Free Speech & Election Law

Helping Americans to Speak Freely

By Jeremy Rosen & Felix Shafir

Note from the Editor:

This article discusses different types of state anti-SLAPP laws and argues that federal anti-SLAPP legislation would help to improve the legal landscape for free speech by offering a backstop for targets of speech-suppressing litigation.

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• Hon. Brian M. Hoffstadt, *SLAPPing Cobras*, Association of Business Trial Lawyers Report (Spring 2016), http://www.abtl.org/report/la/abtlla_spring2016.pdf. (*See also* response at http://abtl.org/report/la/abtlla_summer2016.pdf.)

• Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862 (2015), http://caselaw.findlaw.com/wa-supreme-court/1702446.html.

• Vikram David Amar, *The Vexing Nature of California's Attempt to Protect Free Speech Through its Anti-SLAPP Statute*, Verdict (Aug. 12, 2016), https://verdict.justia.com/2016/08/12/vexing-nature-californias-attempt-protect-free-speech-anti-slapp-statute (discussing *Nam v. Regents of the Univ. of Cal.*, No. C074796 (Cal. Ct. App. July 29, 2016), *available at* http://law.justia.com/cases/california/court-of-appeal/2016/c074796.html).

• Jesse J. O'Neill, Note, *The Citizen Participation Act Of 2009: Federal Legislation As An Effective Defense Against SLAPPs*, 38 B.C. Envtl. Aff. L. Rev. 477 (2011), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1697&context=ealr.

• Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act To Create Federal Anti-SLAPP Law*, Forbes (Sept. 16, 2015), http://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/#6e3819641aff.

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Introduction

The rights to free speech and to petition the government for redress of grievances are fundamental rights protected by the First Amendment.[1] Indeed, each of these ranks amongst the "most precious" of constitutional rights.[2]

More than a quarter century ago, professors George W. Pring and Penelope Canan identified a disturbing litigation trend that sought to chill these vital constitutional rights: strategic lawsuits against public participation, or SLAPPs.[3] Their research demonstrated that, at a minimum, "thousands" of these lawsuits had been filed, "tens of thousands of Americans" had been subjected to the lawsuits' chilling effect, "and still more ha[d] been muted or silenced by the threat."[4] The research revealed these lawsuits were increasingly "found in every jurisdiction, at every government level, and against" a wide range of "public issue[s]."[5]

The targets of these lawsuits were "typically not extremists"; rather, they were normal Americans, thousands of whom had "been sued into silence."[6] These lawsuits struck "at a wide variety of traditional American political activities"—for example, "writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections," or being parties in lawsuits.[7]

Through their research, professors Pring and Canan observed what happened when the targets of these lawsuits were "suddenly confronted" with "summonses, depositions, attorneys, and the trauma of a multi-million-dollar damage claim hanging over their lives."[8] The professors "saw the 'role reversals'" as citizens "were frightened into silence, supporters dropped out, resources

1 Smith v. Silvey, 149 Cal. App. 3d 400, 406 (1983).

2 United Mine Workers of America, District 12 v. Illinois Bar Assn., 389 U.S. 217, 222 (1967); San Francisco Forty-Niners v. Nishioka, 75 Cal. App. 4th 637, 647 (1999).

3 George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out ix-xi (1996) [hereinafter Getting Sued] (explaining how research demonstrated that these "'intimidation lawsuits'" attacked "not just free speech" but also "the right to petition government for a redress of grievances").

4 *Id.* at xi; *see also* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Social Problems 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385 (1988).

5 George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders* 12 Bridgeport L. Rev. 937, 940 (1992) [hereinafter *Introduction to SLAPPs*].

6 George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* 7 Pace Envtl. L. Rev. 3, 3 (1989) [hereinafter *SLAPPs*].

7 *Id.* at 5.

8 Getting Sued, *supra* note 3, at x.

drained away, campaigns foundered," and organizations "died."[9] In short, these civil actions were meant to "send a clear message: that there is a 'price' for speaking out"—that price being "a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[10]

After extensively studying this phenomenon, professors Pring and Canan concluded that tens of thousands of Americans had been victimized by such civil actions, and that although these lawsuits rarely succeeded on the merits, the mere fact of filing the lawsuit led to the goal of silencing those who had been speaking out.[11] Such lawsuits achieved their aims even when the plaintiffs lost because the civil actions successfully "'chill[ed]' present and future political involvement, both of the targets and of others in the community, and have worked to assure that those citizens never again participate freely and confidently in the public issues and governance of their own town, state, or country."[12] As one court put it in describing these lawsuits' devastating "'ripple effect,' '[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.'"[13]

In response to the research identifying this disturbing trend, California and New York enacted anti-SLAPP laws that provide a mechanism to enable victims of SLAPP lawsuits to promptly dismiss and deter them.[14] Thereafter, many other states enacted their own anti-SLAPP statutes, including Arizona, Arkansas, Illinois, Missouri, New Mexico, Oregon, Texas, Utah, and Washington.[15] As one commentator recently explained, "this is not a red or a blue state issue. It is a speech issue that transcends both [political] parties" and goes to "the heart of [American] patriotism."[16]

Today, nearly 30 states (as well as Washington, DC) have enacted some form of anti-SLAPP legislation.[17] But the breadth and scope of these anti-SLAPP laws vary widely.[18] Notably, some of these laws provide substantial protection while others offer significantly more limited safeguards.

This article examines examples of the variation among the broad spectrum of anti-SLAPP statutes by comparing California's broad anti-SLAPP law with New York's far more limited one. The exploration of these differences in the protection afforded to speakers in New York and California will show why it is a good idea to enact federal anti-SLAPP legislation. SLAPP plaintiffs currently have forum shopping incentives to sue Americans for speaking freely and petitioning the government in states with limited or no protection against SLAPPs, and a federal anti-SLAPP law would remove these incentives and provide more broad, even protection.

I. The Sharp Differences Between California's and New York's Anti-SLAPP Laws

A. Introduction to California's Anti-SLAPP Law

California's anti-SLAPP statute "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances."[19] This special motion to strike calls for a "two-step process."[20]

"First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue,"'" as defined by California's anti-SLAPP statute.[21] This is known as the "first prong" of the test for striking a claim under the state's anti-SLAPP law.[22]

California's Legislature "spelled out the kinds of activity it meant to protect" under the anti-SLAPP law in subdivision (e) of California Code of Civil Procedure section 425.16.[23] "Because of these specifications, courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression."[24] Instead, they need only examine whether the defendant's activities in question fall "within one of the four categories described in subdivision (e)."[25]

The first of subdivision (e)'s categories protects "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."[26] The second protected category encompasses "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."[27] The purpose of these two categories "is essentially to protect the

9 *Id.*

10 *SLAPPs*, *supra* note 6, at 6.

11 Getting Sued, *supra* note 3, at xi-xii.

12 *Introduction to SLAPPs*, *supra* note 5, at 943.

13 *Id.* at 944.

14 *Introduction to SLAPPs*, *supra* note 5, at 938, 959-60.

15 Laura Lee Prather, *The Texas Citizens Participation Act—5 Years Later*, Law360 (June 16, 2016), http://www.law360.com/articles/802155/the-texas-citizens-participation-act-5-years-later [hereinafter *Texas Citizens Participation Act*].

16 *Id.*

17 *See State Anti-SLAPP Laws, Public Participation Project*, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited 11/5/16).

18 Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation,* 45 Envtl. L. Rep. News & Analysis 10136, 10137-38 (2015) [hereinafter *SLAPP 2.0*].

19 Flatley v. Mauro, 39 Cal.4th 299, 311-312 (2006).

20 City of Montebello v. Vasquez, 1 Cal.5th 409, 420 (2016).

21 *Id.*

22 Decamabre v. Rady Children's Hosp., 235 Cal. App. 4th 1, 22 (2015).

23 *City of Montebello*, 1 Cal.5th at 422.

24 *Id.* at 433.

25 *Id.*

26 Cal. Civ. Proc. Code § 425.16(e)(1) (2015).

27 Cal. Civ. Proc. Code § 425.16(e)(2).

activity of petitioning the government for redress of grievance *and* petition-related statements and writings."[28]

If a defendant invokes the protection of either of these two categories, he or she "need not demonstrate the existence of a public issue" because California's Legislature "equated a 'public issue' with the authorized official proceeding to which [the statement] connects."[29] In short, "'the context or setting'" in which these statements occur "'itself makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.'"[30]

The third category protected by subdivision (e) includes "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."[31] Similarly, subdivision (e)'s fourth category protects "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."[32] Both of these categories "require a specific showing the action concerns a matter of public interest" whereas the first two categories described above "do not require this showing."[33] California courts broadly construe issues of public interest to include "private communications concerning issues of public interest."[34]

If a court concludes that the defendant has met its first prong burden of "demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out" in subdivision (e), the court turns to the second prong of the anti-SLAPP statute: "determin[ing] whether the plaintiff has demonstrated a probability of prevailing on the claim."[35] To meet this burden, the plaintiff must "state and substantiate a legally sufficient claim."[36] "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[37]

Where the anti-SLAPP statute applies and the plaintiff fails to establish that it has a probability of prevailing, the claim subject to the anti-SLAPP statute "shall be stricken."[38] Moreover, once the anti-SLAPP motion has been filed, all discovery is automatically stayed and plaintiff can secure a lifting of this stay only by filing a noticed motion and showing "good cause."[39] Furthermore, parties have a right to immediately appeal an order granting or denying an anti-SLAPP motion[40]—and such appeals automatically stay "all further trial court proceedings on the merits upon the causes of action affected by the motion."[41] Also, the prevailing defendant is entitled to the reasonable fees it incurred both in the trial court and on appeal to prosecute the anti-SLAPP motion, but a prevailing plaintiff can only secure fees if the anti-SLAPP motion was frivolous or filed solely for the purpose of delay.[42]

California's expansive anti-SLAPP statute has long had its critics. For example, responding to the bill that became the anti-SLAPP law while it was still in its formative stages, the California Judges Association voiced concern "that the bill's provisions were 'too broad.'" This challenge proved insufficient to derail the ultimate passage of the law; the Legislature simply added a provision to "specify[] 'the First Amendment conduct protected by the bill.'"[43]

Even after the Legislature enacted the law, some Courts of Appeal tried to narrow the statute, but, time and again, these efforts were rebuffed by the Legislature, the California Supreme Court, or both.[44] Similarly, when SLAPP scholars Pring and Canan recommended amending California's anti-SLAPP to include the immediate right of appeal, California's Judicial Council opposed this course on the ground that the availability of review by writ proceeding at a Court of Appeal's discretion was sufficient. The Council was rebuffed by the Legislature, which enacted the right of appeal on concluding that writ review was so rarely granted that it was insufficient to protect the vital constitutional rights at stake in an anti-SLAP motion.[45]

Undeterred, a few California courts have continued to issue the occasional decision suggesting that litigants are systematically abusing California's broad anti-SLAPP statute because of the number of motions and appeals the law generates; this vocal minority urges legislative reform to fix the harm they believe

28 Du Charme v. Int'l Brotherhood of Elec. Workers, Local 45, 110 Cal. App. 4th 107, 114 (2003).

29 Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 237 (1999).

30 Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1116 (1999) (quoting Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, 1047 (1997)).

31 Cal. Civ. Proc. Code § 425.16(e)(3).

32 *Id.* § 425.16(e)(4).

33 Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 474 (2000).

34 Terry v. Davis Community Church, 131 Cal. App. 4th 1534, 1545-1546 (2005).

35 Navellier v. Sletten, 29 Cal.4th 82, 88 (2002).

36 *City of Montebello*, 1 Cal.5th at 420.

37 Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 820 (2011) (citation omitted).

38 Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal.4th 12, 21 (2010).

39 Cal. Civ. Proc. Code § 425.16(g).

40 *Id.* §§ 425.16(i), 904.1(a)(13).

41 Varian Medical Systems, Inc. v. Delfino, 35 Cal.4th 180, 186 (2005).

42 Cal. Civ. Proc. Code § 425.16(c); Mendoza v. ADP Screening and Selection Services, Inc., 182 Cal. App. 4th 1644, 1659 (2010).

43 Jerome Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L. Rev. 965, 1002 (1999) [hereinafter *Increasing SLAPP Protection*].

44 Briggs, 19 Cal. 4th at 1114, 1120-21, 1123 n. 10; Equilon Enterprises LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 58-59, 68 n. 5 (2002).

45 *See Increasing SLAPP Protection*, *supra* note 43 at 1008, 1011 & n. 182; Jerome Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 McGeorge L. Rev. 731, 778-79 & fn. 280 (2003); Varian Medical Systems, Inc., 35 Cal. 4th at 193; Doe v. Luster, 145 Cal. App. 4th, 139, 144-45 (2006).

the statute causes to the judicial system.[46] But objective data demonstrates that California's anti-SLAPP law is not being systematically abused, either in the trial courts or on appeal, and has instead operated successfully in accordance with the Legislature's expectations by permitting thousands of defendants (if not more) to dismiss meritless lawsuits that targeted their exercise of First Amendment rights.[47]

B. The Significant Differences Between New York's and California's Anti-SLAPP Laws

1. New York's anti-SLAPP law applies to a far narrower range of activities than California's law

Like California, New York passed legislation in 1992 to provide protections against SLAPP suits.[48] But "New York's anti-SLAPP statute is much narrower than California's,"[49] particularly with respect to the differing range of activities protected by each of these laws.

California's anti-SLAPP statute protects four categories of activities that, collectively, "are quite broad."[50] Thus, California's anti-SLAPP statute has been applied to a diverse array of activities, of which the following are just a few examples:

- Fox News Network's television broadcast of "Manhunt at the Border," a story featuring an anti-illegal immigration activist who claimed that he was attacked by several immigrants seeking work as day laborers.[51]
- Consumer group's service of a notice of intent to sue on gas stations in California who had allegedly been polluting groundwater.[52]
- Companies' lobbying of regulatory and legislative bodies.[53]
- Television station's decision to hire a young, female weather news anchor rather than an older, male applicant.[54]
- Archaeology professor's criticism of efforts to put a strip mall on the site of an ancient Native American village.[55]
- Community church's publication of a report that allegedly falsely accused church youth group leaders of having an inappropriate sexual relationship with a minor female.[56]
- Homeowner's criticism of a charitable organization that sought to convert a house in her neighborhood into a shelter for battered women.[57]
- Non-profit organization's efforts to assist a tenant with filing a complaint with the Department of Housing and Urban Development against the owners of residential rental

46 *See, e.g.*, Hewlett-Packard Co. v. Oracle Corp., 239 Cal. App. 4th 1174, 1196 (2015); Grewal v. Jammu, 191 Cal. App. 4th 977, 944-1003 (2011).

47 *See, e.g.*, Felix Shafir & Jeremy Rosen, *California's Anti-SLAPP Law Is Not Systematically Abused*, Law360 (June 30, 2016), http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused.

48 Hariri v. Amper, 854 N.Y.S.2d 126, 128 (N.Y. App. Div. 2008).

49 Elizabeth Troup Timkovich, *Risk of SLAPP Sanction Appears Lower for Internet Identity Actions in New York than in California,* 74-APR N.Y. St. B.J. 40, 40 (2002) [hereinafter *Risk of SLAPP Sanction*]; *see also* London Wright-Pegs, Comment, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant,* 16 UCLA Ent. L. Rev. 323, 330 (2009) [hereinafter *Media SLAPP Back*]; *Increasing SLAPP Protection*, *supra* note 43, at 1036-37.

50 Wilbanks v. Wolk, 121 Cal. App. 4th 883, 893 (2004).

51 Balzaga v. Fox News Network, LLC, 173 Cal. App. 4th 1325 (2009).

52 Equilon Enterprises v. Consumer Causes, Inc., 29 Cal.4th 53 (2002).

53 DuPont Merck Pharm. Co. v. Super. Ct., 78 Cal. App. 4th 562 (2000).

54 Hunter v. CBS Broad., Inc., 221 Cal. App. 4th 1510 (2013).

55 Dixon v. Super. Ct., 30 Cal. App. 4th 733 (1994).

56 *Terry*, 131 Cal. App. 4th 1534.

57 Averill v. Super. Ct., 42 Cal. App. 4th 1170 (1996).

property as well as to assist another of the owners' tenants with prosecuting a small claims court action against them.[58]

- Supervisors' litigation-related investigation into whether, and determination that, an employee was not entitled to a bonus for being bilingual.[59]
- Talk radio show hosts' disparaging remarks about a reality show contestant.[60]
- A community activist's campaign to persuade a city council to end pony rides and a petting zoo at a local farmers' market.[61]
- Husband and wife's alleged interference with the sale of a house through their purported disclosure, or threat to disclose, that a registered sex offender lived nearby.[62]
- Non-profit organization's demonstrations and public picketing in front of a fashion retailer's stores based on allegedly abusive working conditions.[63]
- Hospital's peer review proceedings that resulted in an injunction requiring a doctor to attend anger management classes and prohibiting him from bringing a firearm to a hospital.[64]
- A lawyer's pre-litigation demand letter on behalf of a client seeking to settle an anticipated lawsuit before it was filed.[65]

In sharp contrast, New York's anti-SLAPP law does not protect a broad category of wide-ranging activities. Instead, New York's statute applies only to "an action involving public petition and participation,"[66] which the New York law defines narrowly to include only those actions "brought by a public applicant or permittee" and which are "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[67] The law likewise defines a "public applicant or permittee" narrowly to "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."[68]

Applying this narrow statutory language, New York courts have held that, for New York's anti-SLAPP statute to apply, a party "must [have] directly challenge[d] an application."[69] For example, a court held that the anti-SLAPP law did not apply where the parties trying to invoke the law were unaware of the application to the government when it was made and therefore "never participated in the application process in any manner."[70] Similarly, courts have held that the law does not apply "to a person who is entitled to engage in her proposed course of conduct without government permission or to a person who merely sought government funding for a project that could be financed privately."[71]

New York's anti-SLAPP law does bear some similarity to the scope of California's law in that it is not limited to statements made solely before a government body. For example, New York courts have found that challenges to a permit or an application that were made via the press or in public protests rather than directly to a government agency were protected under the law.[72] Thus, New York's law was held to apply to trespass allegations where the protestors trespassed on the plaintiff corporation's private property because their protests were designed to demand a meeting with the company's CEO to challenge the company's application for a renewal of its permit with a public agency.[73] As one court put it, allowing statements by critics of an application or permit to fall outside the law's scope "because they appeared in the newspaper and were not spoken directly to the public agency would be completely antithetical to the fundamental speech rights protected under the anti-SLAPP statute."[74]

But New York's anti-SLAPP law cannot apply to statements made to the public rather than to a public agency unless the communications "identify, at least in general terms, the application or permit being challenged or commented on," and are "substantially related to such application or permit."[75]

58 *Briggs*, 19 Cal.4th at 1106.

59 Gallanis-Politis v. Medina, 152 Cal. App. 4th 600 (2007).

60 Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798 (2002).

61 Angel v. Winograd, No. B261707, 2016 WL2756622 (Cal. Ct. App. May 9, 2016).

62 Cross v. Cooper, 197 Cal. App. 4th 357 (2011).

63 Fashion 21 v. Coal. for Humane Immigrant Rights of Los Angeles, 117 Cal. App. 4th 1138 (2004).

64 Kibler v. N. Inyo Cty. Local Hosp. Dist., 39 Cal.4th 192 (2006).

65 Malin v. Singer, 217 Cal. App. 4th 1283 (2013).

66 N.Y. Civ. Rights Law § 70-a(1) (McKinney 2016).

67 *Id.* § 76-a(1)(a).

68 *Id.* § 76-a(1)(b).

69 Guerrero v. Carva, 779 N.Y.S.2d 12, 21 (N.Y. App. Div. 2004), *see also* Silvercorp Metals, Inc. v. Anthion Management LLC, 948 N.Y.S.2d 895, 900 (N.Y. Sup. Ct. 2012); Harfenes v. Seat Gate Ass'n, Inc., 647 N.Y.S.2d 329, 332-333 (N.Y. Sup. Ct. 1995).

70 *Harfenes*, 647 N.Y.S.2d at 332; *see also* Getting Sued, *supra* note 3 at 194 ("[I]n 1995, the first judicial interpretation of the New York law took a very narrow view" of the law's scope to hold that the law did "not cover [a] citizen petitioning three years after an application process, even if the applicant was acting illegally without a permit").

71 Chandok v. Klessig, 632 F.3d 803, 819 (2d Cir. 2011); *accord Silvercorp Metals, Inc.*, 948 N.Y.S.2d at 89 ("An entity is not a 'public participant or permittee' in circumstances where a government process is optional" but the government process need not "be local in nature").

72 Duane Reade, Inc. v. Clark, No. 107438/03, 2004 WL 690191, at *6-*7 (N.Y. Sup. Ct. 2004); Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops, 698 N.Y.S.2d 820, 824 (N.Y. Sup. Ct. 1999).

73 Nat'l Fuel Gas Distrib. Corp. v. PUSH Buffalo, 962 N.Y.S. 2d 599, 561-62 (N.Y. App. Div. 2013).

74 *Duane Reade, Inc.*, 2004 WL 690191, at *6.

75 *Guerrero*, 779 N.Y.S.2d at 22.

For example, a court declined to apply the law to flyers that (1) never identified any particular application or permit that the plaintiffs had either sought or received and (2) never cited any agency proceedings where the defendants had opposed such an application or permit.[76] Similarly, another court declined to apply New York's law where the plaintiff had done little more than aggressively advocate for a particular agenda at public meetings of a public agency and took steps to sue the agency.[77] Another court found that New York's law could not apply because the statements in question simply challenged the accuracy of a communication to an agency.[78]

Furthermore, even where the statements in question are made directly to an agency, they must address matters within the scope of the agency's oversight or courts will not deem them to be materially related to a challenge to the application or permit under New York's anti-SLAPP statute.[79]

In short, unlike the sweeping scope of California's anti-SLAPP statute, the New York law's "narrow definition" of a SLAPP "is well suited to the paradigmatic situation where, for an example, a developer applies for a permit and retaliates against citizen opponents, but it fails to provide any broader protection for the right of petition."[80] As a result, New York's anti-SLAPP statute "covers only about half of all SLAPPs," and "may cover even less."[81]

2. In certain respects, New York's anti-SLAPP statute provides narrower procedural protections than California's law

The differences between the California and New York anti-SLAPP statutes extend beyond the breadth of each statute's scope. The laws also provide meaningfully different procedural protections.

For example, unlike California's anti-SLAPP law, which expressly requires courts to interpret it broadly,[82] the majority of New York courts have said New York's law must be construed narrowly.[83] Also, while California's law requires a court to strike a challenged claim as long as it falls within the anti-SLAPP statute's scope and the plaintiff cannot show a probability of prevailing on it,[84] New York's law is more limited in that it allows for dismissal or summary judgment only if the SLAPP has no substantial basis in law or is unsupported by a substantial argument for an extension, modification, or reversal of existing law.[85] Moreover, whereas California law stays discovery until the anti-SLAPP motion is ruled on (unless the plaintiff demonstrates good cause for targeted discovery),[86] New York's law contains no such provision.

New York's law resembles California's law to the extent that both laws permit those who prevail on their anti-SLAPP motions to recover reasonable attorney's fees.[87] However, whereas prevailing defendants are statutorily entitled to their reasonable attorney's fees under California's law,[88] New York's anti-SLAPP statute gives courts the discretion to not award such fees.[89] And if a New York court exercises its discretion to award fees, it may only do so "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."[90] No such showing is required to recover fees under California's law.[91]

3. New York's anti-SLAPP law affords broader remedies than does California's

While New York's anti-SLAPP statute is significantly narrower than California's statute in the many ways described above, the New York law is broader in one material respect: it offers a more comprehensive range of remedies in response to a SLAPP.

To begin with, even if a SLAPP is not dismissed under New York's anti-SLAPP law and therefore proceeds to the merits, the plaintiff who filed the SLAPP may only recover damages if, "in addition to all other necessary elements," the plaintiff "establishe[s] 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."[92] California's statute includes no such protection. Furthermore, unlike California's law, New York's anti-SLAPP statute allows for the recovery of both compensatory and punitive damages "upon an additional demonstration that the action involving public petition and participation was commenced for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition, or

76 *Id.*

77 *Hariri*, 854 N.Y.S.2d at 130.

78 *Silvercorp Metals, Inc.*, 948 N.Y.S.2d at 901.

79 Clemente v. Impastato, 736 N.Y.S.2d 281, 281-82 (N.Y. App. Div. 2002); Niagara Mohawk Power Corp. v. Testone, 708 N.Y.S.2d 527, 530-31 (N.Y. App. Div. 2000).

80 *Increasing SLAPP Protection*, *supra* note 43 at 1037.

81 Getting Sued, *supra* note 3, at 194.

82 Cal. Civ. Proc. Code § 425.16(a).

83 *E.g.*, *Hariri*, 854 N.Y.S.2d at 129-130; *Guerrero*, 779 N.Y.S.2d at 21; *but see* T.S. Haulers, Inc. v. Kaplan, No. 7313/01, 2001 WL 1359106, at *2, n.4 (N.Y. Sup. Ct., May 2, 2001) (provisions of New York law defining a SLAPP "should be broadly construed" to achieve the legislative goal of full discussion).

84 Cal. Civ. Proc. Code § 425.16(b)(1).

85 N.Y. C.P.L.R. rules 3211(g), 3212(h) (Mckinney 2006); *see also Harfenes*, 647 N.Y.S.2d at 332 (New York's anti-SLAPP law allows "defendants in actions involving public petition and participation to obtain quick dismissal or summary judgment unless the plaintiff can demonstrate 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'").

86 Cal. Civ. Proc. Code § 425.16(g).

87 N.Y. Civ. Rights Law § 70-a(1)(a); Cal. Civ. Proc. Code § 425.16(c)(1).

88 Ketchum v. Moses, 24 Cal.4th 1122, 1131 (2001).

89 *Nat'l Fuel Gas Distrib. Corp.,* 962 N.Y.S.2d at 562.

90 N.Y. Civ. Rights Law § 70-a(1)(a).

91 Cal. Civ. Proc. Code § 425.16(c)(1).

92 N.Y. Civ. Rights Law § 76-a(2).

association rights."[93] Professors Pring and Canan—whose research sparked the momentum toward anti-SLAPP legislation—saw this as "a solid reform," a "commendable step forward in procedures," but one "not without its compromises and limitations."[94]

II. Federal Anti-SLAPP Legislation

The California and New York anti-SLAPP laws are just two of the 28 state anti-SLAPP statutes, and many of these laws significantly differ from one another.[95] But the California and New York anti-SLAPP statutes offer a particularly apt illustration of how these types of laws differ across the country because California's law "is one of the broadest" in the United States[96] whereas New York's law is among the narrower laws.[97]

States throughout the country have either enacted laws that differ significantly in the breadth of protection they afford against SLAPPs or have failed to pass any anti-SLAPP legislation; this uneven patchwork of state legislation undermines efforts to effectively deter SLAPPs.[98] These variations can create an incentive for plaintiffs to forum shop and file suit in the states with either no anti-SLAPP protections or weaker protections.[99] As professors Pring and Canan put it, a federal anti-SLAPP law "would be a great step forward, given the very uneven results" produced by the differences between anti-SLAPP laws "from state to state."[100]

Consequently, a host of organizations—ranging from non-profit corporations to businesses, industry organizations, and trade associations—have supported the enactment of a federal anti-SLAPP statute to provide consistent protection throughout the country for free speech and petition rights. For some time, Congress preferred to let the states take the lead in enacting anti-SLAPP legislation.[101] But in recent years, Congress has increasingly shown an interest in adopting a federal anti-SLAPP law.

In 2009, Representative Steve Cohen of Tennessee introduced a federal anti-SLAPP bill—the Citizen Participation Act—which sought to provide a way for "SLAPPs to be quickly identified and dismissed before their costs can grow to excessive amounts."[102] The bill garnered a few cosponsors but ultimately stalled without even receiving a committee hearing.[103]

In the intervening years, however, the momentum for a federal anti-SLAPP bill has continued to grow. Thus, in May 2015, Representative Blake Farenthold of Texas introduced the "SPEAK FREE Act," which proposes the adoption of a federal anti-SLAPP law.[104] In May 2015, the House of Representatives referred this federal anti-SLAPP bill to the House Judiciary Committee, which in turn referred the bill to the Subcommittee on the Constitution and Civil Justice a month later.[105] This subcommittee held a hearing on the bill in June 2016.[106]

The SPEAK FREE Act would add several new statutory provisions to Title 28 of the United States Code.[107] Many of these provisions resemble California's broad anti-SLAPP statute far more than New York's narrower law. One of the proposed provisions—28 U.S.C. § 4202—would allow a defendant to file a "special motion to dismiss" a SLAPP suit in federal court.[108] Unlike New York's narrow law (but like California's broad one), this proposed statute defines a SLAPP in broad terms as any "claim" that "arises from an oral or written statement or other expression by the defendant that was made in connection with an official proceeding or about a matter of public concern."[109] Likewise, another of the proposed provisions—28 U.S.C. § 4208—would broadly define a "matter of public concern" to mean issues "related" to "health or safety," "environmental, economic, or community well-being," "the government," "a public official or public figure," or "a good, product, or service in the marketplace."[110] And like California's law, H.R. 2304 expressly provides that the federal anti-SLAPP law "shall be construed

93 *Id.* §§ 70-a(1)(b), (1)(c).

94 Getting Sued, *supra* note 3, at 195.

95 *See, e.g.*, *SLAPP 2.0*, *supra* note 18, at 10137-38 (examining significant variations among state anti-SLAPP statutes); *Increasing SLAPP Protection*, *supra* note 43, at 1036-44 (same); Getting Sued, *supra* note 3, at 191-201 (same).

96 *Risk of SLAPP Sanction*, *supra* note 49, at 43.

97 *See Media SLAPP Back*, *supra* note 49, at 330; *Increasing SLAPP Protection*, *supra* note 43, at 1036-44.

98 *See* Carson Hilary Barylak, Note, *Reducing Uncertainty In Anti-SLAPP Protection*, 71 Ohio State L.J. 845, 849 (2010).

99 *See id.* at 849-54 (addressing risk of forum shopping among SLAPP plaintiffs); Eric Goldman, Law Professor Letter in Support of SPEAK FREE Act (Sept. 16, 2005), http://digitalcommons.law.scu.edu/historical/1047/ (explaining that the "patchwork" of state anti-SLAPP laws "allows 'forum shopping' by plaintiffs, who can file abusive anti-speech lawsuits in jurisdictions where anti-SLAPP protections are absent or weak").

100 Getting Sued, *supra* note 3, at 190.

101 *Id.*

102 Jesse J. O'Neill, Note, *The Citizen Participation Act Of 2009: Federal Legislation As An Effective Defense Against SLAPPs,* 38 B.C. Envtl. Aff. L. Rev. 477, 478 (2011) [hereinafter *Citizen Participation Act*] (citing H.R. 4264, 111th Cong. (2009)).

103 *Id.* at 495-96.

104 H.R. 2304, 114th Cong. (2015). The SPEAK FREE Act stands for "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015." H.R. 2304 § 1.

105 *H.R. 2304: All Actions Except Amendments*, Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/2304/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22HR+2304%22%5D%7D&resultIndex=1.

106 *Examining H.R. 2304, the "SPEAK FREE Act": Hearing on H.R. 2304 Before the House Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary*, 114th Conf. (2016), https://judiciary.house.gov/wp-content/uploads/2016/06/114-82_20522.pdf [hereinafter SPEAK FREE Act Hearing].

107 H.R. 2304 § 2(a).

108 *Id.* (citations omitted).

109 *Id.* (citations omitted).

110 *Id.* (citations omitted).

broadly to effectuate the purpose and intent" of the SPEAK FREE Act.[111]

Additionally, much as is the case under California's anti-SLAPP statute, proposed § 4202(a) provides that, if the defendant can make a "prima facie showing that the claim at issue" arises from such activities, then the federal anti-SLAPP motion "shall be granted and the claim dismissed with prejudice, unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied."[112] Moreover, much like California's law, another proposed provision—28 U.S.C. § 4203—provides that, when a federal anti-SLAPP motion is filed, "discovery proceedings in the action shall be stayed until a final and unappealable order is entered on such motion unless good cause is shown for specified discovery."[113]

Also, just as California's law allows litigants to immediately appeal from orders granting or denying anti-SLAPP motions, the federal anti-SLAPP bill would provide parties with the right to immediately appeal from an order granting or denying a federal anti-SLAPP motion. It would do so both by adding a new statutory provision—28 U.S.C. § 4204—codifying this right and by amending an existing statute—28 U.S.C. § 1292(a)—to permit such interlocutory appeals.[114] Furthermore, much like defendants are automatically entitled to their reasonable attorney's fees under California's law if they prevail on their state anti-SLAPP motions, the federal bill would add a provision—28 U.S.C. § 4207—requiring a court to award the party who prevails on a federal anti-SLAPP motion "litigation costs, expert witness fees, and reasonable attorneys fees."[115]

The current version of the SPEAK FREE Act is not limited to federal causes of action. Nor is it confined to only those state-law SLAPPs that are filed in federal court. Instead, the federal bill currently proposes the addition of a new removal provision—28 U.S.C. § 4206—that would allow a defendant to remove to federal court a "civil action in a State court that raises a claim" defined as a SLAPP by the federal statute.[116] Ordinarily, a claim can be removed to federal court only if the grounds for removal appear on the face of a well-pleaded complaint.[117] But, in proposed § 4206, the federal anti-SLAPP bill would override this rule by stating that the "ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."[118]

This removal provision is among the SPEAK FREE Act's greatest benefits because, by permitting the targets of state SLAPP suits to remove to federal court where they can secure the protections of the federal anti-SLAPP statute, the SPEAK FREE Act would ensure that these defendants are no longer at the mercy of SLAPP plaintiffs' ability to choose to file their lawsuits in states where anti-SLAPP laws are either absent or weak.[119] In effect, the defendants would have the power to decide for themselves whether they are better off removing the SLAPP to federal court to take advantage of the federal anti-SLAPP law, or whether they instead "prefer the options available in state court" and choose "to remain there as a strategic choice."[120]

The SPEAK FREE Act also includes a clause that would expressly save state anti-SLAPP laws from federal preemption.[121] This "non-preemption provision" would "permit states to continue to play their role as the laboratories of American democracy, allowing Congress to learn from both the successes and pitfalls of various state anti-SLAPP regimes—with an eye toward not just the initial drafting of federal anti-SLAPP legislation, but improving it going forward."[122]

Today, the SPEAK FREE Act has 32 cosponsors—including Republicans and Democrats who hail from a wide range of states including Arizona, California, Colorado, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, Virginia, Wisconsin, and Texas.[123] In other words, this federal bill reportedly enjoys "broad bipartisan support."[124] Such bipartisan support "makes sense" because "[f]ree speech isn't a partisan issue; it affects

111 H.R. 2304 § 2(d).

112 H.R. 2304 § 2(a) (citations omitted).

113 *Id.* (citations omitted).

114 *Id.*; H.R. 2304 § 2(b)(2).

115 H.R. 2304 § 2(a). The "Federal Government and the government of a State, or political subdivision thereof," are not permitted to recover fees under costs or fees under this provision. *Id.*

116 *Id.*

117 *E.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (preemption defense "does not appear on the face of a well-pleaded complaint" and therefore does "not authorize removal to federal court").

118 *Id.*; *see also* Vaden v. Discover Bank, 556 U.S. 49, 59, n. 9 (2009) (a statute "overrides the well-pleaded complaint rule" where it provides that "'the ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal'" (internal citation omitted)). This provision is not unprecedented as Congress has occasionally overridden the well-pleaded complaint rule in other removal provisions. *See, e.g.*, *id.* (recognizing that 9 U.S.C. § 205's removal procedure "overrides the well-pleaded complaint rule"); Mesa v. California, 489 U.S. 121, 136-37 (1989) (recognizing that 28 U.S.C. § 1442(a)(1)'s removal provision "serves to overcome the 'well-pleaded complaint' rule").

119 *See Citizen Participation Act*, *supra* note 102, at 505-06 (describing the benefits of the similar removal provision that had been included in the Citizen Participation Act of 2009).

120 *Id.*

121 H.R. 2304 § 2(c).

122 Colin Quinlan, Note, Erie *And The First Amendment: State Anti-SLAPP Laws In Federal Court After* Shady Grove*,* 114 Colum. L. Rev. 367, 405 (2014).

123 H.R. 2304: *Cosponsors*, Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/2304/cosponsors?q=%7B%22search%22%3A%5B%22HR+2304%22%5D%7D&resultIndex=1.

124 SPEAK FREE Act Hearing, *supra* note 106, at 2 (statement of Representative Trent Franks, Chairman, House Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary).

everyone."[125] Indeed, conservatives have a history of joining with liberals to favor anti-SLAPP legislation—"again showing this is not a red or a blue state issue," but rather "a speech issue that transcends both parties and strikes at the heart of patriotism."[126]

In the words of Representative Trent Franks of Arizona (Chairman of the House Subcommittee on the Constitution and Civil Justice—the subcommittee that held a hearing on the SPEAK FREE Act), without sufficient protections for vital First Amendment rights, "all other rights are at grave risk."[127] Consequently, as pointed out by professors Pring and Canan, whose landmark research did so much to bring the insidious nature of SLAPP lawsuits to the public's attention, although state anti-SLAPP legislation has taken significant strides towards protecting the rights to petition and free speech from harassment by litigation, the safeguards afforded by these state laws is "very uneven" and therefore "it is time for congressional action as well."[128]

III. Conclusion

Each year, more and more people across the country are sued for speaking out, but these targets of SLAPP lawsuits often find themselves with little recourse—either because they are at the mercy of a patchwork of state anti-SLAPP laws that offer highly uneven protection or, worse yet, because they find themselves in a jurisdiction with no anti-SLAPP statute. Congress should step in to enact a robust federal anti-SLAPP law to protect citizens' fundamental rights to free speech and petition for redress of grievances.

125 Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act To Create Federal Anti-SLAPP Law* Forbes (Sept. 16, 2015), http://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/#6e3819641aff.

126 *Texas Citizens Participation Act*, *supra* note 15.

127 SPEAK FREE Act Hearing, *supra* note 106, at 1-2.

128 Getting Sued, *supra* note 3, at 190.