Boston College Environmental Affairs Law Review

Volume 38
Issue 2 *Learning From Disaster: Lessons for the Future From the Gulf of Mexico*

Article 12

5-1-2011

The Citizen Participation Act of 2009: Federal Legislation as Effective Defense Against SLAPPs

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THE CITIZEN PARTICIPATION ACT OF 2009: FEDERAL LEGISLATION AS AN EFFECTIVE DEFENSE AGAINST SLAPPS

Jesse J. O'Neill*

Abstract: The First Amendment to the United States Constitution expressly guarantees the right of citizens to petition the government. Citizen efforts have been particularly crucial to the process of creating, shaping, and enforcing environmental laws. Nevertheless, citizen participants in government can often find themselves facing retaliation in the form of a strategic lawsuit against public participation (SLAPP). SLAPPs are lawsuits brought to interfere with a party's exercise of its right to petition the government, typically by draining the party's time and resources. Although many states have adopted anti-SLAPP protections, similar protections are lacking at the federal level. Because so many federal environmental statutes rely on citizen participation, the threat of a SLAPP is especially high. This Note argues that current federal anti-SLAPP protections are inadequate, and that legislation proposed in 2009 would better protect the right of citizens to petition the government.

Introduction

"The problem of freedom in America is that of maintaining a competition of ideas, and you do not achieve that by silencing one brand of idea."[1] In recent years, citizen and non-governmental organization (NGO) environmental watchdogs have experienced the silencing of their brand of idea at the hands of a legal construct known as a SLAPP.[2] A SLAPP is a "strategic lawsuit against public participation."[3] Although only a subject of study over approximately the last twenty years, SLAPPs have existed in the American judicial system almost since its beginning.[4] SLAPPs are used to prevent or punish others for exercis-

* Managing Editor, Boston College Environmental Affairs Law Review, 2010–11.

[1] Max Lerner, *The Muzzling of the Movies*, *in* Actions and Passions: Notes on the Multiple Revolution of Our Time 75, 77 (Kennikat Press 1969) (1949).

[2] *See* George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 84 (1996).

[3] Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506, 506 (1988).

[4] *See* Pring & Canan, *supra* note 2, at x, 17.

ing their right to petition, a right protected by the First Amendment's Petition Clause.[5] As lawsuits brought to interfere with a party's exercise of petitioning activity, SLAPPs have a chilling effect on constitutionally protected speech.[6]

Although many citizen environmental enforcers may find themselves fighting a SLAPP in federal court, there is currently no effective defense against a SLAPP brought in federal court.[7] SLAPP defenses in federal courts are presently limited to a narrow set of options: use of the Federal Rules of Civil Procedure, arguing for the extension of a definition of protected petitioning rooted in antitrust caselaw, or attempting to apply state anti-SLAPP statutes under the *Erie* doctrine.[8] None of these defenses adequately or effectively address the needs of those facing a SLAPP in federal court.[9]

In December 2009, Representative Steve Cohen introduced federal anti-SLAPP legislation in the form of the Citizen Participation Act of 2009.[10] This Act attempts to provide an effective federal SLAPP defense by allowing SLAPPs to be quickly identified and dismissed before their costs can grow to excessive amounts.[11] In addition, the Act contains a fee-shifting provision, which can further lighten any resource-draining effects of the litigation.[12]

This Note examines the Citizen Participation Act of 2009 and its likely efficacy as a SLAPP defense. Part I explores the concept of SLAPPs in general, including a discussion of SLAPPs and environmental lawsuits.[13] Part II examines the right to petition, its modern interpretation, and the interplay between SLAPPs and the right to petition.[14] Part III investigates the effects of SLAPPs on speech.[15] Part IV surveys the SLAPP defenses that are currently available in the court system.[16] Part V considers each one of those defenses and explains why they offer inade-

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[5] Canan & Pring, *supra* note 3, at 506–07.

[6] *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 8 (1989).

[7] *See* Pring & Canan, *supra* note 2, at 190.

[8] *See* Fed. R. Civ. P. 11, 12(b)(6), 56; City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379–80 (1991); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999).

[9] *See* Fed. R. Civ. P. 11, 12(b)(6), 56; *Omni*, 499 U.S. at 379–80; *Newsham*, 190 F.3d at 973.

[10] Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).

[11] *See id.* §§ 3–5.

[12] *See id.* § 8.

[13] *See infra* Part I.

[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV.

quate protection in the federal courts.[17] Finally, Part VI argues for federal anti-SLAPP legislation as the best federal SLAPP defense and analyzes the proposed federal bill.[18]

I. SLAPPs Generally

SLAPPs were first identified and studied in the mid-1980s by Professors Penelope Canan and George W. Pring.[19] An early study defined SLAPPs as "civil lawsuits . . . filed against non-governmental individuals and groups for having communicated their views to a government body or official on an issue of some public interest."[20] Stated in different terms, SLAPPs are lawsuits that "claim injury from citizen efforts to influence a government body or the electorate on an issue of public significance."[21]

All SLAPPs fulfill four defining characteristics.[22] First, to be a SLAPP, a lawsuit must primarily "involve communications made to influence a governmental action or outcome."[23] Subsequently, those communications must "result[] in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations . . . on (c) a substantive issue of some public interest or social significance."[24] In other words, a SLAPP requires an underlying communication, generally to the government, which becomes the object of the SLAPP suit.[25] SLAPPs generally take the form of common torts, and can appear in practically any area of law.[26] A 1989 study of 228 SLAPP cases revealed that while the majority of these suits were brought as charges of defamation, SLAPPs were also brought as claims of business torts, judicial torts, conspiracy, constitutional civil rights violations, and nuisance.[27]

As an example, consider a corporation that applies for a permit to conduct a restricted activity, perhaps some form of waste disposal. A private citizen writes a letter to the permitting body, attempting to con-

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[17] *See infra* Part V.

[18] *See infra* Part VI.

[19] Pring & Canan, *supra* note 2, at x.

[20] Pring, *supra* note 6, at 4.

[21] Canan & Pring, *supra* note 3, at 507.

[22] Pring & Canan, *supra* note 2, at 8–9.

[23] *Id.* at 8.

[24] *Id.* at 8–9.

[25] *See* Pring, *supra* note 6, at 7–8.

[26] *See id.* at 9.

[27] *Id.* Business torts included charges of interference with contract, restraint of trade, and other antitrust activities, while judicial torts included charges of abuse of process and malicious prosecution. *Id.* nn.12–13.

vince the permitting body to deny the permit. In response, the corporation files suit for damages against the private citizen, possibly alleging defamation or libel. The corporation's lawsuit would be a SLAPP—a civil complaint for monetary damages against a non-governmental individual who communicated to a government body on an issue of public concern.[28] The corporation would be the "SLAPP filer," and the private citizen would be the "SLAPP target."[29]

A. *A Brief History of SLAPPs*

SLAPPs have been used to threaten public participation in government since the early days of the American judicial system.[30] Early SLAPPs were generally struck down by the courts, and eventually disappeared almost completely.[31] It wasn't until the 1970s and the resurgence of political activism, particularly the environmental movement, that SLAPPs were again used as a legal tool.[32]

B. *SLAPPs and Environmental Lawsuits*

Environmental issues are common subjects of SLAPPs.[33] Of the 228 cases analyzed by Professors Pring and Canan in 1989, at least forty-three concerned potential environmental issues.[34] Many federal environmental statutes contain citizen-enforcement provisions.[35] For example, the Clean Water Act allows "any citizen" to file suit against alleged violators.[36] Similarly, the Clean Air Act bestows enforcement

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[28] *See* Pring & Canan, *supra* note 2, at 8–9.

[29] As lawsuits overlying other communications, which may themselves be lawsuits, the language of SLAPPs can get confusing. For this reason, this Note will refer to the bringer of the overlying civil complaint or counterclaim as the "SLAPP filer," and the non-governmental individual or group who made the initial communication as the "SLAPP target."

[30] *See, e.g.*, Harris v. Huntington, 2 Tyl. 129, 4 Am.Dec. 728 (Vt. 1802). In *Harris*, five citizens wrote to the Vermont legislature to protest Ebenezer Harris's reappointment as Justice of the Peace, painting Harris in less-than-favorable terms. *Id.* at 729. Harris responded with a SLAPP against the citizens. *See id.* The Vermont Supreme Court reversed a jury's verdict in favor of Harris, noting that "[a]n absolute and unqualified indemnity from all responsibility in the petitioner is indispensible, from the right of petitioning the supreme power for the redress of grievances." *Id.* at 733.

[31] *See* Pring & Canan, *supra* note 2, at 18.

[32] *See id.*

[33] *See* Pring, *supra* note 6, at 9.

[34] *See id.* Twenty-five of the cases involved urban/suburban development and zoning, and eighteen of the cases involved environmental/animal rights. *Id.*

[35] *See, e.g.*, Clean Water Act § 505, 33 U.S.C. § 1365 (2006).

[36] *Id.* § 505(a).

authority on "any person."[37] Citizen environmental enforcement also includes activities such as "report[ing] violations, sit[ting] on government boards, testify[ing] at public hearings, . . . [and] lobby[ing] agencies."[38] Citizen efforts have been described as having the "central role . . . in creating and shaping environmental law."[39]

Citizen and NGO enforcement of environmental laws is protected Petition Clause activity.[40] However, if the violator is a large corporation that decides to sue a private citizen in response to her petitioning activity, the corporation likely has the resources to use the costly litigation process to "break" the citizen.[41] At the very least, these threats of retaliation may cause the citizen to reconsider or even abandon her petitioning activity, chilling her desire to engage in activity the First Amendment protects.[42]

Because of the resource-draining, speech-chilling effects of SLAPPs, opponents of citizen and NGO environmental watchdogs have used SLAPPs as a method of intimidation since the beginning of the environmental movement.[43] As early as 1975, scholars noted that "[p]arties whose interests are threatened by environmental suits . . . have jeopardized the continued development and future effectiveness of citizen enforcement of environmental protection laws by devising a new litigation strategy—the assertion of a multi-million dollar counteraction . . . against the environmental plaintiff."[44]

II. The Right to Petition

Scholars have recognized the importance of citizen involvement in a democratic government for thousands of years.[45] As Aristotle observed, "if liberty and equality . . . are chiefly to be found in democracy, they will be best attained when all persons alike share in the govern-

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[37] Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (2006).

[38] Pring & Canan, *supra* note 2, at 83.

[39] Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 398 (3rd ed. 2004).

[40] *See* Pring & Canan, *supra* note 2, at 84; *infra* Part II.

[41] *See* Stacy J. Silveira, Comment, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. Envtl. Aff. L. Rev. 497, 529 (2001) ("litigation is too long and costly for most grassroots groups").

[42] *See* Pring, *supra* note 6, at 8.

[43] *See* Pring & Canan, *supra* note 2, at 83–84.

[44] Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 Mich. L. Rev. 106, 106–07 (1975).

[45] *See* Aristotle, Aristotle's Politics bk. IV, at 156 (H. W. C. Davis ed., Benjamin Jowett trans., Oxford Univ. Press 1916) (c. 350 B.C.E.).

ment to the utmost."[46] The right to petition grew out of pre-Magna Carta practices and was protected in the Great Charter itself.[47] The right to petition continued to mature throughout English history, and was enshrined by the Founding Fathers in the First Amendment of the United States Constitution.[48] Modern courts have given the right to petition a very broad interpretation, even going so far as to designate the right as one of the "fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[49]

A. *The Modern Interpretation of the Right to Petition*

Today, the courts give the right to petition a broad interpretation.[50] In its modern form, the right to petition covers any peaceful, legal attempt to influence any branch of government at any level.[51] "Protected activities include . . . filing complaints, reporting violations of law, testifying before government bodies, writing letters, lobbying legislatures, advocating before administrative agencies, circulating petitions, conducting initiative and referendum campaigns, and filing lawsuits. It even protects peaceful demonstrations, protests, picketing, and boycotts aimed at producing government action."[52] The right to petition the government for a redress of grievances "is implicit in '[t]he very idea of government, republican in form.'"[53]

B. *Are SLAPPs Themselves Protected Exercises of the Right to Petition?*

Under the modern interpretation of the right to petition, filing lawsuits is generally a protected activity.[54] SLAPPs represent the conflict between the parties' petitioning activities—the initial petition by the SLAPP target and the following lawsuit by the SLAPP filer.[55] "When two sides each have fundamental constitutional rights, they must be balanced, must somehow be quantified or limited so that each does not

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[46] *Id.*

[47] *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2163–64 (1998).

[48] *See id.* at 2165–70, 2203.

[49] De Jonge v. Oregon, 299 U.S. 353, 364 (1937); *accord* Pring & Canan, *supra* note 2, at 16.

[50] *See* Pring & Canan, *supra* note 2, at 16.

[51] *See id.*

[52] *Id.*

[53] McDonald v. Smith, 472 U.S. 479, 482 (1985) (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1875)).

[54] Pring & Canan, *supra* note 2, at 16.

[55] *See id.*

cancel out the other."[56] In general, policy and constitutional considerations result in a tipping of the balance in favor of the SLAPP target and against the SLAPP filer.[57]

Tipping the balance against certain lawsuits is not a new idea in American jurisprudence.[58] The judicial system already presupposes that certain lawsuits fall outside of First Amendment protections.[59] For example, the Federal Rules of Civil Procedure go so far as to allow the court to impose sanctions for lawsuits unwarranted by law or fact, as well as those brought for an "improper purpose."[60]

While both SLAPP filers and targets represent their own private interests and injuries, SLAPP targets also implicate "the additional, broader concerns of continued public participation in government, the viability of the representative political process itself."[61] A SLAPP target petitions the government with the goal of participating in and affecting a governmental decision.[62] In contrast, the SLAPP filer has "completely different goals . . . not a government result or outcome but monetary compensation from the target."[63] Therefore, when there is a conflict between a SLAPP filer's right to petition and that of a SLAPP target, the balance often tips in favor of the SLAPP target.[64]

III. The Effect of SLAPPs on the Right to Petition

By their very moniker, SLAPPs imply a conflict with the right to petition—a SLAPP is a lawsuit, strategically brought "against" public participation to discourage or disrupt petitioners.[65] Public participation is the very essence of the right to petition and is protected by the First Amendment's Petition Clause.[66] Although SLAPPs look like normal lawsuits, they are often brought for an ulterior motive.[67] SLAPPs are typically brought in an attempt to block citizen involvement in the po-

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[56] *Id.* at 12.

[57] *See id.* at 12, 87.

[58] *See* Fed. R. Civ. P. 11(b)–(c) (providing a means to sanction bringers of undesirable lawsuits).

[59] *See id.* 11(b).

[60] *Id.* 11(b)–(c).

[61] Pring & Canan, *supra* note 2, at 12.

[62] *See id.* at 87.

[63] *Id.*

[64] *Id.* at 12.

[65] *See* Canan & Pring, *supra* note 3, at 506.

[66] *Id.*

[67] *See* Pring & Canan, *supra* note 2, at 29.

litical process or to punish citizens who have already participated.[68] Prevailing on a SLAPP in court is typically not the goal of a SLAPP filer;[69] rather, filers hope to transform a political debate into a legal one, chilling speech and draining their opponent's resources.[70]

A SLAPP is an example of what the Supreme Court was referring to when it wrote that "[a] lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation."[71] Targets of a SLAPP will likely have to incur legal expenses to deal with the SLAPP and may experience a chilling effect on their willingness to petition the government.[72] As one SLAPP filer wrote, "[s]ee even if I lose the cases. [sic] I'm still going to win because I'm [going to force them] to spend at least $50,000.00 each in legal fees. Either way. I win."[73]

Protect Our Mountain Environment v. District Court (*POME*) is a well-known example of the resource-draining and speech-chilling effects of a SLAPP.[74] In 1978, at the request of developers Gayno, Inc., and Lockport Corporation (collectively Gayno), Jefferson County, Colorado, rezoned over 500 acres of land in order to allow Gayno to proceed with a planned development.[75] Later that year a local environmental group, Protect Our Mountain Environment (POME), and nine individuals sued the county zoning board and Gayno, accusing the board of exceeding its jurisdiction and abusing its discretion.[76] POME did not prevail.[77]

In 1980, Gayno filed a SLAPP against POME and its legal counsel in Colorado state court, alleging abuse of the legal process and civil conspiracy and seeking $10 million in compensatory damages and $30 million in exemplary damages.[78] POME filed a motion to dismiss on the ground that POME's action "was an exercise of the First Amend-

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[68] Pring, *supra* note 6, at 5–6.

[69] *See id.* Over three-quarters of SLAPPs are won in court by the SLAPP targets. *Id.* at 12.

[70] *See id.*

[71] Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 740 (1983).

[72] *See id.* at 740–41.

[73] Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 Duq. L. Rev. 607, 607 (2006) (quoting an e-mail from Anthony DiMeo to "Scott" (July 10, 2006) (on file with Sean P. Trende)). Anthony DiMeo was the plaintiff in *DiMeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3rd Cir. 2007), where he brought suit against Max for offensive comments posted by anonymous others on a website hosted by Max. *Id.* at 524–25. DiMeo's suit was dismissed and his motion to file an amended complaint was denied. *Id.* at 533.

[74] *See* 677 P.2d 1361 (Colo. 1984).

[75] *Id.* at 1362–63.

[76] *Id.* at 1363.

[77] *Id.* at 1364.

[78] *Id.*

ment right to petition the government for redress of grievances."[79] The district court denied POME's motion.[80] On appeal in 1984, the Colorado Supreme Court handed down a new rule for resolving motions to dismiss based on the right to petition for redress of grievances and remanded the case.[81] After another year in district court, Gayno finally dropped the entire matter.[82]

Gayno's lawsuit against POME satisfies the four defining characteristics of a SLAPP.[83] First, Gayno's complaint against POME, the SLAPP, involved a communication POME made to influence a governmental outcome.[84] Gayno's complaint against POME was made in response to POME's lawsuit against Gayno and the board—the communication—which was brought in an attempt to overturn the board's approval of Gayno's rezoning petition.[85] The communication at issue, POME's 1978 lawsuit, resulted in a civil complaint, Gayno's 1980 lawsuit.[86] Gayno's complaint was filed against POME, a non-governmental organization.[87] Finally, the issue was a substantive issue of some public interest—rezoning.[88]

Examining the *POME* case illustrates the resource-draining effect of a SLAPP.[89] Gayno's "development has never been built, and in 1995 community and county leaders [were] completing plans to acquire and preserve the property as open space—exactly what POME wanted in the first place."[90] Although it appears that POME "won" the battle, the result came at a very high price:

> The lawsuit dragged on for nearly four years, taking a tremendous toll in stress, lost time and work, and mounting legal costs. POME's leaders ceased being environmental watchdogs in their community and withdrew from public life; some literally moved out of town. Popular support for POME faded, contributions dried up, and the organization died.[91]

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[79] *Id.*
[80] *POME*, 677 P.2d at 1364.
[81] *Id.* at 1369.
[82] Pring & Canan, *supra* note 2, at 44.
[83] *See id.* at 8–9.
[84] *POME*, 677 P.2d at 1363–64.
[85] *Id.*
[86] *See id.* at 1364.
[87] *See id.* at 1362, 1364.
[88] *Id.* at 1362.
[89] *See* Pring & Canan, *supra* note 2, at 6.
[90] *Id.*
[91] *Id.*

In addition to the resource-draining effect the SLAPP had on POME, the case also exemplifies the chilling effect SLAPPs can have on the public's exercise of the right to petition.[92] "[A] decade later, environmental campaigns in [Jefferson County] can be withered by the phrase: 'Remember *POME*.'"[93]

IV. Current Defenses for SLAPP Targets

There are a number of current defenses for SLAPP targets at both the state and federal level.[94] SLAPP targets can use the Federal Rules of Civil Procedure in their defense,[95] and turn to an expansive definition of protected petitioning activity that evolved in the context of antitrust caselaw.[96] In addition, many states have passed anti-SLAPP legislation that SLAPP targets can use to move for the early dismissal of a SLAPP suit.[97] These state statutes can be used in some federal jurisdictions under the *Erie* doctrine, but this use is not consistent in all federal courts.[98] Recently, anti-SLAPP legislation was introduced at the federal level.[99] As of late 2010, the bill was being considered by the House Judiciary Committee's Subcommittee on Courts and Competition Policy, although it appears to have stalled.[100]

A. *Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure can be used defensively by SLAPP targets.[101] The Federal Rules provide SLAPP targets with the opportunity to move for the early dismissal of the SLAPP, as well as seek

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[92] *See id.*

[93] *Id.*

[94] *See* Fed. R. Civ. P. 11, 12(b)(6), 56; City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379–80 (1991); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999).

[95] *See* Fed. R. Civ. P. 11, 12(b)(6), 56.

[96] *See Omni*, 499 U.S. at 379–80.

[97] Michael Eric Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation,"* 38 Gonz. L. Rev. 263, 275–76 (2002–2003).

[98] *Compare Newsham*, 190 F.3d at 973 (applying California's anti-SLAPP statute to a federal diversity case), *with* Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (holding that Massachusetts' anti-SLAPP statute is not available in federal court).

[99] Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).

[100] *Bill Summary & Status 111th Congress (2009–2010) H.R. 4364*, Libr. of Congress, Thomas, http://hdl.loc.gov/loc.uscongress/legislation.111hr4364 (last visited Apr. 15, 2010).

[101] *See* Fed. R. Civ. P. 11, 12(b)(6), 56.

sanctions against the SLAPP filer.[102] Since a SLAPP is, by definition, a civil lawsuit,[103] the Federal Rules of Civil Procedure are available to all targets of SLAPPs brought in federal court.[104]

Rule 12(b)(6) allows a SLAPP target to assert, as a defense, that the SLAPP "fail[s] to state a claim upon which relief can be granted."[105] Under Rule 8(a)(2), a complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[106] Rule 8(a)(2) does not require detailed factual allegations, but the allegations "must be enough to raise a right to relief above the speculative level."[107] The Supreme Court recently held in *Bell Atlantic Corp. v. Twombly* that a complaint must contain enough facts to show a plausible, rather than merely possible, entitlement to relief.[108] This pleading standard applies to all civil actions.[109]

Rule 56 gives federal SLAPP targets another defense.[110] This rule provides targets with the opportunity to move for summary judgment in an attempt to end the adjudication.[111] A motion for summary judgment can be brought any time until thirty days after the close of discovery.[112] The opposing party, the SLAPP filer in this case, must "set out [in its response] specific facts showing a genuine issue for trial."[113] If necessary to the opposing party's response, the court may order a continuance in order to enable further discovery.[114] "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled judgment as a matter of law."[115]

In addition to early dismissal of the SLAPP, the Federal Rules of Civil Procedure provide a means whereby the court may impose sanctions on a SLAPP filer.[116] As a matter of law, the filing of a SLAPP acts as a certification that the lawsuit "is not being presented for any im-

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[102] *See id.*
[103] Pring & Canan, *supra* note 2, at 8.
[104] *See* Fed. R. Civ. P. 1.
[105] *Id.* 12(b)(6).
[106] *Id.* 8(a)(2).
[107] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).
[108] *See id.* at 570.
[109] Ashcroft v. Iqbal, 129 S.Ct. 1937, 1953 (2009).
[110] *See* Fed. R. Civ. P. 56.
[111] *See id.* 56(b).
[112] *Id.* 56(c)(1)(A).
[113] *Id.* 56(e)(2).
[114] *Id.* 56(f)(2).
[115] *Id.* 56(c)(2).
[116] *See* Fed. R. Civ. P. 11.

proper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[117] Should the court find, upon motion by the SLAPP target or the court's initiative, that the lawsuit was brought for an improper purpose, Rule 11 allows the court to impose sanctions.[118] Improper purposes can include motives "such as personal or economic harassment."[119] A Rule 11 sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated,"[120] but may include an "award to the prevailing party [of] the reasonable expenses, including attorney's fees, incurred for the motion."[121]

B. *Federal Caselaw*

Key Supreme Court decisions in the antitrust realm have developed an expansive constitutional definition of protected petitioning activity, creating a possible SLAPP defense in other areas of law.[122] Beginning in the early 1960s, the Court has considered multiple SLAPPs brought where the underlying communication made to influence governmental action allegedly violated the Sherman Antitrust Act.[123] Throughout these cases, the Court has held that petitioning the government is a protected activity, even if the petitioning would otherwise violate the Sherman Act.[124] Petitioning activity is protected regardless of intent or purpose, unless the petitioning itself is the group's only goal.[125]

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[117] *Id.* 11(b)(1).

[118] *Id.* 11(c)(2)–(3).

[119] Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987).

[120] Fed. R. Civ. P. 11(c)(4).

[121] *Id.* 11(c)(2).

[122] *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[123] *See Omni*, 499 U.S. at 369; *Pennington*, 381 U.S. at 659; *Noerr*, 365 U.S. at 129, 132. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (2006). Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *Id.* § 2. In sum, the Sherman Act comprehensively "provide[s] against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same." D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 173–74 (1915).

[124] *See Omni*, 499 U.S. at 379–80 (summarizing *Noerr* and *Pennington*).

[125] *See id.* at 380.

1. The "Sham Exception" from *Noerr-Pennington*'s Definition of Protected Petitioning Activity

In the early 1960s, the Supreme Court reviewed SLAPP suits in the antitrust context in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* and *United Mine Workers v. Pennington*. In the former case, the Court was faced with cross SLAPPs between a group of truck operators and a group of railroads alleging petitioning activity in violation of the Sherman Act.[126] The Court gave great latitude to the right to petition, holding that the petitioning activity of both groups was protected and that "mere group solicitation of governmental action" did not violate the Sherman Act, even if done solely for an anticompetitive purpose.[127] Four years later, the Court, in *Pennington*, reached a similar conclusion when presented with allegations of Sherman Act violations in response to the United Mine Workers' efforts to enforce a royalty contract in the courts.[128] The Court again emphasized that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[129]

Despite its protection of the right to petition even when the petitioning activity might otherwise violate the Sherman Act, the *Noerr-Pennington* doctrine left one exception that could be used to infringe upon this right.[130] The *Noerr* Court was careful to identify the possibility that a petition might merely be a "sham" to cover otherwise illegal behavior.[131] "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[132] In these situations, a campaign would lose its Petition Clause protection.[133] In a later antitrust case, the Court explained that even a petitioning activity performed with the mere intent to block access to meaningful adjudication and "usurp [the] decisionmaking process" was not protected under the Petition Clause.[134] The Court explicitly focused on intent, stating that "such

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[126] *See Noerr*, 365 U.S. at 129, 132.
[127] *Id.* at 138–39.
[128] 381 U.S. at 659, 670.
[129] *Id.* at 670.
[130] *See Noerr*, 365 U.S. at 144.
[131] *Id.*
[132] *Id.*
[133] *See id.*
[134] Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511–12 (1972).

a purpose or intent . . . would be to discourage and ultimately prevent the respondents from invoking the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*."[135]

2. The Supreme Court Strengthened SLAPP Defenses When it Eliminated the Sham Exception

In time, the Supreme Court limited *Noerr-Pennington*'s sham exception, shifting the focus from the petitioner's intent to the expected outcome of the petitioning.[136] In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court considered an antitrust SLAPP between two companies engaged in the billboard business.[137] The SLAPP filer attempted to use the sham exception against a lobbying campaign that allegedly violated the Sherman Act.[138] However, the Supreme Court explained that the lobbying activities were not a sham and were protected under *Noerr-Pennington* so far as any Sherman Act violations were concerned.[139] Rather than focusing on petitioner's intent as it had previously, the Court instead focused on the expected outcome of the petitioning.[140] "Although [the SLAPP target] indisputably set out to disrupt [the SLAPP filer]'s business relationships, it sought to do so not through the very process of lobbying, . . . but rather through the ultimate *product* of that lobbying . . . ."[141] Regarding intent, the Court wrote "[t]hat a private party's political motives are selfish is irrelevant: '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'"[142] *Omni*'s holding protected SLAPP targets by removing from the scope of the sham exception any petitioning activity undertaken in an attempt to influence government action, regardless of the petitioners' intent.[143]

3. Extension Beyond the Antitrust Realm

Noerr, Pennington, and *Omni* all deal with the issue of whether a petitioning activity, which would otherwise be in violation of the Sherman

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[135] *Id.* (internal quotation omitted).
[136] *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379–80 (1991).
[137] *See id.* at 367, 369.
[138] *See id.* at 368–69, 382.
[139] *Id.* at 382.
[140] *See id.* at 381–82.
[141] *Id.* at 381.
[142] *Omni*, 499 U.S. at 380 (quoting United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965)).
[143] *See id.*

Act, is nevertheless protected under the First Amendment's Petition Clause and immunized from Sherman Act liability.[144] Although developed in the antitrust realm, some federal courts have shown a willingness to extend *Noerr-Pennington* to protect Petition Clause activity in other subject areas.[145] In *Brownsville Golden Age Nursing Home, Inc. v. Wells*, the Third Circuit recognized the application of *Noerr-Pennington* to protect private citizens' petitioning activity to report aborrent conditions in a nursing home.[146] In a decision later affirmed by the Fourth Circuit, the Maryland District Court applied the *Noerr-Pennington* doctrine to protect petitioning activity from the common law claims of malicious use of process, abuse of process, tortious interference with prospective advantage, fraud, and conspiracy.[147] The Supreme Court has not given a clear pronouncement as to its willingness to extend *Noerr-Pennington* beyond the antitrust realm.[148]

C. *Statutory Defenses*

Anti-SLAPP laws can provide SLAPP targets with additional defenses.[149] These defenses include procedural mechanisms allowing SLAPP targets to get the SLAPP dismissed from court, as well as provisions allowing SLAPP targets who prevail on a motion to dismiss to recover attorney's fees and costs.[150]

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[144] *See supra* Parts IV.B.1–.2.

[145] *See, e.g.*, Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 160 (3rd Cir. 1988). In *Brownsville*, two private citizens visited the nursing home in their efforts to find a suitable home for a relative. *Id.* at 157–58. Appalled by the conditions they observed, the two citizens reported their observations to state and federal officials, as well as the general public. *Id.* at 158. The nursing home was eventually decertified. *Id.* In response, Brownsville filed a SLAPP against the two citizens, alleging that they had engaged in a civil conspiracy to interfere with the nursing home's business relations. *Id.* at 157.

[146] *See id.* at 160 (citing the *Noerr-Pennington* doctrine as grounds for holding that "defendants' actions in calling Brownsville's violations to the attention of state and federal authorities and eliciting public interest cannot serve as the basis of . . . liability").

[147] Baltimore Scrap Corp. v. David J. Joseph Co., 81 F. Supp. 2d 602, 620 (D. Md. 2000) ("Because the defendants' behavior is protected from antitrust liability by the First Amendment under *Noerr-Pennington*, it is likewise protected from state common law liability."), *aff'd*, 237 F.3d 394 (4th Cir. 2001).

[148] *Compare* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 59 (1993) ("[w]hether applying *Noerr* as an antitrust doctrine or invoking it in other contexts"), *with Omni*, 499 U.S. at 380 (noting that the *Noerr-Pennington* doctrine rests ultimately on an interpretation of antitrust laws).

[149] *See* Pring & Canan, *supra* note 2, at 189.

[150] *See, e.g.*, Minn. Stat. Ann. § 554.02–.04 (West 2010).

1. State Statutory Defenses

To protect citizens who wish to participate in government, states have begun to pass anti-SLAPP legislation.[151] As of early 2011, twenty-seven states have passed anti-SLAPP legislation.[152] In many instances, this legislation was passed in order to provide an expedited way for the courts to deal with SLAPPs, rather than forcing SLAPP targets to deal with standard, lengthy court procedures.[153] The precise workings and the scope of anti-SLAPP legislation can differ widely between states.[154]

The scope of state statutes protecting petitioning activity generally falls into one of several different categories. Some states follow the *POME* standard, protecting a SLAPP target's petitioning activity unless the petitioning does not contain any reasonable factual support or any arguable basis in law and causes actual compensable injury to the SLAPP filer.[155] These states include Arizona, Massachusetts, and Vermont.[156] Other states, including Illinois, Minnesota, and Rhode Island, follow the *Omni* standard and protect petitioning activity unless the petitioning is not genuinely aimed at procuring favorable government action.[157] A third class of states protects petitioning activity unless the SLAPP filer can show some chance of prevailing in its claim against the

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[151] John G. Osborn & Jeffrey A. Thaler, *Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 Me. B.J. 32, 32 (2008).

[152] *See Your State's Free Speech Protections*, Publ. Participation Project, http://anti-slapp.org/?q=node/12 (last visited Apr. 15, 2011).

[153] *See* Johnston, *supra* note 97, at 279.

[154] *See, e.g.*, *id.* at 276–80 (discussing differing policy objectives and statutory defenses among state anti-SLAPP laws).

[155] *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-752(B) (Supp. 2010); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Vt. Stat. Ann. tit. 12, § 1041(e)(1) (Supp. 2010); *see also* Protect Our Mountain Env't v. Dist. Court, 677 P.2d 1361, 1369 (Colo. 1984) (protecting SLAPP targets unless "(1) the [SLAPP target]'s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; [or] (2) the primary purpose of the [SLAPP target]'s petitioning activity was to harass the [SLAPP filer] or to effectuate some other improper objective; [or] (3) the [SLAPP target]'s petitioning activity had the capacity to adversely affect a legal interest of the [SLAPP filer]").

[156] *See* Ariz. Rev. Stat. Ann. § 12-752(B); Mass. Gen. Laws Ann. ch. 231, § 59H; Vt. Stat. Ann. tit. 12, § 1041(e)(1).

[157] *See* 735 Ill. Comp. Stat. Ann. 110/15 (West Supp. 2011); Minn. Stat. Ann. § 554.03 (West 2010); R.I. Gen. Laws § 9-33-2(a) (1997); *see also* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380 (1991).

SLAPP target.[158] These states include California, Delaware, and Oregon.[159]

Some state anti-SLAPP statutes create an expedited process for determining whether the SLAPP target's petitioning activity is protected and, if so, dismissing the SLAPP.[160] Some states, such as Nevada and Oregon, allow a special motion to dismiss, which SLAPP targets can bring early in judicial proceedings in order to raise the defense that their petitioning activity is protected.[161] In some states, once the SLAPP target brings a motion to dismiss, discovery is suspended and the court is required to hold a hearing on the motion within a short amount of time.[162] This time frame may either be defined, such as Arkansas' thirty days,[163] or open to the court's discretion, such as Maryland's "as soon as practicable" standard.[164]

Many states award attorney's fees and costs to a SLAPP target who prevails on a motion to dismiss.[165] Some states also allow the courts to award compensatory and punitive damages to the SLAPP target.[166]

2. Federal Statutory Defenses

Currently there is no federal statute specifically designed to defend SLAPP targets.[167] A small number of statutes protect specific uses of the right to petition,[168] but comprehensive protections have yet to be passed by Congress.[169] In December 2009, comprehensive anti-SLAPP legislation was introduced in the House of Representatives, but this bill appears to be stalled in committee.[170] At the present, the strongest

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[158] *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004); DEL. CODE ANN. tit. 10, § 8137 (1999); OR. REV. STAT. § 31.150(3) (2009).

[159] *See* CAL. CIV. PROC. CODE § 425.16(b)(1); DEL. CODE ANN. tit. 10, § 8137; OR. REV. STAT. § 31.150(3).

[160] *See* Johnston, *supra* note 97, at 280.

[161] *See* NEV REV. STAT. ANN. § 41.660(1)(a) (LexisNexis 2006); OR. REV. STAT. § 31.150(1).

[162] *See, e.g.*, ARK. CODE ANN. § 16-63-507(a)(1)–(2) (2005); IND. CODE ANN. § 34-7-7-6 (LexisNexis 2008).

[163] ARK. CODE ANN. § 1663-507(a)(2).

[164] MD. CODE ANN., CTS. & JUD. PROC. § 5-807(d)(1) (LexisNexis 2006).

[165] *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(c) (West 2004); 735 ILL. COMP. STAT. ANN. 110/25 (West Supp. 2011); OR. REV. STAT. § 31.152(3).

[166] *See, e.g.*, MINN. STAT. ANN. § 554.04(2)(b) (West 2010).

[167] *See* PRING & CANAN, *supra* note 2, at 190; Trende, *supra* note 73, at 643–44.

[168] PRING & CANAN, *supra* note 2, at 190 (citing federal laws protecting those giving testimony in federal courts and before Congress, as well as whistleblowers).

[169] *See id.*; Trende, *supra* note 73, at 643–44.

[170] *Bill Summary & Status 111th Congress (2009–2010) H.R. 4364*, LIBR. OF CONGRESS, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.111hr4364 (last visited Apr. 15, 2010).

statutory option for SLAPP targets in federal court is to attempt to use state anti-SLAPP statutes under the *Erie* doctrine.[171]

a. *Use of State Statutes in Federal Court*

There is currently a circuit split as to whether state anti-SLAPP statutes can be used in federal court under the *Erie* doctrine.[172] This split is rooted in the courts' judgment of whether state anti-SLAPP protections directly conflict with the Federal Rules of Civil Procedure.[173] The Massachusetts District Court found that a dismissal provision in the Massachusetts anti-SLAPP law directly conflicted with Rule 12(b)(6) of the Federal Rules, and held that "the Federal Rules of Civil Procedure supplant the state Anti-SLAPP procedures."[174] In contrast, the Ninth Circuit Court of Appeals found that a similar provision in California's anti-SLAPP law could exist side-by-side with the Federal Rules, "'each controlling its own intended sphere of coverage without conflict.'"[175] Therefore, the Ninth Circuit held that the statute was available to SLAPP targets in diversity actions.[176]

Recent decisions in federal jurisdictions that permit the use of state anti-SLAPP statutes have limited that use to state law claims only.[177] In 2007, the Southern District of California considered a SLAPP that alleged civil rights and conspiracy claims under 42 U.S.C. §§ 1983 and 1985.[178] The court denied the SLAPP target's special motion to strike, brought under California's anti-SLAPP law, and held that "the

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[171] *See* PRING & CANAN, *supra* note 2, at 190; Trende, *supra* note 73, at 643–44.

[172] *Compare* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (applying California's anti-SLAPP statute to a federal diversity case), *with* Stuborn Ltd. v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (holding that Massachusetts' anti-SLAPP statute is not available in federal court).

[173] *Compare Newsham*, 190 F.3d at 973 (not in direct conflict), *with Stuborn*, 245 F. Supp. 2d at 316 (direct conflict). The *Erie* doctrine relies on direct conflict analysis to solve procedural choice of law issues. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980); Hanna v. Plumer, 380 U.S. 460, 472 (1965). Under *Hanna*, when a state procedural rule directly collides with the Federal Rules of Civil Procedure, the Federal Rules will prevail due to their authorization by the Rules Enabling Act. 380 U.S. at 471, 473–74; *see also* 28 U.S.C. § 2072 (2006). In the absence of a direct collision, *Erie*'s twin aims of discouraging forum shopping and avoiding inequitable administration of the law govern the outcome. *See Walker*, 446 U.S. at 752–53; *Hanna*, 380 U.S. at 468, 471.

[174] *Stuborn*, 245 F. Supp. 2d at 316 (citing *Hanna*, 380 U.S. at 463–65).

[175] *Newsham*, 190 F.3d at 972 (quoting *Walker*, 446 U.S. at 752).

[176] *Id.* at 973.

[177] *See* Best v. Hendrickson Appraisal Co., No. 06-CV-1358 W(JMA), 2007 WL 1110632, at *3 (S.D. Cal. Mar. 28, 2007); Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

[178] *Best*, 2007 WL 1110632, at *1.

[California] anti-SLAPP statute does not, in general, apply to federal claims in federal court."[179]

b. *Proposed Federal Legislation*

In December 2009, Representative Steve Cohen introduced a federal anti-SLAPP bill in the House of Representatives.[180] The bill, known as the Citizen Participation Act of 2009 (the "Act"), recognizes the importance of public participation in government, damaging effects of SLAPP suitson that participation, and the need to identify and eliminate SLAPPs early.[181] The Act contains broad protections for petitioning activity, including "any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest,"[182] and "any written or oral statement made or submitted before a legislative, executive, or judicial body, or any other official proceeding authorized by law."[183] The Act creates a special motion to dismiss that, after a prima facie showing by SLAPP targets that their petitioning activity was protected, shifts the burden to the SLAPP filer to demonstrate "a prima facie showing of facts to sustain a favorable judgment."[184] Once the special motion to dismiss is filed, the Act would stay discovery in the case until the motion is disposed.[185] Furthermore, the Act creates federal removal jurisdiction, allowing SLAPP targets in state court to remove the case to federal court and obtain the Act's protections.[186] Finally, the Act awards a reasonable attorney's fee to SLAPP targets who prevail on the special motion to dismiss.[187] Currently, the Act has garnered three cosponsors,[188] but is stalled awaiting considera-

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[179] *Id.* at *3; *accord Globetrotter Software*, 63 F. Supp. 2d at 1130 (holding that the California anti-SLAPP statute only applies to pendent state law claims, not federal question claims, when both are asserted in the same action).

[180] Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).

[181] *See id.* §§ 2, 5.

[182] *Id.* § 11(1)(B). The Act defines an "issue of public interest" as "includ[ing] an issue related to health or safety; environmental, economic or community well-being; the government; a public figure; or a good, product or service in the market place," while explicitly excluding "statements directed primarily toward protecting the speaker's business interests." *Id.* § 11(5).

[183] *Id.* § 11(2)(A).

[184] *Id.* § 5(b).

[185] H.R. 4364 § 5(c).

[186] *Id.* § 6(a).

[187] *Id.* § 8(a).

[188] *Bill Summary & Status 111th Congress (2009–2010) H.R. 4364—Cosponsors*, Libr. of Congress, Thomas, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04364:@@@P (last visited Apr. 15, 2010) (showing Representatives Charles A. Gonzalez (D-TX), Pete Stark (D-CA), and Mike Doyle (D-PA) as cosponsors).

tion by the House Judiciary Committee's Subcommittee on Courts and Competition Policy.[189]

V. All Current Defenses Fail as Effective Defenses for Federal SLAPP Targets

To be effective, a SLAPP defense must cover all activity protected by the Petition Clause.[190] Furthermore, a SLAPP defense must provide a way to identify SLAPPs early in the judicial process, so as to remove those SLAPPs from the judicial process, and to discourage and warn against future filing of SLAPPs.[191] The best SLAPP defense will strike an appropriate balance between protecting the SLAPP itself as a manifestation of the SLAPP filer's right to petition and saving the SLAPP target from the resource-draining effects of the SLAPP.[192] Since one harmful consequence of a SLAPP is its chilling effect on protected First Amendment activity, the best SLAPP defense will tip slightly in favor the SLAPP target in order to avoid or prevent as much of that chilling effect as possible.[193]

The current defenses available to federal SLAPP targets are the Federal Rules of Civil Procedure, the *Noerr-Pennington* doctrine, and state anti-SLAPP statutes as applied in diversity actions through the *Erie* doctrine.[194] Each of these defenses has shortfalls that prevent any of them from being as effective as well-drafted federal legislation.[195]

A. *The Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure, although available to every SLAPP target in federal court,[196] fail at being an effective SLAPP defense because they do not allow for efficient and quick identification and elimination of SLAPPs, and because they have a very limited deterring effect.[197]

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[189] *Id.*

[190] *See* Pring & Canan, *supra* note 2, at 189.

[191] *See id.*

[192] *See id.* at 200–01.

[193] *See id.* at 12; Pring, *supra* note 6, at 8.

[194] *See* Fed. R. Civ. P. 11, 12(b)(6), 56; City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379–80 (1991); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999).

[195] *See* Fed. R. Civ. P. 11, 12(b)(6), 56; *Omni*, 499 U.S. at 379–80; *Newsham*, 190 F.3d at 973.

[196] *See* Fed. R. Civ. P. 1; *supra* notes 103–104 and accompanying text.

[197] *See* Fed. R. Civ. P. 11, 12(b)(6), 56.

Nonetheless, a successful Rule 12(b)(6) defense would grant a SLAPP target dismissal of the SLAPP for failure to state a claim based on the Petition Clause's protections.[198] SLAPP targets who prevail on a Rule 12(b)(6) defense would avoid much of the resource-draining effect of a SLAPP.[199] Although early dismissal would keep the SLAPP target from having to waste resources on a meritless suit, the Federal Rules' lenient pleading requirements could make it difficult for a SLAPP target to prevail.[200] Rule 8(a)(2) requires only that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[201] Although the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly* could make it slightly easier for a 12(b)(6) defense to prevail by requiring that the SLAPP filer show a plausible, as opposed to a possible, entitlement to relief,[202] trial judges tend to take a wait-and-see approach when faced with questions about the legitimacy of a suit.[203] If, in its 12(b)(6) motion, the SLAPP target attempts to clarify the nature of the SLAPP by presenting matters outside the SLAPP filer's pleadings, Rule 12(d) would treat the SLAPP target's motion as one for summary judgment, which could implicate a whole new host of problems for the SLAPP target's defense.[204] Rule 12(b)(6) could be an effective SLAPP defense if the SLAPP filer's pleading obviously presents itself as a SLAPP, but otherwise Rule 12(b)(6) provides only an uncertain defense that will likely be denied and will allow the trial to continue into the expensive discovery phase.[205]

A motion for summary judgment made under Rule 56(b) fails as an effective SLAPP defense for essentially the same reasons that a Rule 12(b)(6) motion fails.[206] A motion for summary judgment may be made at any time until thirty days after the close of discovery.[207] However, the summary judgment standard depends in part on the discovery completed in the case, implying that at least some discovery, with its atten-

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[198] *See id.* 12(b)(6).

[199] A Rule 12(b)(6) defense can be raised very early in the trial. *See id.* 12(a)–(b). A SLAPP target who raises—and prevails upon—a 12(b)(6) defense before discovery begins will avoid much of the cost of litigation. *See* Ezra Friedman & Abraham L. Wickelgren, *Chilling, Settlement, and the Accuracy of the Legal Process*, 26 J.L. Econ. & Org. 144, 153 (2010) ("discovery is often the most costly part of litigation").

[200] *See* Fed. R. Civ. P. 8(a)(2).

[201] *Id.*

[202] 550 U.S. 544, 570 (2007).

[203] *See* Pring & Canan, *supra* note 2, at 158.

[204] Fed. R. Civ. P. 12(d); *see* discussion *infra* notes 206–211.

[205] *See* Fed. R. Civ. P. 8(a)(2), 12.

[206] *See id.* 56.

[207] Fed. R. Civ. P. 56(c)(1)(A).

dant costs, will likely take place before a motion for summary judgment can be made.[208] Additionally, if the SLAPP filer shows the court that it cannot present facts essential to justify its opposition to the motion, the court may allow further discovery before ruling on the motion.[209] Once a trial moves into the discovery phase, SLAPP targets are exposed to the full resource-draining effect of the SLAPP.[210] Therefore, a Rule 56(b) motion for summary judgment is also an ineffective SLAPP defense.[211]

The Federal Rules also provide limited options for deterring the filing of future SLAPPs.[212] Rule 11 authorizes courts to impose sanctions when a lawsuit has been brought for an improper purpose.[213] These sanctions are "aimed at deterring, and, if necessary punishing improper conduct."[214] Nevertheless, in another manifestation of the Petition Clause, courts have held that Rule 11 "[s]anctions should be sparingly imposed . . . and care should be taken to avoid chilling creativity or stifling enthusiasm."[215] This type of standard could lead to inconsistency in the application of sanctions against SLAPP filers, whereas effective deterrence is best achieved through consistent application of sanctions against SLAPP filers.[216]

B. Noerr-Pennington *Doctrine*

The *Noerr-Pennington* doctrine also fails as an effective SLAPP defense because of its uncertain application outside the antitrust realm.[217] Although it appears to be a boon for SLAPP targets, the *Noerr-Pennington* doctrine is constrained by its very facts to the antitrust realm.[218] In all of the major cases in which the doctrine finds root—*Noerr, Pennington,* and *Omni*—the Supreme Court held that petitioning activity that otherwise may have violated the Sherman Act was in fact

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[208] *See id.* 56(c)(2).

[209] *Id.* 56(f)(2).

[210] *See* Friedman & Wickelgren, *supra* note 199, at 153.

[211] *See* FED. R. CIV. P. 56.

[212] *See id.* 11.

[213] *Id.* 11(b)(1), (c).

[214] United States *ex rel.* Leno v. Summit Const. Co., 892 F.2d 788, 791 n.4 (9th Cir. 1989) (internal quotation and citation omitted).

[215] Guzzello v. Venteau, 789 F. Supp. 112, 118 (E.D.N.Y. 1992) (citing Secs. Indus. Ass'n. v. Clarke, 898 F.2d 318, 322 (2d Cir. 1990)).

[216] *See* PRING & CANAN, *supra* note 2, at 204.

[217] *See id.* at 28.

[218] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 369, 380 (1991) (noting that the *Noerr-Pennington* doctrine rests ultimately on an interpretation of antitrust laws); United Mine Workers v. Pennington, 381 U.S. 657, 659 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129, 132 (1961).

protected under the Petition Clause.[219] These holdings could arguably create a strong defense of general petitioning activity under the First Amendment, but, when limited to their facts, really only help resolve questions of conflicts between the Petition Clause and Sherman Act violations.[220] Although federal courts have applied *Noerr-Pennington* to areas outside the antitrust realm,[221] the Supreme Court has not clearly stated its willingness to invoke the doctrine in non-antitrust contexts.[222] Many SLAPP targets will have to argue before a judge before they know whether the judge will determine that *Noerr-Pennington* covers their specific petitioning activity.[223] Furthermore, any argument advancing the *Noerr-Pennington* doctrine would likely be made as part of a motion to dismiss or motion for summary judgment, which would implicate the same problems discussed above with the Federal Rules of Civil Procedure in general.[224]

C. *State Anti-SLAPP Statutes in Federal Court*

The final defense available to SLAPP targets in federal court is the use of state anti-SLAPP statutes through the *Erie* doctrine.[225] Setting aside the obvious fact that the effectiveness of this defense depends on the existence of an available state statute and the effectiveness of that statute, this defense also fails due to its inconsistent application across federal jurisdictions.[226] Jurisdictional availability depends on the jurisdiction's view as to whether there is a direct conflict between the statute and the Federal Rules of Civil Procedure.[227] While this split can result

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[219] *See Omni*, 499 U.S. at 379–80 (summarizing *Noerr* and *Pennington*).

[220] *See id.*

[221] *See* Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 160 (3rd Cir. 1988) (citing *Noerr-Pennington* as grounds for holding that the acts of two private citizens in reporting a nursing home's health code violations were immune from liability); Baltimore Scrap Corp. v. David J. Joseph Co., 81 F. Supp. 2d 602, 620 (D. Md. 2000) (applying *Noerr-Pennington* to state common law liability), *aff'd*, 237 F.3d 394 (4th Cir. 2001).

[222] *Compare* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 59 (1993) ("[w]hether applying *Noerr* as an antitrust doctrine or invoking it in other contexts"), *with Omni*, 499 U.S. at 380 (noting that the *Noerr-Pennington* doctrine rests ultimately on an interpretation of antitrust laws).

[223] *See* PRING & CANAN, *supra* note 2, at 28.

[224] *See supra* Part V.A.

[225] *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 973 (9th Cir. 1999).

[226] *Compare id.*(applying California's anti-SLAPP statute to a federal diversity case), *with* Stuborn Ltd. v. Bernstein, 245 F. Supp. 2d 312 (D. Mass. 2003) (holding that Massachusetts' anti-SLAPP statute is not available in federal court).

[227] *Compare Newsham*, 190 F.3d at 973 (not in direct conflict), *with Stuborn*, 245 F. Supp. 2d at 316 (direct conflict).

in good news for SLAPP targets in certain federal jurisdictions, the split provides inconsistent protection of a First Amendment right.[228] In addition, recent decisions limiting the use of state anti-SLAPP statutes in federal jurisdictions, where such use is allowed, further diminish the effectiveness of these statutes as a defense in federal courts.[229]

VI. Strong Federal Legislation Is the Best Defense for Federal SLAPP Targets

Given the flaws in current federal-level SLAPP defenses, the best defense for federal SLAPP targets would be a well-drafted, comprehensive federal law.[230] Currently there is no federal anti-SLAPP legislation.[231] A strong federal law can avoid the Rule 12(b)(6) and 56(b) pitfalls and limit a SLAPP target's discovery costs by staying discovery while the court determines how to handle the SLAPP.[232] A strong federal law can also avoid the *Noerr-Pennington* uncertainty by explicitly protecting all petitioning activity that falls under the Petition Clause.[233] Finally, a strong federal law can avoid the failures of state laws used under the *Erie* doctrine by providing a uniform law available to all SLAPP targets in all federal jurisdictions.[234]

A. *Legislative Standard*

Experts have identified three key points that effective anti-SLAPP legislation should address:

> 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."[235]

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[228] *Compare Newsham*, 190 F.3d at 973 (petitioning activity protected by state anti-SLAPP statute), *with Stuborn*, 245 F. Supp. 2d at 316 (petitioning activity *not* protected by state anti-SLAPP statute).

[229] *See* Best v. Hendrickson Appraisal Co., No. 06-CV-1358 W(JMA), 2007 WL 1110632, at *3 (S.D. Cal. Mar. 28, 2007); Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

[230] *See supra* Part V.

[231] *See* Trende, *supra* note 73, at 643–44.

[232] *See* Pring & Canan, *supra* note 2, at 203.

[233] *See id.*

[234] *See id.*

[235] *Id.*at 189.

> 2. Forums: "It must cover all government bodies and agents, whether federal, state, or local, and whether legislative, executive, judicial, or the electorate."[236]
> 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."[237]

Legislation that meaningfully addresses all three of these areas will effectively protect SLAPP targets.

B. *Critique of Currently Proposed Federal Legislation*

The recently introduced Citizen Participation Act of 2009 largely succeeds in the three key areas by broadly defining protected activity and providing an expedited process for dismissing meritless SLAPPs.[238] Furthermore, the Act includes additional protections which will make it available as a strategic choice to SLAPP targets in state courts.[239] Nevertheless, state court interpretations of state anti-SLAPP provisions with similar language to the Act indicate a potential weakness, and the protections included in the Act could be further bolstered with a few key changes.[240]

1. Communications and Forums

The Act's scope of protected constitutional activity is sufficiently broad to cover all Petition Clause activity.[241] Legislation that effectively protects public participation in government must be sufficiently broad to cover a variety of communication in a variety of forums. The Act sufficiently addresses the proper communications made to the proper forums.[242]

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[236] *Id.*

[237] *Id.*

[238] *See* Citizen Participation Act of 2009, H.R. 4364, 111th Cong. §§ 5, 11(1)–(2) (2009).

[239] *Id.* § 6.

[240] *See, e.g.*, Evans v. Unkow, 45 Cal. Rptr. 2d 624, 627–28 (Ct. App. 1995). *Compare* CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004) (dismissing the SLAPP unless the SLAPP filer shows "that there is a probability that the [SLAPP filer] will prevail on the claim"), *with* H.R. 4364 § 5(b) (dismissing the SLAPP unless the SLAPP filer shows "that the [SLAPP] is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment").

[241] *See* H.R. 4364 § 11(1)–(2).

[242] *See id.*

The Act protects activities in furtherance of the right of free speech and acts of petitioning the government.[243] Acts in furtherance of the right of free speech include written or oral statements made in connection with an issue under review by a governmental body or other authorized proceeding or made in public on an issue of public interest.[244] Acts of petitioning the government include written or oral statements made or submitted to a governmental body or other authorized proceedings that encourage such a statement.[245] The language of these definitions is very broad, and neither definition is meant to provide a comprehensive list of protected activity.[246] The definition of acts in furtherance of the right of free speech also includes a catch-all clause, bringing even more activity under the Act's protection and aligning the Act with constitutional jurisprudence.[247]

The Act's scope is similar to the scope used by Professors Pring and Canan in their model anti-SLAPP legislation.[248] Like the Act, the model legislation also includes within its scope "[a]cts in furtherance of the constitutional right to petition."[249] This model scope is based on the *Omni* ruling, and "spells out the acts or communications covered with the maximum constitutional breadth under . . . *Omni*."[250] The Act's catch-all clause brings the *Omni* holding into its scope, and will protect petitioning activity "regardless of intent or purpose."[251]

The Act also succeeds in protecting petitioning activity in all the appropriate forums.[252] Protections are not limited to just one branch of government or one particular jurisdiction.[253] The Act covers statements made to "legislative, executive, or judicial bod[ies], or any other official

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[243] *Id.* §§ 3, 4.

[244] *Id.* § 11(1).

[245] *Id.* § 11(2).

[246] *See id.* § (11)(1),(2) (containing the comprehensive language "includes but is not limited to").

[247] *Id.* § (11)(1)(C) ("any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with an issue of public interest").

[248] *See* Pring & Canan, *supra* note 2, at 203. Pring and Canan's model legislation "melds the most effective elements of the U.S. Supreme Court's *Omni* decision, the federal Model State Volunteer Service bill, and the California, New York, and Minnesota [anti-SLAPP statutes]." *Id.* at 201.

[249] *Id.* at 203.

[250] *Id.* at 205.

[251] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380 (1991) (internal quotation and citation omitted); *see* H.R. 4364 § 11(1)(C).

[252] *See* H.R. 4364 § 11(1)–(2).

[253] *See id.*

proceeding authorized by law,"[254] as well as "the public or a public forum."[255] This language effectively "cover[s] all government bodies and agents, whether federal, state, or local, and whether legislative, executive, judicial, or the electorate."[256] Some states, such as Maryland, have chosen to be more explicit as to covered jurisdictions, protecting communications "with a federal, State, or local government body or the public at large."[257] However, there is no reason to believe that the Act's broad language would not apply to the named government branches in *any* jurisdiction.

2. Prevention and Cure

The Act could be stronger at providing a judicial cure to SLAPP targets as well as discouraging SLAPPs from being filed.[258] To effectively protect public participation in government, legislation "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."[259]

The Act provides separate procedural protections to acts of petitioning the government and acts in furtherance of the constitutional right of petition or free speech.[260] Acts of petitioning the government are strongly and effectively protected by the Act.[261] The Act completely immunizes all acts of petitioning the government from any civil liability except those made with knowledge of falsity or reckless disregard of falsity.[262] The SLAPP filer must prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.[263] The "clear and convincing" standard is very demanding.[264] Therefore, nearly all acts of petitioning the government will be immune from SLAPPs.[265]

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[254] *Id.*

[255] *Id.* § 11(1)(B).

[256] *See* PRING & CANAN, *supra* note 2, at 189.

[257] *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-807(b)(1) (LexisNexis 2006).

[258] *See* H.R. 4364 §§ 5(b), 8(a).

[259] PRING & CANAN, *supra* note 2, at 189.

[260] *Compare* H.R. 4364 § 3 (acts of petitioning the government), *with id.* § 5 (acts in furtherance of the constitutional right of petition or free speech).

[261] *See id.* § 3.

[262] *Id.* § 3(a).

[263] *Id.* § 3(b).

[264] *See In re* Martin, 538 N.W.2d 399, 410 (Mich. 1995) ("the clear and convincing evidence standard [is] the most demanding standard applied in civil cases").

[265] *See* H.R. 4364 § 3.

Acts in furtherance of the constitutional right of petition or free speech are afforded separate, potentially weaker procedural protections.[266] The Act creates a special motion to dismiss, which contains a burden-shifting provision requiring the SLAPP target to "mak[e] a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech."[267] Once that burden is met, responsibility shifts to the SLAPP filer to show "that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment."[268] This motion protects the SLAPP target's resources by staying discovery upon filing of the motion, as well as requiring that the motion be considered in an expedited hearing.[269]

The Act's protections of acts in furtherance of the constitutional right of petition or free speech are likely weak due to the low standard imposed on the SLAPP filer.[270] California's anti-SLAPP law employs a similar standard, where the special motion to strike can be defeated if the SLAPP filer establishes a "probability" of prevailing on the SLAPP.[271] California courts have interpreted this to mean that a SLAPP filer must present evidence to show that the SLAPP filer would establish a prima facie case at trial,[272] which is very similar to the language used by the Act.[273] Furthermore, California courts have held that the SLAPP filer's right to a jury trial prevents the court from weighing this evidence.[274] This has created a "very easy standard of proof for [SLAPP] filers."[275] If the Act is interpreted in a similar way, this easy standard of proof could

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[266] *See id.* § 5. These separate procedural protections, markedly different from the complete immunization from liability that protects acts of petitioning the government, doubtless stem from the more public nature, by the Act's own definition, of acts in furtherance of the right of free speech. *Compare id.* § 11(2), *with id.* § 11(1).

[267] *Id.* § 5(a)–(b).

[268] *Id.* § 5(b).

[269] *See id.* § 5(c)–(d).

[270] *See* Evans v. Unkow, 45 Cal. Rptr. 2d 624, 627–28 (Ct. App. 1995); *see also* Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 635 (Ct. App. 1996), *overruled on other grounds by* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685 (Cal. 2002).

[271] CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004).

[272] *Evans*, 45 Cal. Rptr. 2d at 627–28.

[273] *See* H.R. 4364 § 5(b) ("[T]he burden shifts to the [SLAPP filer] to demonstrate that the claim is . . . supported by a sufficient prima facie showing of facts to sustain a favorable judgment.").

[274] *Wollersheim*, 49 Cal. Rptr. 2d at 635.

[275] PRING & CANAN, *supra* note 2, at 198.

transfer to the federal courts and weaken the Act's utility as a SLAPP defense.[276]

The Act would be stronger if it followed Pring and Canan's model anti-SLAPP legislation.[277] The model legislation does not contain any provision for considering the SLAPP filer's ability to prevail on the SLAPP at trial.[278] The only way a SLAPP filer can defeat a motion to dispose of the SLAPP under the model legislation is by producing "clear and convincing evidence that the acts of the [SLAPP target] are not immunized from liability."[279] This affords a very strong defense to SLAPP targets because it unconditionally protects all petitioning activity that falls within the model legislation's scope.[280]

The Act could also be more effective at deterring SLAPP filings.[281] SLAPP targets who prevail on a special motion to dismiss under the Act will only be awarded reasonable attorney fees and costs.[282] Although the Act makes these fees and costs nondischargeable in bankruptcy,[283] the Act could further strengthen its deterrent effect by allowing additional monetary judgments against SLAPP filers.[284] Minnesota's anti-SLAPP law *requires* courts to award actual damages upon a showing of injury by the SLAPP target and allows courts to award punitive damages as well.[285] Pring and Canan's model legislation allows courts to impose sanctions "sufficient to deter repetition of such conduct and comparable conduct by others similarly situated," and also enables injured SLAPP targets to seek compensatory and punitive damages.[286]

3. Other Benefits of the Act

In addition to its efforts to address communications and forums, and serve both as a prevention and cure of SLAPPs, the Act includes additional benefits for SLAPP targets.[287] Perhaps the Act's strongest benefit is the freedom it affords a SLAPP target to remove from state

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[276] *See Wollersheim*, 49 Cal. Rptr. 2d at 635; *Evans*, 45 Cal. Rptr. 2d at 627–28; H.R. 4364 § 5(b).

[277] *See* PRING & CANAN, *supra* note 2, at 203.

[278] *See id.*

[279] *Id.*

[280] *See id.*

[281] *See* H.R. 4364 § 8.

[282] *Id.* § 8(a).

[283] *Id.* § 9.

[284] *See* PRING & CANAN, *supra* note 2, at 204.

[285] MINN. STAT. ANN. § 554.04(2)(b) (West 2010).

[286] PRING & CANAN, *supra* note 2, at 204.

[287] *See* H.R. 4364 § 6–7.

court to federal court, provided that the SLAPP target's speech activities would otherwise fall within the scope of the Act.[288] Removal jurisdiction is generally only allowed in cases brought in state court where the federal district courts have original jurisdiction.[289] Therefore, the target of a SLAPP that masquerades as a state common law claim and is brought by a filer whose citizenship is not diverse from that of the target would typically be "trapped" in state court.[290] Such a SLAPP target would be at the mercy of that particular state's chosen method—or lack thereof—of SLAPP protection.[291] However, all participants in protected First Amendment activity as defined by the Act would be able to remove a state case to federal court and obtain the Act's procedural protections.[292] This removal jurisdiction would be available regardless of the presence of complete diversity among the parties to the SLAPP, and regardless of the presence of a federal question.[293] The Act's removal jurisdiction would be available as an option for the SLAPP targets, allowing targets who prefer the options available in state court to remain there as a strategic choice.[294] There is no parallel provision to allow the SLAPP filer to transfer the lawsuit into federal court;[295] as the plaintiff in the SLAPP suit, the filer presumably already had first choice as to the venue in which to file.[296]

Conclusion

SLAPPs are insidious lawsuits brought to interfere with a party's constitutionally protected right.[297] Without an appropriate defense, SLAPP targets will likely suffer the resource-draining effects of a SLAPP, as well as experience a chilling effect on their right to petition.[298] SLAPP targets in the environmental realm are especially vulnerable due

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[288] *Id.* § 6(a).

[289] 28 U.S.C. § 1441(a) (2006).

[290] *See* 28 U.S.C. §§ 1331–1332, 1441(a) (2006).

[291] *See supra* Part IV.C.1.

[292] *See* H.R. 4364 § 6(a).

[293] *Compare id.*, *with* 28 U.S.C. §§ 1331, 1332.

[294] *See* H.R. 4364 § 6(a).

[295] *See* H.R. 4364.

[296] *See* Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 Cardozo L. Rev. 2897, 2898 (2009) ("[P]laintiffs . . . have the first-mover advantage in choosing the forum in which their civil suits will be litigated.").

[297] *See* Canan & Pring, *supra* note 3, at 506.

[298] *See* Pring & Canan, *supra* note 2, at 189; Pring, *supra* note 6, at 8.

to the prevalence of citizen and NGO participation in environmental enforcement.[299]

Many defenses exist that a federal SLAPP target *could* use on its behalf.[300] However, none of these defenses are entirely effective at both shielding the SLAPP target and deterring future SLAPPs.[301] The best and most effective defense for a federal SLAPP target would be well-drafted, comprehensive federal anti-SLAPP legislation.[302] The Citizen Participation Act of 2009 would provide strong protections for many federal SLAPP targets and is far more effective than any of the current defenses.[303] Congress should pass this legislation incorporating the changes suggested in this Note in order to guarantee that citizen and NGO enforcers of environmental laws are effectively protected in their petitioning activity.

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[299] *See* PLATER, ET AL., *supra* note 39, at 398; PRING & CANAN, *supra* note 2, at 83.

[300] *See supra* Part IV.

[301] *See supra* Part V.

[302] *See supra* Part VI.

[303] *See* Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009); *supra* Part VI.