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The Big Chill: Are Public Participation Rights Being Slapp-Ed?

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PACE ENVIRONMENTAL LAW REVIEW

ARTICLE

THE BIG CHILL: ARE PUBLIC PARTICIPATION RIGHTS BEING SLAPP-ED?*

RACHEL E. DEMING*

"These lawsuits are meant not just to harass and intimidate and get you to give up, but also to make everyone else say, 'I'm not going to be in that situation,' . . . . It's meant to kill free speech, and it's being used more and more around the country.

This is a matter of principle . . . . If I back down to a billionaire bully, no one will ever be able to walk up to a podium in a public meeting or send an email to a public official or speak to a commissioner again."[1]

Maggy Hurchalla

* This article is dedicated to the tireless environmental warrior Maggy Hurchalla and to the equally tireless protectors of the fundamental right to petition our governments, Penelope Canan and Rock Pring. Mses Hurchalla and Canan spoke at a symposium at Dwayne O. Andreas School of Law, Barry University, on March 28, 2019, "Are Your Public Participation Rights Being "SLAPP"-ed?" (on file with author). Ms. Hurchalla passed away on February 19, 2022. LUCY MORGAN, *Extraordinary FL Women: Two Sisters stronger than most men, and it's hard to believe they're gone,* FLORIDA PHOENIX (Feb. 23, 2022, 7:00 am), https://floridaphoenix.com/2022/02/23/extraordinary-fl-women-two-sisters-stronger-than-most-men-and-its-hard-to-believe-theyre-gone/ [https://perma.cc/E3SM-W92V].

** Retired Tenured Associate Professor of Law and former Director of the Environmental and Earth Law Clinic, Dwayne O. Andreas School of Law, Barry University. The author thanks Dean Leticia Diaz, of Barry Law School, for supporting my scholarship. I also want to recognize the League of Women Voters of Florida and Speak Up Wekiva for their dedication to protecting Florida's natural resources and partnership with the Environmental and Earth Law Clinic as clients and mentors for the student attorneys. I owe a special debt of gratitude to my research assistants, Arieana Dunne and Kathryn Avila, for their excellent research, thoughtful comments and unflagging support.

1. Martin Merzer, *Maggy Hurchalla's Free Speech Right Just Cost her Millions*, FLA. POL. (Apr. 24, 2018), https://floridapolitics.com/archives/261967-maggy-hurchallas-free-speech-right-just-cost-her-millions/ [https://perma.cc/CU4A-4X5R].

ABSTRACT

This article focuses on the Petition Clause of the First Amendment to the U.S. Constitution and addresses a confounding situation caused by Supreme Court precedents that give greater protection to persons who engage in illegal business practices than to citizens who petition their governments. This dichotomy is especially detrimental to environmental protection.

The crux of the conflict lies in which standard courts should use to determine whether the petitioning activity is protected: the subjective Free Speech standard grafted onto Petition Clause activities or the objective standard initially developed by the Supreme Court for petition activities in antitrust cases. The result has been the application of the subjective standard for tort allegations, including business torts, and the objective standard for alleged illegal business practices.

The Supreme Court's failure to protect petition activities in some cases has resulted in a phenomenon known as SLAPPs, Strategic Lawsuits Against Public Participation. The essential characteristic of these lawsuits is that the litigant, usually a business, does not bring the lawsuit to win; the lawsuit is brought to make it costly and difficult for the petitioner to protest for fear of being enmeshed in a protracted legal proceeding. Unfortunately, many environmental activists have tort claims brought against them, especially when the economic stakes are high. The difficulties presented in defending against tort allegations have significantly chilled citizen engagement with their governments on a variety of issues, but a major portion of SLAPPs involve environmental concerns.

This article also examines the myriad of state laws enacted to prevent chilling citizen petition activities, along with the recently released Uniform Public Expression Protection Act (UPEPA).[2] *Many states have enacted anti-SLAPP laws, but those laws vary widely plus not all states have them. The resulting gaps mean that the choice of forum has a significant impact on how protected a citizen's petitioning activities are from a SLAPP. Widespread adoption of UPEPA should help to reduce some procedural differences by creating uniform rules for court management of these lawsuits. However, UPEPA's definition section could perpetuate the disparate treatment of tort and illegal business petitioning activities.*

2. UNIF. PUB. EXPRESSION PROT. ACT (UNIF. L. COMM'N 2020).

To give citizens the full benefit of their rights under the Petition Clause, courts should create a uniform rule, applying the objective standard developed in antitrust cases to all Petition Clauses activities. This solution would raise a question with which the Supreme Court has struggled before: whether protections of the Speech and Petition Clauses should be treated the same.[3] *In the two Supreme Court decisions addressing this issue,*[4] *the Court did so but clearly struggled to reach that conclusion in the more recent case. It also limited its holding to the situation presented in that case: whether an individual government employee could bring an employment claim under the Petition Clause that was barred by the Free Speech Clause.*[5]

The result of the Court's application of Free Speech standards to Petition Clause cases brought by government employees, however, perpetuates an inequality in the application of the Petition Clause overall: greater protection for people who may engage in illegal business practices than for citizens seeking to protect the environment. To address the demonstrable and significant chilling effect on citizen participation in governance, courts should apply the objective Noerr-Pennington standard to Petition Clause cases related to all forms of governmental regulation.

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3. *See, e.g.*, Borough of Druyea, Pennsylvania. v. Guarnieri, 564 U.S. 379 (2011).
4. *See id.*; McDonald v. Smith, 472 U.S. 479 (1985).
5. *Guarnieri*, 564 U.S. at 385.

INTRODUCTION

Why would a corporation sue an environmental activist who had no assets except a kayak and an old Toyota for $4.4 million[6] or a local citizens' group in a poor, rural Alabama community for $30 million?[7] The answer, based on research and experience, is to silence them and to discourage others from speaking out.[8] These kinds of lawsuits to silence opponents are increasing in the environmental sphere, both in the United States and abroad.[9]

I was not aware of SLAPPs, Strategic Lawsuits Against Public Participation,[10] until 2013, when I became the director of a law school environmental clinic, the Barry Law School Environmental and Earth Law Clinic. One of our first assignments was to advise a well-known non-profit public advocacy organization about whether they might face a SLAPP claim if they made public comments against a proposal by a public-private partnership. The organization's leadership made it clear that they would not make the comments unless they felt confident that they would not be SLAPPed.

As a former in-house attorney for a global chemical corporation,[11] I was taken aback, that being sued for making a comment about a public proposal was even a consideration for this organization. In over twenty years of work

6. Hurchalla v. Lake Point Phase I, LLC, 278 So.3d 58, 63 (Fla. Dist. Ct. App. 2019).

7. Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145-CG-N, 2016 U.S. Dist. LEXIS 142654, at *2 (S.D. Ala. Oct. 13, 2016); *see also Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, (last visited Feb. 18, 2023) https://www.rcfp.org/resources/anti-slapp-laws/ [https://perma.cc/KSP5-F8AS] ("Green Group Holdings, Inc. . . . sued a local citizens group, Black Belt Citizens Fighting for Health and Justice, for libel and slander.").

8. *See generally* Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENV'T L. REV. 23 (1989).

9. *See* Peter Hayes, *Green Groups: Suits to Silence Them on the Rise*, BL. (Apr. 10, 2017, 10:53 AM), https://news.bloomberglaw.com/environment-and-energy/green-groups-suits-to-silence-them-on-the-rise [https://perma.cc/D9J7-L6XU]; *see also* LADY NANCY ZULUAGA & CHRISTEN DOBSON, SLAPPED BUT NOT SILENCED: DEFENDING HUMAN RIGHTS IN THE FACE OF LEGAL RISKS (2021) https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf [https://perma.cc/YD6V-VD2P].

10. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT x (Temple Univ. Press ed., 1st ed. 1996).

11. I was employed by Ciba-Geigy Corporation and subsequently by Ciba Specialty Chemicals Corporation (when it was spun-off in the merger that created Novartis Corporation in 1996) from 1992 - 2007.

for large corporations, first at a large New York firm and later the chemical company, I had never heard such a lawsuit proposed, let alone discussed. In fact, a business unit contemplating the litigation had to carefully evaluate the ability to collect a favorable award in addition to the probabilities of success and the litigation costs.[12] In addition, we routinely assessed our case dockets to evaluate the cost-benefit ratio for pursuing litigation.[13]

The SLAPP phenomenon was first identified by George W. Pring and Penelope Canan, a law professor and a sociology professor, respectively, through their extensive research in the 1980's and the term first appeared in published form in 1988.[14] They focused their research on citizens and non-governmental organizations being sued for "communications made to influence a governmental action or outcome."[15] Professors Canan and Pring coined the term SLAPP based on the right to participate in government guaranteed by the Petition Clause of the U.S. Constitution's First Amendment:[16] "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[17]

What these researchers found was the widespread use of lawsuits filed against petitioners, with the "filers" seeking to quell any input from

12. *See*, *e.g.*, *Eight Factors to Consider Before Filing a Lawsuit*, TREMBLY L. FIRM, https://tremblylaw.com/8-factors-consider-filing-lawsuit/ [https://perma.cc/5FVE-YQ8Q]; *see also Factors to Consider When Filing a Lawsuit*, BARTON BRIMM, http://www.bartonbrimm.com/?p=6512 [https://perma.cc/67A2-766S].

13. *See*, *e.g.*, *id.*

14. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 385 (1988). I cite Professors Canan and Pring throughout this article because they coined the term, and their research remains the original source for most other subsequent analyses of SLAPPs. For example, the Uniform Law Commission introduction to UPEPA refers to "commentators" who, in "the late 1980s . . . began observing that the civil litigation system was increasingly being used in an illegitimate way." UNIF. PUB. EXPRESSION PROT. ACT prefatory intro. note (UNIF. L. COMM'N 2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14&forceDialog=0 [https://perma.cc/3JQ2-W3KJ]. The commentators were Professors Canan and Pring, who identified the phenomenon and carefully tailored their research to focus on civil cases and provide a sound analysis.

15. PRING & CANAN, *supra* note 10, at 8.

16. *See* Canan & Pring, *supra* note 14, at 38544.

17. U.S. CONST. amend. I.

"targets" adverse to their requests.[18] However, as explained below, that objective is not something to which filers are entitled. The reason SLAPPs are wrong is because they shift political issues to courts, chill public participation in government, and undermine the Petition Clause in our Constitution.[19]

The research found that these types of lawsuits primarily occurred in five settings: real estate development; the environmental movement; "not in my backyard" land use concerns; disgruntled public servants; and a group of issues labeled "rights."[20] The first three settings relate to environmental concerns and the research also found that the number of SLAPP cases filed involving the first category alone exceeded 30 percent.[21] This fact plus my first-hand experience as an environmental legal advisor to non-profit organizations[22] are the reason I use environmental examples in this article.

It is very impressive how quickly Professors Canan and Pring's research triggered bi-partisan legislative action in the United States;[23] Washington passed the first anti-SLAPP law in 1989,[24] and eight other states followed by the time Professors Canan and Pring published their seminal book in 1996, SLAPPs: GETTING SUED FOR SPEAKING OUT.[25] While 23 states and the District of Columbia legislatures have passed additional SLAPP legislation since that time, there is no federal anti-SLAPP law, not all states have anti-SLAPP laws, and many of the existing statutes are not strong enough to deter SLAPPs.[26]

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18. Because SLAPP claims can be brought as counterclaims or crossclaims, I use Professors Canan and Pring's terminology for referring to SLAPP participants: filers, the parties who initiate the SLAPP claims, and targets, the parties against whom the claims are brought. PRING & CANAN, *supra* note 10, at 9.

19. *Id.* at 14.

20. *Id.* at xii.t

21. *See Id.* at 30.

22. *See In-House Clinics*, DWAYNE O. ANDREAS SCH. OF L. AT BARRY UNIV., https://www.barry.edu/en/academics/law/jd-law/in-house-clinics/ [https://perma.cc/NC5U-3Z7M].

23. PRING & CANAN, *supra* note 10, at 189.

24. Jane Turner, *Brenda Hill Skylstad*, WHISTLEBLOWER NETWORK NEWS (Mar. 31, 2022), https://whistleblowersblog.org/whistleblower-of-the-week/brenda-hill-skylstad/ [https://perma.cc/S54A-EQFM].

25. PRING & CANAN, *supra* note 10, at 189.

26. *See infra* Part III; *see also* Justin Jouvenal, *Va. Legislature Passes Bills Aimed at Lawsuits by Devin Nunes, Johnny Depp*, WASH. POST (Feb. 11, 2020, 11:05 PM), https://www.washingtonpost.com/local/public-safety/va-house-passes-bill-aimed-at-lawsuits-by-devin-nunes-johnny-depp/2020/02/11/865115f4-4cef-11ea-9b5c-eac5b16dafaa_story.html [https://perma.cc/FBM2-EEWR].

The SLAPP phenomenon has also generated action around the globe.[27] The United Nations High Commissioner for Human Rights, Michelle Bachelet, recently stated,

> When human rights defenders are afraid to question reports about wrongdoing and deficits they observe, it affects the entire society. Strategic lawsuits against public participation (SLAPPs) have exactly that effect: they can impose sometimes significant fines and criminal sanctions, and thus intimidate human rights defenders and stop them from shedding light on critical issues. It is our shared responsibility to prevent SLAPPs from undermining everyone's right to know.[28]

One purpose of this article is to address the drift away from the original focus of Professors Canan and Pring, the Petition Clause.[29] As discussed below, the Supreme Court has made the determination about whether targets have Petition Clause protection difficult by creating two lines of conflicting precedents for Petition Clause cases.[30] A decision in a Petition Clause case involving a libel action for damages to an individual's reputation and job prospects[31] was dropped into a line of Petition Clause cases

27. *See Critical Part of the UNGPs 10+ Roadmap: Increasing the Protection of Human Rights Defenders in the Face of Strategic Lawsuits Against Public Participation*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Feb. 4, 2022), https://www.ohchr.org/en/statements/2022/02/critical-part-ungps-10-roadmap-increasing-protection-human-rights-defenders-face [https://perma.cc/YC6B-Y8T3]; *see also* Iris Fischer, Kaley Pulfer & Justin Manoryk, *Anti-SLAPP Litigation: Ontario Court of Appeal Applies Recent SCC Decisions*, BLAKES: BULLETINS (Feb. 1, 2021), https://www.blakes.com/insights/bulletins/2021/anti-slapp-litigation-ontario-court-of-appeal-appl [https://perma.cc/5GZ3-LREG]; *EU Anti-Slapp Directive: A Landmark Step in the Right Direction*, INT'L PRESS INST.: NEWSROOM (Apr. 27, 2022), https://ipi.media/eu-anti-slapp-directive-a-landmark-step-in-the-right-direction/ [https://perma.cc/NU6X-JUTB] (explaining that the European Union announced on April 27, 2022 its intention to push for anti-SLAPP protections); Protection of Public Participation Act, S.B.C. 2019, C 3 (Can.); Protection of Public Participation Act, 2008 (Act No. 2008-48) (Austl.); Anti-Strategic Lawsuits Against Public Participation Act of 2011, S. 3080, 15th Cong. (Nov. 29, 2011) (Phil.), https://legacy.senate.gov.ph/lisdata/1254310602!.pdf [https://perma.cc/DYG8-LH8S].

28. ZULUAGA & DOBSON, *supra* note 9, at 3.

29. PRING & CANAN, *supra* note 10, at x.

30. Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 103 (1996); *see* discussion *infra* Part II.

31. *See* McDonald v. Smith, 472 U.S. 479 (1985).

involving antitrust and other statutory claims.[32] These Supreme Court opinions provide more legal protection for petitioners who engaged in illegal business practices than for those who may have committed a tort.[33] This article examines this dichotomy, asks if it makes sense and concludes that all petitioning activities should be protected because the Petition Clause is so important to our democratic form of government.

The saga of the lawsuit brought against Maggy Hurchalla,[34] an environmental activist in southern Florida, exemplifies the difficulty raised by the dual line of precedents.[35] Ms. Hurchalla petitioned her local county commissioners to prevent a business entity from taking actions Ms. Hurchalla thought would degrade the environment.[36] This is the classic example of petitioning governmental officials.[37] However, both the trial and appellate courts failed to distinguish between what a citizen says when they are advocating a course of action to governmental officials and those same statements made in other forums, public or private.[38] This case illustrates what happens when the courts apply an inappropriate standard to Petition Clause speech, which is aggravated by inadequate or non-existent state statutes—a situation that currently exists in most states.[39]

32. These cases are collectively referred to in this article as the Noerr-Pennington doctrine cases. *See* discussion *infra* Part II.

33. Sarah L. Swan, *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36:1 J. LAND USE & ENV'T L. 57, 83, 87 (2020). Professor Swan's article identifies the special tensions for petitioning local governments about land use. She has an excellent discussion about tortious interference allegations in SLAPP lawsuits. While her article has a brief discussion about anti-SLAPP legislation, this article goes into more in-depth discussion about the status of such laws and evaluates those laws for effectiveness. In addition, this article expands on the Petition Clause discussed in her article, which was based primarily on Aaron Gary's in-depth analysis of the Petition Clause caselaw from 1996. *See Gary*, *supra* note 30, at 70. The reason more focus needs to be on the Petition Clause and anti-SLAPP protections is that adjusting one tort law for tortious interference will not have as much of an impact as implementing an objective standard for petition speech in all cases and strong anti-SLAPP laws.

34. *See* discussion *infra* Part IV.a.

35. This lawsuit was also a significant focus of another recent article on SLAPPs. *See* Swan, *supra* note 33.

36. Hurchalla v. Lake Point Phase I, LLC, 278 So.3d 58, 62 (Fla. Dist. Ct. App. 2019).

37. Brief for Dr. Penelope Canan & George W. Pring as Amicus Curiae Supporting Appellant at 11, *Hurchalla*, 278 So.3d at 58 (No. 4D18-1221).

38. *See Hurchalla*, 278 So.3d at 58.

39. Discussion *infra* Part II.

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While the anti-SLAPP statutes can play a role in deterring actors from bringing SLAPP claims in the first place, these laws do not determine the outcome of these cases. To address SLAPPs, a court must first determine whether the filer's claims might violate a target's First Amendment right to petition their government.[40] Because SLAPPs are brought to deter petitioning activities, courts need to identify those claims and deal with them as expeditiously as possible.[41] Only once that determination is made can targets get some protection for their petitioning activities from anti-SLAPP laws or court procedures, whether weak or strong.

Some of the anti-SLAPP laws were enacted to dispose of SLAPP claims as expeditiously as possible and some to deter SLAPP filers from making claims. However, the deterrent effectiveness of these laws is questionable given the number of SLAPPs still being filed along with the significant variations in content of each state's law.[42] Moreover, the poor target does not get to take advantage of whatever procedures are available until the court has determined that the claims might be SLAPPs, which can take longer than the target has the means to resist.[43]

Section 1 briefly overviews what constitutes a SLAPP claim. Section 2 analyzes the Petition Clause cases and suggests ways to address the current dichotomy between precedents. UPEPA is summarized in Section 3, along with a couple of current state ant-SLAPP laws and the status of state and proposed federal anti-SLAPP legislation. Section 4 discusses two significant recent cases that exemplify what happens when the constitutional analysis undermines the Petition Clause, and the forum lacks adequate anti-SLAPP protections. The article concludes with a recommendation that procedural and statutory protections are necessary to protect citizen participation in our democracy because the cost to achieve victories through going to trial deters too many people from voicing their opinions about governance issues.

40. After filing, petitioners need a court determination.

41. UNIF. PUB. EXPRESSION PROT. ACT prefatory intro. note (UNIF. L. COMM'N 2020); PRING & CANAN, *supra* note 10, at 10–11 (citing Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992)).

42. *See* discussion *infra* Parts III.c., III.d.

43. *See* Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145-CG-N, 2016 WL 6023841, at *1 (S.D. Ala. Oct. 13, 2016).

I. Overview of SLAPPs

SLAPPs use tort claims such as libel, slander, defamation and business interference against targets.[44] SLAPP claims are distinguishable from valid tort claims because the SLAPP filers are motivated by tying their targets up in a lawsuit and discouraging other adversaries from speaking out for fear of also getting sued.[45] The burden and expense of having to defend themselves from these costly lawsuits have a "chilling" effect upon targets of these claims and other citizens who become afraid to speak out.[46]

Containing the right to petition is no longer limited to lawsuits. Recent anti-protest laws also seek to curtail citizens from petitioning their governments. The anti-protest laws enacted by some states in response to the Black Lives Matter movement are classic examples of attempts to prevent ordinary citizens from seeking redress from their governments.[47] For example, Florida enacted a well-publicized "Anti-Riot" bill on April 19, 2021,[48] but that law was found unconstitutional in federal court less than five months later. The United States District Court for the Northern District of Florida found the statute to be "[i]mpermissibly overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment."[49] Specifically, the court found that the targets "have engaged in self-censoring for fear of the challenged statute's enforcement against them. Plaintiffs'

44. PRING & CANAN, *supra* note 10, at 10.

45. *Id*. at 10–11(citing *Gordon*, 590 N.Y.S.2d at 656).

46. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556 (2014).

47. Sophie Quinton, *Eight States Enact Anti-Protest Laws*, PEW TR.: STATELINE (June 21, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/21/eight-states-enact-anti-protest-laws [https://perma.cc/T77T-2ZY3].

48. Florida CS/House Bill 1 was created in response to "a summer of nationwide protest for racial justice" nearly a year beforehand and was intended to combat "public disturbance." *See* Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1250–51(N.D. Fla. Sep. 9, 2021). The language of the bill "(1) redefines 'riot' and creates a new felony for 'aggravated rioting'; (2) comprehensively lists crimes that may occur during a riot, with increased penalties; (3) makes it a felony to damage a memorial or historic property; (4) prohibits bail for alleged rioters until their first appearance in court; and (5) creates an affirmative defense to civil liability where the victim participated in a riot." Legacy Ent. & Arts Found. v. Mina, No. 6:21-cv-698, 2021 U.S. Dist. LEXIS 131549, at *2 (M.D. Fla. May 18, 2021).

49. *Dream Defs.*, 2021 U.S. Dist. LEXIS 170824, at *6.

and their members' First Amendment rights are chilled by section 870.01(2)."[50]

In the environmental arena, legislation preventing protests against pipelines was enacted in several states after the demonstrations against the Dakota Access Pipeline.[51] In response, thirteen states "quietly enacted laws"[52] which increase criminal penalties for protesting, trespassing, or interfering with infrastructure, specifically gas and oil pipelines.[53] Of the states who have enacted or are currently introducing pipeline protest laws, nine of them do not have an anti-SLAPP law.[54]

There are two important components for combatting SLAPPs. The first is to clarify the parameters of constitutional, statutory and caselaw protections for petitioning. The second is to have a robust set of procedural protections for targets and deterrents for SLAPP filers. These components will be addressed in the next two sections.

II. Petition Clause Protection

The Petition Clause of the First Amendment to the U.S. Constitution is at the heart of Professors Canan and Pring's analysis.[55] A democracy cannot

50. *Id*. at *9.

51. "In January 2016, the Dakota Access Pipeline was unanimously approved for construction . . . The controversial pipeline could destroy ancestral burial grounds and poison the water supply." *Stand with Standing Rock: Protect Protesters' Rights*, ACLU, https://www.aclu.org/issues/free-speech/rights-protesters/stand-standing-rock [https://perma.cc/FP9D-ANGC]. The pipeline sparked major protests in Standing Rock, which spread across the globe. Alison Cagle, *Still Standing: Youth Activism and Legal Advocacy Work Hand in Hand in the Fight for Justice*, EARTHJUSTICE (Jul. 6, 2020), https://earthjustice.org/features/standing-rock-still-standing [https://perma.cc/R3W9-RT34].

52. Kaylana Mueller-Hsia, *Anti-Protest Laws Threaten Indigenous and Climate Movements*, BRENNAN CTR. FOR JUST. (Mar. 17, 2021), https://www.brennancenter.org/our-work/analysis-opinion/anti-protest-laws-threaten-indigenous-and-climate-movements [https://perma.cc/P62Z-D9AA].

53. *Id.*

54. *See US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative# [https://perma.cc/4K6N-X4NS]; *see Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, https://static1.squarespace.com/static/5890bc421b10e39a2ab9c2bd/t/59efdd882278e76ed41e5270/1508892041130/Anti-SLAPP_State_Table+10_24_17.pdf [https://perma.cc/FWC2-GKR8].

55. *See* PRING & CANAN, *supra* note 10, at 8.

function if some citizens are restricted from participating in governance.[56] As proven by the research of Professors Canan and Pring and acknowledged by the courts, lawsuits against citizens engaging in petitioning activities imposes a significant burden on those citizens.[57] The fact that most of those lawsuits are dismissed does not give adequate redress to those petitioners because the strain and cost of defending against such lawsuits is so great.[58] The notice pleading standard in our civil procedure rules makes it hard to dismiss such lawsuits without discovery, a key driver of the cost.[59]

The Supreme Court has created two parallel lines of jurisprudence on the Petition Clause.[60] One line refers to the *McDonald v. Smith*[61] decision which makes a broad holding on a very narrow set of facts involving a tort claim. The other line revolves around the decisions the court used to create the Noerr-Pennington doctrine, to address petition activities relating to federal antitrust laws.[62] Few cases cite both these Supreme Court precedents, perhaps because they are in "irreconcilable conflict."[63] However, the Petition Clause claims in environmental cases raise governance issues similar to those in antitrust cases – the extent to which business activity should be constrained for a greater societal benefit.

The Noerr-Pennington doctrine better protects petition activities and should be applied in all Petition Clause cases except, perhaps, individual government employment disputes. That doctrine articulates an objective standard for determining whether activities are protected by Petition

56. *Id.* at 18 ("Today, your right to participate in government is not only recognized by the Constitution and judges like [those in the nineteenth century] but also encouraged by our legislatures with diversity of laws unmatched by any other nation on earth. From 'Administrative Procedures Act' to 'Freedom of Information Acts' to 'Government in the Sunshine' laws to 'Citizen Suit' provisions, our laws invite every American to believe in participation in government, to act on that belief, and to practice it.").

57. *See id.* at 2; Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

58. PRING & CANAN, *supra* note 10, at 11–14.

59. UNIF. PUB. EXPRESSION ACT § 7, cmt. 2 (UNIF. L. COMM'N 2020) ("In other instances, the moving party will have to attach evidence to its motion to establish that the cause of action is based on the exercise of protected activity. That's because a creative plaintiff can disguise what is actually a SLAPP as a 'garden variety' tort action.").

60. *See* Gary, *supra* note 30, at 69–70.

61. McDonald v. Smith, 472 U.S. at 479 (1985).

62. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379–80 (1991).

63. Gary, *supra* note 30, at 70.

Clause.[64] *McDonald* imposes a subjective standard.[65] The Supreme Court has only cited *McDonald* twice since the decision was issued in 1985, and, as discussed below, the only decision to discuss the Petition Clause in some depth questioned *McDonald's* scope.[66] By comparison, there are twenty Supreme Court decisions citing the Noerr-Pennington doctrine,[67] and three of those applied the doctrine to Petition Clause cases, without questioning its scope or relevance.[68] Actually, only one case has cited both *McDonald* and Noerr-Pennington cases, the same one that questioned *McDonald's* scope.[69] However, the Court has yet to address why there is one standard for tort claims and another for alleged illegal business activities.

I will focus on the Noerr-Pennington doctrine cases first because this doctrine pre-dates the *McDonald* case and contains the bulk of Supreme Court Petition Clause jurisprudence. Although developed in the antitrust context, the Noerr-Pennington cases are equally applicable to SLAPPs due to the Petition Clause's importance to our democratic form of governance, regardless of whether the underlying claims are torts or anticompetitive business practices.

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64. *See infra* Part II.a.

65. *See infra* Part II.b.

66. Borough of Duryea v. Guarnieri, 564 U.S. 379, 389 (2011) ("There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis . . . ."); District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (discussing whether the right to petition is collective).

67. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 555 (2014); *Guarnieri*, 564 U.S. at 390; BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002); Pro. Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 627 (1992); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379 (1991); FTC v. Superior Ct. Trial Law. Ass'n, 493 U.S. 411, 419 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495 (1988); S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 53 n.11 (1985); Hoover v. Ronwin, 466 U.S. 558, 574 n. 25 (1984); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 n.10 (1983); Cmty. Commc'ns Co., Inc. v. City of Boulder, 455 U.S. 40, 57 (1982); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 698 n.27 (1978); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 399 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579, 622 (1976); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509 (1972); *see generally* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

68. *Cal. Motor Transp. Co.*, 404 U.S. at 510-11; *Omni Outdoor Advert., Inc.*, 499 U.S. at 382; *Pro. Real Estate Invs., Inc.*, 508 U.S. at 58, 60, 62.

69. *Guarnieri*, 564 U.S. at 389.

> In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity . . . .[70]

The primary benefit of the application of the Noerr-Pennington doctrine in SLAPPs is that it provides an objective standard for evaluating whether a filer's claims should be dismissed because the filer is seeking to curtail the target's petition speech.[71] The factors a court must consider using the subjective *McDonald* test make it difficult to dismiss a case without discovery.[72]

A. Noerr-Pennington Doctrine

The Noerr-Pennington doctrine was created from two Sherman Act antitrust cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[73] and *United Mine Workers of America v. Pennington*.[74] In those cases, the Supreme Court granted immunity to a target "who genuinely [sought] to achieve his governmental result."[75] Even though the target engaged in activities illegal under federal law.[76]

In *Noerr*, trucking companies alleged that railroads engaged in illegal anti-competitive behavior under the Clayton Act.[77] The court found that

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70. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

71. *See Omni Outdoor Advert., Inc.*, 499 U.S. at 380; PRING & CANAN, *supra* note 10, at 27; *See* Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENV'T L. REP. 10136, 10137 (2015).

72. PRING & CANAN, *supra* note 10, at 26–27; *See* Potter & Haller, *supra* note 71, at 10137.

73. *E. R.R. Presidents Conf.*, 365 U.S. 127 (1961).

74. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); *see also* Gary, *supra* note 30, at 77—95 (providing an excellent and thorough discussion of both Noerr and Pennington).

75. *Omni Outdoor Advert., Inc.*, 499 U.S. at 380 (citing to Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.10 (1937)).

76. *See E. R.R. Presidents Conf.*, 365 U.S. at 145; *see also United Mine Workers of Am.*, 381 U.S. at 671.

77. *E. R.R. Presidents Conf.*, 365 U.S. at 129–30.

imposing antitrust liability on people who requested governments to pass and enforce laws that were anti-competitive raised important questions under the Petition Clause.[78] In this case, the targets engaged in direct speech to governmental officials as well as indirect speech seeking governmental action through newspaper and magazine articles, speeches, editorials, and circulars.[79] Nonetheless, the court held that both were forms of speech seeking to induce governmental action and therefore petition speech.[80] Moreover, the court declared that "the intent and methods" of the defendant railroads were "legally irrelevant,"[81] recognizing that "injury to another arising out of petitioning for governmental action may be 'inevitable' but nonetheless be non-actionable because to find otherwise would 'be tantamount to outlawing' such petitioning activity."[82] Based on the facts in this case, the court declined to impose liability under the Clayton Act.[83]

The court refused, however, to establish absolute immunity for petition speech and created the "sham" exception: speech "ostensibly directed towards influencing governmental action, [but] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[84]

In the *Pennington* case, the filers were the partners of a small coal company who brought a cross-claim under the Sherman Act alleging that the United Mine Workers and some large coal companies, the targets, were seeking to put small companies out of business in part by asking the Secretary of Labor to set a federal higher minimum wage for mine workers.[85] The filers alleged that the targets were seeking this change to make it harder for smaller mining companies to enter the market.[86] Relying on *Noerr,* the Court held "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of the intent or purpose."[87]

78. *Id.* at 136–37.
79. *Id.* at 142–43.
80. *Id.* at 144.
81. *Id.* at 142.
82. Gary, *supra* note 30, at 80 (quoting *E. R.R. Presidents Conf.*, 365 U.S. at 143–45).
83. *E. R.R. Presidents Conf.*, 365 U.S. at 145; Gary, *supra* note 30, at 79.
84. *E. R.R. Presidents Conf.*, 365 U.S. at 144.
85. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 659–61 (1965).
86. *See id.* at 660–61.
87. *Id.* at 670.

A Supreme Court case decided seven years after *Pennington* consolidated the Court's Petition Clause analysis into the Noerr-Pennington doctrine.[88] In *California Motor Transport Co. v. Trucking Unlimited,* a case between two sets of competitor trucking companies, the plaintiffs alleged the targets' filing of objections to granting licenses in administrative and judicial proceedings were prohibited under the Clayton Act.[89] The court stated,

> [In Noerr], [w]e rested our decision on two grounds:
> (1) 'In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.'
> (2) 'The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.'
> We followed that view in *United Mine Workers v. Pennington*.[90]

Since the *California Transport* decision, this analysis has been referred to as the Noerr-Pennington doctrine.[91] The major addition the *California Transport* decision made to the Noerr-Pennington doctrine was the clarification that this "philosophy" applied to administrative agencies and

88. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
89. *Id.* at 509.
90. *Id.* at 510.
91. *See* Paul Gowder, *Noerr-Pennington Doctrine*, FREE SPEECH CTR. AT MIDDLE TENN. UNIV.: THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1122/noerr-pennington-doctrine [https://perma.cc/KGK8-CNVC].

state courts.[92] Ultimately, the court remanded the case to the district court for further proceedings on the "sham exception."[93]

The next Supreme Court case to discuss the Noerr-Pennington doctrine and Petition Clause activity is *City of Columbia v. Omni Outdoor Advertising, Inc,* another Sherman Act case.[94] In this case, the filer, a billboard company, made several claims alleging illegal anticompetitive behavior.[95] In two of the claims, the filer alleged that a municipality and the target, a billboard company well established in the municipality, had engaged in an illegal conspiracy under the Sherman Act by enacting an ordinance that restricted the placement of new billboards.[96] The complaint also included tort causes of action related to untrue and malicious rumors and attempts to interfere with the filer's contracts, but only three claims were submitted to the jury, all of which involved anticompetitive business practices.[97] The jury found in favor of the filer and was awarded substantial damages.[98] The targets made a motion for judgment notwithstanding the verdict which the trial court granted.[99] The Fourth Circuit Court of Appeals reversed district court's decision and reinstated the jury's verdict.[100]

The Supreme Court granted certiorari but only addressed the Sherman Act conspiracy claim related to municipal ordinance.[101] The decision first reaffirmed the basic proposition that petitioning government officials is shielded from Sherman Act claims "regardless of intent or purpose."[102]

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92. *Cal. Motor Transp. Co.*, 404 U.S. at 510 (explaining that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly, the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.").

93. *Id.* at 515–16; *see also* Prof. Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) (providing guidance on applying the sham exception rule).

94. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991).

95. *Id.* at 367–68.

96. *Id.* at 368.

97. *Id.* at 368; Omni Outdoor Advertising, Inc. v Columbia Outdoor Advertising, Inc., 974 F.2d 502, 504 (4th Cir. 1992).

98. at 369.

99. *Id.*

100. *Id.*

101. *Id.* at 368, 384.

102. *Id.* at 380. The Court noted its decision did not cover the trade libel and other private action tort claims and left those to be addressed on remand. Id. at

The main focus of this decision, however, was the scope of the "sham" exception to Petition Clause protection.[103] The court explained that "[t]he 'sham' exception in *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon,"[104] where the activities are "not genuinely aimed at procuring favorable government action at all."[105] In contrast, "one 'who genuinely seeks to achieve his governmental result, but does so *through improper means*'" is shielded from liability by the Petition Clause.[106]

Therefore, petitioning a government to enact legislation that would have an anticompetitive impact is protected by the Constitution even though those actions could also constitute an illegal conspiracy under the Sherman Act. In the *Omni* case, the target sought to achieve its objective through a zoning ordinance—the outcome, not by the act of lobbying itself—the process.[107] In this case, the "sham exception" was not relevant, so the target and the municipality were entitled to immunity for anticompetitive actions related to the enactment of an ordinance.[108] The Court remanded the case for further proceedings consistent with its decision,[109] which are discussed in Section II.C. below.

One final Supreme Court case applying the Noerr-Pennington doctrine and discussing it in some detail is *Professional Real Estate Investors v. Columbia Pictures Indus*.[110] The targets in this case were plaintiff movie studios who brought a copyright infringement case against a business that rented videodiscs for use in hotel rooms.[111] The defendant became a filer when it asserted counterclaims for violations under the Sherman Act,

384. It is not clear whether any of those claims involved petition activities, however, so no inference should be drawn about whether the Court was applying a different standard to those claims. Further, the Court did not mention the *McDonald* case. On remand, the Fourth Circuit held that the filer was not entitled to a new trial on any claims because the filer waived its rights to litigate those by not including them in the first trial or failed to establish liability. *Omni Outdoor Advertising*, 974 F.2d at 503.

103. *Id.* at 380–82.

104. *Id.* at 380.

105. *Id.*

106. *Id.* (citations omitted).

107. *See id.* at 381.

108. *Id.*

109. *Id.* at 384.

110. Pro. Real Estate Invs. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

111. *Id.* at 52.

alleging that the lawsuit by the studios was a sham because the studios proceeded with the lawsuit even though they were not confident they would prevail.[112]

The parties cross-moved for summary judgment on all claims and postponed discovery.[113] The court addressed the infringement issue first and found in favor of the rental business.[114] The movie studios appealed the decision, and the dismissal was upheld on appeal.[115]

The trial court then considered the motions for summary judgment on the antitrust claims.[116] The rental business argued that it needed discovery on the allegation that the infringement lawsuit was a sham because it alleged that the studios had malicious intent when they initiated the lawsuit.[117] The issue presented was whether summary judgment could be granted before discovery on the allegation. The lower and appellate courts both held that the infringement lawsuit was not a "sham" and dismissed the antitrust claims because the studios were protected by the Noerr-Pennington doctrine.[118]

The Supreme Court certified the petition in this case to define the "sham" exception because the Courts of Appeal had "defined 'sham' in inconsistent and contradictory ways."[119] The Court established a two-part test for the exception in a litigation context.[120] First, the claims must be objectively baseless and then, if that first prong is found to exist, the claim must be "subjectively intended to abuse the process."[121] A common theme throughout the opinion by Justice Thomas and also the concurring opinions is that courts must apply an objective standard when evaluating claims that involve Petition Clause activities.[122]

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112. *Id.* at 52.
113. *Id.* at 52.
114. *Id.* at 53.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 51, 54.
120. *Id.* at 60–61.
121. BE & K Constr. Co. v. NLRB, 536 U.S. 516, 537 (2002) (Scalia, J., concurring) ("I agree with Justice Breyer that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.").
122. Pro. Real Estate Inv.,508 U.S. at 57, 59, 60, 61, 67, 68.

While the Noerr-Pennington doctrine originated in the antitrust context, the Supreme Court has applied it to boycotts[123] and labor relations, cases which also involve federal statutes.[124] However, the Court still has not applied the doctrine to all Petition Clause cases, although the federal courts of appeal have applied the doctrine in many contexts beyond the doctrine's antitrust roots.[125]

B. McDonald Case: Tort Allegations and the Petition Clause

The other case Supreme Court case to develop a standard applicable to petition speech, *McDonald v. Smith*, created an unfortunate precedent that the Court has never applied again. That case was decided in the middle of the Noerr-Pennington Petition Clause line cases.[126] It was also decided before Professors Canan and Pring published findings from their extensive research and coined the term SLAPPs.[127]

In *McDonald*, the Supreme Court allowed a slander and libel case to proceed against a target for statements in a petition, the form of which was a letter to the president. The filer, an individual, alleged that the target's letters to the president containing false and derogatory statements denied him an appointment as a U.S. Attorney.[128] The target asserted that the Petition Clause granted him absolute immunity.[129]

In a short, five-page opinion, Justice Burger reviewed some of the historical information related to the Petition Clause, noting that a right to petition preceded the Constitution.[130] The right first appeared in 1689 when

123. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 886, 914 (1982).

124. *See* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983); *see also BE & K Constr. Co.*, 536 U.S. at 537–39 (Scalia, J., concurring).

125. *See, e.g.,* B&G Foods of N. Am., Inc. v. Embry, 29 F.4th 527, 535 (9th Cir. 2022); Akhmetshin v. Browder, 993 F.3d 922, 958 (D.C. Cir. 2021); CSMN Invs., LLC v. Cordillera Metro. Dist., 956 F.3d 1276, 1282–83 (10th Cir. 2020); Campbell v. Pa. Sch. Bds. Ass'n, 972 F.3d 213, 218–19 (3d Cir. 2020); Constr. Cost Data, LLC v. Gordian Grp., Inc., 814 F.App'x 860, 866–67 (5th Cir. 2020).

126. *See* McDonald v. Smith, 472 U.S. at 479 (1985).

127. CANAN & PRING, *supra* note 11, at 386; *see* Gary, *supra* note 27, at 102-22; *see also* Smith v. McDonald, 895 F.2d 147 (4th Cir. 1990) (providing an in-depth discussion of the facts of that case and the final result, a decision by the Fourth Circuit Court of Appeals, dismissing the filer's claims on state law right to petition protection), *cert. denied*, 498 U.S. 814 (1990).

128. McDonald v. Smith, 472 U.S. 479, 480–81 (1985).

129. *Id*. at 481–82.

130. *Id.* at 482–83.

a bill of rights was extracted from the English sovereigns, William and Mary.[131]

The Court acknowledged other Supreme Court decisions interpreting the Petition Clause in other situations, mentioning two of the Noerr-Pennington line of cases,[132] but merely to note correctly that those decisions also found that the right to petition was not absolute.[133] Relying on the 1845 decision *White v. Nicholls*[134] which had facts similar to those presented in the *McDonald* case,[135] the court held that the Petition Clause did not confer unqualified immunity for a petition containing falsehoods made with express malice.[136] The concurring opinion referenced *New York Times Co. v. Sullivan*,[137] the seminal Free Speech case establishing the standard that false or misleading statements about an individual must be made with "actual malice" to overcome the First Amendment protection for Free Speech.[138] The *New York Times* case defined "actual malice" as knowledge that a statement was false or with reckless disregard of the truth of the statement,[139] while the *Whyte* case cited by the majority used the term "express malice," defined as "falsehood and the absence of probable cause."[140]

A troubling aspect of this case, however, was the court's sweeping conclusion that, because all First Amendment rights were "inseparable, . . . there is no basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."[141] Yet, the Court already had relatively recent precedents treating individual First Amendment protections differently: the *Noerr* and *Pennington* Petition Clause cases were decided in 1961 and 1965, respectively, and the *New York Times* Free Speech case was decided in

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131. *Id.*

132. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

133. *McDonald*, 472 U.S. at 484.

134. White v. Nicholls, 44 U.S. 266, 291 (1845).

135. *Compare McDonald,* 472 U.S. at 480–81, *with White*, 44 U.S. at 284–290.

136. *White*, 44 U.S. at 291.

137. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

138. *McDonald*, 472 U.S. at 485-6.

139. *Id.* at 485.

140. *Id.* at 484.

141. *Id.* at 485.

1964.[142] In fact, alleged conduct attacking individual reputations were involved in both *Noerr* and *New York Times*, but the *Noerr* court found that injury to another arising out of petitioning for governmental action may be "inevitable" but nonetheless be non-actionable because to find otherwise would 'be tantamount to outlawing' such petitioning activity.[143]

The Court questioned the scope of the *McDonald* opinion's in the 2009 case, *Borough of Duryea, Pa. v. Guarnieri.*[144] As in *McDonald,* this case involved a single petitioner, a public employee, who was protesting the terms of his employment.[145] The precedent established for interference by an employer with employee's right of Free Speech requires the employee to show that the speech was on a matter of public concern. The question presented in the *Borough of Duryea* case was whether the same requirement exists for petitioning activity.[146]

Although the Court stated, "[c]ourts should not presume there is always an essential equivalence in the two Clauses or that Speech Precedents necessarily and in every case resolve Petition Clause claims,"[147] the Court determined that the public concern test applied to speech of government employees should also be applied to government employee Petition Clause cases.[148] The Court held that "the right of a public employee under the Petition Clause is the right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts."[149]

In discussing the "*McDonald* case, the Court disagreed with interpretations of that case that limited to rights under the Petition Clause to the right to Free Speech.[150] The Court stated that "*McDonald* held only

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142. Eastern R. Conference v. Noerr Motors*,* 365 U.S. 127 (1961); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

143. *Noerr,* 365 U.S. 127 at 140.

144. Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011).

145. *Id.* at 382.

146. *Id.*

147. *Id.* 388.

148. *Id.* at 398.

149. *Id.* at 399.

150. *Id.* at 389.

that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition."[151]

Even though the Supreme Court has mostly ignored the *McDonald* case, the decision has had an impact elsewhere. Many cases involving free speech refer to claims as SLAPPs, although a more accurate term would be SLAFS, Strategic Lawsuits Against Free Speech, because many of those cases do not involve public participation in government.[152] At the same time, some state legislatures and courts have grafted the libel-based malice standard into all tort claims, including business torts.[153]

There is no doubt that some people take advantage of the legal system to file lawsuits to deter or punish others in many settings;[154] these types of lawsuits should also be discouraged and can benefit from the application of a more objective standard for dismissal at an early stage. But that is not something this article resolves. This article is concerned about reconciling the different treatment of Petition Clause cases, which has been created by the *McDonald* opinion. The Petition Clause should not be subsumed into the Free Speech Clause for the judicial convenience; to do so writes the Petition Clause out of the Constitution.[155]

More importantly, the adverse impacts chilling effect that the current legal regime has on citizen involvement in governance, demonstrated by Professors Canan and Pring[156] and the case examples below,[157] should not be simply perpetuated because a different immunity standard has evolved for another First Amendment right.

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151. *Id.* at 389, 399–400, 407 (Scalia, J., concurring) (endorsing the majority's distinction between the Speech and Petition Clauses but arguing that the Speech Clause's public concern test should not be grafted onto Petition Clause cases by public employees alleging retaliation).

152. *See*, *e.g.*, Depp v. Heard, 108 Va. Cir. 382, (Va. Cir. Ct. Aug. 17, 2021); *see also* Emma Nolan, *Johnny Depp and Amber Heard Trial: Anti-SLAPP Provision Explained*, NEWSWEEK (Apr. 11, 2022, 12:23 PM), https://www.newsweek.com/johnny-depp-amber-heard-trial-anti-slapp-provision-explained-1696928 [https://perma.cc/JWA7-L4UJ]; *see also* UNIF. PUB. EXPRESSION PROT. ACT (UNIF. L. COMM'N 2020).

153. *See, e.g.,* UNIF. PUB. EXPRESSION PROT. ACT (UNIF. LAW COMM'N 2021), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14&forceDialog=0 [https://perma.cc/52UU-HNX7].

154. CANAN & PRING, *supra* note 11, at 385–88.

155. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 at 405 (2011).

156. *See, e.g.,* PENELOPE CANAN & GEORGE W. PRING, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press, 1996).

157. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

C. Resolving the Petition Clause Dichotomy

The application of the Noerr-Pennington Doctrine provides an objective standard for evaluating whether a filer's claims are seeking to curtail the target's petition speech, which in turn provides more protection under the Petition Clause and facilitates greater citizen participation in government affairs.[158]

Making a distinction between the Free Speech Clause and the Petition Clause is important because the application of a malice standard makes it difficult to dispose of SLAPP allegations at an early stage of the case. With notice pleading, filers can allege malice, requiring a court to make a subjective finding.[159] Courts are constrained from making that determination without evidence, which means the SLAPP claims are hard to resolve on a motion to dismiss.[160] Furthermore, to have the courts apply the heightened malice *New York Times Co.* standard to Petition Clause cases imposes additional burdens on targets such as the need to determine whether the filer is a "public figure,"[161] in addition to whether it could be considered tortious conduct with malice.[162] In contrast, the *Noerr* case states that these kinds of considerations are "legally irrelevant" to petition activities.[163]

Moreover, the *Noerr-Pennington* doctrine is better suited for claims involving environmental petition activities because these cases involve regulated activity,[164] which is similar to the antitrust laws regulating business competition. Hence, they are more similar to the petition activity in the *Noerr-Pennington* cases, in contrast to the government employee,

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158. PRING & CANAN, *supra* note 7, at 22-28; *see* Potter & Haller, *supra* note 67, at 10139.

159. *See* Times v. Sullivan, 376 U.S. 254; PRING & CANAN, *supra* note 7, at 23 ("the 'actual malice' standard . . . thrusts citizen-petitioners in the same 'fact quagmire' the press tends to suffer under the not-so-very protective standard set by *New York Times v. Sullivan*."); Gary, *supra* note 27, at 86–87; Swan, *supra* note 30, at 86–87.

160. PRING & CANAN, *supra* note 7, at 23.

161. *See*, *e.g.*, Resolute Forest Prods., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1016–18 (N.D. Cal. 2017) (adding a further analysis about whether the filer was an "all purpose public figure" or a "limited public figure").

162. *New York Times,* 376 U.S. at 283.

163. *See* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 141—42 (1961).

164. *See, e.g.,* Green Grp. Holdings, LLC v. Schaeffer*,* No. 16-00145-CG-N, 2016 WL 6023841, at *29-32 (S.D. Ala. Oct. 13, 2016).

personal tort allegations against an individual involved in *McDonald* and *Druyea* cases discussed above.[165]

At a minimum, courts should follow the *Borough of Druyea* limitation on *McDonald,* holding that it applies only defamation and libel speech.[166] Such a limitation will not resolve many SLAPPs, but the *McDonald* holding should not be extended to business torts such tortious interference. Professor Sarah Swan makes a compelling case in her recent article for why tortious interference with contractual relations claims are particularly problematic when weighing a right to pursue such claims in land use cases,[167] and her rationale for changing the standard for tortious business interference applies to other environmental cases as well.

The real issue here is the best way to balance competing rights when citizens are petitioning their government, and the overwhelming weight of Supreme Court authority is in favor of applying the objective "sham" exception standard to petitioning governments.[168] In terms of Supreme Court precedents discussing the Petition Clause, however, *McDonald* floats on its own island next to the much larger continent of cases applying the Noerr-Pennington doctrine.

The major impediment to a uniform standard of immunity for Petition Clause cases is the concern about treating Free Speech and Petition Clause cases differently. The *Borough of Druyea* majority opinion discussed that concern extensively in the context of the "public concern" limitation. In his concurring and dissenting opinion, however, Justice Scalia stated that Petition Clause protection should not be sacrificed just because it co-exists with the Speech Clause in the First Amendment. "The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* rights."[169] Moreover, the it is the *New York Times* case, decided in 1964, that created a divergence between standards the two First Amendment protections when it deviated from *Noerr's* 1960 Petition Clause holding,

165. *See* McDonald v. Smith, 472 U.S. 479, 480-81 (1985).

166. *Borough of Druyea*, 564 U.S at 389.

167. Swan, *supra* note 30, at 60.

168. It may well be that the *Noerr-Pennington* standard should apply to Free Speech cases as well. However, that analysis should not be done in the cursory manner used by the court in *McDonald* and requires its own careful analysis. *See McDonald*, 472 U.S. at 479.

169. *Id.* at 405.

which expressly protected petition speech that is "malicious," and "fraudulent," and "vicious." [170]

Nonetheless, *McDonald*'s reach has permeated lower court and state court petition clause analysis as those courts struggle to apply competing Supreme Court precedents in SLAPP cases. The discussions below of the *Hurchalla* and *Black Belt* cases exemplify those difficulties and the burdens *McDonald* places on targets.

In addition to the U.S. Constitutional case law, state statutes and case decisions can provide greater protection for petition speech than the *McDonald* case. In the *McDonald* case itself, after remand, the Fourth Circuit Court of Appeals dismissed filer Smith's claims seeking libel and slander damages. The court held North Carolina's state common law provided absolute immunity for quasi-judicial proceedings, including the process by which government officials are selected.[171]

The research of Professors Canan and Pring and the drafters of UPEPA demonstrated the detrimental impact SLAPPs have on citizen participation in our governmental institutions. An objective standard for early dismissal of cases could significantly decrease the time and cost SLAPP suits impose on targets, which is the goal of UPEPA and discussed in the following section.

III. UPEPA, State Anti-SLAPP Laws, SLAPPbacks, and Federal Proposals

The most significant recent development in anti-SLAPP legislation has been the Uniform Public Expression Protection Act (UPEPA).[172] UPEPA was designed to prevent a SLAPP and to provide a clear framework for the efficient review and dismissal of SLAPPs.[173] Washington led the country by being the first state to adopt UPEPA.[174] The second state to enact UPEPA was Kentucky, a state that had not previously adopted any anti-SLAPP laws,

170. *E. R.R. Presidents Conf.*, 365 U.S. at 133, 141–42.

171. Smith v. McDonald, 895 F.2d 147, 151 (4th Cir. 1990), *cert. denied*, 498 U.S. 814 (1990).

172. Unif. Pub. Expression Prot. Act (Unif. L. Comm'n 2020).

173. *Id.*

174. Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, Rep. Comm.: For Freedom of the Press, https://www.rcfp.org/introduction-anti-slapp-guide/ [https://perma.cc/TBB8-DJ76]; *Public Expression Protection Act: Legislative Bill Tracking*, Unif. L. Comm., https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1#LegBillTrackingAnchor [https://perma.cc/M63D-9KKB].

and the third was Hawaii.[175] Six other states have introduced legislation based on the uniform act, including New Jersey, another state that does not have anti-SLAPP laws.[176]

Thirty-two states and the District of Columbia have some form of anti-SLAPP legislation.[177] Two organizations monitor anti-SLAPP legislative developments: the Public Participation Project[178] and the Reporters Committee for Freedom of the Press.[179] These websites have established certain basic categories for describing anti-SLAPP laws and have their own rating systems, which show a wide variation in these laws.[180]

Until UPEPA is more widely adopted, however, a significant gap remains in protection due to the absence of anti-SLAPP laws in several states and limited application in many others.[181] On top of that, the U.S. Congress has yet to enact anti-SLAPP legislation.[182] The absence of federal legislation is significant because some recent lawsuits allege only federal causes of action, such as a violation of the Racketeering Influence and Corrupt Organizations Act ("RICO").[183] This means that state anti-SLAPP protections may not apply.[184]

This section first explains the components that make anti-SLAPP laws effective, to give a framework for evaluating the following descriptions of UPEPA and SLAPP legislation in two states to demonstrate the variety of statutory approaches to addressing SLAPPs.

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175. *Id.*

176. *Public Expression Protection Act: Legislative Bill Tracking*, UNIF. L. COMM., https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1#LegBillTrackingAnchor [https://perma.cc/M63D-9KKB].

177. *Id.*; *Anti-SLAPP Legal Guide,* REPS. COMM.: FOR FREEDOM OF THE PRESS, https://www.rcfp.org/anti-slapp-legal-guide/ [https://perma.cc/5AVE-B8AU].

178. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org [https://perma.cc/R7RJ-QFBY].

179. *Anti-SLAPP Legal Guide*, *supra* note 138.

180. *State Anti-SLAPP Laws: Score Card*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection [https://perma.cc/GEG4-ERQN]; *Anti-SLAPP Legal Guide*, *supra* note 138.

181. *See* discussion *infra* Part III.b, III.c, III.d.

182. *See* discussion *infra* Part III.d.

183. *See*, *e.g.*, Energy Transfer Equity, L.P. v. Greenpeace Int'l, No. 1:17-Cv-00173, 2019 U.S. Dist. LEXIS 32264, at *3 (D. N.D. Feb. 14, 2019); Resolute Forest Prods., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017).

184. *Resolute Forest Prods.*, 302 F. Supp. 3d at 1026-27.

A. Components of effective anti-SLAPP laws

Professors Canan and Pring advocated for enactment of anti-SLAPP laws and provided a three-part test to determine whether an anti-SLAPP statute effectively protects public participation:

1. Communications: It must cover all public advocacy and communications to government, whether direct or indirect and whether in the form of testimony, letters, reports of crime, peaceful demonstrations, or petitions.

2. Forums: It must cover all government bodies and agents, whether federal, state, or local, and whether legislative, executive, judicial, or the electorate.

3. Prevention and cure: It must set out an effective early review for filed SLAPPs, shifting the burden of proof to the filer and, in so doing, serving a clear warning against the future filing of such suits.[185]

In addition to early review and shifting the burden of proof to filers, states have enacted procedures requiring specificity in pleadings, suspension of discovery, and fast-track appellate review.[186]

Other prevention mechanisms include statutory provisions for awarding attorneys' fees to targets[187] and SLAPPbacks. SLAPPbacks are claims a target can bring against the filer to recover damages.[188] Malicious prosecution is the core claim in SLAPPback complaints, but counterclaims or independent lawsuits filed after the SLAPP was dismissed have included a range of other claims as well.[189] At the time Professors Canan and Pring published their book, they tracked 51 SLAPPbacks.[190] Of the completed claims for which they had information, 21 resulted in awards or settlements ranging from $86,500,000 to $80,000.[191] Another major strategic benefit of SLAPPbacks is that filers have an easier time of finding good lawyers to take on their cases.[192]

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185. PRING & CANAN, *supra* note 7, at 189.
186. *Anti-SLAPP Legal Guide, supra* note 138.
187. Many states have provisions for mandatory reasonable attorneys' fees and expenses. *See id* .
188. PRING & CANAN, *supra* note 7, at 168.
189. *Id.* at 179–80.
190. *Id.* at 178–79.
191. *Id.* at 179.
192. *Id.* at 169.

B. UPEPA

UPEPA is an important development in protecting Petition Clause rights. It provides an understandable framework in straightforward language. Section 2 defines its scope of application:

> (b) Except as otherwise provided in subsection (c), this [act] applies to a [cause of action] asserted in a civil action against a person based on the person's:
> (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
> (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
> (3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or [cite to the state's constitution], on a matter of public concern.[193]

When looking at this section through a Petition Clause lens, subsections 2(b)(1) and (2) incorporate *Noerr*'s description of petition activities --communications with or before governmental bodies, including indirect communications.[194] Comment 7 to Section 2 of the Act confirms this:

> Section 2(b)(1) protects communication that occurs before any legislative, executive, judicial, administrative, or other governmental proceeding—effectively, any speech or expressive conduct that would implicate one's right to petition the government. Section 2(b)(2) operates similarly but extends to speech or expressive conduct *about* those matters being considered in legislative, executive, judicial, administrative, or other governmental proceedings—the speech or conduct need not take place *before* the governmental body.[195]

Including the Petition Clause in subsection 2(b)(3), however, is problematic. One commentator called subsections 2(b)(1) and (2) "arguably

193. UNIF. PUB. EXPRESSION PROT. ACT § 2(b) (UNIF. L. COMM'N 2020). Section 2(a) defines certain terms used in this section. *See id.* at § 2(a).

194. § 2(b)(1–2); *see also* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–42 (1961).

195. UNIF. PUB. EXPRESSION PROT. ACT § 2 cmt. 7 (UNIF. LAW COMM'N 2021).

. . . superfluous,"[196] possibly because they do not distinguish between rights under the speech and petition clauses. If courts address those rights separately, the inclusion of the right to petition in subsection 2(b)(3) is superfluous because that right is already defined in subsections (1) and (2). Moreover, including petitioning in subsection (3) may result in courts and litigants getting enmeshed in the most litigious issue, evaluating what are "matters of public concern," [197] when that is "irrelevant" to Petition Clause activities, both because these activities are already covered under either subsections (1) or (2) and the Noerr-Pennington doctrine.[198]

The Act's preservation of conflicting Supreme Court precedents demonstrates the continued importance of judicial resolution. Comment 8 to Section 2 states, the "[t]terms 'freedom of speech or of the press,' 'the right to assemble or petition,' and 'the right of association' should all be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court."[199] This comment undermines the Act's intent to address SLAPPs efficiently and effectively because tort allegations may still be judged under the subjective *McDonald* standard, requiring discovery and prolonging the cases.

Procedurally, UPEPA requires courts to assess first whether filer's cause of action is based on the target's exercise of a covered right.[200] Once the target establishes that petition or any of the other First Amendment rights are involved, the burden shifts to the filer to show that his or her complaint has sufficient merit to prevail on its claims.[201] Under section 7(a)(3), a court must dismiss claims with prejudice if

> (A) the responding party fails to establish a prima facie case as to each essential element of the [cause of action]; or
> (B) the moving party establishes that:
> (i) the responding party failed to state a [cause of action] upon which relief can be granted; or

196. Jay Adkisson, *The Uniform Public Expression Protection Act: Scope and Applicability,* FORBES (May 11, 2021, 11:48 AM), https://www.forbes.com/sites/jayadkisson/2021/05/11/the-uniform-public-expression-protection-act-scope-and-applicability/?sh=3ed9e81c7226 [https://perma.cc/746F-Z48J].

197. *Id.*

198. *Id.*

199. UNIF. PUB. EXPRESSION PROT. ACT § 2 cmt. 8 (UNIF. L. COMM'N 2020).

200. *Id.* § 7 cmt. 2.

201. *Id.* § 7 cmt. 5.

> (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the [cause of action] or part of the [cause of action].202

If the court determines the cause of action is without merit, the target is entitled to an expeditious resolution of that claim, and the court must award reasonable attorney fees and costs incurred in connection with the claim to the prevailing party.[203]

Finally, the Act "must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or [cite to the state's constitution]."[204]

C. Moderate protection: Florida

Most state anti-SLAPP laws provide some protection, but few provide comprehensive coverage. A typical example is Florida's statute. Florida's original anti-SLAPP law narrowly prohibited "governmental entities" from filing lawsuits against a person or entity "without merit" and "solely because" the person or entity exercised the constitutional right "to petition for redress of grievances before the various governmental entities of the state."[205] Procedurally, the Act provided for expeditious hearing of either a motion to dismiss or summary judgment and allowed the court to award actual damages to targets in SLAPP suits plus required the award of attorney's fees and costs to the prevailing party.[206]

In 2015, Governor Rick Scott signed a law expanding Florida's anti-SLAPP law to include SLAPP suits brought by "persons" in addition to governmental entities.[207] The new law also changed the "solely because" standard to "primarily because" and included "free speech in connection with a public issue" to broaden the range of lawsuits that may be subject to SLAPP review.

202. *Id.* § 7(a)(3).
203. *Id.* § 10.
204. *Id.* § 11.
205. Samuel J. Morley, *Florida's Expanded Anti-SLAPP Law: More Protection for Targeted Speakers*, 90 FLA. BAR J. 16, 18 (2016) (citing FLA. STAT. § 768.295(4) (2014)).
206. Morley, *supra* note 205, at 18.
207. *Id.*

Further, changes to the original statute include defining the term "free speech in connection with public issues" in paragraph (2)(a) to include:

> Any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.[208]

Section (4) of the amendment retains the mandatory award of attorneys' fees to prevailing targets and extends the award to prevailing targets in private party actions.[209] Additionally, the amendment retains the procedural steps necessary to expedite the resolution of SLAPP suits.[210]

When dealing with a potential SLAPP suit, the Florida anti-SLAPP law requires courts to assess first whether filer's cause of action is "primarily because" of the target's exercise of the right to petition.[211]

Similarly to UPEPA, once the petition or free speech protections are established, the burden shifts to the filer to show that his or her complaint has sufficient merit to prevail on its claims.[212] If the court determines the cause of action is without merit, the target is entitled to an expeditious resolution of that claim and the court must award reasonable attorney fees and costs incurred in connection with the claim to the prevailing party.[213] If the filer was a governmental entity, actual damages may also be awarded to the target.[214]

Florida's current anti-SLAPP statute encompasses a large set of communications, although possible ambiguity exists in its scope. The statute prohibits any person or governmental entity in the state from filing or causing to be filed, any lawsuits against another person or entity without merit and primarily because such person has exercised his or her "right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities" of the

208. FLA. STAT. § 768.295(2)(a) (2021).
209. *Id.* § 768.295(4).
210. *Id.*
211. Morley, *supra* note 205, at 18.
212. FLA. STAT. § 768.295(4) (2021).
213. *Id.*
214. *Id.*

state.[215] However, this provision may create a limitation. Section (2)(a), which defines free speech as "any written or oral statement that is… made before a governmental entity in connection with an issue under consideration or review by a governmental entity," may limit the application of Florida's anti-SLAPP protection; it is ambiguous whether the issues have to be before the government or whether the range of free speech protections is only offered to issues "under consideration or review" by a governmental entity.[216] Therefore, when a target writes a letter to the commissioner after reading about plans for a new development in the newspaper, the letter may or may not be a communication that is protected.

Thus, while Florida's statute seems to encompass a broad scope of communications, it is not as clear as UPEPA Section 2(a)(1) and (2) which describes the types of communications the Act covers and also states that the term "communications" should be construed broadly.[217] Alternatively, a clear definition of the right to petition may help clear up some of the ambiguities, such as the definition in Massachusetts statute.[218]

Florida's anti-SLAPP statute covers all governmental bodies. Section (2)(b) defines the statute's use of the term "governmental entity" and "government entity" to mean "The state, including the executive, legislative, and judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof."[219]

Unfortunately, Florida's anti-SLAPP statute does not set out a defined early review process for filed SLAPPs or clearly shift the burden of proof to the filer, so it does not provide a strong deterrent to future filings of such

215. *Id.* § 768.295(3).

216. *Id.* § 768.295(2)(a).

217. UPEPA § 2(a)(1) and (2), cmt. 6.

218. MASS. GEN. LAWS ch. 231 § 59H (2015) (defining "a party's exercise of its right of petition" 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.").

219. FLA. STAT. § 768.295(3) § 768.295(2)(b) (2021).

suits.[220] While the 2015 amendment retains its intent to provide targets with expeditious resolution of SLAPP suits, the statute ultimately fails to provide clear burden shifting or any special motion to strike to effectively allow for speedy disposal. The statute allows targets to move for dismissal or file a motion for summary judgment with supplemental affidavits to prove the suit was a SLAPP, but the burden of proof remains on the moving party, the target.[221]

D. Limited: Nebraska

Nebraska's law is narrowly tailored to apply to persons who apply for a "permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body or any person with an interest, connection, or affiliation with such person that is materially related to such application or permission."[222] If a court determines that a motion to dismiss relates to a covered application, the court must expedite the hearing.[223] The law does not suspend discovery but does shift the burden to the filer to provide a substantial basis for the claims and to present clear and convincing evidence of a false statement or reckless disregard for the truth.[224] The court is given the discretion to award attorneys' fees and damages.[225]

E. Federal Legislative Efforts

State anti-SLAPP laws are only applicable to state law claims.[226] The latest proposal for a federal anti-SLAPP statute, named the Citizen's Participation Act of 2020, was introduced to the House of Representatives as H.R. 7771 by Representative Steve Cohen of Tennessee.[227] The bill was referred to the House Judiciary Committee, but no further action was taken.

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220. *See id.*; *see also* PRING & CANAN, *supra* note 10, at 189.
221. *See* Morley, *supra* note 205, at 18–20.
222. NEB. REV. STAT. § 25-21,242(4) (1994).
223. *Id.* § 25-21, 245.
224. *Id.* § 25-21,244(1).
225. *Id.* § 25-21,243.
226. UNIF. PUB. EXPRESSION PROT. ACT, intro. note on The Need for a Uniform Anti-SLAPP Act at 3 (UNIF. L. COMM'N 2020).
227. *See* H.R. 7771, 116th Cong. (2020).

IV. Recent SLAPP Case Examples

A. Lake Point v. Hurchalla

Maggy Hurchalla, a native Floridian and fierce environmentalist, was the victim of a SLAPP lawsuit to which a jury found she owed over $4 million in damages.[228] Ms. Hurchalla was an environmental activist and advocate for her community, serving as Martin County's first female commissioner from 1974 until 1994.[229]

Ms. Hurchalla became the victim of a SLAPP lawsuit when she wrote emails to county commissioners voicing her environmental concerns about Lake Point's plan to "supply water to the City of West Palm Beach for consumptive use."[230] This limestone mining project, which originally was an Interlocal Agreement allowing Lake Point to mine for limestone[231] seemed to protect the St. Lucie Estuary from toxic algae bloom pollution.[232] When Lake Point's plan to sell water to the city of West Palm Beach was published in a local news article, Ms. Hurchalla opposed the plan and sent emails to Martin County officials.[233] The emails about the project were "[b]ased upon her expertise in environmental issues" and simply expressed Hurchalla's "concerns and reservations about the environmental benefits of the Lake Point project."[234]

In 2013, Lake Point sued Martin County, the South Florida Water Management District, and Ms. Hurchalla in their following amended complaint.[235] The claims against Ms. Hurchalla included tortious interference of a contract based on her communications with Martin County officials regarding the project.[236]

228. Hurchalla v. Lake Point Phase I, LLC, 278 So.3d 58, 63 (Fla. Dist. Ct. App. 2019).

229. *Id.* at 62.

230. *Id.*

231. *Id.*

232. *See* Patricia Mazzei, *The Florida Activist is 78. The Legal Judgment Against Her is $4 Million,* N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/08/us/maggy-hurchala-florida-mining.html?timespastHighlight=maggy,hurchalla [https://perma.cc/CS3S-396Q].

233. *Hurchalla*, 278 So.3d at 62.

234. Trial Memorandum for Defendant at 3, *Hurchalla*, 278 So.3d 58 (No. 43-2013-CA-001321).

235. *Hurchalla*, 278 So. 3d 62–63.

236. *Id.* at 63.

Martin County and the South Florida Water Management District settled for $12 million, but the plaintiffs still proceeded with the case against Ms. Hurchalla.[237] From the start, Ms. Hurchalla staunchly asserted her First Amendment rights to petition the government, and "her common law privilege to make statements to a political authority regarding matters of public concern."[238] Nonetheless, the judge submitted the case to the jury.[239] The jury found that the emails sent by Hurchalla "resulted in the County changing course and moving to thwart, or at the least, significantly delay the Project,"[240] and the jury entered a verdict awarding $4.4 million in damages to Lake Point.[241]

On appeal, Hurchalla argued that the trial court improperly instructed the jury on those rights.[242] Unfortunately, the court affirmed the verdict.[243] Ms. Hurchalla petitioned for certiorari to both the Florida Supreme Court[244] and U.S. Supreme Court, both of which were denied.[245]

The result in this case is very troublesome for several reasons. The facts present a clear case of petition speech; Ms. Hurchalla communicated with her county government officials urging them to take actions to protect the environment.[246] This decision was widely publicized throughout Florida and beyond[247] and generated seven amici briefs from twenty-two organizations urging reversal based on First Amendment rights based on chilling speech concerns.[248]

First, the case demonstrates what happens when there is no applicable anti-SLAPP law. This case was filed before the Florida statute was amended to include SLAPPs by private persons as well as governmental entities.[249] In addition, the issue of malice was pivotal to the decision because that

237. *Id.*
238. *Id.*
239. *Id.* at 62.
240. *Id.* at 62.
241. *Id.* at 63.
242. *Id.*
243. *Id.* at 68.
244. Hurchalla v. Lake Point Phase I, LLC, No. SC19- 1729, 2020 WL 1847637, at *1 (Fla. Apr. 13, 2020).
245. Hurchalla v. Lake Point Phase I, LLC, 141 S. Ct. 1052, 1052 (2021).
246. Canan & Pring, *supra* note 35, at 14; Swan, *supra* note 33, at 83.
247. *See* Mazzei, *supra* note 232; *see also* Merzer, *supra* note 1.
248. Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58, 60 (Fla. Dist. Ct. App. 2019).
249. *Id.* at 62.

allegation defeats the Florida common law privilege.[250] On appeal, the court considered whether there was an error in the jury instructions based on referring to the common law privilege instead of a First Amendment privilege.[251] However, the court found that because Hurchalla failed to distinguish the two privileges in the court below, there was no error.[252] This demonstrates the danger in subjecting Petition Clause speech to any malice standard because of the clear risk petitioners face when these standards can be so broadly interpreted to imply intent.

Second, the alleged tort was tortious interference with contractual relations,[253] which can be difficult to dismiss on a summary motion. As mentioned above, the ambiguity of this tort makes having an objective standard for dismissal at an early stage very important for protection of the Petition Clause rights and citizen participation.[254] Nebulous torts like tortious interference with contractual relations provide another strong basis for applying the objective Noerr-Pennington Doctrine to Petition Clause speech.

Third, opinions about scientific information are particularly inappropriate for consideration in determining malice. This kind of information is always part of environmental cases and citizens should be free to voice their views on such matters.[255] Therefore, courts should never give instructions allowing a jury to draw inferences about malice based on the truth or falsity of scientific information.[256]

B. Black Belt Lawsuit

In December 2008, the Tennessee Valley Authority (TVA) coal ash landfill spilled and contaminated land, river, reservoirs, and shore areas with toxic, human carcinogen.[257] Nine months later, the EPA approved transportation of the coal ash from Tennessee to the Arrowhead Landfill in

250. *Id.* at 64. (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
251. *Id.* at 63.
252. *Id.* at 64.
253. *Id.* at 63.
254. *See infra* Part II.b.
255. Brief for Bullsugar.org et al. as Amici Curiae Supporting Petitioner at 5–6, Hurchalla v. Lake Point Phase I, LLC, 141 S. Ct. 1052 (2021) (No. 20-332).
256. *Id.* at 20–21.
257. *Green Group Holdings, LLC, et al., v. Schaeffer, et al.,* ACLU ALA., https://www.aclualabama.org/en/cases/green-group-holdings-llc-et-al-v-schaeffer-et-al. [https://perma.cc/VE82-PF7Y].

Uniontown, Alabama.[258] The Arrowhead Landfill began receiving TVA coal ash waste on July 4, 2009.[259]

Four million tons of toxic coal ash were designated to be dumped in the Arrowhead Landfill.[260] Local citizens formed a group, Black Belt Citizens Fighting for Health and Justice (BBCFHJ), to bring awareness to the environmental and racial injustices in Uniontown and specifically to oppose the operation of the coal ash landfill,[261] all classic petitioning activities.

On April 6, 2016,[262] Green Group Holdings LLC and Howling Coyote LLC, the two corporations who own and operate Arrowhead Landfill,[263] filed a lawsuit against four BBCFHJ members and a number of other yet-to-be-identified alleging libel with malice.[264] In the complaint, the landfill owners alleged that defendants published "false and malicious statements"[265] on the Black Belt website and Facebook page.[266] Plaintiffs asked for $30 million in damages,[267] against individuals in a town with an median income of $14,094.[268]

This case has all three elements of a classic SLAPP: (1) "unrealistically high dollar demands;" (2) unnamed defendants (to chill others); and (3) "naming individuals [as defendants] but not the organizations they represent."[269] This case has the added dimension of environmental

258. *Id.*

259. *Green Grp. Holdings, LLC v. Schaeffer,* No. 16-00145-CG-N, 2016 WL 6023841, at *2 (S.D. Ala. Oct. 13, 2016).

260. *Our Stories,* BLACK BELT CITIZENS FIGHTING FOR HEALTH AND JUST., http://blackbeltcitizens.org/our-history/#tab-id-40 [https://perma.cc/BPB6-KNZV].

261. ACLU ALA., *supra* note 257.

262. Jury Verdicts, Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145-CG-N, 2016 U.S. Dist. LEXIS 142654 (S.D. Ala. Oct. 13, 2016).

263. ACLU ALA., *supra* note 257.

264. *Green Grp. Holdings, LLC,* 2016 WL 6023841, at *4–5.

265. *See id.* at *1.

266. *Id.* at *3.

267. *Id.* at *1.

268. Maxwell Unterhalter, *Good News for Uniontown, Alabama After Years of Legal Battles*, GEORGETOWN ENV'T L. REV. (Nov. 15, 2019), https://www.law.georgetown.edu/environmental-law-review/blog/uniontown-alabama-legal-battles/#_ftn1 [https://perma.cc/4B5P-TB4X].

269. PRING & CANAN, *supra* note 10, at 151.

justice[270] because Uniontown is a "low-income, predominantly African American community,"[271]

When the lawsuit was filed, BBCFHJ responded by filing a motion to dismiss.[272] ACLU Alabama, representing the four BBCFHJ individuals sued, stated "the plaintiffs have strategically chosen [Uniontown] for the site of a toxic landfill" because it was black and poor.[273] The brief in support of the motion identified the plaintiffs' lawsuit as a SLAPP.[274]

The attorneys for the Black Belt targets did not raise the Petition Clause as a basis for dismissal of the lawsuit.[275] Instead, they based their arguments on Free Speech protection standards, which required them to address whether there was an issue of public concern and whether public figures were involved to have the court apply the more protective actual malice standard to the statements in this case in place of plain malice.[276]

On the motion to dismiss, the magistrate judge found the vast majority of the claimed defamatory statements made were opinions,[277] such as: "[The landfill] affected our everyday life." and "[W]e all should have the

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270. "Environmental justice (EJ) is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/TS7K-SPWM].

271. Marianne Engelman-Lado et al., *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time for Action*, A.B.A: HUM. RTS. MAG., May 21, 2021, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/environmental-injustice-in-uniontown--alabama--decades-after-the/ [https://perma.cc/XA34-6RPT].

272. Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145, 2016 WL 6023841, at *1 (S.D. Ala. Oct. 13, 2016).

273. ACLU ALA., *supra* note 257.

274. Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145-CG-N, 2016 WL 6023841 at *1, 9 (S.D. Ala. Oct. 13, 2016) (No. 2:16-cv-00145).

275. The attorneys did mention a Petition Clause case, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1983), in the brief's opening remarks but did not carry the holding of that case into their analysis. Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), Green Grp. Holdings, LLC v. Schaeffer, No. 16-00145-CG-N, 2016 WL 6023841 at *1, 9 (S.D. Ala. Oct. 13, 2016) (No. 2:16-cv-00145).

276. *ACLU Motion to Dismiss – Green Group Holdings v. Schaeffer*, ACLU (Feb. 2, 2016), Green Group Holdings v. Schaeffer - ACLU Motion to Dismiss | American Civil Liberties Union.

277. ACLU ALA., *supra* note 257.

right to clean air and clean water."[278] She then held that the companies were limited public figures who failed to allege facts sufficient to meet the actual malice free speech standard and dismissed the complaint but allowed the filers to amend their complaint.[279]

Four months after the magistrate judge issued her report, on February 7, 2017, the parties reached a settlement agreement.[280] Arrowhead withdrew its $30 million lawsuit intended to silence the four Uniontown residents listed as individual plaintiffs.[281] Green Group dismissed all claims with prejudice, and gave up "their right to bring counterclaims for libel, slander, or malicious prosecution."[282] Green Group's press release ended with recognition of BBCFHJ's devotion to their community and appreciation for BBCFHJ's use of their First Amendment rights to free speech.[283]

"The landfill [owners] also agreed to two permanent environmental protections: it will provide the public with notice before the landfill receives any potentially toxic waste products, and the landfill will continue to use the current EPA-approved standards to seal off any future shipments of coal ash".[284] Only three days after the landfill dropped its lawsuit, the Alabama Department of Environmental Management (ADEM) approved and renewed the landfill's permit for another 5 years—surely no coincidence.[285] ADEM held public hearings for another five-year renewal of Arrowhead Landfill's permits at the end of January, 2022.[286]

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278. *Green Grp. Holdings, LLC,* 2016 WL 6023841, at *4.

279. *Id.* at *19, *20.

280. Jury Verdicts, *supra* note 262.

281. BLACK BELT CITIZENS FIGHTING FOR HEALTH AND JUSTICE, *supra* note 260.

282. *Communications between Arrowhead Landfill and the Black Belt Citizens Fighting for Health and Justice Result in Dismissal of Lawsuit,* GREENGROUP (Feb. 7, 2017), https://www.gghcorp.com/news/communications-between-arrowhead-landfill-and-the-black-belt-citizens-fighting-for-health-and-justice-result-in-dismissal-of-lawsuit/ [https://perma.cc/7R8A-YNVZ].

283. *Id.*

284. *Landfill Drops Defamation Lawsuit Against Community Activists, Agrees to Environmental Protections,* ACLU (Feb. 7, 2017), https://www.aclu.org/press-releases/landfill-drops-defamation-lawsuit-against-community-activists-agrees-environmental [https://perma.cc/7RYE-HLGR].

285. BLACK BELT CITIZENS FIGHTING FOR HEALTH AND JUSTICE, *supra* note 260.

286. *ADEM Sets Public Hearing for Arrowhead Landfill Permit Renewal for Jan. 27 in Uniontown City Hall,* SELMA SUN (Jan. 24, 2022), https://selmasun.com/news/marion_news/adem-sets-public-hearing-for-arrowhead-landfill-permit-renewal-for-jan-27-in-uniontown-city/article_e754c994-7d54-11ec-b176-fb36285971f3.html [https://perma.cc/QYU5-UJGK].

As of January 2023, Alabama does not have any anti-SLAPP state legislation.[287] This makes Alabama citizens vulnerable to becoming victims of SLAPP suits. Without an anti-SLAPP state or federal statute, Alabama courts are constrained from dismissing SLAPP claims like those alleged against BBCFHJ before the chilling effect sets in.

BBCFHJ and the individuals involved were fortunate to have been represented by the ACLU of Alabama. Without being well-represented and advised, this case could have cost exponentially more in both time and money. SLAPP targets without resources, finances, and support are in the most danger of being chilled from engaging in their right to petition. Fortunately, BBCFHJ continues its work to rectify the injustices their community suffers.[288]

CONCLUSION

The groundbreaking research of Professors Canan and Pring identified a serious threat to one of our most basic and essential elements of democratic government, citizen participation. The Petition Clause was designed to protect citizens engagement with their governments by giving them protection when exercising that right. The Petition Clause has been largely overlooked in Supreme Court jurisprudence, and judges as well as legislators and commentators have often merged consideration of petition activities into Free Speech analysis without giving the Petition Clause its due.[289]

The differences among state anti-SLAPP laws are a significant concern. Targets are particularly vulnerable in states with no or limited anti-SLAPP protection. The variation in substance results in divergent outcomes for SLAPP suits depending on where the suit is filed and what law is applied. Those differences in addition to minimal protections given to targets in limited anti-SLAPP states cry out for the adoption of UPEPA. The lack of federal anti-SLAPP legislation creates another significant gap in protecting petition activities. Targets are not protected when filers base their allegations on federal law and those targets may receive some but not all of state law procedural protections when state law claims are pled in federal courts.

287. *Alabama State Anti-SLAPP*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/alabama [https://perma.cc/26EB-9QPE].

288. *See* GREENGROUP, *supra* note 282.

289. *See* Adkisson, *supra* note 196.

The case of Maggy Hurchalla highlights how courts have decided to side-step both the federal and state constitutions in favor of common law rules. In the Black Belt case, the complaint was dismissed but never identified as a SLAPP, and the plaintiff-filers were allowed to amend their complaint. The stakes in both these cases were very high and the only reason we know so much about them is because there were strong individuals who were lucky enough to find experienced counsel willing to represent them. This is not the case, however, in countless other situations. However, the research of Professors Canan and Pring demonstrates the chilling effect on citizen participation even when targets win in court.

Had the courts applied the Noerr-Pennington standard, both of these cases would have received more effective and efficient protection to what were clearly Petition Clause activities. In *Hurchalla*, the filers claims would never have reached a jury; her speech would have been protected regardless of whether it was "malicious," "fraudulent" or "vicious."[290] In the Black Belt case, the targets would have been saved from discussing whether the filers were "public figures" and subject to the actual malice standard, considerations required by the subjective *New York Times* standard,[291] and the filers would not have been given the opportunity to amend their complaint.

The answer lies in the application of the Noerr-Pennington doctrine to all Petition Clause cases involving government regulation and the adoption of UPEPA by all states and Congress. When balancing individual reputations against citizen participation, the *Noerr* Court resolved that issue in favor of participation. "[I]njury to another arising out of petitioning for governmental action may be 'inevitable' but nonetheless be non-actionable because to find otherwise would 'be tantamount to outlawing' such petitioning activity."[292]

Citizen participation is key to maintain our democratic government institutions. Citizen involvement is also crucial to protect our environment.

290. *E. R.R. Presidents Conf.*, 365 U.S. at 133, 141–42.
291. *See supra* note 161-163.
292. *E. R.R. Presidents Conf.*, 365 U.S. at 143.