STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Lawrence Leiendecker, and
Sinuon Leiendecker,

Plaintiffs,

v.

Asian Women United of Minnesota, et al.,

Defendants.

Case No. 27-CV-12-7021
Case Type: Other Civil

Assigned to: Judge Bartsh

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR DECLARATORY JUDGMENT, TO VACATE THE COURT'S ANTI-SLAPP ORDER, AND TO ENJOIN FURTHER ENFORCEMENT OF MINN. STAT. § 554.02.

INTRODUCTION

Recently, the Washington Supreme Court took a meaningful step toward preserving the freedoms upon which America was founded: it struck down Washington's "anti-SLAPP" statute because it facially violated that state's constitutionally safeguarded jury-trial right.[1] In doing so, the Washington Supreme Court noted the significant similarities between its anti-SLAPP law and Minnesota's anti-SLAPP provisions. Plaintiffs ask this Court to rule in similar fashion by declaring that Minn. Stat. § 554.02 not only offends the jury-trial right, but is also repugnant to other federal and state constitutionally-guaranteed rights including speech, petition, equal protection, and separation of powers.

Plaintiffs contend that section 554.02 is unconstitutional, both facially and as applied to them, because it: (1) is a content-based restriction of First Amendment activity; (2) is an unconstitutional prior restraint; (3) is not narrowly tailored to further a compelling government interest; (4) is facially overbroad; (5) violates equal protection rights; (6) violates the jury-trial right; and (7) violates separation of powers. Accordingly, Plaintiffs request that the Court declare section 554.02 unconstitutional, vacate the portion of the Court's October 1, 2012 Order

[1] *Davis v. Cox*, ___ P.3d ___, 2015 WL 3413375 (Wash. May 28, 2015).

applying the statute,[2] thereby dissolving the anti-SLAPP injunction and, because section 554.02 is facially overbroad, permanently enjoin its further enforcement in Minnesota. The Plaintiffs also ask that the Court give accelerated consideration to their motion (or stay the anti-SLAPP injunction), to obviate further delay-related First Amendment harm, as constitutional violations, however brief, are unquestionably irreparable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

PROCEDURAL BACKGROUND

As the detailed Complaint shows, the facts in this case begin over a decade ago and involve two underlying lawsuits maliciously prosecuted against the Plaintiffs ("Leiendeckers") beginning in 2007 and 2008, respectively, with each being resolved in both of the Leiendeckers' favor in 2011. The underlying cases giving rise to this litigation can be reduced to the following simple summary. Mr. Leiendecker was maliciously sued for legal malpractice by Defendant Asian Women United of Minnesota ("AWUM"). AWUM, through its various constituent/defendants, claimed that he was never the corporation's lawyer – *when he was* – something that AWUM admitted to in prior litigation. (Compl. ¶ 335.) This legally and factually untenable suit was brought despite Mr. Leiendecker's pro bono advice to AWUM having been vindicated by a court ruling years earlier. (*Id.* ¶¶ 46, 62, 113-14, 335-36.)

AWUM, through its various constituent/defendants, also maliciously sued Ms. Leiendecker for allegedly taking unauthorized salary for five years as AWUM's executive director – *when she didn't* – something that AWUM had admitted to through its own certified public account, independent auditor, and publicly filed financial documents. (*Id.* ¶¶ 54-59, 145, 176-85.) Due to AWUM's and other defendants' repeated falsehoods, each of the lawsuits survived for years until the cases were ultimately dismissed in the Leiendeckers' favor in 2011. (*E.g., id.* ¶ 234-35).[3] To redress their grievances in having been maliciously prosecuted, the

[2] *See* Dist. Ct. Oct. 1 2012 Order/Mem. at 12; *see Leiendecker v. Asian Women United of Minn*., 2014 WL 7011061 (Minn. App. Dec. 15, 2014)(affirming district court's application of section 554.02's procedural mechanism triggering Plaintiffs' responsive burden), *rev. denied* (Feb. 25, 2015).

[3] A summary of the particular facts giving rise to this case was previously presented to the Minnesota Supreme Court and is attached for convenience as Exhibit A. (Aff. of Robert Hill, Ex. A.).

Leiendeckers sued AWUM, its board of directors ("BODs") and a number of their constituents for various claims, including malicious prosecution. As part of their motions to dismiss, AWUM invoked Minnesota's anti-SLAPP law, which the BODs joined. This Court refused to dismiss the case under the anti-SLAPP provisions. (Dist. Ct. Oct. 1, 2012 Order/Mem. ¶ 3, p.13-14.)

The Leiendeckers prevailed because of the then binding construction of the anti-SLAPP statutes by the Minnesota Court of Appeals that permitted clear and convincing factual allegations to meet section 554.02's responsive evidentiary burden if an anti-SLAPP motion was brought as part of a Rule 12 motion.[4] On appeal, the Leiendeckers again relied on binding precedent that held: "Minn. Stat. §§ 554.01-.045 must be interpreted consistent with Minn. Stat. § 554.05." *Middle-Snake-Tamarac Watershed v. Stengrim,* 784 N.W.2d 834, 840 (Minn. 2010). Banking on this, they concluded and put forward that section 554.05 operated as a constitutional avoidance proviso that prevented courts from construing section 554.02 in a way that would violate constitutional rights. *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 232 (Minn. 2014).[5] The Minnesota Supreme Court; declining to address any constitutional issues, *id.*; disagreed that section 554.05 changed how it was bound to construe section 554.02 by its plain language. *Id.* at 232-33. The Court abrogated the court of appeals' construction of section 554.02 that had allowed the Leiendeckers to prevail and reversed the District Court.[6]

The matter was ultimately remanded to the District Court for application of the statute under its new construction that requires plaintiffs to demonstrate through "clear and convincing" evidence (without the benefit of full and complete discovery, normal Rule 12 and 56 inferences, or a trial by jury) that moving defendants are not entitled to qualified immunity under section 554.03. Now that section 554.02 has been construed differently, *significantly changing the*

[4] *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc*., 694 N.W.2d 92 (Minn. App. 2005); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. App. 2010). The clear and convincing pleading standard established by these cases explains why the Leiendeckers' Complaint spans 116 pages.

[5] *See* Hill Aff. Ex. B (Plaintiffs' letter to the Minnesota Attorney General explaining the same). Section 554.05 states: "Nothing in this chapter limits or precludes any rights the moving party or responding party may have under any other constitutional, statutory, case, or common law, or rule." Minn. Stat. § 554.05.

[6] No court in this case ever passed on the constitutionality of section 554.02 under its prior interpretation.

Leiendeckers' legal circumstances, they have no choice but to challenge the constitutionality of the statute facially and as applied to them. *See e.g., United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577, 1587 (2010)(stating that the first step in a facial challenge is to construe the challenged statute to determine what it covers).

APPLICABLE STANDARDS

The Minnesota Declaratory Judgments Act gives a court "the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01. "Any person … whose rights … are affected by a statute … may have determined any question of construction arising under the … statute … and obtain a declaration of rights thereunder." *Id*., § 555.02. The Declaratory Judgments Act is remedial, "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." *Id*., § 555.12. The Minnesota Rules of Civil Procedure govern the procedure for obtaining such a declaration. Minn. R. Civ. P. 57.

Under the rules a court may also relieve a party from a judgment, order, or proceeding if the judgment is void, "is no longer equitable that the judgment should have prospective application", or for "[a]ny other reason justifying relief from the operation of the judgment. Minn. R. Civ. P. 60.02(d)-(f). A law repugnant to the Constitution "is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1880). When a litigant contests the constitutionality of a law involving a fundamental right courts "proceed with the understanding that the state bears the burden of establishing the statute's constitutionality." *State by Humphrey v. Casino Mktg. Grp*., 491 N.W.2d 882, 886 (Minn. 1992).

THE ANTI-SLAPP STATUTORY FRAMEWORK

A SLAPP suit is generally defined as a "'Strategic Lawsuit[] Against Public Participation,' initiated with the goal of stopping 'citizens from exercising their political rights or to punish them for having done so…'" *Stengrim*, 784 N.W.2d at 838 (citations omitted). As the label suggests, "anti-SLAPP statutes" were developed to protect citizens and organizations against SLAPP suits. *Id*. at 839. Minnesota's anti-SLAPP provisions, Minn. Stat. §§ 554.01-.05,

operate as a unique burden-shifting procedural framework. *Leiendecker*, 848 N.W.2d at 229; *Stengrim*, 784 N.W.2d at 841. When a defendant moves under Rules 12 or 56 invoking the anti-SLAPP law, the court must immediately stay discovery. Minn. Stat. § 554.02, subd. 2(1). The court then must determine whether the moving defendant has made a "minimal" showing that the plaintiff's claims materially relate to the defendant's public participation activities. *Stengrim*, 784 N.W.2d at 841. After a court determines that the moving defendant has adequately made this showing, the burden then shifts to the plaintiff to provide clear and convincing evidence that the defendant's acts "are not immunized from liability under section 554.03." Minn. Stat. § 554.02, subd. 2(3); *see Leiendecker*, 848 N.W.2d at 233 (construing section 554.02 as requiring actual evidence to be produced). Section 554.03 limits immunity to: "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action [that does not] constitute[] a tort or a violation of a person's constitutional rights." Minn. Stat. § 554.03. The court must dismiss a plaintiff's lawsuit if they are unsuccessful in meeting the imposed burdens. § 554.02, subd. 2(3). As added measures, the anti-SLAPP provisions permit government to intervene and defend the moving defendant, § 554.02, subd. 2(4), and require that if a court dismisses a case under section 554.02 it must award the defendant "reasonable attorney fees and costs associated with the bringing of the motion" § 554.04, subd. 1.

ARGUMENT

I. FIRST AMENDMENT FRAMEWORK.

A. The Right to Petition.

Finding its roots in the Magna Carta (1215), the Petition Clause of the First Amendment protects "the right of the people… to petition the Government for a redress of grievances." U.S. Const. amend. I. Chief Justice Marshall once described the ability to obtain civil redress as the "very essence of civil liberty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 134, 163 (1803). Over the many years since, the United States Supreme Court has made it clear that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights;" *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967); and that it has "a sanctity

and a sanction not permitting dubious intrusions," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Supreme Court's Petition Clause jurisprudence has evolved over recent decades to hold that the Petition Clause safeguards from punishment the right to file and maintain a lawsuit unless it is baseless *and* brought for an improper purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002); *see Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56-61 (1993); *see Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743-44 (1983).

B. Petition & Speech Rights are Inseparable.

Petitioning is a particular form of speech. It is speech directed to a particular audience: the government, some arm of government, or some individual in government. It is also speech with a particular purpose. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. ___, 131 S.Ct. 2488, 2495 (2011)("both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance"); *id*. at 2491 ("[p]etitions are a form of expression, and [those] who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment"); *McDonald v. Smith,* 472 U.S. 479, 482 (1985)(stressing that the right to petition "is an assurance of a particular freedom of expression."). To be sure, the proper petitioning for redress of grievances is protected speech and this is why the same constitutional principles and tests that apply to the Speech Clause are common to the Petition Clause. *See e.g., Borough of Duryea, Pa*., 131 S.Ct. at 2494-95 (applying the "public concern" test developed in Speech Clause cases to Petition Clause claims by public employees). But beyond the pure speech aspects of the Petition Clause, the right also extends to the use of court procedures. *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972)("[t]he right of access to the courts [being] but one aspect of the right of petition" includes the use of "the channels *and procedures* of state and federal . . . courts…." (emphasis added)); *Razorback Ready Mix Concrete Co., Inc. v. Weaver*, 761 F.2d 484, 486 (8th Cir. 1985)(petition right "extends not only to attempts to influence legislative and executive functions but also to 'the use of administrative or judicial processes.'" (citation omitted)); *In re IBP Confidential Bus. Documents Litig*., 755 F.2d 1300, 1310 (8th Cir.

1985)("[t]he right to petition means more than simply the right to communicate directly with the government. It necessarily includes those activities reasonably and normally attendant to effective petitioning.").

C. Minnesota's Anti-SLAPP Chapter Links Free Speech with Petition Rights.

Even though the First Amendment right of petition and access to courts is guaranteed to all Minnesotans by the Due Process Clause of the Fourteenth Amendment; *see, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925); the Minnesota Constitution also guarantees access to courts: "[e]very person is entitled to … obtain justice *freely and without purchase*, completely and without denial, promptly and without delay, conformable to the laws", Minn. Const. art. I, § 8 (emphasis added). Additionally, like the First Amendment to the United States Constitution, the Minnesota Constitution guarantees free speech: "all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." Minn. Const. art. I, § 3. The phrase "on all subjects" necessarily includes petitions to government for redress or favor. In fact, the preamble to the 1994 anti-SLAPP session law links speech directly with the right of petition – expressed therein as "public participation":

> An act relating to free speech; protecting citizens and organizations from civil lawsuits for exercising their rights of public participation in government; proposing coding for new law as Minnesota Statutes, chapter 554.[7]

So, like its federal counterpart, Minnesota's protected speech right is also deemed indispensable to the right to petition courts for redress of grievances.

D. False Speech & Baseless Litigation.

The First Amendment prohibits all government action (including judicial action) that restrains free expression. *See Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961)("regulatory measures… no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."); *see New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)(court action in libel case). This, however, does not mean that constitutional protection of expressive activity is completely inelastic, for it is

[7] Act of May 5, 1994, ch. 566, 1994 Minn. Laws 895.

well-settled that the right to free expression "is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). First Amendment rights may be regulated, but "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Thomas*, 323 U.S. at 527 n.12. Content-based restrictions on speech are considered "presumptively invalid"; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); but "have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar", *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537, 2544 (2012). Defamation is considered one such category of unprotected speech. *Id*. Yet, even though potentially proscribable, a calculated falsehood is not "entirely invisible to the Constitution"; *R.A.V.,* 505 U.S. at 383; unless and until it is actually adjudicated as being unprotected, *see Near v. Minnesota*, 283 U.S. 697, 714 (1931)("the preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false" (citation omitted)).

Three years ago in *Alvarez*, six Justices of the United States Supreme Court agreed that knowing falsehoods are not *categorically* unprotected by the First Amendment. 132 S.Ct. at 2545-46 ("falsity alone may not suffice to bring the speech outside the First Amendment."). Instead, as the plurality explained, First Amendment protection for false statements only gives way, allowing for subsequent punishment, where there is "defamation, fraud, or some other legally cognizable harm associated with a false statement, such as invasion of privacy *or the costs of vexatious litigation*." *Id*. at 2545 (emphasis added). This is consistent with what the Court had said in 1983 in *Bill Johnson's* – a Petition Clause case. There, the Court explained that "[t]he first amendment interests involved in private litigation – compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts – are not advanced when the litigation is based on *intentional* falsehoods or on *knowingly* frivolous claims." 461 U.S. at 743 (emphases added)(citation omitted).

Further linking false statements and baseless litigation together, the Supreme Court in 2002 held in *BE & K* that the right of petition deserves the same "breathing space essential to

[its] fruitful exercise," that is afforded to speech. 536 U.S. at 530-31 (quoting *Gertz v. Robert Welch, Inc*., 418 U. S. 323, 342 (1974)). The Court explained:

> It is at least consistent with these "breathing space" principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose.

Id. at 531 (emphasis in original). This brought the Supreme Court's Petition Clause jurisprudence in lock-step with its Speech Clause decisions. *See e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)("[t]his breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." (emphasis in original)). Just like the Court's defamation decisions holding that false statements causing legally cognizant harm are unprotected only if they are made with a culpable state of mind, *see Sullivan*, 376 U.S. at 280 (scienter); *see Gertz*, 418 U.S. at 350 (fault), the Court acknowledged in *BE & K* that its prior decisions had held that objectively baseless lawsuits are unprotected only if they are "subjectively motivated by an unlawful purpose" (i.e., a culpable state of mind). 536 U.S. at 531; *see also, Sosa v. DIRECTV, Inc*., 437 F.3d 923, 934 (9th Cir. 2006)(the two-part sham "definition over-protects baseless petitions so as to ensure citizens may enjoy the right of access to the courts without fear of prosecution. *BE & K* made this breathing room protection explicit.").

Thus, it should come as no surprise that false speech and baseless litigation are both activities not beyond constitutional protection under the First Amendment unless committed with a culpable state of mind causing legally cognizant injury. Stated somewhat differently, just as speech is protected until proven to be defamation, fraud or "vexatious litigation"; *Alvarez*, 132 S.Ct. at 2545; litigation is protected until proven to be a sham, which is equivalent to vexatious litigation (i.e., malicious prosecution), *see BE & K*, 536 U.S. at 526, 531 (sham litigation is "objectively baseless *and* subjectively motivated by an unlawful purpose" (emphasis in

original)); *see Professional Real Estate Investors*, 508 U.S. at 62 & n.7 (equating "sham litigation" to the tort of malicious prosecution).

Therefore, both Speech and Petition Clauses operate in tandem to safeguard from restraint or punishment the right to bring a lawsuit unless it is proven to be objectively baseless *and* brought for an improper purpose. As will be seen, section 554.02 violates plaintiffs' federal and state guaranteed rights of speech and petition requiring invalidation under both constitutions.

II. SECTION 554.02 VIOLATES THE FIRST AMENDMENT.

A. Section 554.02 is Content-Based.

The First Amendment establishes that "above all else," the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014)(quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Seeing as though section 554.02 is dependent upon what is being said to a court, there can be no real dispute it operates as a content-based restriction on First Amendment activity. The basis for imposition of section 554.02 is an accusation by a plaintiff that calls into question the defendant's public participation activities; that is, an assertion that the defendant's petitioning of government was unlawful, non-genuine, tortious, or violated a person's constitutional rights. *See* Minn. Stat. § 554.03 (outlining immunity criteria). Whether section 554.02's unusual procedural framework and restrictions apply depends entirely on what is asserted against the defendant in a civil lawsuit. The statute is designed to apply in no other circumstance. Therefore, section 554.02 is a content-based regulation of expressive First Amendment activity and is presumptively invalid. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000)(because "'[c]ontent-based regulations are presumptively invalid'… the Government bears the burden to rebut that presumption.").

B. Section 554.02 Operates as a Preliminary Injunction and Constitutes an Unconstitutional Prior Restraint.

Generally speaking, a "prior restraint" is judicial suppression of expressive activity before a determination is made that the activity is unprotected by the First Amendment.

Alexander v. United States, 509 U.S. 544, 551 (1993). "Temporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints." *Id*. at 550. Whether it be pure speech or litigation, an injunction involving communication issued "before an adequate determination that it is unprotected by the First Amendment" presents the "special vice of a prior restraint." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973); *see Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989)("the way in which a restraint on speech is 'characterized' under state law is of little consequence."). The Supreme Court holds that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights"; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); and that *"[a]ny system* of prior restraints of expression comes to th[e] Court bearing a heavy presumption against its constitutional validity," *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)(emphasis added).

The obvious "takeaway" here is that government may not simply enjoin the exercise of a speech related right on the presumption that it is unprotected only to permit its activity after the subject of the restraint proves its constitutional merit. This is because it is "deeply etched in our law [that] a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980)(emphasis in original). Even in *BE & K,* the Court said that First Amendment concerns are greater "when enjoining ongoing litigation than when penalizing completed litigation." 536 U.S. at 530. The Court reasoned: "[a]fter all, the First Amendment historically provides greater protection from prior restraints than after-the-fact penalties and enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning." *Id*.

The applicability of section 554.02 is predicated on a defendant making a "minimal" showing that the plaintiff's claim relates to the defendant's public participation activities. *Stengrim*, 784 N.W.2d at 841. Here, the filing of a defendant's anti-SLAPP motion and their threshold showing functions as a petition for a preliminary injunction. And, by only requiring

that the moving defendant file the motion to suspend discovery, and then minimally show that the plaintiff's claim *relates* to their public participation activities, the statutory scheme *presumes* the plaintiff guilty of strategically pursuing sham litigation until he or she proves their innocence. Like the publishers in *Near*, who were restrained from publishing until they "[brought] competent evidence to satisfy the judge that the charges [in the publication were] true…."; *Near*, 283 U.S. at 713; plaintiffs subjected to the anti-SLAPP injunction are similarly presumed guilty of abusing their protected rights until they prove their innocence through the production of evidence – *essentially proving to the court that the charges in their civil complaint are true*. Simply put, section 554.02 stops First Amendment activity dead in its tracks until plaintiffs prove to government (the court) that their First Amendment activity is highly likely to be constitutionally protected. The Supreme Court in *Near* characterized this type of procedural scheme as being the very "essence of censorship." *Id*.

It is equally clear that the anti-SLAPP injunction punishes plaintiffs through summarily depriving them of their discovery rights upon the mere filing of an anti-SLAPP motion, which significantly curtails their ability to inform the court and satisfy the heightened evidentiary burden. *Leiendecker*, 848 N.W.2d at 229 ("the anti-SLAPP statutes apply a unique burden-shifting framework and, by *restricting* discovery, *limit* the responding party's ability to meet its burden." (emphases added)); *see Putman v. Wenatchee Valley Med. Ctr.*, 216 P.3d 374, 376 (Wash. 2009)("[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense."). So, not only does section 554.02 *deprive* plaintiffs of their access to the court upon the filing of an anti-SLAPP motion – it, by doing so, *limits* their ability to effectively speak to the court in providing it with the answer to the question the statute demands be answered. Incredibly, section 554.02 restricts the very thing that is critical to persuading the court into lifting the injunction that has been placed on a plaintiff's lawsuit. Adding insult to injury is that by requiring plaintiffs to produce more evidence, while restricted, than would otherwise be needed to overcome a defendant's qualified immunity and prevail at trial, the State is further punishing plaintiffs by compelling them to

speak more than they otherwise would have to. *See Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988)(there is no constitutional difference between compelled speech and compelled silence.).

It also cannot be lost on the Court that section 554.02 only requires a defendant to show that the claims against them *relate* to their public participation activities to enjoin the plaintiff and shift *the defendant's* evidentiary burden, vis-à-vis qualified immunity, onto the plaintiff. But, the mere fact that the defendant has previously engaged in "public participation" is not some talisman that dissolves the constitutional liberties that the plaintiff enjoys. Indeed, the fact that a plaintiff sufficiently claims under the civil rules that a defendant has abused their right of petition is certainly no cause to render a plaintiff's access to the courts, and justice, not free and subject to purchase. *See* Minn. Const. art. I, § 8; *see Putman*, 216 P.3d at 376-77 ("[r]equiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts.").

Here, by shifting the burden and depriving plaintiffs of both their complete discovery rights and development of their case through the normal civil litigation process, section 554.02 summarily punishes plaintiffs for merely exercising their constitutional rights. Yet, "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. 'Constitutional rights would be of little value if they could be… indirectly denied,' or 'manipulated out of existence.'" *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)(citations omitted). Even onerous procedural requirements that effectively handicap the exercise of constitutional guarantees are repugnant to the Constitution. *Id*. at 541. The Supreme Court once again made this point clear when it recently characterized a campaign finance law restricting political expenditures by corporations and unions as a prior restraint because it had placed burdens and potential punishment on speakers that essentially required them to seek prior permission from government to speak. *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 335 (2010). There, the Court noted that: "[t]hese onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented

in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Id*.

Section 554.02 is cut from the same prior restraint cloth as it likewise places burdens and potential punishment on plaintiffs that, in this case, expressly requires them to obtain special permission from government – while being summarily handicapped – in order to effectively exercise their fundamental rights. Significantly, because plaintiffs' speech and petitioning rights are deliberately curtailed subject to a required preclearance factual finding by a court, section 554.02 is unquestionably a prior restraint. Section 554.02's constitutional infirmity is further validated by the mere fact that the words "restricting" and "limit"; *Leiendecker*, 848 N.W.2d at 229; when used in relation to content-based expressive activity always adds up to presumptive unconstitutionality, *see R.A.V.*, 505 U.S. at 382 ("[c]ontent-based regulations are presumptively invalid"); *see New York Times Co.*, 403 U.S. at 714 (prior restraints bear a "heavy presumption" against constitutionality). Therefore, because section 554.02 embodies both a prior restraint and a content-based restriction on speech and petition, it is presumed to be unconstitutional and the State must demonstrate that it satisfies strict scrutiny.

C. Section 554.02 does not contain *Freedman's* Strict Procedural Safeguards.

According to the Supreme Court, in addition to surviving strict scrutiny, preclearance laws, like section 554.02, must be invalidated unless they contain these procedural safeguards: (1) any restraint prior to judicial review is imposed only for a specified brief period and serves only to maintain the status quo; (2) the final judicial determination is prompt; and (3) the burden of instituting judicial proceedings, and proving that the activity or material is unprotected, lies with the censor. *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965).

1. <u>No Specified Time Period – Status Quo Not Maintained</u>.

Under *Freedman's* first prong, any restraint prior to "sound judicial resolution" can be imposed only for a specified brief period serving only to maintain the status quo. *Id*. at 59. First, section 554.02 contains no specificity on a time period (brief or otherwise) for the immediate restraint; i.e., the suspension of discovery; which is placed on the plaintiff's case upon the filing

of an anti-SLAPP motion. Second, there is no specificity as to when the court must determine if the moving defendant has met their threshold burden. Third, section 554.02 fails to provide a specified time for the plaintiff to respond with evidence, and once more fails to provide a specified time period in which the court must rule. Finally, one only has to look at section 554.02 to see that the injunction can last through a lengthy appeal process, which adds to the statute's overall failure to provide a specific brief period. Section 554.02 therefore lacks a specified brief time period. *See id*. at 60 (speaking in terms of days and not weeks).

Additionally, the status quo is not maintained under the injunction because discovery is suspended and a plaintiff must move the court showing "good cause" to get only some of it back. Section 554.02 – in contrast to the civil rules *which are the status quo* – also shifts the defendant's burden onto plaintiffs and then requires them to produce clear and convincing evidence, absent complete discovery, which is much more than is required under normal circumstances to proceed in any given case. Under normal circumstances (i.e., the status quo) when courts engage in pretrial evaluation of evidence, nonmoving plaintiffs retain favorable inferences and need only show a solitary disputed issue of material fact to proceed to trial. *See* Minn. R. Civ. P. 56.03; *see Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981)(courts must view the evidence in the light most favorable to the nonmoving party, and "[a]ll doubts and factual inferences must be resolved against the moving party.") The Minnesota Supreme Court agrees that under the anti-SLAPP injunction the status quo is changed: "the summary-judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent." *Leiendecker*, 848 N.W.2d at 231. Here, the status quo changes drastically for plaintiffs – so much so that section 554.02 makes it *more* difficult to meet the augmented burdens it places on them by severely restricting their access to court procedures, which in turn hinders their ability to adequately inform the court.

Plaintiffs are also required to obey the discovery prohibition pending review of the anti-SLAPP motion and would ordinarily be subject to contempt proceedings even if the plaintiff is later found to have met their responsive burden. In *Vance*, the Supreme Court noted this

scenario was unacceptable because a restraint prior to a judicial determination that is subject to the treat of contempt "would be more onerous and more objectionable than the threat of criminal sanctions" since protected activity would be a permitted defense to any criminal prosecution, whereas it would not be in a contempt of court proceeding. *Vance*, 445 U.S. at 316.

2. Final Judicial Determination Is Not Prompt.

Under *Freedman's* second prong, an adverse decision must be provided expeditious judicial review "to minimize the deterrent effect of an interim and possibly erroneous denial…." 380 U.S. at 59; *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975)("[w]e held in *Freedman*, and we reaffirm here,… a prompt final judicial determination must be assured."). The Supreme Court explains that final decisions "must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 780 (2004). In *City of Littleton*, the Supreme Court clarified that the First Amendment required both prompt judicial review and a prompt judicial decision. *Id*. at 781-82. The Court stressed that "ordinary court procedural rules and practices… provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to 'accelerate' proceedings. And higher courts may quickly review adverse lower court decisions." *Id*. at 782 (citations omitted). In situations, like here, where a preclearance scheme involves appellate review that can take significant time, the Supreme Court holds that government "must provide [*Freedman's*] strict procedural safeguards including *immediate* appellate review [or allow a stay of the injunction]." *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977)(emphasis added).

Section 554.02 fails to provide for a reasonably swift final judicial determination. As this case illustrates, a district court's review of an anti-SLAPP motion and the ensuing appellate review is anything but prompt. In this case alone, it took almost three years just to resolve whether Defendants properly met their threshold burden and, if so, whether the Leiendeckers had to produce actual evidence in response it. Add on the fact that following remand this Court must

now still evaluate any evidence the Leiendeckers produce and decide whether it meets the clear and convincing standard – a decision that is certain to trigger yet another appeal by right – it becomes very apparent that section 554.02 is downright antithetical to *Freedman's* core policy of preventing the chilling effects associated with censorship schemes. *Freedman*, 380 U.S. at 59. Just as an "exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation," *id*., a victim with a reasonable defamation or malicious prosecution claim may be discouraged from even seeking judicial relief fearing that their stake in the litigation is too small compared to the initial legal costs of having to vindicate their rights with the anti-SLAPP prior restraint standing in their way. Couple all this with the potential for having to litigate against the government; Minn. Stat. § 554.02, subd. 2(4); being denied a jury-trial, and possibly having to pay a defendant's attorney fees following a long course of judicial review, and the dangers of chilling protected activity that the *Freedman* Court feared have become reality.[8]

3. Censor Bears No Burden to Establish Plaintiff's Activity is Unprotected.

Under *Freedman's* third prong, the "censor" must bear the burden of going to court to suppress First Amendment activity and, once there, must prove that the activity in question is unprotected. *Freedman*, 380 U.S. at 58. Censorship under section 554.02 immediately takes place at the behest of the moving defendant who is the intended subject of the statutory protection. Government also might jointly be the moving party because the statute permits the State, with its incredible weight, to defend or otherwise support the moving party. Minn. Stat. § 554.02, subd. 2(4). Regardless of the moving party, the fact that a restraint is entered by a court rather than an administrative censor does not mean that *Freedman*'s safeguard requirements no

[8] There is also evidence that anti-SLAPP statutes are being misused as delay tactics. For example, a California commentator reports that "legal seminars are continually encouraging corporations to employ the anti-SLAPP Statute motion as a new litigation weapon by filing it in otherwise ordinary personal injury and products liability cases." Joshua L. Baker, *Review of Selected 2003 California Legislation: Civil: Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 McGeorge L. Rev. 409 (2004); *see* John G. Osborn & Jeffrey A. Thaler, *Feature: Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 Maine Bar J. 32 (2008)("[n]ot surprisingly, entities are beginning to find ways to use anti-SLAPP statutes for less legitimate purposes."); *see also Navellier v. Sletten*, 52 P.3d 703, 714 (Cal. 2002)(Brown, J., dissenting)("[t]he cure has become the disease – SLAPP motions are now just the latest form of abusive litigation.").

longer apply, nor does it "change the unconstitutional character of the restraint if erroneously entered." *Vance*, 445 U.S. at 317. In any event, upon the filing of an anti-SLAPP motion the court, a state actor, halts the plaintiff's petitioning activity and then, finding that section 554.02 applies, conditions the continuation of the petitioning activity on the successful production of clear and convincing evidence. Minn. Stat. § 554.02, subd. 2(1)-(3).

With respect to the burden of proof, there is absolutely no requirement that the defendant bear any specific burden in relation to the nature of the *plaintiff's* First Amendment activity. To invoke the anti-SLAPP injunction, all the statute requires is that a defendant file an anti-SLAPP motion and minimally show that the claims against them relate to their public participation activities. But this showing is inapposite in terms of a plaintiff's mental state (i.e., culpable state of mind). Consequently, the statute fails to place the burden on the moving defendant to prove that the plaintiff's lawsuit is unprotected First Amendment activity.

Even in situations that involve the prior submission of pornographic films to an administrative censor to prevent the public exhibition of obscenity, the Supreme Court demands that the burden of proving that a particular film is unprotected expression rests on the censor. *Freedman*, 380 U.S. at 58-60. Certainly, it cannot be that pornographers receive greater First Amendment protection than victims seeking redress from their government. Therefore, section 554.02 must be stricken for failing to provide *Freedman's* compulsory safeguards.

D. Section 554.02 is not Narrowly Tailored to Serve a Compelling State Interest.

In addition to satisfying the *Freedman* procedural safeguards, as a content-based restriction on expression, section 554.02 must be narrowly tailored to serve a compelling government interest. *Playboy*, 529 U.S. at 813; *see Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)(government must overcome a prior restraint's heavy presumption of unconstitutionality as well as providing *Freedman's* safeguards). Strict scrutiny "is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entm't Merchants Ass'n*, ___ U.S. ___, 131 S.Ct. 2729, 2738 (2011).

1. No Compelling State Interest.

There is no precise definition for what constitutes a "compelling interest." *Republican Party of Minnesota v. White*, 416 F.3d 738, 749-50 (8th Cir. 2005)(*White II*). But one thing is certain: strict scrutiny is never satisfied when the interest served by the law is anything less than the most pressing public necessity. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Accordingly, the Supreme Court requires that government's intrusion on fundamental rights be based on more than mere conjecture that a paramount state interest is endangered. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000)("[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden…."). Even when applying the substantial governmental interest test for content-*neutral* restrictions that impose an incidental burden on speech (intermediate scrutiny), the Supreme Court requires that government not "simply posit the existence of the disease sought to be cured" and must "demonstrate that the recited harms are real, not merely conjectural…." *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 664 (1994). Recently, in *Brown*, the Supreme Court clarified that when *strict scrutiny* applies the government's burden is "much higher, and because it bears the risk of uncertainty," it may not even rely on "predictive judgment[s]" or "ambiguous proof[s]" to demonstrate that its interest is real and compelling. 131 S.Ct. at 2738-39 (citation omitted).

Despite its significant intrusion on First Amendment rights, one searches the anti-SLAPP chapter in vain for the State's articulation of a compelling interest that warrants section 544.02's substantial restriction of speech and petition. While seeking to uphold constitutional protections in general is certainly a compelling state interest; *White II*, 416 F.3d at 754; the Legislature did not identify the existence of any exigency in Minnesota to justify prior restraint, summary punishment, and imposing additional burdens on a certain class of plaintiffs. In fact, nowhere has the Legislature identified any particular harm it sought to remedy by restricting civil liberties other than what can be gleaned inferentially by: (1) it seeking to protect public participants from liability through providing immunity and attorney fees to those that qualify, and (2) the fact that the overall statutory scheme is similar to other state anti-SLAPP legislation designed to curtail

harassing lawsuits brought intending to chill public participation. It would seem, as evidenced by the anti-SLAPP chapter itself, that the State has only *assumed* the existence of a grave danger within its borders justifying section 554.02's significant curtailment of constitutional rights. *See 281 Care Committee v. Arneson*, 766 F.3d 774, 791 (8th Cir. 2014)(reminding Minnesota that "*only* relying upon common sensibilities [to prove the existence of a compelling problem] falls short." (emphasis in original)).

The State is clearly resting its infringement on a plaintiff's rights, not on firm evidentiary backing, but on two predicate conjectures: (1) the moving defendant *might* have been previously engaging in conduct that is immune under section 554.03, and (2) the responding plaintiff *might* be misusing the legal system now to improperly punish the defendant because some unrelated litigants in the past have done so under similar circumstances. But this chain of speculation is too thin a reed to support the heavy hammer of summary punishment and prior restraint. *See New York Times Co*., 403 U.S. at 725-26 (Brennan, J., concurring)("the First Amendment tolerates absolutely no prior judicial restraints… predicated upon surmise or conjecture that untoward consequences may result."). It should not even be considered rational for government to surmise that merely because a plaintiff is suing a defendant for abusing their public participation right that the plaintiff is less deserving of First Amendment liberties because some other plaintiffs claiming the same against other defendants have filed sham lawsuits. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 934 (1982)("[a] court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees."). Moreover, the concept that a lawsuit may be enjoined or suppressed simply because it is *speculatively* believed by government to be untrue or unwinnable is entirely inconsistent with constitutional guarantees that preserve the right of the people to petition their government. "[T]he text of the First Amendment [does not] speak in terms of successful petitioning – it speaks simply of 'the right of the people… to petition the Government for a redress of grievances.'" *BE & K*, 536 U.S. at 532 (quoting U.S. Const. amend. I).

Likewise, the State has no legitimate interest in summarily punishing plaintiffs, and encumbering their constitutional rights, in an effort to protect the rights of a group of defendants that it doesn't even know with certainty is deserving of its protection. *See NAACP v. Button,* 371 U.S. 415, 438 (1963)([b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (citations omitted)). To be sure, if *Sullivan*, *Gertz*, *McDonald*, and other kindred cases teach us anything it is that: the First Amendment doesn't turn a blind-eye to a plaintiff's lawsuit simply to safeguard the defendant's right of speech and petition – the First Amendment doesn't just show up for one and not for the other. To reject this rudimentary understanding is to oppose the freedoms the First Amendment enshrines. *See Associated Press v. United States,* 326 U.S. 1, 20 (1945)(the First Amendment "means freedom for all and not for some."). Yet, forgetting that it is always in the public interest to protect the constitutional rights of *every* citizen, the State has created a procedural scheme that by its intended design substantially interferes, unnecessarily, with a plaintiff's fundamental rights.

The Supreme Court holds that government carries "a heavy burden to justify action[s]" that target a few members engaging in First Amendment activity for disparate treatment. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983). This heavy burden, together with the incredibly heavy burden it faces due to section 554.02 being a prior restraint, is well-beyond the State's reach. Surely, it cannot be seriously claimed that the State has a compelling interest in restricting a plaintiff's civil rights just to prevent *potential* harm to some, yet to be determined, immunized defendants for whom the law already provides the adequate remedy of malicious prosecution. In these circumstances a preliminary restraint would not normally be granted due to it not being "necessary to prevent great and *irreparable* injury" *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979)(emphasis added). Moreover, the State's interest in restricting the rights of *all* plaintiffs that accuse their defendants of tortious public participation conduct, on the off-chance that some plaintiffs might be intentionally misusing the legal system, is particularly unjustified given that

section 554.02 requires no allegation or showing that a plaintiff is doing anything wrong. *See United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 583-84 (1971)(an injunction affecting First Amendment activity is arbitrary and capricious when based on no allegation or showing of impending unlawful conduct). The State simply does not have an interest of the highest order in restricting a plaintiff's fundamental rights to prevent *posited* harm to a *contingent* defendant – harm that is not even considered irreparable.

In this same vein, states do not have a compelling interest in raising protection for a particular liberty so far that it conflicts with a competing federal right. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). This means that the State may not enhance a defendant's expressive liberty by encumbering the plaintiff's competing right established by the federal constitution. *See Citizens United*, 558 U.S. at 349-50 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment…"). To protect public participants (defendants) from civil suits, section 554.02 requires plaintiffs to be irreparably punished by, *inter alia*, restricting their access to court procedures that are "reasonably and normally attendant to effective petitioning." *In re IBP*, 755 F.2d at 1310. The federal conflict arises because the State exacts this punishment to protect defendants absent any adjudication that the plaintiff is not only falsely litigating but is doing so with a culpable state of mind – a scienter finding which the Supreme Court requires as necessary "breathing space" before litigation may be enjoined or punished by government. *BE & K*, 536 U.S. at 531. Therefore, the State does not have a compelling interest in abandoning the federally established rights belonging to plaintiffs in the name of providing greater protection to the rights of defendants because the Supremacy Clause of the United States Constitution forbids it.

The State's burdening of plaintiffs' rights cannot be justified by its conjecture that plaintiffs that sue public participants are probably up to no good. Even if the State could show that its interest is not based on speculation, it cannot overcome its heavy burden to justify its disparate treatment of plaintiffs especially when its preclearance methodology enhances the rights of defendants at the expense of the federally established rights that plaintiffs enjoy.

2. Section 554.02 is not Narrowly Tailored.

Even if the State had a compelling interest in restricting First Amendment activity that has the *potential* to be unprotected, section 554.02 must be narrowly tailored to serve the State's purported interest. Section 554.02 is not narrowly tailored because it does not advance the State's interests, is significantly overinclusive and underinclusive, and is not the least restrictive means for achieving the State's goal. *See White II*, 416 F.3d at 751 (stating criteria).

a. Section 554.02 does not advance the State's interests.

The First Amendment requires that government's chosen restriction be necessary to achieve its interest. *Id*. As deduced from the anti-SLAPP chapter, the State's interest is apparently providing immunity from liability to public participants that qualify. Given the State's grant of qualified immunity, it certainly cannot be seeking to protect public participants that do not lawfully and genuinely petition government or those that commit torts or violate the constitutional rights of others in so doing. Indeed, section 554.02's procedural mechanism is all about determining at a very early stage the high probability of whether the plaintiff can overcome the defendant's qualified immunity. However, making it harder on plaintiffs; by restricting their fact-finding abilities and then making them produce, at an embryonic stage in the proceedings, *more evidence than is needed for trial*; diminishes the reliability of any answer concerning a defendant's entitlement to immunity that might be extracted from the plaintiff's preclearance failure. This is especially so where a defendant's culpable state of mind is materially in question due to the constitutional breathing room that is already given to claims involving the rights of speech and petition (e.g., defamation, malicious prosecution).

There can be little doubt that by summarily taking away important discovery tools that can extract and scrutinize evidence only in the possession of the defendant (e.g., their culpable state of mind) the State has made it virtually impossible to meet the clear and convincing evidence requirements of the statute. Clearly, handicapping plaintiffs and then subjecting them to an even higher evidentiary burden than would be needed for trial unavoidably results in the State immunizing conduct that would be proven, after being fully developed through the normal

civil litigation process, to be undeserving of immunity under section 554.03. If its *compelling* interest is only protecting conduct that qualifies for immunity under section 554.03 – which is what section 554.02's procedural scheme ostensibly seeks to ferret out – the State would not be permitting a substantial portion of unworthy defendants to qualify for immunity by making it practically impossible for a plaintiff to establish that the defendant's conduct is beyond the scope of the State's interest. So, if the State's interest is indeed immunizing only defendants worthy of immunity, section 554.02 noticeably misses the mark. *See Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002)(holding regulation was not narrowly tailored to serve the State's interest because it was "barely tailored to serve that interest *at all*,…" (emphasis in original)).

b. Section 554.02 is overinclusive.

A law that restricts a significant amount of First Amendment activity that does not implicate the government's interest is overinclusive. *White II*, 416 F.3d at 751 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991)). Section 554.02 is overinclusive because it encompasses activity beyond the State's interest in protecting only public participants that qualify for immunity. To begin with, the moving defendant's threshold burden being "minimal"; *Stengrim*, 784 N.W.2d at 841; means that section 554.02 is overinclusive simply because such an ambiguously low standard unavoidably sweeps too broadly, *see Chicago v. Morales*, 527 U.S. 41, 56 (1999)(vague terms "may authorize and even encourage arbitrary and discriminatory enforcement."); *see Reno v. ACLU*, 521 U.S. 844, 871-72 (1997)("vagueness… raises special First Amendment concerns because of its obvious chilling effect on free speech."); *see Button*, 371 U.S. at 433 ("government may regulate in the area" of First Amendment freedoms "only with narrow specificity."). Making matters worse is that the defendant's threshold burden requires no showing (let alone allegation) of intentional wrongdoing for the anti-SLAPP injunction to be applied against a plaintiff. There is just no getting around the fact that the surmise that is squeezed from a defendant's threshold showing only serves to speciously impute to the plaintiff attributes of mischief that have no evidentiary basis whatsoever. *See Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642 (1929)("[a]

statute creating a presumption that is arbitrary… violates the due process clause of the Fourteenth Amendment."). Critically important is that not all defendants that engage in public participation activities do so in a manner deserving of section 554.03's immunity. The State inasmuch admits this by making section 554.03 highly qualified, which means that it agrees that not all plaintiffs that sue defendants for their petitioning activities are engaging in sham litigation to chill public participation. Section 554.02's fundamental flaw is that it targets *all* plaintiffs that make claims relating to their defendant's public participation activities whether or not the plaintiff's conduct is constitutionally unprotected, or even whether or not the defendant's conduct is within the zone of the State's protective interest.

What's more, it is quite clear from the statute's plain language that anyone defending *any* civil claim can file an anti-SLAPP motion – even a products liability defendant having nothing to do with public participation. *See supra* note 8. Section 554.02 requires that discovery be suspended upon the mere *filing* of an anti-SLAPP motion regardless of whether the movant has actually satisfied subdivision 1's applicability requirement. Minn. Stat. § 554.02, subd. 2. This overbreadth problem is compounded by the fact that section 554.02 states that "discovery must be suspended pending the final disposition of the motion, *including any appeal*." *Id*. (emphasis added). Once discovery is suspended pending final disposition of the motion the damage is done, the extent to which remains veiled by the injunction itself. Indeed, while it may seem self-evident that a judicial claim does not fall within the scope of the anti-SLAPP chapter, nothing prevents any defendant from using section 554.02 as a delay tactic, or as a way to impede a plaintiff's access to time sensitive discovery, regardless of whether the plaintiff's claim against the defendant may ultimately be found – *after a protracted and onerous course of judicial review* – to be unrelated to public participation. *See 281 Care Committee*, 766 F.3d at 792 (using similar reasoning in holding Minn. Stat. § 211B.06 overbroad).

The obvious byproduct of section 554.02 being vastly overinclusive is that it not only chills unprotected lawsuits, it chills protected ones as well. As explained in Section II-E below, the fact that section 554.02 is so overinclusive means it is facially overbroad requiring the Court

to permanently enjoin its further use. *See e.g., Bd. Of Trs. Of State Univ. of New York v. Fox*, 492 U.S. 469, 483 (1989)(explaining that under narrow-tailoring a statute may be so broad as to render it "effectively unenforceable" under the overbreadth doctrine.)

c. Section 554.02 is underinclusive.

The Supreme Court holds that "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon… speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *White*, 536 U.S. at 780. Section 554.02 is underinclusive because it punishes and exposes to liability, pursuant to section 554.04, a subset of public participants (plaintiffs) that would otherwise be immune under the plain terms of section 554.03. At last check, plaintiffs are considered public participants. Section 554.03 states: "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." Minn. Stat. § 554.03. This statute provides the substantive right of immunity from liability for qualifying *conduct or speech* and does not differentiate between those engaging in it (e.g., plaintiffs, defendants, moving parties or nonmoving parties). If the State's intention is truly providing protection to *all* public participants who behave properly enough to qualify for section 554.03 immunity, it would not be through section 554.02 summarily punishing and exposing to special and unmerited liability a subset of those qualifying public participants (plaintiffs). Here, the State's supposed interest in protecting all public participants that qualify under the terms of section 554.03 is belied by its willful exclusion of plaintiffs.

Additionally, while the State intends to protect public participants that comport themselves in a qualifying manner, it employs a preclearance rule that targets speech and petitioning rights in only one branch of government involving particular content. By doing this, the State is regulating speech directed to government based on its underlying message: disfavoring some petitions that seek dispute resolution and favoring others that seek rule-making or rule-enforcement resolution. *See R.A.V.*, 505 U.S. at 386 ("[t]he government may not regulate

use based on hostility – or favoritism – towards the underlying message expressed."). Surely, lying to government to harm another is not exclusive to the judicial branch. Yet, citizens can lobby the legislature and the executive branches without them having to suffer through a preclearance mechanism to determine the genuineness of their message. Only when someone sues somebody for abusing their public participation right does government say: "now hold on a minute… you must first be pre-cleared so that we (government) can make sure that you are *probably* telling the truth."

Singling out petitions seeking dispute resolution of public participation grievances to be pre-certified for a high probability of truth before government will fully open the courthouse doors plainly exhibits hostility to the content or subject matter of the petitioner's speech to government when all other petitions to government (including those seeking redress of *non*-public participation based grievances) are exempt from restrictive preclearance truth-testing. Of course, with all this in mind, the State has declined to employ its special preclearance mechanism to ensure that *all* speech directed to government – including lawsuits unrelated to public participation – is not intended as a sham simply to cause unjust harm to an adversary. *See Brown*, 131 S.Ct. at 2740 (restriction of violent video games to minors without regulating violence in Saturday morning cartoons "is wildly underinclusive").

d. Section 554.02 is not the least-restrictive alternative.

Finally, strict scrutiny requires that any restriction on First Amendment activity be "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004); *Playboy*, 529 U.S. at 813 ("[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). The Supreme Court has been quite clear that: "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of [law] do not provide sufficient deterrence, perhaps those sanctions should be made more severe." *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); *see CBS Inc. v. Davis*, 510 U.S. 1315, 1318 (1994)(Blackmun, J., in chambers)("[s]ubsequent civil or criminal proceedings, rather than

prior restraints, ordinarily are the appropriate sanction for calculated defamation *or other misdeeds in the First Amendment context*." (emphasis added)).

In *Hebert v. Lando*, the Supreme Court held there is no privilege under the First Amendment that bars a plaintiff from inquiring into the editorial process and the states of mind of persons involved in an alleged libel. 441 U.S. 153, 175-77 (1979). The Court recognized that constitutional protections provided to defendants regarding culpability in such cases make discovery more important and consequently more burdensome on both plaintiffs and defendants. *Id*. at 176. In addressing Justice Brennan's desire to extend more protection to libel defendants in the press, the Court rejected any idea of conditioning pertinent discovery upon a plaintiff making out a prima facie case of falsity. *Id*. at 174 n.23. The Court aptly said: "we decline to subject libel trials to such burdensome complications and intolerable delay." *Id*. Citing the rules of civil procedure that give judges control over the discovery process, the Court explained that "until and unless there are major changes in the present Rules…, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse." *Id*. at 177. Our rules of civil procedure presently have the same protections that the Court referred to. *See* Minn. R. Civ. P. 1; 26.02(b); 26.03; *see Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 605-06 (Minn. 2014).

If better court control over the discovery process is still somehow deemed insufficient to further the State's interest, then it, through the judicial branch, could perhaps amend the rules of civil procedure to require more particularized pleading. This is the approach the federal government now has taken to reduce frivolous securities lawsuits. The Private Securities Litigation Reform Act of 1995 (PSLRA) requires plaintiffs to plead sufficient factual detail to create a strong inference of scienter to state a cognizable securities fraud claim. 15 U.S.C. § 78u-4(b)(2). More specifically, the PSLRA requires for each allegation of false or misleading statement that the pleader explain how it was untruthful or misleading. *Id*., 78u-4(b)(1).

Prior to the Minnesota Supreme Court decision in this case abrogating the anti-SLAPP pleading requirements established by *Marchant*, plaintiffs had to plead factual detail clearly and convincingly to satisfy section 554.02's evidentiary requirement while still remaining faithful to

Rules 12.02(e) and 12.03. Knowing the potential for facing an anti-SLAPP motion, the Leiendeckers used the PSLRA requirements as a guide to craft their Complaint. As the Court can see, the Complaint explains how fraudulent statements directed to the underlying courts were untruthful or misleading in order to establish a strong inference of scienter (*e.g.*, Compl. ¶¶ 239-352) and contains other sections devoted to scienter allegations, (*e.g., id.* ¶¶ 92-139; 163-232). Judge Van de North held that the Leiendeckers had "alleged facts that would clearly and convincingly show that Defendants' conduct constituted a tort, i.e. malicious prosecution, and so are not entitled to immunity under Minn. Stat. § 554.03 at this stage of the proceedings." (Dist. Ct. Oct. 1, 2012 Order/Mem. at 13-14.) Thus, this case is a clear example of how a more particularized pleading standard can successfully be used as a less restrictive alternative to encumbering a plaintiff's constitutional rights. It is also noteworthy to point out that beginning with *Marchant* in 2005, the clear and convincing pleading standard was used for almost a decade with no objection from the State. A heightened pleading standard therefore cannot now be denied by the State as not being an *effective* means to serve its goals because it was successfully used by the State's judiciary without objection for almost a decade.

The State's interest can also be furthered by simply imposing attorney fees and costs on a plaintiff that cannot overcome a defendant's qualified immunity (i.e., subsequent punishment). The State can hardly object to this approach because it, as of May 2015, used it to immunize persons that call law enforcement in good-faith. *See* Minn. Stat. § 604A.34 (providing qualified immunity and attorney fees without imposing a preclearance mechanism), *repealed b*y 2015 Session law Chapter 49 – S.F.No. 1025. Similarly, as Professors Pring and Canan point out: "there is nothing to stop a state court from adopting the *Noerr-Pennington-Omni* approach as a matter of state law. Some states that have adopted anti-SLAPP laws have wisely incorporated that approach." George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* 28 (1996). As seen, the State has an array of plausible less restrictive alternatives from which it could choose or choose to combine. The State has obviously chosen the more; if not the most,

restrictive alternative instead. Therefore, because section 554.02 fails strict scrutiny it must be stricken for being unconstitutional.

E. Section 554.02 is Facially Overbroad.

As explained, section 554.02 is facially unconstitutional because it is a prior restraint that fails to provide the mandatory *Freedman* procedural safeguards. Section 554.02 is also facially invalid because, as a content-based restriction on expressive First Amendment activity, it is not narrowly tailored to serve a compelling government interest. Either of these failures should mean that overbreadth analysis is unnecessary because "where a statute fails the relevant constitutional test (such as strict scrutiny…), it can no longer be constitutionally applied to anyone – and thus there is 'no set of circumstances' in which the statute would be valid." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012)(citations omitted); *see Fox*, 492 U.S. at 483 (a law being so broad under narrow-tailoring will render it "effectively unenforceable").

Even if this weren't the case, and section 554.02 were held to have a legitimate sweep, section 554.02 would nevertheless fail under overbreadth analysis because it is so substantially overbroad that its very existence is highly likely to cause others to refrain from exercising their protected First Amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A statute must be invalidated as facially overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 130 S.Ct. at 1587 (citation omitted).

Aside from section 554.02 permitting any defendant to enjoin a suit by the mere filing of an anti-SLAPP motion, its more conspicuous flaw is that it targets *all* plaintiffs that make claims relating to their defendant's public participation activities. Especially problematic is that section 554.02 contains no scienter requirement before enjoining a plaintiff's case. *See State v. Crawley*, 819 N.W.2d 94, 108 n.15 (Minn. 2012)(noting that a law containing a scienter requirement does not risk chilling protected expression). The predictable result is that section 554.02 captures, *and summarily punishes*, an overwhelming amount of petitioning that is constitutionally protected. Simply put: section 554.02 "burn[s] the house to roast the pig." *Butler v. Michigan*, 352 U.S.

380, 383 (1957). The First Amendment does not tolerate adoption of overly broad approaches that regulate protected activity to regulate unprotected activity. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)("Government may not suppress lawful speech as the means to suppress unlawful speech").

The harsh reality of section 554.02, as now construed, is that it requires plaintiffs to acquire all evidence supporting their claims (including defendants' states of mind) before filing a lawsuit. This impairment alone, as the Washington Supreme Court held, is inconsistent with the right of petition. *Putman*, 216 P.3d at 376-77. Furthermore, taking all of section 554.02's punitive preclearance attributes together with the possibility of: (1) having to litigate against government, (2) being denied a jury-trial, and (3) having to pay the defendant's attorney's fees, means that section 554.02 chills, *by its very existence*, a substantial amount of protected lawsuits from being brought against persons that abuse public participation rights. In this way section 554.02 also insulates itself from constitutional attack. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Therefore, because section 554.02 is facially overbroad, the Court must invalidate it and permanently enjoin its further enforcement in Minnesota.

III. SECTION 554.02 VIOLATES EQUAL PROTECTION.

Section 554.02 also violates federal and state rights of equal protection. This is because the State is choosing to protect the rights of defendants (taken from a class of similarly situated persons: petitioners of government) over the rights of plaintiffs – a choice that is repugnant to the equal protection provisions of both the federal and state constitutions. *See* U.S. Const. amend. XIV, § 1. (Equal Protection Clause); *see* Minn. Const. art 1, § 2 (Rights and Privileges Clause).

Section 554.02 targets the petitioning efforts of plaintiffs to favor the petitioning efforts of defendants based solely on the subject matter and content of the plaintiff's petitioning of government through the vehicle of a civil lawsuit. The hostility to a plaintiff's lawsuit even involves permitting the government to intervene and defend the subject defendant. "When speakers and subjects are similarly situated, the State may not pick and choose." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 55A (1983). To be sure, given that there exists a

profound connection between liberty and equality there can be no legitimate dispute that the guarantees of free speech and petition apply equally *to the victims* of those defendants that have abused fundamental rights to do harm. *See Stengrim*, 784 N.W.2d at 842 n.9 ("[a] solution [to SLAPP suits] cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." (citation omitted)).

Furthermore, not only does section 554.02 treat plaintiffs differently from defendants that petition government, it discriminates between plaintiffs that present cases involving public participation rights and those that present cases involving no public participation rights. To illustrate, in contrast to section 554.02, plaintiffs that present defamation cases involving no public participation rights must only show that their case has minimal merit (e.g., rule 12 & 56) and generally don't have to pay their opponent's legal fees if they fail to do so – and they certainly aren't enjoined and summarily punished merely for having made their claims. Section 554.02 singles out a limited type of expression from a broad range of expression for disparate treatment. When a statute favors one speaker over another, it is a form of content-based regulation and must satisfy strict scrutiny. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). Therefore, because, section 554.02 fails strict scrutiny, *see* Section II-D *supra*, the Court should also rule it violates equal protection rights.

IV. SECTION 554.02 VIOLATES THE JURY-TRIAL RIGHT.

The Minnesota Constitution protects the same jury-trial rights as those protected under the federal constitution. *Onvoy, Inc. v. ALLETTE, Inc*., 736 N.W.2d 611, 617 (Minn. 2007). Under the Minnesota Constitution, "[t]he right of trial by jury shall remain inviolate ..." Minn. Const. art. I, § 4. Section 554.02 infringes on a plaintiff's jury-trial right by requiring that a court make a factual determination on defendant's entitlement to qualified immunity.

In our case, the Minnesota Supreme Court – while not entertaining any constitutional questions due to it "not grant[ing] review to determine the constitutionality of the anti-SLAPP statutes"; *Leiendecker*, 848 N.W.2d at 232 – explained that section 554.02 requires a district court operating as "the trier of fact" to determine "the truth of" whether the defendant's acts are

entitled to immunity, *id.* at 231.[9] What's more, the Court stated that a district court must dismiss a plaintiff's case regardless of genuine factual disputes existing. *Id*. As the Court made perfectly clear (in multiple ways), section 554.02 requires a district court to decide based on the evidence produced whether the defendant's acts were clearly and convincingly: (1) unlawful (2) not genuine, (3) tortious, or (4) a violation of a person's constitutional rights. Minn. Stat. § 554.03. It is axiomatic that such a determination by a court involves making findings of material fact that are reserved for a jury. *See Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 642 (Minn. 1978)(factual disputes regarding the existence of probable cause are for the jury to resolve); *see Smith v. Maben*, 42 Minn. 516, 518, 44 N.W. 792, 793 (1890)(malice "is a distinct issue, to be found as a question of fact by the jury."); *see Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982)("[w]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.").

Supporting the conclusion that section 554.02 violates the jury-trial right is that recently the Washington Supreme Court, finding our supreme court's decision in *Leiendecker* persuasive, struck down its very similar anti-SLAPP law as violating the jury-trial right facially and as applied. *Davis v. Cox*, ___ P.3d ___, 2015 WL 3413375, Slip op. at 18, 25 n.10 (Wash. May 28, 2015)(Hill Aff. Ex. C). In *Davis v. Cox*, the Washington Supreme Court found that its anti-SLAPP law also: "creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial" and held that "[s]uch a procedure invades the jury's essential role of deciding debatable questions of fact." *Id*. at 25. Like Washington's anti-SLAPP

[9] The Minnesota Supreme Court also noted that the "Leiendeckers disclaim any argument that the anti-SLAPP statutes *actually* violate their jury-trial right." *Leiendecker*, 848 N.W.2d at 232 (emphasis in original). Obviously, the Leiendeckers having prevailed in the District Court under the *Marchant-Nexus* pleading standard meant that their jury-trial rights hadn't actually been offended at that point. *See City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 393 (Minn. 1980)("there is no standing to raise a constitutional challenge absent a direct and personal harm resulting from the alleged denial of constitutional rights."). The Court then clarified that the Leiendeckers' precise argument was that section 554.05 operated as a constitutional avoidance proviso that prevented section 554.02 from being interpreted in a manner that would violate constitutional rights. *Leiendecker,* 848 N.W.2d at 232. The Court stated that it expressed no opinion on the jury-trial right subject because it did not accept review on any constitutional issue. *Id.* It then disagreed that section 554.05 required it to abandon its duty to construe section 554.02 by its unambiguous terms stating that "it is neither reasonable nor 'possible'" to adopt a construction of the statute that does not require a district court to make a factual determination on immunity. *Id*. at 233.

law that required plaintiffs to establish by clear and convincing evidence the likelihood of prevailing at trial; *id*. at 14, 18; section 554.02 requires a plaintiff to do the same by proving to a judge, clearly and convincingly, that the defendant's acts are not immune from liability (e.g., tortious). *Leiendecker*, 848 N.W.2d at 231. Thus, section 554.02 violates the jury-trial right and should be stricken as being unconstitutional on its face and as applied.

V. SECTION 554.02 VIOLATES SEPRARTION OF POWERS.

The Minnesota Constitution prohibits any of the three branches of our state government from exercising any of the powers properly belonging to the others. Minn. Const., art. 3, § 1. The Minnesota Supreme Court also has the authority, by express legislative grant, to "regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state…." Minn. Stat. § 480.051. It is therefore well-established that the Legislature may not enact laws that constitute a serious incursion into the exclusive domain of the judiciary. *Sharood v. Hatfield*, 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973).

By enacting a procedural mechanism that requires a district court to cease its normal functioning under the established rules of civil procedure and adhere to section 554.02's unusual procedural scheme, the Legislature has crossed a clear-cut line by exercising a power properly belonging to the judiciary. As a matter of fact, not only does section 554.02 enjoin a plaintiff, it quite literally enjoins a court as well. Under section 554.02's mandate, a court "*must"* immediately suspend discovery upon the filing of an anti-SLAPP motion – but "*may*" order some discovery if a plaintiff shows "good cause" – then, finding that section 554.02 applies, must not proceed any further under the established rules of civil procedure until and "*unless*" section 554.02's requirements are met by the non-moving plaintiff; and if not met, the court "*shall*" dismiss the plaintiff's case. Minn. Stat. § 554.02, subd. 2(1),(3) (emphases added).

The judicial functions of a court are generally laid out in Rule 1 of the Minnesota Rules of Civil Procedure and states that the rules "shall be construed and *administered* to secure the just, speedy, and inexpensive determination of *every* action." Minn. R. Civ. P. 1 (emphases added). The rules, which include motions to dismiss and for summary judgment, are designed to

weed out unmeritorious claims. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002). According to the Legislature, however, the rules do not weed out unmeritorious claims soon enough, which reflects dissatisfaction with how the rules operate to arrive at dispute resolution in cases implicating public participation rights. The Legislature's response was clearly not *itself* petitioning the Minnesota Supreme Court to modify the rules of civil procedure to address what it considered a "compelling" state interest or problem, but was instead to legislatively enact a court procedural rule that would: (1) enjoin and irreparably punish a class of plaintiffs seeking redress of a certain type of grievance in the courts of this state, and (2) enjoin a court from proceeding normally under the established rules of procedure that apply to all other civil litigants that come before it. Quite simply, by enacting section 554.02 the Legislature has forsaken our founding principles in the name of preserving them.

CONCLUSION

For the foregoing reasons, the Leiendeckers respectfully request that the Court grant their motions.

I hereby acknowledge that sanctions may be awarded pursuant to Minn. Stat § 549.211.

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