NO. 90233-0

SUPREME COURT OF THE STATE OF WASHINGTON

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRINNIN; 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; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; FOREST VAN SISE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Respondents,

AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Alicia O. Young
Assistant Attorney General

WSBA 35553
Office ID 91023
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
Tel: (360) 586-6300

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I. INTRODUCTION

The Legislature enacted the Washington Act Limiting Strategic Lawsuits Against Public Participation ("the Act," or "the Anti-SLAPP Act") to deter lawsuits aimed at "chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition." Laws of 2010, ch. 118, §§ 1, 4. Recognizing that timely dismissal avoids the most significant costs of litigation—most often incurred through discovery—the Legislature decided to spare defendants who have done no wrong the "great expense, harassment, and interruption of their productive activities" that could discourage them from exercising their constitutional rights to begin with. *Id.* Specifically, the Legislature provided a remedy in the form of a qualified immunity from suit, which by its nature requires early consideration, a stay of discovery pending resolution of the immunity, and an immediate right of appeal on decisions regarding immunity.[1]

The Legislature has the power to create an immunity or eliminate a cause of action entirely, and could have done so with respect to causes of action typically filed to deter public participation. It follows that taking the lesser step of creating a qualified immunity is not constitutionally infirm. This Court should affirm the lower courts and uphold the

[1] The Legislature provided additional substantive remedies, including monetary compensation, attorney fees, and costs, the constitutionality of which are not facially or timely challenged in this lawsuit, and thus not further addressed in this brief.

Legislature's authority to address the serious impact that lawsuits can have on free speech and petition rights.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae State of Washington submits this brief in furtherance of its interest in defending the constitutionality of its statutes. Additionally, the State is interested in the sound construction and application of the Washington Constitution. The State expresses no opinion on the relative merits of the parties' arguments with respect to application of the statute in this instance or their underlying dispute.

III. ISSUES OF INTEREST TO AMICUS

1. Whether the Act's provision of (1) early dismissal of claims lacking a probability of prevailing on the merits that are based on public participation and petition, and (2) a stay of discovery pending resolution of the dismissal, are constitutional exercises of the Legislature's authority to create substantive rights and immunities, when they are intended to reduce the chilling effect that meritless lawsuits otherwise can have on the valid exercise of constitutional rights of speech and petition.

2. Whether Petitioners failed to establish beyond a reasonable doubt that RCW 4.24.525(4) and (5)(c) are procedural, and directly and irreconcilably conflict with Civil Rules (CR) 8, 11, 12, 26, or 56, where the rules remain available and are unaffected by the challenged provisions.

IV. ANALYSIS

The Anti-SLAPP Act was enacted to limit "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Laws of 2010, ch. 118, § 1. Acknowledging that it is expensive and burdensome to defend against a lawsuit—regardless of the ultimate outcome—the Legislature sought 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." *Id.* This important policy provides the context in which this Court should review the Act's constitutionality.

A. Lawsuits Filed In Response To Public Participation Are Often Meritless, But They Nonetheless Chill Protected Activity

In general, lawsuits seeking to impose liability for public participation are unlikely to succeed, because "the Constitution forbids that courts impose sanctions-even civil liability-upon those exercising First Amendment rights." *Sierra Club v. Butz*, 349 F. Supp. 934, 937 (N.D. Cal. 1972) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). Rather, "[l]iability can be imposed only when" the speaker "knows his statements are false or speaks with reckless disregard of whether they are true or false." *Id.*

Even when a lawsuit is unlikely to succeed, however, it still may

impose substantial costs on the defendants. This Court is well aware of the burdens that litigation itself—regardless of the outcome—has on those engaging in public participation. "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)). Accordingly, the Court has endorsed early, efficient resolution of claims seeking to impose liability for protected activity: "In the First Amendment arena, summary procedures are. . . essential. For the stake here, if harassment succeeds, is free debate." *Id.* "Serious problems regarding the exercise of free speech and free press...are raised if unwarranted lawsuits are allowed to proceed. . . . The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms." *Id.* at 485 (quoting *Tait v. KING Broadcasting Co.*, 1 Wn. App. 250, 255, 460 P.2d 307 (1969)).

While lawsuits filed in response to public participation may ultimately fail, the damage is often done in the form of expense, harassment, and interruption of productivity prior to final disposition, which deters the target and others from exercising their constitutional rights in the future. *Id. See also* Michael Eric Johnston, *A Better SLAPP*

Trap, 38 Gonz. L. Rev. 263, 285-86 (2003). For these reasons, this Court has approved of "an early testing of plaintiff's evidence by a convincing clarity burden" in cases potentially involving protected activity. *Mark*, 96 Wn.2d at 487. *See also Right-Price Recreation, LLC v. Connells Prairie Cmty. Coun.*, 146 Wn.2d 370, 377, 46 P.3d 789 (2002) (holding defamation suit should have been dismissed three years earlier based on immunity under former RCW 4.24.510 (1999), as "party alleging defamation must show, by clear and convincing evidence, an abuse of the statutory privilege amounting to actual malice"). However, despite the possibility of summary judgment, litigants still must endure burdensome discovery, motion practice, and disruption to their lives,[2] which deters them from engaging in future protected activity.

B. RCW 4.24.525 Provides Essential Remedies To Individuals Who Are Sued For Constitutionally Protected Activity

Sharing the judiciary's concern as to the chilling effect of lawsuits instituted in response to constitutionally protected activity, the Legislature enacted the Anti-SLAPP Act. Laws of 2010, ch. 117, §§ 1, 4. The Act provides several remedies, including: (1) early disposition of claims based on protected activity, before litigants have to undergo significant expense

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[2] *See, e.g.*, Peter Callaghan, *Developer Used Courts to Intimidate Opponents*, Tacoma News Tribune, May 21, 2002, at B1 (quoting defendant in *Right-Price*: "Everyone wants to celebrate, but what did we win. . . . All the developer wanted was to shut us up for three years. This worked exactly as these suits are supposed to work.").

and stress of litigation in defending the claims, (2) a stay of discovery pending the determination of the previously-described disposition, (3) immediate appeal, so that the party seeking dismissal under the Act does not need to stand for trial while its immunity is adjudicated, and (4) attorney fees, costs, and monetary relief. *Id.* at § 2.

Providing resolution prior to significant discovery addresses what this Court and the Legislature have identified as the greatest harm faced by individuals exercising their First Amendment rights—the threat and burden of defending a lawsuit. As noted by one court:

> SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of defense. . . . [U]ltimate disposition in favor of the target often amounts merely to a pyrrhic victory.

Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (1992).

C. The Dismissal And Discovery Stay Provisions Are Substantive Provisions, And, Therefore, Do Not Offend Separation Of Powers, Access To The Courts, Or The Right To A Jury

In *State v. Clausen*, 65 Wash. 156, 210, 117 P. 1101 (1911), this Court held that "[t]he Constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the Legislature from so doing." As part of its police power to define what shall constitute a cause of action, the Legislature has the "power to do away with a cause of action." *Id.* at 210-11. If the Legislature has the power to completely eliminate a

cause of action, it also has the authority to limit a cause of action. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711, *amended by* 780 P.2d 260 (1989) ("It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability."). As explained below, in the Anti-SLAPP Act the Legislature provided substantive remedies to litigants sued based on their constitutionally protected activity in the form of immunity. Under this Court's precedent, this raises no constitutional concerns.

1. Like Qualified Immunity, RCW 4.24.525 Is Substantive In That It Provides Immunity From Suit

Fundamentally, RCW 4.24.525 provides substantive remedies to individuals sued for engaging in constitutionally protected activity in the form of immunity, attorney fees, costs, and other monetary relief. Petitioners do not dispute that the latter three remedies are substantive and within the Legislature's power to authorize. With respect to the former, the Legislature set forth a means for immunizing defendants from the burden of litigation by balancing their right to engage in constitutionally protected activity with the plaintiffs' right to seek redress. Examination of the federal qualified immunity doctrine reveals that it operates similarly to the Anti-SLAPP Act, and shows that the Act in essence is substantive.

In the context of statutory liability under 42 U.S.C. § 1983 and

other claims for violations of federal constitutional or statutory rights, the qualified or "good faith" immunity exists for public officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).[3] Qualified immunity represents the "best attainable accommodation of competing values," balancing "the evils inevitable" in either granting full immunity to government officials accused of violating individuals' constitutional rights, or subjecting government officials—many of whom are not ultimately legally culpable—to the expense, burden, chilling effect, and disruption of litigation. *Id.* at 813-14.[4] Similar to the Washington Legislature's findings with respect to RCW 4.24.525, the modern qualified immunity doctrine was motivated by the impacts that lawsuits impose on both individual defendants and society as a whole, in the form of expense, "diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," even where the defendants are ultimately successful in getting a lawsuit adjudicated in their favor. *Id.* at 814. Additionally, the "fear of

[3] This is distinct from the qualified immunities created by this Court in other contexts. *See, e.g.*, *Taggart v. State*, 118 Wn. 2d 195, 216-17, 822 P.2d 243, 254 (1992).

[4] The Court acknowledged the substantive nature of the immunity by indicating it was applying it in the absence of congressional action to the contrary. *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.* at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Besides general burdens including distraction, inhibition of discretionary action, and deterrence from engaging in the challenged behavior, there are also special costs in the form of broad-ranging discovery. *Id.* at 816-17. To avoid these evils, the qualified immunity doctrine was intended to allow some cases to go forward, but to "permit 'insubstantial lawsuits [to] be quickly terminated.'" *Id.* at 814 (quoting *Butz v. Economou,* 438 U.S. 478, 507-508, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

Denial of qualified immunity is immediately appealable because "immunity from suit rather than a mere defense to liability" is at stake, which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (plurality), *abrogated in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). To realize its purpose of avoiding "burdens of litigation," qualified immunity must be resolved at the "earliest possible stage in litigation." *Pearson*, 555 U.S. at 231. Likewise, "until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

See also Anderson v. Creighton, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987) (noting limited discovery may be allowed if it is tailored specifically to question of qualified immunity).

The Anti-SLAPP Act's features demonstrate that, like qualified immunity, it also is intended to act as immunity from suit. First, the law provides for timely resolution and dismissal of cases where the plaintiffs cannot establish a probability of succeeding on their underlying claim. The Court considers, as a matter of law, whether the plaintiffs have established a prima facie case and whether any defenses preclude recovery despite the existence of a prima facie case. RCW 4.24.525(4). Second, to ensure that the immunity from suit is not effectively lost through imposition of discovery costs and burdens, discovery is stayed absent a need for specific discovery to respond to a motion to strike. RCW 4.24.525(5)(c). Third, the parties have an immediate right of appeal of an order on a special motion to strike—again ensuring that immunity from suit is not lost by having to proceed to discovery and trial before immunity is finally decided. This collection of protections demonstrate the Legislature's intent to immunize persons who have exercised their constitutional rights of speech from suit (not just liability) when the plaintiff is unable to demonstrate a probability of success on their claim. *See Mitchell*, 472 U.S. at 525-26 (noting essence of immunity is

entitlement not to stand trial).

Federal courts have concluded that similar anti-SLAPP laws are in the nature of a substantive immunity: "[A] defendant's rights under the anti-SLAPP statute are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003).[5] As with the California law reviewed in *Batzel*, the Washington law granting an immediate appeal and the legislative history "demonstrate[] that. . . lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id.* at 1025; Laws of 2010, ch. 118, § 1.

By allowing dismissal and a stay of discovery before significant costs of defense are incurred, the Legislature provided a meaningful remedy to people sued for engaging in constitutionally protected activity.

2. Because RCW 4.24.525 Provides A Substantive Immunity, It Does Not Implicate Separation of Powers, Access to the Courts, or the Right of Trial by Jury

"A legislative act carries with it the presumption of its constitutionality and will not be declared void unless its invalidity appears beyond a reasonable doubt." *Robb v. City of Tacoma*, 175 Wash. 580, 586, 28 P.2d 327, 330 (1933). The presumption of constitutionality is

[5] *Accord, Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 177 (5th Cir. 2009) (finding similar Louisiana provision provided immunity); *NCDR, LLC v. Mauze and Bagby, PLLC*, 745 F.3d 742, 751-52 (2014) (finding similar Texas provision provided immunity); *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. Ct. App. 2014).

even stronger when analyzing state constitutional restrictions because a state constitution is not a grant of power but a limitation of the otherwise plenary power of the Legislature. *Id.* at 586-87. Here, because the Legislature created a substantive immunity from suit, it did not offend the state constitutional requirements of access to the courts, separation of powers, or the right to a jury trial.

The doctrine of separation of powers prohibits one branch of government from "encroaching upon the 'fundamental functions' of another." *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Because the three branches of state government are not "'hermetically sealed,' the doctrine allows the government a measure of 'flexibility and practicality,'" and some overlap between the branches. *Id.* Accordingly, "[T]he question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Id.* (quoting *Carrick*, 125 Wn.2d at 135 (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975))).

Because RCW 4.24.525 grants substantive remedies to individuals engaging in public participation, which is squarely within the legislative branch's sphere of authority, it does not implicate the separation of powers

doctrine. *See Clausen*, 65 Wash. at 210-11; *Sofie*, 112 Wn.2d at 666. Nor does the limitation of a cause of action or the granting of immunity implicate access to the courts or the right to a jury trial. *Doe v. Puget Sound Blood Ctr.*, 117 Wn. 2d 772, 780-82, 819 P.2d 370 (1991) ("Access does not carry with it any guaranty of success," and it "must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules. . . . The merits of a particular action may depend upon statute, e.g., RCW 4.24."); *Clausen*, 65 Wash. at 210-11 (holding because the right of jury trial in civil cases is "incidental to the right of action," the elimination of a cause of action or the creation of an immunity does not offend the right to a jury trial).[6]

For the above reasons, the challenged provisions are substantive, not procedural, but, as explained next, even if the Court determines they are procedural and concern a matter related to the court's inherent power, there is no direct and unavoidable conflict with the civil rules.

D. RCW 4.24.525 Does Not Directly And Unavoidably Conflict With This Court's Procedural Rules

"The legislature may . . . adopt, by statute, rules governing court

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[6] *See also 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 936, 6 P.3d 74, 81 (2000), *aff'd*, 144 Wn.2d 570, 29 P.3d 1249 (2001) ("None of the article I, section 10 cases considered whether legislative abrogation of a remedy invokes the protections of article I, section 10. But in a case decided in 1936, the Supreme Court considered and rejected the argument that the state Constitution guarantees a remedy at law.").

procedures." *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012). It is only when a statute purporting to govern court procedures directly and irreconcilably conflicts with a court rule concerning a matter related to the court's inherent power that the separation of powers doctrine is implicated. *Id.*; *Wash. State Coun. of Cnty. & City Employees, Coun. 2, AFSCME, AFL-CIO, Local 87 v. Hahn*, 151 Wn.2d 163, 169, 86 P.3d 774 (2004). If a statute governing procedural matters appears to conflict with a court rule, the Court "will first attempt to harmonize them and give effect to both." *Gresham*, 173 Wn.2d at 428 (quoting *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009)). Harmonization is impossible "only when the statute directly and unavoidably conflicts with the court rule." *Hahn*, 151 Wn.2d at 169. "If the statute and the rule 'cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.'" *Gresham*, 173 Wn.2d at 428 (quoting *Putman*, 166 Wn.2d at 980).

Since RCW 4.24.525 is a substantive remedy, this Court need not determine whether the statute conflicts with a court rule. *Hahn*, 151 Wn.2d at 428. But even if the challenged provisions were procedural, they would not raise a constitutional concern: "The coextensive authority as between the legislature and this Court with respect to civil procedure is recognized in RCW 2.04.190[.]" *Sackett v. Santilli*, 146 Wn.2d 498, 506,

47 P.3d 948 (2002). This Court has acknowledged that "[t]he coextensive authority vested by the constitution in the legislature and the court to make rules is not uncommon among the states. '[I]n most jurisdictions court rulemaking power has been shared, *de jure* or *de facto,* between courts and legislatures.'" *Id.* (quoting Hugh Spitzer, *Court Rulemaking in Washington State,* 6 U. Puget Sound L. Rev. 31, 59 (1982)). For example, RCW 4.12.030 provides for a change of venue based a number of grounds. Courts routinely apply this provision when reviewing venue motions.[7]

Even under the Court's more stringent test of recent cases, in which a procedural statute that cannot be harmonized with a court rule is stricken, the Court is unable to harmonize a court rule with a statute only "when the statute *directly* and *unavoidably* conflicts with the court rule." *Hahn*, 151 Wn.2d at 169 (emphasis added). Here, there is no direct and unavoidable conflict.

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[7] By way of further example, it is "not unusual for the legislature to enact legislation mandating the exclusion of certain types of otherwise admissible evidence." *State v. McCuistion*, 174 Wn.2d 369, 397, 275 P.3d 1092 (2012) (citing RCW 5.60.060, mandating exclusion of evidence resulting from privileged communications; RCW 9.73.050, mandating exclusion of evidence obtained in violation of RCW 9.73.030, which prohibits the interception and recording of private conversations). The Legislature has also enacted numerous presumptions for public policy reasons, designed to facilitate expeditious resolution. *See, e.g.*, RCW 11.42.040 (creating presumptions rebuttable by clear, cogent, and convincing evidence); RCW 9A.52.040 (creating presumption of criminal intent following proof of unlawful entry); RCW 84.40.0301 (presumption that determination by public official is correct, rebuttable by clear, cogent, and convincing evidence); RCW 26.26.116 (presumption of parentage).

a. The Dismissal Provision Does Not Directly Or Irreconcilably Conflict With Any Court Rule

RCW 4.24.525(4) provides for dismissal of claims based on public participation where the responding party cannot "establish by clear and convincing evidence a probability of prevailing on the claim." Courts interpreting this provision have concluded that it establishes a method for dismissal similar to summary judgment, whereby the court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff. *See Davis v. Cox*, 180 Wn. App. 514, 528, 325 P.3d 255 (2014); *Spratt v. Toft*, 180 Wn. App. 620, 637, 324 P.3d 707 (2014); *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 88-89, 316 P.3d 1119 (2014); *Phoenix Trading, Inc.* v. *Loops, LLC,* 732 F.3d 936, 941-42 (9th Cir. 2013); *AR Pillow Inc.* v. *Maxwell Payton, LLC,* 2012 WL 6024765, at *2 (W.D. Wash. Dec. 4, 2012).[8]

Petitioners fail to explain how RCW 4.24.525 directly and irreconcilably conflicts with a court rule. This statute is distinguishable

[8] Petitioners incorrectly assert that RCW 4.24.525 altered the moving party's burden on summary judgment to the responding party's detriment. *See* Pet'r Supp. Br. at 13. Under Civil Rule 56, the moving defendant's only obligation is to point out to the trial court that there is an absence of evidence to support the plaintiff's case, whereupon the burden shifts to the plaintiff to establish, by admissible evidence, a genuine issue of material fact for trial. *Young v. Key Pharm.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Additionally, RCW 4.24.525 did not alter summary judgment, but instead created an entirely new dismissal mechanism.

from the statute at issue in *Putman v. Wenatchee Valley Med. Ctr, PS*, 166 Wn.2d 974, 216 P.3d 374 (2009), which required medical malpractice plaintiffs to file a certificate of merit with their initial pleadings. *Id. at* 980. In *Putman*, the Court found a direct and irreconcilable conflict because the certificate of merit required plaintiffs to (1) provide evidence supporting their claims with their initial Complaint, contrary to CR 8, which "requires only 'a short and plain statement of the claim' and a demand for relief"; and (2) provide additional verification of their pleadings, contrary to CR 11. *Putman*, 166 Wn.2d 974.

Here, the special motion to strike does not alter the requirements of CR 8 or any other court rule, but is an additional tool to determine whether, as a matter of law, a claim based on public participation should be dismissed due to an immunity. It does not prevent or interfere with the parties' access to any of the civil rules, including CR 8, 11, 12, or 56, and is consistent with their application. Further, the statute's requirement that a plaintiff must show by clear and convincing evidence a probability of prevailing on the merits does not conflict with CR 56 because, in addition to being an entirely separate mechanism, CR 56 does not mandate a specific burden of proof. It incorporates whatever burden of proof is set forth legislatively or by common law in the underlying claim. *See, e.g.*, *Right-Price Recreation, LLC*, 146 Wn.2d at 381, 384 (evaluating

immunity under CR 56 under clear and convincing standard). Given the presumption of constitutionality and the burden to establish unconstitutionality beyond a reasonable doubt, the Court should decline to find a conflict where the Act does not directly or irreconcilably conflict with a court rule.[9]

b. The Discovery Stay Preserves The Court's Discretion To Manage Discovery And Does Not Directly And Irreconcilably Conflict With CR 26

Petitioners fail to identify a rule that actually, directly, and irreconcilably conflicts with RCW 4.24.525(5)(c), which provides for a stay of discovery during the pendency of a special motion to strike, but states that the court "may order that specified discovery" be conducted. Instead, this provision is consistent with the qualified immunity rule, which also requires a presumptive stay of discovery, and with existing court rules that vest discretion in the trial courts to manage discovery.

Under the Court's existing rules, the trial court has discretion to limit discovery when "the discovery is unduly burdensome or expensive, taking into account," among other things, "the needs of the case," and "the importance of the issues at stake in the litigation." CR 26(b). Consistent with this authority, this Court has sanctioned the limitation of discovery to

[9] The late-raised challenge for vagueness, if addressed, should also be rejected, as this Court has the power to clarify any ambiguity presented by the statute. *See Wainwright v. Stone,* 414 U.S. 21, 22–23, 94 S. Ct. 190, 192–93, 38 L. Ed. 2d 179 (1973) (vagueness challenge must be reviewed in light of prior judicial construction).

protect constitutional rights of association and expression. *See Right-Price Recreation, LLC*, 146 Wn.2d at 375 (Court Commissioner granted emergency stay of trial court order compelling discovery based on asserted constitutional rights, pending of appeal regarding immunity).

Here, similar to CR 56(f), RCW 4.24.525 imposes a presumption of no further discovery pending the motion to strike as a matter of law, but the trial court retains the discretion to manage discovery. *See Pitzer v. Union Bank of California*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000) (court may disallow additional discovery pending summary judgment when the requesting party does not state what evidence would be established through additional discovery or if the desired evidence will not raise a genuine issue of material fact). Rather than a direct conflict, RCW 4.24.525 is consistent with existing court rules and provides similar discretion to the trial court as existing rules. There is no direct conflict with a court rule, and nothing in this statute prevents a trial court from exercising its discretion to allow discovery under civil rules. *See City of Fircrest v. Jensen*, 158 Wn.2d 384, 399, 143 P.3d 776 (2006) (construing statute regarding admissibility to be permissive, and thus not contradictory of evidence rules). As the trial court retains discretion on whether to allow discovery, there is no credible threat to the judiciary's autonomy.

E. The Court Should Limit Its Constitutional Rulings As Applied

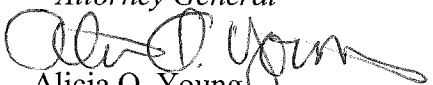
If the Court finds either challenged provision unconstitutional as to the parties in this case, consistent with the Legislature's intent that RCW 4.24.525 remain effective in other circumstances, the Court should restrict its holding accordingly. Laws of 2010, ch. 118, § 5 (severability clause).[10]

V. CONCLUSION

The threat of a lawsuit, regardless of its outcome, can chill constitutionally protected speech. RCW 4.24.525 provides a meaningful remedy to protect such speech: early dismissal of meritless lawsuits and a stay of discovery pending resolution of immunity. For the foregoing reasons, the State respectfully asks the Court to uphold the Act's constitutionality.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

ROBERT W. FERGUSON
Attorney General



Alicia O. Young
WSBA No. 35553
Assistant Attorney General

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[10] There may be additional legal arguments applicable to other potential entities not a party to this case, such as the Legislature's constitutional authority to "direct 'in what manner, and in what courts, suit may be brought against the state.'" *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 62 ¶ 1, 316 P.3d 469 (2013) (quoting Const. art. II, § 26, and clarifying that a conclusion of unconstitutionality issued three years earlier should be construed as applicable to the parties of that case, but not to the State). Those arguments are not raised by the parties and should not be foreclosed by this case.

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington, that on the date below the *Amicus Curiae Brief Of The State Of Washington* and this *Certificate of Service* were filed in the Washington State Supreme Court according to the Court's Protocols for Electronic Filing, as a PDF attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov).

And that I served a copy of *Amicus Curiae Brief Of The State Of Washington* and this *Certificate of Service* on counsel for Appellant at the address below by U.S. Mail, and by e-mail as a PDF attachment:

George M. Ahrend
Ahrend Albrecht PLLC
16 Basin St SW
Ephrata WA 98823-1865
gahrend@trialappeallaw.com

Bryan Patrick Harnetiaux
Attorney at Law
517 E 17th Ave
Spokane WA 99203-2210
bryanpharnetiauxwsba@gmail.com

Robert M. Sulkin
McNaul Ebel Nawrot & Helgren
600 University St Ste 2700
Seattle WA 98101-3143
rsulkin@mcnaul.com

Avi Joshua Lipman
McNaul Ebel Nawrot & Helgren PLLC
600 University St Ste 2700
Seattle WA 98101-3143
alipman@mcnaul.com

Bruce Edward Humble Johnson
Davis Wright Tremaine LLP
1201 3rd Ave Ste 2200
Seattle WA 98101-3045
brucejohnson@dwt.com

Devin M Smith
Microsoft Corporation
1 Microsoft Way
Redmond WA 98052-8300
devins@microsoft.com

Angela Catherine Galloway
Davis Wright Tremaine LLP
1201 3rd Ave Ste 2200
Seattle WA 98101-3045
angelagalloway@dwt.com

Ambika Kumar Doran
Davis Wright Tremaine LLP
1201 3rd Ave Ste 2200
Seattle WA 98101-3045
ambikadoran@dwt.com

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Genie Paquin, Legal Assistant