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## SLAPPING Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition

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# SLAPPING Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition

*[F]ree speech, free press, free religion, the right of free assembly, yes, the right of petition . . . well, they are still radical ideas.<sup>1</sup>*

— Lyndon B. Johnson

## I. Introduction

Many states are beginning to take note of a troubling trend in litigation that devastates First Amendment rights. This litigation, termed Strategic Lawsuits Against Public Participation (SLAPP suits),<sup>2</sup> consists of lawsuits filed against individuals who communicate with or try to influence the government.<sup>3</sup> SLAPP suits differ from ordinary contract and tort lawsuits in that they are simply a reaction to political action.<sup>4</sup> They dissuade public activism such as testifying against real estate development at a zoning hearing,<sup>5</sup> complaining to a school board about unfit teachers,<sup>6</sup> or demonstrating peacefully for or against government actions.<sup>7</sup> While the First Amendment guarantees citizens the right to petition their government for redress of grievances, SLAPP suits effectively chill petitioning activities by subjecting citizens who exercise their right to the fear and intimidation of litigation.<sup>8</sup> As a result, many states are responding by enacting some form of judicial or legislative remedy to combat these suits.

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1. Lyndon B. Johnson, Remarks to the International Platform Association Upon Receiving the Association's Annual Award (Aug. 3, 1965).

2. Professors Pring and Canan of the University of Denver are two of the primary analysts of this legal phenomenon. They coined the term "SLAPP" and initiated a detailed analysis of the SLAPP trend. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 3 (1996).

3. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 *LAW & SOC'Y REV.* 385, 386 (1988).

4. PRING & CANAN, *supra* note 2, at 8; *see also* *Duracraft Corp. v. Holmes Prod. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998).

5. *See Gorman Towers v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979).

6. *See Martin v. Kearney*, 124 Cal. Rptr. 281 (Cal. Ct. App. 1975); *Weissman v. Mogol*, 462 N.Y.S.2d 383 (N.Y. Sup. Ct. 1983).

7. *See County of San Luis Obispo v. Abalone Alliance*, 223 Cal. Rptr. 846 (Cal. Ct. App. 1986); *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186 (Minn. Ct. App. 1984).

8. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

The defining characteristic of a SLAPP suit is its purpose to deter public participation in decision-making forums. Accordingly, SLAPP suits encompass many forms of litigation, including both direct lawsuits and counterclaims or cross-claims to existing lawsuits.<sup>9</sup> For example, a counterclaim alleging defamation might arise in an unfair business practice suit. If the purpose of the counterclaim is to make the original plaintiff withdraw the suit, then the counterclaim is a SLAPP suit.<sup>10</sup> Due to the many forms a SLAPP suit may take, scholars and litigators often refer to those involved in SLAPP suits as “filers” and “targets” instead of “plaintiffs” and “defendants.”<sup>11</sup> Generally, filers of SLAPP suits are well-financed organizations, and targets are private citizens or groups “whose political activism may be detrimental to the organization's business interests.”<sup>12</sup>

Because SLAPP suit filers must camouflage their grievances against the targets’ petitioning activities, five recognized causes of action are typically used for SLAPP suit litigation: defamation, business torts, process violations, conspiracy, and constitutional and civil rights violations.<sup>13</sup> Other less common causes of action may include violations such as nuisance, trespass, and emotional harms.<sup>14</sup> A nationwide study of SLAPP suit litigation identified defamation in the form of libel, slander, and business libel as the most common cause of action.<sup>15</sup> Business torts, the second most common cause of action, include interference with contract or business, antitrust, restraint of trade, and unfair competition.<sup>16</sup>

Courts typically dismiss most SLAPP suits because of their infringements on the First Amendment Right to Petition;<sup>17</sup> however, the primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate the petitioners into dropping their initial petitions due to the expense and fear of extended litigation.<sup>18</sup> While legitimate litigation

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9. PRING & CANAN, *supra* note 2, at 9-10.

10. *Simmons v. Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397, 398 (Cal. Ct. App. 2001).

11. PRING & CANAN, *supra* note 2, at 9-10.

12. Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 402 (1991). Real estate developers, property owners, police officers, public utility companies, and state and local governments frequently file SLAPP suits. Canan & Pring, *supra* note 3, at 389.

13. PRING & CANAN, *supra* note 2, at 217.

14. *Id.*

15. *Id.*

16. *Id.*

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

18. *See United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999); *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 450 (Cal. Ct. App. 1994), *overruled on other grounds by Equilon Enters. v. Consumer Cause*, 52 P.3d 685 (Cal. 2002).

serves to obtain compensation or to right a wrong, the primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition.<sup>19</sup> It has been noted that, “One would be hard-pressed to find another area of law in which so overwhelming a proportion of defendants brought into court are eventually vindicated.”<sup>20</sup> Nevertheless, despite a victory in court, the targets of SLAPP suits must hire lawyers, spend time answering complaints, and deal with burdensome discovery requests. In addition, an overwhelming number of petitioners drop their original petition.<sup>21</sup> Thus, filers achieve success through the withdrawal of the targets’ petitions, or, when the cases have already been resolved in a manner detrimental to the filers, success comes in the form of a chill on future petitioning.<sup>22</sup>

The presence of these ulterior motives confounds established litigation procedures and safeguards, such as fines, sanctions, and unfavorable decisions designed to prevent abuse and manipulation of the legal system.<sup>23</sup> Because filers of SLAPP suits look to intimidate the targets rather than win the lawsuits, unfavorable decisions do little to control or prevent filers from suing the petitioners.<sup>24</sup> Often filers are trying to protect large business deals from the targets’ blocking strategies.<sup>25</sup> If the business incentives outweigh the sanctions for filing frivolous lawsuits, then fines will do little to discourage filing SLAPP suits. Thus, absent additional legislation specifically directed toward SLAPP suits, abuse and manipulation of the legal system will continue unconstrained.

Although SLAPP suits are by no means a new phenomenon in business and political litigation, states have only recently begun to enact legislation geared at defining and dealing with SLAPP suits.<sup>26</sup> California has spearheaded the effort with some of the most comprehensive legislation and case law.<sup>27</sup> Based

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19. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989) (describing filers’ primary motives as: “(1) the intent to retaliate for successful opposition on an issue of public interest; (2) the attempt to prevent expected future, competent opposition on subsequent public policy issues; (3) the intent to intimidate and, generally, to send a message that opposition will be punished; and (4) a view of litigation and the use of the court system as simply another tool in a strategy to win a political and/or economic battle”).

20. Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPBACK: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 420 (1991).

21. Lori Potter, *Strategic Lawsuits Against Public Participation and Petition Clause Immunity*, 31 ENVTL. L. REP. 10,852, 10,853 (2001); PRING & CANAN, *supra* note 2, at 2.

22. Cosentino, *supra* note 12, at 403.

23. *Id.*

24. *Id.*

25. *Id.* at 402.

26. PRING & CANAN, *supra* note 2, at 189 (noting these types of laws are often referred to as “anti-SLAPP” laws).

27. CAL. CIV. PROC. CODE § 425.16 (West 2006); *see also* California Anti-SLAPP Project,

on California's lead, twenty-three other states have enacted legislation with varying degrees of protection for SLAPP suit targets.<sup>28</sup> Some states, like Oklahoma, limit the statute's application to a specific cause of action, such as defamation, and do not provide procedural shortcuts for handling suits.<sup>29</sup> Other states provide more comprehensive procedural mechanisms to effectively deal with SLAPP suits such as special motions to dismiss, procedures to stay discovery, and the shifting of attorney fees, without restricting the cause of action.<sup>30</sup>

Because of the potentially devastating chill effect SLAPP suits have on the constitutional right to petition the government, state legislative action is required to combat their ill effects. Legislation should articulate a clear definition of SLAPP suits and provide a remedy for quick and easy disposal of such suits so that citizens feel free to campaign against ballot issues, demonstrate peacefully, file complaints to government offices, and report official misconduct.<sup>31</sup> Although an increasing number of states are recognizing the need for such legislation, Oklahoma's anti-SLAPP statute remains ineffective and continues to lack the elements necessary to successfully combat SLAPP suits.

This note analyzes how the limited scope of Oklahoma's anti-SLAPP statute hinders the First Amendment Right to Petition by not providing SLAPP suit targets proper procedural shortcuts to easily dispose of improper suits. Part II of this note examines how the Supreme Court and other states have addressed SLAPP suits through an expansive reading of the *Noerr-Pennington*

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<http://www.casp.net/calstats.html> (last visited Feb. 12, 2007).

28. ARK. CODE ANN. §§ 16-63-501 to -508 (2006); DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); FLA. STAT. § 768.295 (2005); GA. CODE ANN. § 9-11-11.1 (2003); HAW. REV. STAT. § 634F (2005); IND. CODE §§ 34-7-7-1 to -10 (1998); LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MASS. GEN. LAWS ch. 231, § 59H (2000); MINN. STAT. §§ 554.01 to -.05 (2000); MO. REV. STAT. § 537.528 (Supp. 2006); NEB. REV. STAT. §§ 25-21-241 to -246 (1995); NEV. REV. STAT. §§ 41.635 to -.670 (2005); N.M. STAT. §§ 38-2-9.1 to -9.2 (Supp. 2006); N.Y. C.P.L.R. 3211(g) (McKinney 2004); 12 OKLA. STAT. § 1443.1 (2001); OR. REV. STAT. §§ 31.150 to .155 (2005); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997); TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2003); WASH. REV. CODE §§ 4.24.500 to .520 (2005).

29. 12 OKLA. STAT. § 1443.1; *see also* DEL. CODE ANN. § 8136(1) (limiting their protection to applicants for public permits); FLA. STAT. § 768.295(2) (limiting the prohibition of SLAPP suits to those filed by governmental entities); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (limiting immunity to those petitioning for environmental causes).

30. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16; GA. CODE ANN. § 9-11-11.1; HAW. REV. STAT. § 634F; MASS. GEN. LAWS ch. 231, § 59H; MO. REV. STAT. § 537.528; R.I. GEN. LAWS §§ 9-33-1 to -4.

31. *See generally* PRING & CANAN, *supra* note 2, at 2.

Doctrine and through individual state statutes. Part III examines how Oklahoma has addressed SLAPP suits through its statute and case law. Part IV analyzes the weaknesses of Oklahoma's statute and suggests that Oklahoma adopt a more expansive recognition of SLAPP suits by not limiting them to defamation causes of action. In addition, Part IV includes suggested procedures for SLAPP suits such as a special motion to dismiss, a stay of discovery upon the filing of a motion to strike, shifting attorney fees, and an authorization for SLAPP-back suits. This note concludes in Part V.

## *II. Guarding the First Amendment: Development of Petition Clause Immunity and SLAPP Suit Protection*

For the first two centuries after the enactment of the First Amendment, defendants rarely used the Petition Clause as a litigation defense.<sup>32</sup> Not until the early 1960s did the Supreme Court officially recognize petition clause immunity in limited situations.<sup>33</sup> The Supreme Court created this immunity, often called the *Noerr-Pennington* Doctrine (the Doctrine), when it held that an antitrust exemption exists for activities involving the petitioning of governmental bodies.<sup>34</sup> Eventually, the applicability of the Doctrine spread beyond the antitrust arena and became a defense to a wide variety of suits.<sup>35</sup> Nevertheless, although the Doctrine provides a defense to cases in which the plaintiff sues the defendant for petitioning, the Doctrine does little to discourage plaintiffs from filing such suits in the first place. States are therefore working to fill this void and discourage the suits through judicial remedies and, more commonly, state statutes.

### *A. Supreme Court Development of the Noerr-Pennington Doctrine*

The *Noerr-Pennington* Doctrine states that the Constitution's Petition Clause protects efforts to influence the government through petitioning, even

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32. *Id.* at 18; *see, e.g.*, *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845) (stating that a citizen was sued for complaining to the U.S. President about malfeasance by a customs collector); *Gray v. Pentland*, 2 Serg. & Rawle 23 (Penn. 1815) (stating that a citizen was sued for a deposition to the governor charging a government official with frequent intoxication and being unfit to perform duties of office with dignity); *Larkin v. Noonan*, 19 Wis. 82 (1865) (stating that a citizen was sued for reporting to the governor that a sheriff tried to defraud the county).

33. Potter, *supra* note 21, at 10,853.

34. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-10 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961).

35. *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 59 (1993); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-14 (1982).

if the petitioning is for an anticompetitive purpose.<sup>36</sup> While normal antitrust law prohibits business practices that may create unfair competition, the First Amendment Right to Petition the Government prevents lawsuits against certain business practices if the “business practice” is some sort of petitioning activity.<sup>37</sup> If a company asks a court or government official to enact a law that would ultimately stifle its competition, it is not violating antitrust laws because the First Amendment protects “asking the government” as a form of petitioning.<sup>38</sup> Even if the motive of the petition is to stifle competition, the right to petition outweighs the policy of promoting fair and equal business practices.<sup>39</sup>

The Supreme Court articulated the principles for a Petition Clause defense and thereby established the *Noerr-Pennington* Doctrine in a series of three related cases.<sup>40</sup> In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, a trucking company sued to stop a railroad’s publicity campaign aimed at obtaining federal legislative action against the interest of trucking companies.<sup>41</sup> The Supreme Court held that this attempt did not violate the Sherman Antitrust Act even if the objective of obtaining government action was for an anticompetitive purpose.<sup>42</sup> The Court viewed this publicity campaign as a petition to the legislature, and held that a law discouraging anti-competitive activity could not hinder the right to petition.<sup>43</sup>

In *United Mine Workers of America v. Pennington*, the Supreme Court further utilized the Doctrine and expanded it to protect petitioning the executive branch. In *Pennington*, a union approached the Secretary of Labor seeking inclusion in an act that would establish a minimum wage law, making it hard for small companies to compete in the long-distance freight transportation market.<sup>44</sup> A small coalmine operator sued the union for violating the Antitrust Act.<sup>45</sup> As in *Noerr Motor Freight*, the Court held that petitioning the executive for the enforcement of laws did not violate the

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36. *Cal. Motor Transp.*, 404 U.S. at 509-10; *Pennington*, 381 U.S. at 669; *Noerr Motor Freight*, 365 U.S. at 136.

37. *Noerr Motor Freight*, 365 U.S. at 135-36.

38. *Cal. Motor Transp.*, 404 U.S. at 510-11.

39. *Cal. Motor Transp.*, 404 U.S. at 509-10; *Pennington*, 381 U.S. at 669; *Noerr Motor Freight*, 365 U.S. at 136.

40. *Cal. Motor Transp.*, 404 U.S. 509; *Pennington*, 381 U.S. 657; *Noerr Motor Freight*, 365 U.S. 127.

41. 365 U.S. at 138-40.

42. *Id.*

43. *Id.*

44. 381 U.S. at 660.

45. *Id.*

Antitrust Act.<sup>46</sup> The Court upheld the right to petition despite the fact that the union's ultimate objective of the petition was to diminish competition.<sup>47</sup>

Finally, in *California Motor Transport Co. v. Trucking Unlimited*, the Court once again extended the *Noerr-Pennington* Doctrine to apply to petitions for relief before a court or administrative agency. In *California Motor Transport*, a trucking company sought damages and injunctive relief in a lawsuit against another trucking company.<sup>48</sup> Although the trucking company's lawsuit may have acted to stifle competition, the Court recognized that the lawsuit was a form of petitioning and the trucking company that filed the initial suit for damages and injunctive relief was immune from a retaliatory suit based on the First Amendment's right to petition as well as the right of free association.<sup>49</sup> Together, these three cases establish that the right to petition the government may not be undermined even if the purpose of the petition is to stifle competition.

#### *B. Expansion of the Noerr-Pennington Doctrine Beyond the Antitrust Arena*

The *Noerr-Pennington* line of cases solely addresses antitrust litigation, but the Supreme Court has acknowledged that the Doctrine has broader application.<sup>50</sup> For example, in *NAACP v. Claiborne Hardware Co.*, the Court applied the Doctrine to civil rights cases.<sup>51</sup> In *Claiborne Hardware*, a boycott seen as a legitimate form of petitioning activity did not seek to destroy competition; rather, the purpose was to vindicate civil rights.<sup>52</sup> The Court stressed that the non-violent boycott aimed at protesting racial discrimination goes to the core of First Amendment values.<sup>53</sup> Applying the *Noerr-Pennington* Doctrine, the Court upheld the boycott as a legitimate form of petitioning activity.<sup>54</sup> Like in *Noerr Motor Freight*, the Court held that even if the foreseeable intent of the boycott is to impact economic activity, the boycott may not be undercut by laws regulating economic activity as long as the purpose is to influence state actors.<sup>55</sup>

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46. *Id.* at 671.

47. *Id.*

48. 404 U.S. 508, 509 (1972).

49. *Id.* at 510.

50. *See Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 59 (1993) ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.")

51. 458 U.S. 886, 913-14 (1982).

52. *Id.* at 914.

53. *Id.* at 915.

54. *Id.*

55. *Id.* at 914.



Expanding the Supreme Court's broad recognition of the Doctrine, lower courts have applied the Doctrine to a wide variety of petitioning activities. Several lower courts have held that those who petition the government seeking redress should not, in turn, be subjected to retaliatory litigation, whether the petition involves antitrust issues or not.<sup>56</sup> For example, in *Ludwig v. Superior Court*, the California Court of Appeals held that the *Noerr-Pennington* Doctrine applies to "virtually any tort, including unfair competition and interference with contract, commercial speech," and to both competitive and anticompetitive activity.<sup>57</sup> In *Alfred Weissman Real Estate v. Big V Supermarkets, Inc.*, the New York Supreme Court Appellate Division held that the Doctrine applies to claims brought under both federal and state law.<sup>58</sup> Thus, as applied by the Supreme Court and the lower courts, the Doctrine now applies to petitions in all areas of the government, including local governments,<sup>59</sup> and can provide immunity from suit in a variety of contexts.<sup>60</sup>

### C. Recognition of SLAPP Suits

The *Noerr-Pennington* Doctrine establishes the foundation for recognizing petition clause immunity and provides a concrete defense for a wide variety of business and tort cases.<sup>61</sup> On the heels of the *Noerr-Pennington* line of cases,

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56. See *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 829 F. Supp. 420, 426 (D.D.C. 1993), *rev'd on other grounds*, 48 F.3d 1260 (D.C. Cir. 1995); *Westfield Partners v. Hogan*, 740 F. Supp. 523, 526 (N.D. Ill. 1990); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816-18 (S.D.N.Y. 1979); *Aknin v. Phillips*, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975).

57. 43 Cal. Rptr. 2d 350, 360 n.17 (Cal. Ct. App. 1995); see also *Zeller v. Consolini*, 758 A.2d 376, 380 (Conn. App. Ct. 2000) (stating that the *Noerr-Pennington* Doctrine "is equally applicable to many types of claims which seek to assign liability on the basis of the defendant's exercise of its first amendment rights").

58. 707 N.Y.S.2d 647, 652 (N.Y. App. Div. 2000); see also *Video Int'l Prod. v. Warner-Amex Cable Commc'ns*, 858 F.2d 1075, 1084 (5th Cir. 1988); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996).

59. *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991) (granting *Noerr-Pennington* immunity for efforts to influence local government); *Monarch Entm't Bureau v. N.J. Highway Auth.*, 715 F. Supp. 1290, 1301-03 (D.N.J. 1989); *Zeller*, 758 A.2d at 381.

60. See, e.g., *Zeller*, 758 A.2d at 384 (applying the *Noerr-Pennington* Doctrine to zoning permit challenges); *Tremaine v. Tremaine*, No. 960149564S, 1997 WL 139422, at \*2 (Conn. Super. Ct. 1997) (holding that the *Noerr-Pennington* Doctrine applies to petitions for alimony and does not bar a husband's suit against his wife for damages and attorney fees for their divorce); *Azzar v. Primebank*, 499 N.W.2d 793, 796 (Mich. Ct. App. 1993) (applying the *Noerr-Pennington* Doctrine to a suit against a bank for an alleged breach of fiduciary duty); *Pillar Corp. v. Enercon Indus. Corp.*, No. 636-912, 1986 WL 22188, at \*13 (Wis. Cir. Ct. 1986) (holding that the *Noerr-Pennington* Doctrine applies to suits to prevent an employee from disclosing potential trade secrets).

61. See *Potter*, *supra* note 21, at 10,853.

however, scholars and litigators noted that a growing caseload of defamation, business interference, and conspiracy torts shared a common feature — they were filed as a tactical strategy to frustrate public law concerns by discouraging petitions to the government.<sup>62</sup> While petition clause immunity effectively prevented most of these suits from persevering in court, the fact that defendants were continually brought to court simply for filing petitions alerted scholars to the escalating trend of SLAPP suits.<sup>63</sup>

SLAPP suit filers often successfully chill petitioning activity by transforming political petitions into legal causes of action.<sup>64</sup> Private citizens can influence the political arena without much risk or expense, but the judicial system erodes the balance of power between the parties and requires immense resources.<sup>65</sup> Petitioners must shift their focus away from the petitions and towards funding a legal defense, and lengthy delays in resolving the disputes cause support for the original petitions to decrease dramatically.<sup>66</sup> By using private tort litigation to shift petitions from the political arena to the legal forum, SLAPP suit plaintiffs increase the target's anxiety and risk, effectively chilling the right to petition.<sup>67</sup> Upon review of the detrimental chill effect of SLAPP suits and the fact that a favorable disposition amounts merely to a "pyrrhic victory," Judge J. Nicholas Colabella of the New York Supreme Court stated, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."<sup>68</sup> Left unregulated, this chill effect not only stifles the petitioner's goal of obtaining public and governmental support for an issue, but also discourages other citizens from exercising their First Amendment rights for fear of similar suits.

The Colorado Supreme Court's decision in *Protect Our Mountain Environment v. District Court* illuminates the need for SLAPP suit remedies and provides a framework to counteract the chill on the right to petition.<sup>69</sup> In *Mountain Environment*, an environmental group protested the development of a large residential-commercial center in an elk meadow in the mountains west of Denver.<sup>70</sup> The group testified in county hearings and filed an appeal against the county's approval in court.<sup>71</sup> In return, the development corporation filed

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62. PRING & CANAN, *supra* note 2, at 3.

63. *See generally id.*

64. Cosentino, *supra* note 12, at 403.

65. *Id.*

66. *Id.* at 404.

67. *Id.* at 403.

68. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

69. 677 P.2d 1361 (Colo. 1984).

70. *Id.* at 1363.

71. *Id.* at 1363-64.

a \$40,000,000 abuse of process and conspiracy suit against the group, its individual members, and its attorneys, arguing that the group's testimony and appeal injured the corporation.<sup>72</sup> The trial court denied dismissal and the group appealed based solely on the right to petition.<sup>73</sup> In a unanimous opinion, the court held that to overcome the motion to dismiss, the corporation had the burden of making a "sufficient showing to permit the court to reasonably conclude that the [environmental group's] petitioning activities were not immunized from liability under the First Amendment."<sup>74</sup> Specifically, the court created three procedural requirements and three substantive requirements for managing SLAPP suits.<sup>75</sup> Procedurally, every motion to dismiss based on the Petition Clause is to be fast-tracked for summary judgment, the burden of proof is shifted from the petitioning group to the entity filing the SLAPP suit, and a heightened standard of review applies. Substantively, SLAPP suit filers must prove the petitioner's activity was devoid of reasonable factual support, had as its primary purpose harassment or some other improper objective, and did adversely affect a legal interest of the filer.<sup>76</sup> This decision has been cited as a model approach for early identification and disposition of SLAPP suits, and has been the basis for some state's anti-SLAPP laws.<sup>77</sup>

#### *D. A Legislative Approach to Handling SLAPP Suits*

Colorado's judicial doctrine and the *Mountain Environment* test establish a "workable balance between protecting the target's constitutional petition rights and the filer's personal rights."<sup>78</sup> The court effectively removed barriers to early dismissal by establishing procedures for early identification, burden-shifting, and proof elements.<sup>79</sup> Despite Colorado's sound judicial basis for dealing with SLAPP suits, case law in other states does not offer a viable solution for SLAPP suits beyond a mere recognition that they exist. In

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72. *Id.* at 1364.

73. *Id.*

74. *Id.* at 1369.

75. *Id.*; see also George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 951 (1992).

76. *Protect Our Mountain Env't*, 677 P.2d at 1369.

77. See, e.g., DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); MASS. GEN. LAWS ch. 231, § 59H (2000); NEB. REV. STAT. §§ 25-21-241 to -246 (1995); TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005); see also PRING & CANAN, *supra* note 2, at 199-200; Robert Abrams, *Strategic Lawsuits Against Public Participation (SLAPP)*, 7 PACE ENVTL. L. REV. 33, 42 (1989).

78. See Pring & Canan, *supra* note 75, at 953.

79. *Id.* at 952-53.

response, many state legislatures have filled the procedural void that case law has yet to address.<sup>80</sup>

In 1990, Washington became the first state to enact a statute that specifically dealt with SLAPP suits.<sup>81</sup> Within two years, California and New York followed Washington's lead and enacted legislation in response to their growing state SLAPP litigation.<sup>82</sup> Since the enactment of anti-SLAPP statutes in those three states, identification of SLAPP suits has intensified with many other states following suit.<sup>83</sup> To date, twenty-four states have enacted some sort of anti-SLAPP legislation since 1990, eight of those within the past five years.<sup>84</sup> In addition to the recent enactment of many state statutes, several states have already amended their current anti-SLAPP statutes to address loopholes and concerns identified in case law.<sup>85</sup>

The legislative approach to dealing with SLAPP suits varies from state to state, but several core provisions are common to most state laws.<sup>86</sup> Professors Canan and Pring, premier SLAPP suit scholars, explain that, for a legislative approach to effectively protect public participation in the government, it must pass a three-part test. First, it must cover "all public advocacy and

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80. See ARK. CODE ANN. §§ 16-63-501 to -508 (2006); DEL. CODE ANN. tit. 10, §§ 8136-8138; FLA. STAT. § 768.295 (2005); GA. CODE ANN. § 9-11-11.1 (2003); HAW. REV. STAT. § 634F (2005); IND. CODE §§ 34-7-7-1 to -10 (1998); LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MASS. GEN. LAWS ch. 231, § 59H; MINN. STAT. §§ 554.01 to .05 (2000); MO. REV. STAT. § 537.528 (Supp. 2006); NEB. REV. STAT. §§ 25-21-241 to -246; NEV. REV. STAT. §§ 41.635 to .670 (2005); N.M. STAT. §§ 38-2-9.1 to -9.2 (Supp. 2006); N.Y. C.P.L.R. 3211(g) (McKinney 2004); OR. REV. STAT. §§ 31.150 to .155 (2005); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997); TENN. CODE ANN. §§ 4-21-1001 to -1003; UTAH CODE ANN. §§ 78-58-101 to -105 (2003); WASH. REV. CODE §§ 4.24.500 to .520 (2005).

81. WASH. REV. CODE §§ 4.24.500 to .520. The statute was amended in 2002 to set forth clear dismissal rules. *Id.*

82. CAL. CIV. PROC. CODE § 425.16 (West 2006); N.Y. C.P.L.R. 3211(g) (establishing procedures for early dismissal and summary judgment in SLAPP cases).

83. For a listing of these states' statutes, see *supra* note 28.

84. For a state-by-state examination of the anti-SLAPP statutes and amendments, see California Anti-SLAPP Project, *supra* note 27. The most recent legislation was enacted by Arkansas, Missouri, and Pennsylvania in 2005; Maryland in 2004; and Hawaii, New Mexico, Oregon, and Utah in 2001.

85. See, e.g., CAL. CIV. PROC. CODE § 425.16 (amended to establish a sixty-day time limit for a motion to strike and to facilitate recovery of damages for SLAPP-back suits against filers); NEV. REV. STAT. §§ 41.635 to .670 (amended to expand immunity to any person who engages in a good faith communication in furtherance of the right to petition); WASH. REV. CODE §§ 4.24.500 to .520 (amended to set forth clear rules for early dismissal review).

86. Potter, *supra* note 21, at 10,856.

communications to government whether direct or indirect.”<sup>87</sup> Second, it must address all government forums, whether federal, state, local, legislative, executive, judicial, or the electorate.<sup>88</sup> Finally, the legislation must set out some mode for prevention and cure, such as effective early review and burden shifting to filers.<sup>89</sup> Most statutes address these elements with provisions that articulate a process for motions to dismiss, allow for expedition of the hearings for such motions, limit discovery requests until the judge rules on the motions, and provide for shifting attorney’s fees.<sup>90</sup> Other statutes, like Oklahoma’s, establish a policy point of upholding petition clause immunity, but fail Canan and Pring’s test by not covering all public advocacy or providing a mode for prevention and cure.<sup>91</sup>

### *III. Relaxing the First Amendment: Oklahoma’s Anti-SLAPP Statute and Interpretive Case Law*

Despite the growing legislative trend toward codifying procedural mechanisms to combat SLAPP suits, Oklahoma has yet to enact effective SLAPP suit legislation. The Oklahoma statute commonly referred to as the anti-SLAPP statute<sup>92</sup> was passed in 1981 and is markedly different from other states’ anti-SLAPP laws.<sup>93</sup> Passed nine years before the first SLAPP-specific

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87. PRING & CANAN, *supra* note 2, at 189.

88. *Id.*

89. *Id.*

90. Potter, *supra* note 21, at 10,856; *see also* PRING & CANAN, *supra* note 2, at 201-07. States that include a model approach for prevention and cure include California, New York, and Minnesota. CAL. CIV. PROC. CODE § 425.16; N.Y. C.P.L.R. 3211(g) (McKinney 2004); MINN. STAT. §§ 554.01 to .05 (2000).

91. Oklahoma’s statute fails part one of the test by only preventing libel actions and not addressing other common SLAPP suit claims such as business torts, civil rights, conspiracy, and malicious prosecution. 12 OKLA. STAT. § 1443.1 (2001). The statute also fails part three by not enacting any sort of cure or court review process. *Id.* Other states with inadequate provisions to “cure” SLAPP suits include Florida, Pennsylvania, and Tennessee. *See* FLA. STAT. § 768.295 (2005); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000); TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005).

92. *See, e.g.*, California Anti-SLAPP Project, *supra* note 27; Sheri Coover, *Pennsylvania Anti-SLAPP Legislation*, 12 PENN ST. ENVTL. L. REV. 263, 277 (2004); Potter, *supra* note 21, at 10,855-56 n.63; Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. REV. 217, 217 n.2 (2002); Noah P. Peeters, Note, *Don’t Raise That Hand: Why, Under Georgia’s Anti-SLAPP Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 38 GA. L. REV. 769, 782 n.96 (2004); Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 572 n.247 (2002).

93. 12 OKLA. STAT. § 1443.1.

statute, Oklahoma's law protects defendants from defamation suits but neither addresses nor protects against the more general phenomenon of SLAPP suits.<sup>94</sup> Nevertheless, while limiting the statute's applicability to defamation cases, Oklahoma courts liberally apply the terms in the statute in order to promote the First Amendment Right to Petition.

*A. Oklahoma's Statutory SLAPP Suit Protections*

Oklahoma's anti-SLAPP statute, section 1443.1 of title 12, provides immunity from libel suits upon certain conditions, but does not address other common SLAPP suit causes of action.<sup>95</sup> The statute states that, with the exception of falsely imputing a crime to a public officer, statements made in or about a legislative, judicial, or other proceeding authorized by law shall not be punishable as libel.<sup>96</sup> Further, the statute protects criticism of the official acts of public officers.<sup>97</sup> For a plaintiff to recover in a libel or defamation suit, the public official must show actual knowledge of probable falsity prior to the publication.<sup>98</sup> Short of a deliberate factual lie, a plaintiff may not sue a defendant for defamation even if there were serious doubts as to truth.<sup>99</sup>

In addition to the immunity defense in section 1443.1, other sections of the Oklahoma statute may also apply to SLAPP suit litigation. Oklahoma's statutes authorize a motion to dismiss for failure to state a claim,<sup>100</sup> and possible sanctions for filing frivolous lawsuits.<sup>101</sup> Further, section 2011 of title 12 allows judges to shift court costs and attorney fees.<sup>102</sup> Unfortunately, these sections, like section 1443.1, are reactionary and do little to address the unique problems associated with SLAPP suits. While these sections provide at least

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* Three Oklahoma cases have addressed the issue of what may be considered an act by a public official. *Jurkowski v. Crawley*, 1981 OK 110, 637 P.2d 56 (holding that an accusation about a police officer's misconduct at a prior job is protected because the accusations are relevant to the officer's fitness for office); *Winters v. Morgan*, 1978 OK 24, 576 P.2d 1152 (holding that statements falsely imputing a crime to an officer are not protected despite being about the officer's official duties); *Wilson v. City of Tulsa*, 2004 OK CIV APP 44, 91 P.3d 673 (holding that a press release alleging theft as a reason for a police officer's discharge was not defamatory and was not made through malice because it was made in the furtherance of the police chief's official duty).

98. *Jurkowski*, ¶ 10, 637 P.2d at 60; *Wilson*, ¶ 22, 91 P.3d at 680; *see also* *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Gaylord Entm't Co. v. Thompson*, 1998 OK 30, ¶ 19, 958 P.2d 128, 141-42.

99. *Jurkowski*, 1981 OK 110, ¶ 13, 637 P.2d at 61.

100. 12 OKLA. STAT. § 2012 (2001).

101. *Id.* § 2011.

102. *Id.*

some minimal remedy to targets of SLAPP suits, they are often burdensome for the target to pursue and do little to discourage filers from bringing SLAPP suits in the first place.<sup>103</sup>

### *B. Judicial Interpretation*

SLAPP suit targets in Oklahoma often view the immunity defense in section 1443.1 as the easiest method to dispose of SLAPP suits.<sup>104</sup> Oklahoma courts recognize the importance of this immunity and have applied the statute generously. The Oklahoma judiciary has articulated a policy concern for protecting petitioning activities,<sup>105</sup> and has applied this policy by liberally defining the statutory requirements of section 1443.1 so that the immunity is available in a wide variety of situations.

#### *1. Oklahoma's Policy Favoring Citizen Involvement in Public Affairs*

The Oklahoma Court of Civil Appeals has repeatedly noted that citizens should be allowed to question actions by public entities. For example, in *White v. Basnett*, a homeowner filed a complaint with the police department and the FBI alleging that a police officer was abusive.<sup>106</sup> In response, the police officer sued the homeowner for defamation.<sup>107</sup> The court found that the public policy of preventing citizens from being fearful of filing a legitimate complaint justified the citizen's absolute immunity from the defamation suit.<sup>108</sup>

Similarly, the court in *Burkett v. Tal* addressed the public policy concerns of protecting communications made in a legislative or judicial proceeding.<sup>109</sup> In *Burkett*, a group of taxpayers filed a written demand with the city clerk of Oklahoma City alleging illegal appropriation of taxpayer funds for expenditures benefitting the private company, Bass Pro Outdoor World, L.L.C.<sup>110</sup> The city attorney of Oklahoma City sued the group of taxpayers for libel in response to their allegations.<sup>111</sup> The court held the allegations of illegal appropriation privileged under the statute because the written demand was a filing required by law.<sup>112</sup> Further, the court noted that the taxpayers deserved protection from a libel suit because the statute's purpose was to keep the

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103. Cosentino, *supra* note 12, at 414-21.

104. 12 OKLA. STAT. § 1443.1.

105. *White v. Basnett*, 1985 OK CIV APP 10, ¶ 11, 700 P.2d 666, 668.

106. *Id.* at 667.

107. *Id.*

108. *Id.* at 668.

109. 2004 OK CIV APP 57, ¶ 10, 94 P.3d 114, 117.

110. *Id.* at 115.

111. *Id.* at 116.

112. *Id.* at 117.

“paths which lead to the ascertainment of truth . . . as free and unobstructed as possible.”<sup>113</sup>

The court in *White* and *Burkett* protected citizens from retaliatory defamation suits in order to encourage free speech and petitioning. Other decisions uphold that policy by broadly defining section 1443.1. Courts broadly construe the statute’s requirement that statements be “in or about judicial proceedings,” and liberally define the statutory phrase, “other proceedings authorized by law.”

## 2. Oklahoma’s Definition of “Judicial Proceedings”

To encourage witnesses to speak freely without the fear of liability, Oklahoma courts liberally construe which statements are “in” a judicial proceeding, which proceedings are “judicial,” and which statements are “about” a judicial proceeding.<sup>114</sup> Oklahoma courts recognize that a statement may be “in” a judicial proceeding if made during or prior to a judicial proceeding, as long as the statement in some way relates to the proceeding.<sup>115</sup> Statements may be made in an affidavit,<sup>116</sup> a pleading,<sup>117</sup> a physician’s report attached to a pleading,<sup>118</sup> and a divorce petition.<sup>119</sup> The courts also widely construe “judicial proceeding” by upholding the immunity in hearings before the University Board of Regents<sup>120</sup> and complaints made to a city police court.<sup>121</sup> Likewise, Oklahoma courts protect statements made about a judicial proceeding via public mediums such as television or newspapers.<sup>122</sup> For example, in *Metcalf v. KFOR-TV*, a physician sued a television station and reporter for statements made on television about pending lawsuits.<sup>123</sup> The district court held the station and reporter were immune from suit for

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113. *Id.*; see *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983); *Cooper v. Parker-Hughey*, 1995 OK 35, ¶ 12, 894 P.2d 1096, 1098-99.

114. *Joplin v. Sw. Bell Tel. Co.*, 753 F.2d 808, 810 (10th Cir. 1983); *State ex rel. Okla. Bar Ass’n v. Dobbs*, 2004 OK 46, ¶ 23, 94 P.3d 31, 45.

115. *Kirschstein v. Haynes*, 1990 OK 8, ¶ 12, 788 P.2d 941, 948; *Hammett v. Hunter*, 1941 OK 253, ¶ 7, 117 P.2d 511, 512.

116. *Kirschstein*, ¶ 21, 788 P.2d at 951.

117. *Bennett v. McKibben*, 1996 OK CIV APP 22, 915 P.2d 400.

118. *Pac. Employers Ins. Co. v. Adams*, 1946 OK 86, 168 P.2d 105.

119. *Pryor v. Findley*, 1997 OK CIV APP 74, 949 P.2d 1218.

120. *Sanford v. Howard*, 1939 OK 343, 95 P.2d 644; *Dickerson v. Crozier*, 1927 OK 401, 261 P. 545.

121. *Dickerson*, 1927 OK 401, 261 P. 545.

122. *Metcalf v. KFOR-TV*, 828 F. Supp. 1515 (W.D. Okla. 1992); *McGhee v. Newspaper Holdings*, 2005 OK CIV APP 41, 115 P.3d 896; see also *Magnusson v. N.Y. Times Co.*, 2004 OK 53, ¶ 10, 98 P.3d 1070, 1076-77.

123. 828 F. Supp. at 1526.



statements that jury selection had begun, that the physician had his license revoked, and comments regarding details in other lawsuits against the physician because they were fair and true reports of judicial and quasi-judicial proceedings.<sup>124</sup>

### 3. Oklahoma's Definition of "Other Proceedings Authorized by Law"

In addition to statements made in and about judicial proceedings, Oklahoma's statute protects fair and true reports of any legislative proceeding or other proceeding authorized by law.<sup>125</sup> The Oklahoma Supreme Court stated in *Gaylord Entertainment Co. v. Thompson* that political speech must be "more jealously and intensely guarded than any other form of permissible expression."<sup>126</sup> To that end, Oklahoma courts recognize an expansive immunity for speech in contexts outside the judiciary, but relevant to the political process. Justice Brandeis stated in *Whitney v. California*, "Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."<sup>127</sup> In *Gaylord*, Justice Opala added, "This, we might add, is a fundamental principle of the Oklahoma government as well."<sup>128</sup>

To encourage political activity and public discussion, the *Gaylord* court applied section 1443.1 to protect political speech from retaliatory defamation suits before the targets even filed an initiative petition.<sup>129</sup> The protected speech occurred during the launch of an initiative drive, which, the court held, was an "essential part of the political process designed ultimately to impact the government."<sup>130</sup> As with communication made in and about judicial proceedings, the court held that as long as there was a rational connection between the comment and the quest for political change, then the statute protected the communication.<sup>131</sup>

In addition to speech intended to influence the legislature, section 1443.1 protects speech directed towards a variety of other government offices. In *Metcalf v. KFOR-TV*, the court not only addressed whether the statute protected statements made about a judicial proceeding, but also statements

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124. *Id.* at 1528.

125. 12 OKLA. STAT. § 1443.1 (2001).

126. 1998 OK 30, ¶ 17, 958 P.2d 128, 141.

127. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

128. ¶ 17, 958 P.2d 128, 141 n.41.

129. *Id.*

130. *Id.* at 140 (emphasis omitted).

131. *Id.*

about other proceedings authorized by law.<sup>132</sup> The district court held that the statute protected statements made on television and shown to the Oklahoma State Board of Medical Licensure and Supervision in a hearing for the physician to become board certified in cosmetic breast surgery.<sup>133</sup> The court stated that the board hearing was a “proceeding authorized by law,” and, thus, the statements were immune from suit.<sup>134</sup> Similarly, an Oklahoma district court upheld immunity for a statement made to the Oklahoma Employment Commission,<sup>135</sup> and the Oklahoma Court of Civil Appeals likewise protected statements made in a disciplinary proceeding before the Oklahoma State Board of Dentistry.<sup>136</sup> Although section 1443.1 limits protection of statements to defamation actions only, Oklahoma courts liberally construe the statute’s applicability to ensure that any statement reasonably intended to have an effect on a political or judicial action receives that immunity.

#### *IV. SLAPPING Back: Analysis of Oklahoma’s Statute and Call for Change*

Oklahoma’s judiciary gives section 1443.1 strength by applying it to statements reasonably related to communication with a governmental body. Unfortunately, despite this expansive reading of the statute, targets of SLAPP suits still receive little protection in Oklahoma. Oklahoma’s statute is ineffective because its narrow scope limits its applicability to a cause of action for libel, and it lacks an effective court review process. Like the *Noerr-Pennington* Doctrine, the Oklahoma statute merely provides a defense once the parties get to trial. Consequently, the targets of SLAPP suits must expend valuable time and resources getting to that point, which in itself is often enough to chill petitioning activity. Oklahoma’s legislature should amend the statute to meet the three-part test suggested by scholars Canan and Pring. Further, the legislature should work to align the statute more closely with other states’ SLAPP suit remedies such as California’s comprehensive anti-SLAPP legislation.

##### *A. Narrow Scope*

Regardless of how broad the Oklahoma judiciary defines the terms in section 1443.1, the statute remains strictly limited to defamation cases. Defamation, however, is only one potential cause of action in which a SLAPP suit may appear. Oklahoma’s statute fails the first prong of Canan and Pring’s

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132. 828 F. Supp. 1515, 1527 (W.D. Okla. 1992).

133. *Id.*

134. *Id.*

135. *Griffith v. Sw. Bell Tel. Co.*, 428 F. Supp. 284, 286 (W.D. Okla. 1976).

136. *Johnson v. KFOR*, 2000 OK CIV APP 64, ¶ 3, 6 P.3d 1067, 1069.

test because it does not cover all public advocacy and communications to the government.<sup>137</sup> The statute only applies if a SLAPP filer camouflages a claim using a defamation cause of action; SLAPP suits, however, frequently appear in other causes of action such as business torts, conspiracy, civil rights claims, abuse of process, and malicious prosecution.<sup>138</sup> As long as SLAPP suit filers avoid defamation and instead utilize one of the other common causes of action, SLAPP suit targets have little statutory protection against the harmful and often chilling attacks on the right to petition.

To address the problems inherent in the statute's narrow scope, the Oklahoma legislature should consider updating the statute to conform to California and other states' anti-SLAPP protections. A remarkable twenty-three states, every state with an anti-SLAPP statute except Oklahoma, broadly cover any civil action<sup>139</sup> and an updated Oklahoma statute should similarly acknowledge SLAPP suits beyond the boundaries of libel.<sup>140</sup> An anti-SLAPP statute will only provide sufficient protection for targets of SLAPP suits by focusing on the actual attack on the right to petition, not the superficial cause of action.

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137. PRING & CANAN, *supra* note 2, at 189.

138. *Id.* at 191.

139. While other states' statutes are not restricted to a particular cause of action, some states do impose certain limitations. For example, Pennsylvania's statute only applies to petitions for environmental issues. 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000). Rhode Island specifies that the lawsuit must not be a "sham." R.I. GEN. LAWS §§ 9-33-1 to -4 (1997). Arkansas, Delaware, Maine, Massachusetts, Pennsylvania, and Tennessee withhold immunity from statements that are made with knowledge of falsity. ARK. CODE ANN. §§ 16-63-501 to -508 (2006); DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MASS. GEN. LAWS ch. 231, § 59H (2000); 27 PA. CONS. STAT. §§ 7707, 8301-8305; TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005). Arkansas and Nevada impose a "good faith" restriction. ARK. CODE ANN. §§ 16-63-501 to -508; NEV. REV. STAT. §§ 41.635 to .670 (2005). A "good faith" restriction is not recommended based on the Supreme Court's decision in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). See PRING & CANAN, *supra* note 2, at 193. That decision held that the Constitution protects any advocacy to government that is designed to have some effect on government decision-making, regardless of the content or motives. *Columbia*, 499 U.S. at 380.

140. See, e.g., PRING & CANAN, *supra* note 2, at 203. Professors Pring and Canan provide a sample provision made from using effective elements of the Supreme Court's *Omni* decision and California, New York, and Minnesota's statutes. *Id.* The sample provision states, in part, "Acts in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the process of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result, or outcome." *Id.*

*B. Lack of an Effective Court Review Process*

Like the statute's narrow scope, the lack of an effective court review process renders Oklahoma's statute inadequate to combat SLAPP suits and their ill effects. Without procedural mechanisms to prevent or cure SLAPP suits in their infancy, the statute fails the third prong of Canan and Pring's test.<sup>141</sup> Due to the costs and anxiety associated with lawsuits, lengthy SLAPP suits discourage targets from continuing their petitioning activities and intimidate future petitioners for fear of similar retaliation.<sup>142</sup> Moreover, prolonged suits often cause support for the original issues to wane, rendering the petitioning activities futile.<sup>143</sup> Implementing procedures that allow for quick dispositions of SLAPP suits while discouraging future suits can mitigate many of these ill effects.<sup>144</sup> Unfortunately, Oklahoma's statute does not provide a method for early review and dismissal, and is therefore inadequate to protect petitioning activity.

In addition to Oklahoma's anti-SLAPP statute, other statutory mechanisms for combating frivolous suits likewise fail to establish adequate protection for targets. A motion to dismiss for failure to state a claim generally proves ineffective as a remedy because filers can easily frame petitioning grievances in the form of legitimate tort claims.<sup>145</sup> Further, targets must still spend considerable time and money for pre-trial practice and discovery, and even if the court grants the motion, dismissals do little to deter future SLAPP suits.<sup>146</sup> Similarly, motions for sanctions and shifting of attorney fees often increase total litigation and do little to discourage suing in the first place.<sup>147</sup> Motions such as these may be difficult for targets to invoke and occur too late in the litigation process to prevent the chill on petitioning.<sup>148</sup> Reactionary solutions may effectively vindicate defendants in ordinary lawsuits, but their impact is minimal when the purpose of the suit is to intimidate targets through enormous

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141. PRING & CANAN, *supra* note 2, at 189 ("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.").

142. *See* PRING & CANAN, *supra* note 2, at 10-11; *see also* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 515 (1988).

143. *See generally* Canan & Pring, *supra* note 142, at 515-16; PRING & CANAN, *supra* note 2, at 10-11; Ralph Michael Stein, *SLAPP Suits: A Slap at the First Amendment*, 7 PACE ENVTL. L. REV. 45, 53.

144. Cosentino, *supra* note 12, at 403.

145. *Id.* at 415.

146. *Id.*

147. *Id.* at 414-21.

148. *Id.* at 421.

court costs and time commitments.<sup>149</sup> An effective remedy must go beyond traditional procedures to address the problems unique to the growing SLAPP suit phenomenon.

Using California's anti-SLAPP statute as a guide, the Oklahoma legislature should provide citizens more protection from SLAPP suits by implementing procedures to establish an adequate court review process. To cure a SLAPP suit with as little impact on petitioning activity as possible, an effective statute should include a special motion to dismiss, an articulable burden of proof for the filer that may include a requirement for more specificity in the pleading, suspended discovery, and an award of costs to the successfully moving party. To prevent future SLAPP suits, the statute should include a specific authorization for serious penalties and accompanying SLAPP-back suits. Together, these elements provide a quick and cost-effective escape route for targets of SLAPP suits and may even discourage filers from attacking the target's First Amendment Right to Petition in the future.

### *1. Curing the SLAPP suit*

The procedures for curing SLAPP suits are the most important elements in combating their ill effects and hinge on an early review process.<sup>150</sup> Courts should treat special motions to dismiss as final summary judgment motions with a time period appropriate for expedited motions.<sup>151</sup> As with typical motions for summary judgment, if a trial court denies the motion or fails to rule in a speedy fashion, then a moving party should have a right to an expedited appeal.<sup>152</sup> Further, all discovery should be stayed pending a decision

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149. See *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999) (addressing California's anti-SLAPP statute in light of the unique goals of SLAPP filers as opposed to ordinary plaintiffs); see also Stein, *supra* note 143, at 55 (“[V]irtually always, the SLAPP plaintiff has no desire to allow the litigation to proceed to the point where *Noerr-Pennington*, or any other speech and petition-protectionist doctrine can be applied.”).

150. *Okun v. Superior Court*, 175 Cal. Rptr. 157, 169 (Cal. Ct. App. 1981) (Mosk, J., dissenting) (“In the preservation of the free exercise of speech, writing and the political function, the early termination of [the] lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process.”).

151. See, e.g., ARK. CODE ANN. §§ 16-63-501 to -508 (2006); CAL. CIV. PROC. CODE § 425.16 (West 2006); GA. CODE ANN. § 9-11-11.1 (2003); HAW. REV. STAT. § 634F (2005); IND. CODE §§ 34-7-7-1 to -10 (1998); LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MASS. GEN. LAWS ch. 231, § 59H (2000); MO. REV. STAT. § 537.528 (Supp. 2006); NEV. REV. STAT. §§ 41.635 to .670 (2005); N.M. STAT. §§ 38-2-9.1 to -9.2 (Supp. 2006); OR. REV. STAT. §§ 31.150 to .155 (2005); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997).

152. See, e.g., ARK. CODE ANN. § 16-63-507 (stating that a hearing on a special motion to dismiss shall not be conducted more than thirty days after service); MO. REV. STAT. § 537.528 (stating that a motion shall be “considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary

on the motion and appeals.<sup>153</sup> A method for early review and a stay of discovery greatly reduces the time commitment and the financial resources needed to combat the SLAPP suits, thereby lessening the chill effect on petitioning activity.

To lessen targets' involvement in SLAPP suits, filers should bear the burden to prove that the SLAPP suits are legitimate claims.<sup>154</sup> Because the suits are attacks on the Right to Petition, requiring targets to disprove the suits' legitimacy places the targets in a cumbersome and often unjustified position of defending their constitutional rights. A burden of proof on filers aligns with the goals of anti-SLAPP statutes in that it alleviates the time and effort required to defend frivolous suits, time and effort that could otherwise be spent focusing on the petitioning activity.<sup>155</sup> States employing this burden shifting often require targets to initiate the motion to dismiss, stating that a suit is an attack on the target's First Amendment rights, after which the filers must prove the claim's legitimacy.<sup>156</sup>

While most states with an anti-SLAPP statute agree that the filer should bear the burden of proof,<sup>157</sup> once the burden is set, states differ as to which standard the courts should use in ruling on the motion to dismiss. In California, for example, the statute requires the filer to establish a *probability*

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expense of litigation”).

153. Fifteen states include a provision for a stay of discovery. ARK. CODE ANN. §§ 16-63-501 to -508; CAL. CIV. PROC. CODE § 425.16; GA. CODE ANN. § 9-11-11.1; HAW. REV. STAT. § 634F; IND. CODE §§ 34-7-7-1 to -10; LA. CODE CIV. PROC. ANN. art. 971; ME. REV. STAT. ANN. tit. 14, § 556; MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MINN. STAT. §§ 554.01 to .05 (2000); MO. REV. STAT. § 537.528; NEV. REV. STAT. §§ 41.635 to .670; OR. REV. STAT. §§ 31.150 to .155; 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000); R.I. GEN. LAWS §§ 9-33-1 to -4; UTAH CODE ANN. §§ 78-58-101 to -105 (2003).

154. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (stating that when reviewing a special motion to strike, the plaintiff must establish that there is a probability the plaintiff will prevail on the claim); MASS. GEN. LAWS ch. 231, § 59H (stating that the court should grant a special motion to dismiss unless the filer shows that the petition was devoid of any reasonable factual support or arguable basis in law and the petitioning acts caused actual injury to the responding party).

155. Canan, *supra* note 19, at 30.

156. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (requiring the target to initiate the motion to dismiss and the filer to assert that the claim is proper, the act in question is not privileged, and the suit was not meant to suppress speech); N.Y. C.P.L.R. 3211(g) (McKinney 2004) (requiring the target to prove a petitioning activity and the filer, in turn, to prove there is a substantial basis in fact and law for the suit).

157. *See* ARK. CODE ANN. §§ 16-63-501 to -508; CAL. CIV. PROC. CODE § 425.16; DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); GA. CODE ANN. § 9-11-11.1; HAW. REV. STAT. § 634F; LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556; MASS. GEN. LAWS ch. 231, § 59H; MINN. STAT. §§ 554.01 to .05; NEB. REV. STAT. §§ 25-21-241 to -246 (1995); N.Y. C.P.L.R. 3211(g); 12 OKLA. STAT. § 1443.1 (2001); OR. REV. STAT. §§ 31.150 to .155.

that he or she will prevail on the claim.<sup>158</sup> Under this standard, the court must weigh the evidence presented by both sides and determine if the plaintiff is more likely than not to prevail at trial.<sup>159</sup>

Opponents of this standard argue that it is unconstitutional because a special motion to dismiss with a “more likely than not” standard circumvents the right to a jury trial.<sup>160</sup> In the case of a SLAPP suit, the fundamental federal and state constitutional rights of petition and speech conflict with the state right to a jury trial;<sup>161</sup> however, when two constitutional rights conflict, legislatures have the power to balance these rights.<sup>162</sup> As Mark Goldowitz, the director of the California Anti-SLAPP Project noted, California’s anti-SLAPP statute strikes that balance because “there is no constitutional right to a jury trial of a lawsuit that violates the First Amendment.”<sup>163</sup> Moreover, many courts routinely adjudicate cases in pre-trial motions.<sup>164</sup> Currently, the legislatures in California, Hawaii, Louisiana, and Oregon have all enacted statutes using the probability standard, and, like traditional motions for summary judgment, courts have not deemed the standard unconstitutional.<sup>165</sup>

In addition to the probability standard, some states require courts to examine the special motion to dismiss based on the standard first articulated in the Colorado Supreme Court decision of *Protect Our Mountain Environment v. District Court*.<sup>166</sup> Like California’s probability approach, this standard also shifts the burden of proof to the filer.<sup>167</sup> Further, the filer must prove that the target’s petitioning was devoid of any reasonable factual support or any arguable basis in law, and that the target’s petitioning activities caused actual injury to the filer.<sup>168</sup> This approach puts the focus on the target’s petitioning activities rather than the filer’s suit.<sup>169</sup> Thus far, this judicial

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158. CAL. CIV. PROC. CODE § 425.16.

159. *Id.*

160. *See, e.g.*, Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1015 (N.H. 1994) (advising the New Hampshire legislature that the proposed anti-SLAPP legislation, modeled off of California’s “probability” standard was unconstitutional because of an expansive view of New Hampshire’s right to a jury trial).

161. Mark Goldowitz, *The Practitioner: Recent Appellate Case Upholds California’s Anti-SLAPP Law*, L.A. DAILY J., Sept. 27, 1994, at 7.

162. Opinion of the Justices, 641 A.2d at 1015; PRING & CANAN, *supra* note 2, at 19.

163. Goldowitz, *supra* note 161, at 7.

164. 10 CYCLOPEDIA OF FEDERAL PROCEDURE § 35.19.10, at 239 (3d ed. 1951).

165. CAL. CIV. PROC. CODE § 425.16 (West 2006); HAW. REV. STAT. § 634F (2005); LA. CODE CIV. PROC. ANN. art. 971 (2000); OR. REV. STAT. §§ 31.150 to .155 (2005).

166. *Protect Our Mountain Env’t v. District Court*, 677 P.2d 1361 (Colo. 1984).

167. *Id.* at 1369.

168. *Id.*

169. PRING & CANAN, *supra* note 2, at 200.

doctrine has been effective in Colorado, and several other states have incorporated this standard, at least in part, into anti-SLAPP statutes.<sup>170</sup>

One potential weakness of the *Mountain Environment* approach results when judges are lenient with filers who assert that there are certain facts at issue that require a trial.<sup>171</sup> Generally, judges only dismiss a case if the facts are either not decisive or not in dispute.<sup>172</sup> In a SLAPP suit, filers argue that subjective terms such as “truth,” “intent,” “motive,” and “good faith,” are at issue and, therefore, require examination at trial.<sup>173</sup> Even if a case does not proceed to trial, this tactic successfully chills SLAPP suits by prolonging the suit through discovery.<sup>174</sup> While filers commonly argue that a trial is needed to ascertain certain facts, this strategy should nevertheless be ineffective if an alert judge recognizes that the only facts at issue are related to the Petition Clause and petitioning activity and, regardless of intent, should not be disputable or open to discovery.<sup>175</sup>

To mitigate the potential problem of opening up a “fact quagmire” using the substantive test from *Mountain Environment*, a third and perhaps more effective standard for review comes from the Supreme Court’s decision in *Columbia v. Omni Outdoor Advertising, Inc.*<sup>176</sup> According to the *Omni* decision, any activity aimed at achieving an actual government decision, result, or outcome receives immunity from suit.<sup>177</sup> In *Omni*, the Court held that motives such as bad faith or unreasonable petitioning are irrelevant because the Constitution protects *any* effort to influence public officials, regardless of intent or purpose.<sup>178</sup>

Three years after the Supreme Court’s *Omni* decision, Minnesota became the first state to enact an anti-SLAPP statute using this broad and straightforward standard.<sup>179</sup> Minnesota’s statute provides immunity for any “lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action.”<sup>180</sup> Under this simplified approach,

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170. See, e.g., DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); GA. CODE ANN. § 9-11-11.1 (2003); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MASS. GEN. LAWS ch. 231, § 59H (2000); NEB. REV. STAT. §§ 25-21-241 to -246 (1995); TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005).

171. PRING & CANAN, *supra* note 2, at 161.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 162.

176. *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).

177. *Id.*

178. *Id.*

179. MINN. STAT. §§ 554.01 to .05 (2000).

180. *Id.* § 554.03.



the filer bears the burden of proof, as in California's probability standard and the *Mountain Environment* standard, and the filer must prove that the petitioning was not aimed at procuring favorable government action.<sup>181</sup> Statutes like Minnesota's that articulate a standard of review based on the straight-forward *Omni* test align with the Supreme Court's policy goal of basing First Amendment protections on foundations other than the petitioner's subjective intent.<sup>182</sup>

Regardless of whether a statute contains a probability standard for the motion to dismiss or a standard developed from the *Mountain Environment* or *Omni* decisions, every state with an anti-SLAPP statute except Delaware, Tennessee, Oklahoma, and Washington, includes some form of early review.<sup>183</sup> If enacted properly, special motions to dismiss are quick, cheap methods to cut off harassing discovery and ensure quick closure.<sup>184</sup> Unfortunately, however, a few potential problems undermine their effectiveness.

Motions to dismiss are discretionary motions decided on bare facts presented in the pleadings.<sup>185</sup> Oklahoma, as a notice pleading state, only requires plaintiffs to include in the pleadings a "short and plain statement of the claim showing that the pleader is entitled to relief."<sup>186</sup> Judges frequently enact a "wait and see" approach to allow trials to sort out the facts and avoid the risk of dismissing legitimate suits.<sup>187</sup> If the pleadings fail to indicate

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181. *Id.*

182. See *Omni*, 499 U.S. at 380; *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."). Arkansas, Georgia, Indiana, Maine, Nevada, New York, Pennsylvania, Rhode Island, and Washington have enacted some form of the *Omni* standard, sometimes used in conjunction with the *Mountain Environment* standard. ARK. CODE ANN. §§ 16-63-501 to -508 (2006); GA. CODE ANN. § 9-11-11.1 (2003); IND. CODE §§ 34-7-7-1 to -10 (1998); ME. REV. STAT. ANN. tit. 14, § 556 (2003); NEV. REV. STAT. §§ 41.635 to .670 (2005); N.Y. C.P.L.R. 3211(g) (McKinney 2004); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2000); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997); WASH. REV. CODE §§ 4.24.500 to .520 (2005).

183. ARK. CODE ANN. §§ 16-63-501 to -508; CAL. CIV. PROC. CODE § 425.16 (West 2006); DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); FLA. STAT. § 768.295 (2005); GA. CODE ANN. § 9-11-11.1; HAW. REV. STAT. § 634F (2005); IND. CODE §§ 34-7-7-1 to -10; LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556; MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MASS. GEN. LAWS ch. 231, § 59H (2000); MINN. STAT. §§ 554.01 to .05; MO. REV. STAT. § 537.528 (Supp. 2006); NEB. REV. STAT. §§ 25-21-241 to -246 (1995); NEV. REV. STAT. §§ 41.635 to .670; N.M. STAT. §§ 38-2-9.1 to -9.2 (Supp. 2006); N.Y. C.P.L.R. 3211(g); OR. REV. STAT. §§ 31.150 to 155 (2005); 27 PA. CONS. STAT. §§ 7707, 8301-8305; R.I. GEN. LAWS §§ 9-33-1 to -4; TENN. CODE ANN. §§ 4-21-1001 to -1003 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2003); WASH. REV. CODE §§ 4.24.500 to .520.

184. PRING & CANAN, *supra* note 2, at 159.

185. *Id.* at 157.

186. 12 OKLA. STAT. § 2008 (2001).

187. *Id.*

whether the bases of the claims are petitioning activities, judges may be unlikely to dismiss. Further, motions to dismiss lose their effectiveness if judges dismisses without prejudice and permit filers leave to amend.<sup>188</sup> While it ordinarily may be reasonable to allow leaves to amend, in cases with constitutional issues at stake, filers simply cannot re-write the claims to avoid the constitutional issue.<sup>189</sup> In short, allowing leaves to amend in constitutional cases is a “dereliction of duty on the part of the judge.”<sup>190</sup>

Oklahoma’s legislature should address these problems by clearly articulating the statute’s goals to emphasize the need for quick disposal,<sup>191</sup> and by expressly providing that a motion to dismiss is a final judgment to prevent repetitive and harassing amendments.<sup>192</sup> Additionally, the Oklahoma legislature should address the minimal facts available in the pleadings by either requiring more specificity in pleadings or supplementing the pleadings with affidavits. For example, in Arkansas, filers must submit a written verification with the pleadings if the court can reasonably construe the claims as against petitioning activity.<sup>193</sup> The verification must state that the basis for

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188. PRING & CANAN, *supra* note 2, at 159.

189. *Id.*

190. *Id.* Judge Murphy of New York’s Appellate Division notably criticized a trial judge for denying a motion for summary judgment. *Immuno A.G. v. Moor-Jankowski*, 537 N.Y.S.2d 129, 137-38 (N.Y. App. Div. 1989). Judge Murphy stated:

The importance of summary adjudication in . . . [SLAPP] litigation cannot be overemphasized. [These] actions are notoriously expensive to defend, and, indeed, “The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.” . . . To unnecessarily delay the disposition of [such an] action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment Rights. . . .

That [the trial court judge] . . . was evidently reluctant to apply the ordinary summary judgment criteria . . . is regrettable. It is disturbing that the [filer] . . . succeeded in coercing . . . “substantial settlements” from all but one of the original defendants for the obvious reason that the costs of continuing to defend the action were prohibitive.

*Id.* (citations omitted).

191. *See, e.g.*, ARK. CODE ANN. §§ 16-63-501 to -508 (2006); CAL. CIV. PROC. CODE § 425.16 (West 2006); NEB. REV. STAT. § 25-21-241 (1995); N.M. STAT. § 38-2-9.1 (Supp. 2006); R.I. GEN. LAWS § 9-33-1 (1997); TENN. CODE ANN. § 4-21-1002 (2005); WASH. REV. CODE §§ 4.24.500 to .520 (2005).

192. *See, e.g.*, FLA. STAT. § 768.295 (2005) (providing that the court should grant *final judgment* in a dismissal action).

193. ARK. CODE ANN. § 16-63-505 (requiring verification for “any claim asserted against a person or entity arising from possible privileged communication or an act by that person or entity that could reasonably be construed as an act in furtherance of the right of free speech or

the claim is not a privileged communication and the claim is not for suppressing the right to petition.<sup>194</sup> California, on the other hand, considers supporting and opposing affidavits submitted with and in rebuttal to the motions to dismiss.<sup>195</sup> Under either approach, the court may acquire enough information about the suit to dismiss potential threats to the right to petition before discovery.

A special motion to dismiss is an important element the Oklahoma legislature should consider incorporating into Oklahoma's statute; however, that by itself is not enough to cure the SLAPP suit problem. An expeditious motion to dismiss alleviates the burden on the petitioner's time, but does not address the petitioner's financial burden. An effective anti-SLAPP statute should specify that the filer bear the costs of the suit upon dismissal. Currently, unlike every other state with an anti-SLAPP statute, Oklahoma's statute contains no such provision for cost shifting, even if the defendant successfully proves his or her actions were immune from suit.<sup>196</sup> Including a cost-shifting element would be consistent with section 2011 of title 12, which permits judges to make one side pay costs and attorney fees for improper or frivolous lawsuits.<sup>197</sup> If a judge dismisses a SLAPP suit on constitutional grounds, sanctions are appropriate under section 2011, but by making cost-shifting automatic in the anti-SLAPP statute, targets would not need to file an additional motion.

## 2. Preventing Future SLAPP Suits

Apart from curing SLAPP suits once initiated, legislatures should address how to prevent SLAPP suits from occurring. Part of an effective court review process includes a remedy to lessen the attractiveness of filing suit; in short, the suits should be less economically desirable.<sup>198</sup> Consider a situation where public opposition threatens a real estate development that the developer

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the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Arkansas in connection with an issue of public interest or concern"); *see also* GA. CODE ANN. § 9-11-11.1 (2003).

194. ARK. CODE ANN. § 16-63-505.

195. CAL. CIV. PROC. CODE § 425.16; *see also* FLA. STAT. § 768.295; IND. CODE § 34-7-7-9 (1998); LA. CODE CIV. PROC. ANN. art. 971 (2000); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MASS. GEN. LAWS ch. 231, § 59H (2000).

196. 12 OKLA. STAT. § 1443.1 (2001).

197. *Id.* § 2011.

198. According to one of the only comprehensive studies of SLAPP suits, Professors Canan and Pring examined 228 SLAPP suits and discovered that business or economically motivated categories made up 84% of SLAPP filings. Canan & Pring, *supra* note 142, at 511 tbl.I. Realistically, some SLAPP suits are motivated by other reasons such as reputation or vindication and may not be impacted by making the suits less economically attractive. *Id.*

estimates to be worth more than the potential costs of a lawsuit. It makes economic sense for the developer to silence the opposition's petitioning activity through a suit in order to protect the development. In response to the potential for repetitive and chilling lawsuits this situation creates, several states include provisions in their anti-SLAPP statutes that impose a fine or authorize a countersuit for damages (SLAPP-back suits).<sup>199</sup>

A fine for initiating SLAPP suits provides a quick and easy solution to help discourage future suits. SLAPP suits will continue as long as the suits remain more economically feasible than allowing the petitioning to continue; accordingly, a fine that makes SLAPP suits economically infeasible represents one of the most efficient ways to prevent them.<sup>200</sup> Oklahoma's legislature should include a provision in the anti-SLAPP statute authorizing courts to impose substantial fines above the traditional court costs.<sup>201</sup> This would encourage courts to focus on preventing future SLAPP suits rather than merely compensating a target's damage.

While a fine has the potential to significantly alter the economic feasibility of a SLAPP suit, legislatures should employ other forms of prevention as well. A judge may be reluctant to issue a fine or may set the dollar amount too low to offset the value of a business deal.<sup>202</sup> Legislatures should consider authorizing SLAPP-back suits, lawsuits filed by SLAPP targets against the original SLAPP filers, in conjunction with a court-awarded fine.<sup>203</sup> Like California, Oklahoma should include a provision in the anti-SLAPP statute granting prevailing targets a cause of action against SLAPP filers if a judge dismisses a SLAPP suit pursuant to a special motion to dismiss.<sup>204</sup> These lawsuits, based on claims for malicious prosecution, abuse of process, or civil

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199. ARK. CODE ANN. §§ 16-63-501 to -508; CAL. CIV. PROC. CODE § 425.16; DEL. CODE ANN. tit. 10, §§ 8136-8138 (2001); HAW. REV. STAT. § 634F (2005); MINN. STAT. §§ 554.01 to .05 (2000); NEV. REV. STAT. §§ 41.635 to .670 (2005); N.Y. C.P.L.R. 3211(g) (McKinney 2004); R.I. GEN. LAWS §§ 9-33-1 to -4 (1997); UTAH CODE ANN. §§ 78-58-101 to -105 (2003); WASH. REV. CODE §§ 4.24.500 to .520 (2005).

200. See Cosentino, *supra* note 12, at 410.

201. See ARK. CODE ANN. § 16-63-506; DEL. CODE ANN. tit. 10, § 8136; HAW. REV. STAT. § 634F-2; MINN. STAT. § 554.04; N.Y. C.P.L.R. 3211(g); R.I. GEN. LAWS § 9-33-2; UTAH CODE ANN. § 78-58-105; WASH. REV. CODE § 4.24.520. Rhode Island's anti-SLAPP statute, for example, states that in addition to costs and fees the court may also grant compensatory damages and punitive damages upon a showing that the suit was frivolous. R.I. GEN. LAWS §§ 9-33-2.

202. PRING & CANAN, *supra* note 2, at 162.

203. *Id.* at 168.

204. CAL. CIV. PROC. CODE § 425.18; NEV. REV. STAT. § 41.670; UTAH CODE ANN. § 78-58-105.

rights violations, have the potential to generate substantial awards, often as punitive damages.<sup>205</sup>

California has the most comprehensive SLAPP-back legislation, and, not surprisingly, some of the most successful SLAPP-back suits.<sup>206</sup> In one particularly successful SLAPP-back suit, a SLAPP target in 1988 won a thirteen million dollar verdict for three plaintiffs — three million for compensatory damages and ten million for punitive damages.<sup>207</sup> In that case, three local farmers in southern California supported a ballot proposition that would create a canal to pipe water from northern California southward.<sup>208</sup> A couple of the largest and richest corporate farmers adamantly opposed this proposition.<sup>209</sup> The corporate farmers, upset by a full-page newspaper advertisement the local farmers ran supporting the proposition and criticizing the corporate farmer's opposition, responded by slapping a \$2,500,000 libel suit on the farmers.<sup>210</sup> This suit caused the local farmers to immediately drop out of the publicity campaign along with other supporters and media outlets for fear of being included in the suit.<sup>211</sup> After a vigorous defense of the libel suit, the court eventually dismissed the SLAPP suit. The farmers immediately responded with a SLAPP-back suit.<sup>212</sup> Although the original suit and the SLAPP-back suit took eight years for discovery and trial, a jury decided that because the corporate farmers had such a high net worth, punitive damages of \$10,500,000 were in order to punish the filers.<sup>213</sup> This suit, like many others with similar results, shows that even though SLAPP-back suits may take several years to resolve, they are still a valuable strategy that has the potential to punish wealthy filers and deter future suits.<sup>214</sup>

After the onset of SLAPP-back suits in California, real estate developers, polluters, and public officials who previously may have SLAPPED opponents without hesitation are now thinking twice.<sup>215</sup> These suits are often successful in court, and juries tend to have a field day handing down substantial verdicts

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205. Robert I. McMurry & David H. Pierce, *Strategic Lawsuits Against Public Participation (SLAPPs): The Benefits and Risks*, in *Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation*, C750 ALI-ABA 823, 831 (1992).

206. CAL. CIV. PROC. CODE § 425.18.

207. Edmund Costantini, one of the expert witnesses in the case, provides a detailed discussion in a published article. Costantini & Nash, *supra* note 20, at 477-79.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. PRING & CANAN, *supra* note 2, at 169.

215. *Id.*

against filers.<sup>216</sup> Together with fines and sanctions, SLAPP-back suits play an important part of the court review process to help assuage the detrimental chilling effect to the First Amendment Right to Petition.

#### *V. Conclusion*

The objective of section 1443.1 of Oklahoma's statute is to safeguard citizens from attacks on their constitutional right to petition the government. The result, however, is a statute that provides a reactionary defense to a limited number of suits, and does nothing to protect a defendant's time and financial resources or prevent similar attacks in the future. The right to petition the government for a redress of grievances is one of the most fundamental liberties essential to an effective representative government and it deserves attention and protection from our legislature. Without adequate protections, ordinary citizens who seek to petition the government are at risk and often fall victim to lawsuits with the sole objective of oppressing current and future opposition. Nearly twenty-five years since its enactment, Oklahoma's statute is in critical need of an update to address the common and growing phenomenon of these lawsuits.

To combat the inadequacies of Oklahoma's statute, Oklahoma's legislature should include provisions to protect all public advocacies and provide remedies to cure the suit and prevent future suits. Filers often disguise suits against public participation using a variety of causes of action beyond defamation, and, like every other state with an anti-SLAPP statute, Oklahoma should expand immunity to public advocacy that results in any retaliatory lawsuit, regardless of the stated cause of action of that suit. Further, Oklahoma's statute should establish procedural mechanisms to lessen the stress on the target such as a special expedited motion to dismiss with the burden of proof shifted to the filer of the suit, suspended discovery, and an award of costs to the moving party. To prevent future suits, the statute should include a specific authorization for a serious penalty to the filer along with SLAPP-back suits. Modifying Oklahoma's statute lessens the detrimental chill effect that SLAPP suits have on public advocacy and better comports with the Petition Clause in the First Amendment.

*Laura Long*

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216. *Id.* (stating that in the 1980s and 1990s, juries have handed down verdicts of \$5,000,000, \$9,000,000, \$13,000,000, and \$86,000,000).