



Why We Need Federal Legislation To Protect Public Speech Online

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Policymakers should pass legislation to protect individuals from SLAPPs—strategic lawsuits against public participation—that silence public speech and hurt consumers.

Imagine that a patient has endured a terrible visit to the dentist. Disturbed by the ordeal, she goes online and posts a review, providing a factual account of her experience as a warning to future patients. Soon after, the patient receives a letter from the dentist's lawyer threatening legal action if she does not immediately take down the post. Scared that she may have done something wrong, and worried about the cost of going to court, the patient quickly deletes her review. Not only has this patient had her voice unfairly silenced, but many potential patients will not be able to benefit from her experience to choose a better dentist.

The type of lawsuit this patient is being threatened with has come to be known as a strategic lawsuit against public participation, or SLAPP, a term coined in the 1980s by two University of Denver law professors.¹ A SLAPP effectively censors public speech by invoking the court system to intimidate critics. Faced with the time and attorney's fees involved in defending against such a lawsuit, the easier path for a defendant often is to retract an unflattering statement about a merchant or service provider, even if the statement is true.

This paper provides an overview of the many ways in which SLAPPs are being used, and it explains how they undermine constitutional rights and harm the public interest. The paper then analyzes the existing patchwork of state-level legal protections against SLAPP claims and concludes it is insufficient. To remedy the problem, ITIF recommends that Congress pass a federal anti-SLAPP law that creates a baseline level of protection for citizens' basic rights of petition and free expression.

BROAD HARMS, INADEQUATE REMEDIES

There is no way to measure the exact scale of the SLAPP problem, partly because there are so many different forms the suits can take, all with at least a thin veneer of legitimacy. Common SLAPP claims include accusations of everything from defamation to business interference, and on to privacy- and intellectual-property violations. Sometimes such claims serve not just to silence criticism, but also to retaliate against business competitors, political opponents, or newspapers that have published negative stories about a business or official. The majority of SLAPPs are dismissed when they go to court or are appealed, and most of the rest settle out of court.² Even when defendants in SLAPPs prevail in court, they may still suffer financial or reputational damage from the litigation process. By discouraging participation in matters of public interest, including government proceedings, SLAPPs can deter people from exercising free speech and the right to petition, both of which are protected under the First Amendment to the U.S. Constitution.

SLAPPs also freeze out many of the wider economic and societal benefits that can result from the information-sharing they obstruct. For example, every day Internet users create millions of new posts on blogs, social networks, and e-commerce platforms to share their opinions and feedback with others, and the growth of these massive, unstructured data sets have created new opportunities to identify trends and patterns about human behavior and interactions.³ SLAPPs, or fear of SLAPPs, may discourage users from posting negative reviews on e-commerce websites, sharing critical feedback on social media, or candidly reviewing a health-care provider online. Over time, the absence of these critical voices may create significant gaps in the accuracy and completeness of the public data sets used by businesses, researchers, and government officials.⁴ For example, by using predictive analytics based on restaurant goers' online reviews, city health inspectors in Chicago are able to focus their in-person inspections on likely violators and improve public health.⁵ Similarly, public health officials in Chicago and New York City have begun analyzing social media data to identify possible instances of food poisoning.⁶ In other words, if individuals are reticent to accurately report negative information about businesses there will be much less competitive pressure in the marketplace to force businesses to improve the quality of their products and services. In this sense, shared information is a key tool in enabling the effective workings of Adam Smith's invisible hand.

To prevent misuse of the court system to silence criticism, many states have passed anti-SLAPP laws. Most of these laws to protect public participation give defendants the option to file a special motion to dismiss a SLAPP claim and recover costs and reasonable attorneys' fees. Such defendants must claim that their speech was public participation protected under the right to petition and free speech as outlined in the relevant state statute. By filing to have a case dismissed immediately and even to recover costs, the party being sued can avoid the time and expense of going to court. For example, a journalist who publishes an article about a local politician's recent scandalous behavior may quickly find himself the defendant in a defamation lawsuit. If his state has passed an applicable anti-SLAPP statute and everything in his article is true, the journalist may be able to head the entire suit off and avoid paying most of his attorney's fees by moving to dismiss the case. Anti-SLAPP laws do not diminish the ability of plaintiffs to bring lawsuits for legitimate

purposes, but they do diminish the appeal of filing frivolous cases that are meritless and only intended to silence critics.

Anti-SLAPP laws are not an altogether recent trend; some states have been legislating against this type of speech suppression since the early 1990s. Twenty-eight states, plus the District of Columbia, have passed some sort of anti-SLAPP legislation. Eighteen of them have passed or amended their statutes since 2000.⁷ Many other states have proposed but not passed anti-SLAPP laws or have strengthened free speech and the right to petition through court proceedings.⁸ While this is progress, the lack of anti-SLAPP laws in all states, as well as the variations in anti-SLAPP statutes from state to state leave many consumers exposed to the threat of a SLAPP. In fact, most states do not have anti-SLAPP statutes protecting their citizens from lawsuits triggered by a critical blog post about a business. This points to the need for federal action.

RESTRICTIONS ON FREEDOM OF EXPRESSION HARM CONSUMERS

The First Amendment to the Constitution protects freedom of religion and freedom of expression from government interference. Freedom of expression includes freedom of speech, freedom of the press, the right to peaceably assemble, and the right to petition the government for redress of grievances. Protected petitioning activity typically entails access to the court system or to any other branch of government; and speech in pursuit of government action involves lawsuits, petitions, complaints, and other requests.⁹

Some types of speech are not protected under the First Amendment: these include defamation, child pornography, certain categories of obscenities, and speech that jeopardizes other people's safety, such as shouting "Fire!" in a crowded theater. Defamation suits are also commonly used as a weapon in SLAPPs to chill free speech and the right to petition. In *New York Times v. Sullivan*, the United States Supreme Court established that public officials may recover damages for defamation only when they can prove "actual malice", defined as knowledge that the statement was "false or [made] with reckless disregard of whether it was false or not."¹⁰ A common-law defense for defamation, one that can be applied to speech about public officials or about private citizens or corporations, is the Doctrine of Fair Comment, which allows for honest expressions of opinion on matters of public interest.¹¹ Thus, both speech that is intended to prompt some government response and speech that is intended to contribute to public debate can be protected from spurious defamation lawsuits, as long as there is no actual malice. For example, in 2003, Barbara Streisand famously sued a photographer for posting a low-quality aerial photograph of the back of her Malibu estate among over 12,000 other photographs on the California Coastline Records Project website. The photographer's special motion to dismiss under California anti-SLAPP laws was granted because there was no intent to invade Streisand's privacy, and the photographs were in the public interest of recording environmental changes to the California coast.¹² Ironically, Streisand's SLAPP publicized the photo far more effectively than the website did.

In some states, First Amendment issues have emerged in contracts in the form of non-disparagement clauses. In the past, non-disparagement clauses, which often appear in negotiated settlement, employment, and sales agreements, have been interpreted in the

same way as any other negotiated contract clause.¹³ Like confidentiality or non-competition provisions, non-disparagement clauses protect the provision's drafter by restricting certain types of speech, in this case, negative public statements about the goods, services, or employment provided. Recent problems have emerged as non-disparagement clauses have become more and more prevalent in non-negotiated consumer contracts and even website terms and conditions. These clauses can be problematic because they prohibit negative speech without giving the speaker balancing opportunities to negotiate or refuse to accept the service. For example, if someone orders a coffee cup from a website, receives a broken cup, and is not satisfied with the company's response to his inquiries, he may decide to post a negative review of the website online. If the company has written a non-disparagement clause into the terms and conditions of either the sales contract or the website itself, mandating that customers do nothing to damage the reputation or services of the company, it may elect to sue the purchaser of the coffee cup for breach of contract due to his negative review, even if the review is accurate.

The owners of the website KlearGear.com were brought to Utah's federal district court over a non-disparagement clause on its website Terms of Sale, placed there "in an effort to ensure fair and honest public feedback."¹⁴ A couple who never received their order and left a negative review on the website Ripoff Report was contacted several years later by KlearGear with a demand for \$3,500 for violating the non-disparagement clause.¹⁵ The Utah court recently found in favor of the reviewers, awarding over \$300,000 in compensatory and punitive damages, but other consumers elsewhere may not have been so fortunate. As a result of this highly-publicized case, some states have begun enacting legislation to protect their citizens from non-negotiated non-disparagement clauses. For example, California recently passed a law prohibiting non-disparagement clauses in consumer goods or services contracts—unless they were knowingly and voluntarily negotiated.¹⁶

Even in states that uphold non-disparagement clauses, courts often utilize the freedom of expression's actual malice standard, taking into account the speaker's intent behind the disparagement and knowledge of whether or not his statements were false. A similar standard is also often used in anti-SLAPP statutes, so that some states require intent to effect governmental change in government petitioning activity or knowledge of falsity, if a statement was false, in petitioning and other speech activity.

Non-disparagement clauses on website terms of service and in other non-negotiable contracts thus preemptively serve similar functions to SLAPP suits: they attempt to prevent anyone bound by the contract from speaking out on matters of public concern in public fora. Although SLAPPs operate under defamation, business interference, and other torts theories, and non-disparagement suits operate under violation of contract theories, SLAPPs and non-disparagement clauses can limit freedom of expression in similar ways. A major purpose of reviews is to create an effective consumer feedback loop: consumers use a product or service, and then review it online or elsewhere, so that other consumers can take those reviews into consideration. The company can change its product or service in response by improving negative features and increasing positive features, and then consumers can review the improved product or service. Limiting reviews to only positive

ones, those that would not damage the company's reputation, significantly reduces the benefit of the consumer feedback loop for consumers, who lose access to accurate information; and for companies, who lose access to the opportunity to improve in response to feedback.¹⁷ Not only can these restrictions on speech discourage individuals from sharing information about a particular person or entity, they can create a chilling effect on online critics by stoking consumers' fears of sharing negative information online.

Companies use data-driven insights to gain important information about how to best meet the needs of their customers. These tools depend on accurate and complete information. For example, L.L. Bean purportedly investigates products that continually receive ratings of less than three stars. After a certain variety of L.L. Bean fitted sheets received a large volume of negative online reviews, the company found a manufacturing defect, took the sheets off the market, and offered 6,300 new sets to customers who had purchased the faulty variety.¹⁸ One e-commerce-solutions provider found that customers who saw a company response to a negative review were almost twice as likely to make a purchase as those who saw negative reviews without a company response; and overall opinion of the product became twice as positive.¹⁹ Thus, the opportunity to share honest reviews can benefit companies and service providers by offering a quality-control platform as well as consumers by offering an opportunity to air grievances and have them addressed.

In addition, accurate reviews improve the functioning of markets. Better information lets consumers make better choices. Some of those choices may result in some companies or service providers going out of business or losing business as potential customers learn of the poor quality of their products and services and opt to shop elsewhere. Allowing consumers to share both positive and negative comments creates a virtuous feedback cycle that puts competitive pressure on companies to produce higher-quality products and services for consumers.

COMPONENTS OF ANTI-SLAPP STATUTES

Anti-SLAPP statutes vary by state, but every anti-SLAPP statute emphasizes First Amendment protections of public participation in the processes of government, particularly the right to petition the government for redress of grievances.²⁰ Each also includes provisions protecting free speech more generally, which can take one of two forms. One form only protects free speech before federal, state, or local governmental bodies or officials, and speech otherwise intended to effect some specific governmental change. The more widely applicable form protects speech before government bodies as well as all free speech that relates to a matter of public concern, including speech made in a public forum and not necessarily intended to effect any particular governmental change. Examples of this broader scope of free speech include blog posts, product and service reviews, and written works such as newspaper editorials that criticize market goods or services.

Anti-SLAPP statutes contain a number of other key provisions, and which particular provisions the drafters select determine what type of speech is protected and how it is protected. For example, while every anti-SLAPP statute protects the right to petition and freedom of speech in some manner, only some states protect speech made in a public forum; and while every statute allows public participants to recover reasonable fees, some

also provide for punitive damages. Nine of the most important SLAPP provisions are described below:

Right to Petition

The right to petition the government for redress of grievances, which is included in every anti-SLAPP statute, is one of the oldest rights in the common-law system, dating back to a provision in the Magna Carta and enshrined in the First Amendment to the U.S. Constitution.²¹ The Supreme Court of the United States has interpreted this right to extend to speech before all departments of the government –legislative, judicial, executive, and administrative.²² A provision protecting the right to petition provides a strong Constitutional justification for an anti-SLAPP statute, but it only protects speech that qualifies as petitioning activity and that is made without actual malice, which is why every anti-SLAPP statute also justifies itself based on broader definitions of freedom of speech.

Freedom of Speech Before a Government Body

Every state statute but one also protects speech acts that qualify as freedom of speech before government bodies. This is usually phrased in terms of speech directed at legislatures, city councils, or government officials; statements made in court or other quasi-judiciary bodies; or requests for agency investigation. Some statutes define this type of speech more broadly by protecting other types of speech acts that still relate to issues under consideration by a governmental body. For example, letters to the editor opposing a pending piece of legislation or calling for the dismissal of a public official who is under investigation for corruption would likely also be protected.

Freedom of Speech in a Public Forum

Half of all state anti-SLAPP statutes explicitly protect an even broader category of freedom of speech by immunizing from liability speech acts made in a public forum or regarding an issue of public concern. Although this allows for speech about private individuals and companies regarding issues of public concern, this type of speech is not protected if actual malice can be proven.²³ This is one of the best-publicized provisions of recent anti-SLAPP legislation, because it protects much of citizens' increasingly common everyday speech online as in blog posts and reviews.

Actual Malice – Intent

Under certain conditions, defamatory statements may be protected by anti-SLAPP laws. One third of state anti-SLAPP statutes explicitly protect speech acts where the purpose of the speech was to influence governmental action or change. Anti-SLAPP statutes that protect this type of public participation protect speech that was intended to serve as petitioning, even if it was otherwise problematic because it contained inadvertent falsehoods. The U.S. Supreme Court has argued that even false statements add value to public debate, because they serve as contrasts to the truth.²⁴

Actual Malice – Knowledge

Just as SLAPPs use the law as a weapon against legitimate public participation, so too may some parties attempt to use anti-SLAPP laws to dismiss legitimate claims. For example, a party that writes an article about another person containing information that the party

knows is false may have clearly and intentionally defamed that other person. Provisions requiring that a public participant's speech act not be knowingly or maliciously false or so obviously false that it was unreasonable for the participant not to know it was false protect anti-SLAPP statutes from being misused. The standard for malicious falsehoods is typically the actual malice standard the Supreme Court set out in *New York Times v. Sullivan*. Federal legislation should incorporate this standard.

Fee Recovery

Most state anti-SLAPP statutes allow public participants who prevail in a motion for dismissal to recover both reasonable attorneys' fees and other litigation costs. This is important because the expense of litigation and threatened damages is often the main factor encouraging public participants to simply settle and avoid going to court, even when their speech was protected public participation.

Expeditious Docket Advancement

All but five state anti-SLAPP statutes require courts to advance a motion for dismissal of an action against an exercise of public participation along the docket as soon as practicable, often within 30 days of filing. These provisions protect public participants from the time-wasting effects of SLAPPs by providing public participants with closure before the proceeding even begins. Coupled with fee recovery, expeditious docket advancement provisions forestall the retaliatory time- and money-draining goals of SLAPPs by halting proceedings as soon as possible and compensating public participants for the money they had already spent.

SLAPP-Backs

SLAPP-back provisions arise from common-law claims of misuse of the justice process and provide the option to sue the SLAPP plaintiff in another later proceeding—that is, to SLAPP back against the plaintiff—and thereby recover extra punitive damages. SLAPP-backs can be effective for discouraging wealthy and frequent SLAPP offenders from repeatedly SLAPPING public participants and either not paying fee recovery damages or writing them off as minor costs of doing business.

Stay of Discovery

Most anti-SLAPP statutes require the court to stay discovery until it has ruled on the motion for dismissal, meaning that neither party can work to obtain evidence from the other until the motion to dismiss has been resolved. However, almost every provision that stays discovery also allows for limited discovery upon a showing of good cause and under the discretion of the court. Limited discovery at the court's discretion can be useful for the public participant when there is not enough evidence to prove that the speech act qualifies as protected petitioning activity or free speech. Alternatively, it can benefit a SLAPP plaintiff who must prove that it was not public participation, such as by satisfying the actual malice standard of knowing falsehood.

STATE ANTI-SLAPP LAWS

State anti-SLAPP laws, like SLAPPs themselves, take many forms. For example, nine state anti-SLAPP statutes also provide for broad construction in order to effectuate the statutes'

purposes, so that courts following those states' laws have discretion to interpret the law somewhat loosely in order to better protect public participation. As was discussed above, anti-SLAPP statutes can operate by protecting the right to petition the government or both the right to petition and the right to free speech. About half of the states with anti-SLAPP laws only protect speech to, about, or involving government affairs or officials; approximately the same number also protect public forum speech. A few state statutes are somewhat unclear. In states with statutes that only protect speech before government bodies, only some forms of public participation are fully protected: the anti-SLAPP statutes defend the First Amendment right to petition the government but not necessarily free speech about non-governmental issues that are still in the public interest. Statutes that protect free speech in public fora or any speech that relates to an issue of public concern are thus better equipped to protect the wide variety of speech acts that SLAPP claims target.

Under every state anti-SLAPP statute except Maryland's, a public participant can recover costs of litigation and reasonable attorney's fees. Damages and fee recovery provisions are important because the purpose of most SLAPPs is to so financially, socially, or procedurally inconvenience a defendant as to force him or her to withdraw claims, go out of business, or suffer some other social, emotional, or time detriment. Allowing wrongfully SLAPPED defendants at least to recover the money they expended defending against the suit, puts public participants back in the position they were in before being SLAPPED. Some states even allow courts discretion to award punitive damages in addition to reasonable fees and court costs: the anti-SLAPP statutes of both Washington and Nevada suggest punitive damages of \$10,000 to deter future SLAPP suits.²⁵ Even in states where the court has not utilized its discretion to award attorneys' fees and costs, or to award additional punitive damages, defendants can often recover under the common law by later suing for misuse of the judicial system and other damages.

SLAPP-back clauses serve as an explicitly state-sanctioned means of recovering additional damages. Several state anti-SLAPP statutes, such as in Delaware, Hawaii, New York, and Utah, contain such clauses and explicitly allow public participants who have won their motions to dismiss to sue under such theories as misuse of process. Awards in SLAPP-back suits effectively serve as state-sanctioned punitive damages to de-incentivize particularly egregious SLAPPs: not only does the public participant recover the fees and costs expended defending against the SLAPP, but the SLAPP plaintiff is also punished for misusing the judicial system. Washington's and Nevada's discretionary additional damage serve a similar purpose but without the time and cost of additional litigation. Delaware, Hawaii, and Nebraska also give their courts discretion to award additional damages as necessary. Most state anti-SLAPP statutes do not contain specific SLAPP-back clauses, but this does not mean that public participants there will not recover damages or cannot sue after winning their anti-SLAPP motions.

Actual malice intent provisions, present in 10 state statutes, and knowledge provisions, present in 16 state statutes, are useful for preventing SLAPP statutes from being so restrictive as to prevent action on meritorious claims. The burden of proof for knowledge—whether defendants must show that their speech act was made in good faith or plaintiffs must prove that speech was knowingly false—varies from statute to statute.

More restrictive statutes are more likely to include intent exceptions, but knowledge exceptions can be found in even the least restrictive statutes. For example, the Illinois anti-SLAPP statute is restrictive in that it does not protect speech made in a public forum or regarding a matter of public concern; and it requires intent to procure a governmental action or outcome for any act of public participation to be protected. Yet it does not include a knowledge provision.²⁶ In contrast, Washington protects both statements made in a public forum or regarding a matter of public concern and, separately, statements intended to effect governmental action; but the statute does require that statements be made in good faith.²⁷

Many states that do not already have anti-SLAPP statutes utilize common-law solutions. For example, public participants in New Jersey who have defeated SLAPP suits may then file malicious use of process claims, akin to SLAPP-backs, to recover extra damages.²⁸ In Colorado, public participants who face lawsuits concerning petitioning activity may make what is commonly called a “POME motion.” In the 1984 case *Protect Our Mountain Environment, Inc. v. Dist. Court of Cnty. of Jefferson* (“POME”), the Colorado Supreme Court adopted a rule for resolving motions to dismiss based on the First Amendment right to petition.²⁹ The POME court established that a motion to dismiss on such grounds should be treated as a motion for summary judgment, leaving it up to the SLAPP plaintiff to prove actual malice (i.e., both falsity and intent to harass using petitioning activity) and that the speech would adversely affect some legal interest held by the SLAPP plaintiff.³⁰ Several other states, including Michigan, Ohio, Virginia, and West Virginia, allow for similar types of recovery under the common law. However, with the exception of West Virginia, all resemble New Jersey in that a public participant must wait to sue for recovery in a different proceeding. These measures are ideal only as stop-gaps before legislation is passed. Because SLAPPs censor or retaliate against speech by draining public participants of time and resources, a pre-trial motion that stops a SLAPP from proceeding and that provides costs and attorneys’ fees prevents public participants from going into debt or spending years defending against a meritless claim, even if they would eventually win in a separate suit. Even in Colorado, where a motion to dismiss can serve as an anti-SLAPP law, only petitioning activity is protected, and public participants often cannot recover attorney’s fees and costs.³¹ Many states, including Kansas and South Carolina, have also considered anti-SLAPP legislation in recent years.

CONGRESS SHOULD PASS FEDERAL ANTI-SLAPP LEGISLATION

In the absence of state action to protect consumers, Congress should pass federal anti-SLAPP legislation to fill the void left by inconsistent and incomplete state anti-SLAPP statutes. Ideally, federal legislation should mirror the best ideas from states and include the following:

- broad protection of speech, including protection of the right to petition, the right to free speech before government bodies, and the right to free speech in public fora or on matters of public concern;
- an actual malice knowledge provision to protect the statute from being misused;
- a provision allowing courts to award costs and reasonable attorneys’ fees;

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- a provision expediting a hearing to no later than 30 days after the motion to dismiss is served; and
 - a stay of discovery except as the court allows for good cause shown.

Legislation should also allow public participants to remove SLAPP suits to federal court, but only in order to file a special motion to dismiss under the immunity granted by the Act.³² This would prevent federal law from preempting state anti-SLAPP laws that provide the same or greater protection.

Finally, Congress should pass legislation that would void anti-disparagement clauses in consumer contracts that restrict consumers from making public comments on businesses. In addition, the Congress should authorize the Federal Trade Commission to take action against businesses who insert these provisions into their contracts for engaging in unfair and deceptive practices.³³

As SLAPP suits have increased in frequency and notoriety, there have been a number of movements and petitions seeking to bring Congress's attention back to the anti-SLAPP issue. One notable movement is the Public Participation Project (PPP)'s website and petition to pass federal anti-SLAPP legislation.³⁴ In addition, anti-SLAPP proposals have received endorsement from groups across the political spectrum such as the American Civil Liberties Union (ACLU), American Legislative Exchange Council (ALEC), the American Society of News editors, and the NAACP.

CONCLUSION

Protecting speech is first and foremost important for defending the First Amendment rights of citizens. These protections help ensure that individuals have the right to engage in lawful forms of speech, and they ensure that others benefit from the information conveyed in the protected speech. In addition, protecting online speech, especially complaints or criticisms, is necessary to ensure that online markets work well and that consumers have access to unfiltered positive and negative feedback about the products and services they research. While states have made some progress in laying the foundation for anti-SLAPP legislation, the U.S. Congress should step in to create a baseline of protection for all citizens' basic rights to petition and to freedom of expression, thereby encouraging public participation. By doing so, the federal government can both protect the rights of individuals and enable e-commerce to flourish.

ENDNOTES

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11. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S. Ct. 2695, 2703, (1990).
12. *Streisand v. Adelman*, SC 077 257, (Cal. Super. Ct. 2003), <http://www.californiacoastline.org/streisand/slapp-ruling.pdf>.
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23. *N.Y. Times Co.*, 376 U.S. 254, 301-02.

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