHUBERT BARER
The Lawfare Project
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
(206) 464-3939

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

DATED this 5th day of December, 2014, at Seattle, King County, Washington.

Brina Carranza, Legal Assistant