No. 71360-4-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION I

Kent L. and Linda Davis et al.,

Appellants,

v.

Grace Cox et al.,

Respondents,

AMICUS CURIAE BRIEF OF THE LAWFARE PROJECT

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I. INTEREST OF THE *AMICUS*

This brief is respectfully submitted on behalf of *amicus curiae* The Lawfare Project, a not-for-profit corporation organized under the law of Washington, D.C. and based in New York, whose mission is to expose and counter "lawfare" – the abuse of legal procedures to advance undemocratic goals. The Lawfare Project engages in legal research and publishes analysis, and assists in legal proceedings as part of its suite of activities.

One of the most oft-used forms of lawfare, and therefore a principal focus of The Lawfare Project, is the predatory filing of meritless lawsuits to impede the exercise of free speech rights on matters of public concern—that is, Strategic Lawsuits Against Public Participation (SLAPPs). The tactic of intimidating speakers into silence with costly and time-consuming (albeit frivolous) litigation has systematically been used against politicians, members of the counterterrorism and intelligence communities, journalists, and concerned citizens. Beyond any individual case, the rise in "lawfare litigation" chills the free speech of society at large as individuals increasingly self-censor their own lawful expression due to fear of being sued.

The Lawfare Project respectfully submits this brief to assist the Court in deciding the issue of whether Washington's anti-SLAPP statute,

RCW 4.24.525, is applicable to Appellants' initial claim. We think our focus on lawfare as the strategic manipulation of legal process, and specifically our knowledge of anti-SLAPP legislation, gives us background and experience that makes our views on this question unique and useful to the Court.

As detailed herein, The Lawfare Project respectfully submits that application of the anti-SLAPP statute to Appellants' claim was improper because the lower court incorrectly found that the conduct from which the claim arose was *lawful* for purposes of determining that the lawsuit was based on an action involving "public participation and petition." Further, the lower court's application of the anti-SLAPP statute counters the expressed legislative intent behind the statute. The Court should therefore reverse the decision below granting Respondents' special motion to strike the complaint under Washington's anti-SLAPP Statute, RCW 4.24.525.

II. STATEMENT OF FACTS

The Olympia Food Cooperative (referred to herein as "OFC") is a non-profit cooperative association organized under the laws of Washington State, with its principal place of business in Olympia, Washington.[1] It operates two retail grocery stores in Olympia, Washington. As is required by law for corporate entities, OFC operates according to

[1] Compl. ¶ 1

certain governing rules, procedures, and principles, which are set forth in publicly available documents. Among these are the OFC "Bylaws," which provide that the organization "relies on consensus decision making," which means that all individuals who are empowered to participate in the making of a particular decision must agree in order for a particular proposal to be approved.[2] Consequently, any individual empowered to participate in the making of a particular decision may block consensus and thereby reject the proposal at issue.

The OFC Board enacted by consensus a "Boycott Policy" in or around May 1993, which has not been changed or amended since its original enactment (referred to herein as "OFC Boycott Policy"). The OFC Boycott Policy provides that OFC may "honor nationally recognized boycotts which are called for reasons that are compatible with [OFC's] goals and mission statement," and details the process by which such a boycott may be honored.[3] The honoring of a "nationally recognized" boycott involves a prohibition on OFC staff ordering or otherwise purchasing on behalf of OFC products that are the subject of the boycott at issue. Further, the OFC Boycott Policy provides, "A request to honor a boycott may come from anyone in the organization. The request will be

[2] Bylaws art. I, § 2
[3] Levine Decl. Ex. I

referred to the Merchandising Coordinator (M.C.) to determine which products and departments are affected. The M.C. will delegate the boycott request to the manager(s) of the department which contains the largest number of boycotted products. The department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott."

In or around March 2009, an OFC staff member proposed that OFC boycott all products produced in Israel and divest from investment in Israel. In discussing the proposal, OFC staff members were unable to reach universal agreement—i.e., consensus—regarding their position on these two proposals. In or before May 2010, OFC staff communicated to the OFC Board that the staff had been unable to reach universal agreement—i.e., consensus—regarding its position on the proposal to boycott products produced in Israel and to divest from investment in Israel. At an OFC Board meeting in or around May – July 2010, the Board proposed that a boycott proposal be drafted regarding Israeli-made products and divestment from Israel. The Board also urged that staff consensus be pursued regarding this draft boycott and divestment proposal.

Following an OFC Board meeting in or around July 2010, the Board adopted the Israel Boycott and Divestment policies. At no time did the OFC staff ever reach universal agreement—i.e., consensus—to adopt

the Israel Boycott and Divestment policies nor any other proposal, in any form, to boycott Israeli-made products and/or to divest from investment in Israel. Additionally, at no time prior to its adoption of the Israel Boycott and Divestment policies did the Board determine whether the proposed boycott of Israeli-made products and proposed divestment from investment in Israel were "nationally recognized." Hence, the Board failed to satisfy two requirements, as stipulated in the OFC Bylaws, to lawfully adopt the Israel Boycott and Divestment policies.

In or around late July or August 2010, another OFC Board meeting was held to review the Board's adoption of the Israel Boycott and Divestment policies The Board refused to rescind these policies, despite widespread opposition to the policies. Through the present day, numerous OFC members and staff members have repeatedly expressed opposition to the Israel Boycott and Divestment policies, as well as to the procedures followed by the OFC Board before, during, and after the July 2010 Board meeting at which the policies were adopted. Appellants, all of whom were members of OFC at all relevant times, have asked repeatedly in writing that the Board rescind these policies and apply the proper procedures to deciding the issue (i.e., in accordance with OFC's bylaws and governing rules, procedures, and principles). Board members—both current members and those who were on the Board when the policies were enacted—have

consistently denied Appellants' requests and have failed to take any steps necessary to rescind the policies and revisit the issue in accordance with OFC's governing rules, procedures, and principles.

In September 2011, Appellants brought suit derivatively on behalf of OFC against current OFC Board members and former members who were on the Board when the Israel Boycott and Divestment policies were adopted, seeking a declaratory judgment that the Board's enactment of the policies was *ultra vires* and must therefore be declared unenforceable, null, and void.[4] Appellants requested that the Superior Court of the State of Washington permanently enjoin the Board from enforcing or otherwise abiding by the Israel Boycott and Divestment policies and order the Board to follow OFC's governing rules, procedures, and principles in the future. Appellants further alleged that by virtue of being current or former members of the Board, Respondents owe fiduciary duties to OFC and breached these duties in adopting the Israel Boycott and Divestment policies, proximately causing damages to OFC in its business or property.

In November 2011, Respondents moved to strike the complaint[5] pursuant to RCW 4.24.525, Washington's anti-SLAPP statute, which provides for early termination of claims that target speech protected by the

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[4] Compl.
[5] Def.'s Special Mot. to Strike (hereinafter SLAPP Mot.)

First Amendment. According to the statute, a "moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition."[6] Further, the statute defines "public participation and petition" as including "[a]ny other 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."[7] If the moving party meets this burden, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim."[8] If the responding party fails to meet its burden, the special motion to strike should be granted.

In December 2011, Appellants filed a brief opposing the special motion to strike. [9] Subsequently, in July 2012, the court granted Respondents' motion, striking the complaint and dismissing the case with prejudice.[10] The court found that: (1) the Israeli-Palestinian conflict is an "issue of public concern"; (2) that the moving party had met its burden of showing by a preponderance of the evidence that the claim is based on an

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[6] RCW 4.24.525(4)(b)
[7] RCW 4.24.525(2)(e)
[8] RCW 4.24.525(4)(b)
[9] Pl.'s Br. Opp'g Def.'s Special Mot.
[10] Order Grant'g Def.'s Special Mot. to Strke

"action involving public participation and petition," specifically, "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern"; and (3) that the responding party had failed to meet its burden by clear and convincing evidence.

III. ARGUMENT

A. For Purposes of Evaluating Applicability of Washington's Anti-SLAPP Statute, the Lower Court Should Not Have Ruled that Respondents' Conduct from which the Claim Arose Was Lawful

With respect to RCW 4.24.525, Washington's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute, *amicus* respectfully submits that the statute was improperly applied to the present case because Appellants' claim did not arise from "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern" and is therefore not based on "an action involving public participation and petition."[11]. Moreover, to hold that RCW 4.24.525 is applicable to the present case, where the corporate activity violated the corporation's governing rules, would improperly expand the scope of the statute, effectively setting as precedent

[11] RCW 4.24.525(2)(e)

that rogue actions of corporate board members should be presumed "lawful" for purposes of invoking the anti-SLAPP statute.

The claim at issue concerns OFC's corporate governance mechanisms and was based on Respondents' improper enactment of Israel Boycott and Divestment policies, the process of which violated OFC's governing rules, regulations, and principles. Per the OFC Boycott Policy, enactment of any boycott policies requires (1) that the boycott is nationally recognized and (2) that OFC staff decide by universal agreement—i.e., consensus—to honor the boycott. This is the only manner in which the OFC's governing rules provide for enactment of a boycott. Because OFC's governing rules provide no other avenue by which boycott policies can validly be enacted, failure to adhere to these requirements in enacting a boycott would render the subsequent enactment of boycott policies invalid. A determination that enactment of boycott policies in any manner other than pursuant to the OFC Boycott Policy is valid and lawful would carry problematic implications counter to public policy, namely that corporate board members are free to deviate from established procedural rules if the corporation's governing documents do not expressly preclude the particular deviant course of action.

Here, neither requirement of the OFC Boycott Policy was satisfied, so the Board members' enactment of the Israel Boycott and Divestment

policies constituted an unlawful act beyond the scope of the Board's power—in short, an *ultra vires* act. Appellants do not contest the fact that the OFC staff did not reach consensus regarding the Israel Boycott and Divestment policies.[12] Further, Respondents have admitted that the Board did not consider the requirement that OFC honor only "nationally recognized" boycotts and, according to one Respondent, "considered the *international* movement to boycott Israel . . . and approved the boycott proposal in solidarity with this *international boycott movement.*"[13] Indeed, the lower court's finding that the Boycott, Divestment and Sanctions (BDS) movement, which supported an OFC boycott, "is a national movement" is unsubstantiated and conclusory, ignoring compelling evidence that there has never existed a "nationally recognized" boycott of Israel in the United States.[14]

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[12] Levine Decl. ¶ 24

[13] Levine Decl. ¶ 25

[14] Moreover, the United States government has enacted anti-boycott laws under the Export Administration Act (EAA) of 1979 (P.L. 96-72) and related legislation, the purpose of which is to "discourage, and in some circumstances, prohibit U.S. companies from furthering or supporting the boycott of Israel sponsored by the Arab League" and to "encourage . . . [or] require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction." Bureau of Industry and Security, U.S. Dep't of Commerce, Antiboycott Compliance, http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm. This legislation demonstrates that the federal law proactively opposes boycotts of Israel, undermining the assertion that there exists any "nationally recognized" movement to boycott Israel. Also demonstrating that there exists no "nationally recognized" movement to boycott Israel is the fact that more than 200 U.S. academic institutions have publicly rejected the recent boycott of Israeli academic institutions adopted by the American Studies Association. *See List of Universities Rejecting Academic Boycott of Israel*, Legal

The recent decision of the Court in *Dillon v. Seattle Deposition Reports, LLC, et al.,* No. 69300-0-I (Court of Appeals, Division 1, January 21, 2014) is instructive. In that case the trial court granted an Anti-Slapp counter-claim, to dismiss a claim brought by someone alleging invasion of privacy by taping a phone conversation without notice or permission, in connection with the subsequent use of the transcript in court. While the Court recognized that the judicial process involved was "an action involving public participation and petition", the act complained of in the plaintiff's complaint involved the taping of the private conversation. The Court quoted *Martinez v. Metabolife Intern., Inc.*, 113 Cal.App.4th 181, 188, 6 Cal Rptr.3d 494 (Cal. App. 2003) in stating:

> "It is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute."

Dillon, Id. at 25-26.

Similarly, while the OFC's failure to follow its internal governance rules is the essential wrong complained of, the mere fact that it arises in the context of an political debate does not justify the use of the anti-SLAPP statute in this case.

Insurrection, http://legalinsurrection.com/2013/12/list-of-universities-rejecting-academic-boycott-of-israel/ (last visited Jan. 25, 2014).

The lower court's evaluation of the legality of the Board's conduct relied on conjecture and arbitrary interpretation, rather than on a finding of clear and convincing evidence, as is required by the statute. Therefore, RCW 4.24.525 cannot properly be applied to this claim. Because the Board's conduct was not lawful, neither the existence of case law indicating that the intended boycott would constitute a protected form of expression under the First Amendment,[15] nor the finding that the Israeli-Palestinian conflict is an issue of public concern, renders the statute applicable.

B. Application of RCW 4.24.525 to Appellants' Initial Claim Does Not Serve the Legislative Intent of RCW 4.24.525

Application of RCW 4.24.525 to the present case would not fulfill the state legislature's expressed goals in enacting the statute, but would instead expand the scope of the statute beyond its intended reach. The historical and statutory notes to RCW 4.24.525 provide that the statute was intended to address the state legislature's "concern[] about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[16] Due to the

[15] The U.S. Supreme Court held in the case of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), that a non-violent boycott constituted "peaceful political activity" and was therefore a protected form of expression under the First Amendment of the U.S. Constitution.

[16] 2010 Wash. Legis. Serv. Ch. 118 (S.S.SB. 6395) (WEST) § 1(a)

"costs associated with defending such suits," individuals and entities may be deterred "from fully exercising their constitutional rights to petition the government and to speak out on public issues."[17] The notes further state that "[i]t is in the public interest for 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,"[18] and that one of the statute's primary purposes 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."[19]

The lawsuit at issue does not implicate the Washington legislature's concerns. Appellants' claim was not brought to challenge a "*valid* exercise" or attempted valid exercise of free speech rights. Rather, Appellants brought suit to ensure that the OFC Board's conduct complied with its governing rules to ensure that any exercise of free speech rights by the Board *was* valid pursuant to such rules. Though the U.S. Supreme Court has held that corporate speech is subject to First Amendment

[17] *Id.* § (1)(c)
[18] *Id.* § (1)(d)
[19] *Id.* § (2)(a)

protections,[20] corporate action, including speech, is valid only if the corporation acts or "speaks" according to its governing rules, regulations, and principles. Here, the alleged exercise of free speech rights—the implementation of the boycott, which could constitute corporate speech—was invalid on its face. Neither law nor logic supports the finding that valid corporate speech can result from attempts by rogue corporate board members to impart their personal policies and views to a corporation in violation of corporate governance mechanisms. Furthermore, such a finding has the potential to *encourage* corporate malfeasance: it would establish precedent that corporate board members may violate governing corporate rules—and subsequently shield themselves from suit—by claiming that the violative conduct was intended to further the exercise of free speech.

Moreover, there is no basis to conclude that the lawsuit at issue will chill Respondents (or any other individuals or entities) from fully exercising their constitutional right to speak out on public issues. At all

[20] The U.S. Supreme Court held in the case of *Citizens United v. Federal Election Commission*, 558 U.S. 3130 (2010), that the First Amendment does not distinguish between corporations and individuals and, as such, that "corporate speech" is protected. In *Citizens United*, a nonprofit organization sought to air and advertise a film critical of Hillary Clinton, an apparent violation of section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibited corporations from using their general treasury to fund broadcast advertisements mentioning a political candidate within 30 days before a primary or 60 days before a general election. The Court's majority opinion found that the BCRA's prohibition of all independent expenditures by corporations violated the First Amendment's protection of free speech.

times, Respondents have been free to speak in their personal capacities in support of boycott and divestment policies—and OFC has been free to speak by validly enacting policies in accordance with its governing rules, regulations, and principles—thereby "participat[ing] in matters of public concern . . . without fear of reprisal through abuse of the judicial process."[21]

Additionally, application of RCW 4.24.525 to the present case undermines the statutory purpose 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."[22] Here, application of the statute effectively denies Appellants access to the court and, as discussed in the previous paragraph, has no impact on the rights of persons to participate in matters of public concern. This lawsuit seeks to ensure, and has the potential to facilitate, OFC's *valid* corporate expression by deterring Board members from taking rogue actions that constitute *ultra vires* conduct. Appellants' motivation in filing suit is evidenced by a letter sent by Appellants to each Respondent, dated May 31, 2011, in which Appellants specifically expressed that their concern stemmed from the Respondents' failure to "act in accordance with [the OFC's]" in passing

[21] *Id.* § (1)(d)
[22] *Id.* § (2)(a)

the resolution to boycott, adding that if "new proposals to enact such policies be pursued at a later date in accordance with the OFC rules and regulations, [the Plaintiffs] would be prepared to respect the outcome of that process." Indeed, the significant penalties imposed under the statute indicate an intent to punish parties who bring suit as a means of obstructing the exercise of free speech rights. However, there is no indication that the legislature intended that the statute be applied to punish individuals for bringing suits raising legitimate questions of fact and law solely because the suit concerns the exercise of free speech rights.

IV. CONCLUSION

For the foregoing reasons, ACLU respectfully requests that the Court reverse the lower court's decision granting Respondents' anti-SLAPP motion and remand the case for further consideration.

Respectfully submitted this 27th day of January 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Motion For Permission To File Amicus Curiae Brief and a copy of the Brief Of Amicus Curiae Lawfare Project of Washington State by U.S. mail on the 27th day of January, 2014, to the following counsel of record at the following addresses:

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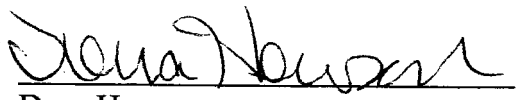
I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

Dated this 27th day of January, 2014, at Seattle, Washington.

GARVEY SCHUBERT BARER



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