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# Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation that Undermines Public Participation

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# Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation That Undermines Public Participation

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## INTRODUCTION

Defamation law is a catchall term encompassing civil claims for reputational harm to an individual, including slander and libel. Defamation claims originated in English common law and have since evolved within the American legal system.[1] Scholars have characterized the law of

defamation as "a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities"[2] and as a "'fog of fictions, inferences, and presumptions.'"[3] Amid these inherent variations and complexities of defamation law and litigation — including the largely state-specific nature of tort law development[4] — emerges a disturbing trend across jurisdictions. In the modern era, defamation claims have been used not to protect purported victims on the receiving end of false claims,[5] but rather to punish and silence individuals advancing truthful information or critical statements of opinion.[6] These burgeoning lawsuits, known as

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1. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 1:3 (2d ed.) (discussing the origins of defamation law).

2. *Id.* (citing Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975).

3. *Id.* (citing Coleman v. MacLennan, 98 P. 281, 291 (Kan. 1908)).

4. *See, e.g.*, TT Arvind & Jenny Steele, *Introduction: Legislation and the Shape of Tort Law*, TORT LAW AND THE LEGISLATURE: COMMON LAW, STATUTE AND THE DYNAMICS OF LEGAL CHANGE 3, 3–10 (Bloomsbury Publishing 2012) (discussing the "continuing impact [on tort law] of statutory influences over extended periods of time"); Kenneth W. Simons, *Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law*, 8 J. TORT L. 29, 31 (noting that even within jurisdictions that have adopted symmetrical approaches, there is "a much more complex landscape" and points of departures between jurisdictions).

5. For a statement to be defamatory or defamatory per se, it must be false and the burden of proving falsity rests with the plaintiff. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 29 n.6 (1990). Truth is an affirmative defense that frees a defendant from any liability. *Id.* at 13 ("'[T]ruth is a complete defense to a suit for defamation.'") (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (AM. L. INST. 1977)).

6. John Oliver highlighted how such lawsuits are frequently used by large corporations and powerful individuals to scare their critics into silence and discussed a suit levied against his television show. *See SLAPP Suits: Last Week*

strategic lawsuits against public participation (SLAPP suits), threaten free speech principles.[7]

This paper first introduces defamation causes of action and contextualizes the emergence of SLAPP suits. Section II provides a more detailed analysis of several emerging cases that underscore who may be most vulnerable to such claims — including victims of sexual assault and domestic violence, as well as individuals speaking out against racial discrimination and non-white individuals more generally — and illuminates the burdens that these claims impose on defendants. Section III provides an analysis of anti-SLAPP legislation as well as the limitations of current policies. Section IV provides some recommended solutions and suggested next steps. Section V provides a brief summary and conclusory remarks.

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*Tonight with John Oliver*, HBO (Nov. 10, 2019), https://www.youtube.com/watch?v=UN8bJb8biZU [https://perma.cc/8B5F-Q4LY]; *see also* Marissa Martinelli, *John Oliver Taunts Coal Baron Enraged by Giant Talking Squirrel with Giant Singing Squirrels*, SLATE (Nov. 11, 2019), https://slate.com/culture/2019/11/john-oliver-coal-baron-squirrel-slapp-lawsuit-bob-murray.html [https://perma.cc/3EZ9-LRKT].

7. SLAPP lawsuits can also appear in the form of other torts. A contract claim, for instance, if filed for the purposes of suppression and intimidation, could constitute a SLAPP claim. *See, e.g.*, George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 8–9 (1989) ("Legally, SLAPPs masquerade as ordinary lawsuits . . . [and] come camouflaged as any of six ordinary torts."). Additionally, tortious interference with prospective economic advantage and business relations could appear concurrently or in lieu of an allegation of defamation. *See id.* at 9 (stating that out of 228 studied SLAPP cases, 32 percent were "camouflaged" as business torts); *see also* Yong Ki Hong v. KBS Am., Inc., 951 F. Supp. 2d 402, 423 (E.D.N.Y. 2013) (setting forth the plaintiff's burden to satisfy their claim under New York law: "(1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship.").

## I. BACKGROUND

### *A. Overview of Defamation*

Defamation claims, like other torts, are governed by state law.[8] As a result, the elements of the claim, the available defenses, and the application of relevant standards vary by state.[9] Despite these state-by-state variations, defamation has traditionally been recognized as "an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him."[10] Whether spoken (slander) or written (libel), "a communication is defamatory if it tends so to harm the reputation of another as to lower [one] in the estimation of the community or to deter third persons from associating or dealing with [the individual]."[11] A prima facie defamation claim requires a plaintiff to prove four distinct elements:

1) a false statement purporting to be fact; 2) publication or

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8. This paper focuses on civil defamation claims, although it is important to note that "[t]wenty-four states have laws that make it a crime to publicly say mean things about people, with penalties ranging from fines to imprisonment." *Map of States with Criminal Laws Against Defamation*, AM. C.L. UNION, https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation [https://perma.cc/JSN9-H53S] (last visited Nov. 1, 2022). Potential SLAPP claims arising out of federal tort litigation are not assessed. *See* Resolute Forest Prods., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1011 (N.D. Cal. 2017).

9. *See, e.g.*, Shaina Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. REV. 332, 336–337 (2020) ("Defamation has been a common law cause of action since the late-15th century. Grounded in state tort case law and bolstered by state constitutional and statutory law, defamation has evolved haphazardly and varies by U.S. jurisdiction."); Pooja Bhaskar, Milkovich, *#MeToo, and "Liars": Defamation Law and the Fact-Opinion Distinction*, 88 FORDHAM L. REV. 691, 695 (2019) (noting that "courts across the country utilize different fact-opinion analyses"); Haven Ward, *"I'm Not Gay, M'Kay?": Should Falsely Calling Someone a Homosexual Be Defamatory*?, 44 GA. L. REV. 739, 766 (2010) ("Defamation is a creature of common law and thus is 'uniquely amenable to judicial revisions.'") (quoting Rachel M. Wrightson, Comment, *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection*, 10 J.L. & POL'Y 635, 640–41 (2002)).

10. WILLIAM LLOYD PROSSER, HANDBOOK OF THE LAW OF TORTS 756 (3d ed. 1964).

11. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

> communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the person or entity who is the subject of the statement.[12]

Departures from the more easily enumerated prima facie claim are often context-dependent. Specifically, which variation of defamation law applies can depend on the specific nature of the complaint, the individual involved in the complaint, or the surrounding facts and circumstances of the complaint. The distinction between claims involving public figures versus those involving private parties is an apt example.[13] Public officials or public figures who sue for defamation are subject to a higher legal standard,[14] given that their claims are more likely to involve efforts to combat criticism essential to democracy[15] and given that, by virtue of their position, they willingly consented to some level of publicity in their lives.[16] For claims involving public figures, an actual malice standard is

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12. Cornell Law School, *Defamation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/defamation [https://perma.cc/4PRQ-MX3P] (last visited Nov. 1, 2022).

13. *See, e.g.*, Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMM. & ENT. L.J. 133, 135 (2022) ("In the realm of anti-SLAPP statutes, the distinction between public and private matters is, in fact, the essential demarcation separating expressive activities that do or do not fall within a state's statutory protection for defendants."); John J. Watkins & Charles W. Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 825 (1984) ("[T]he courts [have] recognized, through adoption of various conditional privileges, that reputational interests must on occasion yield to other societal needs.").

14. *Why Is the Status of a Plaintiff So Important in Defamation Law?*, FREEDOM F. INST., https://www.freedomforuminstitute.org/about/faq/why-is-the-status-of-a-plaintiff-so-important-in-defamation-law/#:~:text=Private%20figures%20must%20show%20that,evidence%20in%20order%20to%20recover [https://perma.cc/39L8-4KHN] (last visited Oct. 27, 2022).

15. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring) ("Purely private defendant has little to do with the political ends of a self-governing society.").

16. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) ("[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."); Donald Elliott Brown, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 565 (1971) ("The public man either voluntarily enters the forum of discussion about public matters or voluntarily attains a position that invites public attention.").

typically applied: to be successful, said public figure must prove that the opposing party made the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[17] Once considered a public official, a defamation plaintiff must meet the actual malice standard regardless of whether or not the defamatory statement at hand applied to the official's public or private life.[18] Similarly, statements made *by* public figures are protected absent proof of actual malice, so as not to "'inhibit the fearless, vigorous, and effective administration of policies of government.'"[19] By contrast, claims involving private individuals apply a lesser negligence standard,[20] whereby the private plaintiff need only prove that the defendant was at fault or negligent in his utterance.[21] Even within these standards are variations and an absence of bright-line rules, thereby adding to the complexity of the case and requiring intensive, fact-specific analyses. These distinctions make the applicable standard unpredictable, ultimately influencing and dictating case outcomes even between cases involving comparable statements.[22]

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17. *Sullivan*, 376 U.S. at 280. "Reckless" is typically defined as "[b]ehavior that is so careless that it is considered an extreme departure from the care a reasonable person would exercise in similar circumstances. Cornell Law School, *Reckless*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/reckless [https://perma.cc/J8XD-NH6Z] (last visited Oct. 27, 2022).

18. *Proving Fault: Actual Malice and Negligence*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2022), https://www.dmlp.org/legal-guide/proving-fault-actual-malice-and-negligence [https://perma.cc/J8EQ-EXD2].

19. *Sullivan*, 376 U.S. at 282 (quoting Barr v. Matteo, 360 U.S. 564, 571 (1959)).

20. *Id.* "Negligence" is typically defined as a "failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances" and may involve *either* actions or omissions. Cornell Law School, *Negligence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/negligence [https://perma.cc/C3L9-RX3Y] (last visited Oct. 27, 2022).

21. *Gertz*, 418 U.S. at 388 (White, J., dissenting) ("[The Court] refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by New York Times.").

22. *Compare* Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) (finding no liability after the defendant publicly questioned the plaintiff's company finances in a published newspaper because, as a *public figure* acting as an executive to multiple non-profits, Chapin "affirmatively and intentionally placed [himself] in the public eye" and "into [ ] significant matters of public concern"), *with* Fleming v. Moore, 275 S.E.2d 632 (Va. 1981) (finding liability after defendant publicly labeled the plaintiff as a racist after he had privately advocated for a tree buffer between his development and an incoming, predominantly Black development, reasoning that the professor-plaintiff was acting in his *private* capacity as a landowner). Case law also recognizes limited-

The nature of the statement — varying by its scope, the location or platform where it was shared, or its alleged harm on professional affairs — can also influence how it is legally assessed.[23]

Despite the abundance of caselaw and discussion surrounding defamation, it is challenging to access comprehensive statistics on the prevalence of these cases, let alone on the arguments and outcomes arising from these claims.[24] Although further research and analysis are required to know exactly how many SLAPP cases are filed or litigated, it is indisputable that at least some subset of defamation claims are filed with a motivation other than the vindication of the reputational interests defamation law was developed to safeguard.[25] This paper does not address

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purpose public figures, which in Virginia is determined pursuant to an assessment of five factors: (1) whether the plaintiff had access to channels of effective communication; (2) whether the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) whether the plaintiff sought to influence the resolution or outcome of the controversy; (4) whether the controversy existed prior to the publication of the defamatory statements; and (5) whether the plaintiff retained public figure status at the time of the alleged defamation. *See* Carr v. Forbes, Inc., 259 F.3d 273, 280 (4th Cir. 2001).

23. When a statement is defamatory *per se*, the harm is presumed and the plaintiff does not need to prove special harm. *See* Liberman v. Gelstein, 605 N.E.2d 344, 346 (N.Y. 1992). Whether a statement is defamatory *per se* is a question of law. *See* Geraci v. Probst, 938 N.E.2d 917, 922 (N.Y. 2010). A statement is defamatory *per se* when the defendant "(i.) charge[s] the plaintiff with a serious crime; (ii.) that tend to injure another in [their] trade, business or profession; (iii.) that plaintiff has a loathsome disease; or (iv.) imputing unchastity to a woman." *See* Zherka v. Amicone, 634 F.3d 642, 647 (2d Cir. 2011) (citation omitted). New York, for instance, holds that a crime is "serious" for purposes of the defamation laws if it is "(a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude." Conti v. Doe, No. 17-CV-9268 (VEC), 2019 U.S. Dist. LEXIS 31408 at *20 (S.D.N.Y. Feb. 27, 2019); *accord* RESTATEMENT (SECOND) OF TORTS § 571 cmt. g (AM. L. INST. 1977) (listing rape as a serious crime to implicate per se defamation).

24. Foreign statistics and discussion indicate that this is potentially an international trend within countries that have defamation laws. Michael Douglas, *Australia's Proposed Defamation Law Overhaul Will Expand Media Freedom – But at What Cost?*, CONVERSATION (Dec. 1, 2019), https://theconversation.com/australias-proposed-defamation-law-overhaul-will-expand-media-freedom-but-at-what-cost-128064 [https://perma.cc/YH5C-3Z3X]; https://inforrm.org/tag/defamation-statistics/ [https://perma.cc/ZVC3-RKB4].

25. Shari Claire Lewis, *Online and Social Media Defamation in Today's Age*, N.Y. L.J. (Feb. 17, 2017), http://www.newyorklawjournal.com/id=1202779335224/Online-and-Social-Media-Defamation-in-Todays-Age?mcode=0&curindex=0&curpage=ALL [https://perma.cc/Z8H9-AQP2].

the prospect of modifying the contours of defamation caselaw or eliminating defamation claims altogether. Rather, it argues that invalid claims and meritless actions exploit power differentials, embedded in our legal and social institutions and preferential to those with more resources,[26] to ultimately deprive certain individuals of their rights. This paper goes on to assert that these claims must be immediately mitigated,[27] and assesses how exactly this exploitation can be remedied.[28] Regardless, an understanding of defamation law and its faults is necessary to identify those ill-intentioned plaintiffs who are hiding behind the means of defamation law in pursuit of different ends.

### *B. Primer on Strategic Lawsuits Against Public Participation*

SLAPP suits are designed to chill or punish the speech of individuals or organizations who speak out on issues of public interest or concern.[29]

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26. Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L. J. 781, 789 (2013) ("SLAPP suits are criticized for the significant power differential between the plaintiff and the defendant. The plaintiff is typically more wealthy and can afford years of litigation, whereas the defendant is often an ordinary 'middle-class[,] … middle-of-the-road American[].' As such, a SLAPP suit can deplete a defendant's resources.") (quoting 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)).

27. *See, e.g.*, *Freedom of Expression – ACLU Position Paper*, AM. C.L. UNION, https://www.aclu.org/other/freedom-expression-aclu-position-paper [https://perma.cc/NTR6-QFXG] (last visited Nov. 2, 2022):

> Censoring so-called hate speech also runs counter to the long-term interests of the most frequent victims of hate: racial, ethnic, religious and sexual minorities. We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them.

28. *See* Section IV.

29. *See, e.g.*, Saner, *supra* note 26, at 787–88 ("SLAPP suits are filed with the intention of intimidating the defendant with costly and time-consuming litigation. The intention is not to win, but rather to discourage the defendant through the prospect of ruinously expensive litigation."); David J. Abell, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment–"Strategic Lawsuits Against Political Participation,"* 47 SMU L. REV. 95, 95–96 (1993) (explaining that SLAPP suits are "brought primarily in retaliation for any activity in opposition to the plaintiff's business interest" and send the message "that if you

The term "SLAPP suit," originally coined by George W. Pring and Penelope Canan in 1988, arose to describe the phenomenon that is still currently flourishing in U.S. courts: the use of civil actions as a means for stifling political expression.[30] Pring and Canan identified four distinct elements indicative of SLAPP suits:

> [1] a civil claim for money damages, [2] defendants who are nongovernmental individuals and organizations, [3] claims based on advocacy before a government branch official or the electorate, and [4] advocacy dealing with a substantive issue of public or societal significance.[31]

These four characteristics taken together reveal the punitive intent of these lawsuits, specifically in the realms of political advocacy and social expression. SLAPP lawsuits are denoted "not only [by] a lack of merit, but an intention to silence and intimidate critics by subjecting them to litigation's time and money requirements."[32]

Rather than vindicating the reputations of the aggrieved, SLAPP suits effectively silence those looking to critique current public officials, political movements, or significant social subject matter. These suits function as covert tools within the legal system, pointedly capitalizing on the system's power to intimidate prospective defendants into abandoning speech.[33] This intimidation encompasses speech and expression in a wide array of contexts, including online search platforms, social networking sites, blogs, and other commonly used online postings.[34]

SLAPP lawsuits are effective in deterring disfavored speech because of the cost and inconvenience of defending against these actions in litigation.[35] They have been referred to as "legal bullying," and are used

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participate in legitimate (and Constitutionally protected) public discussion, you should be prepared to litigate").

30. George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 3–5 (1989).

31. Lauren Bergelson, *The Need for A Federal Anti-SLAPP Law in Today's Digital Media Climate*, 42 COLUM. J.L. & ARTS 213, 230–34 (2019).

32. *Id.* at 231.

33. Pring & Canan, *supra* note 26, at 938.

34. Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 230 (2011).

35. This paper does not explore other potentially applicable defenses that may be available to some litigants. For instance, qualified privilege is an affirmative

"to intimidate opponents' exercise of rights of petitioning and speech" and "to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned."[36] When targeted against media outlets, they can also suppress news reporting and information sharing.[37]

These suits have gained traction as a strategy for silencing critics in a range of other contexts: employment, animal rights advocacy, environmental activism, the Black Lives Matter Movement, and other pressing areas where individual or group rights are at stake.[38] The

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defense that may apply to statements made in legislative proceedings or a Title IX investigation, for example. *See* Pekgoz v. Ehrhardt, Superior Court of Los Angeles County, Case No. BC615536 (Sept. 12, 2016) (granting anti-SLAPP motion to strike upon concluding that defendant's statements to school administrators were made "before, in preparation of, or in connection with issues under consideration and review by an official proceeding, the Title IX proceeding, and, therefore, arise from protected activity"). However, even where available, this only applies to statements made in the course of the proceeding itself, not subsequent statements in other forums, even if is it similar or related content. *See* Goldman v. Reddington, 417 F. Supp. 3d 163 (E.D.N.Y. Sept. 27, 2021) (survivor defending against claims of defamation and tortious interference with business relations despite being successful in her university Title IX claim, which resulted in the plaintiff's expulsion). This paper seeks to propose more protective measures that are directly responsive to SLAPP suits to prevent such conduct, which is chilling to speech.

36. John v. Douglas Cnty. Sch. Dist., 219 P.3d 1276, 1280 (Nev. 2009).

37. *See, e.g.*, *A New Version of SLAPP – Lawsuit Could Chill Reporter-Source Relations*, SOC'Y OF PRO. JOURNALISTS (Aug. 28, 2003), https://www.spj.org/news.asp?ref=339 [https://perma.cc/EK26-GMLR] (making a statement that SLAPP suits are "a blatant, if indirect, attempt to punish the media by throwing up a barrier of fear between journalist and source, intimidating those who might wish to come forward to reveal damaging or embarrassing information"). Two years ago in April 2019, Republican Representative Devin Nunes of California filed a $150 million lawsuit against a newspaper chain after they published an article about a company that Nunes partially owns. The article reported on a lawsuit brought by the company's employee, in which the employee accused the company of involving drugs and prostitution to "entertain" their top investors but specified that it was "unclear" whether Nunes was involved. Since Virginia lacks a strong anti-SLAPP statute, the small newspaper chain will likely endure high litigation costs and drawn-out court proceedings that interfere with its regular journalism efforts. *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws/ [https://perma.cc/RP8T-E6DN] (last visited Oct. 27, 2022).

38. *See, e.g.*, *The Growing Use of Anti-SLAPP in Employment Cases*, LAW360 (Feb. 19, 2019), https://www.law360.com/articles/1128064/the-

proliferation of this tactic requires a strong and immediate response to end the misuse of the legal system as a personal tool to silence critics. This issue is critical, not only because of its injurious effect on potential litigants to defend against these claims, but because of its potentially broad applicability and silencing effect on imperative, far-reaching political and social contexts that impact society as a whole. Despite efforts to curtail the destructive effects of these types of lawsuits through anti-SLAPP laws — which can provide special mechanisms for early case resolution, alter burdens of proof, or establish fee-shifting — the proliferation of abusive suits by plaintiffs continues.[39]

## II. EMERGING TRENDS IN SLAPP SUITS

Although there has been a general proliferation of defamation litigation, and of SLAPP suits specifically, there are certain groups that have been uniquely targeted and are especially vulnerable to the misuse or misapplication of defamation laws. These three groups are (A) individuals who speak out on issues of racial tension or discrimination, (B) individuals seeking to address sexual assault and domestic violence, and (C) political critics.[40] The SLAPP attacks on these three subgroups are demonstrative

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growing-use-of-anti-slapp-in-employment-cases [https://perma.cc/2X3Y-QLFG]; *Defending Our Rights Under the Texas Anti-SLAPP Statute:* Landry's, Inc. v. Animal Legal Defense Fund, et al., ANIMAL LEGAL DEF. FUND, https://aldf.org/case/defending-our-rights-under-the-texas-anti-slapp-statute/ [https://perma.cc/85GY-H2VZ] (last updated Sept. 12, 2019); *Federal Court Dismisses Resolute SLAPP Suit Against Greenpeace*, GREENPEACE (Oct. 16, 2017), https://www.greenpeace.org/usa/news/federal-court-dismisses-racketeering-case-against-greenpeace/ [https://perma.cc/4MRH-WGHH]; Jacqueline Thomsen, *Court Strikes down Far-Right Activist's Lawsuit over Twitter Ban*, HILL (June 6, 2018), https://thehill.com/policy/technology/technology/391096-court-strikes-down-far-right-activists-lawsuit-over-twitter-ban [https://perma.cc/6GZG-AMTK].

39. *See, e.g.*, Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, AM. BAR ASS'N (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws/#19 [https://perma.cc/P48S-TCEY]; The Editorial Board, *New York's Chance to Combat Frivolous Lawsuits*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/opinion/new-york-slapp-lawsuits.html [https://perma.cc/YHR5-FYT7] ("Federal courts can rule that state anti-SLAPP laws do not apply to them, giving vindictive plaintiffs another means of assailing their critics.").

40. Due to length limitations, this paper elevates select examples, including several in Virginia, which have been highlighted as a hotbed for SLAPP suits.

of the ways defamation claims are used today to target particular individuals, certain factions of the population, and meaningful collective messages that are politically and socially relevant to the U.S. population at large.

### *A. Racial Discrimination*

In May 2019, University of Virginia professor, historian, and activist Jalane Schmidt was sued by Edward Dickinson Tayloe II, who sought $1 million in compensatory damages and $350,000 in punitive damages in his initial complaint.[41] Dr. Schmidt was sued for a statement she made to *C-Ville Weekly*, a local Charlottesville publication, for a news article related to ongoing litigation about the removal of Confederate monuments in the community.[42] The *C-Ville Weekly* article delved into the history of the local figures — including Tayloe — that have been fighting the Charlottesville City Council's efforts to remove Confederate monuments.[43]

Dr. Schmidt spoke out through the news media about local issues involving the history of slavery in Charlottesville and these issues' relationship to the Confederate monuments, and was ultimately sued for a single sentence: "For generations this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue."[44] Her comment referenced Tayloe's involvement in protecting the Confederate symbols as well as his family's history of slave ownership and participation in the domestic slave trade, which the *C-Ville Weekly* article

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*See, e.g.*, Dan Casey, *Easy Path to SLAPP Suits Under Scrutiny by Virginia Lawmakers*, ROANOKE TIMES (Nov. 30, 2019), https://www.roanoke.com/news/casey-easy-path-to-slapp-suits-under-scrutiny-by-virginia/article1a34dca3-8b41-574d-a7c1-cf59446d5275.html [https://perma.cc/F872-YUXW]; Peter Vieth, *Lawsuits Turn Spotlight on Anti-SLAPP Law*, VA. LAWS. WKLY (Dec. 9, 2019), https://valawyersweekly.com/2019/12/09/lawsuits-turn-spotlight-on-anti-slapp-law [https://perma.cc/JTM4-LCZV].

41. Complaint at 16, Tayloe v. C-Ville Holdings, L.L.C., No. CL19-868 (Va. Cir. Ct. May 28, 2019).

42. *Id.* at 2.

43. Lisa Provence, *The Plaintiffs: Who's Who in the Fight to Keep Confederate Monuments*, C-VILLE WKLY. (Mar. 6, 2019), https://www.c-ville.com/the-plaintiffs-whos-who-in-the-fight-to-keep-confederate-monuments/ [https://perma.cc/8QAT-F994].

44. *Id.*

directly, and accurately, traced through Tayloe's lineage as one of Virginia's First Families.[45]

In response to the lawsuit, Dr. Schmidt asserted that her comment was an opinion protected by the First Amendment and that Mr. Tayloe failed to prove actual malice[46] — that is, Mr. Tayloe failed to prove that when Dr. Schmidt spoke to the news media she had knowledge, or disregard, of whether her statement was truthful or not. The American Civil Liberties Union (ACLU) of Virginia filed a brief in circuit court calling for the defamation to be dismissed:

> Under the guise of an action for defamation, [Tayloe] seeks to censor the opinion of those [who] question both his support for the Confederate statues and his motivations for defending them . . . [sending] a clear message to others who wish to opine on matters of public concern in which Plaintiff is involved: disagree or critique Plaintiff Tayloe, then you, too, will face the threat of a lawsuit, including extraordinary financial liability and attorney's fees.[47]

The case received national attention in part because of the nature of the claims, which were unprecedented in suggesting Dr. Schmidt be subject to liability for "the revelation of details about [Tayloe's] slaveholding ancestors," especially when "Tayloe d[id] not contest the story's factual accuracy in the lawsuit."[48] Although the claim was

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45. Laura Croghan Kamoie, Three Generations of Planter-Businessmen: The Tayloes, Slave Labor, and Entrepreneurialism in Virginia, 1710-1830 (1999) (Ph.D. dissertation, College of William & Mary – Arts & Sciences) (1999) (on file with Dissertations, Theses, and Masters Projects, W&M ScholarWorks).

46. Defendant Jalane Schmidt's Demurrer at 8–9, Tayloe v. C-Ville Holdings, L.L.C., No. CL19-868 (Va. Cir. Ct. Oct. 21, 2019). Actual malice is a legal standard both for defamation of a public or limited-purpose public figure, as well as for an anti-SLAPP claim. *Id.* at 9; *see also* Patricia Sánchez Abril, *The Evolution of Business Celebrity in American Law and Society*, 48 AM. BUS. L.J. 177, 221–224 (2011) (discussing standards for assessing whether an individual is a limited-purpose public figure).

47. *Id.*

48. *See, e.g.*, Hannah Natanson, *A Newspaper Reported That a Man's Ancestors Were Slaveholders. He's Suing for Defamation.*, WASH. POST (Sept. 25, 2019), https://www.washingtonpost.com/dc-md-va/2019/09/26/newspaper-reported-that-mans-ancestors-were-slaveholders-hes-suing-defamation [https://perma.cc/5B7J-3UKH]; Kali Holloway, *Charlottesville Confederate Statue Defender Sues Paper, Prof, for Reporting His Family's Slaveholding History*, DAILY BEAST (Oct. 20, 2019), https://www.thedailybeast.com

ultimately resolved in Dr. Schmidt's favor, she still suffered significant loss: the controversy required her to seek legal counsel, dedicate extensive time and attention to her defense, and curtail her advocacy for the monument removal. Although the Albemarle Circuit Court determined "the Complaint fail[ed] to plead sufficient facts which, taken as true for the purposes of demurrer, would indicate that any violation of law occurred or that the claimant is entitled to a legal remedy" and found "that Plaintiff [ ] failed to state a claim for defamation upon which relief [could] be granted," the court "decline[d] to reach the question of immunity under Va. Code § 8.01-223.2," the state's anti-SLAPP statute.[49] Although successful in her defense, the court's failure to reach the anti-SLAPP immunity question is significant because it failed to vindicate the question raised by her statutory defense: whether Tayloe's lawsuit satisfied the standard for a SLAPP suit.

There are, however, other examples where this dynamic of tort claim abuse as retaliation for racial justice advocacy is perceptible. For example, in Selah, Washington, two people affiliated with Black Lives Matter protests are being sued by D.R. "Rob" Case, the city attorney, for defamation. The city attorney has "alleged that Facebook posts accusing him of stalking women and teenage girls who attended a Black Lives Matter protest were false and cast him in a false light."[50] Although the lawsuit explicitly maintains that it is being brought in the attorney's *personal* capacity, certain underlying allegations are very much tied to his work as a public official. The controversy includes prior tension over city crews erasing chalk art, purportedly in accordance with the city's anti-graffiti ordinance. The chalk art was created in support of BLM and included the hashtag "ICANTBREATHE," in reference to the passing of

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/charlottesville-confederate-statue-defender-sues-paper-prof-for-reporting-his-familys-slaveholding-history [https://perma.cc/HH6K-SFL6]; Mike Masnick, *SLAPP Suit in Virginia Tries to Silence Historian Highlighting Ancestry of Guy Suing to Keep Confederate Statues in Charlottesville*, TECHDIRT (Aug. 2, 2019), https://www.techdirt.com/articles/20190729/00044342668/slapp-suit-virginia-tries-to-silence-historian-highlighting-ancestry-guy-suing-to-keep-confederate-statues-charlottesville.shtml [https://perma.cc/727S-GBQS].

49. Order, Tayloe v. C-Ville Holdings, L.L.C., No. CL19-868 (Va. Cir. Ct. Nov. 13, 2019). The dispensation of this case is discussed further in Section III. *See* Section III.

50. Donald W. Meyers, *Selah City Attorney Sues BLM Protesters for Defamation over Facebook Posts*, YAKIMA HERALD-REPUBLIC (July 31, 2020), https://www.yakimaherald.com/news/crime_and_courts/selah-city-attorney-sues-blm-protesters-for-defamation-over-facebook-posts/article_db16c895-7c1d-5c15-96db-7ad2aaff8156.html [https://perma.cc/KFY5-32SC].

George Floyd.[51] One of the defendants, Rocha — "a U.S. Marine Corps veteran and former city employee" — described the plaintiff's conduct as "bullying."[52] "He did it to shut me up, and the rest of the protesters in Selah," Rocha explained. Case's lawsuit seeks unspecified damages, as well as a demand that the two take down the posts in question, issue public apologies, and agree never to defame him again on social media. Like Dr. Schmidt, Rocha and fellow co-defendants in this matter advocated for social change that involved unavoidable discussions of local law and city officials and were subjected to punishment on the basis of this unavoidability.

In another case, a Texas real estate investor, Karra Crowley, sued a Black Lives Matter group for posting screenshots of emails that *she had personally sent to the group*.[53] Crowley, who spends time in California, sent Black Lives Matter Sacramento members racist, hate-filled emails. She called them "domestic terrorists," proclaimed that "white lives matter" and, most horrifyingly, openly called for the return of slavery.[54] The Black Lives Matter group posted a screenshot of the emails to their group Facebook page in demonstration of the exact evils the movement works to combat: modern manifestations of racial hatred and discrimination. Now the group is being sued by the real estate investor. The lawsuit seeks the removal of the Facebook post and $75,000 in compensatory damages, in addition to punitive damages and court costs.[55]

To provide yet another illustration: Recently, the Georgia Supreme Court ruled against public defender B. Reid Zeh after Zeh sued the American Civil Liberties Union (ACLU) for calling him "crooked." The ACLU blog post alleged that the part-time public defender "charged a client $2,500 for services that should have been free."[56] In addition, the

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51. *Id.*

52. *Id.*

53. Hilda Flores, *Woman Suing BLM Sacramento for Libel Asks to Add 'Imposter' Ex-tenant to Lawsuit*, KCRA (Aug. 3, 2021), https://www.kcra.com/article/woman-suing-blm-sacramento-libel-adds-imposter-lawsuit/37213592# [https://perma.cc/QTZ4-74Z8].

54. Matthew Nuttle & Eric Escalante, *Black Lives Matter Sacramento Sued by Texas Real Estate Investor over Facebook Post*, ABC 10 (May 3, 2021), https://www.abc10.com/article/news/local/sacramento/black-lives-matter-sacramento-sued-by-texas-real-estate-investor-over-facebook-post/103-ee07fb2b-8d36-4a22-91c7-792c45c36f8b [https://perma.cc/3J82-55VV].

55. *Id.*

56. Debra Cassens Weiss, *Top State Court Rules Against Public Defender Who Sued ACLU for Calling Him 'Crooked'*, AM. BAR ASS'N J. (Oct. 20, 2021, 12:51 PM), https://www.abajournal.com/news/article/georgia-supreme-court-

post "alleged that Zeh [ ] didn't visit his clients in the detention center and didn't secure bail reductions for them, thereby perpetuating the county's wealth-based incarceration system."[57] The state's supreme court held the trial judge should have dismissed the case and granted the ACLU's motion, which had invoked Georgia's anti-SLAPP statute.[58]

Yet another example from North Carolina illustrates these same principles at work in a state with no anti-SLAPP statute: "[P]laintiff Jessica Shoffner, a white nurse at Alamance Regional Medical Center" sued "Black anti-racist activist, Dejuana Bigelow" and other activists.[59] Defendant Bigelow organized a March for Justice and Community in the summer of 2020 to advocate for the removal of a Confederate monument from in front of the Alamance County Courthouse. Plaintiff Shoffner, a counter-protestor, stood with a crowd "that waved Confederate flags and held offensive signs like 'No Free Colored TVs.'"[60] After the event, Defendant Bigelow shared information online that she had received from other attendees and videos from the plaintiff's own social media. In her posts, Bigelow shared that witnesses alleged that Plaintiff Shoffner was overheard making racist comments at the March, including about patients at the medical center. Additionally, Bigelow shared videos from the plaintiff's Facebook page. In one, "Plaintiff is heard to say: 'Y'all talk about spreading hate, but y'all ain't doing nothing but spreading the hate. F-ck you!' and telling Black protestors 'go back to the welfare office.'"[61] Another recording on the plaintiff's publicly accessible page is described as follows:

> The video depicts Plaintiff riding in a truck after dark with a male. The male states: "Where's that Black truck at? Where'd he go?" In response, Plaintiff laughs. Then, Plaintiff states: "They ain't gonna protest here if they knew what's good for them. They won't come down this county." A male voice states: "That's why I got a gun out."[62]

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tosses-public-defenders-suit-against-aclu-for-calling-him-crooked [https://perma.cc/9QX6-UXYE].

57. *Id.*

58. *Id.*

59. *Victory in Alamance!*, EMANCIPATE (Dec. 14, 2022), https://emancipatenc.org/victory-in-alamance/ [https://perma.cc/W8L5-59DV].

60. Defendant's Motion for Summary Judgment, at 6, Shoffner v. Bigelow (N.C. Sup. Ct. 2022).

61. *Id.* (explicative edited).

62. *Id.* at 8.

In addition to sharing these posts online, Defendant Bigelow shared these with the human resources department at the medical center where both she and the plaintiff were employed. After being fired from her nursing position, the plaintiff sued for defamation and civil conspiracy, and sought punitive damages. Although the "court entered an order granting summary judgment to [the co-defendant] and granting summary judgment in part to Ms. Bigelow," the case is still ongoing.[63] Counsel for the defendant, the University of North Carolina Law School Critical Race Lawyering Civil Rights Clinic "expects a jury trial for one remaining claim in 2023."[64]

There is additional evidence that these race-based lawsuits facially disguised as reputation or defamation based are a growing threat and evince an intentional, targeted strategy. Kyle Rittenhouse — the 17-year-old who arrived at a demonstration for Black lives in Kenosha, Wisconsin with an AR-15 and fatally shot two individuals[65] — says he is now fundraising for lawsuits against those who he claims mischaracterized him as a "white supremacist" and "murderer," including members of the media and public, like CNN and Whoopi Goldberg,[66] as well as public officials like President Joe Biden.[67] He announced: "Me and my team have decided to launch The Media Accountability Project as a tool to help fundraise and hold the media accountable for the lies they said and deal with them in court."[68]

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63. Emancipate, *supra* note 59.

64. *Id.*

65. Becky Sullivan, *Kyle Rittenhouse Is Acquitted of All Charges in The Trial over Killing 2 in Kenosha*, NPR (Nov. 19, 2021, 5:53 PM), https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict [https://perma.cc/DW5M-FHAC].

66. Josh Kelety, *Kyle Rittenhouse Hasn't Sued Whoopi Goldberg, Joy Behar or CNN*, AP NEWS (Nov. 28, 2021), https://apnews.com/article/fact-checking-729144062313 [https://perma.cc/768V-KYPK].

67. Joe Walsh, *Rittenhouse Accuses Biden of Defamation in First Post-Acquittal Interview*, FORBES (Nov. 22, 2021), https://www.forbes.com/sites/joewalsh/2021/11/22/rittenhouse-accuses-biden-of-defamation-in-first-post-acquittal-interview/?sh=415b1b3110b8 [https://perma.cc/EF2C-9PSU] ("Rittenhouse took particular issue with Biden, who included a photo of him in a September 2020 Twitter video urging then-President Donald Trump to 'disavow white supremacists' — an insinuation Rittenhouse called 'actual malice, defaming my character.'").

68. Adam Rogan, *Kyle Rittenhouse Has 'Close to Zero' Chance to Win Lawsuits, Experts Say*, KENOSHA NEWS (Mar. 10, 2022), https://www.kenosha news.com/news/local/kyle-rittenhouse-has-close-to-zero-chance-to-win-lawsuits

These cases provide examples of how speech centered on racial justice advocacy — from the removal of Confederate monuments to criminal-legal system reform — is stunted by litigation intended to target the messengers, and thus the messages, calling for equity.

### *B. Sexual Assault & Domestic Violence*

In addition to targeted litigation of particular races or racial activism, SLAPP suits also provide an avenue for targeted legal attacks against survivors of sexual assault or domestic violence.[69] Most recently, the #MeToo movement catalyzed an upsurge in SLAPP suits brought by accused with the sole intent to intimidate and silence their accusers, leaving indigent survivors or those without the financial resources to defend themselves to bear the brunt of such meritless claims.[70] This pattern, however, is not strange to the legal system. In fact, "the Supreme Court's first modern SLAPP encounter, in 1983" involved sexual harassment claims advanced by a Phoenix waitress, Myrland Helton, against her employer.[71] Not only was Helton fired, but her subsequent lawsuit was met five days later with "a classic SLAPP [suit] in state court against Helton."[72] Today, SLAPP suits intended to silence survivors of sexual assault and domestic violence arise in countless contexts, including

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-experts-say/article_3d22dca8-1d71-51be-9c10-f1fbfc3ea39d.html [https://perma.cc/L5Y3-SFC9].

69. *See, e.g.*, Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 FIRST AMEND. L. REV. 441 (2022); Fabre v. Walton, 436 Mass. 517 (2002) (assessing the plaintiff's abuse of process claim against his former girlfriend after she obtained a protective order against him for physical abuse and the defendant's anti-SLAPP statute special motion).

70. Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 TUL. L. REV. 1, 11–13 (2020).

71. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 19–20 (Temple Univ. Press 1996) (citing Bill Johnson's Rests., Inc. v. N.L.R.B., 461 U.S. 731 (1983)).

72. *Id.* at 20.

education,[73] the military,[74] and the newsroom.[75] This can force survivors to continue defending the truth of their claims, even if they have already been successful in one forum.[76]

Recently and highly publicized, Amber Heard, a well-known actress and activist, was a defendant in a $50 million defamation claim levied against her by her ex-husband and actor John "Johnny" C. Depp II. The suit arose from an op-ed she penned for the *Washington Post*.[77] The defamation case was resolved before the Fairfax County Circuit Court in June 2022.[78] Depp ultimately prevailed on all claims and was awarded damages totaling $15 million ($10 million compensatory, $5 million punitive), while Heard prevailed on one counterclaim and was awarded $2

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73. *See* Nicole Ligon, *Censorship of Sexual Assault Survivors in the Educational Context*, 16 HARV. L. & POL'Y REV. 343, 343 (2022) (detailing how SLAPP suits have "undermined the ability for sexual assault survivors to come forward about their experiences in safe and supportive ways, especially within the educational context").

74. *See* Michelle B. Kalas, *Defamation Litigation in Army Sexual Assault Prosecutions*, 6 ARMY LAW. 64, 69 (2019) ("Defamation litigation against the putative victims of sexual assault is a growing trend . . . impacting military sexual assault prosecutions.").

75. *See* Bergelson, *supra* note 31, at 230 (noting that music journalist Jim DeRogatis "had considerable difficulty finding an outlet to publish his piece" exposing R. Kelly for his sexual and psychological abuse of young women).

76. *Reddington*, 417 F. Supp. 3d at 164 (raising claims of defamation and tortious interference with business relations for statements the defendant made online despite an adverse Title IX finding that resulted in the plaintiff's expulsion); *see also* Ivie Guobadia & Emily Haigh, *Title IX and Defamation: An Emerging Challenge Facing Higher-Education Institutions*, LITTLER (Jan. 5, 2018), https://www.littler.com/publication-press/publication/title-ix-and-defamation-emerging-challenge-facing-higher-education [https://perma.cc/2BW2-DV5S] (noting "approximately 60% of Title IX-related lawsuits are brought by respondents (those accused of sexual misconduct)" and "that 72% of accused students who file a Title IX-related lawsuit against their university also sue their individual accuser for defamation") (citing Alyssa Keehan et al., *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, 14–15, United Educators (Oct. 2015)).

77. Eriq Gardner, *Johnny Depp's $50M Defamation Suit Against Amber Heard Allowed in Virginia*, HOLLYWOOD REP. (July 26, 2019, 8:45 PM), https://www.hollywoodreporter.com/thr-esq/johnny-depps-50m-defamation-suit-amber-heard-allowed-virginia-1227186 [https://perma.cc/A5DD-BSDG].

78. Joan Hennessy, *Amber Heard Can't Nix Defamation Claims by Johnny Depp*, COURTHOUSE NEWS SERV. (July 26, 2019), https://www.courthousenews.com/judge-refuses-to-dismiss-johnny-depp-v-amber-heard/ [https://perma.cc/9YFR-CXSD].

million in damages. Although the parties have now settled to avoid appeal,[79] that outcome was reached after the verdict was affirmed.[80] However, the result of the trial is impossible to reconcile with the outcome of Depp's case in the United Kingdom, in which the judge substantiated accusations of abuse and dismissed Depp's libel claims against The Sun for labeling him a "wife beater."[81] In theory, sustaining even just one allegation of abuse against Heard should have provided a sufficient basis to invoke the truth defense in the Virginia case.

Heard and Depp are both actors who married in February 2015. In May 2016, Heard accused Depp of domestic violence and sought a restraining order against him. The two finalized their divorce in January 2017 and nearly one year later, on December 18, 2018, amid the #MeToo movement,[82] Heard published the editorial in which she discussed her

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79. Christi Carras, *Amber Heard, Johnny Depp Settle Defamation Case: 'This Is Not an Act of Concession'*, L.A. TIMES (Dec. 19, 2022), https://www.latimes.com/entertainment-arts/story/2022-12-19/amber-heard-johnny-depp-settle-defamation-case-appeal-trial [https://perma.cc/TMZ8-B8EU] (reporting "Depp and Heard reached a settlement in which Heard's insurance company will pay Depp $1 million" and quoting Heard's proclamation: "I have made no admission. This is not an act of concession. There are no restrictions or gags with respect to my voice moving forward.").

80. *A Judge Rejects Amber Heard's Request to Set Aside the Verdict for Johnny Depp*, NPR (July 13, 2022, 4:12 PM), https://www.npr.org/2022/07/13/1111389062/johnny-depp-amber-heard-trial [https://perma.cc/RPF9-ERFD].

81. *Johnny Depp Loses Libel Case over Sun 'Wife Beater' Claim*, BBC (Nov. 2, 2020), https://www.bbc.com/news/uk-54779430 [https://perma.cc/FNV4-FKPK] (reporting judge's ruling that "the Sun had proved what was in the article to be 'substantially true'" and "found 12 of the 14 alleged incidents of domestic violence had occurred"); Michael Holden & Alistair Smout, *Johnny Depp Is a Wife Beater, UK Judge Rules in Libel Case*, REUTERS (Nov. 1, 2020), https://www.reuters.com/article/us-britain-people-depp-idUKKBN27H1UL [https://perma.cc/Z4LJ-Z7R8] (quoting judge's opinion concluding "I have found that the great majority of alleged assaults of Ms. Heard by Mr. Depp have been proved to the civil standard.").

82. *See Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE UNIV. https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/ [https://perma.cc/Z9BC-U8ZL]; *see also* Jodi Kantor & Megan Twohey, *How to Measure the Impact of #MeToo*, N.Y. TIMES (Oct. 3, 2022), https://www.nytimes.com/interactive/2022/10/03/us/me-too-five-years.html [https://perma.cc/55DL-Q6SN] (noting the endurance and flexibility of the #MeToo movement, but recognizing that Amber Heard's case was seen by some as "the end of MeToo") (citing EJ Dickson, *'Men Always Win': Survivors 'Sickened' by the Amber Heard Verdict*, ROLLING STONE (June 1, 2022)), https://www.rollingstone.com/culture/culture-

experience in the aftermath of her domestic abuse allegations.[83] In the op-ed, Heard referenced her history of suffering abuse, beginning at a young age, as well as the pressures that lead many women in her position to remain silent.[84] She called for changes that would further gender equity, including reauthorization of the Violence Against Women Act.[85] The piece did not mention Depp, either by name or by reference to Heard's prior allegations against him.[86] Heard argued that her speech in the op-ed — speech that described her own, personal experiences without reference to others — cannot be defamatory as a matter of law and that punishing such speech would severely limit that ability of individuals to advocate on issues of public importance, especially on the basis of personal experience.[87] Depp, in response, asserted through his lawsuit that the op-ed smeared and maligned him, providing grounds for a defamation claim.[88]

Heard's op-ed predominantly focused on the current "transformative political moment" America is in as a result of the #MeToo movement, and she ultimately advocated that there is now "an opening [ ] to bolster and build institutions protective of women."[89] SLAPP cases that deal with domestic violence and sexual impropriety are significant because "[c]ourts have only begun to grapple with this #MeToo-inspired wave of defamation lawsuits."[90] Civil lawsuits, including SLAPP actions, have coordinately

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news/amber-heard-johnny-depp-verdict-metoo-trial-1361356/ [https://perma.cc/6RJN-WCHX]).

83. Amber Heard, *I Spoke Up Against Sexual Violence — And Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36story.html [https://perma.cc/YD9W-SHFZ].

84. *Id.*

85. *Id.*; *see also* Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018, 3:21 PM), https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown [https://perma.cc/5NLL-26QF].

86. Heard, *supra* note 83.

87. Plaintiff's Opposition to Defendant's Amended Demurrer and Plea in Bar at 3, Depp v. Heard, No. CL-2019-0002911 (Va. Cir. Ct. Dec. 6, 2019).

88. Janelle Griffith, *Johnny Depp Sues Ex-Wife Amber Heard for $50 Million for Allegedly Defaming Him*, ABC NEWS (Mar. 4, 2019, 2:17 PM), https://www.nbcnews.com/news/us-news/johnny-depp-sues-ex-wife-amber-heard-50-million-allegedly-n978976 [https://perma.cc/L7DJ-QFDZ].

89. Heard, *supra* note 83.

90. Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html [https://perma.cc/N4XM-VCAP].

increased with the number of survivors, including women and individuals vulnerable to violence, speaking out against their assailants. These survivors, unlike the individuals behind SLAPP suits, must typically operate outside of the criminal legal system "because the statutes of limitations on sexual misconduct can be as short as one year, depending on the state and severity of the accusation."[91] Thus, even in cases where there is no risk of criminal consequence, defamation actions are used to demoralize, intimidate, or otherwise pressure survivors into silence, making them "a go-to strategy for accused men trying to preserve their reputations."[92]

There are other countless examples of the weaponization of these suits as a targeted tactic against survivors. For instance, in New York, a "sex-crimes prosecutor accused of sexual assault by a reporter for the Daily News [ ] fired back with a $10 million libel suit" against both the outlet and the reporter that filed a criminal complaint against him.[93] In finding in the reporter (and survivor's) favor, the court acknowledged the broader repercussions of this case given the "disquieting prevalence of sexual assaults":

> And yet, sexual assaults remain vastly underreported, primarily due to victims' fear of retaliation.1 It does not escape us that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out; most victims cannot afford years of litigation, nor do they wish to have their personal information disclosed through invasive discovery or to relive their personal trauma through litigation, including depositions, filings, and testimony in court. They do not wish to endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process. . . . It has the effect of emboldening sexual assaulters who seek to weaponize the legal system in order to silence their victims.[94]

This targeting of survivors is especially problematic in light of the pervasiveness of sexual violence and harassment. It is "estimated one in

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91. *Id.*

92. *Id.*

93. Kate Sheehy, *Ex-Prosecutor Accused of Sex Crime by Reporter Sues for $10M*, N.Y. POST (May 7, 2018), https://nypost.com/2018/05/07/ex-prosecutor-accused-of-sex-crime-by-reporter-sues-for-10m/ [https://perma.cc/UM7R-BVSB].

94. Appeal No. 13314 at 3–4, Sagaille v. Carrega, 194 A.D.3d 92 (N.Y. App. Div. 2021) (No. 2020-02369).

five women and one in seventy-one men experience rape" and "nearly one in three women and one in ten men report[] experiencing unwanted sexual contact."[95] Yet, despite the ubiquity of this harassment, "only about twenty percent of experiences of sexual violence are formally reported."[96] This underreporting can be due to "fear of retaliation, a belief that an assault was not serious enough to warrant reporting, or concern that law enforcement could not or would not help."[97] Now, survivors that come forward also risk retaliation in the form of a defamation claim.[98] Survivors who are brave enough to tell their story may be forced, as a result of a defamation claim, to "retell[] the assault or harassment" and bear the emotional and mental toll that accompanies such a rehashing. This "reliving of any associated trauma" in addition to the forced exposure of a "victims' personal information, details of the violence, or their response . . . is revealed through the discovery process, [and] they may face embarrassment or shame."[99] Such manipulation of the legal system is likely to exacerbate the already prevalent problem of underreporting. Sadly, there is no shortage of such examples and with varying success in invoking anti-SLAPP protections.[100]

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95. Leader, *supra* note 69, at 444.

96. *Id.*

97. *Id.* at 447 (noting "both victims' rights advocates and defense attorneys noted that their own experiences serving clients reflect an uptick in these claims being filed against individuals expressing that they have experienced sexual violence" and that "[p]ublic discourse also reflects an uptick in concern about defamation suits related to assault or harassment, with people taking to social media and other online platforms to offer one another support around defamation claims").

98. Bruce E.H. Johnson & Antoinette Bonsignore, *Protect #MeToo Victims from Retaliatory Lawsuits*, SEATTLE TIMES (Jan. 23, 2018), https://www.seattletimes.com/opinion/protect-metoo-victims-from-retaliatory-lawsuits/ [https://perma.cc/Z3Z8-ZPKN].

99. Leader, *supra* note 69, at 446–48; *see also* Meredith Rose, *Anime Trolls Tried to Silence a #MeToo Campaign with Legal Threats — And Got Shut Down Hard*, VERGE (Sept. 18, 2019), https://www.theverge.com/2019/9/18/20870541/vic-mignogna-metoo-accusations-defamation-lawsuit-anti-slapp-laws [https://perma.cc/VP46-WACY].

100. Rachel Helfand, *Defamation Lawsuit Against Phoebe Bridgers Dismissed*, FADER (Nov. 10, 2022), https://www.thefader.com/2022/11/10/defamation-lawsuit-against-phoebe-bridgers-dismissed [https://perma.cc/5TRZ-8GUF] ("Producer and studio owner Chris Nelson sued Bridgers for defamation, false light, intentional infliction of emotional distress, intentional interference with prospective economic relations, and negligent interference with prospective economic relations" for statements made about Nelson on her Instagram,

### *C. Political Dissent*

In addition to targeting defendants based on statements related to racial discrimination, domestic violence, or sexual misconduct, SLAPP suits allow for the unique targeting of political dissenters and their preferred outlets.[101] For instance, Devin Nunes is a former dairy farmer, former politician serving as the U.S. Representative for California's 22nd Congressional District, and serial SLAPP plaintiff. Just a few years ago, he initiated litigation alleging defamation, insulting words, and civil conspiracy by Defendants, Liz Mair, Mair Strategies, LLC, Twitter, and two anonymous Twitter users [(@DevinCow) and (@DevinNunesMom)] for tweets satirizing and/or criticizing Nunes. He is seeking $250 million in damages or a "greater amount" in punitive damages, in addition to attorneys' fees and injunctive relief.[102] The suit was principally brought against the two anonymous Twitter users. The third defendant, Liz Mair, retweeted and "offered opinions" on claims about Mr. Nunes' business involvement but was primarily used by Mr. Nunes as a "jurisdictional

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including: "I witnessed and can personally verify much of the abuse (grooming, stealing, violence) perpetuated by Chris Nelson, owner of a studio called Sound Space."); Rick Carroll, *Mother Loses Anti-SLAPP Bid to Dismiss Ex-boyfriend's Defamation Lawsuit*, ASPEN TIMES (Oct. 26, 2022), https://www.aspentimes.com/news/mother-loses-anti-slapp-bid-to-dismiss-ex-boyfriends-defamation-lawsuit/ [https://perma.cc/8KDV-VR8H] ("Colorado Court of Appeals [decision] will allow an Aspen man to pursue a defamation lawsuit against his ex-girlfriend for alleging he might have sexually molested their daughter . . . reject[ing] the mother's attempt to have the suit dismissed under Colorado's anti-SLAPP statute enacted in 2019."); Bishop v. The Bishop's School, 86 Cal. App. 5th 893 (2022) (granting anti-SLAPP motion for defamation claim, but denying it with respect to the contract claim, in a case filed by a former teacher fired in the wake of accusations of sexual impropriety).

101. While this section focuses on suits between government officials and the public (either individuals or media), the weaponization of defamation suits is also a potential tactic between candidates in the campaigning sphere. *See, e.g.*, Jesse Scheckner, *Jorge Fors Sues Miami-Dade Commission Opponent Kevin Marino Cabrera for Defamation*, FLA. POLITICS (Sept. 22, 2022), https://floridapolitics.com/archives/558015-jorge-fors-sues-miami-dade-commission-opponent-kevin-marino-cabrera-for-defamation/ [https://perma.cc/7X7P-7ZRV]; Josh Kurtz, *Locked in Tight Senate Race, Del. Saab Sues Foe for Defamation*, MD. MATTERS (Oct. 17, 2022), https://www.marylandmatters.org/2022/10/17/locked-in-tight-senate-race-del-saab-sues-foe-for-defamation/ [https://perma.cc/246D-ZB78].

102. Complaint at 1, Nunes v. Twitter, Inc., No. CL19-1715-00 (Va. Cir. Ct. Mar. 18, 2019).

anchor" to avoid the strong anti-SLAPP protections of his home state of California.[103]

Defendant Devin Nunes' Cow is an anonymous Twitter user purporting to be a cow owned by Mr. Nunes. The account posts satirical and hyperbolic insults regarding Nunes, many of which are filled with cow puns, including: "He's udder-ly worthless," a "treasonous cowpoke," "Devin's boots are full of manure," "Devin is whey over his head in crime" and "its pasture time to move him to prison."[104] Defendant Devin Nunes' Mom is another parody account which purports to be the plaintiff's mother. This account similarly posts hyperbolic insults frequently accompanied by maternal nagging and child-raising jokes, treating Nunes as a misbehaving child. These tropes have included: "Are you trying to obstruct a federal investigation again? You come home right this instant or no more Minecraft!" and a claim that the plaintiff was voted "Most Likely to Commit Treason" in high school.[105]

Although the targeting of identifiable political dissenters through defamation claims should be concerning in and of itself, there are additional issues implicated[106] for anonymous speakers.[107] Nunes has

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103. Memorandum of Law in Support of Motion to Dismiss on Grounds of *Forum Non Conveniens* by Elizabeth A. Mair and Mair Strategies LLC at 1–3, Nunes v. Twitter, Inc., No. CL19-1715-00 (Va. Cir. Ct. May 14, 2019).

104. *Id.*

105. *Id.*

106. SLAPP suits targeting individuals speaking out online may not only be initiated to chill speech, but also to "reveal the identity of the anonymous critic." *What Is a CyberSLAPP?*, AM. C.L. UNION OHIO, https://www.acluohio.org/en/what-cyberslapp [https://perma.cc/2LXX-Y3RR] (last visited Nov. 1, 2022):

> A cyberSLAPP is a lawsuit that is filed based on an individual's online free speech, such as posting a blog or leaving a comment on a review website. CyberSLAPPs typically involve a person who posted anonymous criticisms of a corporation or public figure on the Internet. Much like a standard SLAPP suit, a cyberSLAPP usually has no legal merit, and the underlying goal is the same – to chill free speech by initiating an intimidating and costly lawsuit. . . . Once the cyberSLAPP is filed, the plaintiff will subpoena the Website or Internet Service Provider (ISP) to reveal the identity of the anonymous critic, hoping to intimidate others from voicing their opinions in the future.

107. Devin Nunes' Alt-Mom is a new user purporting to be the same account as Devin Nunes' Mom, perhaps to comply with Twitter's impersonation policy, which prohibits "accounts that pose as another person, brand, or organization in a confusing or deceptive manner may be permanently suspended under Twitter's impersonation policy." *Impersonation Policy*, TWITTER, https://help.twitter.com

served a *subpoena duces tecum* — a request to order a person to attend court and bring relevant documents — seeking documents showing the identity of Defendants Devin Nunes' Cow and Devin Nunes' Mom. This poses a unique threat by allowing defamation claims to be used as a vehicle for unmasking anonymous political critics.[108] This is especially dangerous and manipulative when the statements by the anonymous users are not defamatory as a matter of law; thus, the plaintiff has no means to recover and the threat of unmasking the identities of the users is merely employed as a fear tactic, adding yet another avenue for SLAPP suits to scare away prospective defendants and drown out dissent — the threat of unmasking alone chills speech and severely limits the ability of individuals to advocate on issues of public importance. Lawsuits commenced for the purpose of identifying and silencing anonymous online critics pose the most severe threat when brought by public officials.[109] If permitted, Devin Nunes's suit would create a dangerous blueprint for other public officials to punish critics and revoke citizens' right to speak anonymously.[110]

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/en/rules-and-policies/twitter-impersonation-policy [https://perma.cc/HCU5-6UTG] (last visited Nov. 1, 2022). Interestingly, "Nunes ultimately fell victim to the Streisand effect: when an attempt to censor something ends up bringing more attention to it," as his lawsuit increased the popularity of these Twitter users, including Devin Nunes' Cow, which began with around 1,200 followers. Kate Irby, *Devin Nunes Sued a Parody Account with About 1,000 Followers. Here's How Many It Has Now*, MCCLATCHY DC (Mar. 19, 2019), https://www.mcclatchydc.com/news/policy/technology/article228117599.html. For instance, Devin Nunes' Cow now has nearly 747,000 followers. @DevinCow, TWITTER, https://twitter.com/devincow?s=11&t=u9MQM2OB9DdCdflsIKBCPw [https://perma.cc/SDR2-R9LF] (last visited Nov. 1, 2022).

108. *See, e.g.*, Nathaniel Plemmons, *Weeding Out Wolves: Protecting Speakers and Punishing Pirates in Unmasking Analyses*, 22 VAND. J. ENT. & TECH. L. 181, 189, 202 (asserting that SLAPP suits "loom large in the modern anonymous speaker's mind" and explaining the "real-world effects that unmasking efforts can have on anonymous speakers — namely, forcing them to endure behavior that anti-SLAPP statutes were designed to curtail").

109. Joshua R. Furman, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 215 (2001).

110. The notion of an anonymous plaintiff in a defamation case is counterintuitive, as it is incompatible with the public vindication that a favorable court resolution would have in repairing a prospective plaintiff's reputational damage. However incongruous, some plaintiffs have made the effort to file anonymous defamation cases that could be deemed SLAPP suits. *See, e.g.*, Rachel Mahoney, *Lynchburg Man Sues for Defamation over Jan. 6 Capitol Protest Posts, Claims He Was Forced to Resign from His Job*, NEWS & ADVANCE (Apr. 17, 2021), https://newsadvance.com/news/local/lynchburg-man-sues-for-defamation

In an effort to protect the anonymity and constitutional rights of defendants, some courts have established standards for plaintiff requests to reveal their opposing party's identity.[111] One specific effort resulted in the creation of the Dendrite test (named after *Dendrite International, Inc. v. Doe No. 3*, the case in which the standard originated), which sets guidelines for trial courts to follow when faced with a request for an order compelling an internet service provider (ISP) to reveal the identity of an anonymous Internet poster.[112] When considering whether to identify an anonymous Internet speaker, courts:

> (1) require notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence [in] support in each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff if the subpoena is not enforced against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing.[113]

The Dendrite analysis requires the plaintiff to substantiate a prima facie cause of action before a court will enforce an unmasking order.[114] Because the First Amendment protects against the compelled identification of anonymous speakers, courts should adhere to the Dendrite factors in deciding whether to require identification of Doe defendants in

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-over-jan-6-capitol-protest-posts-claims-he-was-forced/article_b563ad64-9e12-11eb-8fe1-f39d2b9e4664.html [https://perma.cc/ND5J-U493]; *see also* Doe v. Briscoe, 61 Va. Cir. 96 (Va. Cir. Ct. 2003) (applying statutory factors for assessing pseudonymous plaintiffs as derived from a Fourth Circuit case *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

111. *See, e.g.*, Plemmons, *supra* note 108, at 196 ("Courts are still obligated to balance the rights of injured plaintiffs seeking to uncover anonymous wrongdoers with those of defendants exercising their right to anonymous speech on the internet. As such, many courts require plaintiffs to make a threshold showing before permitting discovery into an anonymous internet speaker's identity.").

112. Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

113. Memorandum of Amici Curiae Public Citizen, ACLU, and ACLU of Virginia in Support of Motion to Quash Subpoena at 9, Nunes v. Twitter, Inc., No. CL19-1715-00 (Va. Cir. Ct. Dec. 9, 2019).

114. *Dendrite*, at 775.

particular cases.[115] Given that identification of internet posters encroaches on an individual's right to speak anonymously, a court should not compel discovery from any individual unless a plaintiff can demonstrate, through admissible, sufficient proof that each poster violated the plaintiff's legitimate rights.[116] Nunes is assertedly unable to make such a showing here, since the Cow's Twitter criticism is constitutionally protected political rhetoric, parody, and opinion.[117]

Nunes's case brings up unique issues regarding the unmasking of anonymous internet users in particular, but Nunes continues to employ SLAPP suits widely, against several defendants in various suits that may or may night involve internet users or ISPs specifically, in order to silence

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115. *Id.* at 760–61

> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.;

*see also Anonymity*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/anonymity [https://perma.cc/DH2S-QFKZ] (last visited Nov. 1, 2022) ("The Supreme Court has ruled repeatedly that the right to anonymous free speech is protected by the First Amendment.") (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995)).

116. *See McIntyre*, 514 U.S. at 357 ("Anonymity is a shield from the tyranny of the majority . . . [I]n general, our society accords greater weight to the value of free speech than to the dangers of its misuse."). Evidence that is typically admissible can present a problem in the context of SLAPP suits and anonymous internet users, given that some state evidence rules permit pre-litigation discovery before an actual legal case is filed (and thus before its merits are analyzed). If such rules are deemed to be outside the scope of anti-SLAPP protections, not only can defendants' identities be unveiled but defendants may be required to spend significant time and money battling the admissibility of evidence in cases that may later be dismissed as meritless. *See* Sophia Cope & Aaron Mackey, *Texas Supreme Court Subtly Provides Stronger Protections for Anonymous Speakers*, ELEC. FRONTIER FOUND. (Feb. 6, 2019), https://www.eff.org/deeplinks/2019/02/texas-supreme-court-subtly-provides-stronger-protections-anonymous-speakers [https://perma.cc/PJ35-7KW8] (discussing Glassdoor, Inc. v. Andra Grp., LP, 575 (S.W.3d 523 (Tex. 2019)).

117. Defendant's Reply, Nunes v. Twitter, Inc., No. CL19-1715-00 (2019); *see also* Tom Porter, *The Attorney of a DNC Staffer Named in a Lawsuit About the 'Devin Nunes' Cow' Parody Twitter Account Pointed out That Cows Can't Actually Type*, BUS. INSIDER (Nov. 27, 2019, 9:30 AM), https://www.businessinsider.com/attorney-tells-devin-nunes-cows-cant-type-over-parody-lawsuit-2019-11 [https://perma.cc/TVW7-4Y34].

his critics in all their different forms.[118] In 2019 alone, "Nunes filed six lawsuits . . . alleging political operatives, journalists, parody accounts and others had [all] defamed him online."[119] Although some of these claims have been dismissed,[120] Nunes shows no signs of relenting in this strategy, and has instead launched continual threats to bring similar litigation, even against his own congressional colleagues.[121] Nunes has been referred to as "a serial SLAPP abuser," who as a result of his wealth and influence, "can torture little guys with pleadings."[122] Ironically, Nunes resigned from his congressional position in 2021 to assume the CEO position of Trump

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118. *See, e.g.*, Robin Abcarian, *Devin Nunes Sued a Fake Cow. And Kept Suing and Suing and Suing . . .*, L.A. TIMES (Oct. 20, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-10-20/abcarian-sunday-column [https://perma.cc/RG39-DHV4]; Jonathan Miller, *It's Devin Nunes v. World When it Comes to Lawsuits*, ROLL CALL (Dec. 3, 2019, 1:40 PM), https://www.rollcall.com/news/hoh/its-nunes-v-world-when-it-comes-to-lawsuits [https://perma.cc/E3PA-VJAX]; Sher Watts Spooner, *Devin Nunes May Regret SLAPPing His Critics*, DAILY KOS (Dec. 8, 2019, 12:30 PM), https://www.dailykos.com/stories/2019/12/8/1903524/-Devin-Nunes-may-regret-SLAPPing-his-critics [https://perma.cc/4WUU-QH5E].

119. Kate Irby, *Twitter Demands Legal Fees from Devin Nunes' Attorney in New Filing over Fake Cow's Identity*, FRESNO BEE (Feb. 6, 2020), https://www.fresnobee.com/news/local/article240046358.html#storylink=cpy.

120. *See, e.g.*, Jonathan Stempel, *Trump Ally Devin Nunes Loses Washington Post Defamation Appeal*, REUTERS (Apr. 1, 2022, 12:19 PM), https://www.reuters.com/world/us/trump-ally-devin-nunes-loses-washington-post-defamation-appeal-2022-04-01/ [https://perma.cc/4PHD-QQRX]; Liz Dye, *Another Devin Nunes Defamation Lawsuit Turned into Hamburger by Virginia Supreme Court*, ABOVE THE LAW (Mar. 4, 2022, 1:28 PM), https://abovethelaw.com/2022/03/another-devin-nunes-defamation-lawsuit-turned-into-hamburger-by-virginia-supreme-court/ [https://perma.cc/9QEF-YRJM].

121. Mary Papenfuss, *SHOVE IT: Rep. Ted Lieu Responds to Devin Nunes' Lawsuit Threat,* HUFFINGTON POST (Jan. 18, 2019), https://www.huffpost.com/entry/ted-lieu-devin-nunes-lev-parnas-shove-it_n_5e2275eac5b674e44b985f5c [https://perma.cc/6Q49-UUVJ]. Although both Twitter and Liz Mair have been relieved from Nunes' lawsuit, the claim against the satirical cow remains over three years later. TechDirt, *Devin Nunes Drops SLAPP Case He Lost Against Guy He Claims Is the Husband of the Satirical Tweeting Cow Who Mocks Him*, ABOVE THE LAW (July 29, 2022, 1:13 PM), https://abovethelaw.com/2022/07/devin-nunes-drops-slapp-case-he-lost-against-guy-he-claims-is-the-husband-of-the-satirical-tweeting-cow-who-mocks-him/ [https://perma.cc/V3GK-DADE].

122. Casey, *supra* note 40; *see also Lawyer Who Frequently Represents Devin Nunes Is Sanctioned for Filing Frivolous Defamation Suit*, FIRST AM. WATCH (May 7, 2021), https://firstamendmentwatch.org/devin-nuness-lawyer-sanctioned-for-filing-frivolous-defamation-suit/ [https://perma.cc/8WVK-THNJ].

Media & Technology Group, and upon taking the position claimed that "[t]he time ha[d] come to reopen the Internet and allow for the free flow of ideas and expression without censorship."[123] Today, Nunes is undertaking the creation of a new social media app, "Truth Social," which he has already attempted to fill the ranks of with his own right-wing allies,[124] and his Twitter is painted with accusations that various internet channels, including YouTube, censor his political allies' speech.[125] The paradox of Nunes's anti-censorship advocacy amid his litany of SLAPP suits is demonstrative of SLAPP litigants' true intent: to control the outcomes of speech rather than to mitigate reputational harm.

Nunes is not alone in capitalizing on SLAPP suits to silence critics — this tactic is growing in popularity among other politicians and elected officials. For instance, Virginia Lieutenant Governor Justin Fairfax filed a $400 million suit against CBS after the broadcast company interviewed two women that had accused Fairfax of sexual assault and later aired these interviews during its regular programming.[126] CBS has categorized Fairfax's claim as a SLAPP suit designed to "silence accusers" and "disparage . . . his political opponents."[127] Fairfax's strategy was similarly employed by Donald Trump, who sued Tarla Makaeff for defamation after she filed a lawsuit against Trump University, accusing the entity of fraud.[128] Intimidation and impediment are part of Trump's arsenal, as "[h]e deploys an array of tactics to fight back — countersuits, threats and personal insults, among others — while using stringent confidentiality

123. Jeremy B. White, *Nunes Quits Congress for Trump Media Job*, POLITICO (Dec. 6, 2021, 4:55 PM), https://www.politico.com/news/2021/12/06/devin-nunes-will-leave-congress-523826 [https://perma.cc/MGP9-GSYM].

124. Edward Helmore, *Harsh Truth: Trump's Social Media App Follows Long Line of Failed Ventures*, GUARDIAN (Apr. 9, 2022, 5:00 PM), https://www.theguardian.com/us-news/2022/apr/09/truth-social-trump-app-failed-products [https://perma.cc/Z8GP-XCP4].

125. Devin Nunes (@DevinNunes), TWITTER (Dec. 8, 2020), https://twitter.com/devinnunes/status/1336457874483130370?s=42&t=u9MQM2OB9DdCdflsIKBCPw [https://perma.cc/BU89-WW44].

126. Matthew Barakat, *CBS Claims Justin Fairfax's Lawsuit Against Broadcaster is an Effort to Silence Accusers*, ABC 7 (Nov. 5, 2019), https://wjla.com/news/local/cbs-claims-fairfax-lawsuit-an-effort-to-silence-accusers [https://perma.cc/2Y6V-KRBX].

127. *Id.*

128. Frances Stead Sellers, *How 'Thin-Skinned' Donald Trump Uses Insults, Threats and Lawsuits to Quiet Critics*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/politics/how-thin-skinned-donald-trump-uses-insults-threats-and-lawsuits-to-quiet-critics/2016/07/14/252ae148-1b83-11e6-8c7b-6931e66333e7_story.html [https://perma.cc/S7M9-D567].

agreements to guard against insider accounts from employees, business partners, his former spouses and now his campaign staffers."[129] Defamation claims are likely to remain part of the strategy to silence critics, especially given their prior efficacy.[130]

## III. ANTI-SLAPP PROTECTIONS & CHALLENGES

In an era where SLAPP suits have flourished, particularly in their use against activists and critics, anti-SLAPP protections are essential. Currently, thirty-two states, as well as the District of Columbia and Guam, have anti-SLAPP laws, all of which range in scope, structure, and efficacy.[131] Anti-SLAPP laws "'focus on the swift and efficient dismissal of frivolous lawsuits against protected activity and emphasize subjecting the SLAPPed party to as little time in court as possible. These statutes thus force plaintiffs to take a harder look at litigation by both deterring meritless claims and hastening their resolution.'"[132] Despite the well-intended nature of these provisions, anti-SLAPP protections contain deficiencies or can be applied in a limited manner, thus undermining their accessibility or effectiveness to defendants.

### *A. Lack of Standardization*

There is great variation in the scope of anti-SLAPP provisions that are available to defamation defendants.[133] Interpreted broadly, anti-SLAPP

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129. *Id.*

130. Maggie Severns, *Judge Lets Trump University Plaintiff Step Down*, POLITICO (Mar. 22, 2016, 3:05 PM), https://www.politico.com/story/2016/03/trump-university-lawsuit-plaintiff-221101 [https://perma.cc/6E9Y-KQE4].

131. Laura Prather, *Anti-SLAPP Circuit Split Makes State Protections Uncertain*, LAW360 (Aug. 27, 2020), https://www.law360.com/articles/1304859/anti-slapp-circuit-split-makes-state-protections-uncertain?copied=1 [https://perma.cc/8E4X-EAJR].

132. Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 995 (2019) (quoting Benjamin Ernst, *Fighting SLAPPs in Federal Court:* Erie, *the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181, 1187 (2015)).

133. In addition to shaping the scope of anti-SLAPP provisions, legislatures may also seek to redefine the scope of speech subject to defamation protections. This would undercut the power of anti-SLAPP laws by expanding the type of speech potentially subject to liability, which could have a significant chilling effect. Limiting reporters' protections would have a similarly deleterious effect on speech. One proposed Florida bill seeks to do just that. Lili Levi & Lyrissa Lidsky, *Here's How Florida Could Become the Capital of Weaponized Libel*

statutes "allow[ ] a defendant to defeat a lawsuit if [they] can 'show that the claim is based on an action involving public participation, petitioning, or free speech covered by the statute.'"[134] When considered more closely, however, anti-SLAPP statutes have significant variations and with these variations come meaningful consequences for defendants. For instance, New York's anti-SLAPP provision protects law offers narrow protection . . . [for] speech that comments on, rules on, or contests an application or permission by the government"[135] — a "narrow" safeguard limited to government-related comments and critics of government decision making. Pennsylvania's statute, however, is an even narrower provision "that applies only to individuals petitioning the government about environmental issues."[136] In stark contrast, California's anti-SLAPP provision affords defendants "a special motion to strike a cause of action against a person arising from *any act* of that person in furtherance of the *person's right of petition or free speech* . . . in connection with a public issue"[137] — providing far more expansive protection than New York's statute given that it covers any public issue (rather than only government-related issues), and shields any act of free speech (rather than only specific topics and forms of speech). California's special motion to strike liberally guards defendants "who are sued for a variety of expressive activities" so

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*Suits*, DAILY BEAST (Mar. 3, 2023), https://www.thedailybeast.com/florida-could-become-the-capital-of-weaponized-libel-suits [https://perma.cc/MP3V-G88K] ("Not only does the [proposed HB 991] statute impose 'limitations on judicial determination[s] of [who constitutes] a public figure,' but it also redefines actual malice to require a factfinder to infer actual malice under a variety of circumstances . . . [and treats] statement by an anonymous source as presumptively false."). The statute would codify that any "allegation that the plaintiff has discriminated against another person or group because of their race, sex, sexual orientation, or gender identity constitutes defamation per se." FLA. HB 991 (proposed), https://www.flsenate.gov/Session/Bill/2023/991/BillText/Filed/PDF [https://perma.cc/2HPG-QYZS]. The legislation would also impose a statutory minimum recovery (i.e., statutory damages) of $35,000 and award prevailing plaintiffs' attorneys' fees under these relaxed standards. *Id.* Moreover, the bill would render the journalist's privilege inapplicable against defamation claims. *Id.*

134. Fields, *supra* note 132, at 995 (quoting Ernst, *supra* note 132, at 1188).

135. Bergelson, *supra* note 31, at 23 (emphasis in original) (internal quotation marks omitted).

136. *Pennsylvania*, REPS. COMM. FOR FREEDOM OF THE PRESS (citing 27 PA. STAT. AND CONS. STAT. ANN. §§ 7707, 8301–03 (West 2019)), https://www.rcfp.org/anti-slapp-guide/pennsylvania/ [https://perma.cc/3HZK-5JZ2] (last visited Nov. 1, 2022).

137. *Id.* (emphasis added).

long as these activities fall under the standard of public interest, which California courts have interpreted broadly.[138] Only if the plaintiff then proves a *probability* of prevailing can the claim proceed. Such statutes "can short-circuit expensive discovery in civil cases, require a plaintiff to make a significant showing of likely success on the merits early in the litigation process, and compel the award of attorneys' fees and costs to a successful defendant" — deterrents that are lacking in most other states given the many variations and inconsistent court interpretations of anti-SLAPP statutes.[139]

The impact of these variations is also exemplified in the different evidence requirements to survive early dismissal. At least one scholar has noted that state courts have "interpret[ed] particular language within their anti-SLAPP laws to allow plaintiffs to survive early dismissal by merely pointing to unproven and unsworn-to allegations in their pleadings."[140] For example. Texas' anti-SLAPP suit allows for pleadings to be considered as evidence, meaning that even where individuals bringing SLAPP suits lack evidence for each element of their claim, their suit can proceed solely on the basis of the facts stated in the initial pleading.[141] The majority of states that have anti-SLAPP statutes and also *define* admissible evidence have obscure, up-to-interpretation definitions, allowing pleadings to act "as conclusive evidence" of potentially non-meritorious claims.[142] This ambiguity, along with the fact that most states fail to define what evidence is acceptable in anti-SLAPP suits in the first place, "invites chaos by

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138. Matthew D. Bunker & Emily Erickson, *Ain't Turning the Other Cheek: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC L. REV. 801, 803–04 (2019) (noting that one California appellate court interpreted the public-interest standard so broadly that "a dispute between a fourth grade basketball coach and members of a parent teacher organization regarding parental complaints about the coach's abrasive coaching style constituted an issue of public interest") (quoting Daniel v. Wayans, 8 Cal. App. 5th 367, 386 (2017)) (citations omitted)).

139. Bunker & Erickson, *supra* note 138, at 801.

140. Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 431 (2017).

141. *See* Rio Grande H2O Guardian v. Robert Muller Fam. P'ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App. Jan. 29, 2014) ("'In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.'") (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a)) (West 2019)).

142. Sherwin, *supra* note 140, at 467.

allowing courts to construe anti-SLAPP statutes in a manner that frustrates their purpose."[143]

By affecting a defendant's level of protection and likelihood of success when faced with a SLAPP suit, these variations result in forum shopping.[144] Virginia, for instance, has been a preferred forum for defamation plaintiffs in a phenomenon described as "SLAPP tourism."[145] Virginia's anti-SLAPP statute protects defendants in limited causes of action, such as "tortious interference, defamation, and claims relating to *conspiracy* to injure a person or entity's reputation."[146] Although many states with anti-SLAPP provisions exclude knowingly written or oral statements made with knowledge of their falsity or with reckless disregard as to whether or not they are true,[147] Virginia goes further in its deficiencies by failing to guaranty attorney fees to a successful defendant (stating only that a defendant "may be awarded reasonable attorney fees and costs" if their case is dismissed[148]), and denying defendants any special motion provision, like the one California provides.[149] These two deficiencies, in combination, allow SLAPP plaintiffs to arduously drag out expensive litigation and pre-trial proceedings, creating a hostile environment for defendants attempting to utilize anti-SLAPP provisions.[150] The lack of standardization is also "inconsistent with the certainty essential to the effective deterrence of SLAPPs" because when

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143. *Id.*

144. Nicole Lafond, *GOP Strategist Hits Back at Nunes Lawsuit: He's Afraid of His Own State's Laws*, TPM (May 15, 2019, 12:04 PM), https://talkingpointsmemo.com/news/liz-mair-forum-shopping-nunes-lawsuit [https://perma.cc/G2DM-L85J].

145. Justin Jouvenal, *Devin Nunes, Johnny Depp Lawsuits Seen as Threats to Free Speech and Press*, WASH. POST (Dec. 22, 2019, 8:00 PM), https://www.washingtonpost.com/local/legal-issues/devin-nunes-johnny-depp-lawsuits-seen-as-threats-to-free-speech-and-press/2019/12/22/eef43bc8-1788-11ea-a659-7d69641c6ff7_story.html [https://perma.cc/TLT9-ZYLZ].

146. Cheryl Mullin & Erica Mahoney, *Strategic Lawsuits Against Public Participation: Avoiding the Sting of an Anti-SLAPP Challenge*, 40 FRANCHISE L.J. 647, 652 (2021).

147. Lauren Merk, *Strategic Lawsuits Against Public Participation in the Age of Online Speech: The Relevance of Anti-SLAPP and Anti-CyberSLAPP Legislation*, 5 U. CIN. INTELL. PROP. & COMPUT. L.J. 1, 16 (2021). Other states that have such an exception include Arkansas, Nebraska, Nevada, New York, Pennsylvania, Tennessee, and Virginia. Mullin & Mahoney, *supra* note 146, at 653.

148. VA. CODE ANN. § 8.01-223.2 (West 2020).

149. Mullin & Mahoney, *supra* note 146, at 15–16.

150. Merk, *supra* note 147, at 17 (citing Jouvenal, *supra* note 145).

"individuals and groups are unsure whether their petitioning activities will be protected by an anti-SLAPP measure, its ability to mitigate the suits' chilling effect on public participation will be negligible."[151]

### *B. Lack of Procedural Mechanisms*

In addition to substantive deficiencies, procedural safeguard inadequacies may also plague state anti-SLAPP laws and harm defendants as a result of the aforementioned legal inconsistencies. This was exemplified in the case of *Tayloe v. C-Ville Weekly*, where the circuit court held "that Plaintiff [] failed to state a claim for defamation upon which relief can be granted," the court "decline[d] to reach the question of immunity under Va. Code § 8.01-223.2."[152] Thus, although the claim was determined to be meritless, there was no actual adjudication of the anti-SLAPP provision. Absent a separate procedural mechanism that would allow for an anti-SLAPP argument to be considered in isolation from other merits arguments, it is possible to circumvent the statute entirely in judicial decision-making, rendering the protections of the law illusory, and with it the defendant's prospect for fee recovery.

This is partly because, in Virginia, the state statute does not specify a special procedure for filing anti-SLAPP motions.[153] This is problematic for several reasons. First, Virginia practitioners have had to guess which one of the existing procedural mechanisms serves as the best vehicle to

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151. Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 849 (2010).

152. Order Sustaining Defendant Jalane Schmidt's Demurrer, Tayloe v. C-Ville Holdings, L.L.C., No. CL19-868 (Va. Cir. Ct. Nov. 4, 2019).

153. Joe Mullin, *Virginia Anti-SLAPP Bill Is Good for Free Speech but Can Still Be Made Stronger*, ELEC. FRONTIER FOUND. (Feb. 18, 2020), https://www.eff.org/deeplinks/2020/02/virginia-anti-slapp-bill-good-free-speech-can-still-be-made-stronger [https://perma.cc/H3FA-QMFQ]:

> H.B. 759 ties its anti-SLAPP motion to Virginia's limited "demurrer" or regular motion to dismiss process. The main problem with this procedural mechanism is that it doesn't allow for a SLAPP defendant to attach affidavits, or show new evidence. A defendant simply has to ask the judge overseeing the case to call a SLAPP a SLAPP without having the opportunity to tell their story.;

*see also* Melissa Wasser, *Virginia Legislators Pass Bills Aimed at Dismissing Frivolous Lawsuits Restricting First Amendment Rights*, REPS. COMM. FOR FREEDOM OF THE PRESS (Feb. 20, 2020), https://www.rcfp.org/virginia-anti-slapp-bills-analysis/ [https://perma.cc/7HPX-LTZS] ("Crucially, however, it fails to identify a procedure, like a special motion to dismiss, that would give the defendant a chance to dismiss the case at an early stage before costly discovery.").

challenge such claims. This creates inconsistency in the presentation of SLAPP issues before the courts and fails to clarify how courts should respond to such claims. Second, the use of current procedural mechanisms still requires significant cost and investment. The use of a demurrer or plea in bar, two state-specific procedures with varying requirements in Virginia, have been utilized to raise an immunity defense; however, the need to present evidence or participate in a hearing, can also contribute to litigation costs that increase the expense, and thus the burden, of defending against a defamation claim. Virginia state law essentially asks a judge "to conduct an early assessment of the plaintiff's probability of success . . . [with] no presumptive limitation of discovery, and no provision for an interlocutory appeal when anti-SLAPP motions are denied."[154] Third, judges are less likely to make an adjudication under an anti-SLAPP provision if they can dispose of the issue on easier grounds. This lack of a separate mechanism means that, at least in Virginia, litigants are comingling SLAPP arguments in pleadings concerning the underlying deficiency of the claim.[155] Without requiring judges to decide this specific question, and ultimately develop case law on this issue, Virginia will fail to effectively deter SLAPP actions. As in the *Tayloe* case, when a judge fails to reach an assessment under anti-SLAPP grounds, fee recovery — which is permissive, not mandatory, under Virginia's current statute — is not even a possibility.[156] Thus, the impact of anti-SLAPP legislation is lost because the intended deterrent mechanism has no enforcement arm or judicial bite. Without additional direction or intervention from the state legislature, these challenges are likely to continue.

### *C. Limits on Fee Recovery*

Permissive, rather than mandatory, fee-shifting standards also undermine the efficacy of anti-SLAPP legislation. Although "the costs of defending a defamation suit for an individual can vary depending on the circumstance, they are likely the same as other types of civil claims, ranging from $43,000 (for an automobile claim) to $91,000 (for a contract

154. Paul Alan Levy, *Virginia Updates Its Anti-SLAPP Law, Stiffening the Standard for Many Libel Claims*, PUB. CITIZEN (Mar. 20, 2017), https://pubcit.typepad.com/clpblog/2017/03/virginia-updates-its-anti-slapp-law-stiffening-the-standard-for-many-libel-claims.html [https://perma.cc/6R7C-HTGY].

155. This is in contrast to other jurisdictions which permit a SLAPP counterclaim, *see* N.Y. C.R. LAW § 70-a (McKinney 2020), or special motion to dismiss, *see* D.C. CODE ANN. § 16-5502(a), (d) (West 2012).

156. VA. CODE ANN. § 8.01-223.2 (West 2020).

claim)."[157] While some courts facing SLAPP suits maintain the presumption in favor of awarding attorneys' fees absent special circumstances that would make such an award improper,[158] other courts require defendants to first prove that the immunity provision applies at all. Importantly, "[t]he determination of whether…speech touches a matter of public concern[159] [that would implicate an immunity provision] rests on a particularized examination of each statement to determine whether it can be fairly considered as relating to any matter of political, social, or other concern to the community."[160] It is also problematic if courts avoid assessing anti-SLAPP arguments altogether, and instead dismiss defamation claims on other grounds.[161] In those cases, defendants would face the same financial burden of litigation to defend their speech, but would have no ability to recover fees or even to force courts to consider

157. Leader, *supra* note 69.

158. *See* 28 U.S.C. § 2412(d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a) . . . unless the court finds that . . . special circumstances make an award unjust."). This leaves open the possibility that a prevailing defendant in a SLAPP suit is not awarded attorneys' fees. *See, e.g.*, Williams v. Chino Valley Indep. Fire Dist. 347 P.3d 976, 988 (Cal. 2015) ("A prevailing *defendant*, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.").

159. What constitutes a matter of public concern is generally a question of law for the court. *See* Gaeta v. N.Y. News, Inc., 465 N.E.2d 802, 805 (N.Y. 1984) (noting that "there are no mechanical rules" for identifying matters of public concern). Courts do, however, provide guiding methodologies to determine whether a matter is of public concern, including the following: 1) analyzing the statements "in the context of the writing as a whole, and not as disembodied, words, phrases or sentences," 2) focusing on the "subject of the communication, not the particular viewpoint expressed," 3) "expressly analyzing the content, form and context of a given statement, as revealed by the whole record," rather than simply motive, "which is not dispositive" as to whether speech relates to a matter of public concern, and 4) a weighing of private and public interest. Reuland v. Hynes, 460 F.3d 409, 418 (2d Cir. 2006) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

160. Barrett v. Univ. of Colo. Health Scis. Ctr., 851 P.2d 258, 263 (Colo. App. 1993).

161. For an example of such a case, see Intercom Sols., Inc. v. Basel Action Network, 791 F.3d 729, 732 (7th Cir. 2015) (holding that the relevant anti-SLAPP statute was inapplicable given its conflict with the FRCP and deciding the case on other grounds); *see also* Makaeff v. Trump Univ., L.L.C., 715 F.3d 254 (9th Cir. 2013) (Kozinski, J., concurring) (indicating that the anti-SLAPP law "creates no substantive rights").

fee recovery. Other civil rights suits provide an additional layer of deterrence through mandatory fee-shifting provisions, but anti-SLAPP legislation fails to consistently provide the same level of financial and deterrent protection.[162] Even when courts do reach the anti-SLAPP applicability and arguments, there may be ambiguity in identifying who the prevailing party is for fee-shifting purposes, especially where there are cross-claims or multiple statements at issue.[163]

### *D. Potential Conflict with the Federal Rules of Civil Procedure*

While some state legislation creates additional protections against SLAPP suits, such as SLAPP-Back suits, common law litigation torts, and automatic stays and verifications of discovery,[164] state-specific safeguards might not always be available to the parties in federal court. Although defamation litigation is typically conducted in state courts, there are times,

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162. Fee recovery for a prevailing plaintiff is available under the Civil Rights Act of 1964, Fair Housing Act, Fair Labor Standards Act, Age Discrimination in Employment Act of 1967, Equal Credit Opportunity Act, Voting Rights Act of 1965, Individuals with Disabilities Education Act, and Americans with Disabilities Act of 1990, among others. *See* LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (Oct. 22, 2009).

163. Cathy Gellis, *How Civil Subpoenas Are Used to Unmask Online Speakers, and How a Recent Decision Will Help Deter Bogus Ones*, TECHDIRT (Nov. 30, 2018, 10:44 AM), https://www.techdirt.com/2018/11/30/how-civil-subpoenas-are-used-to-unmask-online-speakers-how-recent-decision-will-help-deter-bogus-ones/ [https://perma.cc/Z3CG-ULZ5].

164. *See* Theodore Z. Wyman, Annotation, *Applicability of State Anti-SLAPP Statutes in Federal Diversity Cases*, 45 A.L.R. Fed. 3d Art. 4 (2019) (explaining that some circuits have "recognized that a state's anti-SLAPP statute is not available to a defendant in a federal diversity suit" and others have explicitly held state-specific "provisions related to discovery stays and verification" are inapplicable in federal court); Elizabeth Troup Timkovich, *Risk of SLAPP Sanction Appears Lower for Internet Identity Actions in New York than in California*, 74 N.Y. STATE BAR J. 40, 41 (2002) (listing state-specific SLAPP-Back suits and litigation torts as additional protections and noting that "[i]n addition to the remedies provided in individual state anti-SLAPP statutes . . . there are many common law and statutory methods for imposing sanctions and recovering monetary awards"); 1 THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 2:59 (2022) (noting that automatic stays of discovery, which halt expensive and invasive discovery in the face of potentially meritless claims, is not available in federal court).

notably in cases of diversity jurisdiction,[165] that it is conducted in federal court.[166] Courts sitting in diversity "apply state substantive law and federal procedural law."[167] The *Erie* Doctrine governs state claims adjudicated in federal court; it requires federal courts to apply state law on substantive issues, but federal law on procedural issues.[168] *Erie* attempts "to create uniformity of predictable outcome between cases tried in a federal court and those tried in the courts of the state in which the federal court sits."[169]

Although the *Erie* Doctrine might seem to effectively transpose state SLAPP protections into federal court, there is currently a federal appellate circuit split as to whether state SLAPP provisions are applicable as substantive provisions, or whether they must cede to procedures established by the Federal Rules of Civil Procedure (FRCP), which govern all cases in federal court. The Second Circuit is the latest court to deepen the existing circuit split, joining the Fifth, Eleventh, and D.C. Circuits in holding that state SLAPP laws are inapplicable in federal court because of certain conflicting FRCP rules.[170] By contrast, the First and Ninth Circuits found no such conflict with the federal rules and applied the state anti-SLAPP statutes in those proceedings.[171]

Specifically, those circuits that hold state SLAPP laws inapplicable in federal court believe that said laws conflict with FRCP 8, 12, and 56.[172] Rule 8 of the FRCP requires any pleading stating a claim for relief to include "a short and plain statement of the claim showing that the pleader is entitled to relief."[173] This rule "sets the standards for the sufficiency of

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165. 28 U.S.C. § 1332(1)(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between — (1) citizens of different States; [or] (2) citizens of a State and citizens or subjects of a foreign state.").

166. Diversity jurisdiction permits the parties in litigation from separate states to sue in federal court on a question of purely state law, if the amount in controversy is more than $75,000. 28 U.S.C. § 1332.

167. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

168. *See, e.g.*, Alexander A. Reinert, *Erie Step Zero*, 85 FORDHAM L. REV. 2341, 2342 (2017) ("The doctrine introduced by *Erie Railroad Co. v. Tompkins* requires federal courts sitting in diversity jurisdiction to apply state substantive law to resolve state law claims."); Wyman, *supra* note 164, at § 2 ("Under *Erie*, a federal court sitting in diversity jurisdiction applies the state's substantive law and the federal procedural rules.").

169. *Id.*

170. La Liberte v. Reid, 966 F.3d 79, 87 (2d Cir. 2020).

171. *Id.*

172. *Id.*

173. FED. R. CIV. P. 8.

a claim."[174] Rule 12 permits responsive motions to assert a defense, including if the other party "fail[s] to state a claim upon which relief can be granted." Such motions "must be made before pleading if a responsive pleading is allowed."[175] Thus, Rule 12 "*tests* the sufficiency of a claim" and allows for dismissal if a plausible claim for relief is not given.[176] Lastly, Rule 56 permits summary judgment only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"[177] — functioning to "ensure that there are genuine issues to be tried."[178] Taken together, these rules govern the procedural mechanism for dismissing cases and the standards for granting pre-trial judgment to defendants in federal court. Importantly, a federal court presiding over a case in "diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure answer[s] the same question as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act."[179]

The D.C. Circuit found that FRCP 12 and 56 "answer the same question" as the District's Anti-SLAPP Act, but that D.C.'s provision was in conflict with these rules because it "set[] up an additional hurdle a plaintiff must jump over to get to trial" by requiring a showing of likelihood of success on the merits.[180] Whereas "[u]nder the Federal Rules, a plaintiff is generally entitled to trial if he or she meets the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment . . . the D.C. Anti-SLAPP Act nullifies that entitlement in certain cases."[181]

Similarly, the Eleventh Circuit relied on FRCP Rules 8, 12, and 56 in holding Georgia's anti-SLAPP provision inapplicable. In the opinion, the court noted that the former two rules "define the criteria for assessing the sufficiency of a pleading before discovery," while Rule 56 "governs whether a party's claim is supported by sufficient evidence to avoid

174. Caitlin E. Daday, *(Anti)-SLAPP Happy in Federal Court?: The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPs*, 70 CATH. U. L. REV. 441, 455 (2021).

175. FED. R. CIV. P. 12.

176. Daday, *supra* note 174, at 455 (emphasis added).

177. FED. R. CIV. P. 56(a).

178. Daday, *supra* note 174, at 455.

179. Abbas v. Foreign Pol'y Grp., L.L.C., 783 F.3d 1328, 1333 (D.C. Cir. 2015) (internal quotation marks) (citations omitted).

180. *Id.* at 1333–34.

181. *Id.*

pretrial dismissal."[182] The Eleventh Circuit found that "[t]he standard for pleading imposed by the anti-SLAPP statute differs from Rules 8 and 12 by requiring the plaintiff to establish a *probability* that he will prevail on the claim asserted in the complaint" — a degree not required under "the plausibility standard" under the FRCP, which plainly "do[] not impose a probability requirement at the pleading stage." Moreover, the circuit held that Georgia's "motion-to-strike procedure also conflicts with Rule 56" because the state anti-SLAPP provision "contemplates a substantive, evidentiary determination of the plaintiff's probability of prevailing on his claims" whereas "under Rule 56, a nonmovant need only designate specific facts showing that there is a genuine issue for trial."[183]

In yet another instance of state SLAPP laws being held inapplicable in federal court, the Fifth Circuit broadly established "that a state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules," finding the Texas Citizens Participation Act (TCPA) inapplicable.[184] The court determined that the statute's "burden-shifting framework and heightened evidentiary standards for pretrial dismissal collide with" FRCP 12 and 56.[185] This burden shift requires plaintiffs, in order to avoid dismissal, to present clear and specific evidence for each element of their claim once the defendant proves the statement at issue affects First Amendment rights.[186] FRCP 12 and 56, on the other hand and as the court noted, do not require any presentation, discovery, or weighing of evidence in the pre-dismissal stage.[187] Thus, the court eschewed the TCPA's "evidentiary weighing requirements" given their absence in the Federal Rules.[188] This ruling was directly contradicted by the Ninth Circuit when it affirmed the district court's finding in *Clifford v. Trump* that the Texas anti-SLAPP statute did apply in federal court, citing the Restatement (Second) Conflicts of Law to support its application of Texas Law.[189]

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182. Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018).

183. *Id*. at 1350–51 (internal quotation marks omitted).

184. Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

185. *Id.*

186. Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH L. REV. 633, 658 (2018).

187. *Klocke*, 936 F.3d at 246.

188. *Id.* (internal quotation marks omitted).

189. Clifford v. Trump, 339 F. Supp. 3d 915, 922 (C.D. Cal. 2018), *aff'd*, 818 F. App'x 746 (9th Cir. 2020) ("In defamation lawsuits involving 'multistate communication,' a court must apply 'the local law of the state where the plaintiff

The Second Circuit determined that California's anti-SLAPP statute was not applicable in federal court. California's law establishes a special motion to dismiss claims "unless the plaintiff can establish [ ] a probability that he or she will prevail on the claim."[190] In contrast, the federal rules pleading burden permits a plaintiff to proceed if they "allege enough facts to state a claim to relief that is plausible on its face." Because California's statute would abrogate the entitlement to proceed on the basis of "a well-pleaded complaint" and "impose a probability requirement at the pleading stage," it was held to be in conflict with the FRCP.[191] The Second Circuit also found a conflict with Rule 56. The statute would require parties attempting to overcome a motion for summary judgment "to prove that it is likely, and not merely possible, that a reasonable jury would find in his favor," exceeding Rule 56's less stringent requirement of "identifying any genuine dispute of material fact" to proceed to trial.[192] The court also found the statute's attorneys' fees award inapplicable in the federal proceeding because the law authorized "*only* . . . a prevailing defendant *on a special motion to strike*,"[193] to recover fees, thus precluding recovery of fees "based on the district court's Rule 12(b)(6) dismissal," or if the defendant prevails on means other than the special motion to strike.[194] Thus, without a finding under the anti-SLAPP law, a defendant who otherwise achieves a dismissal is entirely precluded from any attorneys' fees award given that the court granted the dismissal on some other basis.[195]

The judgment of the Second Circuit and the reasoning of its fellow sister circuits stand in contrast to the holdings of the Ninth and First Circuits. Notably, the *La Liberte* court came to the opposite conclusion as the Ninth Circuit, which analyzed California's anti-SLAPP provision and determined its applicability in federal court over two decades ago. In 1999, the Ninth Circuit found that the California anti-SLAPP statute's motion to strike and attorneys' fees provisions could coexist with "provisions and

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has suffered the greatest injury by reason of [her] reputation,' which 'will usually be the state of the plaintiff's domicile if the matter complained of has there been published.'") (quoting RESTATEMENT (SECOND) CONFLICTS OF LAW § 150 (AM. L. INST. 1971).

190. La Liberte v. Reid, 966 F.3d 79, 87 (2d Cir. 2020) (internal quotation marks omitted) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

191. *Id.*

192. *Id.*

193. *Id.* (citing CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2015)) (emphasis in original).

194. *Id.* at 88–89.

195. *See id.*

Rules 8, 12, and 56 [with] . . . each controlling its own intended sphere of coverage without conflict."[196] Although acknowledging the statute and rules served similar purposes by "weeding out [ ] meritless claims before trial," the Ninth Circuit held "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims."[197] The Ninth Circuit confirmed this holding as recently as 2013 in *Makaeff v. Trump University*, reasoning that the anti-SLAPP statute supplements, rather than abrogates, the FRCP and noting that California enacted an equivalent rule to FRCP 12 alongside their anti-SLAPP statute — "reflecting a legislative intent that the statutes exist in harmony."[198]

The Second Circuit's decision therefore directly conflicts with the Ninth Circuit's analysis applying *Erie* and precedent holdings to determine that California's anti-SLAPP law indeed applied in federal diversity cases.[199] This undercuts the protection of a law that the Ninth Circuit, and presumably the California legislature, had determined Californians could avail themselves of in federal court. As discussed, many anti-SLAPP statutes create a special mechanism to dispense with these cases. Such provisions are, in part, procedural. They determine which party bears the evidentiary burden, what showing the party must make, and non-burdensome procedure by which to dispose of the litigation; however, these rules are also substantive, aiming to deter bad contact and providing efficient adjudication in such matters.[200]

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196. U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999).

197. *Id.*

198. Wyman, *supra* note 164.

199. Joseph S. Persoff, *Second Circuit Says No California Anti-SLAPP Motions in Federal Court*, EMP. L. SPOTLIGHT (July 16, 2020), https://www.employmentlawspotlight.com/2020/07/second-circuit-says-no-california-anti-slapp-motions-in-federal-court/ [https://perma.cc/6RQF-ZU3U]:

> [T]he Ninth Circuit concluded that the anti-SLAPP statute generally applies in federal court, but it since has held that aspects of the statute – such as (1) the deadline to file the motion, (2) the prohibition against amending the complaint and (3) the general stay of discovery once the motion is filed – do not apply.

200. *See* William James Seidleck, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. PA. L. REV. 547, 575 (2018) ("[T]he purpose of anti-SLAPP statutes is to shield substantive speech rights by defining and limiting the *application* of state-law causes of action.") (emphasis added); Noah Brown, *Anti-SLAPPED in the Face: The Applicability of Anti-SLAPP Statutes in Federal Courts*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 265, 289 (2022) (outlining specific states' anti-

The Second Circuit's reasoning is also inconsistent with the First Circuit's findings that Maine's anti-SLAPP provision applied in federal court:

> [The statute] d[id] not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function . . . but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities.[201]

In determining the statute's provisions were "so intertwined with a state right or remedy that it function[ed] to define the scope of the state-created right," the court deduced that neither Rule 12(b)(6) nor Rule 56 could not replace the anti-SLAPP protections granted to Maine residents, even in federal court.[202] The First Circuit also determined that neither of the two rules proscribes "which party bears the burden of proof on a state-law created cause of action" and that the "allocation of [the] burden of proof is substantive in nature and controlled by state law."[203] Additionally, the circuit court concluded that the state anti-SLAPP provision "provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail. It is not the province of either Rule 12 or Rule 56 to supply substantive defenses or the elements of plaintiffs' proof to causes of action, either state or federal."[204]

Discrepancies in the applicability of state provisions in state versus federal courts will only further encourage forum shopping.[205] As a result of the Second Circuit's decision and the worsening circuit divide, "a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum" and "a litigant otherwise entitled to the protections of the anti-SLAPP statute would find considerable disadvantage in a federal proceeding."[206]

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SLAPP laws and showing that multiple federal circuits have determined that said laws are purely procedural).

201. Godin v. Schencks, 629 F.3d 79, 89 (1st Cir. 2010).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Virginia's Not for Lovers: Why Virginia May See More Defamation Claims After* Depp v. Heard, HOLLAND & KNIGHT (June 7, 2022), https://www.hklaw.com/en/insights/publications/2022/06/virginias-not-for-lovers-why-virginia-may-see-more-defamation-claims [https://perma.cc/FR7Q-H7V5].

206. U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999)

This decision will likely catalyze litigation as parties attempt to determine which anti-SLAPP provisions are substantive and which are procedural, given that the Second Circuit referenced the possibility that an anti-SLAPP's law application is substantive.[207] The *Adelson* court broached the issue when it declared that "the effects of the [Nevada] Anti-SLAPP law . . . are substantive."[208] Nevada's statute, which "immunizes 'good faith communication[s]'--defined as communications that are 'truthful or . . . made without knowledge of . . . falsity'--thereby effectively raising the *substantive* standard that applies to a defamation claim" was determined to be distinct from California's anti-SLAPP statute, which creates a higher *procedural* standard pre-discovery.[209] This intra-circuit ambiguity has the potential to further compound the existing inter-circuit split, complicate defamation litigation in federal courts, and leave litigants uncertain about their protections and requirements when faced with litigation in federal court.[210] Ultimately, the questions of anti-SLAPP laws' applicability in federal courts and substantive versus procedural

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207. *See* Thomas Williams, *Survey of Federal Courts of Appeals Cases Addressing Applicability of Anti-SLAPP Statutes in Federal Court*, HAYNES BOONE (Oct. 21, 2019), https://www.haynesboone.com/news/publications/survey-of-federal-courts-of-appeals-cases-addressing-applicability-of-anti-slapp-statutes [https://perma.cc/NY7E-ADER] ("In *Adelson v. Harris*, the Second Circuit approved the use of Nevada's anti-SLAPP statute in federal court in part because 'immunity' and fee-shifting statutes are substantive under *Erie*."). The *Adelson* court explicitly noted that "each" of Nevada's anti-SLAPP rules is "substantive within the meaning of *Erie*, since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity." Adelson v. Harris, 774 F.3d 803 (2d Cir. 2014).

208. Adelson v. Harris, 973 F. Supp. 2d 467, 504 n.21 (S.D.N.Y. 2013), *aff'd*, 867 F.3d 413 (2d Cir. 2017).

209. La Liberte v. Reid, 966 F.3d 79, 94 n.3 (2d Cir. 2020) ("[T]he Nevada statute does not establish a 'reasonable probability of success' standard that must be met without discovery, like the California Anti-SLAPP law.") (quoting *Adelson*, 973 F. Supp. 2d at 493 n.21).

210. There are other prospective constitutional issues, including the right to a jury, due process, and equal protection. For instance, a plaintiff may argue that retroactive application of a new statute offends due process because of reasonable reliance interest. Palin v. N.Y. Times Co., 510 F. Supp. 3d 21, 25 (S.D.N.Y. 2020). "[I]n order to comport with due process, there must be a 'persuasive reason' for the 'potentially harsh' impacts of retroactivity." In re Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972 (N.Y. 2020) (quoting Holly S. Clarendon Tr. v. State Tax Comm'n, 374 NE.2d 1242 (N.Y. 1978)).

characterization will likely need to be resolved by the Supreme Court; however, the Court has avoided taking up these issues thus far.[211]

## IV. PROSPECTIVE SOLUTIONS

Although it is possible to develop anti-SLAPP protections in the common law, given the variation between jurisdictions, legislative solutions on the state or federal level would most significantly protect prospective defendants.[212] Colorado, which only recently codified their limited anti-SLAPP common law protections, is an apt example.[213] The state's pre-statutory protections were grounded in a case in which the Colorado Supreme Court "balance[d] constitutional free speech rights with the deterrence of baseless litigation."[214] While this case ultimately streamlined and facilitated the process for defendants to obtain dismissal of SLAPP suits, the state's subsequent legislation has bolstered these protections significantly — beyond the early dismissal mechanism created in common law. The current provision now "offers defendants the opportunity to recover costs and attorneys' fees if they are successful on a special motion to dismiss (with some narrow exceptions)."[215]

Anti-SLAPP legislation allows for a consistent standard across judicial circuits, provides parity for defendants, and limits some of the

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211. Any time the Court has been presented with the opportunity to answer this question, they have denied it:

> [In 2018] the Supreme Court denied a petition for certiorari filed by the defendant in the Tenth Circuit case, which asked the Court to decide "[w]hether a state anti-SLAPP provision requiring expedited disposition of dismissal motions applies in federal court, as the First and Fifth Circuits have concluded, in conflict with the D.C. Circuit and the Tenth Circuit below." In 2016, the Court denied a petition for a writ of certiorari that wanted the Court to decide "[w]hether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the Erie doctrine."

Leslie Machado, *And Now There Are Two . . .*, LECLAIRRYAN (Dec. 18, 2018), https://dcslapplaw.com/2018/12/18/and-now-there-are-two/ [https://perma.cc/N2UM-XDNE].

212. Prior federal statute proposals include the (1) Citizen Participation Act of 2020, (2) Speak Free Act of 2015, (3) Free Press Act of 2012, and (4) Citizen Participation Act of 2009.

213. *Colorado Enacts Anti-SLAPP Law*, JD SUPRA (July 2, 2019), https://www.jdsupra.com/legalnews/colorado-enacts-anti-slapp-law-10215/ [https://perma.cc/S6TS-AAK7] [hereinafter *Colorado Anti-SLAPP*].

214. *Id.*

215. *Id.*

most egregious forum-shopping challenges. Although thirty-four jurisdictions provide anti-SLAPP protections, the scope and nature of those protections vary. In 2020, New York strengthened its existing protections, while Pennsylvania and Ohio are still considering provisions to bolster existing anti-SLAPP laws.[216] By contrast, legislation to enhance anti-SLAPP protections in Iowa, Maryland, and Virginia failed to survive their respective legislative sessions, as did efforts to introduce new anti-SLAPP protections in West Virginia and Kentucky.[217]

How such legislation is crafted is significant in securing robust mechanisms for dismissal and clearly outlined grounds for when this dismissal is or is not appropriate. Provisions within anti-SLAPP statutes vary both in definitions and levels of protection, but all generally include: (1) descriptions of protected speech within economic, social, and political spheres; (2) a dismissal mechanism; and (3) a fee-shifting or recovery provision.[218] The most protective language and policies will have the greatest deterrent impact by providing remedies for relief early in litigation, while still permitting meritorious claims to proceed.[219] For

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216. Prather, *supra* note 131.

217. *Id.*

218. *See, e.g.*, *The Importance of Anti-SLAPP Statutes*, AM. C.L. UNION OHIO, https://www.acluohio.org/en/importance-anti-slapp-statutes [https://perma.cc/Q9PA-BSFZ] (last visited Nov. 1, 2022) ("Anti-SLAPP statutes commonly include some sort of clear statements of protection for speech in certain areas of public importance, along with a legal procedure for early dismissal of a SLAPP and recovery of the attorney's fees and court costs incurred while defending against a SLAPP."); Laura Long, *SLAPPing Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Person*, 60 OKLA. L. REV. 419 (2007) (noting that "several core provisions are common to most state [anti-SLAPP] laws" including (1) coverage of public advocacy and government communications, (2) addressing of all government forums, and (3) a "mode for prevention and cure" (citing GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 189 (1996)).

219. Some advocates take an absolutist perspective and call for the abolition of all defamation laws. *See, e.g.*, Walter Block, *Libel Laws Should All Be Repealed*, ECONLOG (June 12, 2021), https://www.econlib.org/libel-laws-should-all-be-repealed/ [https://perma.cc/5FT2-3A5S]; Walter E. Williams, *Abolish Libel Laws, Don't Strengthen Them*, GASTON GAZETTE (Jan. 26, 2018), https://www.gastongazette.com/story/opinion/columns/2018/01/26/column-abolish-libel-laws-dont-strengthen-them/15637387007/ [https://perma.cc/HXN6-7XQD]. However, even in states where there are anti-SLAPP laws in place, claims can be successfully vindicated. *See, e.g.*, Dave Collins, *Alex Jones Seeks New Trial After $965 Million Verdict in Sandy Hook Lawsuit*, PBS (Oct. 22, 2022), https://www.pbs.org/newshour/nation/alex-jones-seeks-new-trial-after-965-

instance, "California [law] enables the defendant in a SLAPP suit to file one in return after successfully obtaining dismissal of the original SLAPP suit . . . [which] essentially behaves as a malicious prosecution lawsuit."[220] This model, also followed by Delaware, Hawaii, Minnesota, Nevada, New York, Rhode Island, and Utah,[221] forcefully deters SLAPP suits by putting the litigant at risk of a correctional suit lodged against them should they bring a meritless claim.

In addition to efforts by legislators, many legal institutions and interest groups, have worked to formulate their own proposals. For instance, the Uniform Law Commission adopted the Uniform Public Expression Protection Act (UPEPA) on July 15, 2020, which provides guidance to establish consistent anti-SLAPP standards at the state level.[222] The UPEPA's mandatory attorney fee provision at the dismissal stage, early

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million-verdict-in-sandy-hook-lawsuit [https://perma.cc/D44L-GWJG]; CONN. GEN. STAT. ANN. § 52-196a(b) (2019).

220. *Colorado Anti-SLAPP*, *supra* note 201.

221. *See* DEL. CODE ANN. 10, § 8138 (West 2014) ("A defendant in an action involving public petition and participation . . . may maintain an action, claim, cross-claim or counter-claim to recover damages."); S.B. 3329, 31st Leg., Reg. Sess. (Haw. 2022) (declaring that the state's new anti-SLAPP law "seeks to shift the burden of litigation back to the party bringing the SLAPP claim by providing for expedited judicial review, a stay on discovery, and sanctions"); MINN. STAT. ANN. § 554.045 (West 1997) ("A person may bring an action under this section in state district court against a respondent who has brought a claim in federal court that materially relates to public participation by the person."); NEV. REV. STAT. ANN. § 41.670(1)(c) (West 2019) ("The person against whom the action is brought may bring a separate action."); N.Y. C.R. LAW § 70-a (McKinney 2020) ("A defendant in an action involving public petition and participation . . . may maintain an action, claim, cross claim or counterclaim to recover damages . . . from any person who commenced or continued such action."); R.I. GEN. LAWS ANN. § 9-33-2(d) (West 2019) (mandating awards of compensatory damages and permitting awards of punitive damages "upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or free speech"); UTAH CODE ANN. § 78B-6-1405(1) (West 2019) ("A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim.").

222. UNIF. PUB. EXPRESSION PROT. ACT § 2(b)(3) (UNIF. L. COMM'N 2020) [hereinafter UNIF. PUB. EXPRESSION PROT. ACT] (enumerating that the act applies to civil actions made "against a person based on the person's . . . exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or the *state* Constitution, on a matter of public concern") (emphasis added).

and automatic stays of discovery, interlocutory appeals of motion rulings, and expansive definition of "public participation," provide "substantial protections for citizens who exercise their First Amendment rights."[223] These provisions are evidence that solidified and far-reaching provisions that fully safeguard SLAPP defendants and their constitutional rights are not beyond legislative reach.

Federal legislation would also ensure consistent nationwide anti-SLAPP protections.[224] It has been suggested that an effective federal anti-SLAPP law would build on the previously proposed Speak Free Act of 2015, which includes the following provisions: "(1) a broad SLAPP definition with specific exceptions, (2) a pleading standard that avoids both vagueness concerns and a [Seventh] Amendment conflict,[225] (3) a removal provision that includes explicit conditions, and (4) an enumerated commerce clause hook."[226] Such legislation should also avoid potential

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223. Prather, *supra* note 131 (citing UNIF. PUB. EXPRESSION PROT. ACT, *supra* note 222).

224. Sophia Cope, *Federal Anti-SLAPP Bill Introduced in the House*, ELEC. FRONTIER FOUND. (May 21, 2015), https://www.eff.org/deeplinks/2015/05/federal-anti-slapp-bill-introduced-house [https://perma.cc/3WKU-MKPU].

225. Courts have expressed "concern that [anti-SLAPP laws] . . . might be read to allow, contrary to Rule 56, a judge to resolve a disputed material issue of fact, would then preclude a party from exercising its Seventh Amendment rights to trial by jury on disputed issues of material fact." Godin v. Schencks, 629 F.3d 79, 90 (1st Cir. 2010); *see, e.g.*, Unity Healthcare, Inc. v. Cnty. of Hennepin, 308 F.R.D. 537, 549 (D. Minn. 2015):

> There is an additional reason not to apply Minnesota's anti-SLAPP motion to dismiss procedure in federal court even where Minnesota law supplies the rule of decision. To apply Minn. Stat. § 554.02, subd. 2, and resolve disputed factual issues in the manner required by the Minnesota Supreme Court's decision in *Leiendecker*, would deprive the plaintiffs in this case of their constitutional right to a jury trial for their defamation and tortious interference claims. In *Leiendecker*, the court noted that its understanding of the plain language of section 554.02, subd. 2, presented a potential deprivation of a plaintiff's constitutional right to a jury trial under the Minnesota Constitution. 848 N.W.2d at 231–33 But because the appellant had not raised that issue, the court declined to address it. Here, however, the potential deprivation of the plaintiffs' constitutional right to a jury trial by application of Minn. Stat. § 554.02, subd. 2, is of sufficient importance to inform the Court's decision on the issue whether the anti-SLAPP procedure may be applied.

226. Bergelson, *supra* note 31, at 236–37 (explaining that "a special motion to dismiss with a likelihood of success burden of proof may be inherently vague and require the judge to commandeer the jury's role" given that the "standard seems to require judges to engage in tasks traditionally assigned to the jury, like making

Fourteenth Amendment conflicts regarding adequate notice,[227] as well as due process concerns arising from potentially vague/ambiguous[228] standards or terminology.[229] It is possible, if not likely, that "until federal anti-SLAPP legislation is adopted, state legislatures will be left to respond to the central causes of uncertainty associated with anti-SLAPP law — availability, validity, applicability, and appealability."[230] This is especially true for those sued in states that have weak anti-SLAPP provisions or no anti-SLAPP protections at all.[231]

Model legislation should include: an encompassing definition of what speakers and speech are to be protected; a clear procedural mechanism or special motion for resolution of claims consistent with existing state or federal frameworks; time limitation or stay for discovery; interlocutory appeal mechanism; and fee-shifting provision for recovery of litigation costs.[232] Such legislation should also account for the disparate impact SLAPP suits have on individuals and groups — including racial justice advocates, survivors, and political dissenters — who may already be uniquely marginalized by legal institutions, and who may be further

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factual determinations, weighing evidence, and assessing the evidence's credibility . . . risks violating the Seventh Amendment.").

227. Permitting retroactive application of revisions to New York's anti-SLAPP statute, finding "retroactive application" did not "offend due process where, as here, plaintiff will face no 'harsh impacts.'" Coleman v. Grand, No. 18CV5663ENVRLM, 2021 WL 768167 (E.D.N.Y. Feb. 26, 2021); Bo Pearl & Caitlin Devereaux, *New York Appellate Court Holds Revised Anti-SLAPP Statute Not Retroactive*, PAUL HASTINGS (Mar. 28, 2022) (noting that "[p]rior to the *Gottwald v. Sebert* ruling, courts applied the revised New York statute to earlier claims in at least eight cases, including *Palin v New York Times Co.*, 510 F.Supp.3d 21, 27 (S.D.N.Y. 2020)").

228. Plaintiff asserted "the anti-SLAPP statute is unconstitutionally vague and, thus, violates his right to due process under both the state and federal constitutions because the statute does not provide an identifiable and explicit standard of proof" and that "the probable cause standard is unconstitutionally vague." Gifford v. Taunton Press, Inc., No. DBDCV186028897S, 2019 WL 3526461, at *9 (Conn. Super. Ct. July 11, 2019) (rejecting vagueness arguments).

229. Such provisions could also potentially conflict with state constitutional protections, such as the right to a jury in civil cases. Nick Phillips & Ryan Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute*, 69 MERCER L. REV. 407, 423–24 (2018) (noting "Courts in three states-two of which are the highest court in their respective states-have ruled that anti-SLAPP statutes . . . are unconstitutional" in reference to holdings in Washington, New Hampshire, and Minnesota).

230. *Id.*

231. Mullin, *supra* note 153.

232. *See, e.g.*, UNIF. PUB. EXPRESSION PROT. ACT, *supra* note 222.

disempowered from engaging in advocacy because of the risk that is imposed by the mere threat of meritless, retaliatory claims.

## CONCLUSION

The First Amendment exists "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Holding individuals liable for identifying as a survivor, an advocate, someone who speaks out, or speaks truth to power — and for pointing out the public backlash they experience for doing so — would remove far too much speech from the field of free debate.[233] This is especially true in cases where SLAPP suits are used as a pretext for unmasking anonymous speakers, who are also protected by the First Amendment.[234] As a result of their cost, time, invasiveness, and other corresponding burdens of litigation, SLAPP suits have the effect of chilling the free expression of ideas. This flagrant abuse of the judicial system should be immediately curtailed in order to protect those who must defend themselves against SLAPP suits.[235]

233. Roth v. United States, 354 U.S. 476, 484 (1957).

234. Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 166–167 (2002); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

235. Dave Maass, *How the Court System Is Abused to Chill Activist Speech*, ELEC. FRONTIER FOUND. (Dec. 11, 2017), https://www.eff.org/deeplinks/2017/12/video-how-court-system-abused-chill-activist-speech [https://perma.cc/3HWN-BP4G].