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## Solving SLAPP Slop

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## SOLVING SLAPP SLOP

*Nicole J. Ligon* \*

### ABSTRACT

*In a substantial minority of states, wealthy and powerful individuals can, without much consequence, bring defamation lawsuits against the press and concerned citizens to silence and intimidate them. These lawsuits, known as “strategic lawsuits against public participation” (“SLAPP”s), are brought not to compensate a wrongfully injured person, but rather to discourage the defendants from exercising their First Amendment rights. In other words, when well-resourced individuals feel disrespected by public criticism, they sometimes sue the media or concerned citizens, forcing these speakers to defend themselves in exorbitantly expensive defamation actions. In states without anti-SLAPP statutes—statutes aimed at protecting speakers from these chilling lawsuits—these cases can take months, and sometimes years, to resolve. The result is that speakers—those targeted by the lawsuits and otherwise—will be less inclined to criticize the plaintiff in the future, lest they face a devastatingly burdensome and drawn-out (albeit not meritorious) defamation lawsuit.*

*Even in the thirty-two states that have passed anti-SLAPP statutes, the statutory regimes widely vary. For instance, anti-SLAPP statutes in some populous states like Florida and, until recently, New York are not particularly helpful to the media because they only apply in limited contexts, such as citizens being sued for their comments at public meetings. Other anti-SLAPP statutes, like Virginia’s, lack procedural mechanisms that would require a plaintiff whose lawsuit has been declared a SLAPP to pay the defendants’ legal fees. As a result of these and other differences in anti-SLAPP*

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*regimes, plaintiffs strategically forum shop when deciding where to bring their defamation lawsuits, choosing jurisdictions with less protections for defendants whenever possible. However, even where an action is brought in a jurisdiction that does provide strong anti-SLAPP protections, federal courts are split on whether anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure. Consequently, it is currently unclear whether such statutes can be applied in federal cases at all.*

*Because anti-SLAPP statutes are needed to ensure that the public can exercise their First Amendment rights and freely exchange information of public interest, it is vital to fill the gaps that the current statutory regimes have created. In exploring the current legislative landscape, this Article will consider methods for protecting citizens' First Amendment rights to speak on issues of public interest, such as urging state and federal governments to pass broad anti-SLAPP legislation. In so doing, this Article will suggest specific tools and language that should be incorporated into a federal anti-SLAPP law. Indeed, to date, no federal anti-SLAPP statute has ever been enacted. This Article seeks to change that by outlining provisions for a potential federal anti-SLAPP statute and exploring the benefits and value that enacting strong anti-SLAPP legislation on both the federal and state levels could have on protecting First Amendment rights.*

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## PRELUDE

Consider this real-life scenario: A high-end real estate developer purchases land in Pennsylvania, about ninety minutes from the Delaware River. The property formerly housed a large industrial operation which, from the 1950s to 1999, manufactured stainless steel tubes. The manufacturing process released substantial amounts of chlorinated solvents on the property, which contaminated<sup>1</sup> the soil and groundwater at the site and in the surrounding community.<sup>2</sup> Though the contamination was not caused by the new purchaser, upon acquiring the land, they agreed to partially remediate the site.

While the developer did, in fact, take some steps toward cleaning the area, the site itself was never fully cleaned or wholly restored in a manner that would guarantee safe residential use.<sup>3</sup> Indeed, the developer never intended to remediate the site fully, being under no express obligation to do so.<sup>4</sup> Nonetheless, the developer hoped to redevelop the land into something profitable. Initially, they sought to rezone the site for commercial use, leading to

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1. According to reports, the “[g]roundwater at the site . . . tested positive for a degreasing agent linked to cancer.” See Vinny Vella, *State Court Ruling Favors Chesco Residents Protesting Brownfield Development*, THE PHILA. INQUIRER (Sept. 10, 2018, 2:45 PM), <https://www.inquirer.com/philly/news/pennsylvania/bishop-tube-east-whiteland-brownfield-development-court-ruling-20180910.html> [<https://perma.cc/R3DD-276U>]; Jon Hurdle, *Chesco Advocates Accuse Developer of Trying to Muzzle Free Speech over Toxic Site*, NPR: STATE IMPACT PA. (July 27, 2017, 2:19 PM), <https://stateimpact.npr.org/pennsylvania/2017/07/27/chesco-advocates-accuse-developer-of-trying-to-muzzle-free-speech-over-toxic-site/> [<https://perma.cc/56AD-5UYJ>] (“The contaminants include trichloroethylene (TCE), a chemical that was used as a degreaser by companies that made tubing for defense contractors and other industries on the site, which closed in 1999. TCE is classified by the U.S. Environmental Protection Agency as carcinogenic to humans.”); see generally AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEPT’ OF HEALTH AND HUM. SERVS., HEALTH CONSULTATION: BISHOP TUBE SITE (2008), <https://www.atsdr.cdc.gov/HAC/pha/BishopTubeSite/Bishop%20Tube%20Site%20HC%2007162008%20-%20final.pdf> [<https://perma.cc/7TH9-WSUJ>].

2. Complaint ¶¶ 14–15, *O’Neill v. Van Rossum*, No. 2017-03836-MJ (Pa. Ct. Com. Pl.), 2017 WL 3537516. In this section, “developer” is being used collectively to refer to all buyers, including the developer’s corporate affiliates.

3. See *O’Neill v. Van Rossum*, No. 2017-03836-MJ, 2017 WL 4973220, at \*1–2, \*2 n.1 (Pa. Ct. Com. Pl. Oct. 23, 2017) (“The effect of migrating contamination and additional homes being constructed on an already contaminated site is that more of the community will be exposed to such contamination. Therefore, . . . it appears that the statement of [the defendants] is actually true.”).

4. Brief of Appellees at \*8–9, *O’Neill, v. Van Rossum*, 2018 PA Super LEXIS 2418 (No. 3066 EDA 2017); see also Complaint, *supra* note 2, ¶¶ 17–18; *O’Neill v. Van Rossum*, No. 3066 EDA 2017, 2018 PA Super LEXIS 3292, at \*21–22 (Sept. 6, 2018).

extensive efforts lobbying for a rezoning change.<sup>5</sup> When those efforts failed, they sought municipal approval in or around 2014 to construct a community of 228 residential townhomes on a portion of the site.<sup>6</sup>

When an environmental activist learned about the residential rezoning plans and proposal, she grew immensely concerned. After researching about the site, its contaminants, and attending public meetings regarding the proposal, she led an effort to halt the residential development so that attention could focus first on fully remediating the area. The activist, along with fellow concerned citizens, distributed fliers to the nearby community and made similar online comments which stated that the proposed redevelopment would “expose [the community] to more of the toxins and put 200+ homes on the contaminated land”<sup>7</sup> in an effort to petition the state and local governments to remediate the site.<sup>8</sup>

Rather than revisiting the question of remediation, the developer responded by suing the activist and concerned citizens in June 2017 in a Pennsylvania county court for, *inter alia*, defamation, and sought \$50,000 in damages.<sup>9</sup> The complaint alleged that the speakers lacked “a rational basis or foundation” for their statements and that they “engaged in, and have conspired to engage in a campaign of misinformation that is designed to mislead” “in a thinly-veiled attempt to coerce the Township and the Commonwealth to impede Plaintiffs’ efforts and . . . remediate the site.”<sup>10</sup>

The speakers hired a small law firm to mount a legal defense and, two months after the lawsuit was brought, the county court dismissed the buyers’ case. The court opined that the defendants clearly opposed the proposed residential development “due to genuine environment concerns,” and that they had a First Amendment right to both petition the government to help fully clean the site as well as to voice their concerns about the potential effects of the

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5. See *O’Neill*, 2017 WL 4973220, at \*1 (noting that a buyer “had made extensive efforts to market and redevelop the site for commercial purposes, but was unable to do so.”).

6. *Id.*; Chester Cnty. Plan. Comm’n, Opinion Letter on Zoning Ordinances and Zoning Map Amendment for RRD Residential Revitalization District in East Whiteland Twp. (Mar. 11, 2014), <https://www.chesco.org/DocumentCenter/View/17251/AprPacket?bidId=> [https://perma.cc/YA9P-X7DU].

7. *O’Neill*, 2018 PA Super LEXIS 3292, at \*4–5.

8. Brief of Appellees, *supra* note 4, at \*11.

9. Complaint, *supra* note 2, ¶¶ 38–43.

10. *Id.* ¶¶ 23–24.

proposed development plan.<sup>11</sup> Finding the speech at issue to be grounded in truth,<sup>12</sup> the court also chastised the plaintiffs for “commenc[ing] this action as a means of intimidation and harassment, not because [they] believe in the success of their claims.”<sup>13</sup> In other words, the court appeared to suggest that the developer always knew the speakers’ statements were not provably false,<sup>14</sup> but that they still brought the lawsuit in an attempt to threaten the speakers into silence while they sought approval for their development proposal.

Even with this decision, however, the speakers were not through defending themselves for their decidedly truthful speech.<sup>15</sup> Instead of taking steps to more fully remediate the property following the ruling, the developer filed a motion to vacate and reconsider the order,<sup>16</sup> forcing the speakers to spend additional resources on their initial defense. When that motion was denied, the developer then appealed to the Superior Court of Pennsylvania, causing the speakers to endure over a year of ongoing litigation and accompanying costs<sup>17</sup> and stress for expressing their environmental concerns.<sup>18</sup>

The Superior Court of Pennsylvania affirmed the lower court’s dismissal on September 6, 2018—more than a year after the initial lawsuit had been brought. In so doing, the court agreed that the

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11. *O’Neill*, 2017 WL 4973220, at \*6–7, \*9.

12. *Id.* at \*2 n.1 (“While Appellants describe this statement as false, *it is apparent from the face of the Complaint that it is not.*”) (emphasis added).

13. *Id.* at \*6.

14. The court seemed to support this notion by emphasizing that the buyers had purportedly acknowledged that they would not remediate the contaminated groundwater. *Id.* at \*2 n.1 (“The effect of migrating contamination and additional homes being constructed on an already contaminated site is that more of the community will be exposed to such contamination. Therefore, based upon [the buyers’] own allegations, it appears that the statements of [the defendants are] actually true.”); *id.* at \*2 n.2 (“The groundwater contamination has spread significantly offsite as it makes its way through the water table into the nearby creek. It is clear, therefore, that nearby communities *could* be on the receiving end of more contamination.”).

15. Or, at the very least, decidedly not false speech. *Id.* at \*2 n.1 (“While Appellants describe this statement as false, *it is apparent from the face of the Complaint that it is not.*”) (emphasis added).

16. *O’Neill v. Van Rossum*, No. 3066 EDA 2017, 2018 PA Super LEXIS 3292, at \*7 (Sept. 6, 2018).

17. The defendants purportedly spent \$27,765 defending themselves in this action.

18. See Press Release, Delaware Riverkeeper Network, SLAPP Suit Filed by Developer Against Env’t & Cmty. Opposition Struck Down by PA Superior Ct. (Sept. 7, 2018), <https://www.delawareriverkeeper.org/sites/default/files/PR%20BT%20SLAPP%20dismissed%20w%20memo.pdf> [<https://perma.cc/8GVS-HXMH>].

speech at issue was truthful<sup>19</sup> and found that the trial court did not err in dismissing the complaint.<sup>20</sup> Two weeks later, the developer petitioned the court for a rehearing, prompting the defendants to expend more resources on filing a response in opposition—which they did on October 5, 2018. When the developer’s petition was denied in November 2018, it finally marked the end of this lawsuit.<sup>21</sup>

While the speakers were technically victorious in their defense, they had to endure many months of burdensome litigation, with the threat of tens of thousands of dollars in damages hanging over their heads, to reach this “successful” outcome. Furthermore, at the same time that this lawsuit was ongoing, there was still an ongoing dispute over how to treat the residential development proposal.<sup>22</sup> Consequently, the mere existence of this defamation lawsuit—even though ultimately unsuccessful—likely served as a deterrent and threat to others to not speak out against the development project during this debate, lest risk facing a similar fate.<sup>23</sup> Thus, while the developer’s lawsuit technically failed in court, it likely still silenced citizens and groups for an extended yet critical period of time, illustrating the grave consequences this and similar lawsuits can have on the future of representative democracy.<sup>24</sup>

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19. *O’Neill*, 2018 PA Super LEXIS 3292, at \*20 (“[T]he trial court observed that Appellants’ ‘characterization of the statements as false is belied by the other allegations of Appellants’ complaint,’ and we agree.”); *id.* at \*21–22 (“Appellants admit that they plan to conduct only a partial cleanup of the site—namely to the soils above the water table—and, thus, the groundwater at the site, where the townhouses are planned to be built, would remain contaminated. As a result, we do not consider DNR’s statements that Appellants intended to conduct only a partial cleanup, and planned to build over 200 homes on contaminated land, to be false.”).

20. *Id.* at \*23.

21. See *O’Neill v. Van Rossum*, No. 3066 EDA 2017, 2018 PA Super LEXIS 1212 (Nov. 2, 2018).

22. Bill Rettew, *Environmental Group Challenges Decision on Bishop Tube Site*, DAILY LOCAL NEWS, <https://www.dailylocal.com/2018/02/22/environmental-group-challenges-decision-on-bishop-tube-site/> [<https://perma.cc/9RGA-GCDU>] (Aug. 19, 2021, 1:41 AM); see also Jon Hurdle, *Chesco Residents Urge Officials to Reject Development Plan for Contaminated Site*, NPR: STATE IMPACT PA., (Apr. 25, 2017, 11:05 AM), <https://stateimpact.npr.org/pennsylvania/2017/04/25/chesco-residents-urge-officials-to-reject-development-plan-for-contaminated-site/> [<https://perma.cc/3SN7-K794>].

23. This is also likely the case because the plaintiffs threatened to name ten additional defendants in the action. Complaint, *supra* note 2, ¶ 7.

24. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 1–2 (1996). For a fuller explanation and understanding of this case, please see the filings and rulings cited, see Brief of Appellees, *supra* note 4; Complaint, *supra* note 4.



## INTRODUCTION

This case is a strategic lawsuit against public participation, or a “SLAPP” suit.<sup>25</sup> A SLAPP suit is “commonly defined as a lawsuit designed to shut down a person’s right to participate in public discourse through a lawsuit that the plaintiff has filed not because he thinks he can win, but to intimidate or punish someone else.”<sup>26</sup> In other words, SLAPP suits are brought not to compensate a wrongfully injured person or company, but rather to discourage the defendants and others from exercising their First Amendment rights.

While some such lawsuits target experienced activists, more frequently these actions target “normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making.”<sup>27</sup> Some targets of these suits may not have even made any foray into government action at all—they could, for instance, be a customer of a jewelry store who bought a diamond ring, found out it was fake, wrote a review stating such, and now

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25. See *Lawsuit Denied Concerning Bishop Tube Site*, DAILY LOCAL NEWS, <https://www.dailylocal.com/2018/09/07/lawsuit-denied-concerning-bishop-tube-site/> [<https://perma.cc/B393-VGCP>] (Aug. 19, 2021, 1:34 AM) (“*The original SLAPP action* was filed by O’Neill on June 27, 2017 in the Court of Common Pleas in Chester County and claimed the advocacy activities of van Rossum and the Delaware Riverkeeper Network resulted in defamation/commercial disparagement, interference with contractual or business relations and amounted to a civil conspiracy.”) (emphasis added); Jon Hurdle, *Judge Throws Out Developer’s ‘SLAPP Suit’ Against Environmental Group*, 90.5 WESA (Aug. 23, 2017, 5:08 PM), <https://www.wesa.fm/post/judge-throws-out-developers-slapp-suit-against-environmental-group#stream/0> [<https://perma.cc/R8YS-7LSC>] (“The ruling supports DRN’s contention that O’Neill’s challenge, filed on June 27, was a so-called ‘SLAPP’ suit – a legal acronym standing for ‘Strategic Lawsuit Against Public Participation’ – an attempt to block its free-speech rights.”); James Tager, *SLAPPS: The Greatest Free Expression Threat You’ve Never Heard Of?*, PEN AMERICA (Oct. 30, 2017), <https://pen.org/slapps-free-expression-threat/> [<https://perma.cc/NE2U-KUM7>] (characterizing the lawsuit as a SLAPP); David E. Hess, *Chester County Judge Issues Opinion Reaffirming Decision to Dismiss SLAPP Suit Against Environmental Group*, PA ENV’T DIGEST (Oct. 24, 2017), [www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=41406&SubjectID=](http://www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=41406&SubjectID=) [<https://perma.cc/9CZH-N4Y9>]; see also Darcy Reddan, *Pa. Developer Says Defamation Ruling at Odds with Prior Suit*, LAW 360 (Sept. 21, 2018, 5:53 PM), <https://www.law360.com/articles/1085095/pa-developer-says-defamation-ruling-at-odds-with-prior-suit> [<https://perma.cc/9JFH-HWZY>] (DRN’s attorney Mark Freed explaining that future appeals in this action are “particularly troubling given [the] trial court’s finding that [the developer] ‘by all accounts, is simply using this lawsuit to chill free speech and harass those’ who oppose his project.”). The author’s opinion on this categorization of this case is based on her research, which has been disclosed throughout this piece.

26. Tager, *supra* note 25.

27. George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENV’T L. REV. 3, 3 (1989).

finds himself being sued by the store owner.<sup>28</sup> Whatever the basis for the suit, many of the targeted citizens defending themselves in these actions endure immense financial and emotional strain. Indeed, depending on whether a SLAPP suit is brought in a jurisdiction with an anti-SLAPP statute, these actions can take years<sup>29</sup> to resolve and require the defendants to pay substantial legal fees in mounting their defense. SLAPP suits can also cause defendants great emotional and mental stress; this is unsurprising given that unsuspecting speakers have, for example, been sued for millions,<sup>30</sup> and even billions,<sup>31</sup> of dollars in damages on the basis of their remarks—a worrisome and unsettling predicament. The result is that speakers—those targeted by the lawsuits and otherwise—will be less inclined to criticize the plaintiff or their proposals in the future, lest they face a devastatingly burdensome and drawn-out (even if not meritorious) high-stakes defamation lawsuit.

To combat this issue, thirty-two states and the District of Columbia have enacted anti-SLAPP legislation.<sup>32</sup> These statutes vary widely in effectiveness, providing differing degrees of procedural protections for defendants in SLAPP actions. Part I of this Article

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28. See Cliff Zatz, Joe Meadows & Laura Aradi, *What's Next for Federal Anti-SLAPP Legislation*, LAW 360 (Apr. 17, 2017), <https://www.law360.com/articles/914702/what-s-next-for-federal-anti-slapp-legislation> [<https://perma.cc/Q9NJ-RSRR>].

29. See Pring, *supra* note 27 (citing two New York state cases which took approximately three-and-a-half years and four-and-a-half years to resolve, respectively), see, e.g., *SRW Assoc. v. Bellport Beach Prop. Owners*, 517 N.Y.S.2d 741 (N.Y. App. Div. 1987) (Real estate developer filed a \$11,200,000 libel, prima facie tort, and conspiracy suit against nine homeowner groups and sixteen individuals residing in township of proposed development. The suit was dismissed on appeal *three-and-a-half years later.*); *Oceanside Enterprises v. Capobianco*, 537 N.Y.S.2d 190 (N.Y. App. Div. 1989) (Real estate developer sought *over \$1,000,000* in damages from officers of a Greenlawn civic association that had filed an unsuccessful test case against the county for approving the developer's proposed residential development. The case was dismissed on appeal *more than four-and-a-half years later.*); see also Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENV'T L. REV. 23, 26 (1989) ("Most defendants of the SLAPPs [the author examined] prevailed after an average of thirty-six months and the involvement of a number of court levels.").

30. Canan, *supra* note 29, at 26 (noting that in the SLAPP suits the author had examined, defendants were sued for "an average of \$9,000,000.").

31. Last Week Tonight, *SLAPP Suits: Last Week Tonight with John Oliver*, YOUTUBE, at 8:12–9:40 (Nov. 10, 2019), [https://www.youtube.com/watch?time\\_continue=517&v=UN8bJb8biZU&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=517&v=UN8bJb8biZU&feature=emb_logo) [<https://perma.cc/SWN2-5GND>] (characterizing a multi-billion-dollar libel action as a SLAPP suit).

32. As of April 2022, these states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. See Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-anti-slapp-guide/> [<https://perma.cc/PGT7-9HKY>].

will examine several states' anti-SLAPP statutes and analyze their strengths and weaknesses. In doing so, this Article will demonstrate how the different treatment of and protections for defendants in SLAPP suits between states encourages forum shopping and leaves defendants in a vulnerable position regardless of where they reside.

Furthermore, even where an action is brought in a jurisdiction that does provide strong anti-SLAPP protections, federal courts are split on whether anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure. Consequently, it is currently unclear whether such statutes can be applied in federal cases at all. In examining this, Part II ultimately concludes that though state anti-SLAPP statutes should apply in federal court, the dearth of clear guidance on this issue illustrates the need for a federal anti-SLAPP law. Accordingly, Part II maps out a potential anti-SLAPP law that would help safeguard anti-SLAPP procedures in federal court.

Because strong anti-SLAPP protections are needed to ensure that the public can exercise their First Amendment rights and freely exchange information of public interest, it is vital to fill the gaps of the current statutory regime. By focusing on the shortcomings in the anti-SLAPP landscape and exploring potential ways to rectify and strengthen them, this article sheds light on steps that state and federal legislatures can and should take to protect their citizens and preserve the robust and healthy debate that has allowed this country to flourish and continuously improve throughout its history.

## I: STATE ANTI-SLAPP STATUTORY REGIMES

At present, thirty-two states have enacted anti-SLAPP laws geared toward protecting speakers from frivolous lawsuits that are aimed at chilling petitioning or free speech.<sup>33</sup> Anti-SLAPP laws provide procedural protections for citizens who find themselves on the receiving end of lawsuits intended to punish them for speaking out on public matters. The term "anti-SLAPP" was first coined by Professors George Pring and Penelope Canan who, in 1989, penned companion law review articles<sup>34</sup> detailing a phenomenon of "a new breed of lawsuits . . . stalking America" following a five-year study

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33. *Id.*

34. Pring, *supra* note 27, at 4; Canan, *supra* note 29, at 23.

that examined cases targeting political speech.<sup>35</sup> In response to this concerning phenomenon, states began enacting anti-SLAPP laws to curb lawsuits intended to silence and intimidate critics and other speakers. The effectiveness of these laws, and the procedural protections actually provided, vary from state to state, leaving plaintiffs intent on silencing speech with room to abuse these loopholes.

In some states, for example, anti-SLAPP statutes are narrowly crafted to apply only in specific and limited scenarios,<sup>36</sup> while other states provide broader protections that cover speech on any public issue.<sup>37</sup> Similarly, some statutes provide for procedural mechanisms like an expedited consideration of the defendant's motion to dismiss,<sup>38</sup> an automatic stay of discovery while the motion is pending,<sup>39</sup> and mandatory attorney's fees,<sup>40</sup> while others do not. Because of these stark differences in anti-SLAPP statutes from state to state, plaintiffs seeking to silence speakers can, and often do,<sup>41</sup> forum shop to find a venue that provides less protections for SLAPP defendants.

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35. See Pring & Canan, *supra* note 24; Pring, *supra* note 27, at 6–7.

36. See, e.g., 27 PA. CONS. STAT. §§ 7707, 8301–03 (2021) (applying only to speakers that petition the government over the implementation and enforcement of environmental law and regulations); DEL. CODE ANN. tit. 10, § 8136(a)(1) (2021) (applying only to lawsuits related to licensing and government permits).

37. See CAL. CIV. PROC. CODE § 425.16 (Deering 2021); D.C. CODE § 16-5501 (2021); FLA. STAT. § 768.295(3) (2021); OKLA. STAT. tit. 12, § 1432 (2021).

38. See, e.g., ARIZ. REV. STAT. § 12-752(A) (LexisNexis 2021); ARK. CODE ANN. § 16-63-507(a)(2) (2021); CAL. CIV. PROC. CODE § 425.16(f) (Deering 2021); CONN. GEN. STAT. § 52-196a(e) (2021); D.C. CODE § 16-5502(d) (2021); FLA. STAT. § 768.295(4) (2021); GA. CODE ANN. § 9-11-11.1(d) (2021); HAW. REV. STAT. § 634F-2(1) (2014 & Supp. 2017); 735 ILL. COMP. STAT. 110/20(a) (2021); IND. CODE § 34-7-7-9(a)(2) (2021); KAN. STAT. ANN. §§ 60- 5320(d) (2020); LA. CODE CIV. PROC. ANN. art. 971(C)(3) (2021); ME. STAT. tit. 14, § 556 (2020); MD. CODE ANN., CTS. & JUD. PROC. § 5-807(d)(1) (LexisNexis 2021); MASS. GEN. LAWS ch. 231, § 59(H) (2019); MO. REV. STAT. § 537.528(1) (2012); NEB. REV. STAT. §§ 25-21, 245 (1963); 2021 NEV. REV. STAT. § 41.660(3)(f); N.M. STAT. ANN. § 38-2-9.1(A) (2021); OKLA. STAT. tit. 12, §§ 1433(A)–(C) (021); OR. REV. STAT. § 31.152(1) (2021); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.004(a), 27.007(b) (2021); UTAH CODE ANN. § 78B-6-1404(1)(b) (LexisNexis 2021); VT. STAT. ANN. tit. 12, § 1041(d) (2021).

39. See, e.g., D.C. CODE § 16-5502(c)(1) (2021); CAL. CIV. PROC. CODE § 425.16 (Deering 2021).

40. See, e.g., CAL. CIV. PROC. CODE § 425.16(c) (Deering 2021); ARIZ. REV. STAT. § 12-751(D) (LexisNexis 2021); 12 VT. STAT. ANN. tit. 12, § 1041(f)(1) (2021).

41. See Justin Jouvenal, *Devin Nunes, Johnny Depp Lawsuits Seen as Threats to Free Speech and Press*, WASH. POST (Dec. 22, 2019, 8:00 PM), [https://www.washingtonpost.com/local/legal-issues/devin-nunes-johnny-depp-lawsuits-seen-as-threats-to-free-speech-and-press/2019/12/22/eef43bc8-1788-11ea-a659-7d69641c6ff7\\_story.html](https://www.washingtonpost.com/local/legal-issues/devin-nunes-johnny-depp-lawsuits-seen-as-threats-to-free-speech-and-press/2019/12/22/eef43bc8-1788-11ea-a659-7d69641c6ff7_story.html) [https://perma.cc/XZ6Y-MQSE].

To better understand the differences between state statutes and why the current statutory landscape creates problematic gaps that chafe against the First Amendment, this Section will explore three very different anti-SLAPP laws—New York’s former longstanding statute as well as those of Virginia and California—and provide an overview of their strengths and weaknesses. The former two states have been the focus of extensive lobbying efforts<sup>42</sup> while the latter-most has been regularly regarded as a model anti-SLAPP statute for organizations seeking to pass anti-SLAPP legislation in their jurisdictions.<sup>43</sup> The reception of these anti-SLAPP laws has drastically varied due to the different scopes and procedural mechanisms laid out in these statutes.

### A. *New York*

New York had in place a subpar anti-SLAPP law for over a decade, which was changed in November 2020 only after extensive lobbying efforts.<sup>44</sup> While new legislation has been enacted, discussing the prior statute is helpful in understanding its shortcomings because New York courts encounter significantly more SLAPP suits than states with a less robust media and organizational presence. Previously, and despite its centrality as a media hub, New York’s statute was one of the narrowest anti-SLAPP laws in scope, applying only to lawsuits that were “materially related” to speech by the defendant concerning the plaintiff’s application to a “government body” for “a permit, zoning change, lease, license certificate or other entitlement for use or permission to act.”<sup>45</sup> And New York courts applying this law rarely took any liberties, repeatedly explaining that a “narrow construction [must be] given to the anti-SLAPP law” and dismissing defendants’ motions under the statute

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42. Two SLAPP bills were introduced in the New York Senate and New York Assembly in 2019 and enacted in 2020. *See* S.B. 52-A, 2019 S., Reg. Sess. (N.Y. 2020); A.B. 5991A, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2020); *see also* Brad Kutner, *Anti-SLAPP Speech Protections Pushed in Virginia Legislature*, COURTHOUSE NEWS SERV. (Feb. 3, 2020), <https://www.courthousenews.com/anti-slapp-speech-protections-pushed-in-virginia-legislature/> [<https://perma.cc/YA27-7QVK>].

43. *See* Schwern v. Plunkett, 845 F.3d 1241, 1243–44 (9th Cir. 2017); Clifford v. Trump, 339 F. Supp. 3d 915, 922 n.2 (C.D. Cal. 2018), *aff’d*, 818 F. App’x 746 (9th Cir. 2020).

44. *See* Memorandum from the N.Y.C.L. Union on Strengthening N.Y.’s Anti-SLAPP Statute (2019), [https://www.nyclu.org/sites/default/files/field\\_documents/20200716-legislativememo-antislapp.pdf](https://www.nyclu.org/sites/default/files/field_documents/20200716-legislativememo-antislapp.pdf) [<https://perma.cc/88DS-Z875>]; *see also* S.B. 52-A; A.B. 5991A (SLAPP Bills introduced in the New York Senate and New York Assembly in 2019).

45. N.Y. CIV. RIGHTS LAW § 76-a(b) (Consol. 2017).

if they do not clearly fall within the statute's limited purview.<sup>46</sup> Indeed, New York's anti-SLAPP statute provided:

(1) A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section 76-a of this article,<sup>47</sup> may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

- (a) Costs and attorney's fees shall be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;
- (b) Other compensatory damages *may* only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
- (c) Punitive damages *may* only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously

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46. See *Silvercorp Metals Inc. v. Anthon Mgmt. LLC*, 948 N.Y.S.2d 895, 901 (Sup. Ct. 2012); *Hariri v. Amper*, 854 N.Y.S.2d 126, 127 (App. Div. 2008); *Foley v. CBS Broad., Inc.*, 958 N.Y.S.2d 60, 60 (Sup. Ct. 2006); *Guerrero v. Carva*, 779 N.Y.S.2d 12, 21 (App. Div. 2004).

47. Section 76-a defined the following terms:

- (a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.
- (b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.
- (c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.
- (d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.

N.Y. CIV. RIGHTS LAW § 76-a (Consol. 2020). The definitions provided in N.Y. Civ. Rights Law § 76-a rendered the statute unusually narrow in scope. Subsequently, this section also provided a constitutional actual malice requirement independent of the plaintiff's public figure status. *Id.* (explaining that "[i]n an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.").

inhibiting the free exercise of speech, petition or association rights.<sup>48</sup>

In addition to the narrow scope of New York's prior anti-SLAPP law set forth in N.Y. Civ. Rights Law section 76-a,<sup>49</sup> New York's statutory regime also did not stay discovery while an anti-SLAPP motion was pending. Consequently, SLAPP defendants were required to endure burdensome and costly discovery prior to their anti-SLAPP motion ever being heard. Furthermore, and unlike many other states currently,<sup>50</sup> New York's law did not require plaintiffs to pay costs and attorney's fees to defendants that successfully move under the anti-SLAPP law. Rather, as emphasized by the permissive language highlighted in section 70-a(1)(b) above, a successful movant only recovered these costs and fees at the court's discretion.<sup>51</sup>

Placing sole discretion in the hands of the trial court regarding damages awards made New York a less formidable state to bring a SLAPP action because there is no guarantee that, even if the court determined that the action was dismissible as a SLAPP, the party bringing suit did not necessarily face any financial consequences or lift any from the defendant.<sup>52</sup> These shortcomings resulted in the recent push for legislative change in the state, but there are

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48. N.Y. CIV. RIGHTS LAW § 70-a (Consol. 2020) (emphasis added).

49. *See id.* § 76-a(b).

50. *See, e.g.*, D.C. CODE § 16-5504 (2021); CAL. CIV. PROC. CODE § 425.16(c)(1) (Deering 2021).

51. N.Y. CIV. RIGHTS LAW § 70-a(1)(a)–(c) (Consol. 2020). Successful movants may also only recover compensatory damages and punitive damages on a permissive basis as well. *Id.*

52. It is worth noting that although New York courts are confined to apply their own anti-SLAPP law with regard to New York claims, federal rulings in New York applying other states' anti-SLAPP laws suggested in advance that New York courts would be accepting of more broad-based language in its own anti-SLAPP statute. For example, in *Nat'l Jewish Democratic Council v. Adelson*, 417 F. Supp. 3d 416 (S.D.N.Y. Sept. 30, 2019), the Southern District of New York addressed, and rejected, several challenges to a significantly more expansive anti-SLAPP statute from Nevada. Nevada's statute entitles "a successful anti-SLAPP defendant not only to its costs and fees, but also to compensatory damages and, if the defendant can show that the plaintiff acted with 'oppression, fraud, or malice' in bringing the SLAPP suit, to punitive damages." Edward M. Spiro & Christopher B. Harwood, *Significant Liability May Await Those Who File SLAPP Suits*, LEXOLOGY (Oct. 15, 2019), <https://www.law.com/newyorklawjournal/2019/10/11/significant-liability-may-await-those-who-file-slapp-suits/?slreturn=20200106182108> [<https://perma.cc/ZP4X-EZKU>]; Nev. Rev. Stat §§ 41.670(1), 42.005(1). Applying this law to the case, the district court granted the defendants' motion to dismiss under the statute, awarded fees, and allowed the defendants to move forward with a punitive damages claim against the plaintiff. *See Nat'l Jewish Democratic Council*, 417 F. Supp. 3d at 433.

still many jurisdictions with statutes following similar regimes in effect today.<sup>53</sup>

## B. *Virginia*

Virginia's anti-SLAPP statute is new<sup>54</sup> and unfortunately weak overall, making the state a magnet for SLAPP litigations.<sup>55</sup> Recently in Virginia, for instance, California Congressman Devin Nunes sued both Twitter and his California hometown newspaper for defamation over parodic and critical content; actor Johnny Depp sued his ex-wife for allegedly defaming him in an op-ed she wrote in the *Washington Post* about being a survivor of domestic violence; and Edward Dickinson Tayloe, II sued a Charlottesville newspaper, reporter, and contributing professor for an article that detailed his family's slaveholding past.<sup>56</sup> Because Virginia's anti-SLAPP law lacks a mechanism for frivolous cases to be dismissed before trial begins and, importantly, does not require plaintiffs to pay the attorney's fees of a defendant whose case is dismissed

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53. See *supra* note 40 (listing similar statutes).

54. Virginia enacted its anti-SLAPP law in 2017. As a result, there is little guidance and a dearth of case law regarding its application. VA. CODE ANN. § 8.01-223.2(A) (Cum Supp. 2022).

55. It is worth noting that there are presently efforts underway aimed at strengthening Virginia's anti-SLAPP law. See Kutner, *supra* note 42. However, such efforts have stalled post-2020, and Virginia is still regarded as having "notably weak laws against SLAPPs[.]" Andrew Beaujon, *Will Virginia Tighten Laws on Johnny Depp-Style Lawsuits?*, WASHINGTONIAN, <https://www.washingtonian.com/2022/07/11/anti-slapp-virginia-johnny-depp-style-lawsuits/> [<https://perma.cc/M8T3-FE9G>].

56. Jouvenal, *supra* note 41; *Why is Johnny Depp Suing Ex-Wife Amber Heard in Virginia Where Neither of Them Live or Work?*, THE REEVES L. GRP., <https://www.robertreeveslaw.com/blog/johnny-depp-suing-virginia> [<https://perma.cc/N8SV-H3M3>]. It is likely that Nunes' decision to sue in Virginia as opposed to California was based, in large part, on an attempt to avoid confronting California's significantly stronger anti-SLAPP statute. Andrew M. Ballard, *Nunes' Court Venue Gamble in Twitter Suit Pays Off for Now*, BLOOMBERG L. (Oct. 8, 2019, 10:22 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/nunes-court-venue-gamble-in-twitter-suit-pays-off-for-now> [<https://perma.cc/7S8M-ZW XQ>]; Mike Masnick, *Devin Nunes' Virginia SLAPP Suits Causing Virginia Legislators to Consider a New Anti-SLAPP Law*, TECH DIRT (Dec. 5, 2019, 12:51 PM) <https://www.techdirt.com/2019/12/05/devin-nunes-virginia-slapp-suits-causing-virginia-legislators-to-consider-new-anti-slapp-law/> [<https://perma.cc/HPY5-3Q2A>]. While the merits of the Depp lawsuit have been hotly disputed, his decision to bring suit in Virginia despite his primary U.S.-based residence reportedly being California suggests that the fragility of Virginia's anti-SLAPP statute was likely a serious consideration regarding where to bring suit. See Jessica Winter, *The Johnny Depp-Amber Heard Verdict is Chilling*, NEW YORKER, (June 2, 2022) <https://www.newyorker.com/culture/cultural-comment/the-depp-heard-verdict-is-chilling> [<https://perma.cc/57ND-HSNZ>] (describing the merits of Heard's case and noting that California has "significantly stronger" legal protections "for people who speak up on matters of public interest—such as preventing domestic violence" than Virginia.).



under Virginia's anti-SLAPP law, Virginia is an attractive jurisdiction for plaintiffs seeking to launch a SLAPP suit.

Specifically, Virginia's anti-SLAPP law—Code of Virginia section 8.01-223.2—provides:

A person shall be immune from civil liability for a violation of § 18.2-499, a claim of tortious interference with an existing contract or a business or contractual expectancy, or a claim of defamation based solely on statements (i) regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party or (ii) made at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body. The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false.

Any person who has a suit against him dismissed pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs.<sup>57</sup>

On the positive side, and unlike New York's former statute, the scope of Virginia's anti-SLAPP law is quite broad; it generally applies to speech on "matters of public concern that would be protected under the First Amendment" or "made at a public hearing before [a] governing body."<sup>58</sup> Beyond this though, Virginia's anti-SLAPP law falls short of providing adequate protections to its citizens. Virginia's brief statute fails to provide any special procedure requiring judges to conduct an early assessment of the plaintiff's probability of success upon receipt of an anti-SLAPP motion. There is also "no presumptive limitation of discovery, and no provision for an interlocutory appeal when anti-SLAPP motions are denied."<sup>59</sup> The result is that SLAPP defendants in Virginia lack procedural mechanisms to help quickly dispose of these cases, rendering defendants more likely to be forced to endure lengthy and costly discovery and potentially even trial.

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57. VA. CODE ANN. § 8.01-223.2 (Cum. Supp. 2022).

58. *Id.* § 8.01-223.2(A) (Cum Supp. 2022).

59. Paul Alan Levy, *Virginia Updates Its Anti-SLAPP Law, Stiffening the Standard for Many Libel Claims*, PUBLIC CITIZEN (Mar. 20, 2017), <https://casetext.com/analysis/virginia-updates-its-anti-slapp-law-stiffening-the-standard-for-many-libel-claims> [https://perma.cc/43MC-MUDW].

Furthermore, even if a defendant does successfully move under Virginia's anti-SLAPP statute, the law's fee provision is strictly permissive—just like with the New York statute. Instead of mandating payment of attorney's fees to a successful defendant like with many other anti-SLAPP statutes,<sup>60</sup> Virginia's statute merely permits payment at the court's discretion by providing that such defendants “*may* be awarded reasonable attorney fees and costs.”<sup>61</sup> This makes Virginia a considerably more attractive state to bring a SLAPP suit than many others and also allows the plaintiff to potentially succeed at punishing the defendant for their speech by burdening the speaker with legal fees even if their lawsuit is ultimately unsuccessful.<sup>62</sup>

### C. California

In contrast to the aforementioned statutes, California's anti-SLAPP law has regularly been held up as a model anti-SLAPP statute because it provides defendants with a powerful weapon to utilize in civil litigation. Due to its established strength, California-based plaintiffs have sought to bring their defamation actions in other jurisdictions to avoid having to confront California's tougher statutory regime.<sup>63</sup>

Pursuant to Cal. Civ. Proc. Code section 425.16, defendants can move to strike a complaint by demonstrating that they are being sued for “any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue.”<sup>64</sup> California courts have consistently construed this already-

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60. See *infra* Section I.C and note 69.

61. VA. CODE ANN. § 8.01-223.2(B) (Cum. Supp. 2022) (emphasis added).

62. Given the dearth of caselaw applying Virginia's anti-SLAPP law, it is unclear whether Virginia will follow the lead of certain other non-mandatory fee jurisdictions, like the District of Columbia, which has held in common law that there is a presumption in favor of awarding such fees absent special circumstances that would make such an award improper. See *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016).

63. See, e.g., Masnick, *supra* note 56 (discussing California representative Devin Nunes' decision to bring defamation lawsuit against California-based Twitter and The Fresno Bee in Virginia); Gabe Rottman, *Devin Nunes's Lawsuit in Virginia Against His California Hometown Paper Underscores the Need for Stronger Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS (Apr. 16, 2019), <https://www.rcfp.org/devin-nunes-lawsuit-in-virginia-against-his-california-hometown-paper-underscores-the-need-for-stronger-anti-slapp-laws/> [<https://perma.cc/A3GG-34GD>] (same).

64. CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2021).

inclusive language broadly,<sup>65</sup> making the statute widely applicable to various speech on diverse issues.<sup>66</sup> For example, a California state court applied the anti-SLAPP law and dismissed a case against the creators of the film *Borat* because the plaintiffs appeared in the movie drinking alcohol and making racist and sexist remarks and the court found that those citizens' racist and sexist views were "issues of public interest."<sup>67</sup> The way in which "public issues" has been interpreted under California's law is broader than, for instance, the scope of Virginia's statute, which, while still broad, again only applies to "matters of public concern that would be protected under the First Amendment" or "made at a public hearing before [a] governing body."<sup>68</sup>

Similarly, California courts have construed other aspects of the anti-SLAPP statute in a manner favorable to defendants. For example, California's statute mandates that costs and attorney's fees be awarded to successful anti-SLAPP movants, and California courts have steadfastly adhered to this provision by granting generous awards of attorney's fees to successful anti-SLAPP movants.<sup>69</sup> Likewise, California's statute provides for an immediate discovery stay and a right of appeal (with *de novo* appellate review), among its many defendant-positive facets.

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65. *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574 (Cal. 1999); *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 742 (Cal. 2003) ("In addition to honoring the anti-SLAPP statute's plain language, the Court of Appeal's construction adheres to the express statutory command that 'this section shall be construed broadly.'"); *Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1099 (Cal. 2008) ("The Legislature has also directed that section 425.16 'shall be construed broadly' given that the anti-SLAPP statute protects speech about important public issues.").

66. Although the California legislature "originally enacted Civ. Proc. Code § 425.16 to address the 'paradigm SLAPP suit' of a defamation lawsuit filed by a large developer against environmental activists, the anti-SLAPP statute is not limited to this typical scenario." THOMAS R. BURKE, *ANTI-SLAPP LITIGATION* § 2:5 (2021) (listing cases).

67. London Wright-Pegs, *The Media SLAPP-Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant*, 16 UCLA ENT. L. REV. 323, 336-37 (2009).

68. VA. CODE ANN. § 8.01-223.2(A) (Cum. Supp. 2022).

69. See *Wanland v. Law Offs. of Mastagni, Holstedt & Chiurazzi*, 45 Cal. Rptr. 3d 633, 637 (Ct. App. 2006) ("the full protection of a defendant's rights requires an award of attorney fees for litigating the adequacy of the plaintiff's undertaking."); *Lin v. City of Pleasanton*, 96 Cal. Rptr. 3d 730, 734 (Ct. App. 2009) (recognizing defendant's ability to recovery attorney's fees under CAL. CIV. PROC. CODE § 425.16 even where a demurrer was granted); see, e.g., *Wynn v. Chanos*, No. 14-cv-04329-WHO, 2015 U.S. Dist. LEXIS 80062, at \*18 (N.D. Cal. June 19, 2015), *aff'd*, 685 F. App'x 578, 579 (9th Cir. 2017) (awarding \$390,149.63 in fees and \$32,231.23 in costs); *Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1228 (S.D. Cal. 2002) (awarding \$318,687.99); *Vargas v. City of Salinas*, 134 Cal. Rptr. 3d 244, 250, 261 (2011) (affirming award of \$226,928 in fees and \$2,495.84 in costs).

To explain why these components of an anti-SLAPP statute are important, it is helpful to examine some of them individually. For instance, the mandatory costs and attorney's fees provision makes potential SLAPP plaintiffs more reluctant to bring suit if they must do so in California; should their lawsuit be determined to constitute a SLAPP, they will be forced to pay the defendant's legal fees and related costs. This is not just a financial burden on the plaintiff, but also makes it so that the plaintiff cannot "punish" the defendant for their speech through legal fees if the case proves to be a SLAPP. Similarly, when an anti-SLAPP motion is filed under the California statute, a stay of all discovery is placed on the litigation until the court rules on the motion.<sup>70</sup> This prevents a defendant from being forced to endure and bankroll burdensome discovery as their motion pends—in other words, it removes added stresses and burdens that the defendant would otherwise have to endure as they wait for the court to rule on the motion to strike.

Another important component of California's anti-SLAPP law is that it does not require the defendant to affirmatively or conclusively show that the plaintiff *intended* to chill the defendant's constitutionally protected rights to rely on the anti-SLAPP statute. As the Ninth Circuit and California Supreme Court have explained, "the plaintiff's 'intentions are ultimately beside the point.'" <sup>71</sup> Similarly, a defendant is not required to show that by bringing suit, the plaintiff actually *had* a chilling effect on the defendant's constitutional rights in order for the defendant to rely on the anti-SLAPP statute.<sup>72</sup> Rather, "application of the anti-SLAPP law turns the table on the non-moving party and forces it to establish a probability of success on its claims from the outset of the case so long as the movant establishes that a cause of action arises from a

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70. CAL. CIV. PROC. CODE § 425.16(g) (Deering 2021).

71. See *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005) ("The defendant need not show that plaintiff's suit was brought with the intention to chill defendant's speech; the plaintiff's 'intentions are ultimately beside the point.'") (quoting *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002)).

72. *City of Cotati v. Cashman*, 52 P.3d 695, 699 (Cal. 2002). The Court concluded: [S]ection 425.16 nowhere states that, in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the cause of action complained of has had, or will have, the actual effect of chilling the defendant's exercise of speech or petition rights. Nor is there anything in section 425.16's operative sections implying or even suggesting a chilling-effect proof requirement. Since section 425.16 neither states nor implies such a requirement, for us judicially to impose one . . . would violate the foremost rule of statutory construction.

*Id.*

protected activity.”<sup>73</sup> Accordingly, once the movant under the anti-SLAPP law has simply shown that the plaintiff’s cause of action arises from defendant’s speech on a public issue, the burden completely shifts to the plaintiff. The court will then strike the cause of action unless the plaintiff can produce admissible evidence that establishes a probability of success on the merits.<sup>74</sup>

Because of the strong protections that California’s anti-SLAPP law provides defendants both expressly and through case law, plaintiffs are forced to think twice before filing a meritless defamation lawsuit in California. Indeed, California’s anti-SLAPP statute has been successfully used by citizens,<sup>75</sup> the press,<sup>76</sup> and even lawyers<sup>77</sup> to fight off lawsuits aimed at stifling speech on matters of public interest. The result is that SLAPP suits drain less resources in California’s judicial system and speech in this jurisdiction is less likely to be chilled by plaintiffs seeking to punish a targeted person’s expression.

#### *D. States without Anti-SLAPP Legislation*

While there are some stark differences in the effectiveness of the aforementioned anti-SLAPP laws, nearly twenty states still entirely lack *any* anti-SLAPP legislation.<sup>78</sup> In these states, recovering attorney’s fees, staving off discovery, or using other protective procedural measures to shorten the length of a SLAPP suit are

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73. Patrick J. Somers, *California v. New York: Which State is Better for Your Client’s Objectives?*, KENDALL BRILL KELLY, [www.kbkfirm.com/california-v-new-york-state-better-clients-objectives/](http://www.kbkfirm.com/california-v-new-york-state-better-clients-objectives/) [https://perma.cc/E2KE-FH9C].

74. *Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117, 1123 (Cal. 2010).

75. *See, e.g., Barrett v. Rosenthal*, 146 P.3d 510, 514 (Cal. 2006).

76. *See, e.g., Sipple v. Found. for Nat. Progress*, 83 Cal. Rptr. 2d 677, 682–85 (Ct. App. 1999); *Braun v. Chronicle Publ’g Co.*, 61 Cal. Rptr. 2d 58 (Ct. App. 1997). *Cf. Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 44 Cal. Rptr. 2d 46, 51 (Cal. Ct. App. 1995) (“[T]he language of the statute was broad enough to cover news reporting activity and that newspapers and publishers, who regularly face libel litigation, would be one of the ‘prime beneficiaries’ of section 425.16.”).

77. *See, e.g., Rusheen v. Cohen*, 128 P.3d 713, 717 (Cal. 2006); *Roberts v. Los Angeles Cty. Bar Ass’n*, 129 Cal. Rptr. 2d 546, 548 (Ct. App. 2003).

78. As of April 2022, thirty-two states and the District of Columbia have anti-SLAPP laws, including Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. Minnesota previously passed an anti-SLAPP law, but it was struck down as unconstitutional. *Vining & Matthews, supra* note 32.

extremely unlikely or at least highly unavailable even when it is clear that the defendant is being targeted for their speech.

For example, when billionaire Frank Vandersloot sued *Mother Jones* in 2013 after the magazine published an article that criticized him and his company, he did so in Iowa—a state that lacks an anti-SLAPP statute.<sup>79</sup> Although *Mother Jones* successfully defended against the libel allegations, the magazine “spent years and more than \$2 million<sup>80</sup> fighting the suit before [the court] granted *Mother Jones*’ motion for summary judgment,” putting an end to the litigation.<sup>81</sup> The out-of-pocket expenses were so high for the magazine that it actually sought public donations to help defray the cost of its litigation expenses.<sup>82</sup>

Similarly, in 2018, a local Iowa news outlet—the *Carroll Times Herald*—was sued for libel in Iowa after publishing “the first of a series of investigative pieces about a local cop who was having inappropriate relationships with teenage girls.”<sup>83</sup> Though the court reportedly dismissed the lawsuit and ruled that “the article is accurate and true, and the underlying facts are undisputed,” the newspaper was suffocated by legal fees amounting to approximately \$140,000 in out-of-pocket expenses.<sup>84</sup> As a result, one of the newspaper’s owners launched a GoFundMe page to solicit the public’s help in raising the funds needed to keep the newspaper solvent in the wake of the dismissed lawsuit.<sup>85</sup>

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79. See *Vandersloot v. Mother Jones*, GLOB. FREEDOM OF EXPRESSION, <https://global-freedomofexpression.columbia.edu/cases/vandersloot-v-mother-jones/> [<https://perma.cc/3MR8-B692>].

80. This estimate appears to also include insurance money, because *Mother Jones* has stated that they were stuck with \$650,000 of out-of-pocket expenses. See generally Clara Jeffery & Monika Bauerlein, *Why We’re Stuck with \$650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES (Oct. 23, 2015), <https://www.motherjones.com/politics/2015/10/why-wont-we-get-our-legal-fees-back/> [<https://perma.cc/9FZP-T64A>].

81. *Camera Access, Anti-SLAPP Laws Introduced in Congress*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/news-media-and-law-fall-2015/camera-access-anti-slapp-laws/> [<https://perma.cc/HWF3-9ZSU>].

82. Jeffery & Bauerlein, *supra* note 80.

83. *A Small Newspaper in Iowa Wins a Libel Suit, but Legal Costs May Force It to Close*, FIRST AMEND. WATCH (Oct. 10, 2019), <https://firstamendmentwatch.org/a-small-newspaper-in-iowa-wins-a-libel-suit-but-legal-costs-may-force-it-to-close/> [<https://perma.cc/H762-4BDV>].

84. *Id.*; see also *Smith v. Strong*, No. CVCV039797, 2018 Iowa Dist. LEXIS 1, \*6 (Dist. Iowa May 21, 2018).

85. Douglas Burns (Organizer), *Rural Iowa Newspaper Stares Down Police Lawsuit*, GOFUNDME (Nov. 14, 2019), <https://www.gofundme.com/frural-iowa-newspaper-stares-down-police-lawsuit> [<https://perma.cc/BJM3-WNJP>].

In states like Iowa that lack anti-SLAPP protections, plaintiffs seeking to suppress speech have less incentive to not bring suit. As illustrated by these two cases, even when cases lack legal merit, successful defendants in such states can still end up strapped with exorbitant legal fees and other stresses associated with being on the receiving end of a lawsuit. Conversely, if these same suits were brought in, say, California, the defendants could have “taken advantage of the state’s anti-SLAPP law and filed a motion to strike to dismiss the claim within [sixty] days, avoiding the burden and costs of defending the suit.”<sup>86</sup> Consequently, the enactment of strong anti-SLAPP legislation in these trailing states could make a substantial difference in citizens’ ability to meaningfully engage in and speak on matters of public interest as well as free up resources in the judiciary.

## II: THE NEED FOR A CAREFULLY CONSTRUCTED FEDERAL ANTI-SLAPP LAW

Federal courts are split on whether state anti-SLAPP statutes apply in federal cases.<sup>87</sup> If a lawsuit arises out of federal law, state anti-SLAPP laws are almost never applied.<sup>88</sup> But where a lawsuit arising out of state law is heard in federal court (e.g., in diversity jurisdiction cases), it is unclear whether anti-SLAPP statutes may be applied. Some federal courts have, for instance, held that anti-SLAPP statutes conflict with Federal Rules of Civil Procedure 12 and 56, and have thus refused to apply anti-SLAPP statutes.<sup>89</sup> Conversely, other federal courts have found that applying these statutes aligns with the aims of the *Erie* doctrine<sup>90</sup> by “removing the incentive for filers to shop for a federal forum in order to evade

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86. REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 81.

87. Lauren Bergelson, *The Need for a Federal Anti-SLAPP Law in Today’s Digital Media Climate*, 42 COLUM. J.L. & ARTS 213, 232 (2019).

88. Zatz et al., *supra* note 28.

89. *See, e.g.*, 3M Co. v. Boulter, 842 F. Supp. 2d 85, 103 (D.D.C. 2012) (holding that the District of Columbia’s anti-SLAPP law “squarely conflicts with Rule 12(d) and Rule 56”); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999) (finding that “discovery-limiting aspects” of California’s anti-SLAPP law “collide with the discovery-allowing aspects of Rule 56”).

90. Articulated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the *Erie* Doctrine requires a federal district court reviewing a case concerning issues not governed by federal law to apply the conflict of laws rules of the state in which it sits. For a more thorough explanation and analysis in this context, *see* Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 389 (2014).

anti-SLAPP protections.”<sup>91</sup> While most federal courts have, seemingly correctly,<sup>92</sup> adopted this latter approach in recent years and have allowed state anti-SLAPP statutes to apply for state law claims,<sup>93</sup> this split has left defendants in federal court vulnerable to abusive lawsuits even where the state in which the suit was brought has a strong anti-SLAPP law.<sup>94</sup>

Enacting a strong federal anti-SLAPP law would lessen the risk that SLAPP suits will be able to punish undeserving defendants and drain resources in the federal judiciary in the future. In order to do this, however, such legislation must be carefully crafted to both pass muster in the legislature and ensure that protections for defendants are adequately provided by the law. This Part will lay

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91. Quinlan, *supra* note 90, at 405; *see also* Godin v. Schencks, 629 F.3d 79, 91 (1st Cir. 2010) (“Here, application of [the anti-SLAPP statute] would best serve the twin aims of the *Erie* rule: discouragement of forum shopping and inequitable administration of the laws.”) (internal quotation marks and citations omitted).

92. It seems logical to apply anti-SLAPP laws in federal courts because of the substantive protections they offer. These protections are not dissimilar from the immunities enjoyed by government officials when they are sued under section 1983.

93. Quinlan, *supra* note 90, at 393 (explaining that “[d]istrict courts in [non-DC] circuits have generally favored application of state anti-SLAPP laws in federal court since *Shady Grove*.”); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

94. *See SPEAK FREE Act of 2016: Hearing on H.R. 2304 Before the H. Comm. on the Judiciary & the Subcomm. on Const. and Civ. Just.*, 114th Cong. (2016) [hereinafter *Hearing*] (testimony of Bruce D. Brown, Executive Dir. for Rep.’s Comm. for Freedom of the Press), explaining:

When a traditional tort claim ends up in federal court on diversity jurisdiction grounds, it seems obvious that state anti-SLAPP laws should apply to those claims because of the substantive protections they offer. The First Circuit held in 2010 that the Maine anti-SLAPP law ‘created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional [] activities.’ As the Ninth Circuit recognized in 1999, while anti-SLAPP statutes have a ‘commonality of purpose’ with the federal rules governing early dismissal, ‘there is no indication that Rules 8, 12, and 56 were intended to ‘occupy the field’ with respect to pretrial procedures aimed at weeding out meritless claims. . . . The Anti-SLAPP statute, moreover, is crafted to serve an interest not directly addressed by the Federal Rules: the protection of ‘the constitutional rights of freedom of speech and petition for redress of grievances.’ These protections are similar to the immunities enjoyed by government officials when they are sued under Section 1983.8. But not all federal courts agree. The D.C. Circuit recently declined, for example, to apply the D.C. anti-SLAPP law in federal court. And even in the circuits where rights under the relevant state anti-SLAPP statutes are currently recognized in district court, that protection may be in jeopardy. While the Ninth Circuit has upheld the practice of applying anti-SLAPP laws in federal courts, four judges of that court dissented from a denial of a 2016 HR 2304 2RG petition for rehearing en banc in an anti-SLAPP case. H.R. 2304 is needed to guarantee the viability of anti-SLAPP protections in federal court.



out the features of a potential federal anti-SLAPP law in the hope that it might provide a blueprint for the enactment of a similar federal statute in the near future.<sup>95</sup> Such features include a scope that is carefully construed to be effective but not overinclusive; procedural mechanisms that would allow for swift decisions on anti-SLAPP motions; and a provision that would permit immediate interlocutory appeals on denials of anti-SLAPP motions.

### A. *Proper Scope*

To successfully enact a federal anti-SLAPP law that is effective in nature, it is important to carefully tailor the scope of the statute. On the one hand, some anti-SLAPP laws are too narrow to effectively protect defendants whose speech is significant and on general matters of public concern. On the other hand, broad “public issue”-like language, as in California’s anti-SLAPP law, has been criticized during previous attempts to pass federal anti-SLAPP regulations<sup>96</sup> for being overinclusive<sup>97</sup> and enabling the media and other defendants to abuse statutory protections.<sup>98</sup> Striking the right balance is vital.

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95. It is worth noting that independent of any specific provisions of a federal anti-SLAPP statute, such a statute should be expressly framed as substantive (not procedural) and in the nature of an immunity. Furthermore, these features have been suggested for the enactment of a uniform anti-SLAPP statute called Uniform Public Expression Protection Act (“UPEPA”). UPEPA was drafted by the Uniform Law Commission and has been enacted in Hawaii, Kentucky, and Washington to date. See *Public Expression Protection Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1> [<https://perma.cc/7CPB-SP58>].

96. See Alexander A. Reinert, *SPEAK FREE Act Would Silence Civil Rights and Public Interest Litigants*, HILL (July 7, 2016, 4:47 PM), <https://thehill.com/blogs/pundits-blog/lobbying-world/286811-speak-free-act-would-silence-civil-rights-and-public> [<https://perma.cc/WP65-QAJY>].

97. Zatz et al., *supra* note 28 (“[A] too-broad definition of ‘SLAPP’ suit could allow special motions to dismiss in unintended cases such as employment and whistleblower claims if they involve ‘matters of public concern.’”).

98. This criticism is not without merit. Take, for example, *Britney Spears v. US Weekly*. Britney Spears sued *US Weekly* for libel in California state court for allegedly falsely reporting that her and her then-husband Kevin Federline created a sex tape containing “raunchy footage” of them during intimacy. See Steve Gorman, *Judge Dismisses Britney Spears’ Libel Suit over Sex Tape*, CHRON. (Nov. 6, 2006), <https://www.chron.com/entertainment/article/Judge-dismisses-Britney-Spears-libel-suit-over-1994279.php> [<https://perma.cc/S3JZ-8QNB>]. *US Weekly* moved to dismiss the lawsuit under California’s anti-SLAPP statute. In dismissing the case as a SLAPP suit, the judge reportedly ruled that because Britney Spears is a public figure who “put her modern sexuality squarely, and profitably, before the public eye” during her career, the magazine’s claim could not be found defamatory. *Id.* In other words, the court, using California’s anti-SLAPP law, essentially found that nature of Spears’

Despite its many shortcomings, Virginia's anti-SLAPP statute successfully lays out a scope that would be manageable at the federal level. Tailoring the applicability of a federal anti-SLAPP statute to speech on traditional matters of public concern or that occur at a public hearing, as Code of Virginia section 8.01-223.2 does, would set a proper scope that encompasses a great deal of significant speech without overstepping. Connecticut's anti-SLAPP statute, which is similar in scope, is also illustrative.<sup>99</sup> In applying to any action in which "a plaintiff brings a claim that is based on the defendant's right of free speech, right to petition the government or a constitutional right of association in a connection with a matter of public concern,"<sup>100</sup> Connecticut's statute helpfully clarifies what types of matters would qualify under its statute. As Connecticut Statute section 52-196(a) explains:

(a) As used in this section:

(1) "Matter of public concern" means an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work;

(2) "Right of free speech" means communicating, or conduct furthering communication, in a public forum on a matter of public concern;

(3) "Right to petition the government" means (A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body, (B) communication that is reasonably likely to encourage consideration or review of a matter of public concern by a legislative, executive, administrative, judicial or other governmental body, or (C) communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial or other governmental body;

(4) "Right of association" means communication among individuals who join together to collectively express, promote, pursue or defend common interests[.]<sup>101</sup>

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behavior and conduct in her career has made her unable to be defamed regarding her expression of sexuality. *Id.*; see also Wright-Pegs, *supra* note 67, at 334–36.

99. See generally CONN. GEN. STAT. § 52-196(a) (2021).

100. See *Anti-SLAPP Statutes and Commentary*, MEDIA L. RES. CTR. <https://www.media.law.org/component/k2/item/3494> [<https://perma.cc/RE7N-LYXH>] (describing Connecticut's anti-SLAPP law).

101. CONN. GEN. STAT. § 52-196a.

Crafting a federal anti-SLAPP law that models the language of Virginia and Connecticut's statutes, including an explanatory and definitional component, would help ensure that defendants are generally and broadly covered in SLAPP actions without exceeding the purpose of anti-SLAPP legislation. Clarifying and limiting what constitutes a "matter of public concern" under the federal statute, or otherwise exempting certain types of lawsuits (e.g., employment discrimination cases), would dispel concerns that a too-broad definition of a SLAPP suit could allow for special motions in unintended cases. Additionally, a carefully tailored statute would be more likely to gain bipartisan support in the legislature, be met with a positive response from lobbying groups, and advance the primary objectives of anti-SLAPP regulations.

### B. *Clear and Efficient Procedural Mechanisms*

A federal anti-SLAPP law should ensure that anti-SLAPP motions are "filed, heard, and decided quickly."<sup>102</sup> Indeed, anti-SLAPP statutes are intended to address lawsuits within their purview "quickly and relatively inexpensively,"<sup>103</sup> so such laws ought to have clear and swift deadlines and procedures. Consistent with this, a federal law should allow a defendant no more than sixty days to file a special motion to dismiss after service of the lawsuit—a provision plucked from California's anti-SLAPP law that has enabled parties and courts alike to enjoy efficient handling of anti-SLAPP motions.

Once a special motion to dismiss has been filed under the federal anti-SLAPP law, the movant should need to make a *prima facie* showing that the lawsuit is, in fact, a SLAPP. After such a showing has been made, the court should grant the motion unless the plaintiff can demonstrate that the lawsuit is likely to succeed on the merits. This would ensure that the "standard to avoid dismissal [] is no higher than the summary judgment standard"—something that has concerned lawmakers considering proposed federal anti-SLAPP legislation in the past.<sup>104</sup> As the motion pends, discovery should be stayed in an effort to prevent unnecessary expenditure of resources on the parties' and court's time. Furthermore, to

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102. Zatz et al., *supra* note 28.

103. Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 413 P.3d 650, 651 (Cal. 2018).

104. See Bergelson, *supra* note 87, at 237.

ensure that the federal law is truly efficient, it should generally require that the court hear the special motion no later than thirty days after it has been served and that the court rule on that motion within thirty days of the hearing. If a movant has been successful, the federal law should mandate that the non-moving party pay the moving party's legal fees in bringing the motion. Such a fee-shifting provision would help level the playing field between litigants and likely reduce the number of frivolous SLAPP suits filed in federal courts.

### C. *Interlocutory Appeals Provision*

At the core of any anti-SLAPP statute is a mechanism to dismiss frivolous suits. An interlocutory appeals provision is essential to advancing that objective at the federal level. If a speaker loses on an anti-SLAPP motion and cannot immediately appeal that decision, the purpose of an anti-SLAPP statute is defeated; "it would be pointless to appeal the lack of an early dismissal only after going through a full trial on the merits of a case and then have an appellate court decide much later that the claim was frivolous from the start."<sup>105</sup> An interlocutory appeals provision "flows naturally from the concept of substantive rights akin to immunity protections."<sup>106</sup> An expedited appeals process is especially important in the First Amendment context because, according to reports, "on appeal[,] judgments in matters implicating press rights are upheld in fewer than 25% of cases."<sup>107</sup> Consequently, a federal anti-SLAPP statute should include a clear mechanism to quickly and efficiently appeal denials of anti-SLAPP motions.

\* \* \*

While these suggestions are not exhaustive, they attempt to highlight the most important features to include in a federal anti-SLAPP law. Incorporating the suggested provisions would help to ensure that a federal anti-SLAPP law is effective and can garner bipartisan support in the legislature. A federal anti-SLAPP law containing the above provisions would help bring balance back into litigation in federal courts over speech on issues of public concern.

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105. *See Hearing, supra* note 94.

106. *Id.*

107. *Id.*

## CONCLUSION

The existing anti-SLAPP statutory regimes on the state and federal levels are sloppy and ripe for redress. States that lack any anti-SLAPP protections for their citizens ought to adopt strong legislation aimed at protecting speakers from being penalized for engaging in free expression. Even in states that do have anti-SLAPP statutes, that there has been no agreed-upon one-size-fits-all law means there are further gaps to fill at the state level to avoid forum shopping. Failure to address these gaps and more uniformly apply strong anti-SLAPP protections at the state level may undercut the effectiveness of anti-SLAPP protections altogether.

Similarly, because federal courts do not consistently apply anti-SLAPP protections even in states where such statutes exist, it is important to enact a strong federal anti-SLAPP law as well. This Article has laid out a blueprint of a federal anti-SLAPP law in the hope that it may be instructive for any future efforts to pass such legislation in the future. Shoring up the gaps in the anti-SLAPP statutory landscape at both the state and federal levels is vital for protecting First Amendment rights and ensuring that democracy can function and flourish as a result of free speech.