THE NEED FOR UNIFORM EXEMPTIONS IN STATE ANTI-SLAPP STATUTES

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INTRODUCTION

Strategic lawsuits against public participation (SLAPPs) are baseless lawsuits that weaponize the judicial system to chill critics' exercise of free speech on matters of significant public concern by burdening them with pointless litigation and escalating legal costs. Many states have rightly recognized the danger of SLAPP suits to citizens' First Amendment rights of free speech and expression and have responded by passing laws, called anti-SLAPP statutes, that allow for the swift dismissal of these frivolous suits.[2] These statutes protect citizens' right to free speech in any type of forum on any issue of public importance by providing mechanisms for expedited dismissals of SLAPP suits for defendants and imposing mandatory penalties of attorney fees or litigation costs for plaintiffs who cannot meet the burden of proving their claims have a valid legal foundation.

But while some state anti-SLAPP statutes are intended to *protect* First Amendment interests, they can paradoxically have the effect of *preventing* people who need to turn to the courts to vindicate legal interests from doing so. Some of the anti-SLAPP statutes' broad definitions of protected activity may inadvertently discourage plaintiffs with meritorious claims from utilizing the courts, as the scope of protected activities appears to leave little room for plaintiffs to raise a valid complaint and lends the statute to misuse by opportunistic defendants. For example, in *Hunter v. CBS Broadcasting, Inc.*,[3] the defendants eluded a legitimate employment discrimination claim by exploiting the California anti-SLAPP statute's broad requirement that protected activity must be of interest to the public. In response to Hunter's contention that CBS had not hired him for a weatherman position because he was older and a male, CBS was able to misuse the anti-SLAPP statute to argue that a television station's selection of weather news anchors qualified as an issue of public interest because weather reporting itself was an issue of public interest.[4] The California appellate court accepted this interpretation of the statute to hold that CBS' activity was protected by the First Amendment and remanded the case for the trial court to consider whether Hunter had demonstrated a reasonable probability of prevailing on the merits of his claims.[5]

The *Hunter* case is not the only instance of defendants misusing anti-SLAPP motions. Indeed, one California Supreme Court decision observed that the anti-SLAPP motion would soon be used as a cure-all to circumvent legitimate cases in which the motion was never intended to apply.[6] Thus, this note compares various state anti-SLAPP statutes to analyze how successfully they protect defendants from frivolous lawsuits and the extent to which they unwittingly prevent plaintiffs with legitimate civil claims from pursuing redress. Drawing on this analysis, the note proposes a uniform set of exemptions that seeks to protect financially insecure

[2] *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia and Washington).
[3] Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013).
[4] Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J. PUB. POL'Y 1, 28 (2015).
[5] *Id.*
[6] *See* Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999) (Baxter, J., dissenting).

litigants who are most vulnerable to SLAPP suits and who do not have the resources to defend themselves from baseless claims.

I. BACKGROUND: SLAPP LAWSUITS AND ANTI-SLAPP STATUTES

A. SLAPPs

Strategic lawsuits against public participation (SLAPPs) are predatory civil lawsuits, most often perpetrated by businesses, government bodies, or elected officials, to intimidate and silence critics who speak out on matters of public concern.[7] Instead of attempting to rectify a legitimate harm, these lawsuits serve as a vehicle for chilling critics' exercise of free speech by burdening defendants with costly litigation to drain their financial resources and force them into casting aside their criticisms.[8]

One of the most concerning aspects of SLAPPs is their ability to be filed for a host of innocuous activities such as posting a blog entry, commenting on someone else's blog entry, writing a letter to a newspaper's editor, testifying before the legislature, reporting official misconduct, or circulating a petition.[9] SLAPP plaintiffs typically file defamation actions against these activities; however, they may also file for a variety of tort actions including, but not limited to, invasion of privacy, right of publicity, or breach of contract.[10] Though these are legally cognizable causes of action, the litigation process often proves they have no legitimate foundation.

For example, in his 2005 biography, *TrumpNation: The Art of Being the Donald,* author Timothy O'Brien dedicated a few pages out of his 288-page book to the topic of Donald Trump's net worth.[11] After careful and extensive research into Trump's financial status, O'Brien concluded that Trump's net worth ranged from 150 million dollars to 250 million dollars — an amount substantially lower than the "five to six billion dollars" that Trump claimed he was worth.[12] Upon publication of the book, Trump filed suit against O'Brien for defamation, seeking five billion dollars in damages and claiming that the information debunking his purported net worth harmed his business.[13] Though the presiding judge initially granted summary judgment in favor of O'Brien, Trump pursued the litigation for five more years through prolonged appeals until the appeals court finally affirmed the suit's dismissal in 2011.[14]

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[7] *What Is a SLAPP Suit?,* ACLU OHIO, https://www.acluohio.org/slapped/what-is-a-slapp-suit (last visited Oct. 19, 2020).
[8] *Id.*
[9] *Responding to Strategic Lawsuits Against Public Participation (SLAPPs),* DIGITAL MEDIA LAW PROJECT, https://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps (last visited Oct. 19, 2020).
[10] Daniel Novack & Christina Lee, *How New York Anti-SLAPP Law Could Survive The 2nd Circ.,* LAW360 (Aug. 12, 2020), https://www.law360.com/articles/1300073 (last visited Oct. 19, 2020).
[11] TIMOTHY L. O'BRIEN, TRUMPNATION: THE ART OF BEING THE DONALD (Warner Books 2005).
[12] Paul Farhi, *What really gets under Trump's skin? A reporter questioning his net worth*, THE WASHINGTON POST (Mar. 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html.
[13] Trump v. O'Brien, 29 A.3d 1090 (N.J. Super. Ct. App. Div. 2011).
[14] Farhi, *supra* note 12.

Despite dragging out the court proceedings for years and spending upwards of one million dollars in legal fees throughout the process, Trump admitted that he knew he would not win the suit and only brought it to antagonize O'Brien.[15] In an interview, Trump bragged that he spent a negligible amount of his money on legal fees compared to O'Brien, who spent a significant amount; in this interview, he also boasted that he brought the lawsuit "to make [O'Brien's] life miserable, which [Trump was] happy about."[16]

A similar incident occurred in 2017. Late night television host and comedian John Oliver did an episode about the unethical practices within the coal industry and particularly targeted Bob Murray, the chief executive officer of the Murray Energy Corporation.[17] Oliver denounced the coal magnate's repeated violations of mine safety regulations, as well as his financial support for politicians whose agendas benefit coal executives to the detriment of miners; during this report Oliver mentioned a preventable mining disaster in one of Murray's Utah mines which killed nine miners, and among his other criticisms, comically referred to Murray as a "geriatric Dr. Evil."[18] Murray responded by engaging in his standard tactic against individuals and organizations that condemn his unethical practices: filing a lawsuit. Murray sued Oliver and the HBO network for defamation, claiming Oliver's false statements about the coal industry and Murray Energy Corporation, as well as Oliver's personal insults, caused him emotional distress.[19] Notably, Murray chose to file this lawsuit in West Virginia, a state lacking anti-SLAPP legislation.[20]

Mirroring Trump's case against O'Brien, the judge presiding over Murray's case initially dismissed it because Murray could not show Oliver legally defamed him, but the coal tycoon appealed to the West Virginia Supreme Court and protracted the court proceedings for two years.[21] Though Murray eventually dropped the suit, Oliver explained in a later episode that Murray accomplished his true objective of punishing Oliver for his criticisms by putting the host and HBO through a difficult experience that drained their time and resources, as the lawsuit ultimately cost $200,000 in legal fees and caused the show's libel insurance premiums to triple.[22]

However, SLAPPs are not only inflicted upon individuals who have large platforms or large audiences, like O'Brien and Oliver. Everyday consumers who review companies on websites like Facebook, Twitter, and Yelp have also found themselves victims of SLAPPs.[23] In one such case,

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[15] *Id.*
[16] *Id.*
[17] *Last Week Tonight with John Oliver: Coal* (HBO television broadcast Jun. 18, 2017).
[18] Jamie Lynn Crofts, *This Coal Baron's Lawsuit Against John Oliver is Plain Nuts,* ACLU (Aug. 2, 2017, 4:15 PM), https://www.aclu.org/blog/free-speech/coal-barons-lawsuit-against-john-oliver-plain-nuts.
[19] *Id*; Complaint at 17-21, The Marshall County Coal Company v. John Oliver, No. 17-C-124 (N.D.W. Va. 2017).
[20] Maya Oppenheim, *Coal tycoon's defamation lawsuit against John Oliver dismissed by judge,* THE INDEPENDENT (Feb. 24, 2018, 7:12 PM), https://www.independent.co.uk/news/world/americas/john-oliver-bob-murray-defamation-lawsuit-dismissed-judge-murray-energy-corp-a8226846.html; *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020).
[21] Melissa Locker, *John Oliver Picks a New Fight with Coal Boss He Called 'a Geriatric Dr. Evil' on Last Week Tonight*, TIME (Nov. 11, 2019, 7:29 AM), https://time.com/5722305/john-oliver-coal-fight-last-week-tonight/.
[22] LastWeekTonight, *SLAPP Suits: Last Week Tonight with John Oliver,* YouTube (Nov. 11, 2019), https://www.youtube.com/watch?v=UN8bJb8biZU.
[23] Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court,* N.Y. TIMES (May 31, 2010), https://www.nytimes.com/2010/06/01/us/01slapp.html.

a college student in Michigan created a Facebook page to express his displeasure with a towing company that removed the student's car from his apartment complex's parking lot, despite his permit to park there.[24] T&J Towing promptly filed a defamation lawsuit against the student, claiming the Facebook page hurt the company's business, and sought $750,000 in damages.[25] Similarly, in a separate instance, a car dealership in Florida threatened litigation against one customer who posted negative comments about the dealership on his Twitter.[26] Though the latter lawsuit never came to fruition, its threat serves as a powerful example of how entities that boast significant influence or wealth use the legal system to manipulate critics into silence. These occurrences underscore the need for legislative intervention to prevent such abuses of the judicial system and to protect individuals who choose to exercise their First Amendment rights.

B. Anti-SLAPP Statutes

In an effort to combat these exploitative lawsuits and their chilling effects on free speech, thirty-three states and the District of Columbia have implemented anti-SLAPP statutes.[27] These statutes provide SLAPP defendants with the opportunity to file a special expedited motion to dismiss the complaint against them before the lawsuit reaches the discovery phase.[28] If the defendant prevails on this special motion — called an "anti-SLAPP motion" — the court stays the discovery phase, and the burden shifts to the plaintiff to sufficiently establish a prima facie case to avoid dismissal.[29]

Many states' anti-SLAPP statutes also contain auxiliary provisions that aim to discourage plaintiffs from filing these lawsuits. For instance, some state anti-SLAPP laws require plaintiffs to meet an additional "good-faith" burden when establishing their prima facie case; some state anti-SLAPP laws prohibit plaintiffs from amending their claims if an anti-SLAPP motion is pending or has been granted; and some mandate that plaintiffs pay the legal costs and attorney's fees incurred by a prevailing anti-SLAPP defendant.[30] In their analysis of a defendant's anti-SLAPP motion, courts consider (1) whether the defendant's speech or conduct is protected under the state's anti-SLAPP statute, and if so, (2) whether the plaintiff can still adequately establish their probability of prevailing on the merits of their claim.[31]

Though approximately two-thirds of the states have enacted anti-SLAPP laws, the federal government has not yet successfully created a federal anti-SLAPP statute to provide uniform

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *State Anti-SLAPP Law Scorecard,* PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia and Washington).
[28] Michael C. Denison, *SLAPP Happy Courts Continued to Refine the Reach of the Anti-SLAPP Law in Numerous Decisions in 2010,* L.A. LAW. 21, 21-22 (2011).
[29] Austin Vining & Sarah Matthews, *Introduction to Anti-SLAPP Laws*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/introduction-anti-slapp-guide/.
[30] *Id.*
[31] *Id.*

protection for free speech and petitioning activities.[32] In the past, Congress has made two notable attempts to enact federal anti-SLAPP legislation. First, Tennessee Congressman Steve Cohen introduced the Citizen Participation Act of 2009 ("CPA"), which declared SLAPPs to be abuses of the judicial process and required SLAPP plaintiffs to prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence to allow the suit to move forward in federal court.[33] If the plaintiff filed this claim in federal court but could not meet this burden, the opposing party could file a special motion to dismiss any claim arising from an act in furtherance of the constitutional right of petition or free speech.[34] The CPA also expressly exempted public interest litigation and commercial speech litigation from being dismissed by anti-SLAPP motions.[35] However, the House of Representatives failed to give this bill a floor vote in its congressional session.[36]

In the next attempt to secure federal anti-SLAPP legislation, former Texas Congressman Blake Farenthold introduced the Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015 — more commonly known as the SPEAK FREE Act of 2015 — to provide federal protection for individuals and companies sued for expressing honest opinions on matters of public concern.[37] This bill mirrored state anti-SLAPP laws from California and Texas in that once defendants showed a SLAPP suit could not succeed on its merits, the court stayed the discovery process, dismissed the claims, and awarded attorneys' fees to the defendant.[38] Notably, the bill did not limit its protection solely to speech about the government, unlike some state anti-SLAPP laws.[39]

Despite the bill's strong bipartisan support in Congress, its supporters failed to get the legislation passed before the end of President Barack Obama's presidential term.[40] The bill's sponsors, citing President Trump's fondness for litigation against his critics, commented that the SPEAK FREE Act would be difficult to pass under Trump's administration; indeed, the bill has been stalled since June of 2015, with no further proposed federal anti-SLAPP legislation to take its place.[41]

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[32] Josephine Mason Petrick, *Federal Anti-SLAPP Law Year in Review — 2019 Roundup*, JD SUPRA (April 1, 2020), https://www.jdsupra.com/legalnews/federal-anti-slapp-law-year-in-review-90299/.
[33] Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).
[34] *Id.*
[35] *Id.*
[36] *Id.*; *see also* H.R.4364 (111th): Citizen Participation Act of 2009, GOVTRACK, https://www.govtrack.us/congress/bills/111/hr4364 (last visited Dec. 27, 2020).
[37] Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015, H.R. 2304, 114th Cong. (2015); Mike Godwin, *Congress' new opportunity to protect free speech: Voting to pass SPEAK FREE*, THE HILL (Sept. 12, 2016, 11:25 AM), https://thehill.com/blogs/congress-blog/judicial/295416-congress-new-opportunity-to-protect-free-speech-voting-to-pass.
[38] Mike Masnick, *This Is Important: Federal Anti-SLAPP Legislation Introduced*, TECHDIRT (May 13, 2015, 3:46 PM), https://www.techdirt.com/articles/20150513/14500630991/this-is-important-federal-anti-slapp-legislation-introduced.shtml.
[39] *Id.*
[40] Nancy Scola, *Online speech backers' newest fear: Trump*, POLITICO (June 1, 2016, 5:18 AM), https://www.politico.com/story/2016/06/donald-trump-online-free-speech-223760.
[41] *Id.*; H.R. 2304 (114th): SPEAK FREE Act of 2015, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2304/all-actions (last visited Dec. 27, 2020).

Currently, state anti-SLAPP laws currently only apply in federal courts if they are substantive and in accordance with the federal rules.[42] Thus, the absence of federal anti-SLAPP legislation has contributed to an increase in forum-shopping among plaintiffs who reasonably anticipate that their complaints may be considered SLAPPs, as demonstrated by Bob Murray's West Virginia lawsuit.[43]

II. COMPARISON OF STATE ANTI-SLAPP STATUTES

The lack of federal anti-SLAPP legislation leaves states free to define both what constitutes protected activity within the contours of their anti-SLAPP laws and what procedural avenues are available to SLAPP plaintiffs and defendants in their state. However, this freedom has resulted in a disparity in the strength of states' anti-SLAPP statutes, and correspondingly, a disparity in the statutes' effectiveness.[44] According to legal experts, an anti-SLAPP statute must include three components to be truly effective: (1) a statutory provision explicitly guaranteeing the right to engage in public participation; (2) mechanisms to allow for early review and an expeditious process to lighten the burden on defendants; and (3) strong disincentives to dissuade potential SLAPP plaintiffs from filing meritless claims.[45]

States with weak anti-SLAPP statutes have narrowly drafted their legislation such that their protections may only be applied to certain activities in rare circumstances, and thereby afford little to no protection for most SLAPP defendants; conversely, states with strong anti-SLAPP statutes have drafted their legislation such that courts may interpret and apply the statute broadly in various contexts.[46] However, the broad construction of the strong anti-SLAPP statutes are a double-edged sword. Though most defendants who pursue anti-SLAPP motions are genuine victims of retaliatory lawsuits, some defendants — particularly those who wield social influence, have deep pockets, or both — take advantage of these statutes' broad definitions of protected activity to trigger anti-SLAPP protections and delay court proceedings to dodge lawsuits arising from substantial claims.[47] Abuse of this litigation tactic has inevitably dissuaded plaintiffs with legitimate civil claims from seeking equitable judicial remedies, for fear of lengthy and expensive proceedings.[48] Accordingly, though broadly drafted anti-SLAPP statutes protect a sweeping range of First Amendment activities, such statutes may inadvertently prevent prospective litigants who have faced genuine harm from pursuing redress.[49]

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[42] *Id.*; *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., 559 U.S. 393, 398-99 (2010).
[43] Petrick, *supra* note 32.
[44] *State Anti-SLAPP Law Scorecard,* PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020).
[45] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T. L. REV. 3 (1989); *See also* Hugh Wilkins, et al., *Breaking the Silence: The urgent need for anti-SLAPP legislation in Ontario*, ECOJUSTICE 4, 18 (2010).
[46] Jana S. Baker & Victoria L. Vish, *The Burgeoning Use of "Strong" Anti-SLAPP Statutes in Employment Law,* OGLETREE DEAKINS (Mar. 6, 2019), https://ogletree.com/insights/the-burgeoning-use-of-strong-anti-slapp-statutes-in-employment-law/.
[47] Pamela A. MacLean, *Getting SLAPPed Around,* DAILY JOURNAL (Apr. 2, 2014), https://www.dailyjournal.com/articles/313990-getting-slapped-around.
[48] *Id.*
[49] *Id.*

The Public Participation Project has created an "anti-SLAPP scorecard" to assess the quality of state anti-SLAPP statutes based upon their strength.[50] Drawing on the scorecard and my own independent analysis, states' anti-SLAPP statutes fall into three categories: (1) weak statutes that only protect a narrow range of free speech and petitioning activities; (2) adequate statutes that protect a moderate range of free speech and petitioning activities; and (3) strong statutes that protect a broad range of free speech and petitioning activities.[51]

A. Weak Anti-SLAPP Statutes

Weak anti-SLAPP statutes are those that only protect limited free speech and petitioning activities — such as the statutes from Pennsylvania, Maryland, Delaware, and Nebraska — and are therefore only applicable in narrow circumstances.[52] The wording of these statutes is narrowly tailored to limit anti-SLAPP eligibility based upon either the defendant's class or the type of communication at issue.[53] Accordingly, these statutes are not particularly effective in protecting defendants of SLAPP suits from being exploited by these predatory lawsuits.

For instance, Pennsylvania's anti-SLAPP statute is extremely limited in the scope of the communications that could trigger anti-SLAPP protections.[54] In this state, the only defendants who are immune from civil liability are those who have made statements before a government body or during a government proceeding in relation to the implementation and enforcement of environmental laws or environmental regulations.[55] Furthermore, the statement must be aimed at procuring favorable governmental action toward an environmental issue to be protected against liability.[56] The restrictions in this statute have contributed to the proliferation of SLAPP suits in Pennsylvania, such as the defamation lawsuit filed by Senator Daylin Leach against Cara Taylor, a woman who accused him of sexual assault during the #MeToo movement.[57] Despite Leach's complaint specifically stating that he filed the lawsuit to "punish the defendants for their conduct" and "deter them and others" from engaging in "like acts in the future,"[58] Pennsylvania's flimsy anti-SLAPP law prevented the case from being properly recognized as a SLAPP suit and afforded no protection to the defendants.

Similarly, Maryland's anti-SLAPP statute only protects SLAPP defendants who communicate with a government body or the public regarding a matter that is within the authority of the government body; the statements must also be made without constitutional

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[50] PUBLIC PARTICIPATION PROJECT, *supra* note 44.
[51] *Id.*
[52] PUBLIC PARTICIPATION PROJECT, *supra* note 44 (identifying Delaware, Maine, Maryland, Minnesota, Nevada, New Mexico, Pennsylvania, Utah, Washington, and West Virginia as states with weak anti-SLAPP laws).
[53] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U.L. REV. 1235, 1248 (2007).
[54] 27 PA. CONS. STAT. §§ 8301-3 (2000).
[55] *Id.*
[56] *Anti-SLAPP Law in Pennsylvania*, DIGITAL MEDIA LAW PROJECT, https://www.dmlp.org/legal-guide/anti-slapp-law-pennsylvania (last visited Jan. 17, 2021).
[57] David Gambacorta, *How the Powerful Can Use SLAPP Lawsuits and Muzzle Free Speech For About $300*, THE MORNING CALL (May 26, 2019, 5:11 PM), https://www.mcall.com/news/pennsylvania/mc-nws-pa-slapp-lawsuits-free-speech-20190525-k2jvkup6bfbkfmf6hjmtpcfvw4-story.html.David Gam.
[58] *Id.*

malice to be immune from civil liability.[59] Unusually, this statute also requires the defendant to preliminarily prove that the plaintiff has brought the lawsuit in bad faith for immunity to be granted.[60] This feeble law allowed a real estate developer to sue an internet newspaper company for defamation based upon critical comments left by three anonymous users on the company's article discussing the developer's sale of his historic home,[61] and it also allowed Harford County officials to file a defamation lawsuit against the builder of a housing development who opined that the officials had refused to issue him construction permits because of anti-Muslim sentiment in the community.[62]

In contrast, Delaware and Nebraska implement anti-SLAPP statutes that are weak because they only protect statements about a specific topic made by a specific class of defendants.[63] In these states, only applicants, permittees, or related persons are shielded from civil liability so long as their speech pertains to a government licensing, permitting, or other related decision.[64] The Delaware state courts have further weakened the effectiveness of the state's anti-SLAPP statute as a tool against retaliatory lawsuits by holding that the statute is to be narrowly construed so as to be applicable solely to public participation and petition rights in land use proceedings.[65] Moreover, in both of these states, this class of defendant may only recover damages and attorneys' fees based upon their ability to demonstrate additional considerations.

For example, in Delaware, defendants may only recover attorneys' fees, compensatory damages, and punitive damages if the defendants can make an additional showing that the SLAPP suit was commenced or continued specifically to harass the defendants and prohibit the exercise of their First Amendment rights.[66] Similarly, SLAPP defendants in Nebraska may only recover costs and attorneys' fees upon a demonstration that the plaintiff commenced the SLAPP suit without a substantial basis in fact and law and that the suit could not be supported by a substantial argument for the modification or reversal of existing law; Nebraskan SLAPP defendants must also show that the lawsuit was filed or continued to harass or maliciously inhibit the free exercise of petition, speech, or association rights to recover other compensatory damages.[67]

The attendant requirements found in the anti-SLAPP laws in Delaware and Nebraska further complicate the legal avenue SLAPP defendants can pursue to escape targeted lawsuits or recover

[59] MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (2004); *Maryland State Anti-SLAPP*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/maryland (last visited Jan. 17, 2021).
[60] *Id.*
[61] Independent News v. Brodie, 407 Md. 415, 966 A.2d 432 (Md. 2009); *See also Internet Newspaper Sued for Anonymous Comments,* PUBLIC PARTICIPATION PROJECT: SLAPP BLOG (Jan. 1, 2009), https://anti-slapp.org/slapp-blog/2009/1/1/internet-newspaper-sued-for-anonymous-comments.
[62] Alison Knezevich, *Harford Officials Sue Developer for Defamation in 'Muslim' Housing Case, Blast Gemcraft's Bid for Court Injunction*, THE BALTIMORE SUN (Oct. 27, 2017, 1:00 PM), https://www.baltimoresun.com/maryland/bs-md-ha-defamation-lawsuit-20171027-stAlison Knez.
[63] DEL. CODE. ANN. Tit. 10, §§ 8136-8138 (1992); NEB. REV. STAT. §§ 25-21, 241 – 25-21, 246.
[64] DEL. CODE. ANN. Tit. 10, §§ 8136-8138 (1992); NEB. REV. STAT. §§ 25-21, 241 – 25-21, 246.
[65] *See* Agar v. Judy, 151 A.3d 456, 475 (Del. Ch. 2017) (holding that based on the plain language of the anti-SLAPP statute and its legislative history, the statute was only meant to apply in the land use context).
[66] DEL. CODE. ANN. tit. 10, §§ 8138(a)(1)-(2) (1992).
[67] NEB. REV. STAT. § 25-21,243(1) (1994).

financial compensation for defending frivolous suits.[68] In so doing, these state statutes, and others like them,[69] obstruct defendants from escaping baseless claims without further difficulties. Thus, these anti-SLAPP statutes are weak as they seemingly defeat the stated purpose of legislative anti-SLAPP protection, and do not properly discourage plaintiffs from filing meritless suits.

B. Adequate Anti-SLAPP Statutes

In contrast to weak anti-SLAPP statutes, adequate anti-SLAPP statutes protect a moderate range of free speech and petitioning activities or are more beneficial to SLAPP defendants because they usually guarantee a mandatory award of attorneys' fees. Of the seven states that the Public Participation Project deems as having adequate anti-SLAPP statutes,[70] this Note discusses the statutes from Arkansas, Florida, and Massachusetts.

First, Arkansas' anti-SLAPP statute protects any written or oral statements, writings or petitions made in furtherance of the rights of free speech or petition in connection with an issue of public concern or in connection with issues under consideration by a government body.[71] The state further protects "privileged communications," which encompasses any communication regarding an issue of public concern related to legislative, executive, or judicial proceedings, or other government-sanctioned proceedings so long as the communication was made without knowledge or reckless disregard of falsity.[72] Arkansas' anti-SLAPP law is ostensibly strong as compared to states with weak anti-SLAPP laws[73] because aside from expanding the definition of protected activities, it additionally creates a verification requirement for plaintiffs and attorneys of record that the filed claim does not attack protected communication and is not meant to silence defendants' activities.[74]

However, Arkansas' statute ultimately qualifies as adequate because of the high threshold it requires for the defendant to recover compensatory damages.[75] For Arkansan SLAPP defendants, compensatory damages are available only for cases brought for the purpose of harassing, intimidating, punishing, or maliciously inhibiting the defendant's communication.[76] This requirement mirrors the burdens placed on SLAPP defendants in the weak anti-SLAPP statutes

[68] For example, in one Delaware case that implicated the anti-SLAPP statute, the presiding judge denied an award of costs, attorney's fees, and compensatory damages to the defendants in a breach of contract claim because of the statute's demonstration of malice requirement. As such, the defendants – a single mother and her three children – were left without an avenue to recover the money spent in defending the suit. *See* Nichols v. Lewis, 2008 WL 2253192 at *6 (Del. Ch. 2008).
[69] *See, e.g.*, UTAH CODE ANN. §§ 78B-6-1401 – 1405 (2001).
[70] *State Anti-SLAPP Law Scorecard,* PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Jan. 18, 2021) (identifying Arizona, Arkansas, Florida, Hawaii, Massachusetts, Missouri, and Virginia as states with adequate anti-SLAPP statutes).
[71] ARK. CODE ANN. § 16-63-503 (1)(A)-(B) (2005).
[72] *Id.* at 2(A)-(C).
[73] PUBLIC PARTICIPATION PROJECT, *supra* note 70 (identifying Delaware, Maine, Maryland, Minnesota, Nevada, New Mexico, Pennsylvania, Utah, Washington, and West Virginia as states with weak anti-SLAPP statutes).
[74] *See* Hugh Wilkins, et al., *Breaking the Silence: The urgent need for anti-SLAPP legislation in Ontario*, ECOJUSTICE 4, 29 (2010).
[75] *Id.* at 30.
[76] *Id.*

from Delaware and Nebraska[77] and may inadvertently hinder defendants from receiving proper relief.

Conversely, Florida's anti-SLAPP statute provides early dismissal mechanisms[78] and stronger disincentives for potential SLAPP plaintiffs but has a narrow scope, thereby rendering it an adequate statute.[79] The language of the Florida statute slightly augments the range of protected communication compared to the weaker anti-SLAPP statutes by not only including any written or oral statements made before a governmental entity in connection with an issue under governmental consideration, but also including any written or oral statements made in connection with the media and arts.[80] Furthermore, the statute provides a strong disincentive for governmental entities who may file SLAPP suits as it requires such meritless filings to be reported to the Attorney General, the Cabinet, the Senate, and the House of Representatives.[81] However, this statute falls short in that it applies *only* to SLAPPs filed by governmental entities despite acknowledging that SLAPPs are most often filed by private entities and individuals.[82] Moreover, in accordance with the Florida legislature's intention, courts have held that for a defendant to successfully invoke the anti-SLAPP statute, the plaintiff's complaint must be clearly meritless and instigated solely to silence a concerned citizen.[83]

For example, in one central Florida case, a real estate developer filed suit against the president of a commercial homeowner association based on the president's public objection in front of the local municipal planning board to the developer's proposal to work on a parcel of land.[84] The municipal board ruled in favor of the developer,[85] which prompted the latter to file a suit against the president of the homeowner association for malicious prosecution and abuse of process.[86] Though the defendant moved to dismiss the suit, pursuant to Florida's anti-SLAPP statute as it concerned his free speech in connection with a public issue, the trial court denied the motion because the defendant's objections did not demonstrate that the plaintiff made meritless claims.[87] Thus, the Florida anti-SLAPP statute's inclusion of the "without merit" language[88] unintentionally allows plaintiffs to outmaneuver the true purpose of an anti-SLAPP statute and attack individuals exercising their free speech rights based upon the validity of their concerns toward a public issue.[89]

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[77] DEL. CODE. ANN. tit. 10, §§ 8136-8138 (1992); NEB. REV. STAT. §§ 25-21, 241 – 25-21, 246 (1994) (both statutes require SLAPP defendants to make an additional showing that the plaintiff commenced the lawsuit to purposely chill speech for the defendants to recover compensatory and/or punitive damages).
[78] FLA. STAT. § 768.295(4) (2000) (amended 2015) (the amendment includes SLAPP suits filed by private individuals as well as governmental entities).
[79] *See id.*
[80] FLA. STAT. § 768.295(2)(a) (2000).
[81] FLA. STAT. § 768.295(5) (2000).
[82] *Id.*; WILKINS ET AL., *supra* note 45 at 31.
[83] Robert Garcia, *Florida Broadens Its Anti-SLAPP Statute, But Is It On The Verge of Death?*, 22 DEFENSE DIGEST (2016).
[84] *Id.*
[85] *Id.* (holding that the defendant's objections were without merit and unrelated to any of the issues of the plaintiff's project).
[86] *Id.*
[87] *Id.*
[88] FLA. STAT. § 768.295(3) (2000).
[89] *See* Garcia, *supra* note 83.

Finally, despite the Massachusetts' anti-SLAPP statute[90] providing early dismissal mechanisms, this statute still qualifies as an adequate statute because its applicability has been limited by judicial interpretation and it does not provide strong disincentives for potential SLAPP plaintiffs.[91] The Massachusetts anti-SLAPP law largely protects freedom of speech as it relates to the First Amendment right to petition the government.[92] Under this law, statements made before a government body or government proceeding or statements that are in connection with issues being considered by a government body are protected, as are statements that are reasonably likely to enlist the public's participation to effect such consideration.[93] Consequently, the statute has protected a myriad of defendants who exercised their right to petition the government such as domestic violence victims seeking restraining or protective orders, a condominium trustee communicating with the Federal Deposit Insurance Corporation (FDIC), and a hospital president who gave statements to a newspaper about a pending investigation from the Department of Mental Health.[94]

C. Strong Anti-SLAPP Statutes

Strong anti-SLAPP statutes are broadly drafted to protect a significantly more comprehensive range of activities compared to the protections offered by weak and adequate anti-SLAPP statutes. Statutes in this category protect any conduct in furtherance of the constitutional rights of free speech and petition if the exercise of these rights relates to a public issue or issue of public interest.[95] However, the broad construction of these statutes lends itself to greater misuse by defendants who seek to dismiss justiciable claims against them early on in the litigation process.[96] Of the fifteen states and the District of Columbia which the Public Participation Project deems to have "good" or "excellent" anti-SLAPP laws affording the strongest protections,[97] this Note examines the anti-SLAPP statutes in California,[98] Oklahoma, and New York.

California's anti-SLAPP statute[99] remains the strongest anti-SLAPP statute in the nation and protects the broadest range of free speech and petitioning activities, through both the language of

[90] MASS. GEN. LAWS ANN. ch. 231 § 59H (1994).
[91] WILKINS ET AL., *supra* note 45 at 33-34.
[92] MASS. GEN. LAWS ANN. ch. 231 § 59H (1994).
[93] *Id.*
[94] *See* McLarnon v. Jokisch, 727 N.E.2d 813 (Mass. 2000); Fabre v. Walton, 781 N.E.2d 780 (Mass. 2002); Office One, Inc. v. Lopez, 769 N.E.2d 749 (2002); Blanchard v. Steward Carney Hosp., Inc., 75 N.E.3d 21 (Mass. 2017).
[95] *See* Hartzler, *supra* note 52.
[96] See Golden, supra note 4.
[97] *State Anti-SLAPP Law Scorecard*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Oct. 14, 2021).
[98] *State Anti-SLAPP Law Scorecard*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Jan. 26, 2021) (identifying California, Colorado, the District of Columbia, Nevada, New York, Oklahoma, and Oregon as states with excellent anti-SLAPP statutes and identifying Connecticut, Georgia, Illinois, Kansas, Louisiana, Rhode Island, Tennessee, Texas, and Vermont as states with good anti-SLAPP statutes).
[99] CIV. PROC. §§ 425.16 – 425.18 (1992) (amended 2009).

the statute and the California courts' interpretations of it.[100] Like the adequate anti-SLAPP statutes, the California law assures citizens' right to petition the government by protecting statements made in connection with an issue under governmental consideration; statements made before a governmental body; or statements made during an official proceeding.[101] However, this law goes further in that it additionally protects *any* statements or conduct in furtherance of petition or free speech so long as the statements or conduct are related to a matter of public interest.[102] As a result, California's statute has not only allowed SLAPP defendants to debate the accuracy of public statements made by a waste-materials hauler,[103] but has also protected film producer-defendants' creative licenses in depicting issues of public interest in movies.[104]

Furthermore, California's anti-SLAPP statute is markedly stronger than the adequate anti-SLAPP laws because it prohibits the application of anti-SLAPP motions to certain types of litigation.[105] Namely, the exemptions to the statute prohibit defendants from invoking an anti-SLAPP motion for any actions brought *solely* in the public interest or on behalf of the general public,[106] and any actions related to commercial speech.[107] However, these exemptions to the anti-SLAPP statute are narrowly construed to secure the breadth of the actual statute's protections as they relate to free speech and petitioning activities.[108]

Similarly, inspired by California's robust anti-SLAPP protections,[109] the Oklahoma legislature passed the Oklahoma Citizens Participation Act (OCPA) in 2014 and now retains one of the strongest anti-SLAPP statutes in the nation.[110] Prior to the passage of this Act, Oklahoma's limited anti-SLAPP provision protected only speech related to government proceedings; the law also lacked any provisions for early review and dismissal of SLAPP suits or mandatory awards of attorneys' fees for a SLAPP defendant.[111] But the OCPA supplanted the previous statute's shortcomings by allowing a judge of a SLAPP suit to go "beyond the four corners of the [plaintiff's] complaint" and dismiss the suit if he or she suspects the lawsuit is frivolous regardless of the superficial validity of the plaintiff's claims.[112] The OCPA additionally allows for an award of mandatory court costs, reasonable attorneys' fees, and legal expenses to a

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[100] Thomas R. Burke, *The 2016 Roundup of Key California Anti-SLAPP Decisions*, DAVIS WRIGHT TREMAINE: MEDIA LAW MONITOR (Jan. 2017), https://www.dwt.com/blogs/media-law-monitor/2017/01/the-2016-roundup-of-key-california-antislapp-decis#page=1.
[101] CIV. PROC. § 425.16(e) (1992) (amended 2009).
[102] *Id.*
[103] Industrial Waste and Debris Box Service, Inc. v. Murphy, 4 Cal. App. 5th 1135 (Cal. Ct. App. 2016).
[104] Sarver v. Chartier, 813 F.3d 891, 905–06 (9th Cir. 2016); Brodeur v. Atlas Entertainment, Inc., 248 Cal. App. 4th 665, 681 (Cal. Ct. App. 2016).
[105] CIV. PROC. § 425.17 (1992); *see* discussion *infra* Part III.
[106] CIV. PROC. § 425.17(b) (1992); *see also* Cruz v. City of Culver City, 2 Cal. App. 5th 239 (Cal. Ct. App. 2016) (holding that the plaintiffs' Brown Act complaint was not exempt under the anti-SLAPP statute's "public interest" exemption because the plaintiffs sought personal relief).
[107] CIV. PROC. § 425.17(c) (1992).
[108] *See* City of Montebello v. Vasquez, 376 P.3d 624 (Cal. 2016) (holding that "expansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature's express intent that the statute's core provisions 'shall be construed broadly'").
[109] *See* Michael Bates, Oklahoma adopts strong anti-SLAPP law, BatesLine (Apr. 27, 2014, 9:57 PM), http://www.batesline.com/archives/2014/04/oklahoma-adopts-anti-slapp-law.html.
[110] OKLA. STAT. ANN. tit. 12 § 1430-40 (West. Supp. 2015).
[111] Bates, *supra* note 109.
[112] *Id.*

prevailing SLAPP defendant, as well as sanctions against the plaintiff to deter frivolous suits in the future.[113] As a result, the statute is able to protect newspapers, radio and television stations, news bloggers, smaller news outlets, participants in online forums, consumers and consumer protection organizations, and the public at large.[114] In addition, the OCPA draws inspiration from other states with strong anti-SLAPP statutes,[115] and exempts specific types of lawsuits from being subject to an anti-SLAPP motion, which allows a broad interpretation of the statute and simultaneously protects certain litigants.[116]

Finally, as the most recent state to be deemed as having an excellent anti-SLAPP statute, New York updated its law in 2020 to protect a broad range of free speech and petitioning activities and thereby qualifies as a strong anti-SLAPP statute.[117] Despite New York's status as "the media capital of the country if not the world,"[118] and the media's predominant use of anti-SLAPP statutes, the state's previous weak anti-SLAPP law only applied in limited circumstances.[119] Under that law, New York defendants could only bring an anti-SLAPP motion to dismiss if the plaintiffs were public applicants or permittees who brought claims "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[120] This effectively limited the anti-SLAPP statute's applicability to the real estate context and rendered it ineffectual for protecting free speech rights.[121]

The new statute, adopted in November 2020, addresses this dearth of protection and applies the anti-SLAPP provisions to any communication in a public forum with an issue of public interest or public concern or to any other lawful conduct in furtherance of the constitutional rights of free speech and petition.[122] The improved statute also provides SLAPP defendants with a new host of tools to combat predatory lawsuits, namely, an enhanced burden of proof for the plaintiff; an automatic stay of discovery; mandatory fee-shifting; and the allowance for evidence outside of the parties' pleadings.[123]

Once the defendant shows that the lawsuit against him is based on free speech conduct related to a public issue, the plaintiff must show their claim has a "substantial basis in law" or is supported by a substantial argument for modifying the law.[124] In contrast to a regular motion to dismiss, which shifts the burden of proof onto the movant to show that the claim is unsustainable, this statute creates a heavier burden for the non-moving party to show the validity

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[113] *Id.*
[114] *Id.*
[115] *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-27.011 (2019).
[116] OKLA. STAT. ANN. tit. 12 § 1439 (West. Supp. 2015); *see* discussion *infra* Part III.
[117] N.Y. CLS CIV. R. §§ 70-a, 76-a (2008) (amended 2020).
[118] Matter of Holmes v. Winter, 3 N.E.3d 694, 705 (N.Y. 2013).
[119] *See* Heather Goldman et al., *New York Becomes Latest State to Strengthen Anti-SLAPP Law, Providing Greater Protections for the Exercise of Free Speech, Petition, and Association*, JD SUPRA (Nov. 11, 2020), https://www.jdsupra.com/legalnews/new-york-becomes-latest-state-to-49082/.
[120] *Id.*
[121] *Id.*
[122] N.Y. CLS CIV. R. §§ 70-a, 76-a (2008) (amended 2020).
[123] Theresa M. House & Kyle A. Schneider, *New York's New and Improved Anti-SLAPP Law Effective Immediately*, ARNOLD & PORTER (Nov. 17, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/11/new-yorks-new-anti-slapp-law.
[124] *Id.*

of his claim. This burden is also far more stringent than the standard burden of proof for plaintiffs, which requires that plaintiffs show their causes of action are "cognizable at law."[125] This provision — along with the provision that awards a mandatory award of attorneys' fees to the prevailing defendant — may effectively discourage plaintiffs from filing baseless suits, which is the true aim of an anti-SLAPP statute.

However, the most powerful weapon bestowed by the improved statute for SLAPP defendants in New York is the court's discretion to consider outside evidence, such as affidavits, to decide anti-SLAPP motions. This procedural provision allows defendants to assert legal arguments and defenses earlier on in the litigation process than is normally possible; this temporal change also gives defendants a chance to assert defenses or arguments that would otherwise not be available based solely on the plaintiff's allegations.[126] Accordingly, a defendant may be able to procure dismissal of frivolous claims before any substantial litigation occurs.

Though New York's newly enacted statute raises questions about its applicability in federal courts, its definition of "substantial basis," and its potential for retroactivity,[127] the statute's significant expansion of protections for free speech and petitioning rights and procedural avenues for defendants makes it one of the strongest anti-SLAPP laws in the nation.[128]

III. THE ADOPTION OF UNIFORM EXEMPTIONS FOR STATE ANTI-SLAPP STATUTES

Though anti-SLAPP statutes with broad definitions of protected activity provide some of the strongest First Amendment protections for speakers, these broad definitions sometimes increase the potential for misuse of the anti-SLAPP motions as defendants may easily claim their challenged activities fall within the parameters of a "furtherance of free speech." Thus, the broad reach of these statutes may unintentionally stave off civil lawsuits from plaintiffs with justifiable legal claims.[129] Indeed, one dissent to a California Supreme Court anti-SLAPP case aptly asseverated that "[t]he cure has become the disease — SLAPP motions are now just the latest form of abusive litigation."[130]

To remedy this issue in the absence of a federal anti-SLAPP law, some nonprofit organizations crafted model anti-SLAPP legislation that not only promoted uniformity in state anti-SLAPP laws and discouraged forum shopping among plaintiffs, but also prevented misuse of anti-SLAPP motions by carving out exemptions to which litigants may file for such motions.[131] In 2014 the American Legislative Exchange Council approved the Public

[125] *Id.*
[126] *Id.*
[127] Alan R. Friedman, *New York Anti-SLAPP Law Enhances Free Speech Protections*, FOX ROTHSCHILD (Nov. 23, 2020), https://www.foxrothschild.com/publications/new-york-anti-slapp-law-enhances-free-speech-protections/.
[128] *State Anti-SLAPP Law Scorecard*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Jan. 26, 2021).
[129] MacLean, *supra* note 47.
[130] Navaellier v. Sletten, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting).
[131] Jay Adkisson, Uniform Law Commission Approves New Anti-SLAPP Law In Time For Consideration By New York Legislature, FORBES (July 20, 2020, 12:56 PM),

Participation Protection Act ("PPPA") — amended in 2019 — which was broadly drafted to protect the constitutional rights of free speech, association, and petition and to encourage public participation in civic society.[132] While this model legislation granted parties who engaged in constitutionally protected activities a special motion to dismiss any claims that infringed on their constitutional rights, the PPPA exempted certain types of litigation.[133] For example, the PPPA prohibited courts from granting special motions to dismiss in any action brought in the public interest against a government entity, agency, or employee acting in an official capacity.[134] The PPPA also prohibited anti-SLAPP motions for any lawsuits invoking the Family Code or for applications for protective orders.[135]

Similarly, the Uniform Law Commission approved the Uniform Public Expression Protection Act ("UPEPA") in July 2020.[136] The UPEPA is an amalgam of pre-existing state anti-SLAPP statutes that incorporates the beneficial aspects of the state statutes, such as anti-SLAPP motion exemptions, while excluding components of state statutes that have been detrimental to the litigants.[137] This legislation conspicuously struck the word "conduct" found in most anti-SLAPP statutes from its model law, to narrow the statute's scope so that it impacts only communications, not expressive conduct.[138] For instance, the UPEPA retains the special motion to dismiss, stays discovery upon the filing of the special motion, and allows for an expedited hearing upon the filing of the special motion.[139] Notably, this model legislation also shields three types of litigation from being dismissed by an anti-SLAPP motion.[140]

The UPEPA exempts litigation both brought *against* a governmental unit or employee or agent of a governmental unit that acts, or purports to act, in an official capacity, and litigation brought *by* a governmental unit, employee, or agent acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety.[141] Additionally, the UPEPA exempts commercial speech litigation brought against a person who primarily sells or leases goods and services if the cause of action arises out of a communication that the person made in relation to the person's sale or lease of goods and services.[142] Still, despite the benefits and uniformity propounded in model anti-SLAPP legislation, some states chose not to adopt these statutes. In these states, state legislators consequently face the daunting task of drafting or amending state anti-SLAPP statutes to discount abusive anti-SLAPP motions, while still guaranteeing First Amendment freedoms.

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https://www.forbes.com/sites/jayadkisson/2020/07/20/uniform-law-c ommission-approves-new-anti-slapp-law-in-time-for-consideration-by-new-york-legislature/.

[132] PUBLIC PARTICIPATION PROTECTION ACT § 2 (AM. LEGIS. EXCH. COUNCIL 2019).

[133] *Id*. § 5.

[134] *Id*.

[135] *Id*.

[136] UNIFORM PUBLIC EXPRESSION PROTECTION ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2020).

[137] Adkisson, *supra* note 130.

[138] Memorandum from the Unif. Pub. Expression Prot. Act Drafting Comm. to Nat'l Conf. of Comm'rs on Unif. State L. (Juny 30, 2020).

[139] UNIFORM PUBLIC EXPRESSION PROTECTION ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2020).

[140] *Id*. § 2.

[141] *Id*.

[142] *Id*.

One solution to this problem is to enumerate a uniform set of exemptions in each state anti-SLAPP statute that shields certain types of litigation from anti-SLAPP motions and, in so doing, allows equitable relief for vulnerable plaintiffs. Because state courts are less likely to grant motions to dismiss and motions for summary judgments than federal courts,[143] including a uniform set of exemptions in state anti-SLAPP laws will benefit plaintiffs by allowing them to engage in state-level litigation which creates a greater likelihood that the plaintiffs with legitimate claims will procure a favorable outcome.

In fact, one common feature among strong state anti-SLAPP statutes[144] is the codification of certain exemptions that prohibit special motions to strike for certain types of litigation. By carving out specific exemptions to otherwise broadly worded statutes, states ensure that culpable defendants in certain types of civil litigation will not abuse anti-SLAPP motions to dismiss legitimate claims.[145] For example, the California State Legislature amended its anti-SLAPP law in 2003 to exempt anti-SLAPP motions from being applied to public-enforcement actions, actions filed solely in the public interest, actions involving certain commercial speech, and actions in which the defendant was involved in criminally illegal conduct.[146] In another instance, the Oklahoma Citizens Participation Act included a set of exemptions that prohibited anti-SLAPP motions from being utilized in government enforcement actions, bodily injury actions, insurance-related actions, and commercial speech actions.[147] Similarly, in a "revolutionary"[148] act, the Texas State Legislature enacted a number of exemptions to its existing anti-SLAPP statute to block anti-SLAPP motions from being invoked in actions related to evictions and common law fraud, among others.[149]

The inclusion of the above exemptions allowed state courts to properly utilize their respective state's anti-SLAPP law to dismiss truly meritless lawsuits, while guaranteeing that the anti-SLAPP motion to strike would not be misused by unscrupulous defendants. Thus, based

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[143] Max Kennerly, *Why Civil Defendants Want To Be in Federal Court: Judicial Vacancies*, LITIGATION & TRIAL (Jan. 7, 2013), https://www.litigationandtrial.com/2013/01/articles/series/special-comment/judicial-vacancies/.

[144] *State Anti-SLAPP Law Scorecard*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Jan. 26, 2021) (identifying California, Colorado, the District of Columbia, Nevada, New York, Oklahoma and Oregon as states with excellent anti-SLAPP statutes and identifying Connecticut, Georgia, Illinois, Kansas, Louisiana, Rhode Island, Tennessee, Texas, and Vermont as states with good anti-SLAPP statutes).

[145] Dannielle Campbell, Houman Chitsaz & Constance Yu, *Practitioners, Beware! California's Anti-SLAPP Motions Can Happen to You: A Practical Overview*, MCBA (Apr. 2, 2019), https://marinbar.org/news/article/?type=news&id=428.

[146] Thomas R. Burke, *The Annual Roundup of California Anti-SLAPP Appellate Decisions*, DAVIS WRIGHT TREMAINE: MEDIA LAW MONITOR (Feb. 28, 2020), https://www.dwt.com/blogs/media-law-monitor/2020/02/the-annual-roundup-of-california-antislapp-appella.

[147] Aaron F.W. Meek & Noah E.W. Meek, *The Oklahoma Citizens Participation Act as a General Early Dismissal Procedure*, 90 OKLA. BAR J. 32 (2019).

[148] *Id.*

[149] The full set of anti-SLAPP exemptions for the Texas Citizens Participation Act includes trade secret misappropriation; enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationship; family code cases and applications for protective order; claims under the Texas Deceptive Trade Practices Act; medical peer review cases; and attorney disciplinary proceedings. *See* Laura Lee Prather, *Changes to Texas Anti-SLAPP Statute*, HAYNES BOONE (Jun. 12, 2019), https://www.haynesboone.com/alerts/changes-to-texas-anti-slapp-statute.

upon the exemptions codified in various state anti-SLAPP statutes and in the model anti-SLAPP statutes, and based upon presently pressing social concerns, all state legislators should include the following exemptions in state anti-SLAPP statutes as a uniform set of exemptions: (1) a commercial speech exemption; (2) a public interest litigation exemption; and (3) a landlord-tenant litigation exemption. Codifying these exemptions will still largely allow states the freedom to define protected activities and to decide which measures should be implemented to provide relief to SLAPP defendants within their discrete statutes. But more importantly, codifying these exemptions may also put an end to the chilling of legitimate lawsuits as they will ensure that the threat of an anti-SLAPP motion will not deter vulnerable plaintiffs with justifiable causes of action from seeking legal relief.

A. Commercial Speech Exemption

First, all anti-SLAPP statutes should provide a commercial speech litigation exemption, which has been successfully implemented in multiple state anti-SLAPP statutes.[150] The commercial speech exemption prohibits defendants from utilizing an anti-SLAPP motion if the lawsuit arises from any statement or conduct by the defendant while he was primarily engaged in the business of selling or leasing goods or services. For this exemption to be properly applied, the statement or conduct: (1) must consist of representations of fact about the defendant's goods or services that were made specifically to procure approval, promotion, or sales or leases of the products; and (2) must be made to an actual potential buyer or customer, notwithstanding that the conduct or statement concerns an important public issue.[151]

Before states with this exemption in their anti-SLAPP statutes provided the commercial speech exemption, corporate defendants often misused anti-SLAPP motions to dismiss class action suits that targeted deceptive or fraudulent business practices.[152] For example, prior to California's inclusion of the commercial speech exemption in 2003, a pharmaceutical company was able to invoke the state's broad anti-SLAPP statute to dodge a class action lawsuit for deceptive marketing.[153] In this case, plaintiffs alleged among other complaints that DuPont Merck Pharmaceutical Co., a manufacturer of generic warfarin sodium, "undertook aggressive lobbying and public relations efforts, involving the dissemination of false and misleading information in, inter alia press releases, Internet bulletins, and public statements."[154]

However, DuPont Merck countered with an anti-SLAPP motion. Taking advantage of the then-existing anti-SLAPP statute's broad definition of protected activity, the company argued that its lobbying activities seeking to influence the decisions of regulatory and legislative bodies satisfied the anti-SLAPP statute's protective criteria as these activities were writings or oral statements made before a legislative, executive, or judicial proceeding, or any other official

[150] *See, e.g.,* CAL. CIV. PROC. CODE § 425.17(c); TEX. CIV. PRAC. & REM. CODE § 27.010(b); OKLA. STAT. tit. 12, § 1439 (2); D.C. CODE §§ 16–5505(1).
[151] This proposed exemption draws inspiration from California's commercial speech exemption. *See* CAL. CIV. PROC. CODE § 425.17(c).
[152] Julio Sharp-Wasserman, *New York's Anti-SLAPP Law Is Only A Slap On The Wrist, Will New Legislation Make It Sting?*, 91 N.Y. STATE BAR ASS'N J. 20, 22 (2019).
[153] *See* DuPont Merck Pharmaceutical Co. v. Superior Court, 78 Cal. App. 4th 562, 569 (Cal. Ct. App. 2000).
[154] *Id.* at 564-565.

proceeding authorized by law.[155] The court found this argument persuasive, and further held that the defendants correctly invoked the anti-SLAPP statute because "both the number of persons allegedly affected [by the purchase of the anti-coagulant medicine] and the seriousness of the conditions treated establish[ed] the issue as one of public interest."[156] As such, the absence of the commercial speech exemption to this statute allowed a powerful corporate defendant to evade a legitimate lawsuit.

In contrast, once California enacted the commercial speech exemption to its statute, courts denied corporate defendants anti-SLAPP protection for false advertising cases.[157] In *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.*, the plaintiffs complained that Tyson disseminated false and deceptive advertisements for the chicken products that it sold to consumers in California.[158] Tyson filed a motion to strike pursuant to California's anti-SLAPP statute, arguing that the plaintiff's claims arose from acts done by Tyson to engage in the furtherance of free speech about a public issue, within the context of speech concerning poultry products sold to California residents.[159] However, the Court of Appeal rejected this contention, holding that § 425.17(c) of the statute deprived Tyson of any basis to strike the suit.[160]

Citing the statutory language of the exemption, the court reiterated that the anti-SLAPP statute did not apply to any cause of action brought against a person primarily engaged in the business of selling goods if the person made the statements to prospective purchasers primarily for the purpose of procuring sales.[161] The *Physicians Committee*'s case fell squarely within this exception as the plaintiffs alleged Tyson engaged in deceptive advertising practices specifically to promote the sales of their poultry products.[162] Consequently, the commercial speech exemption prevented the corporate defendants in this case — as well as in further cases[163] — from abusing anti-SLAPP motions to quash false advertising claims.

Therefore, though some states have followed California's example and created a commercial speech exemption in their anti-SLAPP statutes,[164] *all* state anti-SLAPP statutes should include a uniform commercial speech exemption. This exemption is necessitated by corporate defendants' unscrupulous use of anti-SLAPP motions to escape meritorious litigation initiated by common consumers. Indeed, in a statement supporting the California State Legislature's addition of the commercial speech exemption to the anti-SLAPP statute, Dr. Penelope Canan,[165] observed that:

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[155] *Id.* at 565.
[156] *Id.* at 567.
[157] Sharp-Wasserman, *supra* note 151.
[158] *See* Physicians Comm. for Responsible Med. v. Tyson Foods, Inc., 119 Cal. App. 4th 120, 123 (Cal. Ct. App. 2004).
[159] *Id.* at 124.
[160] *Id.* at 127.
[161] *Id.*
[162] *Id.* at 128.
[163] *See, e.g.*, Metcalf v. U-Haul Int'l, Inc., 118 Cal. App. 4th 1261, 1266 (Cal. Ct. App. 2004) (false advertising about the size of storage units).
[164] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 27.010(b); OKLA. STAT. tit. 12, § 1439 (2); D.C. CODE §§ 16–5505(1).
[165] Along with George W. Pring, Dr. Canan authored the seminal article about strategic lawsuits against public participation and coined the acronym "SLAPP" to describe these lawsuits; Penelope Canan & George Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

> "Corporate defendants have far greater resources to defend themselves when sued, and as a group are far less likely — or not likely at all — to be chilled in their exercise of First Amendment rights. Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out."[166]

Thus, including this exemption in all state anti-SLAPP statutes prevents formidable corporations from abusing anti-SLAPP motions to protect their private interests. Given that the stated intent of anti-SLAPP legislation is to provide common citizens with a relatively inexpensive defense mechanism against attacks on their First Amendment rights by SLAPPs,[167] affluent corporate defendants' blatant abuse of anti-SLAPP motions is particularly egregious and should be uniformly blanketed by this exemption.

Furthermore, the commercial speech exemption is also warranted because denying anti-SLAPP protections to corporate defendants in class action lawsuits coheres with the First Amendment's limited protections for commercial speech as opposed to other forms of speech.[168] The Supreme Court of the United States has long reinforced the distinction between commercial speech and non-commercial speech by applying less scrutiny to commercial speech regulations. While non-commercial speech regulations are subject to strict scrutiny,[169] the regulation of commercial speech must only withstand intermediate scrutiny, meaning that the regulation of the speech must further an important government interest and must do so by means that are substantially and reasonably related to that interest.[170] Therefore, to afford corporate defendants anti-SLAPP protections for commercial speech is to turn a blind eye to the constitutionally ordained hierarchy of speech.[171]

B. Public Interest Litigation Exemption

Next, all state anti-SLAPP statutes should exempt public interest litigation from being struck down by an anti-SLAPP motion. Using California's anti-SLAPP statute[172] — as well as the California courts' narrow interpretations of the statute — as a model, the public interest

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[166] *Anti-SLAPP (Strategic Lawsuits Against Public Participation) Motions: Restrictions On Use: Hearing on S.B. 1651 Before the S. Judiciary Comm.*, 2001-2002 Leg. (Cal. 2002) (statement of University of Denver Professor, Dr. Penelope Canan).
[167] *Id.*
[168] *See* Sharp-Wasserman, *supra* note 151, at 22.
[169] Under strict scrutiny, a regulation will be struck down unless it is so narrowly tailored as to serve a compelling governmental interest and is necessary to achieve that end. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).
[170] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989).
[171] *See* Julio Sharp-Wasserman & Evan Mascagni, *A Federal Anti-SLAPP Law Would Make Section 230(c)(1) of the Communications Decency Act More Effective*, 17 FIRST AMEND. L. REV. 367, 398-99 (2019).
[172] *See* CAL. CIV. PROC. CODE § 425.17(b) (1992).

exemption should prohibit anti-SLAPP motions from being applied to any action "brought solely in the public interest or on behalf of the general public."[173] To ensure that this exemption is properly applied, state courts should only disallow anti-SLAPP motions for cases in which the plaintiff does not seek any relief "greater than or different from the relief sought for the general public or a class of which the plaintiff is a member."[174]

The California court introduced the narrow construction of this exemption in its decision for *Club Members for an Honest Election v. Sierra Club*.[175] In this case, a candidate running in the Sierra Club's election and a group of club members supporting his candidacy sued the Club for distributing election materials that contained statements urging club members to vote for the Club's nominating committee slate or against candidates supported by outside groups.[176] Alongside the injunctive relief that the plaintiffs sought against the Club's unconscionable election processes, the plaintiffs' complaint additionally sought to remove five of the elected board members to allow one of the plaintiffs — along with four other unsuccessful candidates — to accede to those board positions.[177] The Sierra Club brought an anti-SLAPP motion against the plaintiffs of this suit; the plaintiffs responded by invoking the public interest exemption clause of California's anti-SLAPP statute, citing the Club's election practices as a matter of "public interest."[178]

Though the California Court of Appeals ruled that the plaintiffs' claims were exempt from the anti-SLAPP statute because the "principal thrust or gravamen" of the plaintiffs' election claims were brought in the public interest, the California Supreme Court disagreed.[179] In espousing a strict interpretation of the statute's language, the California Supreme Court rejected the lower court's expansive reading of the public interest exemption and instead held that "if any part of [the plaintiff's] complaint seeks relief to directly benefit the plaintiff," the lawsuit does not qualify as being brought in the public interest.[180] In so doing, the court ensured that California's anti-SLAPP statute is available to any defendant faced with meritless claims seeking to chill speech, while also ensuring that plaintiffs will not be able to unfairly claim that a lawsuit was filed "in the public interest" despite seeking private relief.[181] All state anti-SLAPP laws should similarly include narrowly tailored language in their public interest exemptions to guarantee that litigants in a public interest lawsuit are not seeking unjust personal enrichment.

The addition of a public interest litigation exemption to all state anti-SLAPP statutes is justifiable because of the chief aim of public interest lawsuits. Because these suits are typically class action cases or test cases seeking equitable relief, rather than seeking to vindicate pecuniary

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[173] *Id*.
[174] *Id*. §425.17(b)(1).
[175] *See Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1098 (Cal. 2008).
[176] *Id*. at 1096.
[177] *Id*. at 1097.
[178] *Id*. at 1096.
[179] Thomas R. Burke & Rochelle L. Wilcox, *California Supreme Court: "Public Interest" Exemption to Anti-SLAPP Statute Is Narrow*, DAVIS WRIGHT TREMAINE (Dec. 16, 2008), https://www.dwt.com/insights/2008/12/california-supreme-court-public-interest-exemption.
[180] *Id*.
[181] *Id*.

interests, they are unlikely vehicles for legal harassment.[182] Additionally, this type of lawsuit may seek to effect broader systemic change. Therefore, allowing defendants to use anti-SLAPP motions to dismiss public interest lawsuits may not only prevent underrepresented or disadvantaged groups — such as women, the poor, and ethnic and religious minorities — from seeking legal remedies after they have been harmed, but may also prevent systemic policy change in society at large.[183] As such, to benefit vulnerable plaintiffs and to prevent defendants from abusing anti-SLAPP motions in a manner that may inhibit social change, all state anti-SLAPP statutes should include a public interest litigation exemption to immunize litigation from the threat of dismissal.

C. Landlord-Tenant Litigation Exemption

Finally, all state anti-SLAPP statutes should provide an exemption for landlord-tenant litigation. Though this exemption has only been codified in Texas' anti-SLAPP law thus far,[184] there have been a few cases in which powerful landlords have attempted to take advantage of anti-SLAPP protections to silence tenant-plaintiffs who brought legitimate habitability claims.[185] Therefore, to prevent further abuse of anti-SLAPP motions by landlords, *all* state anti-SLAPP statutes should include an exemption that precludes landlords from appealing a lower court's denial of the anti-SLAPP motion for eviction lawsuits.

Since at least 2007, landlords have used the litigation privilege and the anti-SLAPP motions in tandem to shut down lawsuits from tenants with valid habitability claims.[186] However, the most alarming attempt to wrongfully deploy anti-SLAPP protections comes from *Moriarty v. Laramar Management Corporation.*[187] In this case, plaintiff John Moriarty filed a complaint against the management of the apartment complex he lived in, alleging breach of implied warranty of habitability and wrongful eviction among nine other claims.[188] Moriarty alleged that throughout his tenancy, he notified the defendants of various maintenance and repair issues required at his premises, as well as the existence of airborne contaminants that negatively impacted him and his health.[189] Once the defendants notified Moriarty that they were going to commence "extensive" repairs on his home, Moriarty chose to temporarily vacate the home until the repairs were complete.[190] However, in June 2011, Moriarty learned that the defendants had

[182] Sharp-Wasserman, *supra* note 151.
[183] FORD FOUNDATION, MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 284 (Mary McClymont & Stephen Golub eds., 2000).
[184] TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-27.011 (as amended by H.B. 2730, 83rd Leg., Reg. Sess. (Tex. 2019)).
[185] *See, e.g.*, Action Apartment Assn., Inc. v. City of Santa Monica, 41 Cal. 4th 1232 (Cal. Ct. App. 2007); Marlin v. Aimco Venezia, LLC, 154 Cal. App. 4th 154 (Cal. Ct. App. 2007); Clark v. Mazgani, 170 Cal. App. 4th 1281 (Cal. Ct. App. 2009); Moriarty v. Laramar Management Corp., 224 Cal. App. 4th 125 (Cal. Ct. App. 2014).
[186] Aaron H. Darsky & Laura R. Keenan, *Too Much Privilege? SLAPP-Happy Landlords Get a Dressing Down*, PLAINTIFF (June 2014), https://www.plaintiffmagazine.com/recent-issues/item/too-much-privilege-slapp-happy-landlords-get-a-dressing-down.
[187] *Moriarty*, 224 Cal. App. 4th 125.
[188] *Id.* at 128.
[189] *Id.* at 129.
[190] *Id.*

chosen to permanently retain possession of the premises and had effectively ousted him from his apartment; this led to Moriarty's action for constructive eviction.[191]

The four corners of Moriarty's complaint did not mention the unlawful detainer and did not implicate protected conduct, and thus an anti-SLAPP motion would ostensibly have been inapplicable.[192] However, the defendants in this case ignored the facts pled in the complaint and brought an anti-SLAPP motion regardless.[193] When the court rightfully denied its motion, Laramar Management persisted in appealing the decision. Thus, this case illustrates the issue of landlords misusing anti-SLAPP motions to drag out litigation. If landlord-defendants lose an anti-SLAPP motion in trial court, they may immediately appeal the decision and stay litigation. As appellate courts are frequently bogged down with appeals, the delay gives landlords the opportunity to force the tenant's attorney to fight an appeal — and maybe even a petition to the Supreme Court — before the plaintiff's simple habitability case gets its day in court.[194]

Similarly, landlords in other cases have attempted to use anti-SLAPP motions to escape legitimate actions brought against them for unlawful detainers and familial status discrimination.[195] Such actions underscore the need for an exemption that prevents landlord-defendants from taking undue advantage of anti-SLAPP protections to the detriment of tenants' rights. While filing an eviction lawsuit and giving the notice of termination before filing for an eviction are protected activities under anti-SLAPP statutes,[196] states should include a statutory exemption that prohibits landlords from utilizing anti-SLAPP motions — or appealing the denial of anti-SLAPP motions — for such actions that are initiated in bad faith.

Particularly in a time where the COVID-19 pandemic has increased unemployment rates, housing instability, and eviction risks,[197] the inclusion of this exemption may allow vulnerable tenants to vindicate legitimate habitability claims, while ensuring that opportunistic landlords cannot engage in retaliatory litigation.

IV. CONCLUSION

Blameworthy defendants have long abused states' broad constructions of anti-SLAPP statutes to bring anti-SLAPP motions and escape litigation for legitimate civil claims brought by impuissant plaintiffs. As defendants in public interest litigation, commercial speech litigation, and landlord-tenant litigation are especially poised to take unwarranted advantage of state anti-SLAPP statutes' special motion to strike, all states should codify this uniform set of exemptions

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[191] *Id.*
[192] Darsky & Keenan, *supra* note 183.
[193] *Id.*
[194] *Id.*
[195] *See generally* Ben-Shahar v. Pickart, 231 Cal. App. 4th 1043 (Cal. Ct. App. 2014); Ulkarim v. Westfield LLC, 227 Cal. App. 4th 1266 (Cal. Ct. App. 2014); Pitts v. Financial Management Co., No. BC644978 (Super. Ct. of Cal., County of Los Angeles Mar. 16, 2017).
[196] *See* Peter N. Brewer, *Court Clarifies That an Eviction is Not a Protected Activity*, BREWER OFFORD & PETERSEN: REAL EST. L. BLOG (Sept. 30, 2014), https://bayarearealestatelawyers.com/real-estate-law/court-clarifies-that-an-eviction-is-not-a-protected-activity.
[197] *See* Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/.

into their anti-SLAPP statutes as it will protect plaintiffs who bring justifiable civil claims for these types of litigation. Including this set of exemptions for state anti-SLAPP statutes is especially valuable to plaintiffs as judges in state-level litigation are less likely to grant motions to dismiss or motions for summary judgment, thereby ensuring that vulnerable plaintiffs with legitimate claims will have the opportunity to pursue proper redress.

Furthermore, the inclusion of this uniform set of exemptions in all state anti-SLAPP statutes would create a homogeneity that may make it easier for Congress to draft a federal anti-SLAPP statute that includes all these exemptions. Though this set of exemptions would likely not eliminate the threat or use of SLAPPs in general, it could curb the amount of time and financial resources vulnerable plaintiffs must expend to fight these meritless suits.