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A Cure for a "Public Concern": Washington's New Anti-SLAPP Law

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A CURE FOR A "PUBLIC CONCERN": WASHINGTON'S NEW ANTI-SLAPP LAW

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Abstract: In March 2010, the Washington State Legislature passed its Act Limiting Strategic Lawsuits Against Public Participation. The new Act fills a critical void in Washington's protection of free expression and petition rights. The Washington Act protects the free expression of Washington citizens by shielding them from meritless lawsuits designed only to incur costs and chill future expression. This Comment offers interpretive guidance for Washington courts by examining the new law, its legislative history, its constitutional underpinnings, and its relationship to the influential California anti-SLAPP statute on which it is modeled. Although the Washington Act shares many identical provisions with the California statute, Washington's Act does include important deviations from the California model. This Comment embraces long-standing canons of statutory construction to argue that the Washington Act's deviations reveal a specific intent to reject certain aspects of the California law. Among these specific rejections is the California law's broader coverage of protected free expression. While California protects expression related to "issues of public *interest*," the Washington Act protects expression related only to "issues of public *concern*." Washington courts interpreting this important provision should reject California case law and embrace the "public concern" test established by the United States Supreme Court in *Connick v. Myers,* a test that already occupies solid ground in Washington case law.

INTRODUCTION

The right to speak on issues of public concern lies at the heart of the freedom of speech.[1] That freedom, guaranteed by both the federal and Washington State constitutions,[2] protects the right to criticize the military draft,[3] provides a shield for newspapers to publish classified documents,[4] and shelters from liability groups who choose to stage peaceful boycotts.[5] Despite these important protections of free

1. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

2. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); WASH. CONST. art. I, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").

3. *See* Cohen v. California, 403 U.S. 15, 16, 26 (1971) (holding that a vulgar phrase worn on a jacket is protected speech).

4. *See* New York Times v. United States, 403 U.S. 713, 714 (1971) (rejecting prior restraint of publication of Pentagon Papers).

5. *See* NAACP v. Claiborne, 458 U.S. 886, 889, 934 (1982) (reversing award of damages for boycott of white merchants after the assassination of Martin Luther King, Jr.).

expression rights, the state and federal constitutions fail to protect citizens from the exorbitant legal expense necessary to defend these rights in court. It is this failure that the Strategic Lawsuit Against Public Participation (SLAPP) exploits.

Plaintiffs file SLAPPs to interfere with the protected free expression of defendants.[6] A SLAPP has little or no chance of success in the courts.[7] Even without a successful court judgment, though, a SLAPP accomplishes an ulterior goal: forcing defendants who legally exercised their constitutional rights of free expression into costly litigation that chills their current and future involvement in public debate.[8] Until July 2010, Washington provided few options to dismiss these frivolous lawsuits.[9]

With the Washington Act Limiting Strategic Lawsuits Against Public Participation ("the Act" or "the Washington Act"),[10] Washington joined a growing group of states—including, most notably, California—that have extended anti-SLAPP protection to defend public exercises of free expression.[11] These laws allow individuals and companies, particularly media organizations, to not only dismiss lawsuits intended to frustrate their free expression rights, but also to secure attorney's fees and additional relief.[12]

Although the Washington Act is similar to California's anti-SLAPP statute, it is no mirror image.[13] The Act's legislative history, the Washington State Constitution's protection of free expression, and a

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6. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802–03 (2000) (SLAPPs "have the effect of interfering with the defendants past or future exercise of constitutionally protected rights").

7. *See infra* Part I.A.

8. *See* Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924 ("'SLAPPs[] are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.").

9. The Washington Act Limiting Strategic Lawsuits Against Public Participation became law in July 2010. *See* Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921.

10. *Id.*

11. *E.g.*, Citizen Participation in Government Act, ARK. CODE ANN. §§ 16-63-501 to 16-63-508 (2005); CAL. CIV. PROC. CODE § 425.16 (West Supp. 2011); GA. CODE ANN. § 9-11-11.1 (2006); Citizen Participation Act, 735 ILL. COMP. STAT. ANN. 110/1 to 110/99 (West Supp. 2011); IND. CODE ANN. §§ 34-7-7-1 to 34-7-7-10 (LexisNexis 2008); LA. CODE CIV. PROC. ANN. art. 971 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2010); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010); OR. REV. STAT. ANN. § 31.150 (West Supp. 2011); R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (1997); VT. STAT. ANN. tit. 12, § 1041 (Supp. 2010).

12. *See infra* Part IV.C.

13. *See infra* Part IV.

comparison of statutory texts of the Washington and California laws all demonstrate that Washington courts should not interpret the two statutes in lockstep.[14] This Comment analyzes these sources and implores Washington courts to pay special attention to provisions of the California statute that the Washington State Legislature expressly adopted, modified, or ignored.[15]

Part I of this Comment introduces the necessity of anti-SLAPP laws to protect those who engage in acts of constitutional free expression. Part II explains the evolution of the Washington State Legislature's anti-SLAPP statutory scheme, from its groundbreaking "Brenda Hill Bill" in 1989 to the passage of the new act in 2010. Part III explores the many similarities between California's influential anti-SLAPP statute and the Washington Act. Part IV shows that, despite their many similarities, the Washington Act includes important deviations from the California model. Finally, Part V argues that long-standing canons of statutory interpretation demonstrate that the Washington State Legislature, in borrowing many provisions of the California statute, implicitly intended to adopt those provisions and their corresponding case law. Likewise, by modifying or ignoring certain California provisions, the Washington State Legislature specifically intended to reject those provisions and their judicial interpretations. In particular, the Washington State Legislature rejected language from the California law defining the scope of protected activities. While the California law protects speech related to "issues of public *interest*," the Washington Act protects only "issues of public *concern*." This explicit modification demonstrates the Washington State Legislature's intent to apply the "public concern" test from the U.S. Supreme Court's decision in *Connick v. Myers*,[16] a test that already occupies solid ground in Washington jurisprudence.

I. SLAPPS FRUSTRATE THE RIGHT TO SPEAK AND PETITION ON ISSUES OF PUBLIC CONCERN

The right to comment on issues of public concern occupies a central position in First Amendment law.[17] The right to participate in debate on public issues derives not only from the Free Speech Clause, but also the Petition Clause.[18] The Petition Clause has been extended to cover

14. *See infra* Part V.

15. *See infra* Part V.

16. 461 U.S. 138 (1983).

17. Schneck v. Pro-Choice Network, 519 US 357, 377 (1997).

18. U.S. CONST. amend. I.

petitions and "any peaceful, legal attempt" to influence government action through any body—even the electorate.[19] It is those fundamental individual rights that a SLAPP aims to frustrate.

A. SLAPPs Frustrate Public Participation by Creating Costly Litigation for Defendants Speaking on Issues of Public Concern

The necessity for anti-SLAPP laws arises not out of the inability of state and federal constitutions to protect free expression, but rather the inefficiency with which the American judicial system provides that constitutional protection. In a SLAPP, the plaintiff bases the lawsuit on the defendant's free expression activities.[20] But unlike many reasonable challenges to free speech, claims in a SLAPP lack merit.[21] With no concern for the inevitable failure of the lawsuit, a SLAPP forces defendants—who have lawfully exercised their constitutional right of expression or petition—into costly litigation that may chill the defendant's future participation in the public debate.[22]

After studying more than 240 cases, University of Denver Professors George W. Pring and Penelope Canan coined the term "Strategic Lawsuit Against Public Participation."[23] In each of the cases they studied, the claim involved communications filed against nongovernment individuals or organizations on an issue of public interest or social significance.[24] The cases involved not only lawsuits traditionally associated with free speech, such as libel and defamation suits, but other actions such as business interference, conspiracy, or trespass.[25]

Because of the cost that it entails, the threat of lengthy litigation becomes vital to a SLAPP's effectiveness.[26] Plaintiffs rarely win in court but often realize their ultimate goal: to devastate the defendant

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19. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3, 211 (1996).

20. Tate, *supra* note 6, at 802–03.

21. Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423–24 (1991). Both the Washington and California anti-SLAPP statutes provide avenues for plaintiffs to prove their claim has merit, even if it is directed at punishing or frustrating public participation. *Compare* WASH. REV. CODE § 4.24.525(4)(b) (2010), *with* CAL. CIV. PROC. CODE § 425.16(b)(3) (West Supp. 2011).

22. *See* Metabolife Int'l, Inc., v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001).

23. PRING & CANAN, *supra* note 19, at vi.

24. *Id.* at 8–9.

25. *Id.* at 150–51.

26. *See* Wilbanks v. Wolk, 17 Cal. Rptr. 3d 497, 500 (Cal. Ct. App. 2004).

financially and chill the defendant's public involvement.[27] Although there are actions that a SLAPP defendant can take either during or after litigation—a so-called SLAPPback[28]—courts have found that those measures will likely do little to deter the plaintiff.[29] The traditional safeguards against meritless actions tend to have little effect because a SLAPP filer may consider any sanction "as merely a cost of doing business."[30]

B. The Case of Camer v. Seattle Post-Ingelligencer *Demonstrates a SLAPP's Costly Impact*

The case of Susan Goldberg demonstrates the damage a SLAPP can inflict without anti-SLAPP legislation. In 1982, Goldberg worked as a reporter for the *Seattle Post-Intelligencer*.[31] On June 20, 1982, the newspaper published her story, *'Nuisance' Suits Clog the Courts*.[32] The story addressed what several Seattle attorneys viewed as an issue of local concern: the effects and implications of pro se litigants filing frivolous claims in county courts.[33] The published article stated that, "correctly or not," area attorneys had leveled accusations that Dorothy Camer and Margaret Coughlin had filed nuisance suits. [34] Both Camer and Coughlin declined opportunities to speak with Goldberg for the story.[35] But on July 20, 1982, Camer and Coughlin alleged that the article defamed them in their joint complaint for libel.[36]

The trial court and appellate court both held that the plaintiffs, as a matter of law, did not present a valid claim for trial.[37] Goldberg's article was "undoubtedly opinion and therefore not actionable."[38] But the trial court did not dispose of the plaintiffs' case until almost two years after

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27. PRING & CANAN, *supra* note 19, at 29 ("Filers seldom win a legal victory—the normal litigation goal—yet often achieve their goals in the real world.").

28. *Id.* at 11, 123–24 (discussing how defendants can use a countersuit for malicious prosecution).

29. *See Wilbanks*, 17 Cal. Rptr. 3d at 500.

30. *Id.*

31. *See* Camer v. Seattle Post-Intelligencer, 45 Wash. App. 29, 31, 723 P.2d 1195, 1197 (1986).

32. Susan Goldberg, *'Nuisance' Suits Clog the Courts*, SEATTLE POST-INTELLIGENCER, June 20, 1982, at A4.

33. *Camer*, 45 Wash. App. at 31–32, 723 P.2d at 1197–98.

34. Goldberg, *supra* note 32, at A4.

35. *Camer*, 45 Wash. App. at 35, 723 P.2d at 1199.

36. *Id.* at 32, 723 P.2d at 1198.

37. *Id.* at 44, 723 P.2d at 1204.

38. *Id.* at 41, 723 P.2d at 1202.

the plaintiffs filed their complaint.[39] The Washington Court of Appeals did not announce its opinion until August 20, 1986—four years after the original filing.[40] Even though both courts considered the libel claim to be meritless, the plaintiffs forced the *Seattle Post-Intelligencer* into court for four years.[41] Considering that defending a typical libel lawsuit costs at least $20,000 to $50,000 merely to get through the initial rounds of dismissal,[42] the *Seattle Post-Intelligencer*'s victory was likely a costly one.

The lawsuit against the *Seattle Post-Intelligencer* imposed more than only financial costs. For four years, the *Camer* litigation forced Goldberg and the *Seattle Post-Intelligencer* to defend their professional reputations against charges of defamation and libel. The SLAPP transformed a public debate—a discussion regarding the propriety of "nuisance suits," including those claims filed by the *Camer* plaintiffs—into a private dispute in the state courts. Often, this role transformation, in which the party legally acting within its rights must defend itself, discourages future exercise of free expression rights.[43] When Professors Pring and Canan completed their study, they estimated that SLAPPs likely resulted in thousands of citizens being "sued into silence."[44] Without laws to protect those engaged in public participation, SLAPP filers can freely use litigation to discourage their opposition.

II. WASHINGTON'S PROTECTION OF PUBLIC PARTICIPATION HAS SLOWLY EVOLVED FROM THE NATION'S FIRST ANTI-SLAPP LAW

Recognizing the dangerous effect of SLAPP lawsuits on free expression, Washington became the first state to pass an anti-SLAPP law with its "Brenda Hill Bill" in 1989. The landmark law protected defendants against frivolous lawsuits challenging the defendants' lawful communication with government agencies. Thirteen years later, the

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39. *Id.* at 32–33, 723 P.2d at 1198. The complaint was dismissed on May 7, 1984. *Id.* at 33, 723 P.2d at 1198.

40. *Id.* at 29, 723 P.2d at 1195.

41. The appellate court did not consider awarding attorney's fees to the *Post-Intelligencer*. *See id.*

42. Rachel Smolkin, *Cities Without Newspapers?*, AM. JOURNALISM REV., June/July 2009, at 16, 25. The *Post-Intelligencer* shut down its print publication on March 17, 2009, after losing $14 million the previous year. Dan Richman & Andrea James, *Seattle P-I to Publish Last Edition Tuesday,* SEATTLEPI.COM (Mar. 16, 2009, 10:00 PM), www.seattlepi.com/business/403793_piclosure17.html.

43. PRING & CANAN, *supra* note 19, at 29.

44. *Id.* at 3.

Washington State Legislature recognized a need to enhance this limited protection. In a 2002 amendment, the legislature strengthened the penalties for filing a SLAPP and also provided courts better guidance for early SLAPP dismissal.

A. With the "Brenda Hill Bill," the Nation's First Anti-SLAPP Law, Washington Protected Citizens' Communication with Government Bodies

Washington passed its first anti-SLAPP legislation in 1989.[45] The legislature enacted the bill in response to the efforts of a young Washington mother named Brenda Hill. After discovering that her real estate company owed the state hundreds of thousands of dollars in unpaid taxes, Hill reported the company to the state government.[46] In retaliation for this lawful act, the real estate company sued and harassed Hill to the point of bankruptcy.[47] After Hill picketed the capitol steps and received favorable media attention, the Washington State Legislature introduced a bill to provide relief to victims of similarly vindictive lawsuits.[48] The law, known as the "Brenda Hill Bill,"[49] provided immunity from civil liability for claims based on good-faith communication with the government regarding any matter "reasonably of concern."[50] The law was America's first modern anti-SLAPP law.[51]

The Brenda Hill Bill was not without defects. Notably, it provided no method for early dismissal.[52] With courts unable to dismiss SLAPPs before discovery, defendants had no means of escaping the significant legal expenses SLAPPs intend to inflict.[53] Additionally, the requirement

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45. Act of May 5, 1989, 1989 Wash. Sess. Laws 1119.

46. PRING & CANAN, *supra* note 19, at 130.

47. *Id.* at 130–31. The real estate company, in retaliation, filed for foreclosure on Hill's home, filed a $1,000,000 defamation claim, and put a gag order on the Hills. *Id.* The president of the company went so far so say "we're going to get every last nickel she has." *Id.* at 131 (quoting Walter Hatch, *Dream Home Is Couple's Nightmare*, SEATTLE TIMES, Mar. 10, 1988, at D1). For years, Brenda Hill felt as if the government had abandoned her in her fight. She received little support in defending the company's lawsuits. The Hills' homeowners insurance was canceled; they had to file for bankruptcy to protect their home. *Id.* at 130.

48. PRING & CANAN, *supra* note 19, at 132.

49. *Id.* at 192.

50. Act of May 5, 1989, 1989 Wash. Sess. Laws 1119–20.

51. PRING & CANAN, *supra* note 19, at 191.

52. *See* 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, 284–85 (2003).

53. *See id.* at 284.

of "good faith" only increased the need for a factual inquiry.[54] The need to resolve factual issues often dragged defendants through litigation for years, muting the law's intended effects.[55]

B. In a 2002 Amendment, Washington Expanded Protection to the Right of Petition, but Not All Exercises of the Right of Expression

In 2002, the Washington State Legislature amended the law to help cure several of the Brenda Hill Bill's defects.[56] The legislature removed the "good faith" requirement as an element of a SLAPP defense, effectively granting immunity to all protected activity, regardless of the defendant's intent.[57] The amendment also authorized courts to award statutory damages of $10,000 to the defendants, although courts could deny that award if they found the defendants acted in bad faith.[58] The legislature also instructed the courts that it intended the law to provide "clear rules for early dismissal review."[59]

Like the Brenda Hill Bill before it, however, the 2002 amendment was not without defects. The amendment limited itself to communication with the government and self-regulatory organizations.[60] For example, the amendment would not apply to a newspaper article.[61] Like the Brenda Hill Bill before it, the amended statute applied only to dismiss "a civil action for damages," and not to claims for injunctive relief, such as a temporary restraining order.[62] And although the availability of a $10,000 award of damages might deter SLAPPs in some situations, it hurt SLAPP defendants in others; the burden of fighting a challenge that

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54. *See id.*

55. *Id.* at 284–85.

56. Act of March 28, 2002, 2002 Wash. Sess. Laws 1057.

57. WASH. REV. CODE § 4.24.510 (2010); Johnston, *supra* note 52, at 285–86.

58. WASH. REV. CODE § 4.24.510.

59. 2002 Wash. Sess. Laws 1057.

60. WASH. REV. CODE § 4.24.510.

61. The statute does not include the electorate as a branch of the government, so communication with the electorate in a newspaper article, similar to the subject of the *Camer* litigation, would not receive protection. WASH. REV. CODE § 4.24.510.

62. Emmerson v. Weilep, 126 Wash. App. 930, 936–37, 110 P.3d 214, 216–17 (2005) (quoting WASH. REV. CODE § 4.24.500). In *Emmerson*, a Spokane city code enforcement officer received a restraining order from a resident who made several complaints regarding a neighbor's land use, and then made complaints to the Spokane City council, City administrator, and police department regarding the officer's investigation. *Emmerson*, 126 Wash. App. at 933–34, 110 P.3d at 215–16. Without specifically addressing whether the defendant's activity was protected, the court held that the anti-SLAPP motion did not apply because the officer had not made a claim for damages. *Id.* at 937, 110 P.3d at 217.

the defendant acted in bad faith had the potential to lengthen litigation to the point of reducing the SLAPP defense's efficiency.[63] These defects continued to plague Washington SLAPP defendants until the legislature authored its new California-style anti-SLAPP law in 2010.

III. THE 2010 WASHINGTON ANTI-SLAPP ACT CLOSELY MIRRORS CALIFORNIA'S, AND COURTS HAVE INTERPRETED THEM SIMILARLY

Even as Washington amended its state law in 2002 to provide more protection for those petitioning the government, other state legislatures had already enacted anti-SLAPP laws that went further. In 1992, after two previous attempts to pass an anti-SLAPP law,[64] California passed a law that went well beyond petitioning. The law, a procedural motion to strike a claim, protects exercises of the right to petition *and* the right of free speech "in connection with a public issue."[65] The California law allows plaintiffs to proceed past the motion to strike if they can prove "a probability" that the plaintiff will prevail on the claim.[66] Several states soon followed suit: by 2010, ten states had followed California's lead in protecting both the exercise of the right of free speech and the right to petition.[67] Washington joined those states when it passed the Act in 2010.[68]

Governor Christine Gregoire signed the Washington Act Limiting Strategic Lawsuits against Public Participation into law on March 18, 2010, just two months after it first appeared before the State Senate Judiciary Committee.[69] The Act went into effect June 10, 2010.[70] The bill did not have a particularly long or dramatic history. Between the original bill that first appeared before the Senate Judiciary Committee[71]

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63. Johnston, *supra* note 52, at 288.

64. PRING & CANAN, *supra* note 19, at 196.

65. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2011).

66. *Id.*

67. *See* statutes cited *supra* note 11.

68. Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924.

69. *See History of Bill, Senate Bill 6395*, WASH. STATE LEGISLATURE, http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6395&year=2009 (last visited Aug. 2, 2011).

70. WASH. REV. CODE § 4.24.525 (2011).

71. *See* S.B. 6395, 61st Leg., 1st Sess. (Wash. 2010), *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/6395.pdf (last visited Aug. 2, 2011). State senators Adam Kline, Claudia Kauffman, and Jeanne Kohl-Welles sponsored the bill. *Id.* at 1.

and the final law,[72] the bill underwent only one substantive change, which related to the relief for defeating a frivolously filed anti-SLAPP motion.[73] Otherwise, the Act passed by unanimous consent with no floor debate in either the state house or senate.[74]

The Washington Act bears a close resemblance to the California law, and courts have taken notice. An analysis of the texts reveals several similar provisions, starting with their instruction that courts interpret the statutes broadly and continuing with their parallel structure and common terms of art. Additionally, the two statutes protect the same essential constitutional right. With these similarities in mind, courts have begun using California law to interpret the Washington Act.

A. The Two Statutes Include Many Similar Provisions

The similarities between the California statute and the Washington Act begin with the two statutes' common directive that courts construe them broadly. The similarities continue with the statutes' parallel procedural structure, and their required stay of discovery. Finally, the two laws use identical terms to describe the protected activity.

1. Both Statutes Instruct Courts to Construe Them Broadly

The California State Legislature encourages broad construction of its anti-SLAPP statute. When it enacted the statute, the legislature found "a disturbing increase" in lawsuits initiated primarily to chill public participation,[75] and it declared that SLAPPs represented an "abuse of the judicial process."[76] In a 1997 amendment to the statute,[77] the California State Legislature added language requiring that the law be broadly construed.[78] This sentence has had a tremendous effect on the statute's

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72. 2010 Wash. Sess. Laws 921.

73. The original bill did not allow for plaintiffs to obtain relief exceeding $10,000 for a frivolously filed motion. At least one committee member worried that the law's sword was not equally sharp on both edges, providing more protection to those who frivolously file anti-SLAPP motion than those who frivolously file SLAPPs. *See* Proposed Substitute to Senate Bill 6395, http://apps.leg.wa.gov/CMD/showdoc.ashx?u=A2iGB9PMbwyP2X1C%2bw7qdVoo636n00r/Ah888keMqQ2FVbQNr8ngp%2btO06aTJMdgMg53kw5bRK5IsDdB/3g6WwwhGtPDHT/P&y=2010 (last visited on Aug. 2, 2011).

74. *See History of Bill, Senate Bill 6395*, *supra* note 69.

75. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2011).

76. *Id.*

77. Tate, *supra* note 6, at 816.

78. CAL. CIV. PROC. CODE § 425.16(a). The legislature amended the law to include this statement in 1997 to react to what had been a narrow interpretation of the statute in its genesis. *See* Tate, *supra*

interpretation, particularly in determining those activities that the law protects.[79] Courts use this provision to resolve difficult questions in favor of providing a broad right of recovery.[80]

Similarly, the Washington Act requires that courts apply and construe the law liberally "to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts."[81] The Washington Act expresses concern about lawsuits initiated primarily to chill the constitutional rights of free speech and petition, and also reasons that expedited judicial review will "avoid the potential for abuse in these cases."[82]

2. Both Statutes Provide a Procedural Remedy for SLAPP Defendants

The procedural remedy that the California law provides has proven to be "a potent weapon for defendants."[83] The California statute applies to claims arising out of exercises of the right of petition and the right of free speech "in connection with a public issue."[84] The California statute focuses "not [on] the form of the plaintiff's cause of action but, rather, [on] the defendant's *activity* that gives rise to his or her asserted

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note 6, at 823–24. Prior to the amendment, courts had narrowed the application only to activities "closely tied to the right to petition and the freedom of speech." Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 58 Cal. Rptr. 2d 613, 616 (Cal. Ct. App. 1996) (citing Zhao v. Wong, 55 Cal. Rptr. 2d. 909, 918 (Cal. Ct. App. 1996)). One study found that in the first year-and-a-half, twenty-two of forty-nine anti-SLAPP motions failed. PRING & CANAN, *supra* note 19, at 198.

79. Tate, *supra* note 6, at 826–27 (stating that the "spirit of the statute's mandate of broad construction" affects courts' approaches).

80. *See, e.g.*, Dowling v. Zimmerman, 103 Cal. Rptr. 2d 174, 194 (Cal. Ct. App. 2001) (stating that the "purpose of the anti-SLAPP statute will be promoted by construing that statute broadly to permit a pro se SLAPP defendant" to recover fees); Lam v. Ngo, 111 Cal. Rptr. 2d 582, 584–85 (Cal. Ct. App. 2001) (ruling that "[b]ecause the Legislature has specified that [§425.16] is to be construed broadly," filing deadlines start fresh with amended complaint); Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 211 (Cal. Ct. App. 2000) ("Given the mandate that we broadly construe the anti-SLAPP statute, a single publication does not lose its 'public forum' character merely because it does not provide a balanced point of view."); *see also* Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 740 (2003) ("This statement of legislative intent has permitted resolution of many knotty problems and has been explicitly relied on by a significant number of courts as a key to their decisions.")

81. Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924.

82. *Id.* at 921.

83. 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 16.2.2, at 16–6 (3d ed. 2009).

84. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2011).

liability."[85] Therefore, California courts first ask whether the claim is based on an activity of the defendant that constitutes protected speech or petitioning.[86] The plaintiff's claim must "arise from" the activity; merely because a claim has been filed at some time after the defendant engaged in such an act will not invoke anti-SLAPP protection.[87]

Should a defendant filing an anti-SLAPP motion prove to the court that the claim arises out of protected activity, it has cleared only the first hurdle. Next, the plaintiff has the opportunity to establish, through the pleadings and affidavits,[88] that there is a probability that the plaintiff will prevail on the claim.[89]

The Washington Act follows the same structure to provide the identical procedural remedy. The Washington Act applies "to any claim, however characterized, that is based on an action involving public participation and petition."[90] Should a Washington defendant prove, by a preponderance of the evidence, that the Washington Act applies, the burden then shifts to the SLAPP filer to establish, by clear and convincing evidence, a probability of prevailing on the claim.[91] If the SLAPP filer cannot meet that burden, then not only must the court strike the complaint, but the court must also award attorney's fees, a $10,000 damage award, and any additional relief to "deter repetition of the conduct and comparable conduct by others similarly situated."[92] If the SLAPP filer succeeds in demonstrating a probability of prevailing on the claim, that determination may not be admitted into evidence later in the case, and it has no effect on the burden of proof in the underlying claim.[93]

3. Both Statutes Require the Court to Stay Discovery Unless the Plaintiff Can Demonstrate "Good Cause"

California law addressed one of the primary weapons of SLAPPs—

85. Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002).

86. *Id.*

87. *See* City of Cotati v. Cashman, 52 P.3d 695, 700 (Cal. 2002).

88. CAL. CIV. PROC. CODE § 425.16(b)(2) (West Supp. 2011). California courts require that the evidence submitted also be admissible at trial. *See* Salma v. Capon, 74 Cal. Rptr. 3d 873, 884 (Cal. Ct. App. 2008) (citing Evans v. Unkow, 45 Cal. Rptr. 2d 624, 628 (Cal. Ct. App. 1995)).

89. CAL. CIV. PROC. CODE § 425.16(b)(1).

90. WASH. REV. CODE § 4.24.525(2) (2011).

91. § 4.24.525(4)(b).

92. § 4.24.525(6)(a).

93. § 4.24.525(4)(d).

the high costs of discovery before dismissal[94]—by including a statutory provision that stays discovery upon filing of an anti-SLAPP motion.[95] The stay goes into effect until the "notice of [an] entry of [an] order ruling on the motion," and a plaintiff may only circumvent the stay by moving, with good cause, to conduct specified discovery.[96]

The discovery stay allows a defendant served with a complaint arising from protected activity to "put the plaintiff to his or her proof before the plaintiff can conduct discovery."[97] Because the statute's design promotes the "fast and inexpensive unmasking and dismissal of SLAPPs,"[98] California courts require plaintiffs to overcome a high burden to prove good cause.[99] To satisfy the good cause standard, the plaintiff must make a timely showing that the defendant, or its agents and employees, knows or holds evidence that would defeat the defendant's anti-SLAPP motion.[100] Even if discovery is granted, parties must limit discovery to the issues raised in the anti-SLAPP motion[101] and must go to an issue that the plaintiff should not be able to establish without discovery.[102] For example, in a defamation case, it would not be enough for the plaintiff to request discovery to prove that a statement was false, or that the statement was published, because the plaintiff should be able to prove falsity or publication without discovery.[103]

The Washington Act includes a similar discovery stay. It requires that a court stay all discovery as well as any pending hearings or motions until it has ruled on the anti-SLAPP motion.[104] The only way to defeat this stay under the Washington Act is if the court orders further discovery "for good cause shown."[105]

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94. *See supra* Part II.

95. *See* CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 2011).

96. *Id.*

97. Price v. Stossel, 590 F. Supp. 2d 1262, 1268 (C.D. Cal. 2008) (quoting Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 980 (C.D. Cal. 1999)).

98. Wilcox v. Super. Ct., 33 Cal. Rptr. 2d 446, 454 (Cal. Ct. App. 1994).

99. *See* Ludwig v. Super. Ct., 43 Cal. Rptr. 2d 350, 356 (Cal. Ct. App. 1995) ("The legislative intent is best served by an interpretation which would require a plaintiff to marshal facts sufficient to show the viability of the action *before* filing a SLAPP suit." (emphasis in original)).

100. *See Price*, 590 F. Supp. 2d at 1266 (citing Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 54 (Cal. Ct. App. 1995)).

101. Nguyen-Lam v. Cao, 90 Cal. Rptr. 3d 205, 215 (Cal. Ct. App. 2009) (quoting Slauson P'ship v. Ochoa, 5 Cal. Rptr. 3d 668, 680 (2003)).

102. *See, e.g.*, Paterno v. Super. Ct., 78 Cal. Rptr. 3d 244, 250 (Cal. Ct. App. 2008).

103. *Id.*

104. WASH. REV. CODE § 4.24.525(2) (2011).

105. § 4.24.525(5)(C).

The discovery stay is one of three important provisions in the Washington Act that deter the lengthy, costly litigation that often makes SLAPPs so devastating. Additionally, a court must hold a hearing on an anti-SLAPP motion no more than thirty days after service[106] and it must announce its ruling within seven days of the hearing.[107] Together, these provisions provide courts the ability to swiftly dismiss meritless claims with minimal cost to the defendant. Hence, the same complaint that took four years for the *Seattle Post-Intelligencer* to completely dispose of could potentially be dismissed, with no further discovery, in no more than thirty-seven days.

4. Both Statutes Protect Statements Made in "Official Proceedings"

Both the California anti-SLAPP statute and the Washington Act protect statements made in "official proceedings."[108] The question of whether an activity involves an official proceeding may often be a threshold question to determining whether California's anti-SLAPP statute applies,[109] so California courts must often draw difficult lines in deciding what constitutes an official proceeding authorized by law.[110] Although the statute plainly applies to court hearings[111] and administrative proceedings,[112] private proceedings held under the influence of the state present difficult cases for the courts.[113] Often, the level of government entanglement involved in the event holds significant

106. § 4.24.525(5)(a). The provision does include a clause that allows for a later hearing if the "docket conditions of the court require [it]." *Id.* However, "such hearings should receive priority." *Id.*

107. § 4.24.525(5)(b). This provision provides no route for a court to escape this requirement. *Id.*

108. *Compare* CAL. CIV. PROC. CODE § 425.16(e)(2), *with* WASH. REV. CODE § 4.24.525(2).

109. In California, this may particularly be the case if the activity does not involve a public issue.

110. *See* A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 41 Cal. Rptr. 3d 1, 10 (Cal. Ct. App. 2006) (holding that stop notice and other collection efforts did not constitute an official proceeding). *But cf.* Kibler v. N. Inyo Cnty. Local Hosp. Dist., 138 P.3d 193, 199–200 (Cal. 2006) (holding that peer medical review meeting was an official proceeding). Even if a court finds that a proceeding is an official proceeding, the defendant must still prove that his or her activity constituted a statement or writing related to the official proceeding. *See* CAL. CIV. PROC. CODE § 425.16(e)(2).

111. *See* Rohde v. Wolf, 64 Cal. Rptr. 3d 348, 353–54 (Cal. Ct. App. 2007). An anti-SLAPP claim based on communications in court differs from the litigation privilege, which may still be relevant in establishing the plaintiff's probability of prevailing. *See* Flatley v. Mauro, 139 P.3d 2, 17 (Cal. 2006) (holding that litigation privilege and anti-SLAPP statute are "substantively different statutes that serve quite different purposes"); *Rohde*, 64 Cal. Rptr. 3d at 356.

112. *See* Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 596 (9th Cir. 2010).

113. *See infra* text accompanying notes 116–121.

sway.[114]

The California Supreme Court has analyzed several factors in determining if a proceeding is official under the statute: whether the proceeding is required under California law; whether results of a proceeding must be reported to a government authority; whether the proceeding plays a role in the public welfare; and whether the decisions made in a proceeding are subject to judicial review.[115] Using those factors, the Court determined that the statute applied to a hospital peer review proceeding, which the state required the hospital to report and which allowed for judicial review.[116] Other proceedings held to apply under the statute include statutorily mandated arbitration,[117] and a public review hearing conducted by a government agency.[118] Conversely, California courts have held that the following do *not* constitute an official proceeding: a "ministerial event" such as a sheriff's auction,[119] a nonjudicial foreclosure proceeding,[120] and a collection effort made by a supplier against a contractor.[121]

The Washington Act also protects statements made in official proceedings and in connection with issues before an official proceeding.[122] The statutory language is similar to the California statute,[123] but Washington courts have not yet had an opportunity to define what an official proceeding is in the context of the statute.

5. Both Statutes Protect Statements Made in Public Forums

The California anti-SLAPP statute protects statements made in a "public forum," but the California courts do not define that term in lockstep with the First Amendment. In First Amendment law, a public

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114. *Compare Kibler*, 138 P.3d at 200 (holding hospital peer medical review subject to administrative mandate and therefore is "quasi-judicial"), *with* Garretson v. Post, 68 Cal. Rptr. 3d 230, 239 (Cal. Ct. App. 2007) (holding that nonjudicial foreclosure proceeding not an official proceeding because it was "not closely linked to any governmental . . . proceedings or regulation").

115. *Kibler*, 138 P.3d at 200 (interpreting the judicial review factor, "the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies[]").

116. *Id.* at 199–200.

117. *See* Mallard v. Progressive Choice Ins. Co., 115 Cal. Rptr. 3d 487, 495 (Cal. Ct. App. 2010).

118. Dixon v. Super. Ct., 36 Cal. Rptr. 2d 687, 744 n.11 (Cal. Ct. App. 1994).

119. *See* Blackburn v. Brady, 10 Cal. Rptr. 3d 696, 701 (Cal. Ct. App. 2004).

120. *See* Garretson v. Post, 68 Cal. Rptr. 3d 230, 239 (Cal. Ct. App. 2007).

121. A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 41 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2006).

122. WASH. REV. CODE § 4.24.525(2) (2011). Additionally, the statute protects statements made in an effort to have a government body or official proceeding consider the issue. *Id.*

123. *Compare id., with* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2011).

forum refers to either a place historically associated with open public debate—a street, sidewalk, or park—or a place designated for expressive activity.[124] The California courts, though, have interpreted "public forum" more broadly in the context of the anti-SLAPP statute.[125]

To determine whether a public forum exists in the context of the statute, California courts ask whether the forum is a place[126] where information is freely exchanged.[127] By broadly construing the term as the legislature directed, California courts have determined that websites,[128] newspapers,[129] magazines,[130] call-in radio talk shows,[131] and a homeowners association's board meeting and newsletter[132] qualify as public forums for the purpose of the statute.

Like the California statute, the Washington Act protects statements made in public forums.[133] Washington courts have not yet had an opportunity to define a public forum in the context of the statute.

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124. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); s*ee also* Zhao v. Wong, 55 Cal. Rptr. 2d 909, 916 (Cal. Ct. App. 1996) ("The term 'public forum' . . . refers typically to those places historically associated with First Amendment activities, such as streets, sidewalks and parks."). Before the legislature amended the California statute in 1997 to encourage a broad construction of the statute, the California courts interpreted the term "public forum" consistently with First Amendment case law. *See Zhao*, 55 Cal. Rptr. 2d at 916.

125. *See* Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 212 (Cal. Ct. App. 2000).

126. Computer Xpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 638 (Cal. Ct. App. 2001).

127. *See* Kronemyer v. Internet Movie Database, Inc., 59 Cal. Rptr. 3d 48, 55 (Cal. Ct. App. 2007). This includes forms of communications that come at a cost, such as newspapers and magazines. *See* Nygård, Inc. v. Uusi-Kerttula, 72 Cal. Rptr. 3d 210, 218 (Cal. Ct. App. 2008) (holding that these forms of communication are public). The court found that a broad reading "comports with the fundamental purpose underlying the anti-SLAPP statute, which seeks to protect against 'lawsuits brought primarily to chill the valid exercise of constitutional rights' and 'abuse of the judicial process.'" *Id.* at 217 (quoting CAL. CIV. PROC. CODE § 425.16(a)).

128. *See* Barrett v. Rosenthal, 146 P.3d 510, 514 n.4 (Cal. 2006) ("Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute."); *Kronemyer*, 59 Cal. Rptr. 3d 48, 55 (Cal. Ct. App. 2007) (Internet Movie Database, which provides information concerning film and television to 35 million visitors monthly, is a public forum); Vogel v. Felice, 26 Cal. Rptr. 3d 350, 353, 357 (Cal. Ct. App. 2005) (defendant's Web site listing plaintiffs as Nos. 1 and 2 on list of "Top Ten Dumb Asses" is a public forum).

129. *See Nygård*, 72 Cal. Rptr. 3d at 218.

130. *See id.*

131. *See* Ingels v. Westwood One Broad. Servs., Inc., 28 Cal. Rptr. 3d 933, 941 (Cal. Ct. App. 2005).

132. *See* Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 210, 212 (Cal. Ct. App. 2000).

133. WASH. REV. CODE § 4.24.525(2)(d) (2011).

B. Washington's Broad Constitutional Right to Free Speech, the Right the Washington Act Protects, Originates from the California State Constitution

Both the Washington Act and the California anti-SLAPP statute protect against lawsuits targeted at lawful exercises of the right of petition and the right of free speech on issues of public concern. Those rights derive not only from the First Amendment of the U.S. Constitution but also from the respective state constitutions.

The free speech provision of the Washington State Constitution, like the Washington Act itself, is derived from the California State Constitution.[134] The drafters of the Washington State Constitution surveyed the free speech laws of many states and elected to provide an affirmative right to free speech, rather than the state-action limitation seen in both the U.S. Constitution and the Oregon State Constitution.[135] When the drafters formalized the Washington State Constitution, they included a guarantee of free speech that mostly mirrored the California provision.[136]

Washington State's constitutional guarantee of free speech is broader than its federal counterpart. Whereas the U.S. Constitution, as a general rule, only forbids state action to abridge free speech,[137] the Washington State Constitution includes no such explicit requirement: "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[138] Washington courts consider this right to be

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134. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 19 (2002).

135. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 172–73, 177 (1985).

136. *See id.* at 177. *Compare* CAL. CONST. art. I, § 2 (1879, amended 1980), *with* WASH. CONST. art. I, § 5. The Washington drafters made one change from the California constitution, although the drafters likely did not see the change as affecting the right provided. Utter, *supra* note 135, at 177 n.94. Washington elected not to include California's additional clause that "no law shall be passed to restrain or abridge the liberty of speech or the press." CAL. CONST. art. I, § 2 (1879, amended 1980). It is likely that the Washington drafters thought that the clause was redundant; the affirmative right necessarily includes the prohibition against state limitation of the right. Utter, *supra* note 135, at 177 n.94.

137. *See* Hudgens v. NLRB, 424 U.S. 507, 519 (1976) (restricting the First and Fourteenth Amendment's safeguards to state action). *But see* Marsh v. Alabama, 326 U.S. 501, 509–10 (1946) (holding that a privately-owned city that opens up its roads to the public is subject to First Amendment restrictions).

138. WASH. CONST. art. I, § 5. *See also* David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 282 (1985) ("Since the 'state action' doctrine fulfills no instrumental or normative function appropriate to state constitutional law decision-making, its abandonment is dictated by reason.").

more expansive than the right granted by the U.S. Constitution.[139] The state constitution's right of petition does not qualitatively differ from the right the U.S. Constitution protects.[140] Under both, no government actor may abridge the right to petition the government.[141]

C. *Federal Courts Have Relied on California Case Law in Early Interpretations of the Washington Act*

Because the Washington Act only went into effect in June 2010, defendants have filed few anti-SLAPP motions under the Washington Act. Federal district courts in Washington, rather than Washington state courts, have been the first to issue opinions interpreting the Washington Act.[142] These early decisions have revealed a heavy reliance on California statutory and case law.[143]

In *Aronson v. Dog Eat Dog Films, Inc.*,[144] Washington resident Ken Aronson sued controversial documentarian Michael Moore[145] for using Aronson's likeness, voice, and song from video footage Aronson shot in England in Moore's health care documentary *Sicko*.[146] Moore responded

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139. *See* Alderwood Assocs. v. Wash. Envtl. Council, 96 Wash. 2d 230, 243–44, 635 P.2d 108, 115–16 (1981).

140. *Compare* U.S. CONST. amend. I, *with* WASH. CONST. art. I, § 4. *See also* Richmond v. Thompson, 901 P.2d 371, 376 (Wash. Ct. App. 1995) (holding that the state provision is usually interpreted "in harmony" with the First Amendment).

141. *See* U.S. CONST. amend. I; WASH. CONST. art. I, § 4.

142. *See* Arata v. City of Seattle, No. C10-1551(RSL), 2011 WL 248200 (W.D. Wash. Jan. 15, 2011); Castello v. City of Seattle, No. C10-1457(MJP), 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010); Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104 (W.D. Wash. 2010); Nguyen v. Clark Cnty., 732 F. Supp. 2d 1190 (W.D. Wash. 2010).

143. Only one court that has made an anti-SLAPP decision since the Washington Act became law has recognized the differences between the California and Washington statutes. *See* N.Y. Studio, Inc., v. Better Bus. Bureau of Ala., Or., and W. Wash., No. 3:11-cv-05012(RBL), 2011 WL 2414452, at *3 (W.D. Wash. June 13, 2011) (discussing Washington's stronger burden of proof to survive an anti-SLAPP motion).

144. 738 F. Supp. 2d 1104 (W.D. Wash. 2010).

145. Moore is well-known for the gun-control documentary *Bowling for Columbine* and the Iraq War documentary *Fahrenheit 9/11*, among others.

146. SICKO (Dog Eat Dog Films 2007). The film claims to portray "the crazy and sometimes cruel U.S. health care system, told from the vantage of everyday people faced with extraordinary and bizarre challenges in their quest for basic health coverage." Michael Moore, *Film: Sicko*, MICHAELMOORE.COM, http://www.michaelmoore.com/books-films/sicko (last visited Aug. 5, 2011). The film features Eric Turnbow, a friend of Aronson's, who injured his shoulder as he attempted to cross Abbey Road walking on his hands and received care in an English hospital. Defendant's Special Motion to Strike at 3, Aronson v. Dog Eat Dog, 738 F. Supp. 2d 1104 (2010) (No. 3:10CV-05293-KLS), *available at* http://docs.justia.com/cases/federal/district-courts/washington/wawdce/3:2010cv05293/167337/15/.

by filing an anti-SLAPP motion to strike Aronson's lawsuit.[147]

The U.S. District Court for the Western District of Washington looked to California case law, after it reasoned that the Washington Act "mirrors" the California provision.[148] The court held that *Sicko* undisputedly addressed an issue of public concern.[149] The court noted, however, after analyzing other California cases, that even if an overall work addresses issues of public concern, it is possible for exercises of free speech within that work to fall outside of the statute's protection.[150] Even though Moore "involuntarily thrust" Aronson into the health care discussion, Aronson's appearance in the film "directly connected to the discussion of the healthcare system."[151] Therefore, Moore met his burden of proving that the statute applied to his activities.[152] The court then examined Aronson's claims to see if he had a probability of prevailing, and concluded that the claims were either barred by the First Amendment,[153] preempted by the Copyright Act,[154] or lacked merit.[155] The court awarded Moore attorney's fees and the statutory award of $10,000.[156]

In a second case before the U.S. District Court for the Western District of Washington, *Castello v. City of Seattle*,[157] a Seattle paramedic filed a suit against several city firefighters and paramedics for defamation.[158] The defendants had previously filed complaints with the city and spoken to a television station about the plaintiff's harassing conduct.[159] The court acknowledged *Aronson*'s reliance on California

147. *Aronson*, 738 F. Supp. 2d at 1107–08.

148. *Id.* at 1110.

149. *Id.* at 1111. The court declined to interpret the Washington State Legislature's intent in applying the Washington Act to issues "of public concern," rather than to "public issue[s]" or "issue[s] of public interest." *See infra* Part IV.A.

150. *Id.* at 1112. The court relied on a California case in which a court found that even though the film *Reality Bites* addressed issues of public concern, the activity on which the lawsuit was based (the use of the plaintiff's likeness in creating one of the film's characters) did not. Dyer v. Childress, 55 Cal. Rptr. 3d 544, 549 (Cal. Ct. App. 2007).

151. *Aronson*, 738 F. Supp. 2d at 1111.

152. *Id.* at 1112.

153. *Id.* at 1114.

154. *Id.* at 1116.

155. *See id.* at 1116–17.

156. *Id.* at 1117.

157. No. C10-1457(MJP), 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010).

158. *Id.* at *1.

159. *Id.* at *2. The news story was about low morale in the fire department. The defendants never mentioned the plaintiff by name in the story.

law and also used California case law as "persuasive authority" to determine whether the defendants successfully proved that the statute protected their activity.[160] Using California case law as a guide,[161] the court determined that the television broadcast constituted a public forum for the purposes of the Washington Act.[162]

IV. DESPITE THEIR CLOSE RESEMBLANCE, THE WASHINGTON ACT AND THE CALIFORNIA ANTI-SLAPP STATUTE HAVE IMPORTANT DIFFERENCES

The Washington State Legislature did not copy the California anti-SLAPP statute verbatim when it drafted the Act. The Washington Act differs in several respects. Most significantly, the Washington Act chose not to adopt California's protection of statements relating to an issue of "public *interest*," and instead protected issues of "public *concern*," a phrase with which Washington courts are already familiar. Additionally, the Washington Act does not include two exceptions in the California anti-SLAPP statute, and the Washington Act punishes SLAPP filers more severely than does the California statute.

A. The Washington Act's Protection of Statements Relating to an "Issue of Public Concern" Differs from the California Statute's Protection of Statements Relating to a "Public Issue" or an "Issue of Public Interest"

One difference between the statutes might be the most important in determining the breadth of the Act's scope. Instead of applying protection to certain activities in connection with "an issue of public *interest*,"[163] as California does, the Washington Act applies to the same activities in connection with "an issue of public *concern*."[164]

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160. *Id.* at *4.

161. *Id.* at *6 (citing *Nygård, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 215–18 (Cal. Ct. App. 2008), which held that a city newspaper is a public forum under California anti-SLAPP statute). The *Castello* court found "no meaningful distinction" between a newspaper and a local news broadcast for the purpose of the statute. 2010 WL 4857022 at *6.

162. *Id.* at *6. The court concluded that "the emotional and psychological stability of an emergency medical worker is 'an issue of public concern.'" *Id.* The court, like the *Aronson* court, declined to interpret the Washington State Legislature's intent in applying the Washington Act to statements related to issues "of public concern." *See infra* Part V.B (discussing the Washington Act's application to statements related to issues of public concern).

163. CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 2011) (emphasis added).

164. WASH. REV. CODE § 4.24.525(2) (2011) (emphasis added).

1. California Courts Emphasize Whether an Issue Has Received Widespread Attention in Determining What Constitutes an "Issue of Public Interest"

California's anti-SLAPP statute protects lawful speech "in connection with a public issue or an issue of public interest."[165] This phrase, in conjunction with the legislature's request that courts construe the statute broadly,[166] has extended the anti-SLAPP statute to provide protection for the producers of the "raunchy, satirical comedy" *Borat*,[167] for a tabloid magazine's stories concerning the sex life of pop singer Britney Spears,[168] for a website discussing the movie *My Big Fat Greek Wedding*,[169] and for unlicensed representations of famous heiress Paris Hilton.[170] Two prominent tests have emerged from California appellate courts to determine which issues are "public" or "of public interest": the *Rivero* and *Weinberg* tests.[171]

Under the test established in *Rivero v. American Federation of State, County and Municipal Employees*,[172] courts discern whether an issue falls into one of three categories of cases: (1) statements that "concerned a person or entity in the public eye"; (2) "conduct that could directly affect a large number of people beyond the direct participants"; or (3) a "topic of widespread, public interest."[173]

Courts that apply the test formulated in *Weinberg v. Feisel*,[174] decided

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165. CAL. CIV. PROC. CODE § 425.16(e)(3)–(4). Although the California State Legislature, unlike Washington, did not specify that the conduct must be lawful, the California courts have held that the statute does not apply to illegal conduct. *See*, *e.g.*, Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871 (Cal. Ct. App. 2001).

166. CAL. CIV. PROC. CODE § 425.16(a).

167. Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment,* 26 CARDOZO ARTS & ENT. L.J. 639, 653–54 (2009). The defendant production company successfully argued that several of the issues the movie invoked, particularly in the contested scene involving several fraternity brothers, were of public interest, including issues surrounding sexism, racism and homophobia. *Id.* at 654.

168. London Wright Pegs, Comment, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant*, 16 UCLA ENT. L. REV. 323, 334–35 (2009).

169. *See* Kronemyer v. Internet Movie Database, Inc., 59 Cal. Rptr. 3d 48, 54–55 (Cal. Ct. App. 2007).

170. Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010).

171. *Id.* at 906–08.

172. 130 Cal. Rptr. 2d 81 (Cal. Ct. App. 2003).

173. *Id.* at 89. Another court, in following this approach, found *Rivero* to be the first case to deal with the public-issue question systematically. Commonwealth Energy Corp. v. Investor Data Exch., 1 Cal. Rptr. 3d 390, 394 (Cal. Ct. App. 2003).

174. 2 Cal. Rptr. 3d 385 (Cal. Ct. App. 2003).

in the same year as *Rivero*, analyze five principles to establish a "somewhat more restrictive test, designed to distinguish between issues of 'public, rather than merely private, interest'":[175] (1) public interest "does not equate with mere curiosity"; (2) an issue of public interest should be of concern to a substantial number of people; (3) "there should be some degree of closeness" between the acts at issue and the asserted interest; (4) the focus of the speaker's conduct should be on the public interest, not to aid in the speaker's own private interest; and (5) "[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people."[176]

The two tests have something in common: an apparent desire to reject the theory that parochial disputes become public issues merely because larger issues might be in play.[177] For example, if a homebuyer sues a home seller for misrepresenting square footage of a home, the seller cannot assert that his conduct related to a matter of public interest merely because most Americans live in, buy, and sell houses.[178]

The emphasis the two tests place on the widespread attention an issue receives, however, allows a court to make fame a primary factor in an anti-SLAPP analysis. For instance, the Ninth Circuit Court of Appeals held that Paris Hilton's image constituted an issue of public interest under both the *Rivero* and *Weinberg* tests.[179]

2. *Washington Courts Have Historically Interpreted "Issue of Public Concern" Under the* Connick *Test*

Unlike the California statute's protection for "issues of public *interest*," the Washington Act protects statements made in connection with an "issue of public *concern*."[180] The Act's legislative history

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175. *Hilton*, 599 F.3d at 906 (quoting *Weinberg*, 2 Cal. Rptr. 3d at 392).

176. *Weinberg*, 2 Cal. Rptr. 3d at 392–93.

177. One court called this theory the "synecdoche theory of public issue." *Commonwealth Energy*, 1 Cal. Rptr. 3d at 395. In *Rivero*, for example, the defendant union claimed its publication of documents relating to the plaintiff's supervision of eight employees applied under the statute because workers' criticism of unlawful workplace activity was an issue of public interest. The court reasoned that under the union's interpretation, "discussion of nearly every workplace dispute would qualify," and instead concluded that to constitute an issue of public interest, the activity must meet "some threshold level of significance." *Rivero*, 130 Cal. Rptr. at 90.

178. *See* Consumer Justice Ctr. v. Trimedica Int'l, Inc., 132 Cal. Rptr. 2d 191, 194 (Cal. Ct. App. 2003) (using a similar hypothetical to explain that specific advertising statements about herbal supplement did not fall under the anti-SLAPP statute).

179. *Hilton*, 599 F.3d at 907–08. Hallmark ultimately failed on the second prong of anti-SLAPP analysis because Hilton showed a probability of prevailing on the claim. *Id.* at 912.

180. *Compare* CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 2011) (emphasis added), *with*

reveals nothing to explain this deviation from the California statute.[181] By employing this "public concern" language, however, the Washington State Legislature borrowed a phrase commonly used by Washington courts. For the past twenty-five years, Washington courts have decided whether speech is "of public concern" by adopting the U.S. Supreme Court's test from *Connick v. Myers*.[182]

In *Connick*, an assistant district attorney, in response to a transfer request she opposed, circulated a questionnaire around the district office concerning office morale, the transfer policy, the need for a grievance committee, and the level of confidence in superiors.[183] The district attorney learned of the questionnaire and fired her. The issue before the Court was whether the plaintiff's expressive conduct pertained to a matter of public concern, and therefore deserved First Amendment protection."[184] The Court held that it did not.[185]

In making this determination, the Court analyzed three factors: the content, the form, and the context of the speech.[186] The Court's analysis of these factors has become known as the *Connick* test, and courts have employed the test repeatedly to determine whether speech relates to an issue of public concern.[187]

None of the three factors is individually dispositive.[188] When analyzing the content, courts look to see if the expression relates to public, rather than private, matters.[189] When analyzing the form, courts

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WASH. REV. CODE § 4.24.525(2) (2011) (emphasis added).

181. See *supra* Part III.

182. *See* Benjamin v. Wash. State Bar Ass'n, 138 Wash. 2d 506, 529, 980 P.2d 742, 754 (1999) (Johnson, J., concurring); White v. State, 131 Wash. 2d 1, 12, 929 P.2d 396, 403–04 (1997) (holding that "[c]ontent is the most important factor"); Meyer v. Univ. of Wash., 105 Wash. 2d 847, 851, 719 P.2d 98, 101 (1986).

183. Connick v. Myers, 461 U.S. 138, 140–41 (1983).

184. *Id.* at 142. The Court held that the State "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*

185. *Id.* at 154.

186. *Id.* at 147–48. The Court reviewed a long line of cases in which the Court safeguarded speech on issues of public concern and gave lower courts this rough test. *Id.* at 143–46. The review included a famous Massachusetts case in which Oliver Wendell Holmes, before he was named to the Court, stated, "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). One commentator has called the test "strikingly vacuous." Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 34 (1990).

187. *See, e.g.*, Snyder v. Phelps, 562 U.S. __, 131 S. Ct. 1207, 1215–17 (2011); Rankin v. McPherson, 483 U.S. 378, 384–87 (1987).

188. *See Snyder*, 131 S. Ct. at 1216.

189. *Id.* at 1211.

consider whether the actor made the expression public, or if the speech was made in a private manner, such as a note to a superior.[190] And when analyzing the context, courts often look to the purpose of the speech, particularly whether the speech was part of a public discussion or whether it merely served a private purpose.[191] In *Connick,* for example, the Court held that the fired employee's expressive conduct was not meant to begin a debate about work conditions, but simply to "gather ammunition for another round of controversy with her superiors."[192] Thus, it did not address an issue of public concern.[193]

The U.S. Supreme Court recently revisited the *Connick* test in *Snyder v. Phelps*.[194] The plaintiff's son in *Snyder*, a U.S. Marine, died in Iraq in the line of duty.[195] On a public street outside the military funeral, a Baptist church group held a protest in which it suggested that military deaths result from the United States' tolerance of homosexuals. The group held signs inscribed with harshly worded condemnations of homosexuality and phrases such as "Thank God for Dead Soldiers," and "You're Going to Hell."[196]

The father, who later saw the signs on television, filed five tort claims and won a jury award on three.[197] The church group argued that because their activities constituted expression on an issue of public concern, the trial court should have shielded them from tort liability.[198] The Court, after applying the *Connick* test, agreed. Under the first factor, the Court found that the content of the defendants' signs related to broad interests

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190. *See* Markos v. City of Atlanta, 364 F.3d 567, 571 (5th Cir. 2004) (holding that comments made to a newspaper reporter, where it was understood that the statements would be used in a published article, were public in nature). *But cf.* Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362–63 (5th Cir. 1986) (holding that speech in a personal notebook where the writer made no effort to communicate the contents to the public was private in nature).

191. *See Rankin*, 483 U.S. at 386. In *Rankin*, the Court found that when a nineteen-year-old stated, on the day of an assassination attempt on President Ronald Reagan, "if they go for him again, I hope they get him," she spoke on an issue of public concern. *Id.* at 381, 386. The Court found that the context revealed that statement came in the course of a political conversation, on the heels of an event that was "certainly a matter of heightened public attention: an attempt on the life of the President." *Id.* at 386.

192. *Connick*, 461 U.S. at 148.

193. *Id.*

194. 562 U.S. __, 131 S. Ct. 1207, 1215 (2011).

195. *Id.* at 1213.

196. *Id.*

197. *Id.* at 1214. The plaintiff's claims for defamation and publicity given to private life were dismissed on summary judgment, but he prevailed on his intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims. *Id.*

198. *Id.*

of society—such as the moral conduct of Americans, the country's fate, and homosexuality in the military—that were of public, not private, import.[199] Although the Court did not discuss the form of the speech, it found that the context of the protest reflected the church's broader attempt to condemn society, and not solely the plaintiff's son.[200]

B. The Washington Act Does Not Include California's Public Interest and Commercial Speech Exceptions

In 2003, the California State Legislature noticed a "disturbing" trend: the abuse of anti-SLAPP motions by corporations, a primary target of anti-SLAPP legislation.[201] Because of the broad construction of the statute, corporations began using anti-SLAPP motions to increase the time and expense of plaintiff lawsuits.[202] Legal seminars promoted the use of anti-SLAPP motions in otherwise ordinary products liability and personal injury cases.[203] With this expanded corporate use, the anti-SLAPP motion became its own form of legal intimidation.[204] As one dissenting justice on the California Supreme Court wrote, "[t]he cure has become the disease."[205]

The California State Legislature responded to these abuses by creating two exceptions to the anti-SLAPP statute. The first exception prohibits the use of an anti-SLAPP motion to strike public interest lawsuits.[206] The second prohibits anti-SLAPP motions by most corporate defendants.[207] Under the corporate defendant exception, the California

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199. *Id.* at 1216–17. The Court found that even those signs that appeared directly targeted at the plaintiff's son, such as "You're Going to Hell," spoke to broader public issues. *Id.* at 1217.

200. *Id.* at 1217. The court did not discuss the form of the speech, although this is likely because the form of the speech—picket signs—was unquestionably public.

201. Joshua L. Baker, *Chapter 338: Another Law, Another SLAPP in the Face of California Business*, 35 MCGEORGE L. REV. 409, 431 (2004).

202. *Id.* at 414.

203. *Id.* at 413–14.

204. *See id.*, *supra* note 201, at 419; Navellier v. Sletten, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting).

205. *Navallier*, 52 P.3d at 714 (Brown, J., dissenting).

206. *See* CAL. CIV. PRO. CODE § 425.17(b) (West Supp. 2011). For the purposes of the exception, "public interest" does not apply anywhere near as broadly as it does in section 425.16. Club Members for an Honest Election v. Sierra Club, 196 P.3d 1094, 1099 (Cal. 2008). Courts have found that neither a lawsuit requesting changes to the election process of the Sierra Club nor an action by city council members to compel council meetings to adjourn by 11 p.m. constituted lawsuits brought solely for the public interest. *See id.* at 1099–100; Holbrook v. City of Santa Monica, 51 Cal. Rptr. 3d 181, 186–87 (Cal. Ct. App. 2006).

207. CAL. CIV. PROC. CODE § 425.17(c).

law now prohibits anti-SLAPP motions when three conditions exist: (1) the target of the suit is "a person primarily engaged in the business of selling or leasing goods or services"; (2) the content of the speech targeted consists of representations or facts about the speaker's or a competitor's business goods or services; and (3) the audience of the targeted speech is an actual or potential customer or someone likely to repeat the speech to an actual or potential customer, or the speech arose out of a regulatory proceeding or investigation.[208] In order to comply with the anti-SLAPP statute's broad construction, courts interpret the exceptions narrowly.[209]

When it drafted the Act, the Washington State Legislature did not add either exception.

C. The Washington Act Punishes SLAPP Filers More Severely than California's Anti-SLAPP Statute

The California anti-SLAPP statute limits the sanction for filing a SLAPP or frivolous anti-SLAPP motion to attorney's fees. In Washington, the Act's drafters notably increased the amount. The Washington Act gives SLAPP victims attorney's fees plus a $10,000 award.[210] It also grants the trial judges discretion to award "[s]uch additional relief . . . as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated."[211] With this provision, the Washington Act gives trial judges more flexibility to promote the legislature's goal of deterring SLAPPs.

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208. *Id.*; *see* Baker, *supra* note 201, at 418. All three conditions must exist. *See* Contemporary Servs. Corp. v. Staff Pro Inc., 61 Cal. Rptr. 3d 434, 443–44 (Cal. Ct. App. 2007).

209. *See* Club Members for an Honest Election v. Sierra Club, 196 P.3d 1094, 1098 (Cal. 2008). The exceptions also have exceptions. Neither the public interest nor commercial speech exceptions apply against three classes of cases: (1) actions against persons engaged in gathering, receiving or processing information for communication to the public; (2) actions based upon the promotion of any dramatic, literary, musical, political, or artistic work; (3) actions against nonprofit organizations that receive more than 50 percent of their annual revenue from government. CAL. CIV. PROC. CODE § 425.17(d) (West Supp. 2011).

210. WASH. REV. CODE § 4.24.525(6)(a) (2011).

211. *Id.* Although the original bill initially only awarded costs and fees to victims of frivolous anti-SLAPP motions, the Senate Judiciary Committee revised the Washington Act so that those victims receive a $10,000 award, and the trial judge may award further relief to deter repeated frivolous motion practice.

V. WASHINGTON COURTS SHOULD USE THE CALIFORNIA ANTI-SLAPP STATUTE TO DETERMINE THE LEGISLATIVE INTENT BEHIND THE WASHINGTON ACT

Despite sparse legislative history behind the Washington Act, courts have accepted that the drafters of the Washington Act modeled it after California's anti-SLAPP statute.[212] One court interpreting the Washington Act proclaimed it to be a mirror of the California law, given the striking similarities between the two.[213] But to interpret the Washington Act as a carbon copy of the California law would ignore critical differences in their respective texts, most of which have been present since the Washington Act was first introduced in the Washington State Legislature. Instead, Washington courts should use long-standing canons of statutory construction to analyze the Act's similarities and differences with the California law. This careful interpretation will reveal a specific legislative intent to adopt some California provisions and corresponding case law while rejecting others entirely. The final result should be a close following of the California law with an important deviation for Washington's definition of "issues of public concern." This result is consistent with the legislative text and Washington's traditional use of the U.S. Supreme Court's *Connick* test.

A. Interpreting Intent from the Act's Similarities to, and Its Deviations from, the California Anti-SLAPP Statute Is Consistent with Canons of Statutory Interpretation

When the legislature enacts a statute, it does so to accomplish a specific purpose, and the goal for the courts in interpreting the statute is to divine that purpose.[214] Yet the legislative process often hides that purpose behind a veil of formality, leaving the courts little guidance to implement that purpose properly.[215] To carry out a statute's purpose effectively, Washington courts have established several canons of

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212. *See* Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104, 1110 (2010); Castello v. City of Seattle, No. C10-1457(MJP), 2010 WL 4857022, at *5 (W.D. Wash. Nov. 22, 2010) (relying on California case law interpreting the California Anti-SLAPP statute to determine that the statements at issue would fall under the protection of the Washington Anti-SLAPP Act).

213. *Aronson*, 738 F. Supp. 2d at 1110.

214. *See* Quadrant Homes v. State Growth Mgmt. Hearings Bd., 154 Wash. 2d 224, 244, 110 P.3d 1132, 1142 (2005) ("The primary goal of statutory construction is to discern the legislature's intent.").

215. Philip A. Talmadge, *A New Approach to Statutory Interpretation*, 25 SEATTLE U. L. REV 179, 179 (2001).

statutory interpretation.[216]

One particular external canon that should aid courts in implementing the purpose of the Washington Act is the borrowed statute rule. Under the borrowed statute rule, courts find that when the legislature borrows a statute from another jurisdiction, it implicitly adopts that jurisdiction's judicial interpretations of the statute.[217] Similarly, where the legislature modifies or ignores a provision of the borrowed statute, it implicitly rejects that provision and its corresponding case law.[218] The borrowed statute rule often involves interpretation of statutes that derive from a model act.[219] The Washington State Supreme Court has found that when the legislature deviates from a model act, it is "bound to conclude" that the deviation "was purposeful" and evidenced an intent to reject those aspects of the model act.[220]

Because the California anti-SLAPP statute served as a model for the Washington Act, courts can use the borrowed statute rule to interpret the Washington Act. Where the Washington State Legislature adopted the California statute's provisions, the Washington Act reveals an explicit intent to embrace the interpretation of those provisions. For example, courts should find that the Washington State Legislature intended to adopt the California courts' interpretation of "public forum" for the statute's purposes, or California's interpretation of what constitutes "good cause" to overcome the stay of discovery. Courts should also interpret the Act to adopt the provisions of the California statute that provide a procedural remedy for defendants to shield themselves from SLAPPs,[221] that offer an opportunity for plaintiffs to prove their claim

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216. *Id.* at 180. Many of those canons are textual, in that they look solely at the words of the statute; others are external, in that they look to outside sources to divine legislative intent. *Id.* at 184–85.

217. *Id.* at 197; *see also* Town of Republic v. Brown, 97 Wash. 2d 915, 917–18, 652 P.2d 955, 957 (1982); Jenkins v. Bellingham Mun. Ct., 95 Wash. 2d 574, 577–78, 627 P.2d 1316, 1318 (1981); Pac. First Fed. Sav. & Loan Ass'n v. Pierce Cnty., 27 Wash. 2d 347, 355, 178 P.2d 351, 355 (1947). This canon, though, would not require the courts to adopt *future* interpretations of the other jurisdiction, as the legislature could not have intended to adopt law it did not know existed.

218. *See, e.g.*, Lundberg v. Coleman, 115 Wash. App. 172, 177–78, 60 P.3d 595, 599 (2002) ("[W]hen the model act in an area of law contains a certain provision, but the Legislature fails to adopt such a provision, our courts conclude that the Legislature intended to reject the provision.").

219. *See* State v. Coria, 146 Wash. 2d 631, 650, 48 P.3d 980, 989 (2002) ("[F]ailure to include language from the Model Penal Code in a criminal statute evidences an intent that the statute's meaning differs from the Model Penal Code."); *Lundberg*, 115 Wash. App. at 177–78, 60 P.3d at 599 (analyzing deviations from the Revised Model Nonprofit Corporation Act).

220. State v. Jackson, 137 Wash. 2d 712, 723, 976 P.2d, 1229, 1234 (1999) (holding that the legislature's deviation from the model act was evidence of its intent to reject the concept of extending accomplice liability for omissions to act).

221. *See supra* text accompanying notes 83–93 (explaining the two statutes' use of a procedural

has merit,[222] and that direct the courts to apply and construe the Washington Act broadly.[223]

Where the Washington Act deviates from its model statute, however, Washington courts should conclude that the legislature intended to reject related provisions and their corresponding case law. This is especially true for the Washington State Legislature's coverage of issues "of public concern" as opposed to California's protection of issues "of public interest."

B. To Interpret the Act's Protection of Speech Related to an "Issue of Public Concern," Washington Courts Should Continue to Apply the Connick *Test*

By applying the statute to statements made in connection with "an issue of public concern," instead of adopting the California statute's "public interest" language, the legislature selected a phrase familiar to the Washington courts. Washington courts, for more than twenty years, have applied a test to determine what expression relates to issues of public concern.[224] The test, established by the U.S. Supreme Court in 1983 in *Connick v. Myers* and still applied today, provides a standard for courts that would fulfill the Act's purpose of granting further protection to speech that lies at the heart of the freedom of expression.

The *Connick* test is well-suited to analyzing Washington anti-SLAPP motions for two primary reasons.[225] First, it fulfills the goals of the Washington Act. The drafters of the Washington Act sought the same goal as the U.S. Supreme Court when it formulated the *Connick* test: to provide protection to those who express themselves on issues of public concern. Just as the Court has found that public participation is "the

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remedy).

222. *See supra* text accompanying notes 83–93 (explaining the two statutes' use of a procedural remedy).

223. *See supra* text accompanying notes 75–82 (explaining the two statutes' directives for broad construction).

224. *See* Benjamin v. Wash. State Bar Ass'n, 138 Wash. 2d 506, 529, 980 P.2d 742, 754 (1999) (Johnson, J., concurring); White v. State, 131 Wash. 2d 1, 12, 929 P.2d 396, 403–04 (1997) (holding that "[c]ontent is the most important factor"); Meyer v. Univ. of Wash., 105 Wash. 2d 847, 851, 719 P.2d 98, 101 (1986).

225. Rhode Island courts, interpreting an anti-SLAPP statute that similarly applies to "issues of public concern," have also used the *Connick* test. *See* Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1214 (R.I. 2000) (finding *Connick* test to underlie anti-SLAPP statute's use of "issues of public concern"); Sisto v. Am. Condo. Ass'n, Inc., No. NC-2008-0119, 2009 WL 3328540, at *3–5 (R.I. Sup. Ct. Aug. 27, 2009) (applying *Connick* test to anti-SLAPP motion).

essence of self-government,"[226] the Washington State Legislature found, when passing the Washington Act, that "[i]t is in the public interest for citizens to participate in matters of public concern . . . without fear of reprisal through abuse of the judicial process."[227]

Second, it fulfills those goals in a way familiar to Washington courts.[228] Washington courts already apply the *Connick* test to interpret what speech is "of public concern" in federal employment law cases similar to *Connick*.[229] Most notably, the Supreme Court of Washington applied the *Connick* test in *Binkley v. City of Tacoma*[230] and *White v. State*.[231] When the legislature employs words or concepts with well-settled common law traditions, Washington courts presume they should follow the common law usage.[232] Additionally, Washington courts traditionally give the *Connick* test such a broad reading that "even the slightest tinge of public concern is sufficient."[233] The *Connick* test provides Washington courts the most direction for interpreting the Washington Act in determining what activities are in connection with an issue of public concern.

CONCLUSION

The Washington Act Limiting Strategic Lawsuits Against Public Participation filled a gap in Washington's protection of free expression and petition rights. Although Washington previously only protected communication with a government agency, the Washington Act now protects a broad range of activities from lawsuits intended only to incur costs and chill future expression. The Washington drafters patterned the Act after the anti-SLAPP statute in California, the same state whose constitutional right of free speech served as the basis for Washington's

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226. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

227. 2010 Wash. Sess. Laws 921.

228. This is not to suggest that Washington courts, when applying the *Connick* test to the anti-SLAPP statute, should be bound by outcomes reached by the United States Supreme Court and others under the test.

229. *See* cases cited *supra* note 224.

230. 114 Wash. 2d 373, 382, 787 P.2d 1366, 1373–74 (1990).

231. 131 Wash. 2d 1, 11–12, 929 P.2d 396, 403–04 (1997).

232. Talmadge, *supra* note 215, at 198; *see* In re Tyler's Estate, 140 Wash. 679, 689, 250 P. 456, 460 (1926) (holding that in the absence of a statutory exception prohibiting a husband from inheriting when he murdered his wife, the "maxims of the common law," forbidding profit by fraud, controlled).

233. *White*, 131 Wash. 2d at 12 n.5, 929 P.2d at 404 n.5 (quoting *Binkley*, 114 Wash. 2d at 383 n.8, 787 P.2d at 1373 n.8).

constitutional right. Despite little legislative history to provide courts guidance on why Washington chose to modify or ignore certain provisions, the choices themselves reveal a legislative intent to reject California's interpretation of those provisions. One of the primary inquiries for courts, then, will be interpreting which exercises of free expression meet the statutory requirement of connecting to an issue of public concern. But Washington courts need not strain far in that inquiry because the test most suitable to fulfill the Act's goals, the *Connick* test, already possesses a firm place in Washington jurisprudence.