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A VIEW FROM THE FIRST AMENDMENT TRENCHES: WASHINGTON STATE'S NEW PROTECTIONS FOR PUBLIC DISCOURSE AND DEMOCRACY

Bruce E.H. Johnson & Sarah K. Duran *

Abstract: In his latest book, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Dean Robert Post promotes the concept of “democratic legitimation” as the cornerstone of democratic decision making. Dean Post defines “democratic legitimation” as “all efforts” to influence “public opinion.”¹ As Post explains, “[d]emocracy requires that government action be tethered to public opinion” because “public opinion can direct government action in an endless variety of directions.”² As a result, First Amendment coverage should extend to all communications that form public opinion, he contends.³ Those who object to speech aimed at influencing public opinion have learned they can file a Strategic Lawsuit Against Public Participation (SLAPP). The purpose of the SLAPP suit is to impede efforts to influence public opinion by intimidating the speaker with expensive and lengthy litigation. Since the late 1980s, states have reacted to SLAPP lawsuits by enacting anti-SLAPP statutes. Washington State has had a statute in place since 1989 that protects speakers from litigation resulting from statements made to government officials. In 2010, the Washington legislature expanded those protections by enacting Revised Code of Washington 4.24.510, which more broadly protects speakers who comment on matters of public concern. This Article reviews Dean Post’s theory of democratic legitimation and then looks at statutes across the nation and in Washington that are aimed at protecting speakers from litigation that seeks to chill the First Amendment rights of citizens who comment on matters of public concern. The Article concludes that Washington’s new statute promotes Dean Post’s goal of democratic legitimation.

INTRODUCTION

This Article provides observations from two lawyers whose practices focus on defending the free speech rights of those citizens whose speech comprise “democratic legitimation,” as described by Dean Robert Post

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1. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 18–19 (2012).

2. *Id.* at 19.

3. *Id.* at 18–20.

in his book *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*. Post describes “democratic legitimation” as necessarily including “all efforts” to influence “public opinion.”⁴ It is a First Amendment doctrine that values the opinions of all citizens, a doctrine that Post believes is the cornerstone of democratic decision making. As Dean Post explains, “[d]emocracy requires that government action be tethered to public opinion” because “public opinion can direct government action in an endless variety of directions.”⁵ As a result, First Amendment coverage should extend to all communications that form public opinion, he contends.⁶

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁷ Despite these lofty ideals, as practitioners we are all too aware of statutory and common law restrictions on free speech.⁸ Some people use these statutory and common law restrictions as weapons to intimidate speakers, by filing baseless lawsuits known as Strategic Lawsuits Against Public Participation (SLAPP).⁹ The strategy is to file weak claims with the goal of silencing speakers because they fear the expense and travails of litigation. Ordinary citizens—not to

4. POST, *supra* note 1, at 18–19.

5. *Id.* at 19.

6. *Id.* at 18–19.

7. U.S. CONST. amend. I.

8. For instance, some states still have libel laws on their books that would allow a person to be held criminally liable for defamatory speech. *See* ALA. CODE § 13A-11-160 (LexisNexis 2005); FLA. STAT. ANN. §§ 836.01–.09 (West 2006); GA. CODE ANN. § 16-11-40 (2011); IDAHO CODE ANN. § 18-4801 to -4809 (2004); 720 ILL. COMP. STAT. ANN. 300/1 (West 2010); KY. REV. STAT. ANN. § 432.280 (West 2006); LA. REV. STAT. ANN. § 14:47 (2007); MASS. ANN. LAWS ch. 272, § 98C (LexisNexis 2010); MICH. COMP. LAW ANN. § 750.97 (West 2004); MINN. STAT. ANN. § 609.765 (West 2009); MISS. CODE ANN. § 97-3-55 (West 2011); MONT. CODE ANN. § 45-8-212 (2011); NEV. REV. STAT. § 200.510–.560 (West 2009); N.H. REV. STAT. ANN. § 644:11 (2007); N.M. STAT. ANN. § 30-11-1 (LexisNexis 2004); N.C. GEN. STAT. § 14-47 (2011); N.D. CENT. CODE § 12.1-15-01 (1997); OHIO REV. CODE ANN. § 2739.03 (LexisNexis 2008); OKLA. STAT. tit. 21, §§ 771–781 (2002); S.C. CODE ANN. § 16-7-150 (2003); UTAH CODE ANN. § 76-9-404 (West 2004); VA. CODE ANN. § 18.2-209 (2009); WIS. STAT. ANN. § 942.01 (West 2005). Examples of common-law restriction of speech include obscenity, *Roth v. United States*, 354 U.S. 476, 483 (1957); incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–49, (1969); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); and defamation, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990).

9. The phrase was first coined by Professors George Pring and Penelope Canan. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

mention experts and academics—are less likely to participate in or contribute to democratic legitimation if they fear their speech will be punished or subject to expensive litigation. SLAPP lawsuits are filed to discourage people from public discourse on an unlimited variety of topics, such as a housing development under consideration in their neighborhood, a candidate running for office, or a story that has made the news headlines.¹⁰ The good news is that Washington State, and numerous other states, have recognized the fundamental importance of protecting public discourse from SLAPP claims.

Washington led the nation in 1989 by passing the first anti-SLAPP statute, codified at Revised Code of Washington (RCW) 4.24.510.¹¹ The statute allows a defendant to bring a motion to defeat the plaintiff's SLAPP claims and to recover fines and attorneys' fees for the cost of defending against the SLAPP claim.¹² However, the statute's protections are limited to statements made to government officials in the course of government decision making.¹³

Recognizing the limitations on Washington's old statute, the Washington Legislature in 2010 enacted RCW 4.24.525, which significantly expands protections for the free speech rights of individuals, government entities, and others.¹⁴ We were involved in drafting the law and urging its enactment. The new law has four goals: (1) to provide as a matter of substantive law a statutory immunity for statements (and expressive conduct) on matters of public concern, where the plaintiff is unable to establish a prima facie case supporting his or her cause of action; (2) to furnish a suggested procedural framework that encourages and facilitates prompt and inexpensive resolution of such SLAPP claims; (3) to provide a right of immediate appeal of a trial court's ruling on an anti-SLAPP motion; and (4) to require appropriate reimbursement for the targets of SLAPP lawsuits through an award of

10. *Id.* at 1–8, 30–45, 71–82; *see, e.g.*, *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46 (Ct. App. 1995) (news story); *Botos v. L.A. Cnty. Bar Ass'n*, 199 Cal. Rptr. 236 (Ct. App. 1984) (candidate for office); *Oceanside Enters., Inc. v. Capobianco*, 537 N.Y.S.2d 190 (App. Div. 1989) (housing development).

11. PRING & CANAN, *supra* note 9, at 191–92.

12. WASH. REV. CODE § 4.24.510 (2010).

13. *See id.* (“A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability.”).

14. *See id.* § 4.24.525.

reasonable attorneys' fees and a \$10,000 sanction.¹⁵

In this Article, we offer our experience with anti-SLAPP legislation and lawsuits to explain how the law protects public discourse and furthers a key First Amendment value. While we agree with Post's warning that it may not be "helpful for constitutional lawyers to venture into . . . epistemological thicket[s],"¹⁶ constitutional lawyers have confronted and addressed the risks to democratic legitimation of a fearful citizenry, hesitant "to speak, write, and publish on all subjects"¹⁷ because of the threat of meritless lawsuits. We hope to show where the First Amendment rubber meets the road, at least here in the Pacific Northwest. To do so, this Article will focus on the anti-SLAPP statute as one aspect of lawmaking that protects speakers who contribute to public discourse and democratic legitimation.

This Article is divided into four subsequent parts. Part One reviews and analyzes Post's theory of First Amendment jurisprudence, focusing on his theory of democratic legitimation. Part Two considers the state of anti-SLAPP statutes nationwide. Part Three explores Washington's first anti-SLAPP statute, RCW 4.24.510, and the statute's limitations for protecting public discourse. Part Three also examines Washington's new anti-SLAPP statute, RCW 4.24.525, and its greater protections for public discourse. Finally, Part Four argues that broad anti-SLAPP statutes such as RCW 4.24.525 play an important role in Post's democratic legitimation by protecting speakers who contribute to public discourse. To safeguard public discourse, and thereby foster democratic legitimation, states should follow Washington's lead by enacting broad anti-SLAPP statutes.

I. POST'S THEORY OF FIRST AMENDMENT JURISPRUDENCE: PROTECTING PUBLIC OPINION AND A CONFLICT BETWEEN DEMOCRATIC LEGITIMATION AND DEMOCRATIC COMPETENCE

Post defines public discourse as "the forms of communication constitutionally deemed necessary for formation of public opinion."¹⁸ Post notes that a recurring theme in First Amendment doctrine is the

15. *See id.*

16. POST, *supra* note 1, at 7.

17. WASH. CONST. art. 1, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").

18. POST, *supra* note 1, at 15.

emphasis on matters of “public concern.”¹⁹ Thus, Post reminds us that a touchstone of First Amendment coverage is:

[W]hether communication involves *public* officials, or *public* figures, or matters of *public* concern, or is directed to the general *public*, [which] derives from the conviction that, as Learned Hand put it, “public opinion . . . is the final source of government in a democratic state.” “Public opinion,” said James Madison, “is the real sovereign in every free” government. The function of the First Amendment is to safeguard the communicative processes by which public opinion is formed, so as to ensure the integrity of “the great process by which public opinion passes over into public will, which is legislation.”²⁰

In short, the purpose of the First Amendment is “to protect the free formation of public opinion that is the sine qua non of democracy.”²¹

Post explains that American democracy rests on the value of self-government, the idea that those who are subject to law should also see their own hand in the creation of the law.²² Democracy in the United States supports this value by making government decisionmaking responsible to public opinion and “guaranteeing to all the possibility of influencing public opinion.”²³ Allowing people to participate in forming public opinion is essential to democratic values: “[I]f persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state.”²⁴ Post explains that “[d]emocracy requires that government action be tethered to public opinion” because “public opinion can direct government action in an endless variety of directions.”²⁵ As a result, First Amendment coverage should extend to all communications that form public opinion.²⁶

Elections are one mechanism that democracies use to subordinate government decisionmaking to public opinion.²⁷ Periodic elections are a form of “public discourse” but are not the only forum for such

19. *Id.* at 14.

20. *Id.* (second alteration in original) (emphasis in original) (footnotes omitted).

21. *Id.* at 15.

22. *Id.* at 17.

23. *Id.*

24. *Id.* at 18.

25. *Id.* at 19.

26. *Id.* at 18–19.

27. *Id.* at 20.

communications, Post argues.²⁸ The larger perspective of the First Amendment regards public opinion as constantly in motion.²⁹

From the constitutional point of view, therefore, public opinion does not possess the internal consistency or integrity that is characteristic of agents who must decide and act. It is instead transactional and subjectless. The object of the First Amendment might most precisely be characterized as protecting the open processes by which public opinion is constantly formed and reformed.³⁰

Post states that democratic values of freedom of expression depend on equality among speakers.³¹ According to Post, the value of democratic legitimation is served by the First Amendment's protection of the autonomy of speakers.³² "If persons within public discourse are prevented from choosing what to communicate or not to communicate, the value of democratic legitimation will not be served."³³ Thus, Post writes:

First Amendment prohibitions against viewpoint and content discrimination express the essential postulate that all persons within public discourse should be equally free to say or not say what they choose. This equality reflects the premise that in a democracy every subject of law possesses an equal right to seek to shape the content of public opinion and so to influence government action.³⁴

He stresses that the free speech doctrine advances the "goal of democratic legitimation by ensuring that public opinion remains open to the subjective engagement of all, even of the idiosyncratic and eccentric."³⁵

On the one hand, First Amendment jurisprudence allows the state to regulate the publication of false facts; but on the other hand, it will eschew regulation of ideas, under the belief that "there is no such thing as a false idea."³⁶ Citizens who disagree with official versions of factual

28. *Id.* at 20–21.

29. *Id.*

30. *Id.*

31. *Id.* at 22.

32. *Id.* at 21.

33. *Id.*

34. *Id.* at 22.

35. *Id.* at 28.

36. *Id.* at 29 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

truth, however, are excluded from participating in public opinion.³⁷ When government intervenes to settle disputes about factual questions, it alienates people from participating in public discourse,³⁸ and this is a problem because “[a] state that controls our knowledge controls our minds.”³⁹ Thus, Post argues, “cognitive empowerment” is essential to a democratic society and intelligent self-governance.

We agree with Post that democratic legitimation is crucial to a democratic society and intelligent self-governance. As a practical matter, we know that the ideal of democratic legitimation conflicts with the real world when the government seeks to regulate the speech of citizens through the courts.⁴⁰ Meanwhile, citizens frequently do not have the financial resources to defend themselves from unwarranted litigation. In these circumstances, the threat of costly SLAPPs can effectively deter the exercise of free expression.

II. AN OVERVIEW OF ANTI-SLAPP STATUTES NATIONWIDE

Post espouses the theoretical importance of protecting public discourse as part of the broader goal of democratic legitimation.⁴¹ In practice, however, protecting democratic legitimation can be a challenge because individuals, companies, and groups have learned that they can bring a lawsuit against a speaker in an effort to discourage or prevent discourse. The speaker ultimately prevails, but in doing so, he or she accrues tens of thousands of dollars in legal bills, and spends countless hours consulting with lawyers on building a legal defense.⁴² Thus, an

37. *Id.*

38. *Id.* at 30.

39. *Id.* at 33.

40. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (stating that Alabama courts may enforce an action involving free speech and the press between two private parties).

41. POST, *supra* note 4, at 21.

42. *See, e.g.*, Maple Props. v. Harris, 205 Cal. Rptr. 532 (Ct. App. 1984) (awarding sanctions of \$20,000 for frivolous litigation in a six-year-long suit by real estate developer against individuals that opposed condo development); City of Long Beach v. Bozek, 31 Cal. 3d 527 (1982), *vacated and remanded*, 459 U.S. 1095 (1983), *aff'd on other grounds*, 661 P.2d 1072 (Cal. 1983) (considering suit by city and police officers against an individual for bringing prior suit in which he alleged false arrest and police brutality); Patane v. Griffin, 562 N.Y.S.2d 1005, 1007, 1009 (App. Div. 1990) (awarding fees and costs for frivolous litigation in a suit by town supervisor against constituents who raised questions about his land dealings); Immuno A.G. v. Moor-Jankowski, 537 N.Y.S.2d 129, 131 (1989) (deciding five-year-long litigation against activist and editor of medical journal that published activist's letter criticizing drug company for proposed testing on chimpanzees); SRW Assocs. v. Bellport Beach Prop. Owners, 517 N.Y.S.2d 741 (1987) (considering suit by real estate partnership claiming libel based on alleged misstatements by homeowners association during planning board hearing); Searle v. Johnson, 646 P.2d 682 (Utah

endorsement for broad anti-SLAPP statutes is an endorsement for protecting the free speech rights that are the cornerstone of Post's democratic legitimation.

Across the country, states have developed different approaches to dealing with lawsuits aimed at discouraging public discourse.⁴³ This section will look at anti-SLAPP legislation nationwide and describe narrow and broad approaches to anti-SLAPP legislation, with the conclusion that narrow statutes are inconsistent with free-speech ideals because they protect limited types of speech while leaving others exposed to meritless lawsuits.

A. *State Anti-SLAPP Statutes Vary, with Some More Protective of Speech than Others*

SLAPP lawsuits are civil claims or counterclaims filed against individuals or organizations based on their communications to government or speech regarding an issue of public interest or concern.⁴⁴ Typically, SLAPPs are brought by real estate developers, corporations, government entities and officials, and others against individuals and community groups who oppose them on an issue of public concern.⁴⁵ The plaintiffs often bring civil claims such as defamation, interference with contract and economic advantage, malicious prosecution, and nuisance.⁴⁶ The purpose is to chill the defendant's speech through costly and emotionally exhausting litigation.⁴⁷ Such lawsuits are antithetical to public discourse.

To protect citizens from these SLAPP lawsuits, twenty-eight states as well as the District of Columbia and the U.S. Territory of Guam have enacted anti-SLAPP laws.⁴⁸ The statutes provide a mechanism for a

1982), *summary judgment order on remand aff'd*, 709 P.2d 328 (Utah 1985) (considering suit against state humane society and director for promoting boycott of businesses in town to create pressure over conditions at local dog pound); *Webb v. Fury*, 282 S.E.2d 28, 47 (W. Va. 1981) (recognizing that the costs of discovery and legal fees "may chill the free exercise of first amendment rights" in a suit by coal mine operator against environmental activist, alleging he defamed company in reports of alleged violations to the EPA).

43. See Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1248-70 (2007).

44. PRING & CANAN, *supra* note 9, at 8-9.

45. *Id.* at 30, 216.

46. *See, e.g., id.* at 3-7.

47. *Id.* at 11.

48. *See* ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (Supp. 2011); ARK. CODE ANN. §§ 16-63-501 to -508 (2005); CAL. CIV. PROC. CODE § 425.16 (West 2004); DEL. CODE ANN. tit. 10, §§ 8136-8138 (1999); D.C. CODE §§ 16-5501 to -5505 (Supp. 2011); FLA. STAT. ANN. § 720.304(4) (West

defendant to file a dispositive motion that requires the plaintiff to come forward with evidence showing the claims are viable, and they provide an award of attorneys' fees or other penalties for bringing a meritless suit that was aimed at discouraging the plaintiff's rights to free speech or petition.⁴⁹ The burden-shifting mechanism in these statutes is particularly important because it requires the plaintiff to come forward early in the case to demonstrate that the claims are viable, and if they are not viable, the court must dismiss the claims before the defendant is bogged down in expensive litigation.⁵⁰ For instance, Arizona's statute states that "[t]he court shall grant the motion unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law," the defendant's motion should be filed within ninety days and the court must "give calendar preference to an action brought under this subsection."⁵¹ Similarly, California's statute provides

2010); FLA. STAT. ANN. § 768.295 (West 2011); GA. CODE ANN. § 9-11-11.1 (2006); GA. CODE ANN. § 51-5-7(4) (2000); 7 GUAM CODE ANN. §§ 17101-17109 (2005); HAW. REV. STAT. ANN. §§ 634F-1 to -4 (LexisNexis 2007); 735 ILL. COMP. STAT. ANN. 110/15 to /25 (West 2011); IND. CODE ANN. §§ 34-7-7-1 to -10 (LexisNexis 2008); LA. CODE CIV. PROC. ANN. art. 971 (2005); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2006); MASS. ANN. LAWS ch. 231, § 59H (LexisNexis 2009); MINN. STAT. ANN. §§ 554.01-.05 (West 2010); MO. ANN. STAT. § 537.528 (West 2008); NEB. REV. STAT. ANN. §§ 25-21,241-.246 (LexisNexis 2004); NEV. REV. STAT. §§ 41.637, .650-.670 (2012); N.M. STAT. ANN. § 38-2-9.1 (Supp. 2011); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (McKinney Supp. 2012); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010); OR. REV. STAT. ANN. §§ 31.150-.155 (West Supp. 2011); 27 PA. CONS. STAT. ANN. §§ 7707, 8301-8303 (West 2009); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-.011 (West Supp. 2011); UTAH CODE ANN. §§ 78B-6-1401 to -1405 (West 2009 & Supp. 2011); VT. STAT. ANN. tit. 12, § 1041 (2012); WASH. REV. CODE §§ 4.24.510-.525 (2010). In addition, the Michigan and North Carolina legislatures and the U.S. Congress in recent legislative sessions introduced anti-SLAPP bills although none has become law. *See* Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009); H.B. 5036, 95th Leg., Reg. Sess. (Mich. 2009); Citizen Participation Act, H.B. DRH30241-MH-45, 2011 Gen. Assemb. of N.C. (N.C. 2011). In addition, although Colorado, Connecticut, and West Virginia do not have anti-SLAPP statutes, the courts in those states have recognized a common law defense to lawsuits that retaliate against efforts by citizens to petition the government. *See* Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 862 (Colo. 2004) (holding that a First Amendment defense to a retaliatory lawsuit be handled as a motion for summary judgment), *reaffirming* Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361 (Colo. 1984); Royce v. Willowbrook Cemetery, Inc., No. X08CV010185694, 2003 WL 431909 (Conn. Super. Ct. Feb. 3, 2003) (recognizing that a plaintiff's objectively baseless defamation suit could violate the Connecticut Unfair Trade Practices Act); Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993) (concluding that because the defendant's speech involved the exercise of the right to petition, his statements were absolutely protected).

49. *See* statutes cited *supra* note 48; *see also* PRING & CANAN, *supra* note 9, at 188-207; Hartzler, *supra* note 43, at 1242.

50. *See* Hartzler, *supra* note 43, at 1242.

51. ARIZ. REV. STAT. ANN. § 12-752(A)-(C).

that a plaintiff's claim will be dismissed unless "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim," the special motion to strike should be filed within sixty days of the service of the complaint, and should be heard no more than thirty days after the motion is served.⁵²

Some anti-SLAPP statutes are narrow in that they protect only statements made to government authorities. For instance, Arizona's anti-SLAPP statute protects (1) written or oral statements that are made as part of an initiative, referendum or recall effort, and (2) written or oral statements submitted to a governmental body, made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding *and* made for the purpose of influencing a governmental action, decision, or result.⁵³ Florida's statute prevents governmental entities from filing SLAPP suits and prohibits SLAPP suits regarding comments made by, to, or regarding homeowners' associations.⁵⁴

In contrast, California's anti-SLAPP statute is one of the broadest anti-SLAPP statutes in effect in the United States. The statute protects any act of a person in furtherance of that person's right to petition or free speech "in connection with a public issue."⁵⁵ An "act in furtherance" of the right to petition includes:

[A]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; . . . or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.⁵⁶

Arkansas's anti-SLAPP statute protects slightly less conduct than

52. CAL. CIV. PROC. CODE § 425.16(b)(1), (f).

53. ARIZ. REV. STAT. ANN. § 12-751. The statute is similar to Washington's RCW 4.24.510. *See infra* Part III.

54. *See* FLA. STAT. ANN. § 720.304 (West 2010); FLA. STAT. ANN. § 768.295 (West 2011). The Florida statute is curious because it acknowledges the increase in SLAPP suits filed by private companies and individuals, but explains that "it is the public policy of this state that government entities not engage in SLAPP suits because such actions are inconsistent with the right of individuals to participate in the state's institutions of government." § 768.295(2). The Legislature declared that prohibiting SLAPP lawsuits by governmental entities preserves the state policy and the constitutional rights of Florida citizens. *Id.* There is no explanation as to why lawmakers chose to limit the statute's reach to government entities, while ignoring the stated problem of lawsuits by companies and individuals.

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

56. *Id.* § 425.16(e).

California's. In order to qualify for protection under the statute, the statement must either (1) be made before or to a legislative, executive, or judicial proceeding, or other official proceeding; or (2) be in connection with an issue under consideration or review by a legislative, executive, or judicial body or other official government body.⁵⁷ Additionally, the statement must not be made with the knowledge that it was false or with reckless disregard of its falsity.⁵⁸ Despite these limitations, the statute is arguably broad because the legislature specifically stated that the definition of protected conduct was not limited to what was delineated by the statute.⁵⁹

B. The District of Columbia and Texas Have Enacted the Two Most Recent Anti-SLAPP Statutes

Washington State has not been alone in passing anti-SLAPP laws in the past two years. After Washington, the District of Columbia and Texas have passed the two most recent anti-SLAPP laws. The District of Columbia's statute went into effect on March 31, 2011.⁶⁰ The statute applies to suits based on written or oral statements regarding an issue being considered by a governmental body, governmental or official proceedings, or issues of public interest made in a public forum.⁶¹ It also applies to suits concerning any expressive conduct involving petitioning the government or communicating with the public regarding issues of public interest.⁶² Certain commercial statements are specifically outside the protections of the statute.⁶³ The statute provides for an award of "the costs of litigation, including reasonable attorneys' fees" to a defendant who prevails in part or in whole.⁶⁴

The D.C. anti-SLAPP statute has already been used in a high-profile case involving a defamation lawsuit brought by Washington Redskins owner Daniel Snyder against the Washington City Paper.⁶⁵ Snyder

57. ARK. CODE ANN. § 16-63-503(1) (2005).

58. *Id.* § 16-53-504.

59. "'An act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern' includes, but is not limited to, any written or oral statement, writing, or petition made" § 16-53-503(1) (emphasis added).

60. D.C. CODE §§ 16-5501 to -5505 (Supp. 2011).

61. *Id.* § 16-5501.

62. *Id.*

63. *Id.* § 16-5505.

64. *Id.* § 16-5504(a).

65. Paul Farhi, *Redskins Owner Daniel Snyder Drops Lawsuit Against Washington City Paper*,

objected to a story the newspaper ran entitled *The Cranky Redskins Fans' Guide to Dan Snyder*, which criticized Snyder's tenure as owner of the Washington Redskins and included an encyclopedic listing of his missteps and public-relations problems.⁶⁶ Snyder's lawsuit sought \$1 million in general damages as well as unspecified punitive damages.⁶⁷ Washington City Paper responded by filing an anti-SLAPP motion to dismiss based on the new law.⁶⁸ Before the motion was resolved, Snyder dropped his suit.⁶⁹

Another recent anti-SLAPP statute is the Texas Citizens Participation Act, passed in 2011.⁷⁰ The law protects acts and communications in connection with the rights of association, petition, or free speech.⁷¹ The statute broadly defines these protected rights. For instance, "right of association" refers to people collectively "express[ing], promot[ing], pursu[ing], or defend[ing] common interests."⁷² Similarly, "right of free speech" is defined as communications related to "a matter of public concern."⁷³ "Right to petition" refers to a wide range of activities, including those relating to governmental proceedings or issues being considered by governmental bodies.⁷⁴ A motion to dismiss may be filed, and discovery may be suspended until the court rules on the motion.⁷⁵ If a defendant shows that the legal action relates to the rights of free speech, petition, or association, a court must dismiss the legal action unless the plaintiff shows by "clear and specific evidence" a prima facie case for each element of the legal claim.⁷⁶

Because the statutes have just gone into effect, it is too soon to say how broadly the courts will interpret them. But standing alone, the statutes provide important broad protections for speech that did not previously exist in the District of Columbia and Texas.

WASH. POST (Sept. 10, 2011), http://www.washingtonpost.com/sports/redskins-owner-dan-snyder-drops-lawsuit-against-washington-city-paper/2011/09/09/gfQA3hf1IK_story.html.

66. *Id.*

67. *Id.*

68. Paul Farhi, *City Paper Fires Back at Snyder*, WASH. POST, June 18, 2011, at C1.

69. Farhi, *supra* note 65.

70. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2011).

71. *Id.* § 27.003.

72. *Id.* § 27.001(2).

73. *Id.* § 27.001(3).

74. *Id.* § 27.001(4).

75. *Id.* § 27.003.

76. *Id.* § 27.005(b), (c). Because the plaintiff must come forward with clear and convincing evidence to withstand the defendant's motion, the statute is similar to Washington State's newly enacted anti-SLAPP statute, RCW 4.24.525, which also requires clear and convincing evidence.

C. *Narrow Anti-SLAPP Statutes Are Inconsistent with Democratic Legitimation*

A review of the types of speech protected by narrow statutes as compared with speech protected by broad statutes demonstrates why the former do little to protect public discourse. Narrow statutes give preference to one type of speech over another and therefore are limited in their ability to protect public discourse. In Arizona, for instance, that state's anti-SLAPP statute protects only (1) written or oral statements that are made as part of an initiative, referendum, or recall effort; or (2) written or oral statements that are submitted to a governmental body, made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding and made for the purpose of influencing a governmental action, decision, or result.⁷⁷ As discussed previously, a key problem with the Arizona law is that the statement must be made to a government body to receive the qualified immunity of an anti-SLAPP statute. Consequently, a statement made to the general public would not be protected by the statute, even if the speakers were addressing the exact same issue. Thus, for instance, citizens who go to a Senate committee hearing to directly communicate with lawmakers are protected by the Arizona anti-SLAPP statute, and if citizens are sued, they may file a motion pursuant to § 12-751.⁷⁸ Subsequently, the burden shifts to the plaintiff to show a prima facie case, and the motion must be heard quickly.⁷⁹ But if the same citizen writes a guest editorial for a newspaper about the same issue and with the same goal of influencing lawmaking, the citizen is fully exposed to meritless litigation for the statements made in the newspaper and cannot invoke Arizona's anti-SLAPP statute.⁸⁰ The statements might be exactly the same; the only difference is that one is made directly to the state

77. ARIZ. REV. STAT. ANN. §§ 12-751, -752 (Supp. 2011). The statute protects "the right of petition," which is defined as:

[A]ny written or oral statement that falls within the constitutional protection of free speech and that is made as part of an initiative, referendum or recall effort or that *is all of the following*:

- (a) Made before or submitted to a legislative or executive body or any other governmental proceeding.
- (b) Made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding.
- (c) Made for the purpose of influencing a governmental action, decision or result.

Id. § 12-751 (emphasis added). The statute is similar to Washington's RCW 4.24.510. *See infra* Part III.

78. *See supra* note 53 and accompanying text.

79. *See supra* note 53 and accompanying text.

80. *See supra* note 53 and accompanying text.

legislature while the second speaks to the public at large. There is no justification for the speech to be treated differently.

Similarly, Florida's statute prevents governmental entities from filing SLAPP suits and prohibits SLAPP suits regarding comments made by, to, or regarding homeowner's associations.⁸¹ Consequently, only those who speak out against governmental entities or homeowners' associations are protected.⁸² Although the Florida statute protects the public from government SLAPP suits, that state's citizens who wish to contribute to public discourse, particularly in matters unrelated to homeowners associations, remain exposed to expensive, meritless litigation.⁸³ The legislatures in Arizona and Florida have made a judgment that values and protects one citizen's speech over another's speech.⁸⁴ Under the anti-SLAPP statutes of these two states, individuals are not equally free to shape the content of public opinion. To that extent, Arizona and Florida's anti-SLAPP statutes are inconsistent with Dean Post's idea of democratic legitimation: "If persons within public discourse are prevented from choosing what to communicate or not to communicate, the value of democratic legitimation will not be served."⁸⁵

In Washington, D.C., by contrast, the speech does not need to be directed to lawmakers, as in Arizona, or relate to a specific subject like homeowners associations to receive protection, as in Florida. Case in point, the Washington, D.C. anti-SLAPP statute was successfully invoked in the lawsuit by Washington Redskins owner Daniel Snyder against the Washington City Paper.⁸⁶ The newspaper's statements about Snyder were not addressed to a government entity, but to the public in general. These statements would not have been protected by an anti-SLAPP statute if they were made in Arizona or Florida. The D.C. anti-SLAPP statute required Snyder to come forward early in his case with

81. See FLA. STAT. ANN. § 720.304 (West 2010); FLA. STAT. ANN. § 768.295 (West 2011). The Florida statute is curious because it acknowledges the increase in SLAPP suits filed by private companies and individuals, but explains that "it is the public policy of this state that government entities not engage in SLAPP suits because such actions are inconsistent with the right of individuals to participate in the state's institutions of government." § 768.295(2). The Legislature declared that prohibiting SLAPP lawsuits by governmental entities preserves the state policy and the constitutional rights of Florida citizens. *Id.* There is no explanation as to why lawmakers chose to limit the statute's reach to government entities, while ignoring the stated problem of lawsuits by companies and individuals.

82. §§ 720.304, 768.295.

83. See §§ 720.304, 768.295.

84. ARIZ. REV. STAT. ANN. §12-751 (Supp. 2011); FLA. STAT. ANN. §§ 720.304, 768.295.

85. POST, *supra* note 4, at 21.

86. Farhi, *supra* note 65.

evidence to show the lawsuit had merit. Rather than meet his burden, Snyder dismissed his suit.⁸⁷

III. WASHINGTON STATE'S TWO ANTI-SLAPP STATUTES: FROM NARROW PROTECTIONS FOR SPEECH TO BROAD PROTECTIONS

Washington State now has both a narrow *and* a broad statute. One law protects communications made directly to government officials, which is useful but limited in its ability to protect speech. The second law protects statements on matters of public concern, which is the “sine qua non of democracy.”⁸⁸ Enacted in 1989, Washington’s initial anti-SLAPP law protects only speech made to lawmakers and government officials.⁸⁹ Over time, commentators advocated that more protections were needed,⁹⁰ and as a result, lawmakers enacted RCW 4.24.525, which is aimed at protecting speech made to the general public that relates to a matter of public concern.⁹¹ This section will look at the first anti-SLAPP statute, its limitations, and the more recently enacted RCW 4.24.525.

A. *An Overview of Washington’s 1989 Anti-SLAPP Law: Text and History*

As it is currently codified, RCW 4.24.510 protects “a person” who files a complaint or provides information to federal, state, or local government or those involved in the regulation of securities or futures businesses.⁹² For immunity to apply, the statement must be a “matter reasonably of concern” to the agency or government authority that received the communication.⁹³ If defendants prevail, they can recover expenses and reasonable attorneys’ fees for defending against the

87. *See id.*

88. POST, *supra* note 4, at 15.

89. WASH. REV. CODE § 4.24.510 (2010).

90. *See, e.g.*, PRING & CANAN, *supra* note 9, at 192–93; 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, 285–88 (2003); Shawn Newman & Hugh McGavik, *State Anti-SLAPP Needs Overhaul*, TRIAL NEWS, Feb. 2007, at 9; *see generally* Hartzler, *supra* note 43 (analyzing different anti-SLAPP statutes and recommending more broad protections).

91. *See* Washington Act Limiting Strategic Lawsuits Against Public Participation, ch. 118, 2010 Wash. Sess. Laws 921, 921–24.

92. WASH. REV. CODE § 4.24.510.

93. *Id.*; *see also* Valdez-Zontek v. Eastmont Sch. Dist., 154 Wash. App. 147, 167, 225 P.3d 229, 349–50 (2010) (citing Gontmakher v. City of Bellevue, 120 Wash. App. 365, 372, 85 P.3d 926, 930 (2004)) (“The statute protects solely communications of reasonable concern to the agency.”).

lawsuit, as well as a statutory award of \$10,000.⁹⁴ However, the statutory award may be denied if a court finds that the statement made to governmental authorities was communicated in bad faith.⁹⁵

RCW 4.24.510 provides immunity from any type of tort claim so long as the claim has as its “starting point” or “foundation” statements communicated to a governmental agency.⁹⁶ The statute has been used to defend successfully against claims of defamation;⁹⁷ tortious interference with a business expectancy, retaliation for the exercise of another’s First Amendment rights, wrongful discharge, and intentional infliction of emotional distress;⁹⁸ invasion of privacy and false light;⁹⁹ and false arrest, false imprisonment, and deprivation of civil rights.¹⁰⁰

The purpose of RCW 4.24.510 is to encourage the reporting of information by citizens regarding potential wrongdoing because such reports are “vital to effective law enforcement and the efficient operation of government.”¹⁰¹ The purpose reflects the legislature’s concern that the threat of costly lawsuits can deter citizens who choose to make good-faith reports to government authorities.¹⁰²

Lawmakers were motivated to pass RCW 4.24.510 by a legal battle between Brenda Hill, a Vancouver, Washington, mother, against the Robert John Real Estate Co. (“Robert John”).¹⁰³ In refinancing her home, Mrs. Hill discovered that the county had no record that she and her husband bought their property because Robert John failed to pay

94. § 4.24.510; *see also* *Segaline v. State*, 169 Wash. 2d 467, 480–81, 238 P.3d 1107, 1114 (2010) (Madsen, C.J., concurring); *Bailey v. State*, 147 Wash. App. 251, 264, 191 P.3d 1285, 1291–92 (2008) (awarding statutory damages in the amount of \$10,000 to a defendant who prevailed on an anti-SLAPP motion based on RCW 4.24.510).

95. § 4.24.510, *quoted in Segaline*, 169 Wash. 2d at 480–81, 238 P.3d at 1114.

96. *Dang v. Ehredt*, 95 Wash. App. 670, 682, 685, 977 P.2d 29, 36, 38 (1999).

97. *E.g.*, *Gilman v. MacDonald*, 74 Wash. App. 733, 875 P.2d 697 (1994).

98. *Bailey*, 147 Wash. App. at 254–55, 191 P.3d at 1287.

99. *Harris v. City of Seattle*, 302 F. Supp. 2d 1200, 1203–04 (W.D. Wash. 2004).

100. *See Dang*, 95 Wash. App. at 686, 977 P.2d at 38.

101. WASH. REV. CODE § 4.24.500 (2010); *see also* *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wash. App. 147, 167, 225 P.3d 339, 350 (2010) (“The purpose of the statute is to protect citizens who provide information to government agencies by providing a defense for retaliatory lawsuits.”); *Bailey*, 147 Wash. App. at 260, 191 P.3d at 1290 (“RCW 4.24.500 articulates a policy to protect citizens who come forward with information that will help make law enforcement and government more efficient and more effective. The term ‘efficient operation of government’ is particularly broad.”); *Gontmakher v. City of Bellevue*, 120 Wash. App. 365, 366, 85 P.3d 926, 927 (2004).

102. § 4.24.500.

103. Roberta Ulrich, *Bill Giving Protection to ‘Whistle Blowers’ Nears OK by Panel*, OREGONIAN, Jan. 17, 1989, at B3; Larry Werner, *Real Estate Company Sues Homeowner After She Tells State About Back Taxes*, SEATTLE POST-INTELLIGENCER, Mar. 10, 1988, at A1.

excise tax on the sale.¹⁰⁴ After she contacted more than 100 other Robert John buyers about possible unpaid taxes and notified the state Revenue Department, Robert John filed a defamation lawsuit against the Hills seeking \$100,000 in damages and initiated a forfeiture on the family's real estate contract.¹⁰⁵ The Hills were forced to file for bankruptcy to protect their home.¹⁰⁶ In 1993, after a six-year legal battle, a jury found Brenda Hill not liable for defaming Robert John.¹⁰⁷

In 2002, lawmakers made three important changes to the statute. First, they eliminated a requirement that the communication be made in good faith; the law as it was passed originally by lawmakers in 1989 granted immunity only if the communication was made in good faith.¹⁰⁸ The Legislature explained that the change would bring Washington's law "in line with . . . court decisions which recognize that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making."¹⁰⁹ By removing the good-faith requirement, the statute now provides absolute immunity for speech that is covered by the statute.¹¹⁰ Bad faith does not deny the speaker immunity; it merely prevents him or her from receiving the \$10,000 statutory penalty.¹¹¹ Second, lawmakers added language explaining the intent of the statute: to protect against intimidation of those who exercise their First Amendment rights¹¹² and free speech rights¹¹³ under the Washington

104. Werner, *supra* note 103, at A10.

105. *Id.*

106. *Id.*

107. Shirleen Holt, *Whistle-Blower Breathes Sigh of Relief*, OREGONIAN, Mar. 15, 1993, at B2.

108. Act of March 28, 2002, ch. 232, 2002 Wash. Sess. Laws 1057; *Bailey v. State*, 147 Wash. App. 251, 261, 191 P.3d 1287, 1290 (2008); *Segaline v. State*, 144 Wash. App. 312, 325, 182 P.3d 480, 487 (2008), *overruled by* 169 Wash. 2d 467, 238 P.3d 1107 (2010). RCW 4.24.510 originally provided: "A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency." 2002 Wash. Sess. Laws 1057.

109. 2002 Wash. Sess. Laws 1057; *Bailey*, 147 Wash. App. at 262, 191 P.3d at 1291.

110. *See Kauzlarich v. Yarbrough*, 105 Wash. App. 632, 641, 20 P.3d 946, 951 (2001) (noting that an absolute immunity absolves a defendant of all liability for defamatory statements while a qualified privilege can be lost if it is abused but declining to rule on whether RCW 4.24.510 provides absolute immunity).

111. WASH. REV. CODE § 4.24.510 (2010).

112. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

113. "Every person may freely speak, write and publish on all subjects, being responsible for the

State Constitution.¹¹⁴ Chief Justice Barbara Madsen has noted that with this language, “for the first time, the legislature expressly recognized the constitutional threat that SLAPP litigation poses.”¹¹⁵ Third, the \$10,000 statutory penalty was added as another deterrent to filing a SLAPP suit.¹¹⁶

B. Gilman v. MacDonald and Right-Price Recreation, LLC v. Connells Prairie Community Council Show the Limitations of RCW 4.24.510

RCW 4.24.510 has been used sparingly since its 1989 passage. *Gilman v. MacDonald*,¹¹⁷ which was decided before the legislature removed the good-faith requirement, exemplifies a rare successful use of the anti-SLAPP statute. There, a developer brought a defamation action against homeowners A.P. and Denise MacDonald based on letters the couple wrote to public officials and others claiming that the developer had illegally cleared land within a development.¹¹⁸ The developer filed a complaint for defamation, commercial disparagement, and intentional interference with business relationships against the homeowners. The MacDonalds sought summary judgment on the basis that their statements were qualifiedly privileged and the developer’s lawsuit was barred by RCW 4.24.510 because their statements were good-faith communications of matters of concern to a governmental agency.¹¹⁹ The King County Superior Court granted the MacDonalds’ summary judgment on some of the plaintiff’s claims, and reserved the issue of attorneys’ fees for trial.¹²⁰ Some claims remained, however, including statements made by the MacDonalds in a letter to the *Issaquah Press*.¹²¹ After the developer took a voluntary nonsuit on the surviving claims, the MacDonalds appealed the denial of their request for attorney fees.

The Court of Appeals held that the trial court erred by applying a negligence standard that placed the burden of showing good faith on the

abuse of that right.” WASH. CONST. art. 1, § 5.

114. 2002 Wash. Sess. Laws 1057.

115. *Segaline v. State*, 169 Wash. 2d 467, 480, 238 P.3d 1107, 1114 (2010).

116. *See* 2002 Wash. Sess. Laws 1057.

117. 74 Wash. App. 733, 875 P.2d 697 (1994).

118. *Id.* at 735, 875 P.2d at 698.

119. *Id.* at 736, 875 P.2d at 698.

120. *Id.*, 875 P.2d at 699.

121. *Id.* at 699 n.4.

defendant in order to justify an attorneys' fee award.¹²² The court explained the proper standard: The burden is on the plaintiff "to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity."¹²³ The court concluded that the record failed to show clear and convincing evidence that A.P. MacDonald acted with knowledge of the falsity of his statements to the county officials or with reckless disregard as to their falsity.¹²⁴ The court acknowledged that MacDonald could have conducted additional investigation before he made his statements, but the failure to do so did not show a lack of good faith.¹²⁵ The case was remanded to the trial court for a determination of attorneys' fees to be awarded to the MacDonalds.¹²⁶

Right-Price Recreation, LLC v. Connells Prairie Community Council,¹²⁷ which was based on the version of the statute before the legislature removed the good-faith requirement, also arose from a dispute with a real estate developer and demonstrates several weaknesses in the statute.¹²⁸ There, the developer sued two citizen groups that opposed the developer's proposed subdivisions, alleging slander, commercial disparagement, tortious interference, and civil conspiracy.¹²⁹ While the defendants' summary judgment motions were pending, the trial court issued a discovery order requiring the citizen groups to produce documents for in camera review including membership lists, financial records, meetings minutes, petitions, and correspondence.¹³⁰ The citizen groups filed an emergency motion with the Washington State Supreme Court seeking a stay of the trial court's order.¹³¹ The citizens argued that the developer's discovery demands violated their constitutional rights.¹³² The Court transferred the case to the Court of Appeals, which then granted discretionary review on the

122. *Id.* at 737–38, 875 P.2d at 699.

123. *Id.* at 738–39, 875 P.2d at 700.

124. *Id.* at 739, 875 P.2d at 700.

125. *Id.* at 740, 875 P.2d at 701.

126. *Id.*

127. 146 Wash. 2d 370, 46 P.3d 789 (2002).

128. *Id.* at 374, 46 P.3d at 792.

129. *Id.*

130. *Id.* at 375, 46 P.3d at 792.

131. *Id.* at 375–76, 46 P.3d at 792.

132. *Id.*

discovery dispute and reversed the trial court's discovery order.¹³³

However, the appeals court refused to review whether the trial court erred by denying the citizen groups' motion to dismiss and continuing their summary judgment motion on the basis that the issues were not designated in the defendant's notice for discretionary review.¹³⁴ On appeal, the Supreme Court of Washington held that the appeals court should have reviewed the denial of the groups' motion to dismiss, although the trial court's order continuing the defendants' motion for summary judgment was not reviewable.¹³⁵ The Court further held that the developer failed to establish a prima facie case of defamation¹³⁶ for statements made at a Pierce County Council meeting: "Right-Price produced a videotape of comments made by group members before the Pierce County Council, but did not identify any alleged defamatory statements."¹³⁷ Moreover, relying on *MacDonald*, the Court stated that even if the developer had pointed to any defamatory statements, the citizens' groups were entitled to immunity because the developer failed to come forward with clear and convincing evidence that the groups' statements were made with actual malice.¹³⁸ Finally, the Court ruled that the citizen groups were entitled to reasonable attorneys' fees but denied their request for sanctions under Civil Rule 11¹³⁹ or Rule of Appellate Procedure 18.9.¹⁴⁰

Gilman and *Right-Price Recreation* demonstrate several shortcomings

133. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wash. App. 813, 816, 21 P.3d 1157, 1159 (2001).

134. *Id.* at 821, 21 P.3d at 1162.

135. *Right-Price Recreation*, 146 Wash. 2d at 380–81, 46 P.3d at 795.

136. *Id.* at 384, 46 P.3d at 796.

137. *Id.*

138. *Id.*

139. Civil Rule 11(a) provides:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

WASH. SUPER. CT. C.R. 11(a).

140. *Right-Price Recreation*, 146 Wash. 2d at 384–85, 46 P.3d at 797. Rule of Appellate Procedure 18.9 provides:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

WASH. CT. R.A.P. 18.9.

in RCW 4.24.510 that exist to this day. First, the inability to invoke immunity for speech that is not made to government authorities is a significant weakness. In *Gilman*, for instance, the developer's claims against statements made to the *Issaquah Press* survived the MacDonalds' summary judgment motion.¹⁴¹ Second, the statute allows meritless claims to proceed on their regular trial schedule. Third, the statute places no suggested limits on discovery, even after the defendant challenges the viability of the plaintiff's claims—if the parties have not conducted any discovery or have just begun to do so, a plaintiff can reasonably argue under Civil Rule 56(f)¹⁴² for a continuance on the defendant's motion to allow for depositions or other discovery. Thus, in *Right-Price Recreation*, the defendants became embroiled in a protracted discovery dispute, even though the plaintiffs ultimately could not make a prima facie showing of a defamation claim.¹⁴³ Fourth, the statute also lacks an expedited dismissal procedure at the appellate level.

The result is that a lawsuit based on statements immune under RCW 4.24.510 may take years to resolve. In *Gilman*, the developer's lawsuit was filed in July 1991, and it was not until July 1994 that the appeals court handed down a decision that ordered additional action by the Superior Court.¹⁴⁴ In *Right-Price Recreation*, the lawsuit was filed in April 1999, and the Supreme Court handed down its decision on May 16, 2002.¹⁴⁵ In both cases, it took the citizens more than three years of costly litigation to successfully fight off the developers' lawsuits. Furthermore, the right to appeal was not automatic; the defendants in *Right-Price Recreation* had to seek approval for review.¹⁴⁶ The time spent arguing the right to appeal adds more unnecessary legal costs to the defendant's legal bill.

141. *Gilman v. McDonald*, 74 Wash. App. 733, 758, 875 P.2d 697, 713 (1994); see also *In re Schafer*, 149 Wash. 2d 148, 167–68, 66 P.3d 1036, 1045 (2003) (stating that whistle-blower reports made to the media are not protected by RCW 4.24.510); *Skimming v. Boxer*, 119 Wash. App. 748, 82 P.3d 707 (2004) (holding RCW 4.24.510 inapplicable where the allegedly defamatory comments were made to a newspaper rather than a public officer).

142. The rule provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

WASH. SUPER. CT. C.R. 56(f).

143. *Right-Price Recreation*, 146 Wash. 2d at 384, 46 P.3d at 796.

144. *Gilman*, 74 Wash. App. at 736, 875 P.2d at 698.

145. *Right-Price Recreation*, 146 Wash. 2d at 374, 46 P.3d at 792.

146. *Id.* at 376, 46 P.3d at 792.

C. *The Washington State Supreme Court Has Ruled that Governments Cannot Invoke RCW 4.24.510*

In 2010, the statute's scope narrowed even more when the Washington State Supreme Court held in *Segaline v. State*¹⁴⁷ that RCW 4.24.510 does not provide immunity to government entities because a government agency is not a "person" under RCW 4.24.510.¹⁴⁸ In that case, an electrical contractor filed a lawsuit against the Washington Department of Labor and Industries ("L&I") and an L&I employee, alleging negligent and intentional infliction of emotional distress, malicious prosecution, negligent supervision, and a civil rights violation under 42 U.S.C. § 1983.¹⁴⁹ The trial court dismissed all his claims, ruling that RCW 4.24.510 gave L&I immunity from most of the plaintiff's claims; his negligent infliction of emotional distress claim was legally inadequate; and his § 1983 claim was untimely.¹⁵⁰ The Court of Appeals affirmed.¹⁵¹

On appeal, the Washington State Supreme Court defined the narrow issue as "whether a government agency that reports information to another government agency is a 'person' under RCW 4.24.510."¹⁵² The Court concluded that a government agency is not a "person":

The purpose of the statute is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution. A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect. L & I is not privy to the RCW 4.24.510 immunity.¹⁵³

The Court's ruling essentially overruled an earlier court of appeals holding in *Gontmakher v. City of Bellevue*¹⁵⁴ that the City of Bellevue

147. 169 Wash. 2d 467, 238 P.3d 1107 (2010).

148. *Id.* at 473, 238 P.3d at 1110.

149. *Id.* at 472, 238 P.3d at 1109.

150. *Id.*, 238 P.3d at 1109–10.

151. *Segaline v. State*, 144 Wash. App. 312, 182 P.3d 480 (2008), *overruled by Segaline*, 169 Wash. 2d 467, 238 P.3d 1107.

152. *Segaline*, 169 Wash. 2d at 473, 238 P.3d at 1110.

153. *Id.* (citation omitted).

154. 120 Wash. App. 365, 85 P.3d 926 (2004).

was a “person” under RCW 4.24.510.¹⁵⁵

D. Criticisms of RCW 4.24.510 Prompted the Washington Legislature to Pass RCW 4.24.525

Commentators noted the problems with RCW 4.24.510 and the restricted opportunity for citizens to invoke the anti-SLAPP statute.¹⁵⁶ In 2007, for instance, two attorneys, Shawn Newman and Hugh McGavick, wrote an article for the Washington State Trial Lawyers Association magazine urging a number of changes to the law.¹⁵⁷ The authors suggested eliminating the good-faith requirement to obtain the statutory fine because a dispute over good faith–bad faith could result in costly discovery and litigation on that issue alone.¹⁵⁸ They argued that the statute should be amended to allow dispositive motions to be brought and heard on an expedited procedure.¹⁵⁹ They suggested that when defendants prevail, each plaintiff should be liable for fines and attorneys’ fees, and any award should be per defendant.¹⁶⁰ Newman and McGavick also urged lawmakers to broaden the statute so that statements made to the media are protected.¹⁶¹ These changes were needed, they said, because “[t]he right to petition government is crucial to our democracy. Citizens who exercise their right to petition government deserve strong protections from those who see litigation as a means to chill that fundamental right.”¹⁶²

Recognizing these and other limitations, the Washington Legislature in 2010 enacted a new statutory provision that significantly expanded the scope of anti-SLAPP protections.¹⁶³ The statute is modeled after California’s anti-SLAPP statute¹⁶⁴ and a model law suggested by the Society for Professional Journalists.¹⁶⁵ Senator Adam Kline, the Chair of

155. *Id.* at 371–72, 85 P.3d at 930.

156. *See, e.g.,* PRING & CANAN, *supra* note 9, at 192–93; Johnston, *supra* note 90, at 284; Hartzler, *supra* note 43, at 1248–53; Newman & McGavick, *supra* note 90.

157. Newman & McGavick, *supra* note 90.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924. (codified at WASH. REV. CODE § 4.24.525 (2010)). The prior law, WASH. REV. CODE § 4.24.510 (2010), was unchanged and remains in effect.

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

165. *A Uniform Act Limiting Strategic Litigation Against Public Participation*, SOC’Y PROF’L

the Senate Judiciary Committee who sponsored the bill, also incorporated suggestions from the Newman and McGavick article when the statute was being drafted.¹⁶⁶

Codified at RCW 4.24.525, the statute protects as a matter of substantive law any public statements and documents submitted to a public forum—and “any . . . lawful conduct in furtherance of the exercise of the constitutional right of free speech”—related to issues of public concern.¹⁶⁷ The statute provides for special motions to strike, which operate as early motions for summary judgment that require SLAPP plaintiffs to demonstrate, at the outset of the litigation, that they can establish the required elements of their case with convincing clarity.¹⁶⁸ A motion “may be filed within sixty days of the service of the most recent complaint or, in the court’s discretion, at any later time upon terms it deems proper.”¹⁶⁹ Once a motion is filed, a hearing shall be held no later than thirty days after the motion is served “unless the docket conditions of the court require a later hearing.”¹⁷⁰ To the extent that a court cannot hold the hearing within thirty days, “the court is directed to hold a hearing with all due speed and such hearings should receive priority.”¹⁷¹ A court must rule on the motion within seven days after the hearing is held.¹⁷² Discovery is stayed pending the decision, and the stay “shall remain in effect until the entry of the order ruling on the motion.”¹⁷³ However, on motion and a finding of good cause shown, a court may order that discovery or other hearings or motions be

JOURNALISTS, <http://www.spj.org/antislapp.asp#4> (last visited Apr. 23, 2012). The California statute and the SPJ Model Law are highly similar. *Compare id.*, with CAL. CIV. PROC. CODE § 425.16. The latter specifically references the California statute in its commentary. *A Uniform Act Limiting Strategic Litigation Against Public Participation, supra.*

166. Email from Adam Kline, Chair of the Senate Judiciary Committee, to Rowland Thompson (Oct. 11, 2009, 10:21 PM) (on file with authors).

167. WASH. REV. CODE § 4.24.525(2)(e).

168. *Id.* § 4.24.525(4). Because the statute protects speech on matters of public concern, it fits within Post’s requirements for the protection of academic freedom because he believes academic freedom should extend beyond simply matters of public concern. POST, *supra* note 4, at 81–85 (considering the public concern test within the context of protecting academic freedom).

169. § 4.24.525(5)(a). Because a “party” can bring a special motion to strike, the language is broad enough to allow a government entity or public employee to invoke immunity. This is another example of how the statute is more protective than RCW 4.24.010, which the Washington State Supreme Court has ruled cannot be used by government entities. *See Segaline v. State*, 169 Wash. 2d 467, 473, 238 P.3d 1107, 1110 (2010).

170. § 4.24.525(5)(a).

171. *Id.*

172. *Id.* § 4.24.525(5)(b).

173. *Id.* § 4.24.525(5)(c).

conducted.¹⁷⁴ As with RCW 4.24.510, prevailing defendants may recover a \$10,000 fine, reasonable attorneys' fees, costs, and "[s]uch additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated."¹⁷⁵

Both parties may seek an expedited appeal if a court fails to promptly rule on a motion to dismiss.¹⁷⁶ The statute's express right of an immediate appeal is particularly important. The Ninth Circuit Court of Appeals recently distinguished between anti-SLAPP statutes that provide a right to an immediate appeal in state court, such as California's, and those that do not expressly so provide,¹⁷⁷ such as Nevada's current and Oregon's former statute.¹⁷⁸ In essence, the California statute provides *immunity from being tried*, while the Nevada and Oregon statutes provide only *immunity from liability*.¹⁷⁹ The difference is subtle but significant. Under California's law, a person has a right to an immediate appeal, which will stop the litigation from progressing while the case is on appeal; under the statutes of Nevada and Oregon, a person must seek a discretionary review but the litigation continues in the meantime.¹⁸⁰ The Ninth Circuit pointed out that a litigant in federal court who invokes the Nevada or Oregon anti-SLAPP statutes may seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or, in truly extraordinary cases, a writ of mandamus.¹⁸¹ A discretionary appeal is always problematic because the party incurs the cost of expensive and time-consuming briefing with no guarantee that the appeals court will accept the case.

According to the accompanying legislative findings, RCW 4.24.525 is

174. *Id.*

175. *Id.* § 4.24.525(6)(a).

176. *Id.* § 4.24.525(5)(d).

177. *Metabolic Research, Inc. v. Ferrell*, No. 10-16209, 2012 WL 400436, at *5 (9th Cir. Feb. 9, 2012). The Ninth Circuit was interpreting Oregon's statute before it was amended in 2009. See *infra* note 178 and accompanying text.

178. NEV. REV. STAT. § 41.660 (2012); Oregon's statute was changed in 2009 when lawmakers added the last sentence: "If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion." OR. REV. STAT. ANN. § 31.150(1) (West Supp. 2011). In addition, lawmakers added a section to section 31.152, which states that a defendant is given "the right to not proceed to trial in cases in which the plaintiff does not meet the burden specified in ORS 31.150 (3)" and that the statute must be liberally construed in favor of the exercise of the rights of expression. § 31.152(4). These amendments provide for an immediate appeal.

179. *Metabolic Research*, 2012 WL 400436, at *5.

180. *Id.* at *6.

181. *Id.*

to be construed liberally.¹⁸² In the findings, the legislature explained that it was concerned about claims “brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”¹⁸³ Although SLAPP suits are typically dismissed, the litigation often is not resolved before “the defendants are put to great expense, harassment, and interruption of their productive activities.”¹⁸⁴ Finally, lawmakers noted that “[i]t is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process.”¹⁸⁵

E. In the First Case to Apply RCW 4.24.525, Aronson v. Dog Eat Dog Films, Inc., the Washington State Supreme Court Interpreted the Statute Broadly and in Line with Legislative Intent

The first case to interpret the new statute was *Aronson v. Dog Eat Dog Films, Inc.*¹⁸⁶ There, a copyright owner filed an action against defendant, Dog Eat Dog Films, Inc., claiming that the inclusion of his song and video in Michael Moore’s documentary film, *Sicko*,¹⁸⁷ without the owner’s authorization, infringed the plaintiff’s exclusive copyright to his video and song.¹⁸⁸ The lawsuit also alleged two state law claims: invasion of privacy for the alleged unauthorized distribution of the plaintiff’s home video, which gave publicity to a matter concerning the plaintiff’s private life, and misappropriation of likeness.¹⁸⁹

Dog Eat Dog Films brought a motion to strike the plaintiff’s two state law claims under RCW 4.24.525. Recognizing that this was a case of first impression, the court explained that analysis of a motion filed

182. Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924 (codified at WASH. REV. CODE § 4.24.525 (2010)).

183. *Id.*; see also *N.Y. Studio, Inc. v. Better Bus. Bureau of Alaska, Or., & W. Wash.*, No. 3:11-cv-05012-RBL, 2011 U.S. Dist. LEXIS 62567, at *1 (W.D. Wash. June 13, 2011) (“The 2010 Revised Washington Anti-SLAPP Act was intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”).

184. 2010 Wash. Sess. Laws at 924.

185. *Id.*

186. 738 F. Supp. 2d 1104 (W.D. Wash. 2010).

187. Dog Eat Dog Films, a loan-out company owned by Michael Moore and his wife Kathleen Glynn, was incorrectly designated as defendant in this case. The company that produced *Sicko*, Goldflat Productions, LLC, owned by Michael Moore, was the proper defendant. *Id.* at 1108 n.1.

188. *Id.* at 1108.

189. *Id.*

pursuant to the anti-SLAPP statute requires a two-step process.¹⁹⁰ First, a defendant who files a motion must make a threshold showing that the complaint arises from protected activity.¹⁹¹ Second, if the defendant makes the showing, the burden shifts to the plaintiff to show a probability of prevailing.¹⁹² The court held that Dog Eat Dog Films satisfied its initial burden.¹⁹³

Moreover, the statute allows a media defendant to file a special motion to strike.¹⁹⁴ The court further explained that the statute is to be construed liberally toward its goal of protecting participants involved in public discourse “from an abusive use of the courts.”¹⁹⁵ The court continued:

Any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern is subject to the protections of the statute. That Defendant may be considered a powerful business entity as compared with the private party Plaintiff is of no import under the modern framework of the statute. Nor is it critical that Plaintiff is not a public figure. Whereas a public figure, standing alone, may satisfy the public interest element of the Act, a private individual satisfies this requirement so long as there is a direct connection with the individual to a discussion of a topic of widespread public interest.¹⁹⁶

The court concluded that the plaintiff appeared in the documentary as a part of the film’s discussion of healthcare and therefore the film company had satisfied its threshold burden of showing that the complaint arose from Dog Eat Dog’s protected activity.¹⁹⁷

Turning to the plaintiff’s burden, the court ruled that the state law claims for misappropriation were barred by the First Amendment and that RCW 63.60.070¹⁹⁸ provides an exemption to Washington’s statutory

190. *Id.* at 1110.

191. *Id.* (citing *Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1098 (Cal. 2008); *Dyer v. Childress*, 55 Cal. Rptr. 3d 544, 546–47 (Ct. App. 2007)).

192. *Id.* (citing *Zamos v. Stroud*, 87 P.3d 802, 806 (Cal. 2004); *Dyer*, 55 Cal. Rptr. 3d at 547).

193. *Id.* at 1111 (citing *Dyer*, 55 Cal. Rptr. 3d 544, 547; *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504, 509 (Ct. App. 2001); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 793–95 (Ct. App. 1993)).

194. *Id.* (citing *Braun v. Chronicle Publ’g Co.*, 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997)).

195. *Id.*

196. *Id.* (citing *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1149 (S.D. Cal. 2005); *Terry v. Davis Cmty. Church*, 33 Cal. Rptr. 3d 145, 153–54 (Ct. App. 2005)).

197. *Id.* at 1112.

198. The statute provides that “[f]or purposes of RCW 63.60.050, the use of a name, voice,

cause of action for misappropriation.¹⁹⁹ The court further ruled that the Copyright Act²⁰⁰ preempted plaintiff's state law claims.²⁰¹ Finally, the court ruled that the plaintiff had not shown by clear and convincing evidence a probability of prevailing on the merits of his invasion of privacy claim because *Sicko* disclosed no facts of intimate details of the plaintiff's life that are highly offensive to the ordinary reasonable person.²⁰² The court concluded that because Dog Eat Dog prevailed on its motion, it was entitled to the \$10,000 statutory fine and its reasonable attorneys' fees.²⁰³

As the first case interpreting RCW 4.24.525, *Aronson* set a number of important precedents. First, the court enunciated the two-step burden shifting analysis, thereby setting clear guidance to subsequent courts on how to evaluate a motion to strike.²⁰⁴ Second, the court recognized that the anti-SLAPP statute must be construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.²⁰⁵ Third, the court did not hesitate to apply the statute to a media defendant, including a media defendant who might have more resources to fight a SLAPP claim, as compared with the citizens who fought the developers in *Gilman* and *Right-Price Recreation*.²⁰⁶ Fourth, the court did not limit use of the statute to traditional anti-SLAPP claims such as defamation or interference with business opportunities, but instead extended it to right of publicity claims²⁰⁷ and invasion of privacy.²⁰⁸ Fifth, the court recognized that "public concern" covered the broader topic in *Sicko* (health care in America) rather than the particular incident that the plaintiff complained about.²⁰⁹ Sixth, the court looked to California law in its interpretation of

signature, photograph, or likeness in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest, including, without limitation, comment, criticism, satire, and parody relating thereto, shall not constitute a use for which consent is required under this chapter." WASH. REV. CODE § 63.60.070 (2010). RCW 63.60.050 is Washington State's right of publicity statute.

199. *Aronson*, 738 F. Supp. 2d at 1114.

200. 17 U.S.C. §§ 101–1332 (2006).

201. *Aronson*, 738 F. Supp. 2d at 1116.

202. *Id.* at 1117.

203. *Id.*

204. *Id.* at 1110.

205. *Id.*

206. *Id.* at 1111.

207. *Id.* at 1114.

208. *Id.* at 1116–17.

209. *Id.* at 1110–12.

the statute.²¹⁰ Subsequent decisions have also looked to California cases for guidance on interpreting the new statute.²¹¹ Reliance on California's case law is important as courts interpret the new statute and establish precedents because California's statute is one of the broadest anti-SLAPP statutes in the United States²¹² and has generated a wealth of interpretive decisions.

F. Recent Efforts to Challenge Washington's New Anti-SLAPP Statute Are Unlikely to Succeed

The anti-SLAPP statute is not without its critics. Some plaintiffs have argued that the statute is unconstitutional.²¹³ At least one federal court in Washington has rejected the argument: "[T]he assertion that the Anti-SLAPP Act is unconstitutional is questionable given that California's Anti-SLAPP Act, which is substantially similar to Washington's statute, has been litigated multiple times and not held unconstitutional."²¹⁴

Plaintiffs who seek to argue that the statute is unconstitutional are unlikely to succeed because the challenging party bears the burden of showing that a statute is unconstitutional, and that burden is a high one.²¹⁵ The Washington State Supreme Court has stated that "statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt."²¹⁶

[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one

210. *Id.* at 1110.

211. *See, e.g.*, *Phillips v. Seattle Times Co.*, No. C11-561RSM, 2011 U.S. Dist. LEXIS 115753 (W.D. Wash. Oct. 5, 2011) (citing the California anti-SLAPP statute); *Phx. Trading, Inc. v. Kayser*, No. C10-0920JLR, 2011 U.S. Dist. LEXIS 81432, at *20 (W.D. Wash. July 25, 2011) (applying California law); *Castello v. City of Seattle*, No. C10-1457MJP, 2010 U.S. Dist. LEXIS 127648, at *13-14 (W.D. Wash. Nov. 22, 2010). *But see* *N.Y. Studio, Inc. v. Better Bus. Bureau of Alaska, Or., & W. Wash.*, No. 3:11-cv-05012-RBL, 2011 U.S. Dist. LEXIS 62567, at *9-10 (W.D. Wash. June 13, 2011) (declining to use California precedent based on a difference in language between WASH. REV. CODE § 4.24.525(4)(b) (2010) and CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2011)).

212. *Hartzler*, *supra* note 43, at 1262.

213. *See, e.g.*, *Castello*, 2011 U.S. Dist. LEXIS 6438, at *13.

214. *Id.* (citing *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002)).

215. *See* *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988).

216. *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wash. 2d 599, 605, 244 P.3d 1, 4 (2010) (citing *Wash. Fed'n of State Emps. v. State*, 127 Wash. 2d 544, 558, 901 P.2d 1028 (1995)); *see also* *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985)) (presuming that statutes are constitutional).

challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. . . . Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.²¹⁷

Plaintiffs challenging the law particularly object to their burden of showing a prima facie case by clear and convincing evidence. By requiring clear and convincing proof of all elements of the plaintiff's prima facie case in response to a dismissal motion, the legislature merely codified the common law of defamation from *Mark v. Seattle Times*,²¹⁸ where the Washington State Supreme Court held that "a defamation plaintiff resisting a defense motion for summary judgment must establish a prima facie case by evidence of convincing clarity."²¹⁹ Even if the statute *did* make a change to the existing case law, the Washington Legislature has the power to modify the common law²²⁰ as well as statutory rights and causes of action.²²¹

V. BROAD ANTI-SLAPP STATUTES SUPPORT POST'S THEORY OF PUBLIC DISCOURSE AND DEMOCRATIC LEGITIMATION

RCW 4.24.525 provides immunity for, inter alia, an oral or written statement submitted "in a place open to the public or a public forum in connection with an issue of public concern" and "[a]ny other lawful conduct" that furthers the right of free speech "in connection with an issue of public concern, or in furtherance of the exercise of the

217. *Sch. Dists. Alliance*, 170 Wash. 2d at 605–06, 244 P.3d at 4 (alterations in original) (quoting *Island Cnty. v. State*, 135 Wash. 2d 141, 147, 955 P.2d 377 (1998)).

218. 96 Wash. 2d 473, 635 P.2d 1081 (1981).

219. *Id.* at 487, 635 P.2d at 1089. The Court noted that the policy reasons, based on the First Amendment, for an early review of a plaintiff's evidence by a convincing clarity standard continue to be persuasive. *Id.* at 487, 635 P.2d at 1088; *see also* *Herron v. KING Broad. Co.*, 112 Wash. 2d 762, 768, 776 P.2d 98, 101 (1989).

220. *See* *Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Mktg. Ass'n*, 276 U.S. 71, 89 (1928) ("[T]he present controversy concerns a statute, and a state may freely alter, amend, or abolish the common law within its jurisdiction.").

221. *See* *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 666, 771 P.2d 711, 727 (1989) ("It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability.").

constitutional right of petition.”²²² The statute does not define “public concern,” although lawmakers provided some guidance when they explained that “[i]t is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process.”²²³ The task of explaining what “public concern” means has been left to the courts. In *Aronson*, the federal court noted that “[t]he Washington Legislature has directed that the [anti-SLAPP] Act be applied and construed liberally.”²²⁴ *Aronson* set the tone, and several Washington courts in subsequent cases have broadly construed “public concern.” For instance, in *Phoenix Trading, Inc. v. Kayser*,²²⁵ the court applied the anti-SLAPP statute to statements about the quality of toothbrushes used in New York prisons.²²⁶ In *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon and Western Washington*,²²⁷ a court applied the statute to a Better Business Bureau press release about talent auditions.²²⁸

A broad construction is consistent with court interpretations of “public concern” involving Washington cases that do *not* involve anti-SLAPP claims. For example, the Washington Court of Appeals found that a dispute between two companies, though ostensibly private, nonetheless touched on a matter of public concern—software piracy—requiring a libel plaintiff to prove a higher level of fault.²²⁹ The Washington State Supreme Court has found that “even the *slightest tinge* of public concern is sufficient” when deciding the level of protection afforded a public employee’s speech.²³⁰

Because the statute is modeled, in part, on California’s statute, the cases from that state are instructive in interpretations of “public concern.” California courts have found that an “issue of public interest”

222. WASH. REV. CODE § 4.24.525(2)(d), (e) (2010).

223. Public Participation Lawsuits—Special Motion to Strike Claim, ch. 118, 2010 Wash. Sess. Laws 921, 924 (codified at WASH. REV. CODE § 4.24.525).

224. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010).

225. No. C10-0920JLR, 2011 U.S. Dist. LEXIS 81432b (W.D. Wash. July 25, 2011).

226. *Id.* at *5.

227. No. 3:11-cv-05012-RBL, 2011 WL 2414452 (W.D. Wash. June 13, 2011).

228. *Id.* at *3.

229. *Alpine Indus. Computers, Inc. v. Cowles Publ’g Co.*, 114 Wash. App. 371, 393, 57 P.3d 1178, 1190 (2002).

230. *White v. State*, 131 Wash. 2d 1, 12 n.5, 929 P.2d 396, 404 (1997) (emphasis added) (quoting *Binkley v. City of Tacoma*, 114 Wash. 2d 373, 383 n.8, 787 P.2d 1366, 1373 (1990)) (finding that nurse’s internal report about patient’s abuse was of public concern for purposes of plaintiff’s claim under 42 U.S.C. § 1983 and the First Amendment).

is “any issue in which the public is interested.”²³¹ The court explained: “In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.”²³²

In our opinion, a broad anti-SLAPP statute is crucial to a democratic society. As Post explained, free speech advances the “goal of democratic legitimation by ensuring that public opinion remains open to the subjective engagement of all.”²³³ Washington’s new statute takes a tremendous leap toward this goal by providing new protections to a broad range of speech. As discussed above, the Washington State Supreme Court has found that “even the *slightest tinge* of public concern is sufficient” when deciding the level of protection afforded a public employee’s speech.²³⁴ It is difficult to imagine speech that is *not* covered.

Reported decisions show that the statute has been effective and met its goals. One such goal is protecting citizens from retaliatory litigation. RCW 4.24.525 has been invoked successfully by government employees accused of defamation for statements made to the media,²³⁵ the Better Business Bureau for statements made in a press release,²³⁶ and a company writing letters to New York City officials.²³⁷ All of these defendants likely would not have been protected by RCW 4.24.510 because their speech was not directed to a government entity. In addition, the new statute has achieved its goal of prompt resolution of meritless claims by significantly shortening the life of non-viable SLAPP claims from a matter of years to months.²³⁸

Because our practices focus on defending the First Amendment, we

231. *Nygård, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 220 (Ct. App. 2008) (emphasis in original).

232. *Id.*

233. POST, *supra* note 1, at 28.

234. *White*, 131 Wash. 2d at 12 n.5, 787 P.2d at 404 n.5.

235. *Castello v. City of Seattle*, No. C10-1457MJP, 2010 U.S. Dist. LEXIS 127648, at *6–7 (W.D. Wash. Nov. 22, 2010) (statements made to a television news station).

236. *N.Y. Studio, Inc. v. Better Bus. Bureau of Alaska, Or., & W. Wash.*, No. 3:11-cv-05012-RBL, 2011 U.S. Dist. LEXIS 62567, at *2–3 (W.D. Wash. June 13, 2011).

237. *Phx. Trading, Inc. v. Kayser*, No. C10-0920JLR, 2011 U.S. Dist. LEXIS 81432 (W.D. Wash. July 25, 2011).

238. The *Castello* lawsuit was filed in August 2010 and a court dismissed the claims in November 2010, some three months later. *Castello*, 2010 U.S. Dist. LEXIS 127648, at *7. *Aronson* was filed in April 2010 and dismissed in August 2010, four months later. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010). Finally, the *New York Studio* claims were filed in January 2011 and dismissed in June 2011, five months later. *N.Y. Studio*, 2011 U.S. Dist. LEXIS 62567.

know the toll litigation takes on a person defending their right to speak out on and contribute to public opinion. If meritless lawsuits are dismissed early, the defendants are spared the cost and emotional toll of unnecessary litigation. Encouraging the prompt resolution of meritless defamation actions—whether it be through a special motion to strike under the anti-SLAPP statute, a *Mark* summary judgment motion,²³⁹ or a simple motion to dismiss for failure to state a claim—is the paramount goal, because the threat of litigation can have a chilling effect upon constitutionally protected free speech rights,²⁴⁰ rights that Dean Post so eloquently advocates for and endorses in his book.

CONCLUSION

Since 1989, Washington has struggled to provide appropriate safeguards to enable ordinary citizens to exercise “democratic competence” and to participate in “public discourse” without fear of pauperization by litigation, which are significant dangers posed by SLAPP plaintiffs: “Because of the cost that it entails, the threat of lengthy litigation becomes vital to a SLAPP’s effectiveness. Plaintiffs rarely win in court but often realize their ultimate goal: to devastate the defendant financially and chill the defendant’s public involvement.”²⁴¹ By focusing its protections on speech involving matters of public concern, RCW 4.24.525 directly fosters democratic legitimation. Furthermore, the law directly protects all “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition,”²⁴² which is consistent with the “contours

239. See *supra* notes 218–219 and accompanying text.

240. See *Mark v. Seattle Times*, 96 Wash. 2d 473, 484–85, 635 P.2d 1081, 1088 (1981) (“Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.” (quoting *Tait v. KING Broad. Co.*, 1 Wash. App. 250, 255, 460 P.2d 307 (1969))); see also *Baker v. L.A. Herald Examiner*, 721 P.2d 87, 96 (Cal. 1986); *Barnett v. Denver Publ’g Co.*, 36 P.3d 145, 147 (Colo. App. 2001); *Andrews v. Stallings*, 892 P.2d 611, 616 (N.M. Ct. App. 1995); cf. *Franchise Realty Interstate Corp., v. S.F. Local Joint Exec. Bd.*, 542 F.2d 1076, 1082–83 (9th Cir. 1976) (“[W]here a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.”).

241. Tom Wyrwich, Comment, *A Cure for a “Public Concern”: Washington’s New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 666–67 (2011).

242. WASH. REV. CODE § 4.24.525(2)(e) (2010).

of First Amendment coverage” advocated by Dean Post.²⁴³ Finally, by providing compensation to those defendants who have been sued for the exercise of their free speech rights but “lack resources to sufficiently participate in the formation of public opinion,” the new statute directly promotes Dean Post’s goal of securing “democratic legitimation in a modern culturally heterogeneous state.”²⁴⁴ Indeed, the right to participate in “public discourse” is promoted with a substantive immunity that we believe is equal to Dean Post’s constitutional goals and values.

243. POST, *supra* note 1, at 15.

244. *Id.* at 18.