

ValpoScholar

Valparaiso University Law Review

Volume 41
Number 3 Spring 2007

pp.1235-1284

Spring 2007

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Recommended Citation

Shannon Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, 41 Val. U. L. Rev. 1235 (2007).

Available at: <https://scholar.valpo.edu/vulr/vol41/iss3/9>

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Notes

PROTECTING INFORMED PUBLIC PARTICIPATION: ANTI-SLAPP LAW AND THE MEDIA DEFENDANT

I. INTRODUCTION

In 1996, television talk show host Oprah Winfrey focused an episode of her show on the topic of dangerous foods, including a discussion on beef and mad cow disease.¹ Texas cattlemen alleged that Winfrey's remarks on the show had caused cattle futures to drop and sued her on a business disparagement claim.² Winfrey defended the suit in federal court and the Fifth Circuit determined that the cattlemen had failed to show that Winfrey or her guests had made false statements on the program.³ While a media giant as wealthy as Winfrey may have the resources to defend such a suit to its end, the litigation might have been effective to silence a defendant with fewer resources at his or her disposal.

In 2003, radio talk show host Tom Leykis refused to air comedian Marty Ingels' comments when Ingels called in to Leykis's show because Ingels was outside the show's targeted age demographic.⁴ Unlike Oprah Winfrey, Tom Leykis and Westwood One Broadcasting Services had the benefit of California Civil Procedure Code, section 425.16.⁵ Section 425.16 permits a party to file a special motion to strike a claim arising out of "any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in

¹ Engler v. Winfrey, 201 F.3d 680, 683-84 (5th Cir. 2000).

² *Id.* at 684-85; Tim Jones, *The Public Starts SLAPPING Back; States Enact Relief for Sued Dissenters*, CHI. TRIB., Dec. 26, 2005, at 11.

³ Engler, 201 F.3d at 687-89. The case was initiated in Texas state court and then removed to federal court upon a motion by the defendants. *Id.* at 684-85. Texas has not enacted legislation deterring SLAPPs. See The California Anti-SLAPP Project, <http://www.casp.net/> (last visited Sept. 28, 2006) (listing all current anti-SLAPP legislation across the United States, including pending bills).

⁴ Robert W. Welkos, *Not Too Old to Sue Tom Leykis; Comedian Marty Ingels, Who Called the Show, Says He's Fighting Age Bias with a Lawsuit Against the Radio Host*, L.A. TIMES, July 6, 2005, at E1. Leykis's radio show was aimed at young singles and Ingels called the show because he found Leykis's dating advice offensive. *Id.*

⁵ Ingels v. Westwood One Broad. Servs., Inc., 28 Cal. Rptr. 3d 933, 944 (Ct. App. 2005), *reh'g denied*, No. S134735, 2005 Cal. LEXIS 9474 (Cal. Aug. 24, 2005) (concluding that Leykis's and the radio station's act of providing a forum through a radio talk show was within the scope of CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2006)).

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connection with a public issue.”⁶ Ingels filed an age discrimination lawsuit against Leykis and the station, but because of section 425.16, both Leykis and the station were able to protect their editing discretion and get the suit dismissed at an early stage of the litigation.⁷ Under the statute, Ingels was also responsible for the defendants’ attorney’s fees.⁸

Since the late 1980s, public concern over lawsuits aimed at punishing or silencing a party’s exercise of free speech or right to petition the government has been slowly on the rise.⁹ Such suits are termed Strategic Lawsuits Against Public Participation (“SLAPPs”).¹⁰ SLAPP suits are frequently identified with development projects in which citizens petition local government to curtail certain development activity and the developers sue the citizens to discourage their complaints.¹¹ Consequently, most states that have passed anti-SLAPP legislation have done so with the large commercial developer versus local citizen scenario in mind.¹² However, comparatively few states have passed anti-SLAPP legislation that protects broader First Amendment interests such as freedom of speech and freedom of the press.¹³

A narrowly-worded statute may protect most direct citizen communications with government officials, but do little to prevent SLAPP suits aimed at citizens for speech not directly addressed to government officials or suits filed with the specific intent of silencing the media on a given issue.¹⁴ The Society of Professional Journalists (“SPJ”) has encouraged states to enact anti-SLAPP legislation protecting a free press and has drafted a model anti-SLAPP law and lobbying plan.¹⁵

⁶ CAL. CIV. PROC. CODE § 425.16(b)(1); see *Ingels*, 28 Cal. Rptr. 3d at 939.

⁷ See *Ingels*, 28 Cal. Rptr. 3d at 949; see also *Welkos*, *supra* note 4, at E1.

⁸ CAL. CIV. PROC. CODE § 425.16(c) (stating that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs”); *Ingels*, 28 Cal. Rptr. 3d at 949.

⁹ Margaret Graham Tebo, *Offended by a SLAPP: As Lawsuits Against Citizens Expand, Countermeasures Are Rolled Out*, A.B.A. J., Feb. 2005, at 16 (describing the increased proliferation of different types of SLAPP suits). See generally *Jones*, *supra* note 2, at 11 (discussing the increasing amount of state legislation aimed at stopping SLAPP litigation).

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.A; see also Malena F. Barzilai, *Public Taking a ‘SLAPP’ with Filing of Frivolous Suits; Strategic Lawsuits Against Public Participation*, THE QUILL, Sept. 1, 2004, at 22 (describing an example of a common SLAPP as “a defamation suit brought by a land developer against an individual who spoke out against the developer’s plan during a zoning board meeting”).

¹² See *infra* Part II.C.1.

¹³ See *infra* Parts II.C.2-II.C.3.

¹⁴ See *infra* Part II.C.

¹⁵ See Barzilai, *supra* note 11, at 22. This Note argues for a similar definition of protected activity to that set forth in the SPJ model statute: “conduct in furtherance of the exercise of

Unfortunately, the view that the media is too powerful and intrusive may be one reason why many anti-SLAPP laws are not worded to include media activity.¹⁶

A free press has long been recognized as one of the bedrocks of citizen participation in government through its role in keeping people informed about issues of public concern and providing a forum for debate about public issues.¹⁷ An individual or organization bringing an

the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." *Id.* Scholars George W. Pring and Penelope Canan have also proposed a model anti-SLAPP statute that defines protected activity as:

Acts in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result, or outcome.

GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 203 (1996) [hereinafter PRING & CANAN]. The text leading up to Pring and Canan's proposed definition of protected activity does not specifically contemplate media defendants. *See id.* at 188-201.

¹⁶ *See* Barzilai, *supra* note 11, at 22 (advocating anti-SLAPP legislation broad enough to protect the media, but acknowledging that overly broad language would be unlikely to garner sufficient support in state legislatures or with public interest groups); Enrique J. Gimenez, *Who Watches the Watchdogs?: The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal*, 52 ALA. L. REV. 675 (2001) (criticizing the media as an entity that creates news for profit as opposed to reporting news to inform the public); Lyrixa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 173-84, 234-39 (1998) (criticizing sensationalized news and arguing for a clearer interpretation of the tort of intrusion to protect individual privacy against the media); Tebo, *supra* note 9, at 16 ("Juries hate the media. God help you when you sue the almighty media and they make you out like some kind of nut." (quoting Cincinnati attorney Richard Creighton)).

¹⁷ *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (explaining that speech on "matters of public concern" is "at the heart of the First Amendment's protection" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978))); *Cox Broad. Co. v. Cohn*, 420 U.S. 469, 491 (1975) ("In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (considering a public official's defamation suit "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). *See generally* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (giving a history of the Press Clause and recognizing the importance of press to citizen participation in government); Jon Paul Dilts, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25 (2002) (discussing the tension between First Amendment protections of speech and newsgathering conduct in the context of role of the press as citizen); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort*

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action to silence the media is often asserting a claim of defamation, invasion of privacy, or intentional infliction of emotional distress—defamation in particular being one of the most common complaints in SLAPP litigation.¹⁸ Anti-SLAPP protection for the media could streamline the existing protections of the press against defamation and invasion of privacy claims by providing a smooth, efficient process for defeating suits brought to silence legitimate media reporting.¹⁹ In a society in which the media plays a crucial role in informing citizens about current issues and encouraging them to participate in government, anti-SLAPP legislation that protects the press should be a priority for every state.

Part II of this Note categorizes the different definitions of protected activity under anti-SLAPP statutes as Narrow, Moderate, or Broad.²⁰ Part III analyzes why the media has failed or succeeded in defending itself through the anti-SLAPP laws of different states and whether the laws as administered reflect or expand the First Amendment protections articulated in U.S. Supreme Court precedent.²¹ Based on the case law from the states that have examined the applicability of anti-SLAPP law to media defendants, Part III also examines the state anti-SLAPP definitions of petitioning activity and burdens of proof that best protect citizen participation for both individuals and the media without leaving the door open for media abuse.²² Drawing on the strongest aspects of the existing state statutes, Part IV proposes a model definition of petitioning activity and burden of proof for states seeking to enact anti-

Liability for Surreptitious Newsgathering, 4 WM. & MARY BILL RTS. J. 1145 (1996) (arguing for a balancing test in the application of tort law to newsgathering conduct due to the public interests implicated in press communications).

¹⁸ Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 612 (1998) (“Defamation is by far the most commonly utilized tort [in SLAPP suits].”).

¹⁹ See, e.g., *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004), *cert. denied*, 126 S. Ct. 368 (2005) (invoking the state anti-SLAPP statute to defeat a plaintiff’s invasion of privacy claim when the press had published information that was a matter of public record); *Thompson v. Emmis Television Broad.*, 894 So. 2d 480 (La. Ct. App. 2005) (invoking anti-SLAPP protection to deflect a defamation suit brought by a plaintiff who was a public figure); see also PRING & CANAN, *supra* note 15, at 189 (describing effective early procedural review as an essential element of an effective anti-SLAPP law).

²⁰ See *infra* Part II.C. Within each category, Part II also explores the media’s use of anti-SLAPP statutes and success or lack thereof based on the nature of protected activity and the safeguards written into each statute to prevent abuse.

²¹ See *infra* Part III.

²² See *infra* Part III.

SLAPP legislation that protects the freedom of the press.²³ Part V concludes this Note with a summary of the argument for media protection under state anti-SLAPP law.²⁴

The existing case law on the subject demonstrates that the extent of anti-SLAPP protection the press can invoke is directly related to the language of the statutes that legislatures enact.²⁵ As this discussion will illustrate, anti-SLAPP legislation broad enough to protect the press also serves the purpose of promoting citizen participation in government by protecting the source from which many citizens glean critical information about current events.²⁶

II. BACKGROUND: ANTI-SLAPP LAW AND THE MEDIA DEFENDANT

Beginning in 1989, states began addressing the problem of SLAPP litigation aimed at discouraging people from exercising their right to petition the government.²⁷ Part II.A sets forth the definition of a SLAPP and discusses the most common aspects of such suits.²⁸ Next, Part II.B examines the current protections that the media enjoys in regard to claims of defamation, libel, and invasion of privacy under Supreme Court precedent as compared with state anti-SLAPP standards.²⁹ Part II.C categorizes the statutory solutions that state legislatures have used to address SLAPPs and examine the media's use of anti-SLAPP statutes within the differing scopes of SLAPP protection.³⁰

A. *Anatomy of a SLAPP*

The acronym SLAPP stands for Strategic Lawsuit Against Public Participation, a term first coined by George W. Pring and Penelope

²³ See *infra* Part IV. See also *supra* note 15 for other proposed definitions of protected activity.

²⁴ See *infra* Part V.

²⁵ See *infra* Parts II.C.1- II.C.3 (comparing and contrasting the protections of all current anti-SLAPP legislation as it relates to the media).

²⁶ See *infra* Part III; see also *supra* note 17 (describing the importance of the press in democratic government).

²⁷ Lauren McBrayer, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603, 609 (2005).

²⁸ See *infra* Part II.A. The discussion in Part II.A draws heavily on Pring and Canaan's book, *SLAPPs: Getting Sued for Speaking Out*. Published in 1996, the book was one of the earliest thorough examinations of the SLAPP suit trend and provides a detailed description of each of the most common kinds of SLAPP suits. See generally PRING & CANAN, *supra* note 15.

²⁹ See *infra* Part II.B.

³⁰ See *infra* Part II.C.

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Canan, two prominent scholars in the field of SLAPPs.³¹ A SLAPP suit is a meritless lawsuit initiated to discourage a party from exercising its First Amendment right to petition the government or right of free speech.³² Pring and Canan describe the typical SLAPP suit as a civil suit that targets a non-government party for that party's communication or other efforts directed at influencing government action on a matter of public concern.³³ A plaintiff bringing a SLAPP suit is not necessarily interested in winning the case.³⁴ Rather, SLAPP suits are used to deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court.³⁵ Claims that frequently appear in SLAPP litigation include defamation, libel, invasion of privacy, abuse of process, malicious prosecution, conspiracy, and tortious interference with contract or business relationships.³⁶ Pring and Canan describe the most common SLAPP scenarios as real estate development cases where a development company sues homeowners who have petitioned local government

³¹ PRING & CANAN, *supra* note 15, at 3; see Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J. MO. B. 124, 124 (2005) (describing Pring and Canan's book, *Getting Sued for Speaking Out*, *supra* note 15, as "a bible for lawyers in disputes involving citizen opposition and for governmental officials in adopting anti-SLAPP legislation").

³² U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); PRING & CANAN, *supra* note 15, at 1; see Kling, *supra* note 31, at 124 ("The primary purpose of a SLAPP lawsuit is not to resolve the allegation in the petition, but to punish or retaliate against citizens who have spoken out against the plaintiffs in the political arena and to intimidate those who would otherwise speak in the future."); see also Arco, *supra* note 18, at 589 ("The underlying strategy for these [SLAPP] suits is retaliation, aimed at intimidating an individual from engaging in particular behavior believed to be detrimental to the SLAPP filer.").

³³ PRING & CANAN, *supra* note 15, at 8-11. Pring & Canan break down the parties involved in a SLAPP suit and then recount the step-by-step process of the classic SLAPP scenario. *Id.* at 10-11. A party filing a SLAPP files a civil suit against a non-government party on an issue of substantial public or social import. *Id.* at 8-9. The typical situation involves citizens who take a position on an issue of public concern and express their views to a government decision-maker. *Id.* at 10. A party opposing the citizen group decides that it is finished battling the citizens in the public, political arena and forces the citizens into the private, legal arena with a lawsuit based on their political activity. *Id.* The citizen group may win the suit, but may have spent months or years in court doing so. *Id.* at 10-11.

³⁴ See Kling, *supra* note 31, at 124 (explaining that SLAPP suits are filed for retaliation and intimidation, often with the hope of spreading fear through an entire community).

³⁵ Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994) ("The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success.").

³⁶ PRING & CANAN, *supra* note 15, at 150 (instructing attorneys on the common claims that signal a SLAPP suit); Arco, *supra* note 18, at 590.

against a development project, public servants who sue the citizens for criticizing their conduct, commercial interests that sue environmental organizations for challenging their activities in regard to the manner in which those activities impact the environment, and corporate interests that sue consumers or workers that have blown the whistle on illegal corporate practices.³⁷

SLAPP suits are a national problem because they have been very effective.³⁸ Even if a party that has been the target of a SLAPP suit ultimately wins in court, the party may have spent months or years defending the suit and accumulated significant legal fees.³⁹ The threat of a major lawsuit is often more than enough to silence the petitioning activity of people who would otherwise seek to be actively involved in government affairs.⁴⁰

Many states have responded to the problem of SLAPP suits by passing anti-SLAPP legislation.⁴¹ Currently, twenty-four states and one United States territory have enacted anti-SLAPP laws.⁴² Ten states have

³⁷ PRING & CANAN, *supra* note 15, at 30, 46, 83, 128. Pring and Canan also discuss “not in my backyard” or “NIMBY” suits, which are SLAPP suits regarding locally unwanted land uses. *Id.* at 105-27. The authors characterize the NIMBY suit as a combination of the suits that occur between land developers and citizens and those that occur between corporate interests and environmentalists. *Id.* at 106.

³⁸ *Id.* at 219 (describing the chilling effect of SLAPP suits); *see also* Gordon, 590 N.Y.S.2d at 656 (“Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.”).

³⁹ *See* Gordon, 590 N.Y.S.2d at 656 (“Those who lack the financial resources and emotional stamina to play out the ‘game’ face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle.”); *see also* PRING & CANAN, *supra* note 15, at 217-18 (explaining that disproportionate damages are a common feature of SLAPP suits and that while many SLAPP targets may ultimately win the suits, the average time it took to resolve such suits was forty months).

⁴⁰ PRING & CANAN, *supra* note 15, at 219.

⁴¹ *See id.* at 188-207 (discussing the main components of an anti-SLAPP law). Pring and Canan argue that anti-SLAPP legislation must: (1) cover all public advocacy and communication with government; (2) cover all government bodies and agents; and (3) set out early review in the process of a SLAPP and shift the burden of proof to the filer. *Id.* at 189-90. The authors examine the then six existing anti-SLAPP statutes in detail and propose their own model statute. *Id.* at 190-207.

⁴² ARK. CODE ANN. §§ 16-63-501 to -508 (2006); CAL. CIV. PROC. CODE §§ 425.16 to .17 (West 2004 & Supp. 2006); CAL. CIV. CODE § 47 (West 2004 & Supp. 2006); DEL. CODE ANN. tit. 10, §§ 8136-8138 (1999); FLA. STAT. §§ 768.295, 720.304 (2005); GA. CODE ANN. § 9-11-11.1 (2006); GUAM CODE ANN. tit. 7, §§ 17101-17109 (2006); HAW. REV. STAT. §§ 634F-1 to -4 (Supp. 2005); IND. CODE § 34-7-7-1 to -10 (2006); LA. CODE CIV. PROC. ANN. art. 971 (2005); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MASS. GEN. LAWS ch. 231, § 59H (2000); MINN. STAT. §§ 554.01 to .05 (2000); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. §§ 25-21,241 to -246 (1995); NEV. REV. STAT. §§ 41.635 to .670 (2002); N.M. Stat. Ann. §§ 38-2-9.1 to -9.2 (LexisNexis 2004);

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proposed anti-SLAPP legislation but have yet to enact an anti-SLAPP bill into law, while Pennsylvania and Missouri have both considered bills that would strengthen existing anti-SLAPP protections.⁴³ Common features of anti-SLAPP laws include a mechanism for early procedural review and a mandatory award of attorney's fees for a party whose motion to dismiss under the statute is successful.⁴⁴

N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney Supp. 2007); N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1993); OR. REV. STAT. §§ 31.150-.155 (2005); 27 PA. CONS. STAT. ANN. § 7707, §§ 8301-8305 (West Supp. 2006); R.I. GEN. LAWS § 9-33-1 to -2 (2006); R.I. GEN. LAWS § 45-24-67 (1997); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2002); WASH. REV. CODE §§ 4-24-500 to -520 (West 2005). See California Anti-SLAPP Project, *supra* note 3, for a list of states with anti-SLAPP statutes and pending bills.

⁴³ The list of states that have considered anti-SLAPP bills without yet enacting an anti-SLAPP statute includes Arizona, Colorado, Connecticut, Illinois, Kansas, Michigan, New Hampshire, New Jersey, Texas, and Virginia. See California Anti-SLAPP Project, *supra* note 3, for the text of bills that state legislatures have considered. Both Missouri and Pennsylvania have considered legislation contemplating stronger anti-SLAPP measures than the State's current anti-SLAPP statute. *Id.* For example, Missouri's current anti-SLAPP statute defines petitioning activity as "conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state" and does not include a particular burden of proof for a party filing a SLAPP. MO. REV. STAT. § 537.528(1). In 2005, 2006, and 2007, Missouri considered bills that would have changed the definition of protected activity. The most recent bill defines protected activity as

speech or other petitioning activities undertaken or made at or in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state [is] shall be immune from civil liability, regardless of intent or purpose and shall possess a qualified privilege against liability for slander or libel, where such conduct, speech, or other petitioning activity is aimed at procuring any governmental action, result, or outcome.

H.B. 163, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007). The bill would have added the further requirement that the party filing suit prove through a preponderance of the evidence that the conduct of the party attempting to invoke anti-SLAPP protection was not immune from liability. *Id.*

⁴⁴ States whose laws include a mandatory award of attorney's fees to a SLAPP target who prevails on a motion to dismiss under the anti-SLAPP law include California, Florida, Guam, Hawaii, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, Oregon, Rhode Island, Tennessee, and Washington. CAL. CIV. PROC. CODE § 425.16(c); FLA. STAT. § 768.295(5); GUAM CODE ANN. tit. 7, § 17106(g); HAW. REV. STAT. § 634F-2(8)(b); IND. CODE § 34-7-7-7; LA. CODE CIV. PROC. ANN. art. 971(B); MASS. GEN. LAWS ch. 231, § 59H; MINN. STAT. § 554.04(1); MO. REV. STAT. § 537.528(2); NEV. REV. STAT. § 41.670; N.M. Stat. Ann. § 38-2-9.1(B); OR. REV. STAT. §§ 31.152(3); R.I. GEN. LAWS § 9-33-2(2)(d); TENN. CODE ANN. § 4-21-1003(c); WASH. REV. CODE § 4.24.510. States whose laws provide that a SLAPP target prevailing on a motion to dismiss *may* recover attorney's fees and costs include Arkansas, Delaware, Georgia, Maine, and New York. ARK. CODE ANN. § 16-63-506(b)(1); DEL. CODE ANN. tit. 10, § 8138(a)(1); GA. CODE ANN. § 9-11-11.1(b); ME.

The main challenge state legislatures face in drafting an anti-SLAPP statute is that in protecting one party's right to petition, an anti-SLAPP law can directly infringe on the petitioning rights of the opposing party.⁴⁵ For this reason, legislatures have sought to draft—and courts have sought to interpret—anti-SLAPP statutes in ways that protect the rights of all parties involved.⁴⁶ Some states have decided to draft broad anti-SLAPP laws and have left it to the courts to limit their reach through narrow interpretations of the statutes, while others have chosen to word their anti-SLAPP provisions narrowly to apply only to select situations.⁴⁷

REV. STAT. ANN. tit. 14, § 556; N.Y. CIV. RIGHTS LAW § 70-a(1)(a). Nebraska and Utah permit a party who has been the target of a SLAPP to *maintain an action* for attorney's fees and costs. NEB. REV. STAT. §§ 25-21,243(1); UTAH CODE ANN. § 78-58-105. See *supra* note 41 for Pring and Canan's breakdown of the common features of anti-SLAPP laws.

⁴⁵ See *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) (criticizing the Massachusetts anti-SLAPP statute for favoring one party's right to petition over another's).

⁴⁶ See, e.g., GA. CODE ANN. § 9-11-11.1(b) (requiring written verification that the complaint against a party for any acts of petition or free speech is well grounded in fact and warranted by existing law or a good faith argument to modify existing law); see also R.I. GEN. LAWS § 9-33-2(a) (limiting immunity to communications genuinely aimed at procuring favorable government action, result or outcome and excluding objectively or subjectively baseless free speech or petitioning activity); *Atlanta Humane Soc'y. v. Harkins*, 603 S.E.2d 289, 291-92 (Ga. 2004) (construing the anti-SLAPP statute such that a court must also determine that the complaint was falsely verified by failing to be well-grounded in fact or law, brought for improper purpose, or brought against otherwise privileged statements); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) (constructing the phrase "based on [said party's right to petition]" to mean that the party moving to dismiss pursuant to the anti-SLAPP statute must make a threshold showing that the opposing party's claims have no substantial basis other than or in addition to the complained of petitioning activity); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998) (explaining that a party could prevail over a motion to dismiss pursuant to the anti-SLAPP statute if the party could prove by clear and convincing evidence that the moving party's communication amounted to a tort).

⁴⁷ See, e.g., FLA. STAT. § 768.295(4) ("No governmental entity in this state shall file or cause to be filed . . . any lawsuit . . . against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state . . ."). Compare *id.* § 768.295(4), with CAL. CIV. PROC. CODE § 425.16(e) (Deering 2006), which defines protected activity to include

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

CAL. CIV. PROC. CODE § 425.16(e) (emphasis added).

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Most states have attempted to balance the petitioning rights of the parties through a procedural safeguard such as a strict burden of proof standard and requiring each side of the controversy to provide some evidence of the merit of its position before a court rules on dismissing the claim.⁴⁸

⁴⁸ See *supra* note 46. Arkansas and Georgia both require a party filing a suit against a person or entity arising from actions by the person or entity that could reasonably be construed as acts in furtherance of the right of free speech or the right to petition the government to submit a verification that the complaint is well grounded in fact or existing law or a good faith argument to change existing law. ARK. CODE ANN. § 16-63-505; GA. CODE ANN. § 9-11-11.1(b).

California and Louisiana's anti-SLAPP laws provide that 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 shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. CAL. CIV. PROC. CODE § 425.16(b)(1); LA. CODE CIV. PROC. ANN. art. 971(A)(1).

Delaware and New York require that the plaintiff prove by clear and convincing evidence that the defendant's communication was false or made with reckless disregard as to whether it was false where truth or falsity is material to the action. DEL. CODE ANN. tit. 10, § 8136(b); N.Y. CIV. RIGHTS LAW § 76-a. Different sections of the Delaware and New York anti-SLAPP statutes require a party responding to an anti-SLAPP motion to dismiss to prove that the complaint is well grounded in fact or existing law or a good faith argument to change existing law. DEL. CODE ANN. tit. 10, § 8137; N.Y. CIV. RIGHTS LAW § 70-a; N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2005 & Supp. 2007). Nebraska's burden of proof is similar to Delaware's and New York's in that the party responding to an anti-SLAPP motion to dismiss must demonstrate that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law. NEB. REV. STAT. § 25-21,245.

Guam requires the party who has filed a suit that could be characterized as a SLAPP to prove by clear and convincing evidence that the targeted party's actions were not immune pursuant to the anti-SLAPP statute. GUAM CODE ANN. tit. 7, § 17106(e) (2006).

By contrast, Hawaii requires only that the party opposing an anti-SLAPP motion to dismiss show by a preponderance of the evidence that its suit is not a SLAPP suit. HAW. REV. STAT. § 634F-2(6).

Florida, Indiana, Missouri, Nevada, and New Mexico all require the court to treat an anti-SLAPP motion to dismiss as a motion for summary judgment or a motion to dismiss on the pleadings. FLA. STAT. § 768.295(5), 720.304(4); IND. CODE § 34-7-7-9; MO. REV. STAT. § 537.528(2); NEV. REV. STAT. § 41.660(3)(a); N.M. Stat. Ann. § 38-2-9.1(B).

Maine and Massachusetts both require a party responding to an anti-SLAPP motion to dismiss to prove that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. ME. REV. STAT. ANN. tit. 14, § 556; MASS. GEN. LAWS ch. 231, § 59H. Massachusetts requires the moving party to prove that the responding party's suit is based solely on the moving party's exercise of its right to petition the government before the aforementioned burden switches to the responding party. MASS. GEN. LAWS ch. 231, § 59H.

While the government interest in protecting citizens' rights to petition is compelling, the anti-SLAPP statutes with broad protections for the exercise of free speech have been susceptible to use in situations other than the typical SLAPP scenario.⁴⁹ A possible explanation is that SLAPP suits actually take many forms that are not deterred by narrowly focused anti-SLAPP statutes.⁵⁰ One use of anti-SLAPP law that a state legislature may not ordinarily contemplate involves the media as the defendant in a defamation, libel, or invasion of privacy suit.⁵¹

B. Supreme Court Protection of the Press Against Libel, Defamation, and Invasion of Privacy Claims

The First Amendment specifically enumerates the freedom of the press as one of the basic rights protected under its provisions.⁵² However, the First Amendment does not grant the press unlimited license to publish defamatory or libelous statements, disclose

Minnesota requires the party responding to an anti-SLAPP motion to dismiss to prove by clear and convincing evidence that the moving party's actions constituted a tort or a violation of a person's constitutional rights. MINN. STAT. § 554.02(2)(3).

Oregon, like Massachusetts, imposes some burden of proof on each side pursuant to an anti-SLAPP motion to dismiss. However, the standard that the plaintiff must meet in the action is closer to the standard in California or Louisiana's anti-SLAPP statutes. In Oregon, the defendant making a special motion to strike must first make a prima facie showing that the plaintiff's claim arises out of conduct covered by the statute. OR. REV. STAT. § 31.150(3) (2005). If the defendant meets this burden, the burden shifts to the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. *Id.*

⁴⁹ See, e.g., *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002). In *Fabre*, a woman successfully used the Massachusetts anti-SLAPP statute to defeat her former boyfriend's claim of abuse of process for obtaining a restraining order against him. *Id.* at 783, 787; see also *McBrayer*, *supra* note 27 (discussing DirectTV's use of California's anti-SLAPP statute to defend its actions in sending cease and desist letters to people who had purchased illegal cable pirating equipment). In comparison, *Hawks v. Hinely*, 556 S.E.2d 547 (Ga. Ct. App. 2001) provides an example of a more typical SLAPP situation. When city officials sued citizens for the citizens' formal applications to recall the officials from office, the court held that the anti-SLAPP clearly applied to the case given that the law was enacted to prevent abusive litigation against a person exercising the right to participate in government. *Id.* at 550. In *Morse Bros., Inc. v. Webster*, 772 A.2d 842, 852 (Me. 2001), when a mulch company brought suit against abutting property owners for the owners' acts of petition against the mulch company's development plans, the court ruled that the anti-SLAPP statute applied to the case and dismissed the mulch company's suit.

⁵⁰ See *supra* note 37 and accompanying text; see also *Tebo*, *supra* note 9, at 16 (describing the proliferation of different kinds of SLAPP suits).

⁵¹ See *infra* Parts II.C.2-II.C.3.

⁵² U.S. CONST. amend. I, *supra* note 32; see also 16A AM. JUR. 2d *Constitutional Law* § 450 (2004) (explaining that the "rights of freedom of speech and of the press are among the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from impairment by state action . . .").

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information that is not of public concern, or exemption from generally applicable laws when it comes to the process of newsgathering.⁵³ While the limits on the media are few, the protections afforded the media decrease slightly in proportion to the private status of the plaintiff and of the information disclosed.⁵⁴

One of the most important cases defining media liability for defamation claims is *New York Times Co. v. Sullivan*, in which the Supreme Court held that a public official or person running for office who brings a defamation claim against the press must prove by clear and convincing evidence that the statement in question was false and published with actual malice.⁵⁵ The Court later applied the same

⁵³ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (holding that the media is not exempt from generally applicable laws with incidental effects on the press); *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (holding that a party need not prove actual malice to obtain presumed and punitive damages when defamatory speech does not involve a matter of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-49 (1974) (holding that states may define media liability in regard to media defamation of private individuals, but that a private individual asserting defamation arising from remarks on a topic of public concern must demonstrate that the statements were made with knowledge that the statement was false or with reckless disregard as to whether the statement was false in order to recover damages for defamation); *Pell v. Procunier*, 417 U.S. 817, 834 (1973) (denying the press special access to prisons); *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) (denying the press special treatment in regard to disclosure of sources pursuant to a subpoena); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that a public official asserting media defamation in regard to his or her official conduct must prove that the statements were made with actual malice—knowledge that the statement was false or with reckless disregard as to whether the statement was false). See generally Giminez, *supra* note 16 (discussing newsgathering torts as applied to the media); Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 515-17 (1998) (explaining that the majority rule among courts does not exempt the media from tort law in regard to its newsgathering activities).

⁵⁴ *Dun & Bradstreet*, 472 U.S. at 763 (permitting presumed and punitive damages—even absent a showing of actual malice—when the media publishes matters not of public concern); *Gertz*, 418 U.S. at 346-47 (permitting states to set their own standards of liability of the press when the plaintiff is not a public figure). But see *Fl. Star v. B.J.F.*, 491 U.S. 524, 534-36, 541 (1989) (refusing to hold the press civilly liable for publishing the name of a rape victim it had gleaned from public records that the government had accidentally disseminated); *Cox Broad. Co. v. Cohn*, 420 U.S. 469, 494-95 (1975) (refusing to hold newspapers liable for publishing the name of a deceased rape victim found in public records of the crime).

⁵⁵ 376 U.S. 254, 279-80 (1964). The Court defined “actual malice” as a statement made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280. In the analysis preceding its holding, the Court explained that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

standard of proof to defamation plaintiffs who were not public officials, but still qualified as public figures.⁵⁶

In *Gertz v. Robert Welch, Inc.*, the Court distinguished between private and public figures and held that the states could set their own standards of liability regarding media entities that published defamatory statements about private individuals.⁵⁷ The Court limited the standards that a state could set by holding that when a defamation plaintiff is a private individual and the matter in question is one of public concern, a state cannot impose presumed or punitive damages without a showing of actual malice.⁵⁸ By contrast, the Court has not required a plaintiff to demonstrate that a statement was made with actual malice to obtain presumed and punitive damages when the matter is not of public concern.⁵⁹

The Supreme Court has also vigorously protected the media regarding the publication of truthful material relating to a matter of public concern.⁶⁰ For example, in *Bartnicki v. Vopper*, when an anonymous source provided the media with a recording of the intercepted cell phone conversation of two union officials, the Court held that because (1) the media had not participated in the illegal interception; and (2) the recorded conversation had involved a matter of public

⁵⁶ *Associated Press v. Walker*, 388 U.S. 130 (1967); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (decided in the same opinion as *Walker*); see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (holding that the *Sullivan* standard applies to public figures seeking damages against the press for intentional infliction of emotional distress).

⁵⁷ *Gertz*, 418 U.S. at 347. The Court explained that public figures invite "attention and comment" whereas a private figure "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345.

⁵⁸ *Id.* at 349 (explaining that the state's interest in protecting the reputation of a private individual goes no further than compensation for actual injury).

⁵⁹ *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). In arriving at its decision, the Court cited *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), explaining that whether a matter is of public concern is determined by its "content, form, and context . . . as revealed by the whole record." *Id.* at 761.

⁶⁰ *Fl. Star v. B.J.F.*, 491 U.S. 524, 534-36, 541 (1989) (refusing to hold the press civilly liable for publishing the name of a rape victim it had gleaned from public records); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) (stating that "state action to punish the publication of truthful information seldom can satisfy constitutional standards"); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (upholding the right of the press to publish material of public concern even though publication compromised the national interest).

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concern, the media could not be held liable to the plaintiffs for invasion of privacy.⁶¹

As these cases illustrate, the Supreme Court has developed some common law protections for the press, and as shown in Part II.C, state courts have interpreted anti-SLAPP law in ways that generally adhere to this precedent. However, the language of an anti-SLAPP statute is the determinative factor in whether or not the press can invoke anti-SLAPP protections in the first place.

C. *Identifying Protected Activity Under Anti-SLAPP Law – Three Categories*

While some states have adopted similar anti-SLAPP statutes, no single definition of activity shielded from prosecution under anti-SLAPP statutes exists.⁶² The range of activity protected under anti-SLAPP statutes falls into three general categories: (1) statutes worded narrowly so as to allow anti-SLAPP protection only in certain statutorily defined circumstances, hereinafter referred to as Narrow Statutes; (2) statutes that apply only to participation in the processes of government or to communication specifically intended to procure government action, hereinafter referred to as Moderate Statutes; and (3) statutes that extend the definition of protected activity to cover the exercise of a party's right to petition or free speech on any matter of public concern, hereinafter referred to as Broad Statutes.⁶³

1. *Narrow Statutes*

Of the three categories, twelve states have passed anti-SLAPP statutes that fall into the category of Narrow Statutes, limiting the use of anti-SLAPP law to specific sets of circumstances.⁶⁴ Within this group,

⁶¹ 532 U.S. 514, 533-35 (2001). The Court qualified its holding by acknowledging that lack of privacy could chill private speech and mentioned in dicta that "some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself." *Id.* at 533.

⁶² See *infra* Parts II.C.1-II.C.3.

⁶³ See *infra* Parts II.C.1-II.C.3.

⁶⁴ DEL. CODE ANN. tit. 10 §§ 8136-8138 (1999); FLA. STAT. § 768.295, 702.304(4) (2005); HAW. REV. STAT. § 634F-1 (Supp. 2005); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. §§ 25-21,241-246 (1995); N.M. Stat. Ann. §§ 38-2-9.1 to -9.2 (LexisNexis 2004); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney Supp. 2007); N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 12, § 1443.1A (West 1993); 27 PA. CONS. STAT. § 7707, §§ 8301-8305 (West Supp. 2006); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2002); WASH. REV. CODE §§ 4-24-500 to -520 (West 2005).

one of the methods that state legislatures have used to narrow the focus of anti-SLAPP laws has been to limit the definition of SLAPP suits to situations where the plaintiff is a “public applicant or permittee.”⁶⁵ By limiting the class of plaintiffs that could conceivably instigate a SLAPP suit, some states limit the use of their anti-SLAPP statutes to circumstances involving permits, leasing, licensing, zoning, and other entitlements.⁶⁶

Other states have defined protected activity as oral or written testimony provided to a government entity during the course of a government proceeding or in connection with such proceeding, public hearing, or public meeting.⁶⁷ Two states in this category, Tennessee and Washington, have limited anti-SLAPP protection to communications made to government agencies regarding matters of concern to such agencies.⁶⁸ Florida’s two anti-SLAPP statutes are even narrower than Tennessee’s and Washington’s in that Florida Code section 720.304(4) limits the use of the anti-SLAPP statute’s protections to “parcel owners” and Florida Code section 768.295 applies only to SLAPP suits instigated by government entities.⁶⁹

⁶⁵ DEL. CODE ANN. tit. 10 § 8136(a)(1)-(2) (defining an “action involving public petition and participation” as “an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission,” and defining “[p]ublic applicant or permittee” as “any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest . . . materially related to such application or permission”). See also NEB. REV. STAT. §§ 25-21, 242(1) and N.Y. CIV. RIGHTS LAW §§ 70-a(1), 76-a(a)(1)(a)-(b), for definitions similar to Delaware’s.

⁶⁶ See *supra* note 65; *infra* note 78.

⁶⁷ HAW. REV. STAT. § 634F-1 (defining “public participation” as “any oral or written testimony submitted or provided to a governmental body *during the course* of a governmental proceeding”) (emphasis added); MO. REV. STAT. § 537.528(1) (limiting the statute’s protective reach to “conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state”). For a complete explanation of the Missouri anti-SLAPP statute, see generally Kling, *supra* note 31. See also N.M. Stat. Ann. § 38-2-9.1(A), for a definition of protected activity similar to Missouri’s.

⁶⁸ TENN. CODE ANN. §§ 4-21-1003(a); WASH. REV. CODE § 4-24-510 (also including self-regulatory organizations involved in the futures or securities business empowered and overseen by a government agency).

⁶⁹ FLA. STAT. § 720.304(4)(b) (2005) states that a party:

may not file or cause to be filed . . . any lawsuit . . . against a parcel owner without merit and solely because such parcel owner has exercised the right to instruct his or her representatives or the right to petition for redress of grievances before the various governmental entities of this state

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In contrast, Utah's statute couches its protections in broader language by defining protected activity simply as "participating in the processes of government."⁷⁰ If Utah courts chose to interpret its anti-SLAPP law broadly, Utah's statute could be categorized with the Moderate Statutes.⁷¹ However, Utah currently requires an element of intentional harassment before a suit can be characterized as a SLAPP, which likely makes the Utah statute applicable on narrower grounds.⁷² Similarly, Pennsylvania's definition of protected activity is nearly identical to that of several of the Moderate Statutes.⁷³ Pennsylvania's anti-SLAPP statute falls into the category of Narrow Statutes because by its title, it applies only to environmental law or regulation.⁷⁴

Similarly, FLA. STAT. § 768.295(4) states that:

No governmental entity in this state shall file or cause to be filed . . . any lawsuit . . . against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state

⁷⁰ UTAH CODE ANN. § 78-58-102(5) (2002) (defining "process of government" as "the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution").

⁷¹ See *infra* Part II.C.2.

⁷² UTAH CODE ANN. § 78-58-103(1) (defining a SLAPP suit as one that "is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant . . ."); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 339 n.4 (Utah 2005) (explaining that "the cause of action created by the SLAPP Act is narrowly defined and is limited to those lawsuits filed primarily to harass the defendant and interfere with public participation in the governmental process"). *But see* Elizabeth Neff, *American Fork Man Ordered to Cough Up Publisher's Legal Fees, Judge Says, The Piece Was Protected Political Speech*, SALT LAKE TRIB., Sept. 24, 2005, at B3. The *Salt Lake Tribune* reported an unpublished case in which a newspaper owner successfully invoked the protection of Utah's anti-SLAPP law in regard to a political piece he had published in his own newspaper. *Id.* The defendant had spent more than \$170,000 defending the case and had been forced to sell the newspaper to raise funds for his court battle. *Id.*

⁷³ 27 PA. CONST. STAT. § 8301 (West Supp. 2006) (including in its definition of protected activity "[a] written or oral statement or writing made . . . in connection with an issue under consideration or review by a legislative, executive or judicial body or any other official proceeding authorized by law"). Compare GA. CODE ANN. § 9-11-11.1(c) (2006); ME. REV. STAT. ANN. tit. 14 § 556 (2003), with MASS. GEN. LAWS ch. 231 § 59H (2000), for similar definitions of protected activity as statements made in connection with an issue under consideration or review by a government body or reasonably likely to procure government review.

⁷⁴ 27 PA. CONST. STAT. § 8301 (titled "Participation in Environmental Law or Regulation").

Among the Narrow Statutes, Oklahoma's anti-SLAPP law is unique in that it appears to have been drafted specifically to aid the press by providing protection for reports on government proceedings and expressions of opinion or criticism.⁷⁵ Unfortunately, the overall effectiveness of the statute in protecting the petitioning rights of citizens is narrow because the law only applies to claims of libel.⁷⁶ While the communications protected by the statute are similar to those protected under the Moderate Statutes, as it is written, Oklahoma's law leaves a party's acts of petition wide open to the many other claims commonly used in SLAPP litigation such as tortious interference with contract or business relationships, invasion of privacy, or abuse of process.⁷⁷

At the date of this writing, with the exception of Oklahoma and New York, states that have anti-SLAPP statutes that fall into the Narrow Statute category have no published opinions concerning the media as a defendant and no published opinions indicating attempted use of their anti-SLAPP statutes outside either the typical SLAPP scenario or the specific situation contemplated by the statute involved.⁷⁸ Conversely,

⁷⁵ OKLA. STAT. tit. 12, § 1443.1(B) (1993) ("No publication which under this section would be privileged shall be punishable as libel"); see also *Price v. Walters*, 918 P.2d 1370, 1377 (Okla. 1996) ("It arouses concern that a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion." (quoting *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (Bork, J., concurring))).

⁷⁶ OKLA. STAT. tit. 12, § 1443.1(B); PRING & CANAN, *supra* note 15, at 190-91 (criticizing the language of the Oklahoma statute for its failure to provide for claims other than libel, for applying only to formal proceedings, and for its failure to provide for a system of judicial review).

⁷⁷ OKLA. STAT. tit. 12, § 1443.1(A). The Oklahoma statute defines privileged communication to include statements made

[b]y a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized

Id. See *infra* Part II.B.2 for a comparison of Oklahoma's statute to statutes with broader language.

⁷⁸ See the discussion of Oklahoma's anti-SLAPP law, *supra* Part II.C.1 and notes 75-77. Because Oklahoma's statute is so narrow that it falls outside the argument of this Note, the numerous published anti-SLAPP cases involving the press as a defendant in Oklahoma are not listed or discussed.

New York has one published case, *Duane Reade, Inc. v. Clark*, 784 N.Y.S.2d 920 (Sup. Ct. 2004), involving anti-SLAPP law and the press, but the facts of the case fall strictly within the limited applicability of New York's statute to public applicants or permittees. In

Duane Reade, a drug store chain sued an artist and a newspaper for articles the paper had run and advertisements that the artist had taken out that criticized the drug store chain's plans for development. *Id.* at 920. Because the drug store, as an entity contemplating development, fit the statutory definition of a public applicant or permittee, New York's anti-SLAPP law applied and the court dismissed the drug store's suit. *Id.* Other recent examples of applications of the New York anti-SLAPP statute to non-media defendants include *T.S. Haulers, Inc. v. Kaplan*, 295 A.D.2d 595 (N.Y. App. Div. 2002) (zoning dispute); *City of Saratoga Springs v. Zoning Bd. of Appeals*, 279 A.D.2d 756 (N.Y. App. Div. 2001) (zoning dispute); *Miness v. Alter*, 262 A.D.2d 374 (N.Y. App. Div. 1999) (declining to award defendants relief under anti-SLAPP statute for newsletter published in opposition to mayoral inaction regarding a local development campaign); and *Bell v. Little*, 250 A.D.2d 485 (N.Y. App. Div. 1998) (declining to apply New York anti-SLAPP law to protect defendant's scrawls on doorways and sidewalks because the defendant's rights to petition public agencies remained unaffected).

To date, Delaware, Hawaii, Nebraska, and New Mexico have not published any opinions citing their anti-SLAPP statutes. The federal district court examined Hawaii's anti-SLAPP law in *Villeza v. United States*, CIV. NO. 05-00043 JMS/BMK, 2006 U.S. Dist. LEXIS 25625 (D. Ha. Jan. 5, 2006) (holding that the government could not invoke Hawaii's anti-SLAPP law when the government had failed to make a prima facie showing that Villeza had brought a SLAPP suit).

Florida cases include: *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562 (Fla. 1993) (ruling on applicability of anti-SLAPP provision to citizen petitions in regard to Ferngrowers Association's water use); and *Londono v. Turkey Creek*, 609 So. 2d 14 (Fla. 1992) (homeowners' dispute with development company).

Missouri cases include *Diehl v. Kintz*, 162 S.W.3d 152 (Mo. Ct. App. 2005) (individual distributed a handbill in opposition to the construction of a trash transfer station), and *Mandel v. O'Connor*, 99 S.W.3d 33 (Mo. Ct. App. 2003) (public official sued citizens for a letter in which they criticized her unwillingness to investigate possible city charter violations).

Pennsylvania has one case citing its anti-SLAPP statute, *Lucchino v. Commonwealth*, 809 A.2d 264 (Pa. 2002), an environmental law dispute.

Tennessee does not have any published cases that explore its anti-SLAPP law in depth. Utah cites its anti-SLAPP law in only one case, *Anderson Development Co., L.L.C. v. Tobias*, 116 P.3d 323 (Utah 2005), a real estate development case.

Recent Washington cases citing its anti-SLAPP law include *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 46 P.3d 789 (Wash. 2002) (subdivision development dispute); *Hoehlin v. Urbiha*, No. 31247-6-H, 2005 Wash. App. LEXIS 850 (Ct. App. 2005), *aff'd in part, rev'd in part and remanded*, 127 Wash. App. 1010 (Ct. App. 2005) (holding that anti-SLAPP law applies to expert witnesses who act in good faith); *Emmerson v. Weilep*, 110 P.3d 214 (Wash. Ct. App. 2005), *aff'd*, 126 Wash. App. 1010 (Ct. App. 2005) (upholding the anti-SLAPP law requirement that reports to government agencies be made in good faith for the statute to apply); *Trummel v. Mitchell*, No. 48662-4-L, 2004 Wash. App. LEXIS 1208 (Ct. App. 2004), *aff'd in part, rev'd in part*, 131 P.3d 306 (Wash. 2006) (holding that anti-SLAPP law did not apply to bad faith conduct amounting to harassment); and *Gontmakher v. City of Bellevue*, 85 P.3d 926 (Wash. Ct. App. 2004) (holding anti-SLAPP applied to city employee's report of property owners' illegal clear-cutting to the Department of Natural Resources).

slightly less than half of the eleven states and one United States territory falling into the Broad or Moderate Statute categories have adjudicated cases with the media as a SLAPP defendant.⁷⁹

2. Moderate Statutes

Unlike the states with Narrow Statutes, the seven jurisdictions with Moderate Statutes do not limit activity protected under anti-SLAPP law to particular classes of individuals or types of proceedings.⁸⁰ Rather, the statutes in these states expand the definition of protected activity to include not only oral or written statements made to government bodies or as part of government proceedings, but also communications made *in connection with any issue under consideration or review* by a government body.⁸¹ Also included in the Moderate Statute category are states that protect communication intended in whole or in part to procure a governmental action or result.⁸² Among the seven Moderate Statute

⁷⁹ Moderate Statute states with anti-SLAPP cases involving the media include Georgia, Massachusetts, and Minnesota. Broad Statute states that have addressed the media's use of anti-SLAPP law include California, Indiana, Louisiana, and Rhode Island. *See infra* Parts II.C.2-II.C.3.

⁸⁰ GA. CODE ANN. § 9-11-11.1(c) (2006); GUAM CODE ANN. tit. 7 § 17104 (2006); MASS. GEN. LAWS ch. 231 § 59H (West 2000); ME. REV. STAT. ANN. tit. 14 § 556 (2003); MINN. STAT. § 554.01 (West 2000); NEV. REV. STAT. § 41.637 (2002); R.I. GEN. LAWS § 45-24-67 (1997).

⁸¹ NEV. REV. STAT. § 41.637 defines "[g]ood faith communication in furtherance of the right to petition" as:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a . . . [government employee] . . . regarding a matter reasonably of concern to the respective governmental entity; or
3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is truthful or is made without knowledge of its falsehood.

See GA. CODE ANN. § 9-11-11.1(c); MASS. GEN. LAWS ch. 231 § 59H; ME. REV. STAT. ANN. tit. 14 § 556, for similar definitions of protected statements made in connection with an issue under consideration or review by a government body.

⁸² *See* ME. REV. STAT. ANN. tit. 14 § 556 (2003); and MASS. GEN. LAWS ch. 231 § 59H (West 2000) for expanded definitions of petitioning activity that also include "any statement reasonably likely to enlist public participation in an effort to effect such [government] consideration, or any other statement falling within constitutional protection of the right to petition government." *See also* GUAM CODE ANN. tit. 7 § 17104 (2006) ("Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, regardless of intent or purpose, except where not aimed at procuring any government or electoral action, result or outcome."); MINN. STAT. § 554.01 (West 2000) (defining 'public participation' as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action").

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states, Georgia, Minnesota, Massachusetts, and Rhode Island have encountered cases where the media has attempted to use anti-SLAPP law to dismiss a suit.⁸³ This Note discusses each state in turn.

⁸³ Georgia is included in the Moderate Statute category even though the initial protective language of its statute (applicable to “any claim asserted against a person or entity arising from an act by that person which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for redress of grievances”) is similar to the Broad statutes. GA. CODE ANN. § 9-11-11.1(b) (emphasis added). The Georgia Code goes on to define an “act in furtherance of the right of free speech or the right to petition the government for a redress of grievances” as:

any written or oral statement, writing, petition made before or to a legislative, executive or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

Id. § 9-11-11.1(c) (emphasis added). The definition limiting activity protected under the Georgia statute to activity connected with government review places Georgia’s anti-SLAPP law into the Moderate Statute category. The Supreme Court of Georgia has also held that Georgia’s anti-SLAPP statute applies only to speech made in the course of or leading to an official proceeding. *Berryhill v. Ga. Cmty. Support & Solutions*, No. S06G0038, 2006 Ga. LEXIS 988 (Ga. Nov. 28, 2006). Like Georgia, the language of Rhode Island’s anti-SLAPP statute is broad. R.I. GEN. LAWS § 9-33-2(a) (defining protected activity as “[a] party’s exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern”); *id.* § 9-33-2(e) (extending SLAPP immunity to “any oral or written statement . . . made in connection with an issue of public concern”). However, the reach of Rhode Island’s anti-SLAPP statute is narrowed by the second and third sentences of R.I. GEN. LAWS § 9-33-2(a), which go on to explain that SLAPP

immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose.

Id. (emphasis added). Unlike other statutes, Rhode Island’s does not set forth any requirements of verification or special burdens of proof that each party must meet. Rather, the statute suggests that in order to defeat an assertion of conditional immunity under the statute, a party would need to prove that the party asserting immunity was involved in sham petitioning. *Id.* § 9-33-2(a). The statute defines sham petitioning as:

(1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and
(2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

Id. §§ 9-33-2(a) (1)-(2). The Rhode Island Supreme Court examined the liability of an individual for speaking out in the media in *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743 (R.I. 2004). Alves sued Alan and William Palazzo for defamation because the two had

a. Georgia

Georgia has addressed the application of anti-SLAPP law to the media in only one case. In 2000, the Georgia Court of Appeals decided *Davis v. Emmis Publishing Corp.*, in which Davis sued *Atlanta Magazine* for a story alleging that he called in favors from local officials to stall a criminal investigation to prevent his son's prosecution for murder.⁸⁴ Among its defenses, *Atlanta Magazine* asserted that the Georgia anti-SLAPP statute protected its communication and asserted that Davis had not verified his complaint as required by the statute.⁸⁵ Davis responded two months later by amending and verifying his complaint.⁸⁶

Rather than addressing the substantive issue, the court decided the case on procedural grounds.⁸⁷ The appellate court declined to address the issue of whether the anti-SLAPP law applied to *Atlanta Magazine's* claims and dismissed Davis's appeal because the verification of his complaint failed to conform with the procedure set forth in the anti-SLAPP statute.⁸⁸ However, in an opinion concurring in the judgment,

written letters to a newspaper critical of Alves's actions in an official capacity and the newspaper published them. *Id.* at 747. The action against the newspaper had already been dismissed and William Palazzo was not a party to the appeal. *Id.* at 747 n.1. The court affirmed the trial court's ruling that Palazzo's letters to the editor were protected under the statute because Alves was a public official and failed to prove that Palazzo's letters were objectively baseless. *Id.* at 756. Because the opinion does not discuss the claim against the newspaper as a media entity, this Note does not analyze the Rhode Island case. Neither Guam nor Nevada has published any decisions citing to their anti-SLAPP laws. Maine decisions include *Maitta Construction, Inc. v. Wainwright*, 847 A.2d 1169 (Me. 2004) (land development dispute); and *Morse Brothers, Inc. v. Webster*, 772 A.2d 842 (Me. 2001) (neighbors' protests of permits for a mulch company due to compliance with noise standards).

⁸⁴ 536 S.E.2d 809, 810 (Ga. Ct. App. 2000).

⁸⁵ *Id.* Under the Georgia anti-SLAPP statute, any party bringing a claim based on another party's acts in furtherance of free speech or right to petition the government must also file a written verification asserting that the party or attorney has read the claim, that to the best of his or her knowledge, information and belief, the claim is well-grounded in fact and warranted by existing law or a good-faith argument to change existing law. GA. CODE ANN. § 9-11-11.1(b). If the party fails to file such verification with the complaint, the party has ten days in which to file an amended complaint that includes the verification. *Id.*

⁸⁶ *Davis*, 536 S.E.2d at 810.

⁸⁷ *Id.* at 812. The trial court opinion in this case has not been published, but the appellate opinion indicates the trial court's decision that Georgia's anti-SLAPP law protected the magazine's act of publishing the article. *Id.* at 810.

⁸⁸ *Id.* at 812; see also *Airtran Airlines, Inc. v. Plain Dealer Publ'g Co.*, 66 F. Supp. 2d 1355, 1369-70 (N.D. Ga. 1999), summary judgment *den'd*, 314 F. Supp. 2d 1266 (N.D. Ga. 2002) (declining to rule on the applicability of Georgia's anti-SLAPP law to media defendants but stating that even if the anti-SLAPP law did apply, the defendants' attempted use of the anti-SLAPP statute would still fail for failure to prove that the communication was made in good faith).

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Judge Frank M. Eldridge expressly stated that Georgia's anti-SLAPP law had no application whatsoever to *Atlanta Magazine's* claims because the magazine had published an article for profit about a local murder that in no way dealt with a petition in the public interest before a government body.⁸⁹ Judge Eldridge's concurrence fell squarely on the mark, as the Georgia Supreme Court later demonstrated in *Berryhill v. Georgia Community Support and Solutions* by holding that Georgia's anti-SLAPP statute applies only to speech made in the course of or leading to an official proceeding.⁹⁰

b. *Massachusetts*

Massachusetts has tackled the issue of media use of anti-SLAPP law in several lower court decisions.⁹¹ The most recent decision involving anti-SLAPP law and a media defendant is *Islamic Society of Boston v. Boston Herald, Inc.*⁹² In *Islamic Society*, the court focused on the meaning of petitioning activity and found that an organized media campaign to discourage the construction of a mosque did not fall within the definition of petitioning activity set forth in Massachusetts's statute.⁹³ The court

⁸⁹ *Davis*, 536 S.E.2d at 813 (Eldridge, J., concurring). Judge Eldridge argued that a statute in derogation of the common law must be strictly construed. *Id.*; see also Steven H. Pollak, *Anti-SLAPP Defense Nixed in Redding Biography Dispute*, ENT. L. & FIN., July 2005, at 3 (commenting on Eldridge's opinion and Georgia's anti-SLAPP). Pollak's article also describes a more recent unpublished Georgia state court opinion in which a biographer's anti-SLAPP defense failed on procedural grounds similar to those in *Davis v. Emmis Publishing Corp.* Pollak, *supra*, at 3. The unpublished case discussed is *Walden v. Freeman*, Docket No. 04VS064224, heard in Georgia's Fulton County Court. *Id.*

⁹⁰ *Berryhill v. Ga. Cmty. Support and Solutions*, No. S06G0038, 2006 Ga. LEXIS 988 (Ga. Nov. 28, 2006).

⁹¹ *Islamic Soc'y of Boston v. Boston Herald, Inc.*, No. 05-4637, 2006 Mass. Super. LEXIS 391 (Super. Ct. July 20, 2006); *O'Neil v. Gilvey*, No. 95-06626-E, 1998 Mass. Super. LEXIS 578 (Super. Ct. Oct. 28, 1998); *Salvo v. Ottoway Newspapers, Inc.*, No. 97-2123-C, 1998 Mass. Super. LEXIS 724 (Super. Ct. May 13, 1998), *rev'd sub. Nom*; *Salvo v. Ottoway Newspapers, Inc.*, 782 N.E.2d 535 (Mass. Ct. App. 2003). Massachusetts has a fourth case in which the court addresses the state's anti-SLAPP law in a context involving a media defendant, *Sarkis v. Grey2K*, 2006 Mass. Super. LEXIS 301 (Super. Ct. June 30, 2006). In *Sarkis*, the plaintiffs sued the defendants for television commercials advocating the termination of greyhound racing. *Id.* The case was dismissed pursuant to Massachusetts anti-SLAPP law and the plaintiffs appealed. *Id.* The court's published opinion does not examine the application of Massachusetts anti-SLAPP law to the media, but rather, focuses on the plaintiffs failure to pursue the appeal.

⁹² No. 05-4637, 2006 Mass. Super. LEXIS 391 (Super. Ct. July 20, 2006).

⁹³ *Id.* at **27-28. See MASS. GEN. LAWS ch. 231 § 59H (West 2000), which defines protected activity as:

any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or

stressed that to be protected by Massachusetts's anti-SLAPP law, conduct must be part of a government proceeding, intended to influence a government proceeding, or be geared toward obtaining government review of an issue.⁹⁴ Although the opinion focuses on the conduct of the non-media defendants, the court ultimately found that none of the defendants could claim the protections of the anti-SLAPP law.⁹⁵ The court explained that the right to petition the government did not grant a person immunity from the tort of libel and that the defendants' conduct appeared to have been motivated partially by religious intolerance.⁹⁶ The court mentioned the balance between the petitioning rights of both parties and held that to deny the Islamic Society the opportunity to pursue relief in this particular situation would likely be an unconstitutional application of Massachusetts anti-SLAPP law.⁹⁷

In *Salvo v. Ottoway Newspapers, Inc.*, Salvo sued the publisher of the *Salem Evening News* for an article that suggested he had traded political favors in order to obtain permission for land development from the city.⁹⁸ The publisher raised Massachusetts's anti-SLAPP statute as a defense, stating that Salvo's lawsuit had been based on the publisher's right to petition.⁹⁹ The trial court agreed that the anti-SLAPP statute applied and held that Salvo had met his burden of demonstrating (1) that

any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

⁹⁴ *Islamic Soc'y*, 2006 Mass. Super. LEXIS 391, at **25-27. The court criticized the defendants for invoking Massachusetts anti-SLAPP law because the challenged conduct occurred during a time when no governmental proceeding was underway. *Id.* at *28. Moreover, the court found that the defendants' public complaints, based in cultural and religious hostility, were not the kind of complaint a government entity could redress. *Id.* at **30-31. The court distinguished the defendants' claims from the facts of *Wynn v. Creigle*, 825 N.E. 2d 559 (Mass Ct. App. 2005), in which a firefighter's widow spoke to the media about an ongoing government proceeding. *Islamic Soc'y*, 2006 Mass. Super. LEXIS 391, at *33. The court explained that the fact that a statement concerns a topic that has attracted government attention does not mean that the statement is automatically protected under the anti-SLAPP statute. *Id.* at *28. The court further explained that to do so would bring *any* activity relating to an issue of public concern into the definition of protected petitioning activity (emphasis added). *Id.* at **28-29.

⁹⁵ *Islamic Soc'y*, 2006 Mass. Super. LEXIS 391, at **27-28.

⁹⁶ *Id.* at *35. The court stressed that in order to protect the petitioning activities of both parties, Massachusetts requires defendants to prove that the plaintiff's complaint had been brought *solely* on the basis of the defendant's petitioning activity. *Id.* at *32.

⁹⁷ *Id.* at **35-36.

⁹⁸ No. 97-2123-C, 1998 Mass. Super. LEXIS 724, at **3-4 (Super. Ct. May 13, 1998).

⁹⁹ *Id.* at **4-5.

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the publisher's petition was devoid of reasonable factual basis or arguable basis in law; and (2) that he had suffered actual injury as a result of the publisher's petitioning.¹⁰⁰ Because Salvo had met this burden of proof under protective measures of the anti-SLAPP statute, the publisher could not prevail on its special motion to dismiss.¹⁰¹

On appeal, the appellate court reversed the trial court's decision without addressing the lower court's ruling or discussing the applicability of the state's anti-SLAPP statute to the case.¹⁰² Rather, the appellate court held that Salvo could not have prevailed on the particulars of any of his defamation claims because the statements the newspaper had printed were not false and remanded the case to the trial court with instructions to grant summary judgment in favor of the newspaper.¹⁰³

¹⁰⁰ *Id.* at **6-10. The Massachusetts anti-SLAPP states that when a party brings a special motion to dismiss under the state anti-SLAPP statute, the responding party must prove: "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." MASS. GEN. LAWS ch. 231 § 59H (West 2000). Under *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 942-43 (Mass. 1998), the Massachusetts Supreme Judicial Court structured the burden of proof such that a party bringing a special motion to dismiss under the anti-SLAPP statute must first demonstrate that the claims against it are based solely on its petitioning activity and have no substantial basis outside such activity before the burden shifts to the responding party. *Id.* The *Salvo* court's analysis did not focus on the media as a defendant, but rather, followed the *Duracraft* burden of proof without examining the identity or nature of the parties involved. 1998 Mass. Super. LEXIS 724, at **6-11.

¹⁰¹ *Salvo*, 1998 Mass. Super. LEXIS 724, at *11.

¹⁰² *Salvo v. Ottaway Newspapers, Inc.*, 782 N.E.2d 535 (Mass. Ct. App. 2003). The name of the newspaper is spelled differently in the Superior Court and Appeals Court decisions. Due to the alternate spellings, the two cases may not reference each other in electronic media. The facts of the case indicate that the case is the same controversy.

¹⁰³ *Id.* at 540-42. Although the court did not address the anti-SLAPP statute at all, because a plaintiff responding to a special motion to dismiss under the anti-SLAPP statute must prove that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law," the substantial accuracy of the newspaper's reporting would likely reverse the trial court's grant of Salvo's special motion to dismiss under the state anti-SLAPP law. See MASS. GEN. LAWS ch. 231 § 59H. Several months after the Massachusetts Superior Court decided *Salvo*, it addressed the issue of anti-SLAPP applicability to a media defendant again in *O'Neil v. Gilvey*, 9 Mass. L. Rep. 237 (Super. Ct. 1998), available at No. 95-06626-E, 1998 Mass. Super. LEXIS 578 (Super. Ct. Oct. 28, 1998). In 1991, Gilvey began working at Boston City Hall for the Boston Fair Housing Commission as a program specialist. *Id.* at *2. In 1991, the *Boston Globe* and *Boston Herald* published Gilvey's allegations of sexual harassment against Boston City Counselor O'Neil. *Id.* at *4. O'Neil then brought suit against Gilvey and the newspapers for the articles they had published about Gilvey's allegations. *Id.* The newspapers raised the Massachusetts anti-

Neither the Supreme Judicial Court, nor any Massachusetts appellate court, has directly stated that Massachusetts's anti-SLAPP law is available to media defendants. However, the Massachusetts courts have expressed a willingness to apply the state anti-SLAPP statute in a wide range of situations, consistent with the legislative intent to enact broad anti-SLAPP protections.¹⁰⁴

c. Minnesota

Somewhat like Massachusetts's anti-SLAPP law, Minnesota's law focuses on the actual legality of the challenged conduct.¹⁰⁵ A Minnesota appellate court ruled that the illegal nature of a media defendant's conduct defeated its attempt to dismiss under the state anti-SLAPP law in *Special Force Ministries v. WCCO Television*.¹⁰⁶ Special Force Ministries operated various care facilities for mentally challenged adults.¹⁰⁷ A reporter from WCCO lied to Special Force in order to obtain employment at one of its facilities.¹⁰⁸ The reporter then secretly videotaped the facility and its employees while she worked there.¹⁰⁹ WCCO broadcast the tapes as an exposé on the facility.¹¹⁰ When Special Force Ministries sued WCCO, the station raised the Minnesota anti-SLAPP statute as a defense.¹¹¹ The Minnesota Court of Appeals held that

SLAPP statute as a defense and the court granted their special motion to dismiss because O'Neil failed to provide opposition. *Id.* at *15.

¹⁰⁴ *McLarnon v. Jokisch*, 727 N.E.2d 813, 817 (Mass. 2000) (noting that the legislature purposefully struck down any requirement that the Massachusetts anti-SLAPP statute apply only in cases involving matters of public concern); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) (describing the legislature's intent to enact a broad statute).

¹⁰⁵ Compare MASS. GEN. LAWS ch. 231 § 59H (West 2000) (requiring a party moving to dismiss under the statute to prove that the challenged lawsuit is based *solely* on its petitioning activity), with MINN. STAT. § 554.03 (West 2000) (explaining that "conduct . . . aimed in whole or in part at procuring favorable government action is immune from liability, unless that conduct or speech constitutes a tort or a violation of a person's constitutional rights") (emphasis added).

¹⁰⁶ 584 N.W.2d 789 (Minn. Ct. App. 1998).

¹⁰⁷ *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 791 (Minn. Ct. App. 1998).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 792; see MINN. STAT. § 554.01 (West 2000) (defining "public participation" as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action"). Special Force Ministries brought complaints of trespass, defamation, and fraud, stating that the harm to their reputation had been so great that they had been forced to relocate to Missouri and that the residents with whom the reporter had had contact were emotionally harmed by her betrayal. *Special Force Ministries*, 584 N.W.2d at 791.

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under the statute, Special Force Ministries had to prove by clear and convincing evidence that WCCO's conduct was not immune from liability under the anti-SLAPP statute because the conduct constituted a tort.¹¹² Specifically, the court reasoned that holding the media accountable for torts of trespass and fraud did not create tension with any First Amendment rights.¹¹³ The court subsequently affirmed the trial court's decision that Special Force Ministries had met its burden of proving that WCCO's conduct amounted to a tort, therefore rendering the conduct outside the protections of the anti-SLAPP statute.¹¹⁴ Although WCCO's broadcast was likely aimed at procuring favorable government action, it failed under the statutory requirement that protected conduct be lawful.¹¹⁵

3. Broad Statutes

The range of activity protected by anti-SLAPP statutes classified in the Broad Statute category is significantly more expansive than the activity protected in the Moderate Statute states.¹¹⁶ The states in this

¹¹² *Special Force Ministries*, 584 N.W.2d at 792; see also MINN. STAT. § 554.03 (explaining that "conduct aimed in whole or in part at procuring favorable government action is immune from liability, unless that conduct or speech constitutes a tort or a violation of a person's constitutional rights").

¹¹³ *Special Force Ministries*, 584 N.W.2d at 793 ("There is no inherent conflict or tension with the First Amendment in holding media representatives liable for the tort of fraud or trespass; neither the courts nor the legislature has given such representatives carte blanche to commit such torts in their pursuit of videotape."). Although the reporter argued that she had made no forcible or unlawful entry on to the Special Force Ministries facilities, the court held that the reporter was guilty of trespass because the tort of trespass in Minnesota included "any unlawful interference with one's person, property, or rights." *Id.* at 792-93. The court did not specify exactly how the reporter's conduct fit the Minnesota definition of trespass, but rather held merely that the definition of trespass was sufficiently broad to cover her conduct. *Id.* at 793. The court also held that the reporter had committed fraud by making affirmative misrepresentations to Special Force Ministries and by failing to disclose her true employment status when she had a duty to do so. *Id.* at 793-94.

¹¹⁴ *Id.* at 792-95 (discussing each alleged tort separately).

¹¹⁵ *Special Force Ministries*, 584 N.W.2d at 792-93; see MINN. STAT. § 554.01(6) (defining 'public participation' as "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action"); see also *id.* § 554.03 ("[C]onduct aimed in whole or in part at procuring favorable government action is immune from liability, unless that conduct or speech constitutes a tort or a violation of a person's constitutional rights.") (emphasis added). The court appears to assume that WCCO's conduct was otherwise protected and addresses only the legality of WCCO's newsgathering conduct in its opinion. *Special Force Ministries*, 584 N.W.2d at 792-95.

¹¹⁶ Compare MASS. GEN. LAWS ch. 231 § 59H (West 2000) (defining petitioning activity to include "any statement reasonably likely to enlist public participation in an effort to effect such [government] consideration, or any other statement falling within constitutional protection of the right to petition government"), and MINN. STAT. § 554.01(c) (defining "public participation" as "[l]awful conduct or speech that is genuinely aimed in whole or in

category have broadened the protective reach of anti-SLAPP statutes beyond the Moderate Statute activities that encourage government review, either directly or through public participation, to include any conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest.¹¹⁷ While intended to afford broad protection to citizens' First Amendment rights, the anti-SLAPP statutes in this third category also can be the most problematic and open to uses outside the contemplation of citizen

part at procuring favorable government action"), with MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006) ("A defendant in a SLAPP suit is not civilly liable for communicating with a federal, State, or local government body or the public at large, if the defendant, without constitutional malice, reports on, comments on, rules on, challenges, opposes, or in any other way exercises rights under the First Amendment of the U.S. Constitution . . .") (emphasis added), and IND. CODE § 34-7-7-2 (2006) (defining protected activity as any conduct in furtherance of the exercise of the constitutional right of petition or free speech).

¹¹⁷ ARK. CODE ANN. § 16-63-503(1) (2006) defines protected activity as: "An act in furtherance of the right of free speech or the right to petition government for a redress of grievances." The statute continues the definition of petitioning activity similarly to the statutes in category two, but states that while the definition includes statements in connection with issues under consideration by government bodies and opinions regarding government bodies and officials, it is *not limited* to such statements. *Id.* CAL. CIV. PROC. CODE § 425.16(e) (West 2004 & Supp. 2006) defines protected activity as:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(emphasis added). See LA. CODE CIV. PROC. ANN. art. 971 (2006) and OR. REV. STAT. §§ 30.142-30.146 (2006) for similar definitions of protected activity. California has one other statute protecting communication to the government, CAL. CIV. CODE § 47 (West 2004 & Supp. 2006) (declaring privileged any publication or broadcast made in the proper discharge of an official duty during a government proceeding with certain exceptions, "communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information," and "a fair and true report in, or a communication to, a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued"). See IND. CODE § 34-7-7-2 (defining protected activity as any conduct in furtherance of the exercise of the constitutional right of petition or free speech).

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participation in government.¹¹⁸ Because of the expansive nature of their statutes, the statutes in the Broad Statute category are naturally more accessible to the media.¹¹⁹ Among the six states with anti-SLAPP laws classified as Broad Statutes, three states have addressed the applicability of anti-SLAPP law to media defendants.¹²⁰

a. *California*

Of all of the anti-SLAPP statutes, California's provides some of the broadest First Amendment protections.¹²¹ The media has invoked the protections of California's anti-SLAPP law far too frequently for this Note to examine every case.¹²² Rather, this Note discusses two recent anti-SLAPP cases involving the media from the California Supreme Court and appellate courts that address issues that may raise the concerns of opponents of media protection under anti-SLAPP law.¹²³

When Steve Gates sued Discovery Communications over a true crime documentary concerning a murder that had occurred years ago, the California Supreme Court granted Discovery Communications' motion to dismiss pursuant to California's anti-SLAPP law in *Gates v. Discovery Communications, Inc.*¹²⁴ Gates's complaint alleged defamation

¹¹⁸ See generally Lauren McBrayer, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603 (2005) (discussing DirecTV's use of California's anti-SLAPP statute to defend its actions in sending cease and desist letters to people who had purchased illegal cable pirating equipment). *Contra Hawks v. Hinely*, 556 S.E.2d 54, 549 (Ga. Ct. App. 2001). When city officials sued citizens for the citizens' formal applications to recall the officials from office, the court held that the anti-SLAPP clearly applied to the case given that the law was enacted to prevent abusive litigation against a person exercising the right to participate in government. *Id.*

¹¹⁹ See *infra* notes 124-74 and accompanying text.

¹²⁰ California, Louisiana, and Indiana have all addressed anti-SLAPP cases with media defendants. See *infra* notes 124-74 and accompanying text.

¹²¹ See Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965 (1999); Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801 (2000).

¹²² A few other anti-SLAPP cases with media defendants from California include *Ingels v. Westwood One Broadcasting Services, Inc.*, 28 Cal. Rptr. 3d 933, 941 (Ct. App. 2005), *reh'g denied*, No. S134735, 2005 Cal. LEXIS 9474 (Cal. Aug. 24, 2005), *Rezec v. Sony Pictures Entertainment, Inc.*, 10 Cal. Rptr. 3d 333 (Ct. App. 2004), *reh'g denied*, No. S124476, 2004 Cal. LEXIS 6647 (Cal. July 21, 2004), *Colt v. Freedom Communications, Inc.*, 1 Cal. Rptr. 3d 245 (Ct. App. 2003), and *Braun v. Chronicle Publishing Corp.*, 61 Cal. Rptr. 2d 58 (Ct. App. 1997).

¹²³ See *infra* notes 129-39 and accompanying text.

¹²⁴ 101 P.3d 552, 553, 563 (Cal. 2004), *cert. denied*, 126 S. Ct. 368 (2005). The crime involved a car salesman murdered outside his home by professional killers. *Id.* at 554. An auto dealer had arranged the killing to prevent the car salesman from filing a class action suit against an auto dealership owned by the dealer's parents. *Id.* At the time of the killing,

and invasion of privacy, claiming that until the broadcast of the documentary, he had lived a quiet and lawful life after having served his prison term and that the documentary falsely depicted him as a murderer, a crime for which he was never convicted.¹²⁵ The trial court had held that the television station could not dismiss under the anti-SLAPP statute because Gates had proven the likely success of his invasion of privacy claim.¹²⁶ The California Supreme Court reversed the trial court's decision and affirmed the decision of the appellate court, holding that the station could not be held liable for invasion of privacy for information it had gleaned from public records.¹²⁷ Because Gates could not prove the probability of success of his invasion of privacy claim, the court granted the television station's motion to dismiss pursuant to the anti-SLAPP statute.¹²⁸

In a less favorable decision for the press, the California Court of Appeals denied a television station's motion to dismiss pursuant to California's anti-SLAPP law in *Lieberman v. KCOP Television, Inc.*, where television reporters had posed as patients and recorded Lieberman, a

Gates was working as an assistant manager for the dealer who was later convicted for the crime. *Id.* Gates had originally been charged as a co-conspirator, but the charges against Gates were later reduced. *Id.*

¹²⁵ *Id.* at 554. Gates had been convicted of a felony as accessory after the fact to a murder for hire in 1988. *Id.* In his complaint, Gates asserted that the television program falsely portrayed him as being involved in a conspiracy to murder and falsely suggested he had confessed to the murder. *Id.* The station broadcast the program nearly twelve years after the murder had occurred. *Id.*

¹²⁶ *Id.* at 555; see CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2006).

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 under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, *unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.*

Id. (emphasis added).

¹²⁷ *Gates*, 101 P.3d at 562. The appellate court had based its reversal on *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975). *Gates*, 101 P.3d at 554.

¹²⁸ *Gates*, 101 P.3d at 562-63 (holding that a media defendant cannot be civilly liable for publishing facts obtained through public records, even if such facts were not newsworthy). In deciding the case, the *Gates* court cited to multiple United States Supreme Court decisions addressing the issue, including *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which had held that unless a state demonstrated a need of the highest order, a state could not hold a newspaper liable for publishing truthful information that the paper had lawfully obtained, even if the party providing the newspaper with the information had obtained it unlawfully. See *Gates*, 101 P.3d at 556-60; see also *Fl. Star v. B.J.F.*, 491 U.S. 524 (1989); *Okla. Publ'g. Co. v. Dist. Ct.*, 430 U.S. 308 (1975); *Cox*, 420 U.S. 469 (1975) (all holding that members of the press could not be held liable for publishing the name of a juvenile offender when the members had been lawfully present at the hearing in which the boy's name had been revealed).

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doctor, on a hidden camera when he dispensed medical advice.¹²⁹ The reporters broadcast the footage they had surreptitiously obtained of Lieberman in a news segment on doctors that improperly prescribed controlled substances.¹³⁰ Lieberman brought suit and the trial court denied the station's anti-SLAPP motion to dismiss.¹³¹ The appellate court concluded that the station's conduct, even if unlawful, occurred in furtherance of the right of free speech in connection with an issue of public concern and therefore fell under the definition of activity protected by California's anti-SLAPP statute.¹³² However, the court also found that Lieberman had presented evidence sufficient for a prima facie case that the station had violated section 632 of the California Penal Code, which prohibits electronic eavesdropping.¹³³ Accordingly, the

¹²⁹ *Lieberman v. KCOP Television, Inc.*, 1 Cal. Rptr. 3d 536, 539 (Ct. App. 2003). Lieberman sought damages pursuant to CAL. PENAL CODE § 637.2 (Deering 2005) for the violation of CAL. PENAL CODE § 632 (Deering 2006) as well as damages for lost income and emotional distress. *Lieberman*, 1 Cal. Rptr. 3d at 539. Section 632 of the California Penal Code prohibits electronic eavesdropping on private communications. Section 637.2 is the statutory provision that sets forth damages for the provisions in the chapter including Section 632. As a result of the broadcast, Lieberman had allegedly lost five hundred HMO patients, pharmacies refused to fill his prescriptions, he could no longer testify as an expert at trials due to the taint on his reputation, his malpractice insurance provider refused to renew his policy, and the California Medical Board launched an investigation against him that included a police raid of his office. *Lieberman*, 1 Cal. Rptr. 3d at 539. Because of the emotional distress Lieberman experienced, he allowed his medical license to expire and ceased all practice of medicine. *Id.*

¹³⁰ *Lieberman*, 1 Cal. Rptr. 3d at 539.

¹³¹ *Id.* at 538. The trial court determined that Lieberman had produced sufficient evidence to show a likelihood of prevailing on his claim that the station had violated CAL. PENAL CODE § 632 (West 2004). *Id.* See *supra* note 48 for a description of the burden of proof written into California's anti-SLAPP statute.

¹³² *Lieberman*, 1 Cal. Rptr. 3d at 541-42. Lieberman attempted to argue that because the station's conduct was illegal, that it was unprotected by California's anti-SLAPP law, but the court explained that the anti-SLAPP law protected conduct in furtherance of the right of free speech on a public issue and that although the station's conduct may not have been lawful, it still fit the definition of protected activity provided by the anti-SLAPP statute. *Id.* at 542. The court also clarified the anti-SLAPP law's burden of proof by stating that once the party claiming anti-SLAPP protection had proven that the suit in question had arisen from its acts in furtherance of free speech, the plaintiff then had to prove that the moving party's acts were not protected by the First Amendment. *Id.* Citing *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zemel v. Rusk*, 381 U.S. 1 (1965); and *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Ct. App. 1986), the court acknowledged that news organizations are not privileged to commit crimes while gathering news. *Lieberman*, 1 Cal. Rptr. 3d at 542. However, the court qualified the acknowledgment by explaining that no authority addresses the case of whether illegal activity is or is not in furtherance of First Amendment rights and that the language of California's anti-SLAPP statute specifically required that its provisions be construed broadly. *Id.* (citing CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2006)).

¹³³ *Lieberman*, 1 Cal. Rptr. 3d at 543-46; see *supra* note 48 (detailing the protective burden of proof of California's anti-SLAPP law). Although the station urged the court to permit

court affirmed the trial court's decision to deny the station's motion to dismiss under the anti-SLAPP statute.¹³⁴

b. Indiana

Indiana has only two published opinions regarding media defendants and its anti-SLAPP statute, the most recent of which affirmed that the protections of Indiana's anti-SLAPP law extend to media defendants.¹³⁵ In *Shepard v. Schurz Communications, Inc.*, an attorney sued a local newspaper and a public official for publishing statements about him that were allegedly false.¹³⁶ The court found that the newspaper had merely reported statements of "rhetorical hyperbole" made against Shepard by Litz, an opposing attorney, without adopting or endorsing the statements as the newspaper's own opinion.¹³⁷ The Indiana Court of Appeals held that, at least as far as the newspaper was concerned, the published statements undoubtedly implicated issues of public concern and were "lawful" according to established elements of defamation law in Indiana.¹³⁸

the press an affirmative defense to CAL. PENAL CODE § 632 on the basis of the First Amendment, the court declined to address the issue. *Lieberman*, 1 Cal. Rptr. 3d at 545.

¹³⁴ *Lieberman*, 1 Cal. Rptr. 3d at 546.

¹³⁵ *Shepard v. Schurz Commc'n, Inc.*, 847 N.E.2d 219, 226 (Ind. Ct. App. 2006).

¹³⁶ Shepard requested documentation of a delinquent sewer bill for a client and received a list of delinquencies from Monrovia town attorney Steven Litz that contained the contact information for fifty-one other Monrovia sewer customers. *Id.* at 221-22. Shepard sent a letter to each of the town's customers informing them of the invasion of their privacy. *Id.* at 222. A local newspaper published a story about the incident and included comments from Litz stating that Shepard was a liar. *Id.* Shepard sued Litz and the newspaper for defamation. *Id.*

¹³⁷ *Id.* at 225-26. To prevail under Indiana's anti-SLAPP statute, the party asserting the protection of the statute must state specifically the issue of public concern that prompted its actions of petition or free speech and prove "by a preponderance of the evidence, that the act upon which the claim is based is a lawful act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana." IND. CODE § 34-7-7-9 (3)(b), (3)(d) (2006) (defining protected activity as any conduct in furtherance of the exercise of the constitutional right of petition or free speech). If the court finds that a party's attempt to invoke the anti-SLAPP statute was frivolous or intended only to delay the proceedings, the plaintiff can recover all attorney's fees and costs in answering the anti-SLAPP motion. *Id.* § 34-7-7-8.

¹³⁸ *Shepherd*, 847 N.E.2d at 224, 226. The court explained that Indiana defamation law required an actual malice standard in regard to both public and private plaintiffs when the speech involved an issue of public concern. *Id.* In contrast to *Shepard*, the Indiana appellate court decided the only other Indiana case involving a media defendant on procedural, rather than substantive, grounds. *Poulard v. Lauth*, 793 N.E.2d 1120 (Ind. Ct. App. 2003). Poulard appeared pro se, claiming damages for slander, libel, and defamation against the *Michigan City News-Dispatch* and several other defendants in response to an article the newspaper had printed about the Shores Town Council, of which Poulard was president.

c. Louisiana

The most recent published Louisiana case examining the protections of its anti-SLAPP statute as they apply to a media defendant is *Thompson v. Emmis Television Broadcasting*.¹³⁹ Reverend Thompson sued television station WVUE for defamation and for disclosing information contained in a sealed court record from a prior suit the Reverend had filed against the church where he was a pastor and certain members of the congregation.¹⁴⁰ WVUE's broadcast included statements from people on both sides of the controversy as well as statements from Thompson himself and his attorneys.¹⁴¹ WVUE eventually filed a motion to strike Thompson's complaint pursuant to Louisiana's anti-SLAPP statute.¹⁴² When both parties appealed, the court noted that WVUE had not made any defamatory comments about the Reverend, but rather, merely

Id. at 1122. The newspaper raised Indiana's anti-SLAPP law as its defense and the trial court ruled that the law applied and that Poulard's claims should be dismissed pursuant to the statute. *Id.* On appeal, Poulard, now represented by counsel, argued that he should not have to pay the defendants' attorney's fees. *Poulard*, 793 N.E.2d at 1123; see IND. CODE § 34-7-7-7 (allowing a defendant who prevails on an anti-SLAPP motion to recover reasonable attorney's fees). Although Poulard's appeal was based merely on attorney's fees, the appellate court notes that the trial court's decision to dismiss pursuant to Indiana's anti-SLAPP law was "imbued with newspaper defamation law." *Poulard*, 793 N.E.2d at 1123. As part of his argument, Poulard stated that the Indiana anti-SLAPP law did not apply to his situation as a citizen against the media and that if it did, it was unconstitutional. *Id.* Because Poulard did not raise the applicability of the anti-SLAPP statute in the trial court, the appellate court did not rule on the applicability of the statute to a media defendant and awarded the defendants attorney's fees pursuant to the statute. *Id.* at 1123-25.

¹³⁹ 894 So. 2d 480 (La. Ct. App. 2005).

¹⁴⁰ *Id.* at 482. The opinion does not give many details of Thompson's prior suit, however the reader may infer that Thompson had originally sued his former church and congregation for defamation over allegations that he had embezzled money. *Id.* at 484-86. His suit against the station appears to be based on the fact that they publicized the nature of the congregation's original allegations against Thompson. See *id.* (describing the contents of Thompson's amended petition); *id.* at 486 (explaining that Thompson's defamation suit against his former church and congregation was in response to allegations that he had embezzled church money). The court record describing Thompson's suit against the church was supposed to have been left under seal but had been mislabeled, thus the station's reporter had full access to the record. *Id.* at 482 n.2.

¹⁴¹ *Id.* at 482.

¹⁴² *Id.* at 483. Louisiana's anti-SLAPP statute provides,

[a] cause of action against a person arising from any act of that person in furtherance of the person's right of . . . free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.

LA. CODE CIV. PROC. ANN. art. 971(A)(1) (2005). Thompson did not show up to the hearing on the motion and the trial court dismissed his complaint with prejudice. *Thompson*, 894 So. 2d at 483.

reported the statements of those involved in the controversy.¹⁴³ The court also pointed out that the Reverend had become a public figure through his political activism and the fact that he was suing his own church and congregation for defamation over allegations that he had embezzled funds was an issue of public interest.¹⁴⁴ Because Thompson was a public figure, the court ruled that the Louisiana anti-SLAPP law applied to the media's broadcast about the controversy.¹⁴⁵ The appellate court agreed with the trial court that Thompson had not established a probability that his claims would succeed and struck down his complaint pursuant to the anti-SLAPP statute.¹⁴⁶ The court reasoned that Thompson had failed to prove that the station acted with malice or that the broadcast was false and awarded the station attorney's fees pursuant to the provisions of the anti-SLAPP statute.¹⁴⁷

By the time the Louisiana Court of Appeals for the Fourth Circuit had ruled on the *Thompson* case, the Louisiana Court of Appeals for the Second Circuit had already permitted a media entity to use the state's anti-SLAPP law to defend itself in court.¹⁴⁸ In 2002, David and Ruby Johnson were murdered and their deranged son was the alleged killer.¹⁴⁹ Different members of the press spoke with law enforcement officers about the crime, and a local sheriff and deputy both told reporters that the deceased husband and wife were also brother and sister.¹⁵⁰ As a result, several broadcasts by different stations identified David and Ruby Johnson as twin brother and sister who had later married and had children.¹⁵¹ In each instance, members of the Johnson family contacted the stations to inform them that David and Ruby Johnson were not brother and sister and the stations ceased to reference the couple as related.¹⁵² The family then filed a complaint for defamation against the

¹⁴³ *Id.* at 486.

¹⁴⁴ *Id.* at 485. In discussing the defamation claim, the court mentioned that for a public figure to prevail on such a claim, the party must prove that the statements were made with actual malice. *Id.* at 486.

¹⁴⁵ *Id.* at 485.

¹⁴⁶ *Id.* at 486-87.

¹⁴⁷ *Id.* at 486-88. The court held that because truth is a defense to a defamation claim, Thompson had no probability of success with his claims against the station. *Id.* at 486.

¹⁴⁸ *Johnson v. KTBS, Inc.*, 889 So. 2d 329 (La. Ct. App. 2004).

¹⁴⁹ *Id.* at 331.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* The opinion makes no mention of any retractions or corrections made by any of the television stations involved. *Id.* The plaintiffs' complaint states a different story and alleges that the stations continued to broadcast the statement that the decedents were brother and sister, even after the stations had been informed otherwise by family members. *Id.* at 333.

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television stations, and the stations responded with a motion to strike pursuant to Louisiana's anti-SLAPP law.¹⁵³ The trial court granted the motion stating that the stations had exercised their right of free speech in connection with a public issue and had broadcast their story in good faith, reasonably believing that their information had come from reliable sources.¹⁵⁴ The appellate court affirmed the trial court's finding that the Johnsons did not have a likelihood of prevailing on their defamation claim because they would not be able to prove all of the elements required to succeed on the claim.¹⁵⁵

Two years before the *Johnson* case, Louisiana had affirmed the constitutionality of its anti-SLAPP law in another case involving the media, *Lee v. Pennington*.¹⁵⁶ When George Lee III sued a newspaper and four New Orleans television stations for broadcasting a story about his arrest for three counts of rape, the media moved to strike Lee's complaint pursuant to Louisiana's anti-SLAPP law and Lee responded by challenging the constitutionality of the law.¹⁵⁷ The court held that the

¹⁵³ *Id.* at 331.

¹⁵⁴ *Id.* Once the stations had shown that the Johnsons' suit was based on their exercise of free speech regarding a public issue, the Johnsons needed to prove a likelihood of prevailing on their claim. *Id.* at 332. See *supra* note 48 for a description of the protective burden of proof in Louisiana's anti-SLAPP statute.

¹⁵⁵ *Johnson*, 889 So. 2d at 333. In Louisiana, to succeed on a defamation claim, a plaintiff must prove: (1) defamatory words, (2) unprivileged publication, (3) falsity, (4) malice (actual or implied), and (5) injury. *Id.* at 332. The court pointed out that none of the allegedly defamatory statements had been made about any of the plaintiffs, but instead were about the decedents, and that the plaintiffs had also failed to prove any actual damage to their reputations from the broadcasts. *Id.* The court also noted that because the statements were made in regard to a matter of public concern, the plaintiffs would need to prove that the statements had been made with actual malice. *Id.* at 333. The court implied that for a statement to be made with malice, it must be made with "knowledge that the information was false or with reckless disregard for the truth." *Id.* at 334. Because the stations had relied on their sources in good faith, the plaintiffs had no probability of proving that the stations had not made the statements about the Johnsons with malice and thus, no probability of success on their defamation claim. *Id.*

¹⁵⁶ 830 So. 2d 1037, 1043 (La. Ct. App. 2002).

¹⁵⁷ *Id.* at 1040. The news of Lee's arrest was broadcast in 1999. *Id.* In 2001, Lee was found guilty of three counts of second degree kidnapping and five counts of forcible rape. *Id.* at 1040 n.1. In his suit against the media, Lee claimed defamation, invasion of privacy, and malicious prosecution. *Id.* at 1040. In Lee's complaint, the only portions of the broadcasts that Lee objected to were those that characterized him as a serial rapist. *Id.* at 1040 n.2. In his constitutional challenge, Lee stated that the statute violated the principles of statutory construction, equal protection, and due process. *Id.* at 1040. Lee emphasized in his complaint that the anti-SLAPP law could not be used to defeat an enforcement suit brought by a state entity. *Id.*; see LA. CODE CIV. PROC. ANN. art. 971(E) (2005) ("This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor."). Lee also

Louisiana anti-SLAPP law was constitutional because a plaintiff could proceed with his or her suit, even if it was based on the opposing party's right to petition or exercise of free speech, if the plaintiff could prove a probability of success on his or her claim.¹⁵⁸ The court also held that the statute did not violate equal protection because the statute does not classify individuals by race, religion, nationality, age, sex, physical condition, or political ideas.¹⁵⁹ Moreover, the court found that the statute did not violate due process because the purpose of the statute is to dismiss frivolous suits, and would not prevent plaintiffs with valid claims from pursuing a case.¹⁶⁰ The court held that the defendant stations had published the news about Lee in good faith as a matter of public concern and awarded the defendants attorney's fees pursuant to the statute.¹⁶¹

In a fourth case involving a media defendant, Louisiana's anti-SLAPP suit again shielded the media from liability for broadcasting a story on school truancy that included embarrassing footage of the plaintiff Stern.¹⁶² Television station WGNO had decided to run a news report on truancy in the local schools.¹⁶³ Stern was stopped by a truancy officer, asked for identification and being unable to produce any, was taken to the truancy enforcement center.¹⁶⁴ The station was at the enforcement center filming the activities and filmed Stern emptying his pockets, the contents including cash, a stick of gum, and a condom.¹⁶⁵ The station broadcast the story that evening including a voiceover quip about how Stern was "prepared, just not for school."¹⁶⁶ The report also included a statement that Stern's mother had said Stern was not in class due to a paperwork problem and would be back in school the next day.¹⁶⁷ Stern alleged that his sister also called the station prior to the broadcast to inform them that he had been sent home from school due to

asserted that permitting a trial court to evaluate the probable success of a claim before the claim had been adjudicated on the merits violated due process. *Lee*, 830 So. 2d at 1043.

¹⁵⁸ *Lee*, 830 So. 2d at 1041. The court found that "the standard to be applied in determining the 'probability of success' [was] the . . . elements of the tort the plaintiff alleges the defendant committed, coupled with the legislative intent set forth when the statute was enacted." *Id.*

¹⁵⁹ *Id.* at 1042.

¹⁶⁰ *Id.* at 1043.

¹⁶¹ *Id.* at 1044.

¹⁶² *Stern v. Doe*, 806 So. 2d 98 (La. Ct. App. 2001).

¹⁶³ *Id.* at 100.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

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a paperwork problem.¹⁶⁸ Stern sued the City of New Orleans and WGNO for false light invasion of privacy.¹⁶⁹ WGNO raised Louisiana's anti-SLAPP statute as a defense and the trial court struck Stern's complaint pursuant to the statute.¹⁷⁰

On appeal, Stern argued that the trial court erred in determining (1) that he had no probability of success on his claim; and (2) in holding that the station's footage of him was reasonably related to the public issue of truancy.¹⁷¹ The appellate court affirmed the trial court's finding that Stern had failed to prove a likelihood of success on his claim.¹⁷² The appellate court granted WGNO's motion to strike, but declined to award the station attorney's fees, stating that there was not sufficient evidence to indicate abuse of judicial process on Stern's part.¹⁷³ The decision suggests that while anti-SLAPP protection for media entities can be an effective way to prevent meritless suits that chill citizen participation in government, not all suits against media speech are an abuse of process per se merely because the plaintiff turned out to be incorrect.

The following analysis compares the results in the state court cases that have examined anti-SLAPP protection for the media with the First Amendment protections extended to the news media under current Supreme Court jurisprudence.

III. ANALYSIS: DOES ALLOWING THE MEDIA DEFENDANT ACCESS TO ANTI-SLAPP LAW EXPAND ON EXISTING MEDIA PROTECTION?

The courts of the eight different states that have addressed the applicability of anti-SLAPP protections to media defendants have, in

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 100-01. The court explained that false light invasion of privacy "arises from publicity which unreasonably places the plaintiff in a false light before the public." *Id.* at 101. In Louisiana, to prevail on a claim of false light invasion of privacy the plaintiff must prove a privacy interest, falsity, and unreasonable conduct. *Id.*

¹⁷⁰ *Stern*, 806 So. 2d at 99.

¹⁷¹ *Id.* at 100.

¹⁷² *Id.* at 102. The court found that Stern had no expectation of privacy on a public sidewalk and that the broadcast had not contained any false information. *Id.* The court also found that the station's actions in having a reporter follow along with truancy officers to report on a matter of public concern was not unreasonable. *Id.* at 102. Quoting *Roshko v. Hebert*, 439 So. 2d 428, 430 (La. 1983), the court emphasized that more than insensitivity is required to impose damages on the media "when the publication is truthful, accurate and non-malicious." *Id.* at 101.

¹⁷³ *Stern*, 806 So. 2d at 102-03. In choosing not to award attorney's fees to the defendants, the court noted that Stern had plead *in forma pauperis*. *Id.* *In forma pauperis* is defined as pleading "in the manner of an indigent who is permitted to disregard filing fees and court costs." BLACK'S LAW DICTIONARY 1164 (8th ed. 2004).

most instances, decided the issue in a manner that reflects the existing First Amendment protections extended to the media as evidenced in Supreme Court jurisprudence.¹⁷⁴ This trend could be reassuring for states contemplating a moderate or broad anti-SLAPP law. If the only increase in protection that anti-SLAPP law extends to the media is a speedier and more efficient process in defending itself against meritless suits, then everyone stands to benefit through the efficiency of unclogging court dockets and the economy of lowering the costs of litigation.¹⁷⁵ The aspects of each law that contribute the most to defining the actual boundaries of anti-SLAPP laws are both the definition of protected activity under each statute and the statutory burden of proof protecting the petitioning rights of each party.¹⁷⁶ Part III demonstrates that a moderate definition of protected activity, together with a “likelihood of success on the merits” burden of proof, works best to protect the media speech of greatest First Amendment importance.

Part III.A analyzes how the definition of protected activity in the Moderate and Broad statutes affects the way the media can use anti-SLAPP protection and whether the cases in the Moderate and Broad statute states remain within or expand upon existing Supreme Court precedent.¹⁷⁷ Part III.B examines the way in which the burdens of proof written into the Moderate and Broad anti-SLAPP statutes has affected the outcome of the cases with media defendants in those states.¹⁷⁸

A. *The Right Fit: Protected Activity Defined*

Throughout Part II, this Note illustrated the interaction between anti-SLAPP statutes and the high value the U.S. Constitution places on a free press and media speech involving public and political issues.¹⁷⁹ In contrast to this Supreme Court precedent, the limited language of Narrow Statutes not only fails to protect media speech, but also indirect forms of citizen participation in government.¹⁸⁰ Conversely, Broad

¹⁷⁴ See *infra* Parts III.A-III.B.

¹⁷⁵ *Supra* note 41 (listing early review in the litigation process as a key component of an anti-SLAPP statute).

¹⁷⁶ See *infra* Parts III.A-III.B.

¹⁷⁷ See *infra* Part III.A. This Note does not analyze the anti-SLAPP laws or case law of the states that have Narrow Statutes because so few addressed anti-SLAPP cases with media defendants. New York’s known case stays within the limited scope of its statute, Utah’s single known decision is unpublished and Oklahoma’s anti-SLAPP law is outside the scope of this Note. See *supra* notes 72, 75-77.

¹⁷⁸ See *infra* Part III.B.

¹⁷⁹ See *supra* Parts II.B-II.C.

¹⁸⁰ See *supra* Part II.C.1.

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Statutes, like those in California and Louisiana, stretch media protection too far, covering speech with little or no relation to citizen participation in government and in one case, activities that the state has otherwise deemed illegal.¹⁸¹ Striking a middle ground between these two extremes, the Moderate Statutes' slightly narrower anti-SLAPP language does not bar protections for media speech covering most topics of public interest.¹⁸² For example, the language of Massachusetts's, and Minnesota's anti-SLAPP laws, by limiting the activity protected to speech discussing the government or aimed at procuring government action, cover media speech of the kind most vigorously protected by the Supreme Court.¹⁸³

A combination of Minnesota's and Massachusetts's definitions of protected activity would protect the most important media speech while excluding less valuable speech such as tabloid reporting from anti-SLAPP protection.¹⁸⁴ Massachusetts anti-SLAPP law covers statements reasonably likely to encourage government consideration of an issue or to *enlist public participation* in an effort to affect government consideration of an issue.¹⁸⁵ Minnesota's law covers "speech or *lawful* conduct genuinely aimed in whole or in part at procuring favorable government action."¹⁸⁶ In this manner, both definitions easily extend anti-SLAPP protection of media speech to any communications made directly to a government body or in connection with issues under review by government bodies, but each also offers a unique safety valve that covers speech directed at public participation when such speech is not specifically addressed to a government body or regarding an issue under review in a current proceeding. Because of the way each is worded, both statutory definitions protect a broader spectrum of conduct aimed at procuring government action or stimulating public debate on current issues without extending anti-SLAPP protection to every act, no matter how questionable, that is connected to free speech.

¹⁸¹ See *supra* Part II.C.3.

¹⁸² See *supra* Part II.C.2. While the applicability of Georgia's anti-SLAPP statute to media defendants remains in some doubt, the concurring opinion from Judge Eldridge in *Davis* decrying anti-SLAPP protection for the media may have been motivated by the fact that, unlike the issues surrounding the home for the mentally challenged in *Special Force Ministries* or the cases involving public officials in Massachusetts, *Davis* did not involve an issue concerning government or aimed at procuring government action. See also *supra* Part II.C.2.a and notes 88-90.

¹⁸³ See *supra* note 17; *supra* Parts II.C.2.b-II.C.3.b; see also *supra* Part II.C.2.a; *supra* notes 88-90.

¹⁸⁴ See *supra* note 17; *supra* Parts II.C.2.b-II.C.3.b.

¹⁸⁵ *Supra* note 93.

¹⁸⁶ *Supra* note 111.

To be most effective, a definition of protected activity must also be accompanied by a statutory provision encouraging broad construction of the statute, but worded such that the statute encompasses only lawful activity and involves only issues of public concern. For example, Massachusetts courts' interpretation of the legislative intent to enact a broad statute has caused courts to apply the anti-SLAPP law to matters that are not of public concern—an interpretation that stretches the Massachusetts law further than that of nearly any other state.¹⁸⁷ From the standpoint of protecting citizen participation in government, the fact that the law protects all petitioning activity regardless of public interest makes Massachusetts's anti-SLAPP law the purest in regards to citizen protections. However, such an interpretation could also cover the most salacious tabloid reporting.¹⁸⁸ If the Massachusetts's anti-SLAPP law had included a policy statement limiting protection to petitioning activity regarding matters of public concern, the risk of providing anti-SLAPP protection to media acts that invade the privacy of others would be lower.

A definition of protected activity that does not limit anti-SLAPP protection to matters of public concern becomes even more troubling when coupled with Massachusetts's requirement that the non-moving party prove that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law" and caused the non-moving party "actual injury"—a burden of proof which could be nearly insurmountable.¹⁸⁹ While the Massachusetts cases involving issues that are not of public concern may be sympathetic, opening the door to anti-SLAPP protection for statements on purely private issues would also extend protection to the least valuable media speech.¹⁹⁰ This

¹⁸⁷ *Supra* note 104.

¹⁸⁸ *But see* *Islamic Soc'y of Boston v. Boston Herald, Inc.*, No. 05-4637, 2006 Mass. Super. LEXIS 391 (Super. Ct. July 20, 2006) (discussed *supra* notes 91-97). The court's decision that communications to the media and the resulting media campaign arising from religious and social antagonism did not satisfy the definition of protected activity because the conduct did not concern a governmental proceeding and was not directed at procuring action from a government official or entity. *Id.* at **27-31. Such a decision indicates that the Massachusetts anti-SLAPP law permits a court to draw the line at disingenuous communications—even on matters of public concern.

¹⁸⁹ *Supra* notes 45, 48.

¹⁹⁰ *See supra* note 17 (describing the most valuable kind of speech); *see also* *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (explaining that speech unrelated to matters of public concern is less protected under the First Amendment). *But see supra* note 49 (describing the facts of *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002)).

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Note addresses the burden of proof concern in more detail under subpart B.¹⁹¹

The *Lieberman* case from California is a second example of an anti-SLAPP interpretation that sweeps too broadly.¹⁹² The result in *Lieberman* falls in line with the current requirement that the media follow generally applicable laws as set forth in *Cohen v. Cowles Media*, *Pell v. Proconier*, and *Branzburg v. Hayes*.¹⁹³ However, the court's reasoning in *Lieberman* contradicts the same three Supreme Court opinions and extends anti-SLAPP protection to all newsgathering activity, even if illegal, as activity that "furthers the right of free speech" as defined in California's anti-SLAPP statute.¹⁹⁴ The court's broad construction of the anti-SLAPP statute in this case pushes the envelope past the *Cohen*, *Pell*, and *Branzburg* holdings requiring the media to adhere to generally applicable laws.¹⁹⁵ Moreover, because the activity of the press is nearly always activity that furthers the right of free speech, such reasoning ultimately leads to the preferential treatment of the press, a result that falls outside current Supreme Court interpretations of the First Amendment.¹⁹⁶

States considering anti-SLAPP legislation broad enough to protect the press should view *Lieberman* as a cautionary tale. If *any* conduct in furtherance of the constitutional rights of freedom of speech and petition is protected under anti-SLAPP law regardless of its legality, then suits concerning the most egregious media intrusions would be dismissed without adequate review, depending on the burden of proof that a state chooses to adopt.¹⁹⁷

¹⁹¹ See *infra* Part III.B.

¹⁹² See *supra* notes 129-34 and accompanying text.

¹⁹³ See *supra* note 53 (explaining how *Cohen*, *Pell*, and *Branzburg* hold that the media is not exempt from generally applicable laws).

¹⁹⁴ *Supra* note 132 and accompanying text.

¹⁹⁵ See *supra* note 53.

¹⁹⁶ *Id.*; see also *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) ("[T]he Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937))). It should be noted that a state law or judicial decision is not necessarily unconstitutional because it falls outside the standards articulated by the Supreme Court. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-47 (1974). *Gertz* permits states wide latitude in setting standards of liability for the press. *Id.*

¹⁹⁷ For example, in *Lieberman v. KCOP Television, Inc.*, 1 Cal. Rptr. 3d 536, 540 (Ct. App. 2003), when analyzing the probable success of *Lieberman's* case against the station, the court noted specifically that *Lieberman* based his case on the violation of the Penal Code as opposed to any generalized tort claim. While the California appellate court found that *Lieberman* did provide sufficient evidence that the press had violated a California statute

A point to consider in comparing the sweeping protections of Massachusetts and California's statutes is that the broad protections of Massachusetts's statute originated not in the language of the law itself, but rather, through a generous judicial interpretation of legislative intent.¹⁹⁸ Conversely, the *Lieberman* court's holding that California's anti-SLAPP law protects illegal activity as long as the activity is in furtherance of the right of free speech or petition originated from a reading of the plain language of the statute, illustrating the danger of overly broad anti-SLAPP language.¹⁹⁹

The California Supreme Court case *Gates* illustrates another risk of a broad definition of activity protected by anti-SLAPP law.²⁰⁰ While the result in *Gates* comports with the Supreme Court's holding in *Cox Broadcasting Co.* and *Florida Star*, the result also goes against the principal of many anti-SLAPP laws and even the language of California's own statute, which is aimed at protecting speech and petitioning activity on matters of public concern.²⁰¹ The questionable level of involvement of an otherwise unknown person in a crime solved more than twelve years ago likely falls outside matters defined as being "of public concern."²⁰² Comparing the similar facts of *Gates* to the facts of Georgia case *Davis*, makes it easier to appreciate Judge Eldridge's objection to anti-SLAPP protection for the media when the protection encompasses tabloid-style stories about old crimes in that such media stories do little to promote citizen participation in government, the main reason for the existence of anti-SLAPP laws in the first place.²⁰³

Although the language of Louisiana's anti-SLAPP law is as broad as California's, the case law from Louisiana evinces a strong adherence to existing Supreme Court precedent, demonstrating that broad statutory language, while riskier in regard to media abuse, does not automatically

prohibiting electronic eavesdropping, the outcome of the case might have been very different had *Lieberman* pleaded only in tort. *See id.*

¹⁹⁸ *See Duracraft v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 (Mass. 1998) (explaining that the Massachusetts legislature had struck the phrase "of public concern" from an earlier version of the anti-SLAPP bill and failed to reinsert the phrase).

¹⁹⁹ *Lieberman*, 1 Cal. Rptr. 3d at 541-42; *see supra* notes 129-34 and accompanying text.

²⁰⁰ *Gates v. Discovery Commc'n., Inc.*, 101 P.3d 552 (Cal. 2004).

²⁰¹ *See supra* note 54 (explaining through the holdings of *Cox Broadcasting Company* and *Florida Star* that the Supreme Court has refused to impose civil liability on the press for publishing information gleaned from public records); *see also McBryer, supra* note 27, at 607 (regarding the purpose of anti-SLAPP law); *supra* note 133 (California's definition of protected activity).

²⁰² *See supra* note 59 for the Supreme Court's test for recognizing matters of public concern.

²⁰³ *Compare supra* Part II.C.2.a, and notes 84-90, with Part II.C.3.a, and notes 124-28.

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add up to new and different protection for the press.²⁰⁴ The decisions of *Thompson* and *Lee* keep anti-SLAPP law close to the standards articulated by the Supreme Court, reflecting the holdings of *New York Times* and *Gertz*.²⁰⁵ *Johnson* and *Stern* also follow *Gertz*, enforcing a similar burden of proof for private figures involved in matters of public concern.²⁰⁶ Although both California and Louisiana's statutes contain anti-SLAPP protections that encompass far more than citizen participation in government, both states limit the stretch of those protections through the second critical feature determining the scope of an anti-SLAPP law – the burden of proof.²⁰⁷

B. Procedural Safeguards: Preserving Petitioning Rights for All

While the Moderate Statutes' definitions of protected activity are better focused on protecting citizen participation in government than the definitions in laws with broader language, the feature that makes a critical difference in the practical scope of anti-SLAPP protection is the procedural safeguard written into each statute. In this respect,

²⁰⁴ See *supra*, Part II.C.3.c; *supra* notes 139-74. While Indiana's anti-SLAPP law features protective language similar to California's and Louisiana's, the two Indiana cases citing the statute do little to examine the actual breadth of the Indiana law. The results in *Poulard* and in *Shepard* line up neatly with traditional press protections in regard to public officials set forth in *New York Times Co. v. Sullivan*. See *supra* notes 55-56, 138 and accompanying text. Poulard's actions in suing a newspaper for statements it printed about him in his role as a public official are so typical of a SLAPP that had the court applied the Indiana anti-SLAPP statute to the case, it is difficult to imagine that the media would have lost. See *supra* note 33 and accompanying text. *Shepard*, decided on the merits, cements the Indiana standard and refers to principals identical to those announced by the Supreme Court in *Sullivan* and *Gertz*. See *supra* notes 55-58, 135-38 and accompanying text.

²⁰⁵ In *Thompson*, the court's holding that the Reverend Thompson, a public figure, needed to prove actual malice on the part of the newspaper as well as the falsity of the statements, lines up with the standard the Supreme Court set for public figures in *Sullivan*. See *supra* notes 55-56, 139-48 and accompanying text. Similarly, in *Lee*, the court followed the standards the United States Supreme Court set forth in *Gertz* for media reporting on a private party involved in a matter of public concern when the court affirmed the media's motion to dismiss pursuant to the state anti-SLAPP statute. See *supra* notes 57-59, 157-62 and accompanying text.

²⁰⁶ Both *Johnson* and *Stern* involved private figures involved in a matter of public concern and in both cases the media erroneously reported aspects of the private individuals' involvement in the matters at issue. See *supra* notes 149-56, 163-74 and accompanying text. True to *Gertz*, Louisiana analyzed the likelihood that the plaintiffs could prevail on their claims by its own state standard and found that Johnson and Doe both failed to prove the necessary elements of defamation as a matter of law. See *supra* notes 53, 57-59, 156, 173 and accompanying text.

²⁰⁷ See *supra* note 48 for the respective burdens of proof written into California and Louisiana's anti-SLAPP statutes.

California's and Louisiana's statutes offer the best procedural balance between the petitioning rights of each party.

Compared to California and Louisiana, the burdens of proof written into the Moderate Statutes analyzed in this Part provide too much protection for a defendant invoking the anti-SLAPP shield.²⁰⁸ For example, the question of what was or was not a reasonable basis in fact under the Massachusetts anti-SLAPP law formed a key portion of both the trial and appellate courts' analysis of *Salvo*.²⁰⁹ The two opinions are a literal difference in judicial opinion as to what facts comprising the controversy are true or false.²¹⁰ The burden on the non-moving party to prove that the moving party's petitioning activity was "devoid of any reasonable factual basis or arguable basis in law" and caused the non-moving party actual injury, as required by the Massachusetts anti-SLAPP law, indicates that the appellate court's decision would likely have been the same had it followed the language of the statute.²¹¹

The Massachusetts standard as applied in *Salvo* does not fall far from the "actual malice" standard announced under the Supreme Court's holdings in *Sullivan* and *Gertz*.²¹² However, not all defamation cases necessarily involve public officials or matters that qualify as being of public concern.²¹³ The fact that the Massachusetts anti-SLAPP law and its strict burden of proof applies evenly to all parties and all issues, regardless of whether the issue is of public concern, likely increases the protection of the press under the Massachusetts law beyond the bounds

²⁰⁸ See *supra* note 48 to compare different procedural safeguards for anti-SLAPP motions. In contrast to the other Moderate anti-SLAPP laws in Massachusetts or Minnesota whose burdens of proof sweep too broadly, Georgia's anti-SLAPP law does not feature a burden of proof that materially changes the scope of the statute. See *supra* note 48 for an explanation of Georgia's procedural safeguards. Because the burden of proof written into Georgia's statute requires only a verification on the plaintiff's part at the time of filing that the complaint has been made in good faith, the burden creates no significantly new protections in regard to media speech. See *supra* note 85. The verification method bears a striking similarity to the requirements of Rule 11 of the Federal Rule of Civil Procedure which requires attorneys to sign each pleading. FED. R. CIV. P. 11(a). Similar to Georgia's verification requirement, Rule 11 states that by signing a pleading, the attorney is certifying that the pleading is reasonable under the circumstances and is not being maintained for any improper purpose. FED. R. CIV. P. 11(a), (b)(1).

²⁰⁹ See *supra* notes 98-113 and accompanying text.

²¹⁰ See *supra* notes 98-113 and accompanying text.

²¹¹ See *supra* notes 102-03 and accompanying text.

²¹² See *supra* notes 55-59 and accompanying text; see also *Salvo v. Ottaway Newspapers*, 782 N.E.2d 535, 537 (2003) (describing *Salvo* as a former city councilor).

²¹³ See *supra* notes 56-59 and accompanying text.

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articulated in Supreme Court precedent.²¹⁴ In addition, a burden of proof that heavily favors a party invoking anti-SLAPP protection hammers punitive measures that are already addressed by the statute's mandatory award of attorney's fees to a party whose motion to dismiss is successful, while unfairly impinging on the petitioning rights of the nonmoving party.²¹⁵

Like Massachusetts, the language of Minnesota's anti-SLAPP statute is moderate in scope, but the burden of proof, which requires the non-moving party to prove through clear and convincing evidence that the moving party's conduct was tortious, is problematic in regard to media defendants.²¹⁶ This standard reflects the standard of proof for government officials in *Sullivan* and the Court's holding in *Cohen* that the media is not exempt from generally applicable laws.²¹⁷ However, while this burden of proof was probably intended—like the Massachusetts burden of proof—to discourage SLAPP suits, such a provision could also expand protection for the press, or any other defendant in the same position, by pushing the burden of proof beyond the preponderance of the evidence standard used for most torts.²¹⁸ Consequently, Minnesota's anti-SLAPP law creates a potential windfall of protection for a defendant like the media whose conduct would have some protection even under a Moderate anti-SLAPP statute.²¹⁹

²¹⁴ See *supra* notes 48, 94 (discussing the burden of proof under Massachusetts' anti-SLAPP law); see also *supra* notes 59-61 (addressing the possible limits on the media as established by *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001)); *supra* note 216 (reminding the reader that state law or jurisprudence expanding protection for the press is not necessarily unconstitutional). This Note argues, rather, that anti-SLAPP laws that offer more protection for the press than the standards articulated by the Supreme Court result in anti-SLAPP laws less focused on actual citizen participation in government and less likely to garner wide support in a legislature.

²¹⁵ See *supra* notes 44-45.

²¹⁶ See *supra* note 48 for the burden of proof under Minnesota's anti-SLAPP law.

²¹⁷ See *supra* notes 53, 55 and accompanying text.

²¹⁸ See *supra* note 48.

²¹⁹ See *supra* note 48. Minnesota's burden of proof essentially requires that a plaintiff be able to prove that the media had acted tortiously by clear and convincing evidence in regard to nearly any media speech. MINN. STAT. § 554.02(2)(3) (West 2000). While the language of Minnesota's anti-SLAPP burden of proof may be problematic, the *Special Force Ministries* decision appears to be based as much on policy as it is on law. *Supra* note 120. The result in *Special Force Ministries v. WCCO Television* lines up with Supreme Court cases *Branzberg*, *Pell*, and *Cohen* and suggests that, at the least, Minnesota courts might refuse to extend SLAPP protections outside the traditional tort law limitations on the media, regardless of the language of the statute. See *supra* note 53 (describing the *Cohen*, *Branzberg*,

Louisiana and California may have obtained differing degrees of deference to other law under the similar provisions of their Broad anti-SLAPP laws, but the burden of proof required in these statutes creates optimal flexibility in its application. By permitting a party to defeat an anti-SLAPP motion to dismiss if the party can prove a likelihood of success on its claim, the burden of proof for maintaining the suit aligns with the substantive elements of the claim.²²⁰ For example, in a state following the *Sullivan* standard, a public figure bringing a defamation action against the media would need to produce clear and convincing evidence that a statement was false and made with actual malice to overcome an anti-SLAPP motion to dismiss the suit.²²¹ By contrast, a private party seeking to prove trespass or intrusion might need only to produce a preponderance of the evidence in support of their claim to succeed against a similar anti-SLAPP motion. Therefore, a “likelihood of success” standard similar to California’s and Louisiana’s permits the state legislature and judiciary to address different sorts of claims in the manner each finds best.²²² Such a burden of proof is ideal in that it deters SLAPP suits while working seamlessly with other bodies of law as well as preserving the petitioning rights of both parties.

By contrast, Indiana’s anti-SLAPP law warrants a cautionary note in regard to the safeguard of a procedural burden of proof. Under Indiana’s anti-SLAPP law, an anti-SLAPP motion must be dismissed if the party moving to dismiss proves by a preponderance of the evidence that the act upon which the SLAPPER’s claim is based is a “lawful act in furtherance of the person’s right of petition or free speech” under the United States Constitution.²²³ Indiana’s requirement that the party invoking anti-SLAPP protection bear the burden of proof that its actions were lawful defeats the purpose of an anti-SLAPP law because placing the burden of proof on the party invoking the law’s protection weighs on the party under attack instead of putting the pressure on a party filing such a suit to reconsider its actions.²²⁴ Rather, statutes such as

and *Pell* decisions as indications that the media is not exempt from generally applicable laws).

²²⁰ See, e.g., *supra* note 156.

²²¹ See *supra* notes 55-56 and accompanying text.

²²² See *supra* note 156.

²²³ *Supra* note 137.

²²⁴ *Supra* note 41. For information about the legislative purpose behind anti-SLAPP laws, see PRING & CANAN, *supra* note 15, at 3 (describing SLAPP suits as chilling “citizen participation, volunteerism, public service... [and a threat to] the functioning of government” and holding forth anti-SLAPP legislation as a potential solution). See also McBrayer, *supra* note 27, at 607 (describing anti-SLAPP laws as “[d]eveloped to protect

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California's or Louisiana's which require the plaintiff to demonstrate a likelihood of success on its claim to defeat a motion to dismiss pursuant to an anti-SLAPP law serves the purpose of discouraging meritless suits without creating an insurmountable barrier for parties with legitimate claims.

Overall, the application of anti-SLAPP law to media defendants has served the purpose of citizen participation in government by protecting the media's ability to inform the public.²²⁵ However, the broad provisions and varied judicial interpretations of some anti-SLAPP statutes could ultimately be detrimental to getting anti-SLAPP laws sufficient to protect the media passed in the twenty-six states that have yet to adopt anti-SLAPP legislation.²²⁶ Those who harbor concern over a powerful and intrusive media will not be supportive of anti-SLAPP measures so broad that they protect otherwise illegal conduct or make it disproportionately difficult to defeat a motion to dismiss under anti-SLAPP law.²²⁷ By synthesizing the best aspects of different state anti-SLAPP statutes, it is possible to draft a definition of protected activity and burden of proof that best serve the interests of true citizen participation in government without leaving the law open to abuse.

IV. FREE TO BE YOU AND ME: PROTECTING BOTH THE PRESS AND THE
INDIVIDUAL CITIZEN

The demonstrated effectiveness of Moderate and Broad anti-SLAPP laws in protecting the role of the media according to existing Supreme Court standards indicates that anti-SLAPP laws with language broad enough to cover the activities of the press are both workable and desirable.²²⁸ As illustrated in Part III, either the definition of protected activity or the burden of proof written into an anti-SLAPP statute has the potential to make existing media protections either more efficient or open to abuse.²²⁹ Consequently, a model statute needs both aspects of the statute to work toward the acts of free speech and petitioning activity genuinely aimed at procuring government action or sparking debate on public issues.

citizens from meritless lawsuits filed by large private interests with the intent to discourage the citizens' exercise of their constitutional rights").

²²⁵ See *supra* Parts III.A-III.B; *supra* note 17.

²²⁶ See *supra* Parts III.A-III.B; see also *supra* note 16.

²²⁷ See *supra* note 16.

²²⁸ See *supra* Parts II.C.2-II.C.3.

²²⁹ See *supra* Parts III.A-III.B.

An anti-SLAPP definition of protected activity that protects citizen participation in government through both individual activity and the press would incorporate the best aspects of the language of Minnesota's and Massachusetts's laws while retaining a burden of proof similar to that of California's and Louisiana's statutes. Thus, "protected activity" under a model statute would be defined as:

*any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue of public concern under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue of public concern by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other lawful conduct genuinely aimed in whole or in part at procuring favorable government action in regard to an issue of public concern.*²³⁰

²³⁰ The proposed definition of activity gleans the specific language addressing many situations from the Massachusetts law while retaining the requirement from the California and Louisiana statutes that protected activity involve issues of public concern for the catch-all phrase "any other lawful conduct." See MASS. GEN. LAWS ch. 231 § 59H (West 2000), which defines protected activity as:

any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

See also CAL. CIV. PROC. CODE § 425.16(e) (West 2004 & Supp. 2006) (including "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" in its definition of protected activity); LA. CODE CIV. PROC. ANN. art. 971(F)(1) (2005) (listing out the activities that constitute acts "in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue"). The proposed definition also includes language from the Minnesota law protecting activity directed at procuring government action in whole or in part to fully encompass any and all activity that could be characterized as citizen participation in government. See MINN. STAT. § 554.02(2)(3) (West 2000), which defines protected activity as "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring

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The proposed definition requires that any statement not made directly to a government body involve an issue of public concern in order to be protected under anti-SLAPP law and also covers any and all lawful conduct aimed in whole or in part at procuring favorable government action, including enlisting others to engage in such action. A definition like the one above covers nearly any political speech or speech addressing issues of public concern, from a citizen's Web site about municipal issues to a t-shirt that says "Support Our Troops" to Oprah Winfrey's talk show episode about mad cow disease.²³¹

One criticism of the above solution is that a statute that excludes certain matters from protection because they are not of public concern overlooks sympathetic cases of genuine petitioning in front of a government body such as the case of *Fabre v. Walton*.²³² The proposed definition is unlikely to exclude such claims because the provisions regarding direct communication with the government do not require the communication to involve an issue of public concern. Rather, the requirement that the activity involve issues of public concern in order to qualify for anti-SLAPP protection applies only when the activity is not addressed directly to the government.

In addition, the model statute would contain a burden of proof stating that if a court finds the complained-of activity to be within the definition of activity protected under the anti-SLAPP law, that the court "shall dismiss the claim, unless the court determines that the plaintiff has established a probability of success on the claim."²³³ The proposed procedural safeguard still places the pressure on the filer to justify a suit that could be characterized as a SLAPP, but does not create insurmountable odds for a party with a legitimate claim.²³⁴ This burden protects the media speech geared toward citizen participation in

favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights."

²³¹ Ironically, under the anti-SLAPP legislation proposed in this Note, Oprah Winfrey's broadcast about mad cow disease would likely have fallen into the definition of protected activity proposed in this Note, while Tom Leykis's radio broadcast would not. See *supra* notes 1-8 and accompanying text.

²³² 781 N.E.2d 780 (Mass. 2002). See *supra* note 49 for a summary of *Fabre's* facts.

²³³ This proposed burden of proof draws directly from the procedural safeguards California's and Louisiana's anti-SLAPP statutes. See *supra* note 48.

²³⁴ See *supra* note 41 (explaining the importance that the burden of proof to maintain the suit land on the SLAPP filer). Cf. MASS. GEN. LAWS ch. 231, § 59H (West 2000) (requiring a party responding to an anti-SLAPP motion to dismiss to prove that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party).

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government without extending anti-SLAPP protection beyond existing limits on the media.

V. CONCLUSION

To truly protect citizen participation in government, the language of anti-SLAPP laws must also protect the media. Existing case law that examines the protections of anti-SLAPP law to the media demonstrates that courts have generally declined to extend the media any more protections under anti-SLAPP law than the media already enjoys under current Supreme Court precedent. Language limiting the application of anti-SLAPP law to statements and conduct genuinely directed at producing government action regarding issues of public concern focuses anti-SLAPP protection on the most legitimate forms of media speech. Likewise, a burden of proof that requires a SLAPP-ing party to prove a likelihood of success on his or her claim works in tandem with the established elements of the claim in question without providing increased substantive protection to a party invoking the anti-SLAPP law as a shield. By incorporating these provisions into their anti-SLAPP laws, states seeking to enact anti-SLAPP legislation will strike the right balance of shielding the media reporting that promotes citizen participation in a democratic government without handing tabloid reporters a sword.

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