No. 97734-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROGER LEISHMAN,

PLAINTIFF/RESPONDENT,

V.

OGDEN MURPHY WALLACE PLLC AND PATRICK PEARCE,

DEFENDANTS/PETITIONERS.

# BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves interpretation of RCW 4.24.510, which comprises part of Washington's anti-SLAPP statutes (SLAPP refers to "strategic lawsuits against public participation"). Washington's anti-SLAPP statutes were created to protect communications to the government of public interest and to protect the right to petition. The issue here is whether a contractor hired by the state to perform an internal employee discrimination investigation should be granted immunity from suit by Washington's anti-SLAPP statutes. Granting immunity here would conflict with the statute's important purposes and should be rejected.

Anti-SLAPP statutes generally were created to protect whistleblowers and those who petition the government for redress of grievances from intimidation from the threat of costly lawsuits. Laws of 1989 Chapter 234, Sec. 1; RCW 4.24.500. Anti-SLAPP statutes were not created to immunize reports or investigations made on behalf of the government, pursuant to a government contract.

Certainly, consistent with the statute's purpose, Washington's anti-SLAPP statutes should be construed broadly so as to cover any "person who communicates a complaint or information to any branch or agency of federal, state, or local government." RCW 4.24.510. However, in

discussing this statute, this Court has recognized the term "person" is ambiguous here and "its meaning varies within the RCW." *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn. 2d 467, 473, 238 P.3d 1107 (2010).[1] Thus, in each statute in which the term "person" is used, its meaning must be determined in light of the purpose to be served by the statute at issue. *Id*.

In this case, it is antithetical to the purposes of Washington's anti-SLAPP statute to read "person" to immunize investigators who are performing the work of a government agency. The legislative history of Washington's anti-SLAPP statutes and Washington case law show that the purpose of RCW 4.24.510 is to protect the right to petition, yet the history of petitioning has never included reports or investigations made on behalf of the government. As the Court of Appeals recognized here, *Leishman v. Ogden Murphy Wallace, PLLC*, 10 Wn. App. 2d 826, 835-36, 451 P.3d 1101 (2019), *review granted*, 194 Wn.2d 1023, 456 P.3d 397 (2020), Washington courts have avoided reading RCW 4.24.510 to immunize government action:

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[1] See also, *Arup Laboratories v. State Dept. of Revenue*, ___ Wn.App. ___, ___ P.3d ___ (2020) (http://www.courts.wa.gov/opinions/pdf/D2%2052349-3-II%20Published%20Opinion.pdf 4/14/20) (a tax case involving a claim that an entity was not a "person" because it was an arm of a state, in which the Court explains that the word "person" must be interpreted in light of the particular factual and statutory context before the Court.)

> When a government contractor is hired to conduct an internal investigation and report its findings to the government agency, it is not exercising its right to petition the government on its own behalf, advocating to government, or attempting to have effect on government decision making. Instead, the government contractor is performing the work of a government agency.

The Court of Appeals properly identified 1) that Defendants were performing an investigation and writing a report that the government, itself, would otherwise have conducted; and 2) that the claims at issue arose from the contents of that report. Expanding the statute to immunize the Defendants in this context is contrary to the history, purpose, and spirit of the right to petition and the protections that anti-SLAPP statutes offer. Under these circumstances, the immunity of RCW 4.24.510 does not apply.

## II. INTEREST OF AMICUS ACLU-WA

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonprofit, nonpartisan organization with over 135,000 members and supporters that is dedicated to constitutional principles of liberty and equality. ACLU-WA has long been committed to the defense and preservation of civil liberties, including the right to free speech and the right to petition the government. ACLU-WA also believes that civil liberties are promoted when government entities are accountable for their conduct.

ACLU-WA supports laws that protect individuals who are exercising their right to petition, including laws that protect them from SLAPP suits. ACLU-WA does not support expanding immunity for those who are performing the work of the government on behalf of the government. If individuals and organizations were to gain anti-SLAPP protection pursuant to RCW 4.24.510 for the work they perform on behalf of the government, the policy underlying the anti-SLAPP laws would be undermined and government accountability would diminish, all to the detriment of the civil liberties that ACLU-WA works to protect.

## III. ARGUMENT

### A. The Purpose of Washington's Anti-SLAPP Statute is to Protect the Right to Petition for Washingtonians, Not to Grant Immunity for Government Reports of the Type in Issue Here.

The scope of RCW 4.24.510 must be informed by the history and purpose of anti-SLAPP laws. In the most common type of SLAPP, a private business enterprise sues a public interest group or individuals who make critical comments to the government regarding the enterprise, in order for the enterprise to disrupt the public interest activity and place a chill on future participation in political activity. Michael Eric Johnston, A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation," 38 Gonz.

L. Rev. 263, 264 (2002-03). The ripple effect of SLAPP suits is enormous, not only because of their chilling effect on the target's constitutional right to petition the government, but also because a SLAPP suit has the effect of deterring other persons from speaking out or reporting on issues of public importance or from whistleblowing in the future. *Id*. at 266.

Recognizing the harm of SLAPP suits, Washington passed the United States' first modern anti-SLAPP legislation in 1989, the statute in issue in this case - RCW 4.24.510. The statute was passed in response to the efforts of a young Washington mother named Brenda Hill who reported a real estate company's unpaid taxes to the government and was ultimately rendered bankrupt due to the real estate company's legal retaliation and harassment. Tom Wyrwich, A Cure for a "Public Concern": Washington's New Anti-SLAPP Law, 86 Wash. L. Rev. 663, 669 (2011). The Washington State Legislature introduced Laws of 1989 Chapter 234, Sec. 2[2] (which became RCW 4.24.510 - the "Brenda Hill Bill") to provide immunity from civil liability for claims based on good-faith communication with the government regarding any matter "reasonably of concern." *Id*. The legislation originally lacked any reference to the constitutional issues implicated by SLAPP litigation. *See* RCW 4.24.500.

[2] http://leg.wa.gov/CodeReviser/documents/sessionlaw/1989c234.pdf?cite=1989%20c%20234%20%C2%A7%202 .

However, the Washington statute noted the Legislature's concern that the threat of lawsuits would deter individuals from reporting wrongful activity to the appropriate authorities.[3]

In 2002 the Legislature amended RCW 4.24.510 in several ways. Significantly, along with changes made to 4.24.510, the Legislature adopted a new section containing a strong policy statement recognizing the constitutional threat of SLAPP litigation:

> Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.
>
> Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

[3] "The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies." Laws of 1989 Chapter 234, Sec. 1; RCW 4.24.500.

Laws of 2002, Ch. 232, sec. 1, (RCW 4.24.510 was amended as Sec. 2 of the same 2002 bill).

The version of RCW 4.24.510 amended in the 2002 bill provided much greater protection to SLAPP targets because it added that the target of the SLAPP enjoys a near absolute statutory immunity. Johnston, *supra*, 38 Gonz. L. Rev. at 286. The 2002 amendment deleted the "good faith" requirement and also authorized the target of a SLAPP to receive $10,000 in damages. Laws of 2002, Ch. 232, sec. 2.[4] The changes converted section 4.24.510 from a whistleblower statute to a true anti-SLAPP statute. *Id.*

Consistent with this legislative history and with the history of the right to petition protected by RCW 4.24.510, Washington's anti-SLAPP statutes should be construed broadly so as to cover any "person who communicates a complaint or information to any branch or agency of federal, state, or local government" that is "aimed at procuring favorable government action, result, product, or outcome." Laws of 2002, Ch. 232, sec. 1 and 2.[5] It should not matter, for example, whether the speaker is

[4] http://lawfilesext.leg.wa.gov/biennium/200102/Pdf/Bills/Session%20Laws/House/2699S.SL.pdf?cite=2002%20c%20232%20%C2%A7%202

[5] http://lawfilesext.leg.wa.gov/biennium/200102/Pdf/Bills/Session%20Laws/House/2699S.SL.pdf?cite=2002%20c%20232%20%C2%A7%202

petitioning for pending legislation or is providing information to law enforcement.[6] Likewise, neither the content of the speech or the source of the information conveyed should affect these protections. Nor should it matter if the speaker is reimbursed by others for her petitioning activity. Yet, even though the statute should be broadly construed, it does not extend immunity to defendants here. It would make no sense in light of the petitioning and public participation purposes of the statute to immunize investigators who are performing the work of a government agency. The history of petitioning has never contemplated nor included reports or investigations made on behalf of the government, for the government, under circumstances like those here.

The right to petition one's king or government was specifically recognized in the Magna Carta and was later incorporated into the Petition of Right of 1628 in England, which embodied the personal rights that have become central to the Anglo-American system. Norman B. Smith, "Shall

[6] Amicus does not agree with Respondent Leishman's argument that the anti-SLAPP statute is inapplicable where the "complaint or information" communicated to the government comes originally from the government, itself. Leishman Opening Brief at. 24-25. In fact, many petitions to the government involve quoting data or information that comes from government sources; this form of advocacy must be protected. Moreover, this standard would create a factual issue in many SLAPP suits that requires costly discovery and motions practice in connection with a motion to dismiss. These are precisely the costs that the anti-SLAPP statute is intended to avoid.

Make No Law Abridging…": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. Cin. L. Rev. 1153, 1154-58 (1986). The right to petition government in the United States was expressly outlined in both pre-Revolutionary declarations and pre-union state constitutions. *Id*. at 1173. The Stamp Act Congress of 1765 stated that "it is the right of the British subjects in these colonies to petition the King or either House of Parliament." *Id*. "In 1774, the Declaration and Resolves of the First Continental Congress stated that the colonists 'have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.'" *Id*. at 1174.

The purpose of petitioning garnered from its history shows that the Defendants' conduct here is distinguishable; the petitioning protected by RCW 4.24.510 is the means by which peoples' problems that need governmental response are brought to the attention of the government. *Id*. at 1178-80.[7] "[T]he right to petition is generally concerned with expression

[7] Since Art. 1, Section 4 of the Washington State Constitution and the right to petition in the First Amendment to the U.S. Constitution have similar language, the history and purpose of the federal constitution are relevant to the state constitution provision. Arthur S. Beardsley, *Sources of the Washington Constitution, in State of Washington*, 2011-2012 Legislative Manual at 389 (https://lib.law.uw.edu/waconst/sources/LegManBeardsley.pdf ). But because the right to petition has its own section in Wash. Const. Art. 1, sec. 4, it may provide even greater protection than the First Amendment.

directed to the government seeking redress of a grievance." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388, 131 S. Ct. 2488, 2495, 180 L. Ed. 2d 408 (2011).

In contrast, Defendants' report to the Attorney General's office was not an expression seeking a redress of a grievance, nor "public participation," as Defendants were merely investigating and writing a report about an internal investigation of a workplace dispute, pursuant to a contract with and on behalf of the Attorney General's office. Petitioning has not historically included investigating or writing reports of this kind. While the right to petition should be broadly held, it should not be contorted beyond its original purpose to grant immunity here.

### B. Washington Courts Have Refused to Expand Government Immunity when Interpreting the Purpose of Anti-SLAPP statutes.

Courts in Washington have recognized that anti-SLAPP laws were created to protect speakers against speech-chilling lawsuits, not to extend those protections to government entities and government speech. *Segaline v. State, supra,* 169 Wn. 2d at 473 ("A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect."); *Henne v. City of Yakima*, 182 Wn. 2d 447, 449–50, 341 P.3d 284, 285

(2015), as corrected (Apr. 7, 2015) ("We hold that a governmental entity like Yakima cannot take advantage of the anti-SLAPP statutes at least where, as here, the challenged lawsuit is not based on the government's own communicative activity.").

The Court of Appeals' decision follows logically and directly from this Court's decisions in these cases. In particular, *Segaline* held that a government agency that reports information to another government agency may not claim immunity under RCW 4.24.510. 169 Wn.2d at 473-74.[8] A plurality of Justices in *Segaline* reasoned that "[t]he purpose of [RCW 4.24.510] is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution." *Id*. at 473. Since the government agency defendant there had no free speech rights to protect, the plurality needed to go no further to resolve that case. *Id*.

To have immunity under Washington's anti-SLAPP statute, the cause of action itself must be based on an act in furtherance of the right of free speech. *See Aronson v. Dog Eat Dog Films, Inc*., 738 F.Supp.2d 1104, 1110-11 (W.D. Wash. 2010). The critical issue here is not that Defendants

[8] The State defendant in *Segaline*, like Defendants here, relied on unrelated statutes and authority that broadly construed the meaning of "person" in other contexts. *Id*.; *Cf*. Defendants' Suppl. Brief at 6-8.

were paid, as Defendants' supplemental brief repeatedly states, but that Defendants were not exercising their "rights under the First Amendment and article I, section 5 of the Washington State Constitution" by writing a report on behalf of the government.

To evade this point, Defendants in their supplemental brief mischaracterize the Court of Appeals' holding by alleging it limits the protections of RCW 4.24.510 to "private citizen whistleblowers" who "petition the government on [their] own behalf." Defendants' Suppl. Brief at 3, citing *Leishman*, 10 Wn. App. 2d at 830, 836. The Court of Appeals instead, consistent with the statute's purpose and history, as noted above, held that "RCW 4.24.510 was meant to protect a citizen's right to advocate to government agencies and public participation in governance. Insulating government contractors from civil liability for injury caused by their contracted submissions to government agencies does not meet the intent behind RCW 4.24.510. When a government contractor is hired to conduct an internal investigation and report its findings to the government agency, it is not exercising its right to petition the government on its own behalf, advocating to government, or attempting to have effect on government decision making". In these circumstances, government contractors "are communicating to a government agency under the scope of their contract," and "are not 'persons' entitled to protection under RCW

4.24.510." *Leishman*, 10 Wn.App. 2d at 835-36. Contrary to Defendants' supplemental brief, this holding does not depart from Washington case law applying the statute to a variety of persons including individuals, nonprofit groups, and corporate entities.

The Court of Appeals does not imply that Defendants have no right to petition or speech in other contexts; nor is the decision based on the sole reason that they were paid by the government. Government workers, who are also paid by the government, may exercise their right to petition when expressing concerns about their conditions of employment or mismanagement, as Leishman did for example. *Castello v. City of Seattle*, No. C10-1457MJP, 2010 WL 4857022, at *9 (W.D. Wash. Nov. 22, 2010) (anti-SLAPP law protects paramedics and firefighters acting on their own behalf who made complaints about workplace conditions to KOMO news and to superiors). Government contractors may exercise these rights in other contexts as well, and denying RCW 4.24.510 immunity here does not affect those rights. But it logically follows that third parties writing reports on the government's behalf, under circumstances like those here, should not be granted anti-SLAPP immunity for those reports.

Furthermore, a foundational principle of Washington's anti-SLAPP statutes is to prevent "intimidation" of Washingtonians who are

engaged in "public participation" and petitioning activity. Organizations and individuals conducting investigations on behalf of the government pursuant to government contracts are unlikely to be vulnerable to "the intimidation factor" in the same way as individuals or private organizations petitioning the government. *Segaline*, at 482. (Madsen, concurring).

Government contractors communicate with the government in the context of a commercial transaction, which allows them to allocate the risk of litigation in their contract or through insurance (as Defendants apparently did here). Leishman Suppl Brief at 13. In any event, there is no indication whatsoever that the Legislature was concerned about protecting government contractors in the anti-SLAPP statute. In contrast, the Legislature expressly found that individuals, organizations, whistleblowers, and government employees engaging in public participation – e.g., speaking out to influence government decisions as in the classic SLAPP context or raising complaints regarding government conduct, including regarding workplace discrimination -- require the immunity from lawsuits provided by RCW 4.24.510 to protect their right to petition for redress of grievances.

> SLAPP suits are designed to 'intimidate the exercise of rights under the First Amendment and article I, section 5 of the

> Washington State Constitution. This intimidation factor does not, in my view, affect government agencies in the way that it does private individuals and organizations ….'

*Segaline*, 169 Wn.2d at 482 (Madsen, concurring, referring to Laws of 2002, ch. 232, § 1.

In fact, the *Segaline* concurrence expressly anticipated the issue presented here. There, Justice Madsen relied in part on *Kobrin v. Gastfriend*, 443 Mass. 327, 332, 821 N.E.2d 60 (2005), in which the Massachusetts Supreme Court held that Massachusetts' anti-SLAPP statute "did not apply to the communications of one hired by a government agency made within the context of that employment." Defendants argue that the Massachusetts statute is different, but Justice Madsen considered the differences in language between the Massachusetts statute and RCW 4.24.510 and concluded that any differences were formal rather than substantive. "[T]he Massachusetts statute explicitly states it applies with respect to suits against a party based on the party's exercise of the right to petition, while this purpose is not explicit in RCW 4.24.510 but rather is found in the purpose clause of the amending legislation." *Segaline*, at 483; *cf.* Defendants' Supplemental Brief at 11-12.

The Court of Appeals correctly applied these principles to the issue in this case. The critical issue here is not that Defendants were paid, but that Defendants were performing work on behalf of the government

pursuant to a contract with the government. Defendants were thus not exercising "rights under the First Amendment and article I, section 5 of the Washington State Constitution." Nor are those in Defendants' position likely to be vulnerable to "the intimidation factor" in the same way as individuals or private organizations petitioning the government. *Segaline*, 169 Wn.2d at 482 (Madsen, concurring). Both the plurality opinion and the concurrence in *Segaline* lead to the result reflected in the Court of Appeals decision here.

### C. Granting Defendants Immunity Here would have Significantly Harmful Policy Effects.

Under this Court's precedent including *Segaline* and *Henne*, *supra*, if the state itself had engaged in the conduct at issue here, which it easily could have done, it could not invoke anti-SLAPP immunity. But, immunizing government contractors from claims for an investigation conducted on behalf of the government would create a harmful loophole. This disparity would allow the State to utilize an outside contractor to give the agency "cover" for its decision, while at the same time the contractor would be immunized from any claims by those individuals who were harmed thereby. This would insulate the State's decisions from judicial review and eliminate government accountability.

It is also important to consider the consequences of a contrary decision. If, as OMW argues, RCW 4.24.510 were held to cover government contractors in the performance of their contracts, those contractors would be immune from any "claims" related to their report. This would bar claims by the government, itself, based on (for example) fraud or breach of contract. This type of immunity is completely unrelated to the purpose of the anti-SLAPP statute. *Segaline,* 169 Wn.2d at 473. The Court should reject an interpretation that would lead to this absurd result.

## IV. CONCLUSION

There are ample reasons the Court of Appeals decision should be affirmed. While the protections of RCW 4.24.510 are to be broadly construed outside of the narrow exception applicable here, the statute's immunity does not extend to a government contractor whose "communication" involves the work of the government itself, under the circumstances present here.

Respectfully submitted this 24th day of April, 2020.

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