

## Strategic Lawsuits Against Public Participation in the Age of Online Speech: The Relevance of Anti-SLAPP and Anti-CyberSLAPP Legislation

Lauren Merk

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## **Strategic Lawsuits Against Public Participation in the Age of Online Speech: The Relevance of Anti-SLAPP and Anti-CyberSLAPP Legislation**

### **I. INTRODUCTION**

Strategic Lawsuits Against Public Participation (“SLAPPs”) are not a new phenomenon in American jurisprudence, yet these lawsuits have been the topic of recent commentary. The discussion surrounding SLAPPs may be a result of various states proposing new or amended anti-SLAPP laws—Virginia and New York, for instance, are a few of the latest legislatures to propose amended anti-SLAPP legislation.<sup>1</sup> Or maybe, the rise of online speech and journalism have created new questions and concerns relating to SLAPPs. The point is, while strategic lawsuits against public participation are in no way new, they are as relevant now as ever.

Most individuals with social media presences have likely either expressed or witnessed the expression of opinions online. The internet has given rise to whole new platforms on which public participation can exist. For example, online review forums are becoming increasingly popular with sites such as Yelp, TripAdvisor, Google Reviews, and Glassdoor providing users with platforms to offer opinions about tourism spots, restaurants, and workplaces. Even e-commerce sites like Amazon allow users to leave reviews about the products they buy. When considering these and the countless other examples of online channels for speech and public participation, the subject of SLAPP litigation appears especially relevant to matters relating to computer and internet law.

This article aims to provide an overview of SLAPPs and the recently coined “cyberSLAPPs;” some of the resulting legislation in response to these lawsuits; and a discussion about the relevance of SLAPPs in relation to online speech and participation. Further, this article attempts to provoke thought and continue the discussion about the relevance of anti-SLAPP legislation as electronic forums become more commonplace and public participation becomes increasingly accessible online. The article is

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<sup>1</sup> Brad Kutner, *Anti-SLAPP Speech Protections Pushed in Virginia Legislature*, Courthouse News Service (Feb. 3, 2020), <https://www.courthousenews.com/anti-slapp-speech-protections-pushed-in-virginia-legislature/>; *New York Legislature Passes Revised Anti-SLAPP Law to Deter Frivolous Lawsuits and Strengthen Free Speech Protections*, Gibson Dunn (Aug. 5, 2020), <https://www.gibsondunn.com/new-york-legislature-passes-revised-anti-slapp-law-to-deter-frivolous-lawsuits-and-strengthen-free-speech-protections/>.

organized into four subsequent sections, the first which offers a summary of some of the general principles of SLAPPs and cyberSLAPPs. The article then examines current and proposed state legislation attempting to protect citizens against SLAPP and SLAPP-like litigation. Next, the article considers federal issues related to SLAPP litigation and legislation. The section includes discussion about federal anti-SLAPP legislation, some of the arguments for and against a federal anti-SLAPP law, and some of the jurisdictional questions that commonly arise when SLAPPs end up in the federal courts. Finally, the article concludes with a discussion on the relevance of SLAPPs and resulting legislation in the age of online communication and anonymous commentary.

## II. SLAPP AND CYBERSLAPP ACTIONS: AN OVERVIEW

Examining how SLAPPs and anti-SLAPP legislation are relevant in the digital age first requires an understanding of what constitutes a SLAPP. Essentially, strategic lawsuits against public participation are lawsuits that attempt to chill public participation by intimidating defendants with legal action.<sup>2</sup> While SLAPPs are often associated with artificial defamation or libel claims, not all SLAPPs are related to speech. The Digital Media Law Project lists defamation as well as interference with contract or economic advantage, intentional infliction of emotional distress tort claims, and conspiracy as four common claims that a SLAPP may bring.<sup>3</sup> Plaintiffs might bring SLAPPs in attempt to win a settlement or succeed in court, but that is not always the primary goal. Rather, plaintiffs commonly use SLAPPs as intimidation tactics to deter defendants from speaking or participating in a way that is unfavorable to plaintiffs.<sup>4</sup> The First Amendment of the United States Constitution protects the rights of assembly, religious exercise, speech, press, and petition.<sup>5</sup> Anti-SLAPP statutes are often enacted to prevent threats to First Amendment protections.<sup>6</sup>

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<sup>2</sup> *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, Digital Media Law Project, <http://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (last visited Feb. 15, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Const. amend. I.

<sup>6</sup> *Understanding Anti-SLAPP Laws*, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/resources/anti-slapp-laws/>.

The term “cyberSLAPP” is sometimes used to refer to SLAPPs that infringe on individuals’ First Amendment rights on the internet.<sup>7</sup> SLAPPs arising from blog posts and online comments are among the examples of cyberSLAPPs that the American Civil Liberties Union (“ACLU”) of Ohio offers on its website.<sup>8</sup> The ACLU of Ohio explains that oftentimes, cyberSLAPPs not only seek to intimidate online speakers, but also to uncover the speaker behind anonymous internet speech.<sup>9</sup> These concerns raise questions about the right to speak anonymously on the internet, First Amendment protections to online speech, and whether protections similar to reporters privileges may apply to ordinary internet commentary.

There is currently no federal anti-SLAPP law, and consequently, no federal anti-cyberSLAPP statute.<sup>10</sup> However, some case law exists regarding whether states’ anti-SLAPP legislation also protects against cyberSLAPPs. For example, in 2001, the California District Court for the Central District of California found that the state’s anti-SLAPP statute is applicable to SLAPPs arising from online commentary in the case, *Global Telemedia International, Inc. v. Doe, 1*.<sup>11</sup>

In *Global Telemedia*, the defendants were SLAPPED by a media company for posting unfavorable commentary about the company on an online bulletin board.<sup>12</sup> The plaintiff brought a case “for trade libel, libel per se, interference with contractual relations and prospective economic advantage against several posters . . . .”<sup>13</sup> The defendants responded to the suit by filing motions to strike under the state’s anti-SLAPP statute which this article discusses in further detail in Section III.<sup>14</sup> In order to succeed under the

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<sup>7</sup> *What is a CyberSLAPP?*, ACLU Ohio, <https://www.acluohio.org/slapped/what-is-a-cyber-slapp>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, *supra* note 2.

<sup>11</sup> *Do Anti-SLAPP Laws Apply to Online Libel Suits?*, Freedom Forum Institute, <https://www.freedomforuminstitute.org/about/faq/do-anti-slapp-laws-apply-to-online-libel-suits/> (last visited Feb. 15, 2020) (citing *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001)).

<sup>12</sup> *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 at 1264 (C.D. Cal. 2001).

<sup>13</sup> *Id.* at 1264.

<sup>14</sup> *Id.*

California statute, a court must find that (1) the defendants were exercising their First Amendment rights by commenting on a public issue, and (2) the defendants were likely to succeed in court.<sup>15</sup>

The court determined that the defendants' posts were a valid exercise of free speech and that the subject matter of the posts was a matter of a public concern.<sup>16</sup> In its discussion of public concern, the court acknowledged the plaintiff's status as a publicly traded company with several thousand investors.<sup>17</sup> Further, the court noted that the defendants' posts about the plaintiff were among 30,000 other postings in chat rooms about Global Telemedia on the online bulletin board.<sup>18</sup> Additionally, the defendants were not competitors of Global Telemedia and were rather engaging in speech as investors.<sup>19</sup> The court ultimately found that the defendants "established a prima facie case that the basis of the claims against [the defendants] arose out of acts in furtherance of [their] right to free speech in connection with a public issue," and thus, the plaintiff had a shifted burden to prove a probability of success.<sup>20</sup> The court determined that the plaintiff failed to show a likelihood of success in its case against the defendants.<sup>21</sup> The court also found that the defendants' statements seemed to be opinions, which, unlike facts, are not actionable in trade libel and defamation claims.<sup>22</sup> Further, even if the statements were factual, the court said that the plaintiff failed to show damages, and therefore did not prove a likelihood of success in the trade libel or defamation claims.<sup>23</sup>

*Global Telemedia* embodies many elements that are common in SLAPP litigation: public participation (in this case, speech on an online forum), unfavorable publicity to a plaintiff, and economic disproportion amongst the parties (here, a publicly traded company and individual private citizens). The

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<sup>15</sup> *Id.* at 1263, 1265.

<sup>16</sup> *Id.* at 1266.

<sup>17</sup> *Id.* at 1265.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1266.

<sup>20</sup> *Id.* (citing *Globetrotter Software Inc. v. Elan Computer Group, Inc.*, 63 F. Supp 2d 1127, 1129 (N.D. Cal, 1999)).

<sup>21</sup> *Id.* at 1270-71

<sup>22</sup> *Id.* at 1267-60.

<sup>23</sup> *Id.* at 1270-71.

case also exemplifies a court that determined a state’s anti-SLAPP law was applicable to a case involving a cyberSLAPP.

### III. STATE LEGISLATION

More than half of the U.S. states and territories currently have anti-SLAPP statutes that provide various levels of protections and safeguards to defendants.<sup>24</sup> The Media Law Resource Center (“MLRC”) is a nonprofit membership organization made up of media providers and legal professionals who serve media providers.<sup>25</sup> The MLRC has multiple publications, hosts conferences, provides resources relating to media law, and is involved in advocacy relating to various communications law issues.<sup>26</sup> The MLRC explains that anti-SLAPP legislation attempts to provide efficient and inexpensive defenses to individuals facing SLAPPs.<sup>27</sup> Many anti-SLAPP statutes allow defendants facing SLAPP litigation to seek early dismissal and sometimes obtain legal fees.<sup>28</sup>

Andrew Dennington is a partner at Cohn Kavanaugh in Boston, where his practice areas include business litigation, employment, and defense law.<sup>29</sup> As a member of the DRI Commercial Litigation Committee, he wrote a 2017 article in the organization’s publication, *For the Defense*, entitled “Do Anti-SLAPP Statutes Protect Bloggers?”<sup>30</sup> In his article, Dennington explains that while anti-SLAPP statutes are distinct to the state where they exist, such laws give defendants a “procedural mechanism” allowing for early dismissals of SLAPPs.<sup>31</sup> Dennington identifies the two prongs that courts examine when a defendant asserts a lawsuit violates an anti-SLAPP statute: (1) “whether the plaintiff’s claim arises from

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<sup>24</sup> *Anti-SLAPP Statutes and Commentary*, Media Law Resource Center, <https://www.medialaw.org/component/k2/item/3494> (last visited Feb. 15, 2020).

<sup>25</sup> *About MLRC*, Media Law Resource Center, <https://www.medialaw.org/about-mlrc> (last visited Feb. 15, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Andrew R. Dennington – Biography*, Cohn Kavanaugh Rosenthal Peisch & Ford, LLP, <https://www.connkavanaugh.com/andrew-r-dennington> (last visited Feb. 15, 2020).

<sup>30</sup> Andrew R. Dennington, *Do Anti-SLAPP Statutes Protect Bloggers?*, DRI For the Defense, 36 (July 2017), <https://www.connkavanaugh.com/wp-content/uploads/2020/08/Do-Anti-SLAPP-Statutes-Protect-Bloggers.pdf>.

<sup>31</sup> *Id.* at 37.

protected activity,” and (2) “whether the plaintiff’s claim nonetheless is sufficiently meritorious to proceed, notwithstanding that it arises from protected activity.”<sup>32</sup>

It is important to note that even if a state does not have an anti-SLAPP statute, a defendant facing a SLAPP can still win their case.<sup>33</sup> For instance, if the *Global Telemedia* case occurred in a state with a narrower or even nonexistent anti-SLAPP statute than that of California, the defendants still may have prevailed at trial using other procedural mechanisms meant to combat baseless claims. However, the burden of costly and inconvenient litigation may be enough to chill speech or discourage public participation.<sup>34</sup> Even if a defendant knows a claim against them is meritless under the First Amendment, they still probably want to avoid time-consuming and costly litigation – the fear of being served a lawsuit alone may be enough to discourage a person from exercising their right to public participation. There are also judicial efficiency concerns that are associated with anti-SLAPP legislation.<sup>35</sup> In 2009, the U.S. House of Representatives introduced the Citizen Participation Act of 2009, which this article discusses in further detail in Section IV.<sup>36</sup> The Summary of the Act states:

Strategic Lawsuits Against Public Participation (SLAPPs), filed against thousands of individuals, organizations, and businesses based upon their valid exercise of the rights to petition or free speech, are an abuse of the judicial process that waste judicial resources and clog the already overburdened court dockets.<sup>37</sup>

As judicial efficiency continues to be a policy concern in the passage of legislation, the concern that SLAPPs manipulate the resources of the courts seems to provide a convincing argument for enacting anti-SLAPP laws.

While a majority of the states have anti-SLAPP laws to combat the negative impacts of the meritless lawsuits, the levels of protection afforded to defendants vary greatly by territory.<sup>38</sup> In an effort

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<sup>32</sup> *Id.*

<sup>33</sup> *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, *supra* note 2.

<sup>34</sup> *Id.*

<sup>35</sup> Citizen Participation Act of 2009, Summary, H.R. 4364, 111th Congress, <https://www.congress.gov/bill/111th-congress/house-bill/4364>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

to demonstrate how different states' anti-SLAPP laws vary, this article will look at four different statutes offering varying degrees of protection. California, for instance, has a notoriously broad anti-SLAPP statute that protects defendants facing SLAPPs arising out of participation or speech about public issues.<sup>39</sup> New York's anti-SLAPP laws, in contrast, are much narrower.<sup>40</sup> Further, Minnesota's anti-SLAPP statute is an example of an anti-SLAPP law that was deemed unconstitutional.<sup>41</sup> It is one of only two state anti-SLAPP laws that have been struck down for unconstitutionality.<sup>42</sup> Finally, while Virginia currently has an anti-SLAPP law, the commonwealth is one of the latest jurisdictions to propose amended anti-SLAPP legislation.<sup>43</sup> The article will explain the current provisions of the Virginia's anti-SLAPP statute and consider some of the factors that may have inspired proposals for changes.

**a. California: Cal. Code Civ. Proc. §425.16**

California's anti-SLAPP law, found at Section 425.16 of the California Code of Civil Procedure, is a broad statute that provides substantial rights and remedies to defendants who have been SLAPPED.<sup>44</sup> Section 425 is entitled: "Legislative findings; Special motion to strike action arising from 'act in furtherance of person's right to petition or free speech under United States or California Constitution in connection with a public issue.'"<sup>45</sup> In Section 425.16(a), the statute explains the legislature's policy reasons for enacting the statute and construing the law broadly. It states:

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition of the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.<sup>46</sup>

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<sup>39</sup> Cal. Civ. Proc. Code § 425.16.

<sup>40</sup> N.Y. Civ. Rights §§ 70-a, 76-a; N.Y. C.P.L.R. 3111, 3112.

<sup>41</sup> Minn. Stat. § 554.02; *Leiendecker v. Asian Woman United of Minn.*, 895 N.W. 2d 623, 637-38 (S.C. Minn., 2017).

<sup>42</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>43</sup> Va. Code Ann. § 8.01-223.2; Kutner, *supra* note 1.

<sup>44</sup> Cal. Civ. Proc. Code § 425.16.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 425.16(a).

In *Global Telemedia*, the court's decision primarily focused on whether the elements of a SLAPP under California's anti-SLAPP statute existed.<sup>47</sup> While there is some discussion of the public nature of online internet boards, the electronic medium on which the defendants exercised their free speech rights was not the main focus of the opinion.<sup>48</sup> Further, the court was able to use the online medium on which the speech occurred in its analysis, specifically in its determination of whether the defendants' speech dealt with a public issue. Because the message board that the defendants used included over 30,000 postings about the plaintiff's company, the court saw this as further indication that the matter on which the defendants spoke was one of public concern.<sup>49</sup>

California's anti-SLAPP statute protects four broad categories of public participation:

(1) any written or oral statement or writing made before a legislative executive, or judicial, proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any 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 (4) 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.<sup>50</sup>

Section (e) of the California statute provides a wide array of categories in which speech or public participation can occur.<sup>51</sup> The defendants' speech in *Global Telemedia*, for instance, would not likely fall within the first two categories of the anti-SLAPP statute because the defendants' speech dealt with commentary about Global Telemedia, a telecommunications and media company, rather than commentary about legislative, executive, or judicial matters.<sup>52</sup> Nonetheless, the second two categories of speech that the statute names demonstrates the broad nature of the statute and its applicability to a wide array of speech.<sup>53</sup>

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<sup>47</sup> 132 F. Supp. 2d at 1264-65.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1265.

<sup>50</sup> Cal. Civ. Proc. Code § 425.16(e).

<sup>51</sup> *Id.*

<sup>52</sup> 132 F. Supp. 2d at 1263.; Cal. Civ. Proc. Code § 425.16(e).

<sup>53</sup> Cal. Civ. Proc. Code § 425.16(e).

Many states do not have such broad anti-SLAPP laws. Some anti-SLAPP statutes apply only to speech and public participation related to legislative, executive, or judicial matters.<sup>54</sup> Still, some states have even narrower statutes. For example, Pennsylvania’s anti-SLAPP legislation, found in Sections 7707, and 8301-03 of Title 27 of the Pennsylvania Consolidated Statutes, “apply only to individuals petitioning the government about environmental issues.”<sup>55</sup> Section 8302(a) states:

Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.<sup>56</sup>

In comparison to narrow statutes like that of Pennsylvania, California’s anti-SLAPP statute is much broader and more comprehensive, making it favorable among defendants facing SLAPP litigation. Many other states have modeled or amended their SLAPP statutes to resemble that of California.<sup>57</sup>

#### **b. New York**

New York’s anti-SLAPP legislation is made up primarily of four statutes: New York Civil Rights Law Sections 70-a and 76-a, and New York Civil Practice Laws and Rules 3211 and 3212.<sup>58</sup> The protections that New York affords defendants facing SLAPPs are substantially less broad than anti-SLAPP laws of other states like California.<sup>59</sup> There have been some attempts in the New York legislature to broaden current anti-SLAPP laws as attorneys Edward Spiro and Christopher Harwood acknowledge in their article, “Significant Liability May Await Those Who File SLAPP Suits.”<sup>60</sup> Most recently, in July 2020, the New York State Senate and Assembly passed Senate Bill S52 which has potential to

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<sup>54</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>55</sup> *Pennsylvania*, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/anti-slapp-guide/pennsylvania/> (last visited Feb. 20, 2020) (citing PA C.S. §§ 7707, 8301-03).

<sup>56</sup> 27 Pa. Cons. Stat. § 8302(a).

<sup>57</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Edward M. Spiro and Christopher B. Harwood, *Significant Liability May Await Those Who File SLAPP Suits*, Law.com: New York Law Journal (Oct. 11, 2019), <https://www.law.com/newyorklawjournal/2019/10/11/significant-liability-may-await-those-who-file-slapp-suits/?slreturn=20200221143829>.

dramatically expand the state's current anti-SLAPP laws.<sup>61</sup> Attorney Amy Chambers explains some of the notable impacts the bill could have in her article, "New York Anti-SLAPP Law No Longer Just a Slap on the Wrist."<sup>62</sup> The legislation is still pending approval from the state's governor.<sup>63</sup> For purposes of demonstrating the stark contrasts in anti-SLAPP laws in various states, this article looks specifically at New York's current anti-SLAPP protections which remain rather narrow and apply only in limited circumstances.

**i. N.Y. Civ. R. §70-a. Actions involving public petition and participation; recovery of damages.**

New York Civil Rights Law Section 70-a(1)(a) gives parties the potential to recover damages and attorney fees when "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 law."<sup>64</sup> Section 1(b) of the statute permits additional compensatory damages only when there exists "... an additional demonstration that the action involving public petition and participation was commenced or continued for the purposes of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition, or association rights . . . ."<sup>65</sup> Finally, the statute allows a party to recover punitive damages only "... 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 inhibiting the free exercise of speech, petition or association rights."<sup>66</sup> Section (2) of the statute requires specific waiver if a party wishes to waive the right to bring an action under the statute, and Section (3) ensures protection of a party's right to recovery under the common law or other statutes, laws, or rules.<sup>67</sup>

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<sup>61</sup> Amy Chambers, *New York Anti-SLAPP Law No Longer Just a Slap on the Wrist*, Tyson & Mendes LLP (Sept. 1, 2020), <https://www.tysonmendes.com/new-york-anti-slap-law-no-longer-just-a-slap-on-the-wrist/> (referencing 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> N.Y. Civ. Rights § 70-a (1)(a).

<sup>65</sup> N.Y. Civ. Rights § 70-a (1)(b).

<sup>66</sup> N.Y. Civ. Rights § 70-a (1)(c).

<sup>67</sup> N.Y. Civ. Rights § 70-a (2)-(3).

**ii. N.Y. Civ. R. §76-a. Actions involving public petition and participation; when actual malice to be proven.**

New York Civil Rights Law Section 76-a(1) provides definitions to the terms and phrases:

“action involving public petition and participation;” “public applicant or permittee;” “communication;” and “government body.”<sup>68</sup> The statute’s definitions of such terminology suggest the narrow nature of the state’s anti-SLAPP protections. Section 1 of the statute includes the following provisions:

- (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.<sup>69</sup>
- (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.<sup>70</sup>
- (c) “Communication” shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.<sup>71</sup>
- (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 authority, board, or commission.<sup>72</sup>

Subsection 2 of the statute goes on to establish that damage recovery by a plaintiff requires clear and convincing evidence that the defendant’s communication “. . . 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.”<sup>73</sup> Finally, like Section 70-a(3), 76-a(3) ensures the right for a party to pursue other recoveries available by the common law, or other applicable statutes, rules, or laws.<sup>74</sup>

The New York Civil Rights Law Section 76-a definition of an “action involving public petition and participation” is also the applicable definition in New York Civil Rule Section 70-a.<sup>75</sup> When applying

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<sup>68</sup> N.Y. Civ. Rights § 76-a (1)(a)-(d).

<sup>69</sup> N.Y. Civ. Rights § 76-a (1)(a).

<sup>70</sup> N.Y. Civ. Rights § 76-a (1)(b).

<sup>71</sup> N.Y. Civ. Rights § 76-a (1)(c).

<sup>72</sup> N.Y. Civ. Rights § 76-a (1)(d).

<sup>73</sup> N.Y. Civ. Rights § 76-a (2).

<sup>74</sup> N.Y. Civ. Rights §§ 70-a (3), 76-a (3).

<sup>75</sup> N.Y. Civ. Rights § 70-a (1).

the definitions from the above statute, parties have limited circumstances under which they can invoke New York's anti-SLAPP laws. For instance, unlike California's law, which ultimately provides anti-SLAPP protection to any defendant speaking on a matter of public interest, New York's protections are limited to public seekers of government licenses or permissions.<sup>76</sup> This severely limits the situations and circumstances under which the state's anti-SLAPP legislation is relevant.

### iii. N.Y. C.P.L.R. R. 3211 and N.Y. C.P.L.R. R. 3212

Rules 3211 and 3212 of New York Civil Practice Laws and Rules further address procedural measures concerning New York Civil Rights Law Section 76-a.<sup>77</sup> Rule 3211(g) deals specifically with motions to dismiss in cases regarding public petition and participation.<sup>78</sup> Pursuant to Rule 3211(g), motions to dismiss actions under New York Civil Rights Law Section 76-a "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law . . . ."<sup>79</sup> Rule 3212(h) pertains to summary judgment and places almost the same stipulations on motions for summary judgment as Rule 3211(g) places on motions for dismissal.<sup>80</sup> Both rules seem to place the burden on SLAPPED defendants when a plaintiff seeks dismissal or summary judgment in response to a Section 76-a motion.

If New York's governor signs the state legislature's currently pending anti-SLAPP bill, anti-SLAPP protections stand to expand greatly in New York, and the landscape of SLAPP litigation in the state could see substantial changes.<sup>81</sup> Until then, New York's anti-SLAPP laws remain relatively narrow.

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<sup>76</sup> N.Y. Civ. Rights § 70-a; Cal. Civ. Proc. Code § 425.16(e).

<sup>77</sup> N.Y. C.P.L.R. 3211(g), 3212(h).

<sup>78</sup> N.Y. C.P.L.R. 3211(g).

<sup>79</sup> *Id.*

<sup>80</sup> N.Y. C.P.L.R. 3212(h).

<sup>81</sup> Chambers, *supra* note 61.

**c. Minnesota: Minn. Stat. §§ 554.01-554.06**

Chapter 554 of the Minnesota Statutes includes seven sections that make up the state’s anti-SLAPP legislation.<sup>82</sup> Until 2017, Section 554.02 served as the state’s anti-SLAPP law when the Minnesota Supreme Court deemed portions of law unconstitutional.<sup>83</sup> Under Subdivision 1 of Section 554.02, the section “applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.”<sup>84</sup> Subdivision 2 of the section, which includes the portions that were deemed unconstitutional, concerns procedure.<sup>85</sup> It includes the following provisions:

- (1) discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted;<sup>86</sup>
- (2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;<sup>87</sup>
- (3) the court shall front the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03;<sup>88</sup> and
- (4) any governmental body to which the moving party’s acts were directed or the attorney general’s office may intervene in, defend, or otherwise support the moving party.<sup>89</sup>

Under the statute, plaintiffs responding to a defendant’s invocation of the state’s anti-SLAPP laws had the burden of proof and persuasion.<sup>90</sup> The law also set a clear and convincing evidence standard.<sup>91</sup> Further, the statute allowed for a court rather than a jury to determine whether dismissal is proper.<sup>92</sup> The language of the statute seemed favorable to defendants in SLAPPs. However, as the Minnesota Supreme Court determined in 2017, the anti-SLAPP law was unconstitutional.<sup>93</sup>

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<sup>82</sup> Minn. Stat. §§ 554.01-554.06.

<sup>83</sup> 895 N.W. 2d at 637-38; *Anti-SLAPP Statutes and Commentary*, *supra* note 24; Mike Mosedale, *Anti-SLAPP Law Perishes at Supreme Court*, Saint Paul Legal Ledger – Minnesota Lawyer (May 30, 2017), <https://minnlawyer.com/2017/05/30/anti-slapp-law-perishes-at-supreme-court/>.

<sup>84</sup> Minn. Stat. § 554.02 Subdivision 1.

<sup>85</sup> Minn. Stat. § 554.02 Subdivisions 1-2; 895 N.W. 2d at 637-38.

<sup>86</sup> Minn. Stat. § 554.02 Subdivision 2 (1).

<sup>87</sup> Minn. Stat. § 554.02 Subdivision 2 (2).

<sup>88</sup> Minn. Stat. § 554.02 Subdivision 2 (3).

<sup>89</sup> Minn. Stat. § 554.02 Subdivision 2 (4).

<sup>90</sup> Minn. Stat. § 554.02 Subdivision 2 (2)-(3).

<sup>91</sup> Minn. Stat. § 554.02 Subdivision 2 (2).

<sup>92</sup> Minn. Stat. § 554.02 Subdivision 2 (3).

<sup>93</sup> 895 N.W. 2d at 638.

The Minnesota Supreme Court determined that Clauses 2 and 3 of Subdivision 2 of Section 554.02 were unconstitutional in the case, *Leiendecker v. Asian Women United of Minnesota*.<sup>94</sup> In *Leiendecker*, the court determined that Clauses 2 and 3 of §554.02 Subdivision 2 violated the right the a jury trial because (1) they shift the fact-finding duty of a jury to district courts, and (2) they place a clear and convincing evidence burden of proof rather than the lower burden of a preponderance of evidence on the responding party before trial.<sup>95</sup> The opinion continued by determining that the unconstitutional clauses of the statute were inseverable from the remaining provisions.<sup>96</sup> The court determined that “[w]ithout the unconstitutional provisions, section 554.02 provides no procedure for courts to determine whether a lawsuit violates the substantive prohibition of Minn. Stat. §554.03,” and therefore the entirety of Section 554.02 “is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. §554.03 . . . .”<sup>97</sup> The case resulted in a 6-1 decision with a dissenting opinion from the court’s Chief Justice.<sup>98</sup> Chief Justice Gildea took the position that it was unnecessary for the court to rule on the constitutionality of the statute, and that evaluation of the statute was contrary to precedent that the court should “resolve cases without reaching constitutional issues whenever possible.”<sup>99</sup> Chief Justice Gildea went on to say that it was “not necessary to decide whether section 554.02 violates the jury-trial right because the dispositive question that the district court decided was not one of law.”<sup>100</sup>

A news article in the *Saint Paul Legal Ledger* responded to the case days after the decision.<sup>101</sup> The article, written by Mike Mosedale, explained that many attorneys did not find the statute effective in the first place.<sup>102</sup> Both Mosedale’s article, and an article by Marshall H. Tanick in *MinnPost*

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<sup>94</sup> 895 N.W. 2d at 637-38; Mosedale, *supra* note 83.

<sup>95</sup> 895 N.W. 2d at 635.

<sup>96</sup> *Id.* at 637-38.

<sup>97</sup> *Id.* (citing Minn. Stat. § 554.02-554.03).

<sup>98</sup> 895 N.W. 2d at 638; Marshall H. Tanick, *Minnesota’s SLAPP Law is Slapped Down, and the Impact is Likely to be Profound*, MinnPost (June 7, 2017), <https://www.minnpost.com/community-voices/2017/06/minnesotas-slapp-law-slapped-down-and-impact-likely-be-profound/>.

<sup>99</sup> 895 N.W. 2d at 638 (citation omitted).

<sup>100</sup> 895 N.W. 2d at 638.

<sup>101</sup> 895 N.W. 2d at 637-38; Mosedale, *supra* note 83.

<sup>102</sup> *Id.*

acknowledged the varying opinions surrounding the *Leindecker* decision.<sup>103</sup> Tanick said that despite the potential impacts of the decision, the ruling was not especially surprising, and further explained that:

A number of lower courts, including the trial judge and intermediate appellate tribunals in [*Leindecker*], had reached the same conclusion. Other jurists in different cases around the state also had held that the law was unconstitutional for similar or additional reasons, but the *Leindecker* case was the first to yield that result from the state's highest court.<sup>104</sup>

Minnesota's anti-SLAPP law is an example of anti-SLAPP legislation that may have been so broad that it lacked effectiveness. Even before the Minnesota Supreme Court deemed the law unconstitutional, commentary from practitioners suggests that the law was difficult to apply.<sup>105</sup> The court's finding the statute unconstitutional demonstrates the sentiment that while an anti-SLAPP statute may be favorable to a party, that does not mean that the statute should favor a certain party.

**d. Virginia: VA. Code Ann. §8.01-223.2**

Virginia has had an anti-SLAPP statute since 2007. However, amidst recent high-profile SLAPP litigation in the commonwealth, there has been a call to add provisions to the current legislation to provide defendants with additional procedural mechanisms. The current anti-SLAPP statute states:

A person shall be immune from civil liability for a violation of Section 18.2-499, a claim of tortious interference with an existing contract or 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 . . . .<sup>106</sup>

Like many other anti-SLAPP laws, Virginia's statute does not protect defendants who make knowingly false statements or who make statements with reckless disregard to whether the statements are true.<sup>107</sup>

Along with the immunity that Section (A) provides defendants, Section (B) states that defendants may also be entitled to attorney fees if their case is dismissed under the statute.<sup>108</sup> The current law often

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<sup>103</sup> Mosedale, *supra* note 83; Tanick, *supra* note 98.

<sup>104</sup> Tanick, *supra* note 98.

<sup>105</sup> Mosedale, *supra* note 83.

<sup>106</sup> Va. Code Ann. § 8.01-223.2(A).

<sup>107</sup> *Id.*

<sup>108</sup> Va. Code Ann. § 8.01-223.2(A)-(B).

receives criticism for providing weak protections to SLAPPED defendants.<sup>109</sup> A *Washington Post* article by Justin Jovenal explains some of the critiques to the current statute are in response to the lack of a special motion provision and lack of a guarantee of attorney fees.<sup>110</sup> Jovenal reports that “[t]he practical effect, experts say, is that cases can drag on until the sides begin to exchange evidence and a case goes to trial. That can mean months—or even years—of wrangling and hefty legal bills.”<sup>111</sup>

As of February 2020, Virginia’s House and Senate passed two different bills that would amend the commonwealth’s current anti-SLAPP laws.<sup>112</sup> Melissa Wasser, a Policy Analyst for the Reporters Committee for Freedom of the Press, explains the differences between House Bill 579 and Senate Bill 375 in her article “Virginia legislators pass bills aimed at dismissing frivolous lawsuits restricting First Amendment Rights.”<sup>113</sup> Essentially, both bills would create a kind of special motion for defendants to use in cases in which they believe they have been SLAPPED.<sup>114</sup> Both bills seem to favor the sort of “procedural mechanism” that are common in anti-SLAPP laws.<sup>115</sup> The House’s bill would require mandatory attorney fee awards, while the Senate’s bill does not allow mandatory but permissive attorney fees.<sup>116</sup>

The proposals for a new anti-SLAPP law follow a series of high-profile lawsuits in Virginia courts, specifically, *Depp v. Heard* and multiple lawsuits from California Representative Devin Nunes, including *Nunes v. Twitter*.<sup>117</sup> The lawsuits involve public figures—actor Johnny Depp, and Representative Nunes, respectively—and have received media attention.<sup>118</sup> The suits have exposed some of the

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<sup>109</sup> Justin Jovenal, *Devin Nunes, Johnny Depp Lawsuits Seen as Threats to Free Speech and Press*, *Washington Post*, (Dec. 22, 2019), [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).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Melissa Wasser, *Virginia Legislators Pass Bills Aimed at Dismissing Frivolous Lawsuits Restricting First Amendment Rights*, Reporters Committee for Freedom of the Press, (Feb. 20, 2020), <https://www.rcfp.org/virginia-anti-slapp-bills-analysis/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (citing H.R. 579 (Va.) and S. 375 (Va.)).

<sup>115</sup> Dennington, *supra* note 30.

<sup>116</sup> Wasser, *supra* note 112.

<sup>117</sup> Jovenal, *supra* note 109; Wasser, *supra* note 112; referencing *Depp v. Heard*, 102 Va. Cir. 324 (Cir. Ct. 2019) and *Nunes v. Twitter, Inc.*, 103 Va. Cir. 184 (Cir. Ct. 2019).

<sup>118</sup> *Id.*

shortcomings in Virginia's current anti-SLAPP law and created further discussion about the relevance of anti-SLAPP laws.<sup>119</sup> Additionally, the lawsuits have highlighted continued concerns about SLAPPs and forum shopping.<sup>120</sup>

#### **IV. FEDERAL LEGISLATION**

As more states consider passing anti-SLAPP legislation, discussion exists about whether the legislature should enact a federal anti-SLAPP statute. Three recent pieces of proposed legislation attempted to provide federal laws to help defendants who have been SLAPPED: The Citizen Participation Act of 2009, the Free Press Act of 2012, and most recently, the SPEAK FREE Act of 2015.<sup>121</sup> While a federal anti-SLAPP law did not result from the proposed acts, and no federal anti-SLAPP law currently exists, proposals like the aforementioned continue the discussion about the policy concerns surrounding SLAPPs.<sup>122</sup> Further, as there is no federal anti-SLAPP law, jurisdictional questions persist about whether defendants can rely on their state's anti-SLAPP legislation in Federal Court.<sup>123</sup>

##### **a. Citizen Participation Act**

One concern that the Citizen Participation Act of 2009 (H.R. 4364) sought to address was the impacts that SLAPPs have on the judiciary.<sup>124</sup> The bill, proposed to the House of Representatives in 2009, had three Democratic Representative cosponsors: Charles Gonzalez of Texas, Fortney Pete Stark of California, and Michael Doyle of Pennsylvania.<sup>125</sup> The proposed Act recognizes multiple policy concerns associated with SLAPPs including: the costliness to defendants; the ability of SLAPPs to chill speech and public participation; abuses of judicial resources and the burden on the judiciary that SLAPPs stand to

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>122</sup> *Id.*

<sup>123</sup> Ashley J. Heilprin, *Do State Anti-SLAPP Laws Apply in Federal Court?*, American Bar Association (Nov. 7, 2019), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2019/fall2019-do-state-anti-slapp-laws-apply-in-federal-court/>.

<sup>124</sup> Citizen Participation Act of 2009, Summary, *supra* note 35.

<sup>125</sup> Citizen Participation Act of 2009, Cosponsors, H.R. 4364, 111th Congress, [https://www.congress.gov/bill/111thcongress/housebill/4364/cosponsors?q={%22search%22:\[%22Citizen+participation+act+of+2009+4364%22\]}&r=6&s=4&searchResultViewType=expanded&KWICView=false](https://www.congress.gov/bill/111thcongress/housebill/4364/cosponsors?q={%22search%22:[%22Citizen+participation+act+of+2009+4364%22]}&r=6&s=4&searchResultViewType=expanded&KWICView=false).

pose; and the lack of uniform and comprehensive anti-SLAPP laws among the states.<sup>126</sup> The bill places the burden of proof on plaintiffs to show that defendants had “knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.”<sup>127</sup>

#### **b. Free Press Act of 2012**

In 2012, Senator Jon Kyl proposed a narrower bill to the U.S. Senate, the Free Press Act.<sup>128</sup> While the Citizen Participation Act was more tailored towards protecting individuals who face SLAPPs after engaging in a wide variety of public participation, the proposed Free Press Act focused on providing safeguards for media professionals. As the Summary of the bill explains, the legislation attempted to:

authorize a representative of the news media to file a special motion to dismiss any claim asserted against such representative in a civil action if the claim arises from an oral or written statement or other expression that is on a matter of public concern or that relates to a public official or figure . . .<sup>129</sup>

As is common with proposed legislation, the Free Press Act was the subject of frequent commentary and critique. The Electronic Frontier Foundation (“EFF”), for example, was encouraged by the proposal of federal anti-SLAPP legislation, but expressed critiques to the bill when it was first proposed.<sup>130</sup> The Electronic Frontier Foundation was founded in 1990 as a nonprofit focused on issues relating to civil liberties online.<sup>131</sup> The organization is vocal about digital topics pertaining to creativity and innovation, free speech, international subjects, privacy, security, and transparency.<sup>132</sup> EFF correspondent, Trevor Timm, criticized the Act for being too narrow in a 2012 article entitled “New

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<sup>126</sup> Citizen Participation Act of 2009, Text, H.R. 4364, 111th Congress, §§ 2(1)-(9), <https://www.congress.gov/bill/111th-congress/house-bill/4364/text?q=%7B%22search%22%3A%5B%22Citizen+participation+act+of+2009+4364%22%5D%7D&r=6&s=4>.

<sup>127</sup> *Id.* at § 3(b).

<sup>128</sup> Free Press Act of 2012, S. 3493, 112th Congress, <https://www.congress.gov/bill/112th-congress/senate-bill/3493>.

<sup>129</sup> Free Press Act of 2012, Summary, S. 3493, 112th Congress, <https://www.congress.gov/bill/112th-congress/senate-bill/3493>.

<sup>130</sup> Trevor Timm, *New Federal Anti-SLAPP Legislation Introduced: A Good Start*, Electronic Frontier Foundation (Aug. 27, 2012), <https://www.eff.org/deeplinks/2012/08/new-federal-anti-slapp-legislation-introduced-good-start>.

<sup>131</sup> *About EFF*, Electronic Frontier Foundation, <https://www.eff.org/about> (last visited Feb. 20, 2020).

<sup>132</sup> *Issues*, Electronic Frontier Foundation, <https://www.eff.org/work> (last visited Feb. 20, 2020).

Federal Anti-SLAPP Legislation Introduced: A Good Start.”<sup>133</sup> Timm expressed the concern that the law might not protect “bloggers, citizens journalists or other commentators on the Internet . . . ”.<sup>134</sup>

Eric Goldman also critiqued the Free Press Act of 2012 in a *Forbes* article entitled, “We Need Federal Anti-SLAPP Legislation, But Sen. Kyl’s ‘Free Press Act of 2012’ Isn’t the Answer (Yet).”<sup>135</sup> Goldman, a professor of Law at the Santa Clara University School of Law, echoed the common criticism that the bill was too narrow.<sup>136</sup> He had three overarching critiques in arguing that the Free Press Act, as proposed, was not broad enough. He first took the stance that the act was “anachronistic” because the act, as proposed, would only apply to journalists in a society where so many non-journalists post content on the internet.<sup>137</sup> Next, Goldman argued that the proposal was “ambiguous.”<sup>138</sup> He cites phrasing like “news” and “information of potential interest to a segment of the public” as leaving room for questions when interpreting the bill.<sup>139</sup> Finally, Goldman’s article suggested that the proposed legislation was “regressive” because it would not afford as much protection to individual consumers as it would institutional defendants.<sup>140</sup> Goldman takes the position that the proposed language of the bill “favors defendants who are more likely to be able to afford litigation even without anti-SLAPP protection, while leaving the individuals with the least financial capacity without the extra statutory protection.”<sup>141</sup> Goldman has voiced his support for a national anti-SLAPP legislation, and his article suggested two benefits that would come from an adoption of a federal law: (1) “it would immediately provide anti-SLAPP protection to the tens of millions of Americans who lack such protection today,” and (2), “it could establish a national ‘floor’ to strengthen anti-SLAPP protection in those states with narrower anti-SLAPP

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<sup>133</sup> Timm, *supra* note 130.

<sup>134</sup> *Id.*

<sup>135</sup> Eric Goldman, *We Need Federal Anti-SLAPP Legislation, But Sen. Kyl’s “Free Press Act of 2012” Isn’t the Answer (Yet)*, *Forbes* (Sept. 24, 2012), <https://www.forbes.com/sites/ericgoldman/2012/09/24/we-need-federal-anti-slapp-legislation-but-sen-kyls-free-press-act-of-2012-isnt-the-answer-yet/#33562ccb7541>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

laws.”<sup>142</sup> His article, while critical of the Free Press Act as proposed, suggested that the act was a step in the right direction of eventually adopting federal anti-SLAPP legislation.<sup>143</sup>

While no new federal law resulted from the proposal of the Free Press Act of 2012 after the bill was referred to the Committee of the Judiciary, there is value in considering some of the critiques to the proposed legislation.<sup>144</sup> A common criticism, as both Timms and Goldman’s articles raise, is the bill being too narrow. The next federal anti-SLAPP proposal, the SPEAK FREE Act of 2015, embodied much broader protections.

### c. SPEAK FREE Act of 2015

In 2015, Congress saw yet another proposed bill to combat SLAPP litigation – the SPEAK FREE Act of 2015 (H.R. 2304). The Act, sponsored by Representative Blake Farenthold of Texas received bipartisan support and was co-sponsored by thirty-two Representatives, twenty from the Democratic Party, and twelve from the Republican Party.<sup>145</sup> The proposed legislation sought to:

allow a person against whom a lawsuit is asserted to file a special motion to dismiss claims referred to as strategic lawsuits against public participation (“SLAPP suits”) that arise from an oral or written statement or other expression, or conduct in furtherance of such expression, by the defendant in connection with an official proceeding or about a matter of public concern.<sup>146</sup>

In defining “a matter of public concern,” the bill provided five categories of issues: “(1) health or safety; (2) environmental, economic, or community well-being; (3) the government; (4) a public official or public figure; or (5) a good, product, or service in the marketplace.”<sup>147</sup> This language suggests broader protections than the Free Press Act of 2012, as well as many individual states’ already existing statutes. Similar to California’s anti-SLAPP statute, the SPEAK FREE Act of 2015 proposed protection to a variety of different forms of participation relating to various issues of “public concern.”

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Free Press Act of 2012, Actions Overview, S. 3493, 112th Congress, <https://www.congress.gov/bill/112th-congress/senate-bill/3493/actions?KWICView=false>.

<sup>145</sup> SPEAK FREE Act of 2015, Cosponsors, H.R. 2304, 114th Congress, <https://www.congress.gov/bill/114th-congress/housebill/2304/cosponsors?searchResultViewType=expanded&KWICView=false>.

<sup>146</sup> SPEAK FREE Act of 2015, H.R. 2304, 114th Congress.

<sup>147</sup> *Id.* at § 4208.

The SPEAK FREE Act was referred to the Subcommittee on the Constitution and Civil Justice in June of 2015, but no further action resulted.<sup>148</sup> Nonetheless, the proposal continued to spark conversation about federal anti-SLAPP legislation and garnered support from organizations like the Public Participation Project.<sup>149</sup> The Public Participation Project is an organization that focuses its efforts primarily on anti-SLAPP legislation at both the state and federal level.<sup>150</sup> The Public Participation Project supported the proposal of the SPEAK FREE Act and has attempted to help get the act reintroduced in the House and introduced in the Senate.<sup>151</sup> Upon introduction of the bill in 2015, the Public Participation Project issued a press release supporting the Act. The press release highlights the bipartisan nature of the bill and points out that the SPEAK FREE Act is the first proposed federal anti-SLAPP statute that had co-sponsors from both the Democratic and Republican parties.<sup>152</sup> The press release suggests that a federal anti-SLAPP law is necessary as public participation on the internet continues to grow.<sup>153</sup>

#### **d. SLAPP Litigation in Federal Court**

Without a comprehensive federal anti-SLAPP law, litigants will sometimes attempt to invoke a state's anti-SLAPP law in federal court. Federal courts are split on whether anti-SLAPP laws create procedural or substantive measures, and thus, whether such state statutes are applicable in federal court.<sup>154</sup> Litigator Ashley J. Heilprin explores this issue in a 2019 American Bar Association article.<sup>155</sup> Heilprin reminds readers that the Eire Doctrine requires federal courts sitting in diversity to use the substantive law of the state in which the court is located, but the federal procedural rules over state procedural laws.<sup>156</sup> Disagreement as to whether a state's anti-SLAPP law is procedural or substantive often exists in federal

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<sup>148</sup> SPEAK FREE Act of 2015, Actions Overview, H.R.2304, 114th Congress, <https://www.congress.gov/bill/114th-congress/house-bill/2304/actions?KWICView=false>.

<sup>149</sup> *SPEAK FREE ACT of 2015*, Public Participation Project, <https://anti-slapp.org/speak-free-act> (last visited Mar. 5, 2020).

<sup>150</sup> *Our Work*, Public Participation Project, <https://anti-slapp.org/federal-state-legislation> (last visited Mar. 5, 2020).

<sup>151</sup> *SPEAK FREE ACT of 2015*, *supra* note 149.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Heilprin, *supra* note 123.

<sup>155</sup> *Id.*

<sup>156</sup> Heilprin, *supra* note 123 (citing *Eire R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1938)).

court cases. In fact, as Kimberly Strawbridge Robinson reported in an October 2020 Bloomberg Law article, litigants in *Retzlaff v. Van Dyke* recently petitioned the Supreme Court to address the split among the circuits regarding the procedural or substantive nature of state anti-SLAPP laws.<sup>157</sup>

As Heilprin's article explains, the Fifth Circuit determined that Texas's anti-SLAPP statute, the Texas Citizens Participation Act, is procedural rather than substantive.<sup>158</sup> This determination, which resulted from the 2019 case, *Klocke v. Watson*, means that the Texas statute is not applicable in federal courts sitting in diversity.<sup>159</sup> Heilprin further notes that while federal courts like the Fifth and D.C. Circuits have determined state anti-SLAPP laws to be procedural and thus inapplicable in federal litigation, other Circuits have found some state anti-SLAPP laws to be suitable in federal court.<sup>160</sup> For instance, the First Circuit ruled that Maine's anti-SLAPP law is appropriate in federal court in the 2010 case, *Godin v. Schencks*.<sup>161</sup> Further, while the Fifth Circuit determined that Texas's anti-SLAPP law does not apply in federal court, it has not ruled that all anti-SLAPP laws are inapplicable.<sup>162</sup> For example, in 2009 the court found Louisiana's anti-SLAPP law could apply in federal court in *Henry v. Lake Charles American Press, LLC*.<sup>163</sup> It is unclear whether Louisiana's anti-SLAPP law still applies in the Fifth Circuit after *Klocke*, and further questions exist as to whether Texas could amend its current anti-SLAPP statute to be sufficient for use in federal court.<sup>164</sup> These cases demonstrate the uncertainties that often arise when litigants want to use a state's anti-SLAPP law in federal court. Further, such uncertainties suggest another argument for why a federal anti-SLAPP law could be beneficial.

Heilprin's article also discusses the common concern about potential forum shopping resulting when state anti-SLAPP laws are inapplicable in federal court.<sup>165</sup> If plaintiffs become more inclined to

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<sup>157</sup> Kimberly Strawbridge Robinson, *Supreme Court Won't Resolve Split Over Free Speech Protections*, Bloomberg L. (Oct. 13, 2020), <https://news.bloomberglaw.com/us-law-week/supreme-court-wont-resolve-split-over-free-speech-protections?context=search&index=0> (referencing *Retzlaff v. Van Dyke*, U.S., No. 19-1272).

<sup>158</sup> Heilprin, *supra* note 123 (referencing *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019)).

<sup>159</sup> *Id.*

<sup>160</sup> Heilprin, *supra* note 123.

<sup>161</sup> Heilprin, *supra* note 123 (referencing *Godin v. Schencks*, 629 F.3d 79, 91-92 (1st Cir. 2010)).

<sup>162</sup> Heilprin, *supra* note 123.

<sup>163</sup> Heilprin, *supra* note 123 (referencing *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 183 (5th Cir. 2009)).

<sup>164</sup> Heilprin, *supra* note 123.

<sup>165</sup> Heilprin, *supra* note 123.

SLAPP defendants in federal court rather than state court, defendants may be forced to endure litigation even when a state anti-SLAPP law could otherwise apply.<sup>166</sup> That not only seems counterproductive to judicial efficiency, but suggests opportunities for parties who bring SLAPPs to take advantage of the federal court system.

## V. RELEVANCE TO ONLINE SPEECH AND JOURNALISM

Exercising one's First Amendment rights to free speech and participation is arguably easier than ever with the rise of the internet and online forums. The internet has undoubtedly impacted the accessibility and ability for private individuals to exercise their First Amendment rights of speech and participation. As the Public Participation Project noted, "[t]echnology now makes it possible for everyone to don the hat of journalist, editor, town crier or anonymous pamphleteer."<sup>167</sup> While this change in the public participation landscape raises the possibility of increased participation, it also presents new legal challenges and questions. Further, the increase in speech and participation means that more individuals may find themselves vulnerable to SLAPP suits. As such, strategic lawsuits against public participation are relevant to internet law.

The internet not only makes speech and public participation more accessible; it also allows speakers to reach wider audiences. Many individuals, like Professor Goldman, have taken the position that the internet's new forums for commentary present potential societal benefits. In the Public Participation Project's Speak Free Act of 2015 press release, Goldman said:

Society benefits when consumers share their critical consumer reviews and social media complaints, but those negative comments often trigger strongly-worded legal threats. Anti-SLAPP laws tell consumers that they can ignore bullying tactics, which helps keep this socially important content from being scrubbed from the Internet.<sup>168</sup>

The internet provides a powerful tool, which, if used properly and responsibly, presents new opportunities for societal gain. Of course, the internet also presents new opportunities for speech to be used negatively. While this article does not attempt to unpack the intricacies of online speech laws, it is

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<sup>166</sup> *Id.*

<sup>167</sup> *SPEAK FREE ACT of 2015*, *supra* note 149.

<sup>168</sup> *SPEAK FREE ACT of 2015*, *supra* note 149 (citing Professor Eric Goldman).

worth acknowledging that just like in-person speech, not all online speech is valuable.<sup>169</sup> The purpose of anti-SLAPP laws is not to discount valid causes of action including meritorious libel and defamation claims.<sup>170</sup> Rather, anti-SLAPP laws should attempt to ensure the integrity of authentic causes of action while protecting individuals from baseless claims.

## VI. CONCLUSION

The right to public participation has long been a cornerstone of American democracy, and continuous developments to the internet provide brand new ways in which individuals can exercise their First Amendment rights. As public participation and exercising speech becomes easier than ever, there are new opportunities for litigants to bring meritless SLAPP claims against defendants.

While many states have enacted anti-SLAPP laws to help protect against and discourage SLAPPs, the levels of protection that anti-SLAPP laws provide vary greatly by state.<sup>171</sup> Some states, like California, offer broad protections for SLAPPED defendants.<sup>172</sup> Other states, like Pennsylvania and New York, have narrower statutes that apply to SLAPPs resulting only from certain forms of participation.<sup>173</sup> An anti-SLAPP statute like that of Minnesota may have aggressive provisions that go so far as to lose effectiveness, or even be determined unconstitutional.<sup>174</sup> Other states, like Virginia, may be trying to actively amend existing anti-SLAPP laws.<sup>175</sup> Finally, some states lack any anti-SLAPP legislation at all.<sup>176</sup> The lack of a comprehensive federal anti-SLAPP statute presents multiple questions and concerns. For instance, federal courts are split in regard to the applicability of state anti-SLAPP laws in federal courts.<sup>177</sup> While there has been a call for a federal anti-SLAPP statute as well as multiple attempts to pass such legislation in recent years, a federal anti-SLAPP law has not yet resulted.<sup>178</sup>

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<sup>169</sup> James Grimmelmann, *INTERNET LAW: CASES AND PROBLEMS* 142 (9th ed. 2019).

<sup>170</sup> *Do Anti-SLAPP Laws Apply to Online Libel Suits?*, *supra* note 11.

<sup>171</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>172</sup> Cal. Civ. Proc. Code § 425.16.

<sup>173</sup> N.Y. Civ. Rights §§ 70-a, 76-a.; N.Y. C.P.L.R. 3211, 3212.

<sup>174</sup> 895 N.W. 2d at 638; Minn. Stat. § 554.02.

<sup>175</sup> VA. Code Ann. § 8.01-223.2; Va. H.R. 579; Va. S. 375.

<sup>176</sup> *Anti-SLAPP Statutes and Commentary*, *supra* note 24.

<sup>177</sup> Heilprin, *supra* note 123.

<sup>178</sup> H.R. 4364; S. 3493; H.R. 2304.

A well-construed federal anti-SLAPP law is arguably a necessary safeguard, especially as journalism, speech, and participation, continue to grow on online platforms. The fact that some states have anti-SLAPP laws while others provide no safeguards to defendants who are SLAPPED seems outdated in the age of the internet. The internet already poses new jurisdictional questions.<sup>179</sup> Without a uniform anti-SLAPP law at the federal level, additional questions about the applicability of one state's anti-SLAPP law over another are likely to arise, especially in cases involving cyberSLAPPs and online speech.

In the event that the federal legislature passes an anti-SLAPP law, there may be reason to make it comprehensive enough so to apply to cyberSLAPPs like the California statute.<sup>180</sup> However, the language of a federal anti-SLAPP law should not be so broad that becomes ineffective or contradicts judicial principles like the Minnesota law.<sup>181</sup> A federal anti-SLAPP law should necessarily strike a balance in its language and provide comprehensive protection.

To echo Professor Goldman, a federal anti-SLAPP law stands to provide safeguards to numerous individuals who lack ample protection against SLAPPs, and to establish the minimum requirements for state anti-SLAPP laws, thus ensuring stronger protection from narrower statutes that already exist.<sup>182</sup> I think there is a lot to be said about the bi-partisan nature of the SPEAK FREE Act of 2015.<sup>183</sup> The fact that it garnered support from individuals of both major political parties suggests a sense of agreement that some sort of anti-SLAPP law could be beneficial. Further, I am persuaded by the judicial efficiency policy concerns that many anti-SLAPP laws seek to address.<sup>184</sup>

Despite the many questions and concerns that currently exist surrounding the topic of strategic lawsuits against public participation, I hope this article has posed food for thought about the relevance of

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<sup>179</sup> Grimmelmann, *supra* note 169 at 53.

<sup>180</sup> 132 F. Supp. 2d at 1266; Cal. Civ. Proc. Code § 425.16.

<sup>181</sup> 895 N.W. 2d at 638; Minn. Stat. § 554.02; Mosedale, *supra* note 83; Tanick, *supra* note 98.

<sup>182</sup> Goldman, *supra* note 135.

<sup>183</sup> SPEAK FREE Act of 2015, Cosponsors, *supra* note 145.

<sup>184</sup> Citizen Participation Act of 2009, Summary, *supra* note 35.

SLAPPs and the potential impacts that anti-SLAPP laws stand to have on the judiciary, state and federal legislatures, and democracy.