No. 10-36181

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

STEVEN K. CASTELLO,

Plaintiff-Appellant,

v.

CITY OF SEATTLE, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington, Case No. 2:10-cv-01457-MJP The Honorable Marsha J. Pechman

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amicus* states that The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae The Reporters Committee for Freedom of the Press ("The Reporters Committee" or "*amicus*") 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. As set forth more fully in the accompanying motion for leave to file this brief, *amicus* has a strong interest in ensuring that anti-SLAPP statutes like the one at issue in this case serve their objective of providing journalists, publishers and others with an immediate means to dispose of lawsuits brought to chill speech about matters of public interest and concern. *Amicus* requests that this Court find the Washington anti-SLAPP statute a constitutional embodiment of the legislature's intent to protect the rights of "citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process[.]" *See* S. 6395, 61st Leg., Reg. Sess. (Wash. 2010). Accordingly, the Court should affirm the lower court's dismissal of all claims against Appellees.

SOURCE OF AUTHORITY TO FILE

Counsel for Defendants-Appellees consented to the filing of this brief *amicus curiae*. Counsel for Plaintiff-Appellant did not. As such, *amicus curiae*, pursuant to Fed. R. App. P. 29(a), respectfully requests the Court's permission to submit a brief *amicus curiae* in this action in support of Defendants-Appellees. *Amicus* submits its motion herewith.

FED. R. APP. P. 29(c)(5) STATEMENT

Amicus states that:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person — other than the *amicus curiae*, its members or its counsel — contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The nationwide campaign to combat civil lawsuits against individuals who speak out about matters relating to the public interest began more than 20 years ago, when state legislatures recognized that "[t]he costs immediately imposed on the . . . targets can be substantial, including not only attorney's fees, court costs, and litigation expenses but also time and dollar resources diverted from the campaign [on which the suit was based], lost wages, potential credit problems, insurance cancellations, and extreme psychological insecurity." *See* George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938, 942 (1992). The suits do not succeed on the merits but rather in removing the speaker from the public debate, "chilling the politically outspoken as well as observers, and chilling important public discussion and dispute." *See id.* at 944. What began as two professors' attempt to highlight the troublesome trend through a study of 100 SLAPP lawsuits[1] has swept across the country: Twenty-

[1] Pring and Canan, University of Denver professors at the time, first coined the term "SLAPP" in 1988. *See* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, Soc. Probs., Dec. 1988, at 506, 506 (defining SLAPPs as "attempts to use civil tort action to stifle public expression" and lawsuits that "claim injury resulting from citizen efforts to influence the government or sway voters on an issue of public significance").

eight states, along with the District of Columbia and U.S. territory of Guam, have enacted anti-SLAPP laws.[2]

Moreover, courts in Colorado, Connecticut and West Virginia, none of which has an anti-SLAPP statute, have recognized a defense to lawsuits that target acts aimed at petitioning the government for action on issues of public importance. These common-law rules offer similar protections and remedies to those provided by some anti-SLAPP statutes. *See Protect Our Mountain Env't v. Dist. Court*, 677

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[2] *See* Ariz. Rev. Stat. Ann. §§ 12-751–12-752 (2011); Ark. Code Ann. §§ 16-63-501–16-63-508 (West 2010); Cal. Civ. Proc. Code § 425.16 (West 2010); Del. Code Ann. tit. 10, §§ 8136–8138 (West 2011); Anti-SLAPP Act of 2010, D.C. Law 18-0351 (2011); Fla. Stat. Ann. §§ 720.304(4), 768.295 (West 2011); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (West 2010); 7 Guam Code Ann. §§ 17101–17109 (2010); Haw. Rev. Stat. §§ 634F-1–634F-4 (West 2011); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); Ind. Code Ann. §§ 34-7-7-1–34-7-7-10 (West 2011); La. Code Civ. Proc. Ann. art. 971 (2010); Me. Rev. Stat. Ann. tit. 14, § 556 (2011); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (West 2011); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2011); Minn. Stat. Ann. §§ 554.01–554.05 (West 2011); Mo. Ann. Stat. § 537.528 (West 2011); Neb. Rev. Stat. §§ 25-21,241–25-21,246 (2010); Nev. Rev. Stat. Ann. §§ 41.637, 41.650–41.670 (West 2010); N.M. Stat. Ann. § 38-2-9.1 (West 2011); N.Y. Civ. Rights Law §§ 70-a, 76-a, N.Y. C.P.L.R. 3211(g) (McKinney 2011); Okla. Stat. Ann. tit. 12, § 1443.1 (West 2011); Or. Rev. Stat. Ann. §§ 31.150–31.155 (West 2011); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8303 (West 2011); R.I. Gen. Laws Ann. §§ 9-33-1–9-33-4 (West 2010); Tenn. Code Ann. §§ 4-21-1001–4-21-1004 (West 2011); Citizen Participation Act, H.R. 2973, 82nd Leg., Reg. Sess. (Tex. 2011); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (West 2011); Vt. Stat. Ann. tit. 12, § 1041 (West 2011); Wash. Rev. Code Ann. §§ 4.24.510–4.24.525 (West 2011). 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).

P.2d 1361, 1369 (Colo. 1984) (holding that, because it threatens the First Amendment rights of speech and petition, a SLAPP suit should face a "heightened standard" from a court considering a defendant's motion to dispose of the claim); *Royce v. Willowbrook Cemetery, Inc.*, No. XO8CV010185694, 2003 WL 431909, at *2 (Conn. Super. Ct. Feb. 3, 2003) (adopting a standard requiring a SLAPP suit, in order to be identified and dismissed as such, to be "objectively baseless in that no reasonable litigant could realistically expect success on the merits and . . . conceal[ing] an effort to interfere improperly with the defendant's rights"); *Arigno v. Murzin*, No. CV960474102S, 2001 WL 1265404, at *10 (Conn. Super. Ct. Oct. 2, 2001) (same); *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).

Last year, Washington enacted an anti-SLAPP statute aimed at curbing so-called Strategic Lawsuits Against Public Participation. *See* S. 6395, 61st Leg., Reg. Sess. (Wash. 2010). The law broadly defines the types of free speech and petition activities that qualify for its protection. *See* Wash. Rev. Code Ann. § 4.24.525(2) (West 2011). It supplements and does not supersede an earlier Washington anti-SLAPP statute that immunizes from civil liability communication to government entities. *See* Wash. Rev. Code Ann. § 4.24.510. Appellant, a Seattle firefighter, sued Appellees, two of his coworkers, for defamation and related claims after they

expressed concerns to fire department investigators and other city officials about what they considered to be threatening and violent workplace behavior by Appellant, and appeared in a local television station's broadcast about low morale within the Seattle Fire Department. Applying the new anti-SLAPP statute, the District Court ruled that Appellees' statements constituted actions involving public participation and petition as defined in the statute. Because Appellant could not prove a probability of prevailing on his claims — a burden that shifted to him after Appellees showed the suit arose from a protected speech or petition activity — the court granted their special motion to strike.

Although the procedures required and protections afforded under anti-SLAPP statutes vary among states, their general aim is to provide a remedy to SLAPP suits and ensure their dismissal as soon as practicable before the speaker incurs crippling attorney fees and discovery costs. They are not tools to deprive plaintiffs of redress of their legally cognizable injuries, and *amicus* does not claim that the legislative measure can or should be used to deny, for example, the subject of a false, defamatory and non-privileged report his day in court. Rather, the laws are designed to help alleviate a dangerous chilling effect on vital public speech by expeditiously terminating unfounded claims that threaten constitutional free speech rights — claims, simply put, that should have never been brought in the first place. As such, the overwhelming majority of jurisdictions with anti-SLAPP laws,

including Washington, recognize that providing a remedy to lawsuits that target acts aimed at petitioning the government for action on issues of public importance cannot come at the expense of a plaintiff's right to petition the court for redress of injury. Accordingly, these states, either through explicit language in their anti-SLAPP statutes or judicial interpretations of the laws, "[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[.]"*See* S. 6395, 61st Leg., Reg. Sess. (Wash. 2010).

Although Appellant asserts that his "primary challenge to the Act was the manner in which it had been enacted," Appellant's Br. 6, he clearly takes issue with the conduct protected under the new statute as action "involving public participation and petition." Wash. Rev. Code Ann. § 4.24.525(2) (West 2011); *e.g.*, Appellant's Br. 20. Yet, this expanded scope of protection aligns the state of Washington with numerous others, which recognize that their citizens' exercise of the constitutional right to petition the government and engage in public participation extends beyond just communications to government entities and encompasses a wide range of communications about vital issues of significant public interest. Indeed, even in states without the broad explicit protection for "[a]ny . . . 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," Wash. Rev. Code Ann. § 4.24.525(2)(e), courts have held that publicly airing complaints or expressing concerns about important issues are protected acts of citizen participation. *See infra* Part II.B.

Because the measure is not an infringement of a plaintiff's right to seek legal remedy, but rather a valid legislative attempt to shield individuals from the costs of litigation targeting First Amendment-protected activity, *amicus* urges the Court to find the anti-SLAPP statute constitutional and affirm the lower court's grant of Appellees' special motion to strike and dismiss the complaint. A ruling that the law is unconstitutional and remanding the case for an analysis under the older one would mark a significant departure from the nationwide trend of extending protection under anti-SLAPP statutes to a wide variety of speech about matters of public interest and concern.

ARGUMENT

I. The overwhelming majority of jurisdictions do not immunize from civil liability or otherwise provide a defense under anti-SLAPP statutes to false or defamatory statements.

Like its numerous counterparts nationwide, the Washington anti-SLAPP statute is not an infringement of a plaintiff's right to file a lawsuit and to trial by jury but rather is an essential tool to help ensure that important discussion about matters of significant interest or concern reaches the public debate.

A. Some states' anti-SLAPP statutes explicitly prohibit their application to legally cognizable injuries.

Seven of the 30 jurisdictions that provide a remedy to avoid protracted SLAPP litigation prohibit, through explicit statutory language, application of the anti-SLAPP law to claims stemming from unprotected speech. *See* Ark. Code Ann. § 16-63-504 (West 2010) (barring immunity from civil liability for acts in furtherance of the rights of free speech or petition in connection with an issue of public interest or concern if the acts were done with knowledge of or reckless disregard for their falsity); Md. Code Ann., Cts. & Jud. Proc. § 5-807(c) (West 2011) (barring protection to SLAPP defendants who acted with constitutional malice); 27 Pa. Cons. Stat. Ann. § 8302(b)(1) (West 2011) (barring immunity from civil liability for acts aimed at procuring favorable government action relating to an environmental law or regulation if the acts were immaterial or irrelevant to such action and "knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity"); Tenn. Code Ann. § 4-21-1003(b)(1)–(2) (West 2011) (barring immunity from civil liability for the communication of information about a person or entity to a government agency about a matter of concern to that agency if the person knowingly or with reckless disregard for its

falsity communicated false information about a public figure or negligently communicated false information about a private person or entity).[3]

Moreover, the Georgia, Indiana and Nevada anti-SLAPP statutes balance a plaintiff's right to petition the court for redress of reputational injury with a citizen's right to participate in matters of public concern by a good faith requirement similar to the one Appellant claims was eliminated when the new Washington law was enacted.[4] In Georgia, statements made in good faith as part of an act in furtherance of the rights of free speech or petition under the federal or state constitution in connection with an issue of public interest or concern are deemed privileged from liability. Ga. Code Ann. § 51-5-7(4) (West 2010). Similarly, in Indiana, only defendants who can show that their speech or petition activities in connection with a public issue were taken in good faith are entitled to protection under the law. Ind. Code Ann. § 34-7-7-5 (West 2011). Likewise, the

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[3] Although they do not bar immunity from civil liability for acts done with actual malice, three other anti-SLAPP statutes require that a plaintiff, in order to recover costs, attorney fees or damages, prove the defendant acted with such intent if truth or falsity is material to the underlying claim. *See* Del. Code Ann. tit. 10, § 8136(b); Neb. Rev. Stat. § 25-21,244(1); N.Y. Civ. Rights Law § 76-a(2).

[4] Despite Appellant's assertions to the contrary, the Washington legislature eliminated this good faith requirement from the older anti-SLAPP statute in 2002. *See* Wash. Rev. Code Ann. § 4.24.510; H.R. 2699, 57th Leg., Reg. Sess. (Wash. 2002) ("This bill amends Washington law to bring it in line with these [U.S. Supreme] court decisions which recognizes [sic] that the United States Constitution protects advocacy to government, *regardless of content or motive*, so long as it is designed to have some effect on government decision making." (emphasis added)).

Nevada anti-SLAPP statute immunizes from civil liability only good faith communications in furtherance of the petition right. Nev. Rev. Stat. Ann. § 41.650 (West 2010). The Nevada statute defines a good faith communication, in part, as one made without actual malice. *Id.* § 41.637.

Much like Washington's, most anti-SLAPP statutes nationwide include a burden shifting procedure that helps ensure the speedy dismissal of meritless suits, while allowing cognizable causes of action to proceed, thereby eliminating an alleged infringement of the right to petition the court for redress of injury.[5] Under these provisions, a court will grant a motion to dispose of the claim by a defendant who can show that his acts fall within the statutory protection, unless the plaintiff can rebut the defendant's assertion through his own showing, which depends on

[5] *Amicus* is puzzled by Appellant's consistent contention that the Washington anti-SLAPP statute he claims is unconstitutional provides absolute immunity from civil liability. *See, e.g.*, Appellant's Br. 9, 16–18, 25, 26; *id.* at 16 ("No citizen would have known that . . . statements that were ***not*** made in connection with government 'proceedings' but were merely [action involving public participation and petition as defined in the statute] would be immune from civil immunity [sic]."). While the older anti-SLAPP statute immunizes from civil liability "claims based upon the communication [of a complaint or information] to [a government] agency or organization regarding any matter reasonably of concern to that agency or organization," Wash. Rev. Code Ann. § 4.24.510, the new law provides for special motions to strike, puts discovery on hold until the court rules on the SLAPP motion and requires a plaintiff to show by clear and convincing evidence a probability of prevailing on the claim. *Id.* § 4.24.525(4)(a)–(b), 5(c).

the particular statute.[6] That is, a plaintiff's ability to meet the relevant evidentiary standard precludes early dismissal of his claim. As such, anti-SLAPP statutes do not bar anyone with a valid claim from pursing that case through the judicial process. Rather, their only purpose is to act as "procedural screen[s]" that effectuate the intent of numerous state legislatures nationwide, including Washington's, that individuals who want to exercise their constitutional rights to petition the government or speak out about public issues are not deterred from doing so by the costs of defending meritless lawsuits. *See Lee v. Pennington*, 830 So. 2d 1037, 1043 (La. Ct. App. 2002) (rejecting plaintiff's argument that the Louisiana anti-SLAPP statute violated his constitutional rights of open access to courts and jury trial and denied him due process); *see also* S. 6395, 61st Leg., Reg. Sess. (Wash. 2010).

B. Courts in other jurisdictions have interpreted anti-SLAPP statutes to apply only to meritless causes of action.

Many courts interpreting anti-SLAPP statutes that, like Washington's, lack specific language making clear that the remedies do not apply to bona fide

[6] These burdens include, for example, a showing by the plaintiff that: the defendant's claimed exercise of the speech or petition right lacked any reasonable factual support or arguable basis in law, and his acts caused actual injury to the plaintiff, Ariz. Rev. Stat. Ann. § 12-752(B); there is a probability the plaintiff will prevail on the claim, Cal. Civ. Proc. Code § 425.16(b)(1); the claim has a substantial basis in law or is supported by a substantial argument for a modification of existing law, Del. Code Ann. tit. 10, § 8137(a); or the defendant's acts are not in furtherance of the rights of petition, speech or participation in government and thus not immune from liability, 735 Ill. Comp. Stat. Ann. 110/20(c).

grievances have upheld the constitutionality of the laws. *See, e.g.*, *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63 (Cal. 2002) ("[The anti-SLAPP law] does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits . . . ." (citations omitted)); *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 22 (rejecting plaintiff's argument that the Guam anti-SLAPP statute unconstitutionally impacted his right to petition by limiting his right to bring a defamation claim); *Sandholm v. Kuecker*, 942 N.E.2d 544, 560 (Ill. App. Ct. 2010), *appeal docketed*, No. 11-1443 (Ill. Jan. 26, 2011) (finding that the Illinois Citizen Participation Act, which extends a qualified privilege for conduct and speech in furtherance of the rights of petition, free speech and participation in government, did not violate plaintiff's constitutional right to seek remedy for allegedly defamatory statements); *Pennington*, *supra*; *Staten v. Steel*, 191 P.3d 778, 789 (Or. Ct. App. 2008) ("The purpose of the special motion to strike procedure, as amplified in the pertinent legislative history, is to expeditiously terminate *unfounded* claims that threaten constitutional free speech rights, not to deprive litigants of the benefit of a jury determination that a claim is *meritorious*."); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996) (upholding the constitutionality of the Rhode Island anti-SLAPP statute's provision of conditional

immunity to a person exercising the rights of petition or free speech under the federal or state constitution concerning matters of public concern).

A Washington court likewise has noted that "[t]he purpose of anti-SLAPP statutes is to protect the First Amendment right of citizens to petition the government for redress of grievances. Litigation that does not involve a bona fide grievance does not come within the First Amendment right to petition." *Reid v. Dalton*, 100 P.3d 349, 356 (Wash. Ct. App. 2004). Accordingly, the Washington anti-SLAPP statute did not unconstitutionally infringe Appellant's right to petition the court for redress of injury. Indeed, had he been able to establish a probability of prevailing on his claims, he presumably could have pursued his case through the judicial process. *See* Wash. Rev. Code Ann. § 4.24.525(4)(b). In the absence of such a showing, however, the state anti-SLAPP statute — like its numerous counterparts nationwide — is an essential tool to help ensure that vital public speech is not chilled by the expense of defending unfounded claims.

II. The Washington anti-SLAPP statute reflects the nationwide trend of extending protection under the laws to a wide range of activities.

A. Some states' anti-SLAPP statutes explicitly protect speech made in any forum in connection with any public issue.

In 2011, two jurisdictions enacted anti-SLAPP statutes, both of which broadly define the rights of advocacy, free speech and petition protected under the laws from meritless suits stemming from acts in furtherance of those rights. *See*

D.C. Law 18-0351 (2011); H.R. 2973, 82nd Leg., Reg. Sess. (Tex. 2011). Like the Washington anti-SLAPP law, these statutes protect oral or written statements made in connection with an issue under consideration by a government body or in a place open to the public or a public forum in connection with an issue of public interest, and any other expression that involves petitioning the government or communicating views to the public in connection with an issue of public interest. *See* D.C. Law 18-0351 (2011); H.R. 2973, 82nd Leg., Reg. Sess. (Tex. 2011). The Texas law also explicitly protects conduct in furtherance of the exercise of the right of association, which it defines as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." H.R. 2973, 82nd Leg., Reg. Sess. (Tex. 2011). The expanded scope of protection, advocates say, reflects a legislative recognition that the exercise of the First Amendment rights of free speech and petition in connection with matters of public interest often extends beyond direct communications to the government to encompass a wide variety of speech activities, particularly in the modern era of information gathering and dissemination. *See* The Reporters Committee for Freedom of the Press, *SLAPP Happy in America: Defending Against Meritless Lawsuits and the Need for a Federal Bill*, The News Media & the Law, Fall 2010, at 22, 22–23 [hereinafter *SLAPP Happy*], *available at* http://www.rcfp.org/news/mag/34-4/slapp_happy_in_america_22.html (discussing

recent drafts and revisions of anti-SLAPP statutes nationwide).

While the hallmark of recently enacted anti-SLAPP laws nationwide is a broad definition of action involving public participation and petition, such a wide scope of protection is by no means a novel introduction to the laws. Rather, much of the statutory language recently codified in various anti-SLAPP measures, including Washington's, first appeared in the early-1990s, shortly after enactment of the earliest anti-SLAPP statutes.[7] The California anti-SLAPP law — commonly recognized as the nation's strongest and thus often a model for others, including Washington's new statute — was enacted in 1992 and included three categories of activities in furtherance of the rights of free speech or petition in connection with a public issue: statements made before a legislative, executive or judicial proceeding; statements made in connection with an issue under consideration by a government body; and statements made in a place open to the public or a public forum in connection with an issue of public interest. *See* S. 1264, 1991–1992 Leg., Reg. Sess. (Cal. 1992). A 1997 amendment to the law expanded its scope of protection to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *See* . 1296, 1997–1998 Leg., Reg. Sess. (Cal. 1997).

[7] Notably, Washington became the first state to adopt an anti-SLAPP law in 1989. *SLAPP Happy*, *supra*, at 22.

In addition to Texas, the District of Columbia and Washington, seven jurisdictions define the activities protected under their anti-SLAPP statutes in language that largely mirrors the California law. *See* La. Code Civ. Proc. Ann. art. 971(F) (2010); Me. Rev. Stat. Ann. tit. 14, § 556 (2011); Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1), (c); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2011); Or. Rev. Stat. Ann. § 31.150(2) (West 2011); R.I. Gen. Laws Ann. § 9-33-2(e) (West 2010); Vt. Stat. Ann. tit. 12, § 1041(i) (West 2011).[8] Moreover, the Indiana anti-SLAPP statute protects acts "in furtherance of the . . . right of petition or free

[8] The Maine and Massachusetts laws include in their scope of protection claims based on the constitutional right of petition but not free speech. As such, statements made in a place open to the public or a public forum in connection with a public issue or an issue of public interest are not covered under the statutes. However, statements reasonably likely to encourage a government body's consideration of an issue or to enlist public participation in an effort to bring about such government consideration are protected as acts in furtherance of the exercise of the constitutional petition right. Despite the lack of explicit statutory protection for acts in furtherance of the right of free speech, however, Maine courts have defined the petition right broadly, noting that the anti-SLAPP statute targets plaintiffs who "'punish activists by imposing litigation costs on them for exercising their *constitutional right to speak* and petition the government for redress of grievances.'" *See Maietta Constr., Inc. v. Wainwright*, 847 A.2d 1169, 1173 (Me. 2004) (emphasis added) (quoting *Morse Bros., Inc. v. Webster*, 772 A.2d 842, 846 (Me. 2001)). Conversely, the Massachusetts Supreme Judicial Court cited the lack of protection for free speech activities in the Massachusetts anti-SLAPP law to reconcile its holding that the statute did not apply to a journalist's objective, factual news reports with numerous California cases finding otherwise. Although the newspaper articles concerned an issue under review by a government body and aimed to enlist public participation in the matter, they "did not contain statements seeking to redress a grievance or to petition for relief *of [the reporter's] own*," the court ruled. *See Fustolo v. Hollander*, 920 N.E.2d 837, 842, 844 n.12 (Mass. 2010).

speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue" and does not specify or otherwise limit the types of activities that would qualify for the protection. *See* Ind. Code Ann. § 34-7-7-5.

These provisions have been successfully employed to defeat claims arising from the exercise of the constitutional right of free speech in connection with a wide range of issues of public interest and concern — important citizen participation activities that would not qualify for statutory protection under, for example, the older Washington anti-SLAPP law. *See, e.g.*, *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009) (applying Oregon's anti-SLAPP statute to protect statements about an allegedly defective product made during a consumer advocacy radio show); *Thompson v. Emmis Television Broad.*, 894 So. 2d 480 (La. Ct. App. 2005) (protecting statements in news broadcasts reporting a minister had allegedly embezzled and misappropriated church funds); *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208 (R.I. 2000) (protecting residents' statements to a newspaper reporter about a neighboring then-unlicensed construction and demolition debris facility and a recent fire there).

B. Courts in other jurisdictions have interpreted anti-SLAPP statutes broadly to protect speech about matters of significant public interest made in any forum.

In at least two states without this explicit statutory protection for any statement made in any forum in connection with any issue of public interest or concern,[9] courts have interpreted the laws broadly to cover a variety of speech about significant public issues. The Illinois anti-SLAPP statute, for example, immunizes from civil liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome" but does not define these acts. *See* 735 Ill. Comp. Stat. Ann. 110/15 (West 2011). However, a flurry of anti-SLAPP cases decided last year provided significant guidance about the law's scope of protection, which, in light of this jurisprudence, is broad.

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[9] Of the 30 jurisdictions that provide a statutory remedy against SLAPP suits, slightly more than half, 17, limit the protection to specific types of petition or free speech activities. Examples of such restrictions include the narrow protection for just oral or written testimony given to a government body during the course of a governmental proceeding, *see* Haw. Rev. Stat. § 634F-1, and only those statements genuinely aimed at procuring favorable government action, *see* Minn. Stat. Ann. § 554.03. For a comprehensive analysis of the scope of protection (by statute, common law or both), or lack thereof, in each state, see The Reporters Committee for Freedom of the Press, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists; a State-by-State Guide to Anti-SLAPP Laws* (2011), *available at* http://www.rcfp.org/antislapp.

In one case, the intermediate court affirmed the grant of a condominium owner's motion to dismiss pursuant to the anti-SLAPP law claims brought by her condo association over public statements the owner made to a Jewish newspaper about the association's rule prohibiting the display of a mezuzah outside her unit. In rejecting the condo association's assertion that the affairs of a private condo association and its board members do not constitute an ongoing attempt to petition a government entity for redress, the court said, "the Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected. Rather, it protects from liability all constitutional forms of expression and participation in pursuit of favorable government action." *See Shoreline Towers Condo. Ass'n v. Gassman*, 936 N.E.2d 1198, 1207 (Ill. App. Ct. 2010).

In another case involving condominiums, the defendant attended a meeting at a local official's office regarding condo development in the area and participated in a "mingling session" where he expressed his concerns to a local newspaper reporter. The condo developer sued the defendant for defamation after his comments were published, and the trial court denied his motion to dismiss pursuant to the anti-SLAPP law because the statements were not made in the context of a government proceeding. The defendant appealed to the Illinois Supreme Court, which reversed and found that he was entitled to immunity under the law because

his statements to the reporter addressed a public matter in furtherance of his right to petition the government.

> These statements were in response to [the local official's] public notice and addressed the subject matter of his testimony and the public meeting. At the very least, these statements affected the 262 unit owners at the [developed condo]. They also potentially affected citizens of the [area] and the City at large. Therefore, [defendant's] statements were "in furtherance of" his rights to speech, association, petition or otherwise participate in government because the Act expressly encompasses exercises of political expression directed at the electorate as well as government officials.

Wright Dev. Grp., LLC v. Walsh, 939 N.E.2d 389, 398 (Ill. 2010).

Another anti-SLAPP case is currently pending before the Illinois Supreme Court. In *Sandholm v. Kuecker*, opponents of a high school's head basketball coach campaigned to have the coach removed, and the school board eventually removed him as coach. The former coach sued the opponents alleging defamation, false light invasion of privacy and tortious interference, but the appellate court affirmed the trial court's dismissal of all claims against the defendants as immune under the anti-SLAPP statute. *See* 942 N.E.2d 544, 569–70 (Ill. App. Ct. 2010). The opponents' statements, made during a local radio program and posted on a local sports website, were genuinely aimed at procuring favorable government action, namely the school board's removal of the coach, the court said. *See id.*

Likewise, Pennsylvania has a narrow anti-SLAPP statute that applies only to individuals petitioning the government about environmental issues. *See* 27 Pa.

Cons. Stat. §§ 8301–8302. To challenge a lawsuit as a SLAPP suit, a defendant must show that he is being sued for communications relating to the implementation or enforcement of an environmental law or regulation that are made to a government agency, or in a court action to enforce an environmental law or regulation, with the aim of procuring favorable government action. *Id.* § 8302. Pennsylvania courts, however, have interpreted this language broadly to include statements made directly to a government body, as well as statements made to non-government representatives but aimed at procuring favorable government action on an environmental issue.

> Examples of statements in this latter category include
>
> > a letter to the editor of a local newspaper expressing concern about the possibility of contamination at a proposed development, a statement made to a newspaper reporter about the possibility of contamination at a proposed development, or a signboard which protests the development of a wetland. Although such oral and written statements are technically not made directly to the government, they are more likely than not, aimed at procuring favorable government action and may be entitled to the immunity authorized by the [anti-SLAPP law].

Penllyn Greene Assocs., L.P. v. Clouser, 890 A.2d 424, 433 n.11 (Pa. Commw. Ct. 2005).

To be sure, enactment of the Washington anti-SLAPP statute aligns the state with those that recognize that speech critical to informing the public debate about vital issues of significant interest or concern often extends beyond just communications to government entities. Ruling that the law is unconstitutional and

remanding the case for an analysis under the older one would mark a significant departure from this nationwide trend and, perhaps more significantly, defy the legislative intent to protect the rights of citizens "to participate in matters of public concern and *provide information to* public entities and *other citizens on public issues that affect them* without fear of reprisal through abuse of the judicial process." *See* S. 6395, 61st Leg., Reg. Sess. (Wash. 2010) (emphasis added).

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court find the Washington anti-SLAPP statute constitutional and affirm the lower court's grant of dismissal of all claims against Appellees.

Dated: September 16, 2011
Arlington, VA

Respectfully Submitted,
By: *s/ Lucy A. Dalglish*

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing brief *amicus curiae*:

1) Complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,745 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-processing system used to prepare the brief; and

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: September 16, 2011
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2011, I electronically filed in searchable Portable Document Format the foregoing brief *amicus curiae* with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, thereby affecting service on the following counsel of record, all of whom are registered for electronic filing:

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