NO. 83768-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SIDDHARTH JHA,

Respondent,

v.

VARISHA MAHMOOD KHAN
and YASSIR ANWAR JAMAL,

Appellants.

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Reporters Committee for Freedom of the Press (the "Reporters Committee") and 18 Media Organizations.[1]

Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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[1] A statement of identity and interest for all amici, including the Reporters Committee, Californians Aware, The E.W. Scripps Company, Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, Investigative Reporting Workshop at American University, The Media Institute, MediaNews Group Inc., Mother Jones, National Press Photographers Association, The News Leaders Association, News Media Alliance, Pro Publica, Inc., Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Tribune Publishing Company, and Tully Center for Free Speech may be found in the concurrently filed Motion of the Reporters Committee for Freedom of the Press and 18 Media Organizations for Leave to File Amicus Curiae brief and Appendix A to that motion.

II. SUMMARY OF ARGUMENT

Strategic lawsuits against public participation ("SLAPPs") are meritless legal claims that chill the exercise of First Amendment rights. While SLAPPs, by definition, lack legal foundation, defendants are often forced to spend substantial time and financial resources defending against them; the mere threat of expensive, protracted litigation, alone, can discourage speech.

To combat this troubling trend, Washington, along with thirty-one other states, the District of Columbia, and the Territory of Guam have adopted anti-SLAPP laws to provide mechanisms to minimize the costs and other burdens associated with defending against baseless lawsuits arising out of speech on matters of public concern. *See* Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, Reporters Comm. for Freedom of the Press, available at https://perma.cc/4DW5-H2JK. These laws protect a wide range of speech and enable defendants to recover attorney's fees and costs upon dismissal in an effort to discourage future abusive litigation.

In May 2021, Washington enacted a version of the Uniform Public Expression Protection Act ("UPEPA"). *See* RCW 4.105 *et seq.* The Uniform Law Commission drafted UPEPA to serve as a model anti-SLAPP law providing "a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner." Unif. Pub. Expression Prot. Act 3 (Unif. L. Comm'n 2020), available at https://perma.cc/J3AE-EZHC ("UPEPA Comments"). The Act serves two purposes: "protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." *Id.* Although Washington was the first state to introduce UPEPA, several other state legislatures have followed suit.

The present case concerns a false light invasion of privacy suit brought by Siddharth Jha against Varisha Khan, a politician, for an article Khan wrote criticizing her political opponent's acceptance of campaign contributions from developers—including Jha—with business before the city. Khan filed a motion for expedited relief pursuant to

Washington's anti-SLAPP law. The Superior Court agreed that Jha's lawsuit was subject to UPEPA, but denied Khan's motion, determining that genuine issues of material fact exist regarding the elements of fault and falsity. *See* Order Denying Summary Dismissal at 1–2, *Jha v. Khan*, No. 21-2-14469-8 (Wash. Super. Ct. Mar. 1, 2022).

Amici's brief is limited to two important issues raised on appeal: (1) whether a plaintiff's prima facie case must include allegations which, if proven, would be sufficient to overcome the substantive legal defenses of a defendant who has invoked the expedited relief available under Washington's anti-SLAPP law, and (2) what construction of the "good cause" requirement in RCW 4.105.030 comports with the Legislature's intent to "protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or the Washington State Constitution." RCW 4.105.901.

Strong anti-SLAPP protections are essential to protecting the news media's ability to inform the public. The lower court's orders, if left undisturbed, would weaken UPEPA and its vital

protections for public discourse. For the reasons herein, amici urge this Court to hold that (1) a SLAPP plaintiff must make a showing sufficient to overcome any substantive defenses raised by the defendant as part of their prima facie case, and (2) a plaintiff facing a UPEPA motion cannot move to amend the pleadings without "good cause," and that this provision "must be broadly construed and applied to protect the exercise of the right of freedom of speech." RCW 4.105.901.

III. ARGUMENT

A. For UPEPA to Protect the Exercise of First Amendment Rights as Intended, Established Free Speech Protections Must be Contemplated When a Court Considers Whether the Plaintiff has Met the Requirements of RCW 4.105.060(1)(c).

The Superior Court below noted that "disposition of the false light claim may ultimately turn on whether Khan's speech was protected by the First Amendment" but nevertheless denied Khan's motion to dismiss, concluding that "free-speech protections that may apply cannot yet be decided in light of the genuine issues of material fact [as to fault and falsity] that currently exist." *See* Order Denying Summary Dismissal at 12. This determination was clear error. Under RCW

4.105.060(1)(c) the lower court should have taken into account recognized First Amendment and common law protections for speech, like substantial truth, fair report privilege, and opinion.

1. The fair report privilege and opinion defenses are essential protections for free speech in false light cases.

The constitutional and common law privileges and defenses that protect a libel defendant are equally applicable to a defendant accused of the tort of false light invasion of privacy. In Washington, which has adopted the definition of false light set forth in the Restatement (Second) of Torts, "[a] false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed." *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470–71, 471 n.8, 722 P.2d 1295 (1986) (citing Restatement (Second) of Torts § 652E (Am. L. Inst. 1977)).

The Restatement is explicit that the fair report privilege applies in both contexts: "Under any circumstances that would

give rise to a conditional privilege for the publication of defamation, there is likewise a conditional privilege for the invasion of privacy." Restatement (Second) of Torts § 652G cmt. a (Am. L. Inst. 1977); *cf. id.* § 611 (fair report privilege for defamation). In *Alpine Industries, Computers, Inc. v. Cowles Publishing Co.*, the Court noted this parallel, writing that "[i]f the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy." 114 Wn. App. 371, 385, 57 P.3d 1178 (2002) (quoting Restatement (Second) of Torts § 611 cmt. b (Am. L. Inst. 1977)).

In *Cowley v. Pulsifer*, Justice Holmes (then a Justice of the Massachusetts Supreme Judicial Court) gave one of the earliest descriptions of the common law fair report privilege in a case involving a story published in the *Boston Herald* about

an attorney facing disbarment.[2] 137 Mass. 392 (1884). Holmes wrote that the foundation of the fair report privilege at English common law was an interest in the "proper administration of justice." *Id.* at 394. Specifically, though the record in question was not subject to the privilege, Holmes wrote that the privilege was rooted in the right of access to information about what transpires in courts and other official, public proceedings:

> [T]he privilege and the access of the public to the courts stand in reason upon common ground. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy

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[2] While the stated cause of action in *Cowley* was libel, according to one commenter the case is better understood as one at the root of modern American privacy law. *See generally* Amy Gajda, *Seek and Hide: The Tangled History of the Right to Privacy* 6 (2022). Although the allegations in the unpublished petition were "100 percent accurate," and thus fell under the doctrine of "truthful libel" (now defunct within defamation law), Professor Gajda writes that several of the modern privacy torts emerged from that doctrine. *See id.* at 16, 73, 123. Indeed, the decision was apparently contemporaneously understood to demarcate a privacy right. *See id.* at 7 (discussing a *Boston Daily Advertiser* editorial about the decision that wrote of the case: "It [would] not be unreasonable to hope that before long the honest citizen m[ight] find some way to make his privacy respected.").

> himself with his own eyes as to the mode in which a public duty is performed.

Id.; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492–96 (1975) ("At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.").

This reasoning, fundamental to amici (and all commenters on government affairs), was echoed by the Washington Supreme Court over a century later. "States in general and Washington in particular have carved out an exception to this rule and recognized a conditional privilege protecting the republisher when the defamatory statement originally was made in the course of an official proceeding or contained in an official report." *Herron v. Trib. Publ'g Co.*, 108 Wn.2d 162, 179, 736 P.2d 249 (1987). Because the fair report privilege "serve[s] the public's interest in obtaining information as to what transpires in official proceedings and public meetings," *Alpine Indus.*, 114 Wn. App. at 384, it is an essential press and free speech protection in both the defamation and false light context.

The Restatement categorizes opinion not as a defense to defamation, but rather part of the inquiry into whether a statement is capable of defamatory meaning. Restatement (Second) of Torts § 566 (Am. L. Inst. 1977). The distinction between statements carrying a factual connotation and those expressing an opinion is a key protection in the false light context as well. *See Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1123 (W.D. Wash. 2004), *aff'd*, 152 F. App'x 565 (9th Cir. 2005) ("Statements of opinion cannot support a defamation or false light claim.").

The U.S. Constitution dictates the same result. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); Restatement (Second) of Torts § 566 cmt. c (Am. L. Inst. 1977) (delineating between opinion based on disclosed facts and other protected opinion statements); *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 24 (1990) (Brennan, J., dissenting) (explaining that "protection for

statements of pure opinion is dictated by *existing* First Amendment doctrine"). Indeed, given the ease with which defamation plaintiffs, including SLAPP plaintiffs, can reframe a defamation claim as one for invasion of privacy, it is essential that this First Amendment protection be understood to apply to false light claims as well.

Numerous courts have recognized the threat posed to public discourse if false light carries with it a less robust set of free speech protections than defamation. *See, e.g.*, *Sullivan v. Conway*, 157 F.3d 1092, 1098–99 (7th Cir. 1998) (noting "the same privileges are applicable to the false-light tort as to the defamation tort," because "[o]therwise privilege could be defeated by relabeling"); *Berry v. Nat'l Broad. Co.*, 480 F.2d 428, 431 (8th Cir. 1973) (finding First Amendment protections applicable in the false light context; otherwise a "plaintiff can, by suing for invasion of privacy, by-pass the various safeguards and limitations which have grown up around the accusation of defamation"); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983) (holding "the defense available in a defamation action that the allegedly defamatory statements are opinions, not

assertions of fact, is also available in a false light privacy action").

Plaintiffs must not be permitted to circumvent constitutional protections and common law privileges by simply reframing defamation claims as claims for invasion of privacy.

2. SLAPP plaintiffs must present prima facie evidence sufficient to overcome a defendant's substantive legal defenses to survive a motion under Washington's anti-SLAPP law.

UPEPA requires the court dismiss all or part of a claim if (1) the moving party establishes the chapter applies; or (2) the responding party fails to establish, under one of the enumerated exemptions, that the chapter does not apply; and either:

> (i) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or
>
> (ii) The moving party establishes that:
>
> > (A) The responding party failed to state a cause of action upon which relief can be granted; or
> >
> > (B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

RCW 4.105.060(1)(c) (emphasis added). The Washington Supreme Court has not addressed whether, under RCW 4.105.060(1)(c), a prima facie claim for false light requires a showing that the statement or publication at issue is *non-privileged*. However, courts interpreting similar state anti-SLAPP statutes have consistently held that a responding party must overcome demonstrable privileges to defeat an anti-SLAPP motion.

Like Washington's UPEPA statute, a party moving to strike under California's anti-SLAPP law is required, as an initial matter, to demonstrate the applicability of that statute. *See Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016). Next, the burden shifts to the non-moving party to make "a prima facie factual showing sufficient to sustain a favorable judgment." *Id.* at 608. California's Supreme Court has held that an applicable "privilege is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." *Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006); *see also Argentieri v. Zuckerberg*, 214 Cal. Rptr. 3d 358, 372 (Cal. Ct.

App. 2017) (affirming grant of anti-SLAPP motion to strike where fair report privilege applied to the challenged statements, "foreclos[ing] plaintiff from showing a probability of prevailing on the merits"); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 357 (Cal. Ct. App. 2004) (noting the anti-SLAPP statute "contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to constitutional defenses").

Courts in the District of Columbia also require SLAPP plaintiffs to contend with facially applicable defenses to overcome their burden under the anti-SLAPP statute. Under D.C. law, if the defendant shows that the anti-SLAPP statute applies, the court will grant dismissal unless the plaintiff demonstrates that the claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). In considering a special motion to dismiss under D.C.'s anti-SLAPP law, the court "evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the

evidence that has been produced or proffered in connection with the motion." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1232 (D.C. 2016), *as amended* (Dec. 13, 2018). The court considers both "the underlying claim and related defenses and privileges." *Id.* at 1236; *see also Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 740 (D.C. 2021) (requiring "the plaintiff to make, and the court to evaluate, a proffer of evidence supporting the well-pled claim and overcoming any defenses asserted against it"). In *Bronner*, the court noted that an anti-SLAPP motion "is essentially an expedited summary judgment motion, albeit with procedural differences, and summary judgment is appropriate when a claim is legally insufficient for any reason, including the defenses that may be raised against it." 259 A.3d at 740–41. Requiring a plaintiff to overcome applicable First Amendment defenses "achieves the Anti–SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles." *Mann*, 150 A.3d at 1232–33.

Similarly, in the second phase of the UPEPA analysis, "the court determines if the responding party has a viable cause of action from a prima-facie perspective." UPEPA Comments at 3. As explained in the comments to UPEPA, anti-SLAPP laws "do not insulate defendants from any liability for claims arising from protected rights of petition or speech. [They] only provide[] a procedure for weeding out, at an early stage, *meritless claims* arising from protected activity." *Id.* at 18 (citing *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (alterations in original) (emphasis added)). The crux of RCW 4.105.060(1)(c) is determining whether a plaintiff has a facially tenable claim that will not be defeated by applicable defenses or privileges. But if a privilege applies as a matter of law, the claim is meritless—exactly the type of claim UPEPA aims to "weed out."

Amici urge this Court to hold that Jha must make a prima facie case that would overcome Khan's substantive legal defenses as part of his showing under RCW 4.105.060(1)(c). Washington would become an outlier if this Court were to adopt the lower court's view that a plaintiff bears no burden to

defeat applicable privileges or defenses raised by the defendant to survive an anti-SLAPP motion.

B. Allowing Parties to Easily Amend Pleadings Once a UPEPA Motion has been Filed Would Undermine the Act's Purpose.

Per RCW 4.105.030, upon filing of an anti-SLAPP motion, the court automatically halts discovery and all other proceedings until it rules on the motion. *See* RCW 4.105.030. This provision is meant to prevent SLAPP defendants from being needlessly saddled with the burdens and expense of civil discovery and thereby lessen the chilling effect that SLAPPs pose to participants in public discourse. During the stay, the court "for good cause may hear and rule on: [a] motion unrelated to the [UPEPA] motion." *See* RCW 4.105.030(7). The Superior Court twice lifted the mandatory stay, granting Jha's Motion for Leave to File Motion for Leave to File Second Amended Complaint on February 8, 2022, and Jha's Motion for Leave to File Second Amended Complaint on March 2, 2022.

UPEPA's stay provision must be consistently and strictly applied to prevent plaintiffs from easily amending their complaints while an anti-SLAPP motion is pending. If it is not,

SLAPP plaintiffs will seize the opportunity to repeatedly seek to amend pleadings, thereby raising the cost of litigation for the targets of their meritless lawsuits and circumventing the protections that UPEPA is intended to provide.

1. Powerful plaintiffs use SLAPPs to punish and chill protected speech, and excessive motions and amendments increase litigation costs.

The practice of amending complaints to cause delay and increase legal costs is common among SLAPP plaintiffs. A recent case in the U.S. District Court for the District of Columbia is illustrative. In March 2020, former congressman Devin Nunes filed a $250 million lawsuit accusing the Washington Post of defamation per se for allegedly implying that he lied to former President Trump. In May 2020, the case was transferred to the District Court for the District of Columbia, where the Post promptly filed a motion to dismiss for failure to state a claim. *See Nunes v. WP Co. LLC*, 513 F. Supp. 3d 1, 4 (D.D.C. 2020), *aff'd*, No. 20-7121, 2022 WL 997826 (D.C. Cir. Apr. 1, 2022). Four months later—while the motion to dismiss was still pending—Nunes sought to amend the complaint to, *inter alia*, "add a new false light invasion of

privacy claim." *Id.* at 5. The court denied Nunes' motion to amend, stating that "the Amended Complaint does nothing to address Plaintiff's inability to plead actual malice. Instead, it repeats the same litany of conclusory or otherwise insufficient allegations." *Id.* at 9.

In 2016, a pet-sitting company sued two customers in small-claims court for leaving a one-star Yelp review of the company claiming the assigned pet-sitter had overfed their fish. *See Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 WL 5109341, at *1 (Tex. App. Nov. 6, 2017). The couple filed an anti-SLAPP motion, but after the lawsuit received broad coverage in the media, the company dismissed its small-claims proceeding and filed a new complaint in state court alleging $1 million in damages due to alleged harm the broader media attention purportedly caused its business. *See id.* at *2. The state court quickly dismissed the lawsuit under Texas' anti-SLAPP law. Without it, the defendants could have been tied up in court for years.

And in another 2016 case, logging giant Resolute Forest Products filed a multi-million dollar lawsuit against several

Greenpeace entities (among other defendants) over their campaign to raise awareness about what they viewed as Resolute's destructive logging practices. Resolute alleged violations of the Racketeer Influenced and Corrupt Organizations Act and various state laws, including defamation. *See* Order Granting Motions for Attorney's Fees, *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-02824 (N.D. Cal. Apr. 22, 2020), ECF No. 314 (the "2020 Order"). In 2017, the court granted defendants' motions to dismiss Resolute's initial complaint. *See* Order Granting In Part And Denying In Part Motions To Dismiss And Strike, *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-02824 (N.D. Cal. Jan. 22, 2019), ECF No. 246. In November 2017, Resolute filed an amended complaint, and defendants renewed their motions to dismiss and strike. *See id.* at 1. Despite a near entirety of the lawsuit being dismissed per those motions in January 2019, *see id.* at 1, 34, Resolute continued to litigate, *see, e.g.*, 2020 Order, notwithstanding an order to reimburse defendants almost $816,000 in attorney's fees and costs under California's anti-SLAPP law, a tactic Greenpeace described as "an attempt to

drain Greenpeace resources and distract the organization from other valuable work." *See* Valentina Stackl, *Judge Orders Resolute Forest Products to Pay Almost 1 Million Dollars to Greenpeace*, Greenpeace (Apr. 23, 2020), available at https://perma.cc/JN25-GZCV.

2. Allowing plaintiffs to amend complaints following the filing of an anti-SLAPP motion—without a showing of good cause in accord with the Legislature's intent—is not authorized by RCW 4.105.030.

Washington's anti-SLAPP law requires a stay of proceedings while a UPEPA motion is pending, with few exceptions. This provision must be robustly enforced to shield defendants from unnecessary litigation expenses and provide a meaningful remedy to meritless suits.

Under the plain language of Washington's anti-SLAPP law, once a special motion has been filed, a showing of good cause is required for a plaintiff to amend. RCW 4.105.030. The stay remains in effect until the court rules on the special motion, and the moving party's appeal is exhausted. *See* RCW 4.105.030 (2).

The only exemption relevant to this appeal is RCW 4.105.030 (7), which states that on a party's motion and "for good cause," the court may hear and rule on "[a] motion unrelated to the [anti-SLAPP] motion under RCW 4.105.020." *Id*. This provision should be read in concert with RCW 4.105.020(1), which states:

> Prior to filing a special motion for expedited relief under subsection (2) of this section, the moving party shall provide written notice to the responding party of its intent to file the motion at least 14 days prior to filing the motion. *During that time, the responding party may withdraw or amend the pleading in accordance with applicable court rules*, but shall otherwise comply with the stay obligations listed in RCW 4.105.030.

RCW 4.105.020 (1) (emphasis added). All provisions "must be broadly construed and applied to protect the exercise of the right of freedom of speech." RCW 4.105.901.

Together, RCW 4.105.020 and RCW 4.105.030 announce a clear rule: providing notice of intent to move for expedited relief under the anti-SLAPP statute triggers a mandatory stay, which creates (at minimum) a 14-day window during which a "responding party may withdraw or amend the pleading in accordance with applicable court rules," RCW

4.105.020(1)—including CR 15(a)'s mandate that "leave [to amend] shall be freely given when justice so requires." Upon filing of the motion for expedited relief, the notification window closes, and a stay is then in effect as to "[a]ll other proceedings between the moving party and responding party." RCW 4.105.030 (1)(a). After the UPEPA motion has been filed, a party may only seek leave to lift the stay and amend a pleading upon a showing of "good cause." RCW 4.105.030 (7).

This case is the first to ask a Washington appellate court to construe the state's new anti-SLAPP law, thus there is no binding precedent interpreting the statute. However, in interpreting the stay provision of Washington's prior anti-SLAPP statute, Washington appellate courts took a similar approach.[3] The Court's analysis in *Henne v. City of Yakima* is informative. There, following defendant's filing of a motion to strike under Washington's 2010 anti-SLAPP statute, the plaintiff moved to amend his complaint under CR 15 to

[3] That statute provided: "All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section." RCW § 4.24.525(5)(c) (2010), *repealed by* RCW 4.105 *et seq.*

eliminate the protected activity as a basis for the claims, and thus strike defendant's motion as moot. *See* 177 Wn. App. 583, 586, 313 P.3d 1188 (2013), *rev'd on other grounds*, 182 Wn.2d 447, 341 P.3d 284 (2015). The Court granted plaintiff's motion, stating that "[a]bsent prejudice, dilatory practice, or undue delay, [plaintiff] had a right to amend his complaint while the anti-SLAPP motion was pending." *Id.* at 588. Yet, the court emphasized:

> A different situation might be presented if [defendant] had notified [plaintiff's] counsel that the claims violated the anti-SLAPP statute, had warned that a motion would be filed if [plaintiff] did not voluntarily amend his complaint, and had given him a reasonable amount of time to make that amendment and yet [plaintiff] had failed to take action—thereby making it necessary for the [defendant] to prepare a motion.

Id. The notice window in Washington's newly enacted anti-SLAPP statute does just that—it provides plaintiffs an opportunity to resolve or amend SLAPP claims before an anti-SLAPP motion is filed. Outside of that window, plaintiffs must make a showing of "good cause" to amend their pleadings.

Courts should vigorously apply the good cause requirement in light of UPEPA's purpose and the Legislature's

command that the chapter "must be broadly construed and applied to protect the exercise of [First Amendment rights]." RCW 4.105.901. In enacting Washington's anti-SLAPP statute, the Legislature sought to "protect[] a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the motion and the moving party's appellate rights with respect to the motion are exhausted." *See* UPEPA Comments at 13.

This provision is also meant to prevent a SLAPP plaintiff from advancing an entirely new theory (and abandoning unsuccessful claims) to evade fee-recovery provisions intended to reimburse a prevailing defendant for expenses incurred in extricating themselves from a baseless lawsuit. That purpose is thwarted if a plaintiff can easily amend their complaint after an anti-SLAPP motion has been filed to circumvent the application of the statute or its mandatory fee shifting provision. Indeed, the decision below invites SLAPP plaintiffs who cannot meet their burden under the anti-SLAPP statute "to go back to the drawing board with a second opportunity to disguise the

vexatious nature of the suit through more artful pleading." *Simmons v. Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397, 401 (Cal. Ct. App. 2001). Allowing such amendments would enable a plaintiff to achieve indirectly what the Act prohibits directly: forcing a defendant to engage in expensive, protracted litigation before meritless claims are dismissed. *Id.*

Amici urge this Court to hold that a plaintiff facing an anti-SLAPP motion cannot move to amend without "good cause," and that this provision "must be broadly construed and applied to protect the exercise of the right of freedom of speech." RCW 4.105.901.

IV. CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse.

This document contains 4,816, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of August, 2022.

Respectfully submitted,

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The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, including the following:

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Comments:

Amicus Brief of Reporters Committee for Freedom of the Press and 18 Media Organizations

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