No. 90233-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICAN LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This case is about corporate misconduct and the misapplication of an unconstitutional statute known as the Washington Act Limiting Strategic Lawsuits Against Public Participation. RCW 4.24.525 (".525" or the "Act"). It is not, as the courts below improperly concluded, "based on an action involving public participation and petition." .525(4)(a). The Bylaws and governing rules of the Olympia Food Cooperative (the "Co-op"), which Petitioners represent in this derivative action, specifically define how the Co-op may participate in boycotts. In derogation of these Bylaws and rules, Respondents, who are current and former directors of the Co-op, breached their fiduciary duties by compelling the Co-op to boycott Israeli products. Petitioners suit seeks redress for this abuse of authority, which did not involve an exercise of Respondents' right to free speech. By upholding the dismissal of Petitioners' claims under the unconstitutional procedures of .525, and ordering $232,325 in sanctions, fees, and costs against Petitioners, the Court of Appeals erred.

First, the court erred under "step one" of the Act, *see* .525(4)(b), by concluding that "the principal thrust of [Petitioners'] suit is to make the Directors cease engaging in activity protected by the First Amendment." 180 Wn. App. 514, 530, 325 P.3d 255 (2014). To the contrary, Petitioners sought to enjoin Respondents from forcing the Co-op to "speak" for them.

Paradoxically, the conclusion that Respondents met their burden under "step one" threatens to chill challenges by members/shareholders to misconduct by corporate directors that relates only to the ***corporation's*** speech (e.g., political contributions by a corporation compelled by its directors in violation of the governing rules of its board).

Second, the court erred under "step two" of the Act, *see* .525(4)(b), by (1) ignoring crucial evidence (e.g., the declarations of Lowsky and Haber, CP 347-52); (2) finding the trial court's weighing of evidence to be "harmless;" (3) drawing inferences against Petitioners, and (4) concluding that Petitioners had failed to establish by "clear and convincing evidence a probability of prevailing" on their claims. 180 Wn. App. 532-36.[1]

For example, it is undisputed that after Petitioners protested the Board's enactment of the Israel Boycott, Respondents tried ***and failed*** to revise the very procedures by which the Co-op joins product boycotts (the "Boycott Policy"). CP 928. This effort to retroactively legitimize its misconduct should have led the Court of Appeals to infer (in Petitioners' favor, as required by the summary judgment rules) that the Board knowingly violated the Boycott Policy when it enacted the Israel Boycott.

Third, the court erred by concluding that .525 does not violate the separation of powers doctrine under *Putman v. Wenatchee Med. Center*,

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[1] The Act's unconstitutional structure forced the court to weigh evidence. *See* § III.C.1.b.

166 Wn.2d 974, 980, 216 P.3d 374 (2009). In particular, the court's attempt to reconcile .525 to CR 56 relied on one Minnesota appellate court case, *Nexus v. Swift*, 785 N.W.2d 771,781 (Minn. App. 2010). *Davis*, 180 Wn. App. at 533 (quoting *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 87, 316 P.3d 1119 (2014)). The Minnesota Supreme Court has since rejected the proposition in *Nexus* upon which Division One relied. *Leiendecker v. Asian Women United of Minn.,* 848 N.W.2d 224, 231 (2014) ("the statutory framework for evaluating an anti-SLAPP motion" is "mutually inconsistent" with summary judgment). *Leiendecker* undermines Division One's holding here and its *dicta* in *Dillon.* To date, Respondents have not seriously confronted *Leiendecker* —perhaps because .525 so patently conflicts with CR 56.

Fourth, the court erred by concluding that the standard under "step two" of .525 is not unconstitutionally vague. The Act holds non-moving parties to a standard of proof without precedent in common law: "to establish by clear and convincing evidence a probability of prevailing" .525(4)(b). This standard is void for vagueness because "persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Hirschfelder*, 170 Wn.2d 536, 549, 242 P.3d 876 (2010). Even the trial court here repeatedly held Petitioners to an unqualified "clear and convincing" standard. *See* CP 979, 984-85, 989,

990, 992, 995; *see also* Resp'ts' Br. at 7 (recognizing the trial court used a "clear and convincing" standard).

Fifth, the court erred by upholding the denial of Petitioners' cross-motion for an exception to .525's unconstitutional stay of discovery. Petitioners sought depositions of only three key witnesses, each of whom provided a declaration in support of Respondents' motion. CP 362-66. As to Petitioners' requests for production, Respondents admitted reviewing (and sought fees for reviewing) thousands of pages to which Petitioners were denied access. CP 949. They then cherry-picked the most self-serving of those to support their motion, while the rest were shielded from discovery. Appellants, without access to these records, had to establish "by clear and convincing evidence a probability of prevailing." The Court of Appeals improperly approved this and found that Petitioners had failed to establish "good cause" for discovery. 180 Wn. App. at 538-41.

Sixth, the court erred by concluding that .525 does not violate the right of access to the courts, and in particular the right to a jury trial. The Act (1) mandates that the court weigh evidence, a function reserved to juries; (2) imposes an evidentiary standard elevated beyond what most plaintiffs must prove at trial; (3) improperly restricts discovery; and (4) imposes arbitrary and crippling sanctions. *Putman,* 166 Wn.2d at 979; *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 780, 819 P.2d 370

(1991). In so doing, it exposes ***meritorious*** claims to improper dismissal.

Seventh, the court erred by concluding the trial court properly excluded as hearsay certain sworn testimony offered by Petitioners.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners have extensively briefed the facts and procedural history of this case. *See* Pet'r's Br. at 5-21. A brief restatement follows.

The Co-op Bylaws state that the Co-op is a "collectively managed, not-for-profit cooperative organization that ***relies on consensus decision making***." CP 56 (emphasis added). "Consensus" at the Co-op indisputably means "unanimous." CP 462, 464. Against this backdrop, the Bylaws empower the Co-op Board to "adopt major policy changes," CP 41 ¶ 10, and "resolve organizational conflicts after all other avenues of resolution have been exhausted," CP 58 ¶ 13(16). Yet, nothing in the Bylaws (or Washington law) gives the Board unfettered power to contravene one of its own policies without an authorized decision to first amend that policy.

In 1993, the Board adopted the Boycott Policy: "[T]he Olympia Food Co-op will honor nationally recognized boycotts which are called for reasons that are compatible with our goals and mission statement." CP 106. The procedure is as follows: "The department manager [affected by the proposed boycott] will make a written recommendation to ***the staff who will decide by consensus*** whether or not to honor a boycott." *Id.*

(emphasis added).[2] The Policy allows no exceptions, nor any alternative mechanism for the enactment of boycotts. The Co-op Board diligently followed the Boycott Policy for more than fifteen years. CP 351.

In 2010, the Co-op received a proposal to boycott Israeli-made products and divest from Israeli companies (the "Israel Boycott"). CP 351, 121-23. The staff considered the Israel Boycott but did not reach a consensus to enact it. CP 351-52. The Board, apparently dissatisfied with the staff's lack of consensus, decided to act unilaterally. *Id.* In July 2010, it voted to enact the Israel Boycott (1) without considering whether there was a "nationally recognized boycott" to "honor" (i.e. follow), CP 347-52, 990; and (2) with full knowledge that there was no consensus among the Co-op staff concerning the Israel Boycott, as required under the Boycott Policy. CP 986, 252; *see also* CP 347-49.

After the Board approved the Israel Boycott, several long-time Co-op members urged Respondents to honor the Boycott Policy, Bylaws, and Co-op Mission Statement by reversing their decision and returning the issue to the staff. *See, e.g.*, CP 303-05, 832. Respondents refused. CP 170-73. Instead, they tried unsuccessfully to amend the Boycott Policy. CP 837, 849, 851-52, 862-63, 872, 884, 893-94, 902, 906; *see* CP 928.

In September 2011, Petitioners filed this verified derivative lawsuit seeking to hold Respondents accountable for their unauthorized and

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[2] After the Boycott is enacted: "The department manager will post a sign informing customers of the staff's decision ... regarding the boycott. If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision." CP 106.

unlawful actions, seeking declaratory and injunctive relief, and nominal damages on behalf of the Co-op. CP 6-18, 7, 296-97, 353-54, 356, 371-72, 374-75. Respondents countered with an anti-SLAPP motion. CP 245-74.

The trial court granted Respondents' motion and dismissed the case. CP 1238-42, 1246-61. In doing so, it held Petitioners to an unqualified burden of "clear and convincing evidence" of success on the merits. CP 979, 989, CP 995; *see also* CP 984-85, 990, 992.[3] The trial court then sanctioned Petitioners $10,000 per each of the sixteen Respondents—whom Petitioners had to name as defendants to properly sue the Co-op's Board—plus attorneys' fees and costs, for a total judgment of $232,325. The Court of Appeals affirmed.

III. SUPPLEMENTAL ARGUMENT

A. The Act Does Not Apply to Petitioners' Suit

For the reasons stated above and in Petitioners' prior briefing, Respondents failed to carry their burden under "step one" of .525(4)(b) to establish "by a preponderance of the evidence that the claim is based on an action involving public participation and petition." *See* Pet'rs' Br. at 22-32. In short, Respondents argue the suit tried to subvert their right to engage in politically motivated boycotts. Resp'ts' Br. at 12. But internal votes by corporate directors are not speech or petition protected by the

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[3] The trial court ignored the second part of the "step two" standard, i.e., "a probability of prevailing." Yet, Division One concluded "there seems to be little risk that, when [these two standards are] considered together, confusion will abound." 180 Wn. App. at 548.

First Amendment. *Donovan v. Dan Murphy Found.*, 204 Cal. App. 4th 1500, 1506 (2012).[4] Nor was Respondents' action "***lawful*** conduct" under .525(2)(e) (emphasis added).[5] *See* Pet'rs' Br. at 13-15. Plus, the Israel Boycott was the ***Co-op's*** speech—not Respondents'. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010). In this derivative action, Petitioners (not Respondents) represent the Co-op.

Even if Respondents engaged in some protected First Amendment activity in relation to the Boycott, that speech was incidental to Respondents' suit. "Step one" of .525 requires scrutiny of the nature of the claims and harms asserted to determine the "gravamen" of a complaint. *Bevan v. Meyers*, 334 P.3d 39, 43-44 (Wash. Ct. App. 2014). Petitioners here alleged that Respondents unlawfully violated corporate rules, CP 14 ¶ 51, and harmed the Co-op by "fractur[ing] the OFC community" and causing "division and mistrust among OFC members, staff members, and Board members," *id.* Petitioners did not allege that they have been harmed because of Respondents' views on Israel, or even by the Israel Boycott

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[4] *See also Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (First Amendment does not apply to a legislator's vote because such a vote "is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal" and "the legislator has no personal right to it").

[5] The Court of Appeals interpreted "lawful" to mean not "illegal as a matter of law," and suggested that refers only to criminal law. 180 Wash. App. at 531. The vagueness of the term "lawful" in this context creates an independent constitutional defect. *See* § III.B.1.c.

itself. The gravamen was Respondents' corporate misconduct.[6]

B. The Undisputed Record Below Establishes That Respondents Breached Their Fiduciary Duties

The undisputed record below establishes that Respondents provided sufficient evidence to satisfy "step two" of .525, whatever its vague evidentiary standard means. *See* § III.C.1.c. ***First***, the Boycott Policy, which allows no exceptions, and reserves no authority to the Board on boycott decision-making, states that it is the "staff who will decide by consensus whether…to honor a boycott." CP 106. The trial court recognized that "[i]t is undisputed that there was no consensus among the staff in addressing this Boycott." CP 986; *see also* CP 350-52.

Second, the Boycott Policy provides that the Co-op will endeavor to "honor" "nationally recognized boycotts." CP 106.[7] Longtime Co-op member Michael Lowsky testified that no evidence was ever presented to the staff that a boycott of (or divestment from) Israel was "nationally recognized." CP 351-52, 986. Expert Jon Haber testified that "policies boycotting and/or divesting from the State of Israel have never been

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[6] If a Co-op Board acted without a quorum, members could assert a breach of the voting directors' fiduciary duties. RCW 24.03.110. The subject matter of the vote would be irrelevant and could not cure the procedural defect. The same is true here.

[7] "To honor" in this context ordinarily means "to accept and comply with the terms of" and "to treat with consideration; recognize; respect" or "to live up to or fulfill[;] carry out." Webster's Third New International Dictionary 1087 (2002). Thus, the Co-op's rule is that where "nationally recognized" boycotts exist, the Co-op may (by staff consensus, in accordance with the Boycott Policy) "accept and comply with the terms of" them.

'nationally recognized' in this country." CP 348. Indeed, the proposed boycott was pitched to the Co-op as an opportunity to be the "***first*** grocery store to publicly recognize a boycott and/or divestment from Israel." CP 351-52 (emphasis added). The trial court admitted this evidence, but both it and the Court of Appeals ignored it.

Third, Petitioners presented evidence that Respondents attempted unsuccessfully to modify the Boycott Policy after the fact, *see* CP 928, meaning there is at least a factual dispute as to whether the Board believed it had violated the Boycott Policy by enacting the Israel Boycott. This is particularly true given the court's heavy reliance on a provision in the Co-op's Bylaws that the Board may "resolve organizational conflicts after all other avenues of resolution have been exhausted," CP 58 ¶ 13(16). How could the court conclude as a matter of law, without giving Petitioners' discovery, that this Bylaw provision—which was raised for the first time by Respondents' lawyers after litigation commenced—authorized the Board to enact the Israel Boycott when the Board itself tried to change the Boycott Policy *ex post facto*? If the Board's actions were authorized, why did it try to amend the Boycott Policy retroactively? Petitioners should at least have been granted discovery on these issues.

Moreover, they should have prevailed under "step two" because there are genuine issues of fact as to whether Respondents breached their fiduciary

duties by failing to exercise "proper care, skill, and diligence." *Riss v. Angel*, 131 Wn.2d 612, 632-33, 934 P.2d 669 (1997). Both courts below ignored Petitioners' evidence (or, at most, implicitly and unconstitutionally "weighed" it against other evidence).[8]

C. The Act Is Unconstitutional on its Face and as Applied

1. The Burden of Proof

The burden of proof under "step two" of .525(4)(b) is facially unconstitutional because it violates the separation of powers and the right of access to the courts. It is also invalid under the Washington Constitution for vagueness because it cannot be—and manifestly was not here—applied in a reasonable and consistent fashion.

a. Separation of Powers

The Washington Constitution places "[s]ome fundamental functions . . . within the inherent power of the judicial branch." *Putman,* 166 Wn.2d at 980. One "fundamental function" reserved to the courts is the "power to promulgate rules" for operating civil courts. *Id.*[9] Where a

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[8] The Court of Appeals correctly concluded that the trial court erred by weighing evidence on both of these issues and drawing factual inferences in Respondents' favor, but found the errors harmless and affirmed instead "on the basis that the Co-op's governing documents"—i.e., its articles of incorporation and bylaws—"provided the board with the authority to adopt the boycott." 180 Wn. App. at 536. The Bylaws reveal no such authority. *See* Pet. for Review at 15-17. Fairly construed, the Bylaws, Boycott Policy, and other governing rules mea the staff's failure to achieve consensus on approval constitutes a rejection of the proposal. *Id.* At a minimum, this factual issue should have entitled Petitioners to discovery and led the trial court to deny Respondents' motion.

[9] *See also City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

procedural statute and court rule conflict, the Court first attempts to harmonize them and give effect to both, but if it cannot, the court rule prevails. *Putman*, 166 Wn.2d at 980.

The Act is procedural because it dictates the "mechanics" by which the claim may proceed to trial. .525(4)(b). *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1051-52 (N.D. Ill. 2013) (.525 not applied in diversity action because burden of proof imposed on plaintiffs is "heavier than prescribed by" Fed. R. Civ. P. 12 & 56); *see also Nguyen v. County of Clark,* 732 F. Supp. 2d 1190, 1193-94 (W.D. Wash. 2010) (.525 is procedural). The burden of proof under "step two" of .525 is not a substantive element created by the legislature for "distinct claims." Resp'ts' Br. at 36. To the contrary, it arbitrarily applies without prior notice to ***any*** claim that happens to be challenged as a SLAPP under .525.

Like the statute at issue in *Putman*, .525 conflicts with the pleading, amendment, dismissal, and evidentiary burdens of CR 8, 11, 12(b), 15, and 56, as well as the right to full discovery under CR 26–34 & 56(f). In short, it conflicts fundamentally with the manner in which the Civil Rules determine whether a claim may proceed to discovery and, eventually, to trial. *Putman*, 166 Wn.2d at 983.

To prevail on summary judgment, the moving party must demonstrate "the absence of an issue of material fact." *Young v. Key*

Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party carries this burden, the non-moving party must then demonstrate the existence of a "genuine issue" as to a "material fact" (regardless of the burden of proof at trial). CR 56. Just ***one*** factual dispute is enough to survive summary judgment. *Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991). The Act turns this standard on its head: The moving party need only show that the claims are "based on" public participation and petition to shift the burden of proof. (The Act does away entirely with the moving party's initial burden under CR 56.) The responding party must then establish by "clear and convincing evidence a probability of prevailing" on every element of its claims (which includes disproving even potential affirmative defenses). .525(4)(b). This is more onerous than a plaintiff's burden under CR 56 and, as to most claims, at trial. It also exceeds the burden imposed on non-moving parties by California's anti-SLAPP statute. Cal. Civ. Proc. Code § 425.16 (West).

The Court of Appeals relied on *Nexus*, 785 N.W.2d at 781, for the proposition that the Act is consistent with CR 56. *Davis*, 180 Wn. App. at 546-47. The Minnesota Supreme Court has rejected that part of *Nexus*:

> While *Nexus* suggests that the summary-judgment standard should apply to some anti-SLAPP motions, the summary-judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent.

Leiendecker v. Asian Women Utd. of Minn., 848 N.W.2d 224, 231 (2014).

Nexus is inapposite, and Minnesota law supports Petitioners' position.

The Act's burden of proof also conflicts with CR 56. Where a claim must be proven by a preponderance at trial, a summary judgment motion is evaluated under the same standard. In contrast, "step two" of .525 ***always*** requires a plaintiff to "establish by clear and convincing evidence a probability of prevailing." Whatever that means, it exceeds the preponderance standard. This violates the separation of powers.[10]

b. Rights of Access to the Courts and Jury Trial

"The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman*, 166 Wn.2d at 979 (quoting *Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). Further, Washington's Constitution guarantees that the role of jury in weighing evidence and resolving factual questions must be held "inviolate." WA Const. art I, §21; *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

The Act infringes on the right of access by necessarily excluding meritorious claims. By having to meet an elevated standard of proof on every element—plus disprove affirmative defenses—plaintiffs who could otherwise survive summary judgment (by demonstrating one genuine issue of fact), and even ***prevail at trial***, may fail to satisfy "step two" of .525

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[10] The burden under "step two" is also inconsistent with CR 12(b)(6), which provides that a motion to dismiss will be denied if the plaintiff can demonstrate that it is "possible that facts could be established to support the allegations in the complaint." *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010).

and face daunting penalties under a presumption of no discovery.

The Act also requires trial courts to improperly weigh evidence to determine whether a non-moving plaintiff has met its burden under .525(4)(b).[11] *See* .525(4)(c) ("the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based").[12] This imposes on unconstitutional burden on the right to a jury trial.

c. Vagueness

For the reasons described in prior briefing, the burden of proof in "step two" is unconstitutionally vague because it cannot withstand a normal, reasoned interpretation. Pet'rs' Br. at 42-43; *see State v. Hirschfelder*, 170 Wn.2d 536, 549, 242 P.3d 876 (2010). The burden "to establish by clear and convincing evidence a probability of prevailing on the claim" was apparently unprecedented when Washington adopted it.[13]

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[11] If the Court determines .525 can be harmonized with the Civil Rules, .525 was nonetheless applied unconstitutionally here. Petitioners provided undisputed evidence supporting their claims that was wholly ignored by the trial court. *See supra* § III.B.

[12] Even Division One has recognized that .525 threatens access to the courts. *See Akrie v. Grant*, 178 Wn. App. 506, 513 n.8, 315 P.3d 567 (2013). Other state courts have also. *See, e.g., Mann v. Quality Old Time Serv., Inc.*, 139 Cal. App. 4th 328, 344, 42 Cal. Rptr. 3d 607 (2006); *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 167, 691 N.E.2d. 935 (1998).

[13] In October 2013, Nevada revised its anti-SLAPP statute to incorporate a "step two" standard of proof that mirrors .525. Nev. Rev. Stat. Ann. § 41.660 (West). That statute only applies, however, to "a ***good faith communication*** in furtherance of the right to petition or the right to free speech in ***direct*** connection with an issue of public concern. *Id.* (emphases added). Nevada's Supreme Court has held the statute does not violate that state's separation of powers doctrine, but in doing so never analyzed its consistency with Nevada's Civil Rules. *Davis v. Parks*, No. 61150, 2014 WL 1677659, at *2 (Nev. Apr.

The "clear and convincing" standard is common, as is "a probability," but combined they are not susceptible to consistent, reasoned application. Indeed, the trial court here repeatedly applied an unqualified "clear and convincing" standard. CP 979, 984-85, 989, 990, 992, 995; *see* § II *supra*. Respondents acknowledge this. Resp'ts' Br. at 7. The trial court's confusion shows that even judicial consideration of the burden of proof under "step two" produces inconsistency and errors.

2. The Mandatory Discovery Stay

a. Separation of Powers

The Act's discovery stay concerns the mechanics of the courts, not substantive claims, and is thus plainly procedural. Further, it conflicts with the Civil Rules by imposing a presumption of no discovery and granting exceptions only for "good cause." *Compare* .525(5)(c) *with* CR 26(c). In *Putman*, this Court found a statute unconstitutional because it required plaintiffs to obtain all relevant facts without discovery. 166 Wn.2d at 981-85. The Act does also. *See* Pet'rs' Br. at 33-36; Pet. for Review at 7-10.

Respondents and the courts below analogized the Act's discovery rules to continuance motions under CR 56(f). 180 Wn. App. at 546-47. The two are inconsistent. Parties responding to a summary judgment motion are presumed to have access to discovery. Plus, given the

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23, 2014). Not only is "step one" of Nevada's statute narrower than Washington's, but the Nevada court was not bound by *Putman* and other Washington precedent.

significantly lower standard of proof that applies to summary judgment, CR 56(f) is necessarily more liberal because a plaintiff need only point to one material fact that discovery might reveal. *See Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 89-91, 838 P.2d 111 (1992). In contrast, under the Act, a non-moving plaintiff must demonstrate "good cause" that the requested discovery will help "establish by clear and convincing evidence a probability of prevailing on the claim." .525(4)(b). Indeed, the trial court's ruling here laid bare the harsh reality that .525 requires a plaintiff to acquire all facts supporting its claims ***before*** filing suit. CP 960-63. This is plainly inconsistent with the Civil Rules and *Putman.*

Respondents and the court below also urge that the Act's discovery limitations are not unconstitutional in light of RCW 11.96A *et seq.* ("TEDRA"). 180 Wn. App. at 543-45. But TEDRA matters are "special proceedings" governed by legislative procedures that, according to CR 81, prevail over conflicting Civil Rules. The Act does not create or concern a "special proceeding." TEDRA is inapposite. *See* Pet. for Review at 9-10.

b. Rights of Access to the Courts and Jury Trial

Among the rights guaranteed by the Washington Constitution is "the right of discovery authorized by the civil rules, subject to the restrictions contained therein." *Lowy v. PeaceHealth,* 174 Wn.2d 769, 776-77, 280 P.3d 1078 (2012). *Putman* held that a statutory "certificate of

merit" requirement violated the right of access because "[o]btaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when [witnesses] can be interviewed and [documents] reviewed." 166 Wn.2d at 979. Here, denied the right to even limited discovery, Petitioners' ability to establish the merits of their claims was severely constrained.[14] Except for materials Respondents unilaterally filed with their motion, Petitioners still do not know what documents exist regarding the Board's adoption and application of the Boycott Policy.

Even if construed as facially constitutional, the discovery stay was applied in an unconstitutional manner by the trial court here. The court read the good cause requirement out of the statute by finding the anti-SLAPP Act's "governing principle ... [is] to avoid the time and expense of litigation, including discovery." CP 963. Petitioners had no opportunity to depose witnesses who provided declarations, or to explore key issues, such as the Board's failed attempt to amend the Boycott Policy and the meaning of Bylaw provisions on which Respondents and the courts have relied. CP 58 ¶ 13(16). The Washington Constitution and Civil Rules cannot tolerate such a denial of access. *Putman*, 166 Wn.2d at 981-85.[15]

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[14] The "good cause" exception to the discovery stay does not save .525 under the Washington Constitution. The statute found unconstitutional in *Putnam* also had a good cause exception. *See* RCW 7.70.150(4).

[15] Indeed, the burden on Petitioners here outweighed any legitimate goal served by the Act. *See Putman*, 166 Wn.2d at 987 (Madsen, J., concurring). The Act was designed to

3. The Mandatory Damage Award

The Act dictates that a prevailing moving party is entitled to a mandatory damages award of $10,000, plus reasonable attorneys' fees and costs relating to the motion. .525(6)(a). The Court of Appeals construed this provision to mandate that "all persons who prevail on an anti-SLAPP motion filed on their behalf are entitled to the statutory damage award" separately. 180 Wn. App. at 549.

Petitioners, suing on behalf of the Co-op, named sixteen Co-op Board members individually in order to comply with the court rules and statutes governing derivative suits. *See Goodwin v. Castleton*, 19 Wn.2d 748, 761-62, 144 P.2d 725 (1994); CR 23.1; RCW 24.03.040. The court below, declining to recognize that the lawsuit addressed the misconduct of the Board as an entity, *see* CP 6-18, upheld a damages award of $160,000 plus fees and costs against Petitioners. 180 Wn. App. at 549-50.

By authorizing a crushing penalty that bears no relationship to the harm alleged suffered by Respondents, the Act offends core due process principles. Furthermore, as Division One recognized in *Akrie v. Grant,* a large cumulative award of mandatory statutory damages could deter plaintiffs and curb the right to petition the courts. 178 Wn. App. at 513.

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limit the burdens associated with meritless actions targeting speech. Petitioners presented uncontroverted evidence showing their claims were meritorious, yet were denied discovery. The Act is unconstitutional as applied to Petitioners. *Id.*

Indeed, the Act as applied here threatens to deter future plaintiffs from filing valid claims, and thus infringes on the guaranteed right of petition. *See Putman*, 166 Wn.2d at 979; *see also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (applying *Noerr-Pennington* immunity to civil liability arising from filing a lawsuit).[16]

D. Improperly Excluded Declarations

The trial court incorrectly excluded declarations offered in support of Petitioners' arguments on hearsay grounds, yet allowed Respondents to offer comparable declarations. *See* Pet'rs' Br. at 44-46.

IV. CONCLUSION

Petitioners respectfully request that this Court reverse the Court of Appeals and remand this case for trial.

DATED this 21 day of November, 2014.

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[16] Further, the Court of Appeals declined to consider whether .525 conflicts with the standard for awarding fees and costs against an unsuccessful representative plaintiff in a derivative suit on behalf of a non-profit. *See* RCW 23B.07.400(4) ("reasonable cause" standard). This was reversible error. *See Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 208, 229 P.3d 871 (2010).

DECLARATION OF SERVICE

On November 21, 2014, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 21st day of November, 2014, at Seattle, Washington.

Sandra Stepper

Sandra Stepper, LEGAL ASSISTANT