

Increasing SLAPP Protection: Unburdening the Right of Petition in California

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INTRODUCTION

Dr. Keith Dixon, an emeritus archaeology professor at California State University at Long Beach, had long been interested in an ancient Native American village site called Puvunga. He nominated it for inclusion in the National Register of Historic Places and worked for its preservation. But Puvunga is on land now part of the university campus, and the university wanted to build a strip mall and parking lot on the site. The university hired a consultant which reported (as the university wished) that building the mall would cause no significant harm to the site. Dr. Dixon didn't agree, and criticized the consultant's report both through internal state university channels and in public comment procedures established under the California Environmental Quality Act. In retaliation the consultant sued Dr. Dixon personally for \$570,000 "for intentional and negligent interference with contractual relations and prospective economic advantage, libel, slander, and trade libel."¹

Jeannie Averill opposed locating a battered women's shelter in her Anaheim neighborhood, and had spoken against it in city hearings. When she heard her employer intended to give money to the shelter as part of its Christmas charity package, she asked it not to do so. Although her employer contributed anyway, the shelter sued Averill for slander and intentional interference with prospective advantage.²

Alan LaPointe led community opposition to a large waste-burning plant his local sanitation district wanted to build in Contra Costa County. He spoke against it at district meetings and before a grand jury, and was a lead plaintiff in a taxpayer's action based on allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for \$42 million for interference with prospective advantage.³

Betty Evans looked through the peephole in her apartment door

¹ See *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 737-39, 36 Cal. Rptr. 2d 687, 690-92 (Ct. App. 1994).

² See *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1172-73, 50 Cal. Rptr. 2d 62, 63-64 (Ct. App. 1996).

³ See William B. Chapman, *SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT*, C935 ALI-ABA 155, 157-58 (1994) (referring to *LaPointe v. West Contra Costa Sanitary District*, No. C89-0710DLJ (N.D. Cal. 1992)).

and saw a San Francisco police officer kicking a handcuffed prisoner lying on the ground. She reported the incident to the Office of Citizen Complaints, which found enough merit in her charge (after extensive investigation) to recommend that the Police Commission hear the matter. While the matter was still under review, the officer sued Evans for defamation based on her complaint.⁴

Ruby Bond and Pauline Cooper, senior citizens living in the government-subsidized cooperative housing project Freedom Homes, felt the project management was taking excessive fees. They publicized their concerns in the project's newsletter and asked that management open their books for inspection by residents. The management firm responded by suing the residents for libel, demanding \$16 million in actual and punitive damages, \$2 million each from Bond and Cooper and six other private defendants.⁵

In all these cases, and many more across California and the nation, public or corporate entities with deep pockets use litigation to inhibit or retaliate against those who exercise their constitutionally protected rights of speech and petition in ways that threaten the entities' interests. These actions have come to be called SLAPP suits. The name — an acronym for Strategic Lawsuits Against Public Participation — was invented by Penelope Canan and George W. Pring in their ground-breaking 1988 article, the first to identify the problem as an area of study.⁶ A SLAPP suit is a lawsuit aimed at discouraging public use of the governmental process. Typically (but by no means always) the aim is to stifle opposition to a private development or enterprise. In California, since 1992, an anti-SLAPP law has protected targets of SLAPP suits by allowing them to strike complaints at an early stage.⁷ But the legislature could improve the anti-SLAPP law in a number of ways. This Article will review the development of the California anti-SLAPP legislation and suggest ways it might usefully be strengthened.

⁴ See Julie Chao, *Cop Sues Woman Who Reported Kicking Incident*, S.F. EXAMINER, Nov. 13, 1998, at A-4.

⁵ See Ray Delgado, *Elderly Battling Company Lawsuits; Management Sues Five Seniors for Alleged Complaints; Senior Power*, S.F. EXAMINER, Oct. 18, 1997, at A1.

⁶ See Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBLEMS 506 (1988); see also *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1109 n.1, 969 P.2d 564, 565 n.1 (1999) (discussing use of acronym in California decisions).

⁷ See CAL. CIV. PROC. CODE § 425.16 (West Supp. 1999). All statutory references in this Article are to the California Code of Civil Procedure unless otherwise specified.

I. SLAPP SUITS

Since 1988 Pring, a law professor, and Canan, a professor of sociology, have collaborated on a series of studies that have focused public and professional understanding of the SLAPP problem and helped develop legislative responses.⁸ Their work is an accepted starting point for any inquiry into the field, and it is appropriate to define the term as used in their studies. For Pring and Canan, the elements of a SLAPP suit are: (1) a civil complaint or counterclaim (for monetary damages or injunction); (2) filed against nongovernmental individuals and/or groups; (3) because of their communication to a government body, official, or the electorate; (4) on an issue of some public interest or concern.⁹

The third element is the key. The purpose of the proponents of a SLAPP suit (or countersuit — for convenience let them be called “filers”) is almost always to intimidate or retaliate against those (let them be called “targets”) who use traditional approaches to government to oppose the filers’ plans or purposes.¹⁰ While opponents of private enterprises are the most likely SLAPP defendants, critics of public officials, employees or projects are also frequent targets.¹¹ The object is to quell opposition by fear of large recoveries and legal costs, by diverting energy and resources from opposing the project into defending the lawsuit, and by transforming the debate from a political one to a judicial one, with a corresponding

⁸ See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 223 n.2 (1996). Pring and Canan teach at the University of Denver and conduct their research from the University’s Political Litigation Project, founded in 1984. They have published very extensively in the field. For a bibliography of publications of their Project, most by Pring and/or Canan, see the work cited above. This book is at the time of writing the most comprehensive and authoritative treatment available on the subject.

⁹ See George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 *PACE ENVTL. L. REV.* 3, 8 (1989). But see Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 *DUKE ENVTL. L. & POL’Y F.* 17, 18 (1993) (suggesting fifth criterion: that “the suits [are] without merit and contain an ulterior political or economic motive”); Darrell F. Cook & Dwight H. Merriam, *Recognizing a SLAPP Suit and Understanding Its Consequences*, *ZONING & PLAN. L. REP.*, May 1996, at 33, 34 (accepting additional factor). This additional criterion seems both unnecessary and pregnant with complications. Imposing a requirement of establishing bad faith or ulterior motive adds a needless burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of existing anti-SLAPP structures under which actions become suspect because of the circumstances of their arising and the relief sought, without need to litigate motive.

¹⁰ See PRING & CANAN, *supra* note 8, at 9-10. The conveniently simple terms “filer” and “target,” which avoid unnecessary procedural complexities, were first used by Pring and Canan. See *id.*

¹¹ See, e.g., *id.* at 214-16 (identifying individuals who are often targets); see also, e.g., Alexandra Dylan Lowe, *The Price of Speaking Out*, *A.B.A. J.*, Sept. 1996, at 48-49, 53.

shift of issues from the targets' grievances to the filers' grievances.¹² Usually the filers have considerably more resources than their targets, who are typically (although not always) citizen activists without significant corporate or government backing. The financial and human costs of litigation, which pose serious threats to the targets, are simply another cost of doing business for filers well positioned to absorb them.¹³

The actions that can precipitate a SLAPP suit are as varied as the ways by which citizens participate in government. As Pring has written:

We have found people sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations. Yet these are among the most important political rights citizens have.¹⁴

Because the incidental effects on the targets, rather than the relief nominally sued for, are the filers' true objectives, filers ordinarily do not care if they lose; indeed they may well expect to lose. The filers' indifference both to the usual measures of success, and to the financial constraints that affect the targets, makes it hard to control the problem through customary methods.

Because filers do not care that they cannot ultimately prove their allegations, they are free to choose from a large menu of causes of action. Defamation in its various forms is a favorite, as are conspiracy, interference torts such as interference with contract or prospective economic advantage, judicial torts such as abuse of process, antitrust violations, civil rights violations, nuisance, and even

¹² See PRING & CANAN, *supra* note 8, at 212. "The suits are an attempt to 'privatize' public debate: a unilateral initiative by one side to transform a public, political dispute into a private, legalistic adjudication, shifting both forum and issues to disadvantage the opposition." *Id.*

¹³ Also the costs of litigation are tax-deductible for the filers but not for the targets, which amounts to a public subsidy for SLAPP plaintiffs. One method of countering the SLAPP problem is to reverse this situation. See discussion *infra* Parts VII, VIII.J (discussing proposed statutory reforms).

¹⁴ Pring, *supra* note 9, at 5 (footnote omitted).

intentional infliction of emotional distress.¹⁵ The wider the variety of claims, the more effort is required for the target to respond. In the absence of a statutory method of weeding out SLAPP suits before the damage is done, courts are obliged to take the allegations of SLAPP filers as seriously as they would those of any other plaintiff. By the time the filers lose (typically years later if there is no effective anti-SLAPP statute in force, or if it is not invoked)¹⁶ or settle (ordinarily after the opposition has run out of money, or energy, or activists), their objectives of intimidation and of shifting the forum and issues to ones of their choosing have usually been accomplished.¹⁷

Why does this matter so much? It matters because SLAPP suits chill the right of free expression and free access to government, a double-barreled assault on the core values of our society.¹⁸ "These things work," says Mark Chertok, an attorney who has defended a major SLAPP suit in New York. "They scare the hell out of people Citizens see a million-dollar lawsuit and they just want to go run and hide."¹⁹ Institutions such as a free press and a reasonably

¹⁵ See *id.* at 9 & nn. 12-13 (analyzing statistical breakdown of causes of action). Also sometimes alleged are invasion of privacy and "prima facie tort." See John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 403 n.34 (1993).

¹⁶ See PRING & CANAN, *supra* note 8, at 218. Pring and Canan found that the average SLAPP stayed active in the courts for 40 months. See *id.* Thirty-one percent were resolved within 18 months, 28% from 18 months to three years, and 41% of SLAPPs from three to 13 years. See *id.*

¹⁷ See, e.g., *Pinnacle Holdings, Inc. v. Simon*, 31 Cal. App. 4th 1430, 1437, 37 Cal. Rptr. 2d 778, 782 (Ct. App. 1995) (stating that "[r]espondents have had to incur legal expenses due to Pinnacle's effort to 'protect' respondents' right because they appeared at the hearing on Pinnacle's application. Had respondents utilized the procedure set out in Code of Civil Procedure section 425.16, the court might well have granted the motion."). Litigants, guided perhaps by ignorant lawyers, often do not invoke anti-SLAPP legislation even when it is available. See *id.*

¹⁸ See PRING & CANAN, *supra* note 8, at 219. After an elaborate empirical study, Pring and Canan concluded that

[t]he factorial surveys of the "vignette" responses prove scientifically for the first time that SLAPP litigation typically "chills" victims' willingness to participate politically in the future SLAPPs are proven, effective tools for eliminating many persons from public political participation and constraining those that do survive. Since American political ideology assumes both the openness of the political system and the representative accountability of government, this chill points to the need to reinforce and reaffirm constitutional protections.

Id.

¹⁹ Lowe, *supra* note 11, at 49 (quoting Mark A. Chertok, who defended The Nature Conservancy against SLAPP suit by land developer in *Gordon v. Marrone*, 590 N.Y.S.2d 649 (Sup. Ct. 1992), *aff'd* 616 N.Y.S.2d 98 (App. Div. 1994)).

neutral government do not work if people are afraid to use them. Debate on public issues is distorted when one side is afraid to speak, or when one side is able to shift the efforts of its opponents away from public issues toward private self-defense. The entire character of public discourse is polluted when intimidation becomes a common or acceptable tactic. This intimidation, and the personal cost and psychic trauma to victims of the SLAPP technique, is itself a matter of concern, as is anything which deters citizens from public service and participation in government and public debate.²⁰ The inclusion of John Doe defendants, a device by which further named defendants can be added to the suit at the option (indeed at the whim) of the plaintiff, is a particularly powerful technique for chilling activism.²¹ And more fundamentally, the use of wealth to dominate access to government is deeply subversive.

All of these factors together make the SLAPP suit a dangerously corrupting influence in our society. Pring and Canan estimate that in the twenty years from the mid-1970s to the mid-1990s, "thousands of SLAPPs have been filed . . . , tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat."²² "[W]e conservatively estimate," the authors continue, that in that period "thousands have been sued into silence, and that more thousands who heard of the SLAPPs will never again participate freely and confidently in the public issues and governance of their town, state, or country."²³

But a solution is not easily found. States cannot simply ban SLAPP suits, because on the surface they look like legitimate actions, and subtle inquiry is required to identify them. It is no easy

²⁰ See *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992).

The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Id.

²¹ See, e.g., Editorial, *Putting a Stop to Unfair Suits*, S.F. CHRON., Oct. 9, 1991, at A16 (describing \$63 million lawsuit with 500 Doe defendants filed by condominium developer against League of Women Voters in retaliation for letter-writing campaign). Pring and Canan note that Doe defendants were included in about 10% of the cases they studied. See PRING & CANAN, *supra* note 8, at 214.

²² PRING & CANAN, *supra* note 8, at xi.

²³ *Id.* at 3.

matter to bar any litigant's access to the courts. Constitutional guarantees of access to government and trial by jury must be respected; to brush these guarantees aside even for the most benevolent purposes would (even if the courts permitted it) be more dangerous than the evil the remedy sought to correct. Because SLAPP filers accomplish their illicit purposes when their cases proceed through normal channels, a response in limine is required to protect the targets. But a threshold determination by a judge that a complaint does not deserve even to be heard can interfere with the filers' right to trial by jury.²⁴ Also, recourse must be protected for people and businesses with legitimate complaints of defamation, interference and the like. Filers lose seventy-seven percent of SLAPP suits that proceed to judgment, but that means they win twenty-three percent of them.²⁵

Because SLAPP suits masquerade as legitimate tort actions, there is no obvious way to identify them from court dockets. For this reason, and because they do not usually reach the appellate stage, they are difficult to study.²⁶ The pioneering work of Canan and Pring has done much to counter these difficulties and bring the SLAPP problem out in the open, where it can be studied by scholars and, more importantly, where state legislatures can work to devise statutory solutions.²⁷ California adopted such a statute in 1992 and has amended it twice since.²⁸ But the California statute remains deficient in a number of respects; a solution in the form of proposed statutory amendments and other reforms is therefore offered in Part VII below, and commented on in Part VIII.

²⁴ Indeed, this was one reason why a pleading bar was excluded from the version of the California anti-SLAPP statute that finally passed. See *infra* notes 139-47 and accompanying text.

²⁵ See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 944 n.17 (1992). This figure is distorted to an undeterminable degree by inclusion of cases in which overwhelmed targets settle despite injustice, and the settlement includes judgment for plaintiffs.

²⁶ See PRING & CANAN, *supra* note 8, at 210 (footnote omitted). "[W]e cannot ever know with precision how many of these suits have been filed and whether they are increasing or decreasing, because of imprecise cataloguing, inadequate reporting, and a lack of centralized recording." *Id.*

²⁷ See *id.* at 225 n.21. Pring and Canan identified more than 30 professional and scholarly articles on SLAPPs. See *id.* More (such as this one) continue to appear.

²⁸ See CAL. CIV. PROC. CODE § 425.16 (West Supp. 1999); see also discussion *infra* Part V (discussing legislative history of section 425.16).

II. THE RIGHT OF PETITION

A. *The English Historical Background*

The right to petition for redress of grievances is arguably both the oldest and the broadest of our constitutional liberties. The right to petition long predates other rights such as free speech and press, right of peaceable assembly, and free exercise of religion, all of which are now protected by the First Amendment.²⁹ Moreover, unlike these other First Amendment rights the right to petition for redress of grievances is as close to an absolute right as exists in our constitutional law.

The English antecedents of our right of petition can be traced to Anglo-Saxon times.³⁰ The ninth century dooms of King Alfred, the dooms of King Æthelstan, and the Andover Code of King Edgar the Peaceful in the tenth century, all contain provisions for appealing grievances to the king.³¹

Despite these Anglo-Saxon precursors, it is customary to look to Magna Carta for a direct antecedent of the modern right of petition. In section 61 of Magna Carta (1215), King John makes the following concession:

[I]f we or our justiciar or our bailiffs or any of our ministers are in any respect delinquent toward any one or transgress any article of the peace or the security, and if the delinquency is shown to

²⁹ See U.S. CONST. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Id.

³⁰ See Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154-57 (1986) [hereinafter Smith, *Shall Make No Law Abridging*] (providing understanding of, and citations to, early English history of right of petition); Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* (1971) (unpublished Ph.D. dissertation, Texas Tech University) (on file with University Microfilms, Ann Arbor, Michigan) [hereinafter Smith, *The Right to Petition*] (discussing development of right to petition); see also Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 19-27 (1993) (describing evolution of right to petition).

³¹ See ANDOVER CODE, §§ 1.1-2.1, quoted in Smith, *The Right to Petition*, *supra* note 30, at 12-13 nn.5-6 (citing 1 ENGLISH HISTORICAL DOCUMENTS 394-96 (Dorothy Whitelock ed., 1948)); see also *Dooms of Edgar, III, 2*, in *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 19 (C. Stephenson & F.G. Marcham eds., 1972).

four barons of the aforesaid twenty-five barons, those four barons shall come to us, or to our justiciar if we are out of the kingdom, to explain to us the wrong, asking that without delay we cause this wrong to be redressed.³²

Though Magna Carta required baronial intercession for a petition, during most of the medieval period suppliants independently directed petitions to the king or his council or (later) to his chancellor. The kings encouraged this as part of the historical process whereby the royal jurisdiction was deliberately expanded, at the expense of local or baronial jurisdictions, by the simple expedient of providing better justice. By the time of King Edward I (reigned 1272-1307), "[c]ommon and frequent petition, without the threat of force, took the place of prolonged discontent and the abrupt presentation of a confused cahier or grievances at the point of the sword."³³

As Parliament grew in importance more petitions came to be addressed to Parliament rather than to the king, and receipt of petitions became one of Parliament's major occupations. In 1340, Parliament appointed a committee to transform responses to meritorious petitions into statutes of general application,³⁴ and in time petition became one of the principal avenues for initiating legislation.

By the Stuart period petitioning was an important institution in England, but it was still not always legally protected. For example, several of the men who presented the Millenary Petition to James I in 1603 found themselves imprisoned for it by the Court of Star Chamber because it was considered "an offense fineable at discretion, and very near to treason and felony, as it tended to sedition and rebellion."³⁵ This was typical of the high-handed attitude of the early Stuart kings, which ultimately led to the English Civil War. Nevertheless, in 1622, James I officially proclaimed "the Right of

³² Magna Carta (1215), c. 61, in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 15 (Bernard Schwartz ed., 1980). Magna Carta itself was foreshadowed in earlier charters, including those of Henry II (1154), Stephen (1135), Henry I (1100), and Canute (1020). See Smith, *The Right to Petition*, *supra* note 30, at 12.

³³ J.E.A. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 405 (4th ed. 1961), *quoted in* Smith, *Shall Make No Law Abridging*, *supra* note 30, at 1155.

³⁴ See Smith, *The Right to Petition*, *supra* note 30, at 25 (citing T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 162 (1956)).

³⁵ HENRY HALLAM, *1 CONSTITUTIONAL HISTORY OF ENGLAND* 298 (Garland Publ'g 1978) (1846) *cited by* Smith, *The Right to Petition*, *supra* note 30, at 29.

his subjects to make their immediate Addresses to him by petition."³⁶ During the tense period leading up to the English Civil War, petitions became very numerous; some (such as the Grand Remonstrance in 1641) were of constitutional importance. In 1648, Parliament passed an ordinance which, while limiting the manner of presenting petitions, stated for the first time in a statute that "it is the Right and Privilege of the Subjects of England, to present unto the Parliament their just Grievances, by Way of Petition, in a due Manner; and they shall be always ready to receive such Petitions."³⁷

In 1680, after King Charles II prohibited petitioning "for specious ends" as likely to "raise sedition and rebellion,"³⁸ Parliament replied by resolving that "it is and ever hath been the undoubted right of the subjects of England to petition the King for the . . . redressing of grievances."³⁹ Parliament further resolved that for the king "to traduce such Petitioning as a violation of duty, and to represent it to his majesty as tumultuous or seditious, is to betray the Liberty of the Subject, and contributes to the design of subverting the an[c]ient legal constitution of this kingdom, and introducing arbitrary power."⁴⁰

The issue of the right of petition came to a head in 1688 over the famous case of the Seven Bishops. In this case, James II, that headstrong monarch, tried for seditious libel a delegation of bishops who had delivered a petition on a religious issue. In an act of nullification the jury found the bishops not guilty.⁴¹ But the incident was the final outrage that pushed Parliament and the army to depose James II. William of Orange and his wife Mary Stuart were

³⁶ 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND ccxiii (1809) (Proclamation 10 July, 19 Jac. I).

³⁷ 1 C.H. FIRTH & R.S. RAIT, ACTS AND ORDINANCES OF THE INTERREGNUM 1642-1660, at 1139 (Wyman & Sons ed., 1911), *quoted in* Smith, *Shall Make No Law Abridging*, *supra* note 30, at 1159. While this ordinance (like many others) was annulled after the Restoration, its principal features were promptly re-enacted. In 1669, after the war and the Interregnum were over, Parliament again declared that "it is the inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievance, and the House of Commons to receive the same." 4 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 432 (1808) (Resolution of House of Commons 1669).

³⁸ See CECIL S. EMDEN, THE PEOPLE AND THE CONSTITUTION 75 (2d ed. 1956), *quoted in* Smith, *Shall Make No Law Abridging*, *supra* note 30, at 1160.

³⁹ 4 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1174 (1808).

⁴⁰ *Id.*

⁴¹ See CHARLES GRANT ROBERTSON, SELECT STATUTES CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832, at 388-406 (4th ed. 1923) contains a full account of the famous case of the Seven Bishops. The reference is to Act 13 Car. II Stat. I., ch.5 (1661).

invited to assume the English throne on condition that they accept the Declaration of Rights, which they did in 1689; soon thereafter Parliament enacted it as a statutory Bill of Rights.⁴² The Bill of Rights guaranteed "that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal."⁴³

The last major confrontation over petitioning came in 1701, over the so-called "Kentish Petition." Petitioners were imprisoned but released after the pamphleteer Daniel Defoe denounced Parliament's actions as illegal in his famous tract *Legion's Memorial*.⁴⁴ Although Parliament imprisoned two more petitioners in 1702, after that there were no further prosecutions or contempt proceedings based on petitioning activity, and as a practical matter the right of petition (although not the rights of assembly and free press) became accepted as part of the common law of England.

B. *The American Historical Background*

Parallel to these English developments, there is a long history of petitioning activity in the American colonies, especially in colonies with royal governors. Just as in the 14th century, when the King had welcomed petitions as a way of expanding his jurisdiction at the expense of the baronial courts, colonial legislatures of the 17th and 18th centuries welcomed petitions in order to enhance their prestige and authority at the expense of the Crown. As in English practice of centuries before, colonial petitions covered a lot of what would now be thought of as judicial or even executive business. As in England, a great many colonial petitions concerned private demands or grievances which would today be dealt with either by private bills or by court action. Legislatures often responded by concessions or monopolies that were then an accepted way of encouraging local improvements such as roads and ferries. Stephen Higginson, in his study of petitioning in colonial times, has shown that responding to petitions was the main activity of many colonial legislatures and their principal vehicle for gathering

⁴² See 1 W. & M. Stat. 2, ch. 2 (1689); ROBERTSON, *supra* note 41, at 130 (giving history of England's Declaration of Rights).

⁴³ 1 W. & M. Stat. 2, ch. 2; ROBERTSON, *supra* note 41, at 132 (spelling and capitalization modernized).

⁴⁴ DANIEL DEFOE, *LEGION'S MEMORIAL*, reprinted in 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1252-1255 (1809).

information and introducing legislation.⁴⁵ Petitions provided disenfranchised populations (including the poor, women, indigenous people, freedpeople, and slaves) with their only meaningful form of access to government.

By the time of the American Revolution the right of petition was well established both by local custom and by the common law of England.⁴⁶ The Stamp Act Congress (1765), the Declarations and Resolves of the First Continental Congress (1774), and a number of state conventions in revolutionary times had reaffirmed the right of petition.⁴⁷ Perhaps because the nature of the right was already well understood and accepted, it was not much discussed in the Constitutional Convention, or in *The Federalist Papers* or other seminal documents of the time. But the generation of the Bill of Rights remembered with anger the contempt with which the English government had received their own petitions.⁴⁸ When Madison drafted the First Amendment in 1789, he and his contemporaries may be taken to have understood the right “to petition the Government for a redress of grievances” in the same way it was understood both in America and in England — as a right which included protection against official reprisal based on content.⁴⁹

⁴⁵ See Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 145 (1986).

⁴⁶ See, e.g., *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985).

The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights enacted of William and Mary stated: “[I]t is the Right of the Subjects to petition the King.” 1 Wm. & Mary, Sess. 2, ch. 2. This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. See Bernard Schwartz, *The Bill of Rights — A Documentary History* 198 (1971). And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. See, e.g., *Pennsylvania Declaration of Rights* (1776).

Id.

⁴⁷ See *Smith, Shall Make No Law Abridging*, *supra* note 30, at 1174 nn.126-31 (providing citations to state conventions of Pennsylvania, Delaware, North Carolina, Vermont, Massachusetts, and New Hampshire).

⁴⁸ See, e.g., THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.” *Id.*

⁴⁹ Contemporaneous practice is conventionally considered to be the key to understanding the protections of the American Bill of Rights. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (“[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.”); *cf. Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (use of early practice in interpreting protection against cruel and unusual punishment); *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) (Fifth Amendment protection against double jeopardy).

Nevertheless, in considering the text of the Petition Clause to be included in the Bill of Rights, the First Congress rejected language which would have given the people the power to "instruct their Representatives" by petition.⁵⁰ One of the main petitioning issues during the early years of the American republic was whether the right to present a petition also included the right to have the petition acted upon. Major petitioning campaigns had been mounted on various public issues, including the National Bank, Sunday mails, dueling, the Cherokee problem in Georgia, land issues, and the tariff question.⁵¹ In each of these cases Congress acted on the petitions (although not always favorably). The question of the right to congressional action was finally answered in the negative when petitioning became a major avenue for the movement to abolish slavery. Abolitionists used the Congressional custom of beginning daily proceedings with reading of petitions to clog the system with antislavery petitions.⁵² In response, Southern forces in Congress, headed by Senator John C. Calhoun of South Carolina, enacted so-called "gag rules" which required petitions on slavery to be tabled without action. Substantial controversy forced an interpretation of the right of petition which has lasted to this day: the people have the right to present petitions to government, but the government is not legally obliged to act on them, or even to consider them.⁵³ In modern times, the Supreme Court has held that the right of petition implies no duty on the part of government to listen or respond.⁵⁴

While this interpretation blunted the power and effectiveness of the right of petition, the Court did not abridge the underlying ba-

⁵⁰ See BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1091-105 (1971) (reprinting debate). The House vote was 41-10 against. See *id.* at 1105. The Senate vote was 14-2 against. See *id.* at 1148.

⁵¹ See Smith, *The Right to Petition*, *supra* note 30, at 87; Higginson, *supra* note 45, at 156.

⁵² For a typical example, see the report of the Senate proceedings for February 12, 1836. See 12 GALES & SEATON'S REGISTER OF DEBATES IN CONGRESS 471-97.

⁵³ The operative document was the Standing Rule of 1840, stating:

No petition, memorial, resolution, or other paper, praying the abolition of slavery in the District of Columbia, or any State or Territory, or the slave trade between the States or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever.

8 CONG. GLOBE, 26th Cong., 1st Sess. 150 (1840). The Rule was adopted 114-108. See *id.* at 151.

⁵⁴ See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); *Smith v. Local 1315, Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979).

sic right of presenting a petition (the First Amendment provided that it could not be abridged). The right of petition continued to be effective in issues less highly charged than slavery. Particularly important in this connection was the demise of the concept of seditious libel. Prosecutions for seditious libel had shadowed petitioning activity in colonial times, requiring on occasion the extreme remedy of jury nullification.⁵⁵ The uproar which followed the passage of the Sedition Act of 1798,⁵⁶ its subsequent repeal, and later judicial opinions, made this form of repression a dead letter in America, as it had earlier become in England.⁵⁷

In its historical roots the right of petition was broader than the rights of free speech, free assembly, and free press; these other rights were burdened and limited at a time when the right of petition was not. Nevertheless, the Supreme Court has come to understand these rights as more or less complementary and subject to similar analysis.⁵⁸ Thus, the Court held in *Garrison v. Louisiana* that petitioning activity is not by itself a defense to libel, but that knowingly false statements and statements made in reckless disregard of truth are actionable even though uttered in a petition to government.⁵⁹ Similarly, while "filing a complaint in court is a form of petitioning activity[,] . . . baseless litigation is not immunized by the First Amendment right to petition."⁶⁰

C. *The Noerr-Pennington Doctrine*

The *Noerr-Pennington* doctrine is one of the most influential modern applications of the Petition Clause. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁶¹ the Supreme Court considered a publicity campaign waged by a group of railroads

⁵⁵ As for instance in the famous trial of John Peter Zenger in 1735. See the full report in 17 Howell's State Trials No. 490, at 635 ff.

⁵⁶ See Sedition Act of 1798, 1 Stat. 596 (1798).

⁵⁷ See *United States v. Hudson & Godwin*, 11 U.S. (7 Cranch) 32, 32 (1812) (holding no federal common law criminal action for seditious libel).

⁵⁸ See, e.g., *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-15 (1982); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In *Claiborne Hardware*, the Court said that speech, "assembly, association, and petition, though not identical, are inseparable." 458 U.S. at 911 (quoting *Thomas*, 323 U.S. at 530).

⁵⁹ See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); see also, e.g., *McDonald v. Smith*, 472 U.S. 479, 485 (1985); *White v. Nicholls*, 44 U.S. (3 How.) 266, 291 (1845).

⁶⁰ *McDonald*, 472 U.S. at 484 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)); see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

⁶¹ 365 U.S. 127 (1961).

against the trucking industry with the hope of destroying or at least impeding competition. The railroads' campaign induced the governor of Pennsylvania to veto a protrucking law, with consequent damage to the trucking industry. The truckers asked for antitrust damages from the railroads for this, and for the railroads to

be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing "any other act or thing to further"⁶²

the objects and purposes of the supposed conspiracy. The Supreme Court held that, because the campaign was intended to influence legislative and executive action, the Petition Clause protected it against antitrust proceedings despite its anticompetitive intent. This was of great importance, not only in establishing the trumping power of the right of petition, but also in extending the reach of the constitutional protection beyond direct petitioning to cover collateral actions aimed at influencing public opinion in aid of the petition. The holding was also important in establishing that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."⁶³ But the Court noted in an aside that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."⁶⁴

The second part of *Noerr-Pennington* came four years later in *United Mine Workers of America v. Pennington*.⁶⁵ There a miners' un-

⁶² *Id.* at 131.

⁶³ *Id.* at 139. *Noerr* did not specifically hold that petition trumped antitrust, and indeed Justice Black was careful not to base his opinion on First Amendment grounds. *See id.* But in holding that the Sherman Act did not prohibit the conduct complained of, he stated that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

⁶⁴ *Id.* at 144.

⁶⁵ 381 U.S. 657 (1965).

ion pension fund sued a small coal producer to recover royalties under the trust provisions of a wage agreement. The producer counterclaimed for antitrust damages arising from an allegedly collusive agreement between the union and larger coal operators. The trial judge allowed the jury to consider facts that showed the union and company acted jointly in their efforts to influence the Secretary of Labor and the Tennessee Valley Authority. The jury was also permitted to consider these joint acts on the question of damages. The Supreme Court reversed on the basis of *Noerr* and remanded for a new trial, instructing the lower court to disregard these protected activities.⁶⁶

In *California Motor Transport Co. v. Trucking Unlimited*, the Supreme Court approached an application of the “sham” exception created by the dictum in *Noerr*.⁶⁷ There one group of truckers allegedly attempted to put another group out of business “by a jointly financed, widely publicized program of opposing, before the two commissions and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights,” even those which were ordinarily granted routinely.⁶⁸ The district court dismissed the complaint on the ground that under *Noerr* allegations of such activity did not state a cause of action on which antitrust relief could be granted, but the court of appeals reversed.⁶⁹ The Supreme Court agreed that if the facts alleged were proved, they would constitute a “sham.” A “combination of entrepreneurs to harass and deter their competitors from having free and unlimited access to the agencies and courts [and] to defeat that right by massive, concerted, and purposeful activities

⁶⁶ See *id.* at 670-72.

⁶⁷ See 404 U.S. 508, 509 (1972).

⁶⁸ *Trucking Unlimited v. California Motor Transp. Co.*, 432 F.2d 755, 757 (9th Cir. 1970).

They agreed to and did establish and maintain a joint trust fund by monthly contributions based upon each defendant's gross income. They informed their competitors that they would use this trust fund to finance opposition to *all* applications then pending or thereafter filed by their competitors with the PUC or the ICC; that *each and every* application would be opposed *with or without probable cause, and regardless of its merits*; and that *in every case* defendants would pursue their opposition through all stages of administrative and judicial review. Defendants told their competitors that they could avoid the expense and delay resulting from defendants' opposition only by abandoning pending applications and severely limiting or refraining entirely from filing further applications.

Id. at 762 (emphasis added).

⁶⁹ See *id.* at 762.

of the group" could constitute a Sherman Act violation even if the method chosen was itself nominally petitioning activity.⁷⁰

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,⁷¹ the Supreme Court reiterated that to qualify as a "sham" the defendant's conduct must not be "genuinely aimed at procuring favorable government action at all."⁷² A party who genuinely attempts to affect governmental action is immune from antitrust liability (and presumably from other liability as well) regardless of the impurity of its motives or the shadiness of its conduct.⁷³ Later, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,⁷⁴ the Court held that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." The Court said an action would be "objectively baseless" if "no reasonable litigant could realistically expect success on the merits."⁷⁵ It may be (but the Supreme Court has not yet so held) that an action obviously subject to a complete First Amendment defense under the Petition Clause could be regarded as "objectively baseless."⁷⁶

California petitioners are also protected by Civil Code section 47, which in subsection (b), provides immunity for, and declares privileged, a publication or broadcast made in a legislative or judicial proceeding, or in any other official proceeding authorized by law, or in the "initiation or course" of any other proceeding authorized by law and reviewable by mandate. There has been extensive litigation under this section. But section 47, like the constitutional pro-

⁷⁰ See *California Motor Transp.*, 404 U.S. at 515. The Court called this a "classic" example of the sham exception to *Noerr*. See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). It is in fact the only example the Court has ever identified as of this writing. The Court later characterized the offending conduct in *California Motor Transport* as "filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id.*

⁷¹ 499 U.S. 365 (1991).

⁷² *Id.* at 380 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 496, 500 n.4 (1988)).

⁷³ Obviously there is a limit. Bribery, for example, is not immune from criminal sanction because it is aimed at influencing the governmental process. It would be interesting to see how the Court would resolve an antitrust case alleging bribery, in view of the words of *City of Columbia v. Omni Outdoor Advertising* that the "sham" exception does not cover "one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* at 380 (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465, n.5 (9th Cir. 1987)).

⁷⁴ 508 U.S. 49, 57 (1993).

⁷⁵ *Id.* at 60.

⁷⁶ The *Noerr-Pennington* doctrine has primary application as a defense to antitrust proceedings. Whether it extends generally to a broader reach is still uncertain. See PRING & CANAN, *supra* note 8, at 28-29.

tection, is only available as a defense. In the absence of a special anti-SLAPP procedure it becomes (like other substantive defenses to tort claims) just part of the litigation and may be raised only after at least some of the psychological, political, and economic objectives of the SLAPP filer have been achieved. The premise of effective anti-SLAPP legislation is that defenses by themselves are insufficient to protect targets, because the filer need not win the action in order to use the suit itself as a weapon against the targets.⁷⁷

III. APPROACHES TO REMEDY

Since Canan and Pring first identified the SLAPP problem ten years ago, dozens of solutions have been suggested and many of them have been applied. Solutions suggested by academic and professional observers fall generally into four categories: (1) those which aim at deterring SLAPP suits from being filed at all; (2) those which aim at early identification of targets and dismissal of SLAPP suits already filed; (3) those which aim at indemnification, such as awards of attorney fees and counterclaims for compensatory or punitive damages; and (4) those which aim at helping targets in the conduct of their defense.

Within each of these four categories remedies fall into two groups: (1) judicial solutions, which proceed from existing actions and procedures, and (2) statutory solutions, which involve a legislative response designed specifically to meet the SLAPP problem. Of course, these categories overlap substantially. For example, a remedy such as punitive damages could have both deterrent and compensatory effects, and a traditional judicial remedy might require statutory action to make it available in a SLAPP context.

A. *Judicial Remedies*

Even before Canan and Pring's work began to encourage statutory solutions to the SLAPP problem, two state supreme courts had fashioned judicial solutions within existing procedural forms.

West Virginia was the first state to attempt serious judicial re-

⁷⁷ See Geoffrey Paul Huling, *Tired of Being SLAPPED Around: States Take Action Against Lawsuits Designed to Intimidate and Harass*, 25 RUTGERS L.J. 401, 403 (1994). "The deleterious effects of SLAPPs do not arise from their successful prosecution, but rather from their mere filing." *Id.* (footnote omitted).

form, in the landmark case *Webb v. Fury*.⁷⁸ This case arose in a classic SLAPP context: the conflict between rapidly expanding commercial strip-mining in the Buckhannon River watershed and the resistance of environmental groups through lawful avenues of petition. Through their newsletter and other channels, the environmentalists complained to the Environmental Protection Agency, the Federal Office of Surface Mining, and the public.⁷⁹ When the federal authorities took remedial action, the company sued for defamation and for "damaging its commercial interests."⁸⁰ It alleged that the communications the environmentalists made to the federal agencies "were made maliciously, with knowledge of their falsity, in order to harass [the company] and to damage its business relations."⁸¹

The environmentalists moved to dismiss because constitutional privilege made the company's claim one on which relief could not be granted.⁸² But the state trial court refused to dismiss, to hear the matter on summary judgment, or to certify the constitutional claim to the state supreme court as permitted by state law.⁸³ The environmentalists sought prohibition in the state supreme court, to prevent the company's action from continuing.

Based on the federal and state petition clauses⁸⁴ and on the *Noerr*

⁷⁸ 282 S.E.2d 28 (W. Va. 1981), *overruled on other grounds by* *Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993) (overruling as to its standard of privilege but not as to its SLAPP provisions).

[T]he right to petition the government found in Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment to the United States Constitution. It does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). To the extent that *Webb v. Fury*, *supra*, states to the contrary, it is overruled.

Harris, 432 S.E.2d at 552.

⁷⁹ See *Webb*, 282 S.E.2d at 42. The *Webb* court said it was "apparent" that "the newsletter here should be viewed in the context of a public campaign to 'influence the passage and enforcement of laws.'" *Id.*

⁸⁰ *Id.* at 31.

⁸¹ *Id.* at 32.

⁸² See W. VA. CODE STATE R. tit. 3, § 12(b)(6) (1960), based on FED. R. CIV. P. 12(b)(6).

⁸³ See *Webb*, 282 S.E.2d at 31; W. VA. CODE § 58-5-2 (1997); W. VA. R. OF APP. P. 13 (1980).

⁸⁴ The petition clause of the West Virginia Constitution reads: "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." W. VA. CONST., art. III, § 16. The West Virginia Constitution provides broader constitutional protection than does the federal constitution. See *Webb*, 282 S.E.2d at 37 n.4.

Pennington doctrine,⁸⁵ the West Virginia Supreme Court held that “all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.”⁸⁶ The court further held that

[Webb’s communications] to the federal agencies appear to be classic examples of absolutely privileged petitioning activity. . . . These communications appear to be exactly the types of activity that the right to petition was intended to foster and on all fours with the conduct held to be protected in *Noerr* and its progeny. In fact, the activity of which the respondent complains is actually encouraged under the citizen participation provisions of the Surface Mining Control and Reclamation Act and provisions of the Clean Water Act. The people’s right to petition the government for a redress of grievances is a clear constitutional right and the exercise of that right does not give rise to a cause of action for damages.⁸⁷

The application of the “sham” exception was rejected, as the environmentalists had not attempted to block the company’s access to government. The court said, “A scurrilous anonymous letter or an attempt to marshal political clout to ruin an offending agent would certainly present different cases than does this open straightforward petition lodged through what the parties agree to be the proper and established channels.”⁸⁸

The court went on to hold on the basis of *Noerr* that the newsletter articles, while not direct petitioning activity, “were shielded by the right to petition because they arose in the context of a public campaign designed to ‘influence the passage and enforcement of laws.’”⁸⁹

⁸⁵ See *supra* text accompanying notes 61-76 (discussing *Noerr-Pennington* doctrine).

⁸⁶ *Webb*, 282 S.E.2d at 36-37 (quoting *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972)).

⁸⁷ *Id.* at 37-39 (footnote omitted).

⁸⁸ *Id.* at 39 (quoting *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977)).

⁸⁹ *Id.* at 41 (quoting *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142 (1961)).

[W]e shudder to think of the chill our ruling would have on the exercise of the freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation.⁹⁰

Webb v. Fury established firmly that where the Petition Clause protects the activity complained of, the court may properly dismiss as a claim for which relief cannot be granted and, therefore, clear a SLAPP suit procedurally at a threshold stage. The court did not, however, set out a formal test beyond that contained in general Petition Clause jurisprudence. In *Protect Our Mountain Environment, Inc. v. District Court*⁹¹ the Colorado Supreme Court did establish such a formal test.

The *POME* case (so called from the acronym of the plaintiff association Protect Our Mountain Environment) also arose from a classic SLAPP pattern of events. Gayno, a developer, applied to the Jefferson County Board of Commissioners for permission to develop a tract of land and change its zoning accordingly, and the Board approved the application. POME went to the state district court to overturn the Board's actions, claiming on thirteen grounds that the Board had exceeded its authority, abused its discretion, and otherwise acted unlawfully. The district court ruled against POME; the intermediate appellate court affirmed and entered an order for damages and double costs against POME, on the ground that the appeal had been "frivolous."⁹² After this disastrous conclusion to POME's substantive action against Gayno, Gayno sued POME for abuse of process and civil conspiracy based on POME's lawsuit, asking \$10 million in actual and \$30 million in punitive damages. POME's motion to dismiss Gayno's action was summarily rejected by the state district court on the ground that its original action had been a "sham." POME then applied to the Colorado Supreme Court for prohibition, based on its contention that "its legal challenge to the zoning reclassification was constitutionally protected activity and was not subject to the 'sham exception' relied on by the respondent court in denying its dismissal motion."⁹³

The Colorado Supreme Court agreed with POME that its under-

⁹⁰ *Id.* at 43.

⁹¹ 677 P.2d 1361 (Colo. 1984).

⁹² *See id.* at 1364 n.4.

⁹³ *Id.* at 1364.

lying action was petitioning activity protected by both the Federal and Colorado Constitutions, and reversed the orders below. After a learned discussion of the impact of the *Noerr-Pennington* doctrine on the right of access to courts, and on the immunities extended by the two petition clauses,⁹⁴ the court announced a new rule.

It cannot be denied that suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances. Damage to other persons and society, however, can also result from baseless litigation instigated under the pretext of legitimate petitioning activity. Accommodation of these competing concerns can best be achieved by requiring the suing party, when confronted with a motion to dismiss predicated on the First Amendment right to petition the government for redress of grievances, to demonstrate the constitutional viability of his claim. Because this constitutional defense raises the question of whether the plaintiff's complaint states a claim upon which relief can be granted, the court should give the parties a reasonable opportunity to present all material pertinent to the motion and should treat the motion as one for summary judgment, to be resolved under the heightened standard we herein adopt. That standard requires that when, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; *and* (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; *and* (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

⁹⁴ See COLO. CONST. art. II, § 24. Colorado's petition clause states that "[t]he people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance." *Id.*

This standard will safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation and, at the same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights.⁹⁵

Cumbersome as it was, this procedure was a daring innovation at the time. It provided substantial protections to targets because a filer would have to make a threshold showing not only about the merits of its opponent's case but also about its opponent's motives.

Both the Colorado and West Virginia solutions have been influential in academic treatment of the SLAPP problem and also in the legislative responses of other states.⁹⁶

Washington State has a law commonly regarded as an anti-SLAPP law.⁹⁷ Sometimes called the "Brenda Hill" law after the defendant in the notable SLAPP suit which inspired state legislative action,⁹⁸ it is really just an immunity law providing a tort defense (and attorney fees) to citizens who complain or provide information to government agencies. But in *Gilman v. MacDonald*,⁹⁹ the first case decided under the statute, a Washington court of appeals held that on a target's motion for summary judgment (and attorney fees) under the law, the filer has the burden of negating by "clear and convincing evidence" the target's "good faith" in speaking out.¹⁰⁰ This provides a framework for a judicially crafted anti-SLAPP remedy on the West Virginia or Colorado models.

⁹⁵ *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1368-69 (emphasis added) (citations omitted).

⁹⁶ For example, an electronic search for citations to the *POME* case shows that at least 13 cases outside Colorado and at least 27 law review articles cited it as of January 1, 1999. For *Webb v. Fury*, the count as of the same date is at least 14 cases outside West Virginia and at least 25 law review articles. See, e.g., *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942 n.16 (Mass. 1998). "A standard for summary judgment adopted in [*POME*], is a likely source of the standard for evaluating special motions to dismiss in the Massachusetts anti-SLAPP statute." *Id.*

Federal courts have also experimented with heightened pleading requirements in petition cases. See, e.g., *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers* 542 F.2d 1076, 1082-83 (9th Cir. 1976) *cert. denied*, 430 U.S. 940 (1977) (stating that "in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required").

⁹⁷ See WASH. REV. CODE ANN. §§ 4.24.500-.520 (West 1999).

⁹⁸ See PRING & CANAN, *supra* note 8, at 130-33 (discussing Brenda Hill's case).

⁹⁹ 875 P.2d 697 (Wash. Ct. App. 1994).

¹⁰⁰ See *id.* at 700.

B. *The SLAPP-back Suit*

One obvious solution for targets of SLAPP suits is to slap back — indeed, an action whose aim is restitution for the injury of a SLAPP suit is sometimes called SLAPP-back suit.¹⁰¹

The clearest resort for a party aggrieved by a groundless lawsuit is an action for malicious prosecution. This is a long-established remedy available in every state. In California the elements of malicious prosecution are that the prior action: (1) was commenced by or at the direction of the defendant and was pursued to a legal conclusion in the malicious prosecution plaintiff's favor; (2) was brought (or continued) without probable cause; and (3) was initiated with malice.¹⁰²

In malicious prosecution *probable cause* "is purely a legal question, to be determined by the trial court on the basis of whether, as an objective matter, the prior action was legally tenable or not."¹⁰³ The objective quality of the test "does not include a determination whether the attorney subjectively believed that the prior claim was legally tenable."¹⁰⁴ The element of malice, on the other hand, focuses on the "subjective intent or purpose with which the defendant acted in initiating the prior action, and . . . the defendant's motivation is a question of fact to be determined by the jury."¹⁰⁵

There is a difficulty with malicious prosecution as a remedy for a SLAPP suit: it requires that the plaintiff must have lost the underlying action. In the context of ordinary litigation this makes sense. Malicious prosecution is a disfavored action,¹⁰⁶ and because success on the merits of the underlying action would be an automatic defense on the element of probable cause it is appropriate to require

¹⁰¹ The origin of this term is obscure — Pring and Canan trace it back through phrases in article titles as follows: ". . . SLAPP Defendant Slaps Back" (1988); "SLAPPs are Back" (1989); "Sierra Club SLAPPs Back" (1990); "SLAPPed . . . ? SLAPP back" (1991). For full citations, see PRING & CANAN, *supra* note 8, at 256 n.1.

¹⁰² See, e.g., *Landaker v. Warner Bros., Inc.*, 56 Cal. App. 4th 1294, 1296, 67 Cal. Rptr. 2d 175, 178 (Ct. App. 1997) (citing *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 50, 529 P.2d 608, 613 (1974)).

¹⁰³ *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 868, 765 P.2d 498, 499 (1989).

¹⁰⁴ *Id.* at 881, 765 P.2d at 508; see, e.g., *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal. App. 4th 55, 63, 49 Cal. Rptr. 2d 551, 557 (Ct. App. 1996). "If a court finds that the initial lawsuit was in fact objectively tenable, the court has determined that the fundamental interest which the malicious prosecution tort is designed to protect — the interest in freedom from unjustifiable and unreasonable litigation — has not been infringed by the initial action." *Id.* (citations and internal quotation marks omitted).

¹⁰⁵ *Sheldon Appel Co.*, 47 Cal. 3d at 874, 765 P.2d at 503.

¹⁰⁶ See, e.g., *Babb v. Superior Court*, 3 Cal. 3d 841, 847, 479 P.2d 379, 383 (1971).

this element to mature before allowing the cause of action to accrue.

In a SLAPP context, however, requiring completion of the underlying action makes malicious prosecution nearly useless as a remedy, because it is the very pendency and conduct of the action (rather than eventual judgment) which causes the harm.¹⁰⁷ By the time the underlying action has been completed the defendants may already have been intimidated or dissuaded or ruined, and the diversion of their efforts from the public question which originally engaged them, into defense of the retaliatory tort action, will already have been accomplished. Even a successful SLAPP-back suit for malicious prosecution will necessarily come too late to do much good, and the threat of eventual recovery will be of little consequence to a SLAPP filer with deep pockets and a cynical attitude. It is unlikely that monetary damages (even when combined with an award of attorney fees) will adequately compensate the SLAPP-back plaintiffs for infringement of their political rights. Even if damages were sufficient the filers would still have been permitted to use their financial resources to impede the governmental process, thwart the public's right of petition, and perhaps achieve their political goals by illicit means even if they had to pay damages for doing so. Forcing them to pay up afterward does not make such private condemnation of political rights an acceptable use of the judicial process.

One technique which could help make the well-established jurisprudence of malicious prosecution useful in SLAPP cases would be to remove the requirement of successful termination and permit malicious prosecution as a cross-claim.¹⁰⁸ This has been the subject of academic proposals.¹⁰⁹ Such a reform could appropriately be limited to actions where the defendant can make a threshold showing that it is a SLAPP case; or there could be a rebuttable presumption to that effect for certain causes of action; or the pre-

¹⁰⁷ See, e.g., *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 817, 33 Cal. Rptr. 2d 446, 450 (Ct. App. 1994). "Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, and requests for sanctions) are inadequate to counter SLAPPs." *Id.*; accord *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F.3d 1208, 1215 (9th Cir. 1999) (quoting *Wilcox*).

¹⁰⁸ California abolished counterclaim in 1972 and replaced it with cross-complaint. See CAL. CIV. PROC. CODE § 428.80 (West Supp. 1999).

¹⁰⁹ See, e.g., Joseph Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 137-40 (1988).

sumption could be imposed by motion, in the discretion of the trial court. By combining the devices of cross-claim, summary adjudication, and sanctions, a regime could be established which would permit a SLAPP defendant to allege the remaining elements of malicious prosecution, establish them in limine, and win not only dismissal and costs but also damages at a very early stage of the proceedings. This would require a threshold finding that the plaintiff's case was objectively untenable (not difficult when the act complained of is protected First Amendment speech or petitioning). A potential SLAPP filer *promptly* would thus be faced with a procedure under which it could be thrown on the defensive, lose the advantage it had sought to gain, and have to face a relatively quick imposition of damages high enough to hurt.¹¹⁰ This procedure is one of the core reforms suggested in Parts VII and VIII below. It would, of course, only be available against a filer when its claim had *already* been stricken by the court under the anti-SLAPP statute, *and* the strike order had become final.

The related tort of abuse of process is less suitable than malicious prosecution as a SLAPP-back instrument.

Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the *tools* the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery.¹¹¹

Thus, while unethical conduct of a SLAPP suit to maximize disruption of the target's petitioning activity could justify a cross-action for abuse of process, the cross-action would not reach the improper motivation for the underlying action and would be unrelated to its merits. Where an action has met the threshold requirement to be considered a SLAPP suit, a reformed statute could permit a cross-claim for abuse of process to be added and even given priority. But while the reformed procedure for malicious

¹¹⁰ This may be thought of as a "scorpion" strategy — although a scorpion is a small creature, it is unwise even for large creatures to attack it because its response can be quick and painful.

¹¹¹ *Bidna v. Rosen*, 19 Cal. App. 4th 27, 40, 23 Cal. Rptr. 2d 251, 259-60 (Ct. App. 1993) (citations omitted).

prosecution would go directly to the harm caused by SLAPP filings, doing the same for abuse of process would not be similarly SLAPP-specific. Without a stronger empirical link between abuse of process and SLAPP filings, this reform does not appear warranted.

A third remedy of this sort is a claim for the “constitutional tort” of interference with (or denial of) the target’s constitutional rights, primarily the right of petition. Although this remedy is still poorly developed in California, isolated cases have supported the “constitutional tort” on the theory that the constitutional provisions affected are “self-executing in the sense that they provid[e] a specific method by which they might be enforced.”¹¹² For example, in *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*¹¹³ the court held a property owner’s discriminatory exclusion of carrier delivery of a free newspaper from a private residential development violates the free press rights secured under the California Constitution.¹¹⁴

Because this theory of recovery is still a novelty, it is a slender reed on which to base vindication of the targets’ right of petition. Even if it were well-established, it would still suffer from the same deficiencies as other tort theories. Unless given priority as a cross-claim, it would not address the filers’ interference with the targets’ petition rights, and filers could still accomplish their primary extrajudicial purposes of diversion and intimidation even if they suffered sanctions afterward. Even if a target eventually succeeded in its cross-claim, without priority the harm would already have been done. To make this remedy effective, a reformed statute should permit a constitutional violation to be alleged and claimed in the same accelerated way as for malicious prosecution. This is suggested in Parts VII and VIII below. If this were done it could set

¹¹² *Bonner v. City of Santa Ana*, 45 Cal. App. 4th 1465, 1471, 53 Cal. Rptr. 2d 671, 674 (Ct. App. 1996).

¹¹³ 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (Ct. App. 1982).

¹¹⁴ *See id.* at 857, 182 Cal. Rptr. at 837; *see also* *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1457 n.4, 249 Cal. Rptr. 688, 693 n.4 (Ct. App. 1987) (noting that “[t]he civil remedy for constitutional torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his constitutional rights”) (citations and internal quotation marks omitted); *Hill v. NCAA*, 7 Cal. 4th 1, 16, 865 P.2d 633, 641 (1994) (en banc) (finding right of action implicit in state constitutional right to privacy); *cf.* *Higginbotham v. King*, 54 Cal. App. 4th 1040, 1045, 63 Cal. Rptr. 2d 114, 117 (Ct. App. 1997) (holding slander not constitutional tort only because “a person’s interest in his reputation is neither ‘liberty’ nor ‘property’ for purposes of the due process clause”). *See generally* Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53 (1986).

the stage for development of constitutional tort as a normal and accepted device for protecting political rights.

C. Remedies Aimed at Early Identification and Dismissal

As noted, the evil of a SLAPP suit is accomplished by its very pendency, with the accompanying threat of ruinous recovery and need for costly and distracting defense. Therefore, to protect political rights, the faster an action can be identified as a SLAPP suit and either dismissed outright or have its impact on the defendant mitigated, the better. Such remedies proceed largely from the premise that speech and petitioning activity is privileged under the First Amendment (except in certain limited circumstances). Subject to these narrowly defined exceptions, First Amendment privilege amounts to a prima facie defense to a tort claim, as any complaint based on privileged activity cannot succeed. Accordingly, the sooner a court can identify an action as subject to a valid First Amendment (or state statutory immunity) defense, the sooner the court can dispose of it. As Pring and Canan put it, "[t]he best means of managing SLAPPs and protecting Petition Clause activity is early, fair, effective court dismissal and review."¹¹⁵

Many statutory anti-SLAPP remedies, including California's, concentrate on this approach. In California, since 1992, a cause of action subject to a defense of speech or petitioning privilege may be attacked in a special motion to strike, which is heard on an accelerated basis.¹¹⁶ For its claim to survive, a SLAPP filer must demonstrate (as to each claim) a reasonable probability of success on the merits. Of course this is not possible in the presence of a valid defense of constitutional or even statutory privilege. The theory is that causes of action subject to the privilege defense will be stricken; if there is nothing left of the case it can then be dismissed, and if there is something left it will, at least, no longer be a SLAPP suit.

There are other methods for clearing SLAPP suits, such as demurrer, summary judgment, and extraordinary writs which proceed from the assumption that the action cannot succeed. But demurrer is not of much help in California. A SLAPP defendant may certainly answer that the action complained of by the plaintiff

¹¹⁵ PRING & CANAN, *supra* note 8, at 26.

¹¹⁶ See CAL. CIV. PROC. CODE § 425.16 (West Supp. 1999).

is constitutionally protected speech or petitioning. But a defense of privilege raised in this way must be answered in the ordinary course of the litigation and therefore does not, without more, afford a SLAPP defendant any protection from having to engage in the very litigation which is intended to intimidate or dissuade him. Also, in California a demurrer must ordinarily be grounded in a defect on the face of the pleading.¹¹⁷ But the constitutionally privileged nature of the acts complained of may not appear on the face of the pleading.¹¹⁸

A related device is summary judgment. The acts complained of in a SLAPP complaint (at least as to elements which would support a claim of constitutional privilege) are not often open to serious factual dispute. The constitutional protection afforded such utterances is usually a question of law rather than fact. A constitutional defense established as a matter of law on undisputed facts could therefore be a basis for summary judgment.¹¹⁹ But anti-SLAPP procedures such as California's, which provide for bifurcating this issue and having it heard in limine, meet the same objections faster and with less paperwork, and without intervening discovery which can itself overwhelm a target.

A related but more cumbersome technique is use of an extraordinary writ such as mandamus or prohibition to require the trial court to dismiss the SLAPP suit. This is permitted in California

¹¹⁷ See *id.* § 430.30(a) (West Supp. 1999).

¹¹⁸ But see, e.g., *Irwin v. Murphy*, 129 Cal. App. 713, 715-16, 19 P.2d 292, 292-93 (Ct. App. 1933) (where complaint in libel shows on its face that publication was privileged, no cause of action is stated).

Section 430.30(a) also provides that a demurrer may be grounded on a matter of which the court may take judicial notice. See CAL. CIV. PROC. CODE § 430.30(a). While judicial notice may be taken of the "decisional . . . [and] statutory law of this state and of the United States," CAL. EVID. CODE § 451(a) (West 1995), it would be inappropriate for a court to rule as a matter of judicial notice that the acts complained of were protected by the First Amendment. Although that may be plain as a matter of law, the proper avenue for recognizing it (absent an anti-SLAPP statute) would be by summary judgment.

In a jurisdiction whose procedural rules permit a speaking demurrer, a SLAPP defendant could demand dismissal under a rule like Federal Rule of Civil Procedure 12(b)(6), on the ground that a tort claim based on constitutionally privileged speech or petitioning does not state a claim on which relief can be granted. *Webb v. Fury* is an example of this, having been decided under W. VA. C.P.R. 12(b)(6). See 282 S.E.2d 28, 31 (W. Va. 1981); see also discussion *supra* notes 78-91 and accompanying text.

¹¹⁹ As noted, *supra* text accompanying note 95, the judicially adopted Colorado anti-SLAPP scheme explicitly applied summary judgment standards. See *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1368 (Colo. 1984). A California target could move for summary judgment under section 437c, on the ground that the filer's action had no merit because the acts complained of were protected by the immunity statute. See CAL. CIV. PROC. CODE § 47 (West Supp. 1999).

and is an accepted vehicle for appellate review of applications of the anti-SLAPP statute.¹²⁰ Allowing interlocutory appeal of denial of a motion to dismiss based on a First Amendment defense would do as well, without the complications of an extraordinary writ. This is suggested as a proposed reform in Part VIII.C below. A similar proposal is contained in Assembly Bill 1675, pending at this writing in the 1999-2000 Regular Session of the California legislature. Further discussion of this bill appears in Part IV below.

Other means of attacking the complaint are more far-fetched and less effective. One approach is to regard the SLAPP suit as an attempt to infringe the civil rights of the target. But because the federal civil rights laws require state action, this technique is of no use unless the SLAPP plaintiff is a governmental agency, or unless by a very strained interpretation of the law a filer is considered to be acting under color of state law by invoking the state judicial power.¹²¹ One scenario would be to hold the filer's *attorney* liable under 28 U.S.C. § 1983 as an "officer of the court."¹²² Even if this made sense legally, it would still require a separate action in the federal system, where it would face likely abstention while the state action was pending. Raising the federal claim in the state court would not help without priority. In either jurisdiction, a civil rights action would involve the target (at least at the start) even more deeply in litigation. This technique is too complicated procedurally to be a useful response.

D. Remedies Aimed at Deterrence

Another class of responses tries to deter SLAPP suits by shifting the cost of the action to the SLAPP filer. This also has a compensatory effect. While the filer typically has the means to finance the litigation and regards it simply as a business expense, the target rarely has such resources and litigation costs can be burdensome or even overwhelming. Shifting these costs to the filer has the po-

¹²⁰ See, e.g., *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357 (Ct. App. 1996); *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687 (Ct. App. 1994); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

¹²¹ This technique has occasionally been used successfully. See *La Pointe v. West Contra Costa Sanitary District*, No. C89-0710 (N.D. Cal. filed May 2, 1988), and discussion *infra* at note 421.

¹²² See James W. Harper, Note, *Attorneys as State Actors: A State Action Model and Argument for Holding SLAPP-Plaintiffs' Attorneys Liable Under 42 U.S.C. § 1983*, 21 HASTINGS CONST. L.Q. 405, 420 (1994).

tential to be effective *only* if imposed early enough. Because the costs of litigation are one of the principal weapons filers use to intimidate targets, removing this threat leaves the target less threatened and freer to resist. California includes a fee-shifting device in the present law.¹²³

But the usual fee-shifting device, under which a motion to award fees and costs is made by the prevailing party at the end of the litigation, is obviously insufficient to protect the targets. As with an ordinary SLAPP-back suit for malicious prosecution, by the time the “prevailing” party is identified the damage will have been done. A better solution is a system under which, once a determination is made early in the litigation that this is a SLAPP suit, the filer is required to pay the target’s costs as the litigation proceeds.

But there are practical problems with this solution too. Is the determination on costs to be binding whatever the result? If so there is the risk of injustice to a filer who ultimately prevails, as some of them do; if not, the target still runs the risk of ruinous costs and is intimidated.

John Barker has recommended “up-front payment of defendant’s discovery costs” by the plaintiff.¹²⁴ But Barker recommends this procedure primarily for the situation in which “a potential SLAPP survives the initial early review, yet the court still recognizes its potential as a SLAPP.”¹²⁵ But if an action survives the early screening of a well-constructed anti-SLAPP statute, in fairness to filers it ought to be regarded as an ordinary civil action. It is true that discovery costs form an important part of the financial threat to targets, but California’s statutory discovery stay goes a long way toward neutralizing this problem.¹²⁶

Another approach would be to sanction attorneys who file SLAPP suits where there is a clear First Amendment defense. The filer may be sufficiently wealthy not to care about losing or even

¹²³ See CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 1999); see also CAL. CIV. PROC. CODE § 128.5(a) (West Supp. 1999). “Every trial court may order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” *Id.*

¹²⁴ Barker, *supra* note 15, at 456. This has resonances with other procedures requiring financial guarantees from plaintiffs before allowing them to proceed with claims of doubtful prospect. See, e.g., CAL. CORP. CODE § 800(c)(1) (West Supp. 1999) (requiring that plaintiff in shareholder derivative action must file bond if court finds no reasonable possibility of benefit to corporation).

¹²⁵ Barker, *supra* note 15, at 453.

¹²⁶ See CAL. CIV. PROC. CODE § 425.16(g).

about monetary sanctions, but the attorney presumably cares about being sanctioned, both in terms of the money and in terms of his or her ethical obligations, reputation, and professional standing. Sanctioning the attorney in this situation could have a major impact on this kind of litigation.

Attorneys are already subject to an ethical obligation not to bring baseless actions or to sue for purposes of harassment.¹²⁷ Bringing a legal action for purposes of retaliation or intimidation, based on constitutionally privileged speech or conduct, violates subsections (A) and (B) of the California Rules of Professional Conduct section 3-200, because of the action's purpose and because the attorney knows (or should know) of an impregnable constitutional defense. An attorney may be able to claim ignorance (however disingenuously) of her client's purpose in bringing an action. But it would be difficult to argue that a complaint for tort damages, based for example on a comment made to a zoning board in the course of a hearing, *either* presents probable cause *or* is warranted under existing law or a good faith argument for law reform. Any attorney may reasonably be held to a basic awareness of the civil protections of the First Amendment. In the statutory reform suggested in Part VII below, provision is made for sanctioning both filers and their attorneys at the court's discretion.¹²⁸

Georgia has a procedure which requires a party and its attorney to verify the bona fides of any action attacking exercise of free speech or petition rights.¹²⁹ This not only provides an avenue to discipline an attorney who files an action in bad faith but, by forcing the attorney to face the issue *before* filing, should go far toward preventing SLAPPs from being filed in the first place. A form of

¹²⁷ See, e.g., CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-200 (1998).

A member [of the State Bar] shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

- (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Id.; see also MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990) (stating that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action").

¹²⁸ See also discussion *infra* Part VIII.D.

¹²⁹ See GA. CODE ANN. § 9-11-11(a) (Harrison 1996).

this procedure, suggested for inclusion in a reformed California statute, is set out in Part VIII.D below.

Many of these solutions use existing litigation techniques in new and innovative ways which would probably require either express statutory authorization or at least a rule of court. Whether such solutions could be imposed without legislation, by rule of court or (as in Colorado) by appellate opinion, is a difficult question which need not be addressed here.

An additional element of deterrence would be achieved if the tax subsidy were removed from SLAPP filings. At present most SLAPP filers can deduct the expenses of the suit as a business expense, while the targets get no comparable subsidy. Reversing this situation would be a useful reform; while the largest subsidy is federal, state reform would be of some use and could serve as a pilot program for tax reform on the federal level. A model tax provision is included in the proposed statutory reform in Part VII below, and is discussed in the accompanying commentary in Part VIII.J.

E. Remedies Aimed at Indemnity

Making damages (especially punitive damages) immediately available to a SLAPP defendant has great potential for indemnity as well as deterrence. While a filer may be able to finance ordinary litigation, punitive damages by definition are calculated to be high enough to hurt, taking into account the resources of the party to be punished.¹³⁰ As noted, the main problem is that punitive damages are now only available at the end of successor litigation for malicious prosecution. If this were changed (as suggested in the amendment proposed in Part VII below) punitive damages could become routinely available in SLAPP suits.¹³¹

¹³⁰ See CAL. CIV. CODE § 3294(a) (West 1997). Punitive damages are awarded "for the sake of example and by way of punishing" the wrongdoer. *Id.* "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624 (1974). "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds." *College Hosp., Inc. v. Superior Court*, 8 Cal. 4th 704, 712, 882 P.2d 894, 898 (1994).

¹³¹ See CAL. CIV. CODE § 3294(a). California law permits punitive damages to be based on the element of malice. See *id.* Malice is also an element of the tort of malicious prosecution. See *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 874, 765 P.2d 498, 503 (1989). However, the definitions are not the same. See CAL. CIV. CODE § 3294(c)(1) (defining "malice" for purposes of punitive damages as "conduct which is intended by the defen-

One commentator suggests that targets should be able to recover from SLAPP filers for the emotional distress their actions cause.¹³² There is no principled reason why this injury, which is sometimes deliberately caused by SLAPP filers for coercive ends, should not be compensated for, and an explicit mention of this remedy in a reformed statute would clarify its availability. Such a provision is included in the proposal in Part VII below. Provisions shifting fees and costs to the losing party, while generally considered as a deterrent, also serve as a form of indemnity. This point was discussed in Part IV.D above.

F. Remedies Aimed at Assisting the Target's Defense

Of the remedies aimed at assisting the target, the most easily available would be discretionary intervention by the state attorney general, who could assist the target's defense at no cost to the target. The proposed reform builds on such provisions in other states' laws by enabling the attorney general, once having intervened, to seek further relief underlying issues which originally inspired both the petitioning activity and the retaliatory SLAPP. Further discussion appears in Part VIII.H below.

Other devices aimed at assisting the target's defense, suggested in the literature but not adopted here, include subsidy from a public fund,¹³³ protection of availability of liability insurance,¹³⁴ and reform of the defamation law to broaden the "public figure" test of *New York Times Co. v. Sullivan*¹³⁵ to include real estate developers. All of these are discussed in Part VIII.K below. Another approach,

dant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others"). For case law definitions of malice for purposes of malicious prosecution, see *Downey Venture v. LMI Insurance Co.*, 66 Cal. App. 4th 478, 498-99, 78 Cal. Rptr. 2d 142, 154 (Ct. App. 1998), which discusses what evidence of malice is for this purpose. In this context, malice "must include proof of either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant." *Id.* It seems likely that bringing a SLAPP suit could meet both definitions; it might also under some circumstances also constitute "oppression," likewise a ground for punitive damages. See *Albertson v. Raboff*, 46 Cal. 2d 375, 383, 295 P.2d 405, 410 (1956); see also CAL. CIV. CODE § 3294(c)(2) (defining oppression as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"). The point need not be decided here.

¹³² See Barker, *supra* note 15, at 441-42.

¹³³ See *supra* note 437.

¹³⁴ See Barker, *supra* note 15, at 414-15.

¹³⁵ 376 U.S. 254 (1964).

reforming the tax treatment of SLAPP expenses both for filers and targets, is discussed in Part VIII.J below, and is included among the proposed statutory revisions set out in Part VIII.

IV. DEVELOPMENT OF THE CALIFORNIA STATUTE

The first attempt at a statutory solution in California came less than two years after Canan and Pring's original article in *Social Problems*. On February 28, 1990, then-Senator William Lockyer (D. Hayward [Alameda County]), chairman of the Senate Judiciary Committee, introduced a bill to protect citizen involvement from retaliatory litigation.¹³⁶ "It seems," Senator Lockyer said at a news conference that day, "[that] our courts are being used by wealthy interests . . . to prevent citizens from speaking out on [issues] of controversy."¹³⁷ He said that his bill was introduced "to protect citizens from frivolous lawsuits filed against them when they exercise their First Amendment rights to free speech and petition."¹³⁸

Senator Lockyer's bill¹³⁹ had two principal features. It contained what Senator Lockyer called an "early washout provision for frivolous or malicious suits,"¹⁴⁰ which required plaintiffs to show in limine "a substantial probability" of prevailing on a claim "arising from any act of the [defendant] in furtherance of his or her First Amendment right to petition or free speech."¹⁴¹ Unless the filer could persuade the judge of probable success, the action *would not be accepted for filing*. This requirement, called a "pleading hurdle" or "pleading bar," was designed to stop meritless suits before they could impose disabling financial or emotional tolls on SLAPP defendants. The bill also allowed a prevailing defendant to recover attorney fees and court costs.

The California Legislature approved Senator Lockyer's bill. But it was opposed by the State Bar's Committee on Administration of Justice ("CAJ"), and by the State Bar as a whole, on "definitional

¹³⁶ See S.B. 2313, 1989-90 Leg., Reg. Sess. (Cal. 1990). In November 1998, Senator Lockyer was elected Attorney General of California, and took office in January 1999. See Jon Matthews & Dan Bernstein, *Other Officials Sworn In*, SACRAMENTO BEE, Jan. 5, 1999, at A1.

¹³⁷ Tom Dresslar, *Bill Would Curb SLAPPs*, L.A. DAILY J., March 1, 1990, at 8. Alan LaPointe, the target in the pioneering SLAPP-back suit *LaPointe v. West Contra Costa Sanitary District*, see *supra* text accompanying note 4 and *infra* note 413, was present at Senator Lockyer's news conference. See Dresslar, *supra*, at 8.

¹³⁸ *Id.*

¹³⁹ See Cal. S.B. 2313.

¹⁴⁰ Dresslar, *supra* note 137, at 8.

¹⁴¹ Cal. S.B. 2313.

and constitutional grounds."¹⁴² The "definitional" ground was that the proposed statute might also affect civil rights actions and environmental suits against developers; the far more persuasive constitutional ground was that the pleading bar impaired filers' rights to trial by jury.¹⁴³ By requiring a filer first to convince a judge that its action had a *probability* (rather than merely a *possibility*) of success, Senator Lockyer's bill might have kept a prospective filer from reaching the jury with a case (whose chances may at first have looked about even) which might ultimately have prevailed there. Governor George Deukmejian vetoed the measure.

Senator Lockyer tried again in 1991 by introducing S.B. 10,¹⁴⁴ later "bundled" with a similar pleading-bar measure aimed at actions against volunteer directors and officers of nonprofit corporations.¹⁴⁵ This time the State Bar's CAJ tried to persuade Senator Lockyer to substitute a compromise bill, which would have suspended discovery for a specified period, and provided for a motion to strike following existing standards of nonsuit or summary judgment. This compromise was intended to allow for an accelerated test of the sufficiency of a complaint while still keeping the burden of persuasion on the defendant. The compromise measure also added a preamble stating the legislature's concerns.¹⁴⁶ Senator Lockyer accepted some of the CAJ compromise, but not enough of it to alleviate their concerns about trial by jury, and the State Bar finally opposed the 1991 bill.¹⁴⁷ It nevertheless passed both houses of the legislature, but was vetoed by Governor Pete Wilson.

The indefatigable Senator Lockyer was back the next year (1992) with essentially the same (bundled) bill.¹⁴⁸ This bill contained the earlier CAJ preamble, and combined the CAJ's discovery bar with a *post-filing* motion to strike. Although the CAJ never approved this compromise, the Assembly Judiciary Committee nevertheless de-

¹⁴² Michael D. Stokes, *SLAPPING Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992*, 14 CEB CIV. LITIG. RPTER. 485, 487 (1992).

¹⁴³ See *id.* at 488-89 (describing negative implications of "definitional" problem).

¹⁴⁴ 1990-91 Leg., Reg. Sess. (Cal. 1991).

¹⁴⁵ See Stokes, *supra* note 142, at 487 (describing Senator Lockyer's second attempt to introduce SLAPP suit provisions); S.B. 341, 1990-91 Leg., Reg. Sess. (Cal. 1991).

¹⁴⁶ This preamble has survived into the final statute and has occasionally been cited by the courts. See, e.g., Ludwig v. Superior Court, 37 Cal. App. 4th 8, 14, 43 Cal. Rptr. 2d 350, 355 (Ct. App. 1995) (stating that Code of Civil Procedure "[s]ection 425.16 was enacted to serve a specific purpose, which, happily if unusually, the Legislature explicitly set forth in subdivision (a)").

¹⁴⁷ See Stokes, *supra* note 142, at 487 (describing opposition to SLAPP suit).

¹⁴⁸ See S.B. 1264, 1991-92 Leg., Reg. Sess. (Cal. 1992).

clared that it met the CAJ's concerns.¹⁴⁹

Several further changes were made in the legislative process. The 1992 bill originally required the plaintiff to establish a *substantial* probability of success on the claim; a Senate amendment removed the word "substantial."¹⁵⁰ At the urging of the California Judges Association (which had been concerned that the bill's provisions were "too broad in potentially applying to every case") a passage specifying "the First Amendment conduct protected by the bill" was added to "ensure [] that the bill is not used in private disputes."¹⁵¹ Legislative amendments also added a provision for staying discovery except as permitted upon a showing of good cause, and another for awarding costs and fees to plaintiffs where the motion to strike was "frivolous."¹⁵² A suggestion by the Governor's Office of Planning and Research to provide that a successful motion to strike should bar a later action for malicious prosecution was not accepted.¹⁵³

Many California newspapers voiced support for the 1992 version of the bill. The California Newspaper Publishers Association also supported the bill, their support perhaps related to the fact that newspapers are prime SLAPP targets.¹⁵⁴ Other supporters included environmental groups such as Concerned Citizens for Environmental Health, the Planning and Conservation League, the Greenlining Coalition, Friends of the River, and a chapter of the Sierra

¹⁴⁹ See Stokes, *supra* note 142, at 487 (citing Analysis of S.B. 1264 by Assembly Committee on Judiciary (July 1, 1992)).

¹⁵⁰ Richard Sybert, Director of the Governor's Office of Planning and Research, suggested "evidence to substantiate the claim" as a substitute formula for "substantial probability." Letter from Richard Sybert, Director of the Governor's Office of Planning and Research, to Bill Lockyer, Senator, Cal. Senate (Mar. 18, 1992) (on file in Legislative Author's File). Director Sybert rejected "reasonable probability" as indistinguishable from "substantial probability." *Id.* He repeated his support for this formula in a subsequent letter. See Letter from Richard Sybert, Director of the Governor's Office of Planning and Research, to Bill Lockyer, Senator, Cal. Senate (Apr. 28, 1992) (on file in Legislative Author's File).

¹⁵¹ SENATE FLOOR NOTES FOR S.B. 1264, ¶6 (on file with Office of Senate Floor Analyses). Director Sybert also urged a tightened definition of protected conduct. See Letter from Richard Sybert to Bill Lockyer, Senator, Cal. Senate (Mar. 18, 1992) (on file in Legislative Author's File).

¹⁵² The plaintiffs' fees and costs provision was suggested by Director Sybert. See Letter from Richard Sybert to Bill Lockyer, Senator, Cal. Senate (Mar. 18, 1992) (on file in Legislative Author's File).

¹⁵³ See Attachment to Letter from Richard Sybert to Bill Lockyer, Senator, Cal. Senate (Apr. 28, 1992) (on file in Legislative Author's File).

¹⁵⁴ See SENATE COMMITTEE ON JUDICIARY, 1991-1992 REG. SESS., ANALYSIS OF S.B. 1264, at 1 (Feb. 25, 1992) [hereinafter ANALYSIS OF S.B. 1264] (listing as support *San Diego Union, San Jose Mercury News, Fremont Argus, Los Angeles Times, Contra Costa Times, Sacramento Bee, San Francisco Chronicle, San Mateo Times, and San Francisco Bay Guardian*).

Club.¹⁵⁵ Civil liberties and “good government” groups such as the First Amendment Coalition, California Common Cause, Public Advocates, the American Civil Liberties Union, and the Jewish Public Affairs Council also supported the bill.¹⁵⁶ The Los Angeles County Board of Supervisors supported it too,¹⁵⁷ as did the City of Los Angeles.¹⁵⁸ So did the California School Employees Association. The School Employees Association had previously sued to stop an employment subcontracting practice, and the subcontractor countersued for \$123 million on twenty causes of action, including defamation and interference torts.¹⁵⁹

The Golden State Mobile Home Owners League was also in the list of supporters. Some SLAPP cases had arisen from agitation by mobile homeowners against the management of the sites where they were parked. The American Heart Association also supported the bill, presumably to protect against SLAPP suits by manufacturers of tobacco and other somatic irritants.¹⁶⁰ The California Trial Lawyers Association, the California Building Industry Association, and the Association for California Tort Reform opposed the bill.¹⁶¹ But the Bar Association of San Francisco supported it.¹⁶²

Senator Lockyer stated in support of his bill that SLAPP actions “are lawsuits designed to silence ordinary citizens from trying to

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See* Letter from Los Angeles Board of Supervisors to Bill Lockyer, Senator, Cal. Senate (Feb. 21, 1992) (on file in Senate Policy Committee File).

¹⁵⁸ *See* Letter from Norm Boyer, Chief Legislative Representative, to Bill Lockyer, Senator, Cal. Senate (Mar. 26, 1992) (on file with Office of Senate Floor Analyses).

¹⁵⁹ These claims were based upon comments made at meetings of school district personnel committees and were privileged under California Civil Code section 47(b). *See* California Sch. Employees Ass'n v. Del Norte County Unified Sch. Dist., Orange County Superior Court No. 591957 (1989), coordinated as Santa Clara Superior Court Coordinated Case No. 2351 (1989). Senator Lockyer specifically mentioned this case as an example of the abuses his bill was intended to remedy. The author is grateful to William Heath, Esq., Deputy Chief Counsel, California School Employees Association, for sharing his recollections of the case.

¹⁶⁰ *See* Analysis by Senate Rules Committee Office of Senate Floor Analyses (on file in Senate Committee File).

¹⁶¹ *See id.* at 1. The Association for California Tort Reform later dropped its opposition. *See* Letter from Bill Lockyer, Senator, Cal. Senate, to Pete Wilson, Governor, Cal. (Aug. 21, 1992) (on file in Legislative Author's File).

Some of the groups on either side of the issue based their positions at least in part, and sometimes entirely, on the portion of the bill dealing with volunteer officers and directors of nonprofit corporations. This part of Senator Lockyer's legislation, which became Code of Civil Procedure section 425.15, is outside the scope of this Article.

¹⁶² *See* Letter from James M. Seff, President, Bar Association of San Francisco, to Bill Lockyer, Senator, Cal. Senate (Mar. 6, 1992) (on file in Legislative Author's File).

influence their government. In a democratic society with the right to petition government being one of the fundamental liberties, we want to encourage participation."¹⁶³

This time Governor Wilson signed the bill, which became section 425.16 of the Code of Civil Procedure.¹⁶⁴ At the time, the Governor declared he was signing the bill only on Senator Lockyer's promise that he would introduce remedial legislation to make mandatory a permissive provision for awarding costs and attorney's fees to a plaintiff who prevailed on a motion to strike, and to add a five-year sunset provision.¹⁶⁵

As he promised, on December 7, 1992 Senator Lockyer introduced a new bill to make the changes the Governor requested.¹⁶⁶ The new bill changed "may" to "shall" in the plaintiff's costs and fees provision and added an automatic repeal date of January 1, 1998. But before passing the bill, over Senator Lockyer's objection, the Assembly changed the sunset provision to provide instead for the Judicial Council to report to the legislature on the effect of the law.¹⁶⁷ Governor Wilson signed the bill anyway.¹⁶⁸

In 1997, Senator Lockyer proposed another amendment to the anti-SLAPP law.¹⁶⁹ The amendment sought to resolve questions about whether the law covered protests related only tangentially to issues formally before official bodies. It mandated a broad interpretation and explicitly extended protection to "any other conduct in furtherance of the exercise of the constitutional right of petition

¹⁶³ Analysis by Senate Rules Committee Office of Senate Floor Analyses, at 3 (on file with Senate Committee).

¹⁶⁴ See Act approved Sept. 16, 1992, ch. 726, sec. 425.16, § 2, 1992 Cal. Stat. 3522, 3523-24.

¹⁶⁵ See Message of the Governor, September 16, 1992.

¹⁶⁶ See S.B. 9, 1993-94 Leg., Reg. Sess. (Cal. 1992).

¹⁶⁷ In a letter to Governor Wilson, Senator Lockyer said:

I recognize that a Judicial Council study in five years is not the equivalent of a five-year sunset. However, a study could achieve much the same purposes as a five-year sunset, and would identify specific failures or shortcomings of the law should any emerge. Thus, the study could be useful in determining whether the law should be amended, repealed or preserved.

Letter from Bill Lockyer, Senator, Cal. Senate, to Pete Wilson, Governor, Cal. (Sept. 15, 1993) (on file in Legislative Author's File).

Due largely to research problems occasioned by the difficulty in identifying SLAPP cases on trial court dockets, by the beginning of 1999 the prescribed study had still not been sent to the legislature. The notice and public register provisions in the proposed new section 425.16(k) should avoid this problem in the future. See discussion *infra* Part VIII.E.

¹⁶⁸ See Act approved Oct. 11, 1993, ch. 1239, sec. 425.16, §1, 1993 Cal. Stat. 1-3.

¹⁶⁹ See S.B. 1296, 1997-98 Leg., Reg. Sess. (Cal. 1997).

or the constitutional right of free speech in connection with a public issue or an issue of public interest." The phrase "any other conduct" was chosen to make explicit that the law applied to "non-communicative conduct."¹⁷⁰ The requirement of broad construction was added in response to conflicting decisions in the courts.¹⁷¹ The Senate Judiciary Committee's Analysis stated that the added language would

strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise.¹⁷²

A number of organizations, including many from the media, supported the bill.¹⁷³ No formal opposition is reported in the legislative history documents. The amendment was passed unanimously in both houses and was approved by Governor Wilson.¹⁷⁴ The code section, as modified by the two amendments, now reads as follows:

§ 425.16. Actions arising from exercise of free speech or right of petition; legislative findings; motion to strike; stay of discovery; fees, costs; exception; report to legislature.

¹⁷⁰ Senator Lockyer made specific reference to *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995). Although there the court rejected a party's contention that the activity complained of (soliciting agents to oppose a developer's project) was "non-communicative," *id.* at 18-20, 43 Cal. Rptr. 2d at 357-59, Senator Lockyer wished to establish the principle that both kinds of First Amendment activity would be entitled to protection. See ANALYSIS OF S.B. 1296, *supra* note 154, at 3. On the distinction between communicative and noncommunicative acts in the context of the litigation privilege, see *Kimmel v. Goland*, 51 Cal. 3d 202, 793 P.2d 524 (1990), which states that the litigation privilege does not protect unlawful recording of telephone conversations in anticipation of litigation.

¹⁷¹ Cal. S.B. 1296. The amendment concerning the broad interpretation was inspired by case law, specifically *Zhao v. Wong*, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996), *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996), and *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996). See ANALYSIS OF S.B. 1296, *supra* note 154, at 3; see also discussion of these cases *infra* Part V.

¹⁷² ANALYSIS OF S.B. 1296, *supra* note 154, at 4.

¹⁷³ See documents in Assembly Committee on Judiciary Legislative Bill File (listing organizations such as California Broadcasters Association, California Newspaper Publishers Association, Orange County Register, ACLU, and Planning and Conservation League).

¹⁷⁴ See Senate Weekly History, August 29, 1997, at 646.

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

A bill that may change the law is pending in the California legislature as this Article goes to press. Assembly Bill 1675, introduced on March 16, 1999 by Assembly Judiciary Committee Chair Sheila Kuehl, would provide for a direct appeal from an order denying a special motion to strike. This would correct the perceived inequity in existing law, under which an order granting a motion to strike can be appealed directly under most circumstances, but an order denying the motion can only be reviewed by writ until the proceedings in the trial court are concluded. It would also provide for an automatic stay pending appeal, unless the plaintiff demonstrates to the *appellate* court probable success and the likelihood of irrepara-

ble injury.¹⁷⁵ A similar suggestion is made in statutory amendments proposed in Part VII *infra* (proposed new section 425.16(g)(2)(a)), and discussed in Part VIII.C.

Assembly Bill 1675 would also simplify data collection on anti-SLAPP motions by requiring transmission to the Judicial Council of endorsed caption pages of section 425.16 motions and oppositions (and related orders, writ petitions, and notices of appeal) for inclusion in a public record.¹⁷⁶ A somewhat different suggestion is made in statutory amendments proposed in Part VII *infra* (proposed new section 425.16(k), and discussed in Part VIII.E.¹⁷⁷

Section 425.16(i) of the 1992 statute required the Judicial Council to report to the Legislature by January 1, 1998, on the frequency and outcome of motions to strike under the new law and on "any other matters pertinent to the purposes of this section."¹⁷⁸ For reasons having largely to do with the difficulty of research,¹⁷⁹ the re-

¹⁷⁵ The text of the Kuehl proposal on this subject reads as follows:

An order denying a special motion to strike shall be appealable under Section 904.1. Upon the filing of such an appeal, all proceedings on any cause of action which is the subject of the appeal shall be stayed unless the plaintiff demonstrates to the appellate court probable success on the appeal and that the plaintiff will otherwise sustain irreparable injury.

¹⁷⁶ The text of the Kuehl proposal on this subject reads as follows:

- (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order granting or denying a special motion to strike, discovery, or fees.
- (2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision, and shall include it on the Judicial Council Internet website.

¹⁷⁷ Senate Bill 1188, introduced by Senator Ray Haynes on February 26, 1999 but later defeated in committee, would have prevented public entities (and in its original form public officials as well) from using section 425.16 at all. It was a response to *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (Ct. App. 1996), see *supra* text accompanying notes 290-97, and to an unpublished Second District decision in *Marshall v. Board of Education of Torrance Unified School District*, No. B120528 (filed Nov. 25, 1998), granting attorney fees against the Board. The language of the bill — providing that the word "person" as used in the law excludes public entities as defined by Government Code sections 810.2 and 811.2, (and originally public officers as defined in Government Code section 811.4 acting in an official capacity) — might have had the paradoxical effect under section 425.16(b)(1) of blocking anti-SLAPP motions *against* them rather than *by* them. As the bill was defeated in committee the question is moot for the time being.

¹⁷⁸ CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 1999).

¹⁷⁹ See *infra* note 432 and accompanying text.

port was not made until May 28, 1999. After gathering what information it could, the Judicial Council retained Pring and Canan as consultants to analyze the data and prepare an independent report.¹⁸⁰ Their report proposed seven statutory reforms:

- (1) Filing of a form for statistical purposes when making a motion under the anti-SLAPP law;
- (2) Extending the attorney fee provisions "to cover the full costs that filer have imposed on targets";
- (3) Amending the statute to control the judge's discretion regarding the deadline for filing the motion;
- (4) Permitting immediate appeal of denial of an anti-SLAPP motion;
- (5) Providing that the anti-SLAPP law does not apply to SLAPP-backs;
- (6) Amending the statute to control trial court lifting of the discovery stay; and
- (7) Adding a provision for sanctions against filers and their attorneys.¹⁸¹

¹⁸⁰ See Judicial Council of California, Administrative Office of the Courts: LEGISLATIVE REPORT: SPECIAL MOTIONS TO STRIKE STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION ("SLAPP SUITS") — CODE OF CIVIL PROCEDURE SECTION 425.16 (MAY 28, 1999) [hereinafter LEGISLATIVE REPORT], at 2.

¹⁸¹ Penelope Canan and George W. Pring, ANTI-SLAPP MOTIONS: A REPORT TO THE LEGISLATURE PURSUANT TO CCP 425.16(2) [sic] UNDER CONTRACT TO THE ADMINISTRATIVE OFFICE OF THE COURTS[,] JUDICIAL COUNCIL OF CALIFORNIA (1998) [hereinafter CONTRACT REPORT], Attachment 2 to LEGISLATIVE REPORT, *supra* note 180, at 12. The text of their recommendations follows:

Recommendation 1. If the legislature requires knowing how the anti-SLAPP provision is working, it must enable reliable research. At a minimum it should require the filing of a simple form whenever the motion is entered. Then a random sample of these could be selected and various participants interviewed about impacts.

Recommendation 2. Amend the statute to extend attorneys fees to cover the full costs that filers have imposed on targets. Add "... reasonably incurred in defending against the action" to the end of the first sentence of 425.16(c).

Recommendation 3. Amend the statute to control the judge's discretion regarding the motion-filing deadline. Add "whenever necessary or desirable to carry out the legislative intent in subsection (a)" to 425.16(f).

Recommendation 4. Amend the statute or the list of appealable orders in the CCP to permit an immediate appeal of the denial of an anti-SLAPP motion.

Recommendation 5. Amend the statute by adding a sentence to 425.16(d) to clarify that the special motion to strike does not apply to so-called SLAPPbacks. Possible language might be: "This section shall not apply to any cause of action arising from any cause of action which has been dismissed pursuant to a special motion to strike under this section."

Recommendation 6. Amend the statute to control trial court lifting of the "stay" of all discovery proceedings upon the filing of the notice of the 425.16 mo-

The Judicial Council rejected all seven recommendations.¹⁸² Three

tion. We would recommend an amendment deleting the last sentence of subsection (g) and inserting: "Discovery shall be disfavored. In permitting any discovery, the court shall limit it both as to means and subject to only that which is necessary and designed to uncover evidence directly relevant to the special motion to strike, most expeditiously and at least expense to the party from whom discovery is sought. To this end the court shall consider the following factors before permitting discovery: (1) whether the information sought goes to the hear to the claim or defense of the party seeking discovery; (2) whether the party seeking discovery has made a showing on every other element of the claim or defense before any discovery is conducted; (3) what efforts the party seeking discovery has made to secure the information prior to filing the action; (4) whether the information is uniquely held by the party from whom discovery is sought; and (5) whether the party seeking discovery has exhausted all other sources of obtaining the needed information."

Recommendation 7. Amend the statute to add new remedies. We recommend the language in our "model bill" section (5)(g)(2): "such additional sanctions upon the responding party [plaintiff filer], its attorneys, or law firms as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated."

¹⁸² See LEGISLATIVE REPORT, *supra* note 180, at 4-6. The text of the Judicial Council's responses follows:

Consultants' Recommendation 1. *If the Legislature requires knowing how the anti-SLAPP provision is working, it must enable reliable research. At a minimum it should require the filing of a simple form whenever the motion is entered. Then a random sample of these could be selected and various participants interviewed about impacts.*

Council's View on Recommendation 1: The Judicial Council does not believe that further data collection on special anti-SLAPP motions by the courts is necessary. The information already obtained by staff is adequate to indicate that special anti-SLAPP motions are not very common. Most survey respondents believed the existence of the statute deters SLAPP suits as the Legislature intended. A case-level review is required to collect data on special anti-SLAPP motions. Further tracking of section 425.16 would be burdensome and costly and should not be required.

Consultants' Recommendation 2. *Amend the statute to extend attorney fees to cover the full costs that filers have imposed on targets. Add "reasonably incurred in defending against the action" to the end of the first sentence of 425.16(c).*

Council's View on Recommendation 2: As drafted, section 425.16 is unclear as to whether mandatory fees apply only to costs associated with the motion or costs associated with the entire action. The Legislature's clarification of this point would be helpful. Beyond this, the council does not endorse the consultants' specific proposed amendment and takes no position on the substantive issue of the appropriate extent of attorney fees.

Consultants' Recommendation 3. *Amend the statute to control the judge's discretion regarding the motion-filing deadline. Add "whenever necessary or desirable to carry out the legislative intent in subsection (a)" to 425.16(f).*

Council's View on Recommendation 3: The council believes that the legislative action recommended by the consultant is not necessary because the statute already provides the court with sufficient discretion to extend the motion-filing deadlines.

Consultants' Recommendation 4. *Amend the statute or the list of appealable orders in the Code of Civil Procedure to permit an immediate appeal of the denial of an anti-SLAPP motion.*

Council's View on Recommendation 4: The council believes that the amendment proposed by the consultants is unnecessary because review by writ of mandate,

of the recommendations (those regarding statistical information, appealable order, and sanctions) are recommended here as well, in somewhat different form.¹⁸³

V. THE CALIFORNIA STATUTE IN THE COURTS

The California anti-SLAPP law has been sympathetically received by the appellate courts. Of the twenty-seven published cases decided under the law as of this writing,¹⁸⁴ the target prevailed in

which is currently available, is sufficient.

Consultants' Recommendation 5. Amend the statute by adding a sentence to 425.16(d) to clarify that the special motion to strike does not apply to so-called SLAPPbacks. [A SLAPPback occurs when a defendant prevails on a motion to strike, subsequently files a malicious prosecution claim, and the original plaintiff files a special motion to strike, claiming that the malicious prosecution suit is a SLAPP.] Possible language might be: "This section shall not apply to any cause of action arising from any cause of action which has been dismissed pursuant to a special motion to strike under this section."

Council's View on Recommendation 5: The council believes that the amendment proposed by the consultant is unnecessary because the judge hearing the SLAPPback case can determine whether the special motion is meritorious or not.

Consultants' Recommendation 6. Amend the statute to control trial court lifting of the "stay" of all discovery proceedings upon the filing of the notice of the 425.16 motion. We would recommend an amendment deleting the last sentence of subsection (g) and inserting: "Discovery shall be disfavored. In permitting any discovery, the court shall limit it both as to means subject to only that which is necessary and designed to uncover evidence directly relevant to the special motion to strike, most expeditiously and at least expense to the party from whom discovery is sought. To this end the court shall consider the following factors before permitting discovery: (1) whether the information sought goes to the hear[ing] to the claim or defense of the party seeking discovery; (2) whether the party seeking discovery has made a showing on every other element of the claim or defense before any discovery is conducted; (3) what efforts the party seeking discovery has made to secure the information prior to filing the action; (4) whether the information is uniquely held by the party from whom discovery is sought; and (5) whether the party seeking discovery has exhausted all other sources of obtaining the needed information."

Council's View on Recommendation 6: The council believes that the statute currently provides sufficient discretion for judges to permit discovery after the filing of a special motion. Therefore, the consultants' proposed amendment relating to the "stay" of discovery upon the filing of a section 425.16 motion is not necessary.

Consultants' Recommendation 7. Amend the statute to add new remedies. We recommend the language in our "model bill" section (5)(g)(2): "such additional sanctions upon the responding party [plaintiff filer], its attorneys, or law firms as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated."

Council's View on Recommendation 7: The council does not endorse the consultants' specific proposed amendment and takes no position on the substantive legal issue of whether additional sanctions should be authorized.

¹⁸³ See discussions *supra* Parts VIII.C (appealable order), VIII.D (sanctions), VIII.E (statistical information).

¹⁸⁴ April 19, 1999. Two additional cases, *Kyle v. Carmon*, 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303 (Ct. App. 1999) (opinion filed Apr. 28, 1999), and *Marich v. QRZ Media, Inc.*, 1999 WL 447515 (Cal. App.) (opinion filed July 2, 1999), were decided while this Article was in proof and are not included in the above calculation.

twenty-two. Of these, thirteen affirmed a strike order,¹⁸⁵ three reversed a denial of a strike order,¹⁸⁶ three granted mandate to overrule denials of strike orders,¹⁸⁷ and three held for the filer even though the underlying issue was moot.¹⁸⁸ Three of the remaining five (where strike orders were reversed because the underlying issue was held insufficiently public to qualify under the statute) were disapproved by the California Supreme Court in 1999 in *Briggs v. Eden Council for Hope and Opportunity*.¹⁸⁹ One case in a similar posture was settled after *Briggs* and Supreme Court review was dismissed.¹⁹⁰ Only one case decided for a filer remains good law, and

¹⁸⁵ See *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 969 P.2d 564 (1999); *Sipple v. Foundation for Nat'l Progress*, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999); *Conroy v. Spitzer*, 70 Cal. App. 4th 1448, 83 Cal. Rptr. 2d 443 (Ct. App. 1999); *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483*, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 (Ct. App. 1999); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), *disapproved on other grounds*, *Briggs*, 19 Cal. 4th at 1124 n.10, 969 P.2d at 575 n.10; *Macias v. Hartwell*, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (Ct. App. 1997); *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1997); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (Ct. App. 1996); *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996); *Matson v. Dvorak*, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880 (Ct. App. 1995); *Evans v. Unkow*, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (Ct. App. 1995); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (Ct. App. 1995), *cert. denied*, 519 U.S. 809 (1996); *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464 (Ct. App. 1995).

¹⁸⁶ See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F.3d 1208 (9th Cir. 1999); *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (Ct. App. 1996); *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995).

¹⁸⁷ See *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996); *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687 (Ct. App. 1994); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

¹⁸⁸ See *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357 (Ct. App. 1996) (dismissing writ as moot). In *Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 77 Cal. Rptr. 2d 600 (Ct. App. 1998), the court of appeal upheld an award of attorney fees even though the filers' action was voluntarily dismissed. In *Moore v. Liu*, 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807 (Ct. App. 1999), the court upheld a third-party defendant's right to seek attorney fees under the anti-SLAPP statute even after that party's voluntary dismissal from the case.

¹⁸⁹ See *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs*, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th at 1124 n.10, 969 P.2d at 575 n.10; *Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc.*, 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th at 1124 n.10, 969 P.2d at 575 n.10; *Zhao v. Wong*, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th at 1124 n.10, 969 P.2d at 575 n. 10.

¹⁹⁰ See *Los Carneros Community Assocs., Inc. v. Penfield & Smith Eng'rs, Inc.*, 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396 (Ct. App. 1998). In *Los Carneros*, which went against the filer in the court of appeal, the California Supreme Court granted review but deferred consideration pending decision of *Briggs*. See *Los Carneros Community Assoc., Inc. v. Penfield & Smith Eng'rs, Inc.*, 966 P.2d 441 (Cal. 1998). After *Briggs* was decided, the case was settled and the Supreme Court dismissed its grant of review and remanded for unpublished disposition. See *Los Carneros Community Assocs., Inc. v. Penfield & Smith Eng'rs, Inc.*, 970 P.2d

that case upheld a denial of a strike order on substantive rather than procedural grounds.¹⁹¹

A. *Holdings of First Impression*

The first reported appellate case interpreting the new law was not decided until August 16, 1994, more than nineteen months after the law's effective date.¹⁹² The case, *Wilcox v. Superior Court*,¹⁹³ concerned a court reporters' practice called "direct contracting," under which a group of reporters (in this case California Reporting Alliance) contract with a major consumer of their services, such as an insurance company, for the exclusive right to report their depositions. Nonaffiliated reporters, including Wilcox, sued the Alliance and two of their insurance company clients, charging unfair business practices and interference torts. Wilcox distributed materials to other court reporters commenting on the issues in the litigation and soliciting contributions to help defray the costs of suit; she may also have threatened a secondary boycott. The Alliance cross-complained for defamation and conspiracy to restrain trade. Wilcox moved to strike the cross-claim as a SLAPP suit, but her motion was denied. She then sought mandate from the court of appeal, which was granted.

The court of appeal recognized that to fulfill the purpose of the legislation, the target's remedy must provide for a "fast and inexpensive unmasking and dismissal of SLAPPs."¹⁹⁴ As it was the first reported case, the court took the opportunity to lay down some basic principles for interpreting the anti-SLAPP law and preserving its constitutionality.

The court held that a SLAPP defendant has the burden of proving that the suit is indeed a SLAPP suit. The defendant must show that the case falls within the statutory definition of an action "arising from any act . . . in furtherance of [the] right of petition or free

409 (Cal. 1999); CAL. CT. R. 29.4(c).

¹⁹¹ See *Foothills Townhome Ass'n. v. Christiansen*, 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516 (Ct. App. 1998) (holding plaintiff's case not meritless). Another case concerned only fees and is not counted in this survey. See *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 39 Cal. App. 4th 1379, 46 Cal. Rptr. 2d 542 (Ct. App. 1995) ("*More IP*").

¹⁹² S.B. 1264 was denominated an urgency measure and took effect immediately upon approval by Governor Wilson on September 16, 1992. See Message of the Governor, *supra* note 165.

¹⁹³ 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

¹⁹⁴ *Id.* at 823, 33 Cal. Rptr. 2d at 454.

speech under the United States or California Constitution in connection with a public issue."¹⁹⁵ The court based its decision on the legislative history, noting that the pleading bar in the vetoed 1990 bill had placed the burden entirely on the plaintiff to justify the action. But the court construed the later compromise as "placing the initial burden on the defendant to show the action should be tested under the provisions of subdivision (b) and the burden on the plaintiff to show the action meets that test."¹⁹⁶

Accordingly, the statute requires the defendant to make a prima facie showing that the plaintiff's suit arises "from any act of [a defendant] in furtherance of [the defendant's] right of petition or free speech . . . in connection with a public issue."¹⁹⁷ Thus, to use the court's example,

if the defendant's act was a lawsuit against a developer the defendant would have a prima facie First Amendment defense. But, if the defendant's act was burning down the developer's office as a political protest, the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant.¹⁹⁸

The *Wilcox* court also held that to preserve the filer's right to trial by jury, and thus, the constitutionality of the statute, determining whether the action is a SLAPP may not involve weighing of evidence.¹⁹⁹ But the filer must meet the target's constitutional defenses "by showing the defendant's purported constitutional de-

¹⁹⁵ CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 1999).

¹⁹⁶ *Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452. But, the court continued,

[w]e do not believe the Legislature intended that to invoke the special motion to strike the defendant must first establish its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) [requiring the court to consider the pleadings and affidavits] would be superfluous because by definition the plaintiff could not prevail on its claim.

Id.

¹⁹⁷ CAL. CIV. PROC. CODE § 425.16(b)(1).

¹⁹⁸ *Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452-53 (citations omitted). The scope of protest covered by the law has been broadened by the 1997 amendment. See CAL. CIV. PROC. CODE § 425.16(a); *supra* notes 169-72 and accompanying text. Presumably it still does not cover arson, whether politically motivated or not.

¹⁹⁹ See *Wilcox*, 27 Cal. App. 4th at 823, 33 Cal. Rptr. at 454 (citing *Looney v. Superior Court*, 16 Cal. App. 4th 521, 537-38, 20 Cal. Rptr. 2d 182, 192 (Ct. App. 1993)).

fenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.²⁰⁰ Showing that the relevant speech is privileged under the Petition Clause constitutes a defense to defamation or an interference tort; a statutory privilege such as that conferred by the litigation privilege (Civil Code section 47) would do as well, even in the presence of common law malice or ill will.²⁰¹ Similarly a showing of privilege defeats a claim of conspiracy by removing the essential element of tortious or wrongful conduct.²⁰² Thus the presence of a constitutional or statutory privilege would prevent the filer from showing the "probability of success" required to defeat the motion to strike. A "probability" of success means a "reasonable" probability, notwithstanding the fact that the word "reasonable" is not included in section 425.16 as it is in other statutes.²⁰³

Finally, the *Wilcox* court held that an "act in furtherance of" a person's First Amendment rights is not limited to oral or written statements, but includes other constitutionally protected conduct

²⁰⁰ *Wilcox*, 27 Cal. App. 4th at 824, 33 Cal. Rptr. 2d at 455.

²⁰¹ *See id.* at 827, 33 Cal. Rptr. 2d at 457.

Courts have universally declared common law malice — ill will — does not defeat the protection afforded by the right to petition the government. As the Supreme Court affirmed in *Noerr*, the freedom to petition the government cannot reasonably be allowed to disappear merely because the petitioner acts with malice. The motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate their petition. The petition privilege is defeated, if at all, only by a showing of actual malice — knowledge of the falsity of the allegations or with reckless disregard for their truth or falsity.

Id. (citations and internal quotation marks omitted).

²⁰² *See id.* at 825-30, 33 Cal. Rptr. 2d at 456-59 (discussing privilege against civil liability for filing lawsuits).

²⁰³ *See id.* at 823-25, 33 Cal. Rptr. 2d at 454-55. For an example of such a statute, see CAL. CIV. PROC. CODE § 425.13 (covering negligence actions against health care providers). The court noted that the word "substantial" had been removed in the Assembly to avoid conflicts with the filers' jury right, but that the legislature could not have intended to require a court to recognize an "unreasonable" probability. The court held that the "reasonable probability" standard of *Hung v. Wang*, 8 Cal. App. 4th 908, 929, 11 Cal. Rptr. 2d 113, 125 (Ct. App. 1992) — that the petitioner must show a "substantial case" — would apply to anti-SLAPP motions. *See Wilcox*, 27 Cal. App. 4th at 823-25, 33 Cal. Rptr. 2d at 454-55. However, this decision came before the California Supreme Court's holding in *College Hospital, Inc. v. Superior Court*, 8 Cal. 4th 704, 882 P.2d 894 (1994), amalgamating standards from similarly intended but differently phrased statutes. In *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 15-16, 43 Cal. Rptr. 2d 350, 355-56 (Ct. App. 1995), decided after *College Hospital*, the court of appeal reconciled the standard with *College Hospital* without disapproving *Wilcox*. *See infra* text accompanying notes 208-15.

such as a peaceful economic boycott.²⁰⁴ The fact that Wilcox's statements were made in the course of soliciting funds to support a lawsuit constituted "a strong showing those statements are rationally connected to the litigation itself."²⁰⁵ The anti-SLAPP statute protects commercial speech.²⁰⁶ There can be no antitrust liability based on petitioning any branch of government "even if the intent is anticompetitive."²⁰⁷

Another case which addressed a number of different questions about the new law was *Ludwig v. Superior Court*.²⁰⁸ Ludwig, a developer, wanted to build a mall near the city of Barstow, but the city had hoped to attract a competing developer to build a mall in Barstow itself. Environmental litigation followed against the project Barstow favored, Ludwig allegedly assisted this litigation, and Barstow (believing Ludwig to be "behind" it) sued him for interference torts and unfair competition.²⁰⁹ Ludwig moved to strike under the anti-SLAPP law, lost, and petitioned for mandate, which was granted, reversing the denial of the strike motion.²¹⁰

The court of appeal departed slightly from the probability standard set out in *Wilcox*. After *Wilcox*, but before *Ludwig*, the California Supreme Court decided *College Hospital, Inc. v. Superior Court*.²¹¹ There the court considered Code of Civil Procedure section 425.13, which requires plaintiffs demanding punitive damages from health care providers to show a "substantial probability" of prevailing on the claim. The court compared that standard with Civil Code section 1714.10 (requiring a plaintiff to show a "reasonable probability" of success in a conspiracy claim against an attorney), Code of Civil Procedure section 425.14 (requiring a plaintiff to "substantiate" a claim for punitive damages against a religious organization), and the anti-SLAPP statute's requirement of a

²⁰⁴ See *Wilcox*, 27 Cal. App. 4th at 820-21, 33 Cal. Rptr. 2d at 453 (describing how defendant may make prima facie showing that plaintiff's suit arises from defendant's act in furtherance of defendant's right of free speech); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (involving peaceful economic boycotts).

²⁰⁵ *Wilcox*, 27 Cal. App. 4th at 822, 33 Cal. Rptr. 2d at 453.

²⁰⁶ See *id.* at 822 n.6, 33 Cal. Rptr. 2d at 454 n.6 (discussing Legislature's intention to exclude commercial speech from anti-SLAPP legislation).

²⁰⁷ *Id.* at 822, 33 Cal. Rptr. 2d at 453 (citing *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1133, 791 P.2d 587, 595 (1990)).

²⁰⁸ 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995) (reversing denial of motion to strike).

²⁰⁹ See *id.* at 12, 43 Cal. Rptr. 2d at 353.

²¹⁰ See *id.* at 11, 43 Cal. Rptr. 2d at 353.

²¹¹ 8 Cal. 4th 704, 882 P.2d 894 (1994).

“probability” of success to defeat a motion to strike. The California Supreme Court found it “unlikely that each subtle difference in phraseology was intended to establish a completely different legal standard.”²¹² “As one of the statutes cited was section 425.16,” said the *Ludwig* court, “we must construe it in accordance with the Supreme Court’s analysis.”²¹³ The court of appeal adopted the *College Hospital* standard: a plaintiff (that is, a filer, the respondent on a special motion to strike) fails if its showing “either negates or fails to reveal the actual existence of a triable claim.” As in summary judgment motions, the showing must be made by “competent admissible evidence within the personal knowledge of the declarant” and the court may not weigh the evidence in assessing the claim.²¹⁴

The *Ludwig* court accepted that the anti-SLAPP statute provides the plaintiff less time for discovery than the medical malpractice-related statute construed in *College Hospital*. It stated that

an overly-lenient standard would be wholly inappropriate, given that the statute is intended to “provid[e] a fast and inexpensive unmasking and dismissal of SLAPPs.” Obviously, the purpose of the statute would be frustrated if the plaintiff could drag on proceedings for many months by claiming a need to conduct additional investigation. The legislative intent is best served by an interpretation which would require a plaintiff to marshal facts sufficient to show the viability of the action *before filing* a SLAPP suit.²¹⁵

The *Ludwig* court also held it makes no difference that litigation is backed by a different party than the one actually filing the action. The court observed, “We see no meaningful difference between a person who supports and encourages the filing of a lawsuit, and one who supports and encourages a third party to speak out publicly on a matter of public interest.”²¹⁶

The court also reinforced the *Noerr-Pennington* doctrine that

²¹² *Id.* at 716, 882 P.2d at 901; see also text accompanying *supra* note 203.

²¹³ *Ludwig*, 37 Cal. App. 4th at 16, 43 Cal. Rptr. 2d at 356.

²¹⁴ *Id.* at 15, 43 Cal. Rptr. 2d at 355-56 (internal quotation marks omitted); cf. CAL. CIV. PROC. CODE § 437c (West Supp. 1999) (providing standard required for evidentiary showings in summary judgment motions).

²¹⁵ *Ludwig*, 37 Cal. App. 4th at 16, 43 Cal. Rptr. 2d at 356 (citations omitted) (emphasis added). The words “before filing” are not a slip of the pen — although the crux of the 1992 legislative compromise was to permit filing before the showing had to be made, this dictum wisely recommends that filers nevertheless prepare their response to an expected motion to strike before filing.

²¹⁶ *Id.* at 18, 43 Cal. Rptr. 2d at 357.

"[t]hose who petition the government are generally immune from . . . liability."²¹⁷ Finally, the *Ludwig* court rejected the idea that a party's attempts to influence government action lack protection if the party lacks "standing." For example, the party need not own property in the affected area. The court observed that "[n]o doubt a public entity may brush off objections or inquiries from non-residents, but this does not mean that such persons act 'wrongfully' when they voice concerns in a public forum."²¹⁸

Another important early case was *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*,²¹⁹ where the court of appeal held that the anti-SLAPP law protects newspapers reporting on issues before government agencies.²²⁰ The court upheld the constitutionality of the statute against an equal protection challenge (that it impermissibly created differing classes of litigants) by holding the classification reasonably related to a legitimate legislative goal.²²¹ The court also rejected a constitutional challenge based on impairment of the filers' jury right.²²² A due process challenge, based on "arbitrarily curtailing or precluding necessary discovery," was turned aside on the facts of the case but left open for another day.²²³ But the court admonished:

The trial court . . . must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish

²¹⁷ *Id.* at 21-22, 43 Cal. Rptr. 2d at 360 (citing *Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 56 (1993)). The court justified its omission of the word "antitrust" from the quotation by saying that "the principle applies to virtually any tort, including unfair competition and interference with contract." *Id.* at 21 n.17, 43 Cal. Rptr. 2d at 360 n.17 (citing *Hi-Top Steel Corp. v. Lehrer*, 24 Cal. App. 4th 570, 577-78, 29 Cal. Rptr. 2d 646, 650 (Ct. App. 1994) and cases cited therein).

²¹⁸ *Id.* at 22 n.19, 43 Cal. Rptr. 2d at 360 n.19.

²¹⁹ 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (Ct. App. 1995). The case is sometimes referred to as *More I* because it concerned *San Francisco Chronicle* articles about More University. *More II* is the case cited *infra* at note 225.

²²⁰ *See id.* at 859, 44 Cal. Rptr. 2d at 48. The court declined to decide whether a newspaper would also get the benefit of subsection (e)(3), concerning "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." *Id.* at 863 n.5, 44 Cal. Rptr. 2d at 50-51 n.5. The court was unconvinced that a newspaper was a public forum in this sense, and did not need to reach the issue. *See id.* The 1997 amendment mandating broad construction of the statute might lead to a different result if the point is relitigated.

²²¹ *See id.* at 865-66, 44 Cal. Rptr. 2d at 52.

²²² *See id.* at 866-67, 44 Cal. Rptr. 2d at 52-53.

²²³ *See id.* at 867-68, 44 Cal. Rptr. 2d at 53-54. The challenge was based on the combined effects of the discovery stay and the 30-day hearing requirement. *See id.* at 867, 44 Cal. Rptr. 2d at 53.

a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees.²²⁴

In a subsequent proceeding in the same action the court held that a prevailing defendant was entitled to recover attorney fees only on the motion to strike, not on the entire action.²²⁵ The court based its holding on the legislative history of the 1992 act.²²⁶ But appellate attorney's fees are recoverable.²²⁷

B. "Public" and "Private" Issues

One of the most difficult issues in the new law was the requirement that the protected activity relate to a public issue or an issue of public interest. This was first addressed in *Dixon v. Superior Court*,²²⁸ the second case decided under the anti-SLAPP law. Dixon was an emeritus professor of archaeology at California State University, Long Beach. A Native American archaeological site was discovered on university land. The university wanted to erect a strip mall on the land and engaged a consulting firm to report on the potential archaeological impact. The consultants reported that the university could proceed; Professor Dixon challenged this result and criticized the consulting firm's methods. The consultants sued Dixon for \$570,000, alleging four kinds of interference and three kinds of defamation.²²⁹ Dixon moved to strike the complaint as a SLAPP suit, alleging that his comments were part of a public review process mandated under the California Environmental

²²⁴ *Id.* at 868, 44 Cal. Rptr. 2d at 54.

²²⁵ See *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 39 Cal. App. 4th 1379, 1381, 46 Cal. Rptr. 2d 542, 542 (Ct. App. 1995) ("*More II*").

²²⁶ "S.B. 1264 would provide attorney's fees and costs to a prevailing defendant in a motion to strike The provision applies only to the motion to strike, and not to the entire action." *Tort Liability Protections - "SLAPP" Suits — Suits Against Volunteer Directors and Officers of Nonprofit Corps.: Hearing on SB 1264 Before the Senate Committee on Judiciary*, 1991-92 Reg. Sess. 5, cited in *More II*, 39 Cal. App. 4th at 1383, 46 Cal. Rptr. 2d at 544. A Senate floor report contains similar language. "This bill . . . provides that a prevailing defendant in the motion to strike is entitled to recover his or her attorney's fees for that motion." Senate Floor Report, Analysis of Assembly Amendment to Senate Bill No. 1264, 1991-1992 Reg. Sess. 1 (emphasis added), cited in *More II*, 39 Cal. App. 4th at 1383, 46 Cal. Rptr. 2d at 544.

²²⁷ See *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1499-1500, 45 Cal. Rptr. 2d 624, 630 (Ct. App. 1995).

²²⁸ 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687 (Ct. App. 1994).

²²⁹ See *id.* at 739, 36 Cal. Rptr. 2d at 692 (listing consultants' causes of action as negligent and intentional interference with contract and prospective advantage, libel and trade libel, and slander).

Quality Act ("CEQA").²³⁰ When the trial court denied his motion, he sought mandate, which was granted.

The court of appeal held that Dixon's comments were made in connection with an issue of public concern because they were part of a statutory public comment process. For the same reason, the exception for comments made with "actual malice" (that is, with knowledge of their falsity)²³¹ did not apply.²³² The court reasoned that, "the statutory invitation for public participation bars any inquiry into the motives behind the statements or comments made."²³³

*Church of Scientology v. Wollersheim*²³⁴ applied the anti-SLAPP law in a curious setting. Wollersheim (a former church member) won a tort judgment against the church, and for the next fifteen years the church pursued a litigious vendetta against him. The church filed numerous bizarre, unfounded and unsuccessful actions against Wollersheim, as well as against the judges in the case and the entire Los Angeles County trial bench.²³⁵ After one such action by the church, Wollersheim interposed a special motion to strike under section 425.16. Holding that "the trial court may properly consider the litigation history between the parties,"²³⁶ the court upheld the granting of this motion. It described the church's action, nominally a collateral attack on the tort judgment, as follows:

²³⁰ CAL. PUB. RES. CODE §§ 21091-21092 (West 1996); *Dixon*, 30 Cal. App. 4th at 740, 36 Cal. Rptr. 2d at 692.

²³¹ See *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

²³² See *Dixon*, 30 Cal. App. 4th at 744-45, 36 Cal. Rptr. 2d at 695-96.

²³³ See *id.* at 745, 36 Cal. Rptr. 2d at 696. The *Dixon* court relied on *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 161 Cal. Rptr. 532 (Ct. App. 1980), for its recognition of petition-based privilege for invited public comment and for the irrelevance of the motive behind such comment. See *Dixon*, 30 Cal. App. 4th at 744-45, 36 Cal. Rptr. 2d at 696.

²³⁴ 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996).

²³⁵ See *id.* at 648-49 n.5, 49 Cal. Rptr. 2d at 632 n.5. According to the court,

[t]he Church's complaint asserted that the judgment in the prior action should be declared null and void and a new trial should be ordered. The effect of such an order would be to directly impact Wollersheim by requiring him to incur further economic hardship by relitigating a matter that has already consumed fifteen years of litigation; a five-month jury trial; at least two appeals and six writ petitions in the Court of Appeal; two petitions for review in the California Supreme Court; two petitions for certiorari in the United States Supreme Court and two lawsuits in federal district court, all arising out of Wollersheim's original 1980 lawsuit against the Church.

Id. at 653, 49 Cal. Rptr. 2d at 634-35.

²³⁶ *Id.* at 648-49, 49 Cal. Rptr. 2d at 632.

[The action was] brought by the Church against Wollersheim: (a) in retaliation for his 1980 lawsuit against the Church; (b) to punish him economically for bringing that lawsuit; and (c) to obliterate the value of any victories over the Church by forcing him to abandon his efforts to recover the damages awarded in the prior action by making it too costly to do so.²³⁷

This was an attempt to chill Wollersheim's right to petition the courts by abuse of the judicial process, which brought it within the scope of section 425.16. The court continued

[A]n examination of the history of the underlying litigation reveals that the instant action is consistent with a pattern of conduct by the Church to employ every means, regardless of merit, to frustrate or undermine Wollersheim's petition activity. When a party to a lawsuit engages in a course of oppressive litigation conduct designed to discourage the opponents' right to utilize the courts to seek legal redress, the trial court may properly apply section 425.16.²³⁸

The court held that section 425.16 is not limited to tort actions, but applies to any meritless action (such as one attacking a judgment) brought "to interfere with and burden the defendant's exercise of his or her [speech or petition] rights."²³⁹ The contention that it was not a public issue was held of no consequence because it was Wollersheim's right to petition the courts that had been burdened.²⁴⁰ Moreover, the court held it *was* a public issue because the media directed much attention toward the Church of Scientology.²⁴¹

²³⁷ *Id.* at 649, 49 Cal. Rptr. 2d at 632 (citation omitted).

²³⁸ *Id.* at 648, 49 Cal. Rptr. 2d at 632.

²³⁹ *Id.* at 652, 49 Cal. Rptr. 2d at 634.

²⁴⁰ The court held (on the basis of the clear language of the 1992 act) that of the three protected activities listed in subsection (e), only the third (statements in a public forum) required the presence of an issue of public interest. "The first two categories parallel the description of privileged communications in Civil Code section 47, subdivision (b) and include judicial proceedings without any limitation as to subject matter." *Id.* at 650, 49 Cal. Rptr. 2d at 633.

²⁴¹ The court said:

Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals. Examples are product liability suits, real estate or investment scams, etc. The rec-

In *Averill v. Superior Court*²⁴² the court addressed the vexing issue of private conversations. Averill had long opposed Eli Home, a women's shelter in her neighborhood. She had petitioned the city council against placing the home in her neighborhood and had written in a similar vein to the newspapers. Eli Home threatened to sue her if she continued her opposition. Averill's employer, Rockwell International, had Eli Home on its list to receive Christmas charity. Averill told Rockwell that Eli Home was undeserving and asked that they not support it; Rockwell nevertheless continued its support of Eli Home. Based solely on her approach to Rockwell, the shelter sued Averill for slander and interference with prospective advantage. Averill moved to strike Eli Home's complaint as a SLAPP suit. Her motion was denied on the ground that it did not concern a matter of public interest, but she won mandate from the court of appeal to grant her motion. The court said (unsurprisingly) that the word "includes" in subdivision (e) was a word "of inclusion," leaving open the possibility of further coverage. It held the suit was an attempt to punish her for her previous public advocacy, and for that reason the anti-SLAPP law could reach this private conversation on an issue still theoretically open to government action (the home had only a year's permit).²⁴³

The holdings of *Wollersheim* and *Averill* on the "public issue" question were criticized in later opinions, of which *Zhao v. Wong*²⁴⁴ is the most thoughtful. This was a garden variety slander action in which Zhao accused Wong of telling a newspaper reporter that Zhao murdered Wong's brother.²⁴⁵ The trial court granted a spe-

ord reflects the fact that the Church is a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and assets. Furthermore, the underlying action concerned a fundamental right, the constitutional protection under the First Amendment religious practices guaranties, and addressed the scope of such protection, concluding that the public has a compelling secular interest in discouraging certain conduct even though it qualifies as a religious expression of the Scientology religion.

Id. at 650-51, 49 Cal. Rptr. 2d at 633 (citations omitted).

An eccentric interpretation of *Wollersheim*, limiting free speech protection to the "public forum" section, was rejected by *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1044-45, 61 Cal. Rptr. 2d 58, 62 (Ct. App. 1997). See *infra* text accompanying notes 266-75.

²⁴² 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996).

²⁴³ See *id.* at 1175-76, 50 Cal. Rptr. 2d at 65.

²⁴⁴ 48 Cal. App. 4th 1114, 1121-22, 55 Cal. Rptr. 2d 909, 912-13 (Ct. App. 1996), *disapproved* by *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1113, 969 P.2d 564, 568 (1999).

²⁴⁵ See *Zhao*, 48 Cal. App. 4th at 1121-22, 55 Cal. Rptr. 2d at 913.

cial motion to strike, and the appeals court reversed. The appeals court held that Wong's conversation with the newspaper did not concern a matter of public interest within the statutory terms. The court stated, contrary to *Wollersheim*, that "[m]edia coverage cannot by itself . . . create an issue of public interest within the statutory meaning. If that were the case, [t]he more sensational and hence injurious a statement might be, the more public interest it would generate."²⁴⁶ The court continued

It cannot be seriously contended that every comment on a lawsuit involves a public issue. If that were the case, any statement pertaining to a dispute would come within the statute once a related lawsuit has been filed. Though lawsuits may sometimes relate to a public issue, the mere fact that a lawsuit was pending has no significance in determining the existence of a public issue. Moreover, the question whether the statements concerned a matter of public interest cannot be determined on the basis of media coverage, notoriety or potential newsworthiness. It would be absurd to suppose that a newspaper can generate a public issue by the mere fact of printing a story, even when it expects lively interest among its readers. If that were the case, a newspaper could bring itself, and others, within the statute by its own decision to cover a controversy even if the public has no interest in it.²⁴⁷

The court was clearly right on the facts of the case. The alleged slander was a private matter unconnected to the rights of free

²⁴⁶ *Id.* (internal quotation marks omitted) (quoting *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1020, 271 Cal. Rptr. 30, 36 (Ct. App. 1990)). This statement, intended to be a disproof by its obvious falsity, actually seems true — public interest in an issue *does* make it by definition an issue of public interest. It has this sense in *Carney*, where the court quotes *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 752, 771 P.2d 406, 432, (1989) (quoting 1 HANSON, LIBEL AND RELATED TORTS ¶ 141, 109 (1969)). The *Brown* court declined to accept a public-interest privilege for media-published libel. Media-generated public interest may not justify a privilege in this sense for actual provable libel. "The *practical* effect of th[is] view would be that nearly everything [the media] publish would be a matter of 'public interest' and therefore privileged. The news media would have a privilege shared by no other speaker." *Id.* But this should not mean that once the public's interest has been aroused, petitioning activity around the issue does not qualify for the protection of the anti-SLAPP law, especially since the 1997 amendment requiring broad interpretation of the statute. In view of the conflict among the lower courts, the question whether a private dispute can become a "matter of public interest" because of public interest generated by press coverage will have to be settled by the California Supreme Court.

²⁴⁷ *Zhao*, 48 Cal. App. 4th at 1121-22, 55 Cal. Rptr. 2d at 913.

speech or petition, and the fact that Wong made his statement "in an effort to aid [his] father's will contest litigation"²⁴⁸ was insufficient to bring it within the ambit of petitioning the judicial branch. But the *Zhao* court's narrow approach to the statute's "public interest" requirement is no longer tenable. First, as noted in the discussion of the legislative history, subsection (a) was amended in 1997 to mandate broad interpretation.²⁴⁹ And second, in its first interpretation of the anti-SLAPP law, the California Supreme Court disapproved *Zhao*, and three other cases that followed *Zhao*'s reasoning, in *Briggs v. Eden Council for Hope and Opportunity*.²⁵⁰

The Eden Council ("ECHO"), was a nonprofit organization that provided "counseling, mediation, and referral services related to landlord-tenant disputes."²⁵¹ Briggs, a landlord, sued ECHO for defamation and infliction of emotional distress, claiming that ECHO "engaged in a pattern of harassment by giving false information to plaintiffs' tenants and making defamatory statements about plaintiffs."²⁵² ECHO moved to strike under section 425.16, saying that Briggs's claims "were based upon statements connected to issues pending before official proceedings of executive and judicial bodies."²⁵³ These included the federal Department of Housing and Urban Development ("HUD") and small claims courts, where ECHO helped tenants file complaints. ECHO moved to strike Briggs's complaint under section 425.16, and the court granted the motion to strike along with a substantial award of attorney fees. Briggs appealed on the ground that ECHO's activities, some of which were unconnected to HUD or the small claims courts, "did not involve issues of public significance."²⁵⁴

The court of appeal agreed, reversing the strike order and vacating the fee award. It reiterated its earlier position²⁵⁵ that "a lawsuit qualifies as a SLAPP suit only if it challenges a statement on a pub-

²⁴⁸ *Id.* at 1131, 55 Cal. Rptr. 2d at 920.

²⁴⁹ See *Briggs*, 19 Cal. 4th at 1119, 969 P.2d at 572 (applying 1997 amendment). The rejection of the narrow interpretation of "public interest" in *Braun v. Chronicle Publishing Co.* had already made it questionable. See *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1043-48, 61 Cal. Rptr. 2d 58, 61-65 (Ct. App. 1997).

²⁵⁰ See *Briggs*, 19 Cal. 4th at 1123, 969 P.2d at 575.

²⁵¹ *Briggs v. Eden Council for Hope and Opportunity*, 63 Cal. Rptr. 2d 434, 435 (Ct. App. 1997).

²⁵² *Id.*

²⁵³ *Id.* at 436.

²⁵⁴ *Id.*

²⁵⁵ See *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.*, 50 Cal. App. 4th 1633, 1639, 58 Cal. Rptr. 2d 613, 617 (Ct. App. 1996).

lic issue made *in* an official proceeding or a statement made in connection with a *public* issue . . . *under review in* an official proceeding."²⁵⁶ The offending statements did not qualify under that test, and were also considered to be private rather than public issues.²⁵⁷ Presiding Justice Strankman dissented vigorously, arguing that "Briggs' suit arises from ECHO's petitioning on behalf of tenants and ECHO's statements made in official proceedings or in connection with those proceedings challenging the Briggs' housing practices," and should therefore be covered.²⁵⁸

The California Supreme Court reversed, holding that the anti-SLAPP law requires a statement to be "in connection with an issue of public interest" *only* where coverage is based on subsection (e)(3) ("any other written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest") or (e)(4) ("any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.") To gain the protection of these subsections, a statement must have a public dimension. But where coverage is claimed for any written or oral statement or writing made before (subsection (e)(1)) or in connection with (subsection (e)(2)) a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, no public interest requirement appears in the statute. Therefore the legislature intended the "official proceeding" test to be a "bright line," and where a party can show the challenged statement meets that test it "need not separately demonstrate that the statement concerned an issue of public significance."²⁵⁹

²⁵⁶ *Briggs*, 63 Cal. Rptr. 2d at 437 (emphasis added).

²⁵⁷ For example, the court stated:

[W]e reject ECHO's contention that housing issues are inherently issues of public significance. The housing issues advanced by ECHO here were matters of purely private concern. Whether Ford was overcharged for electricity and whether Bond was entitled to a refund of her security deposit were not matters of political, social or other concern to the community; they were issues of significance only to plaintiffs and the individual tenants.

Id. at 438.

²⁵⁸ *Id.* at 440.

²⁵⁹ *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1123, 969 P.2d 564, 575 (1999). Justice Baxter disagreed in a separate opinion, joined by Justice Brown, concurring and dissenting. See *id.* at 1124-35, 969 P.2d at 575-84. The court did not reach the significance of the variance in phrasing between (e)(4), which adds "public issue" to "issue of public interest," and (e)(3), which does not. Presumably there is a difference in

The court reached its holding by four independent paths of reasoning. The plain words of subsection (e) of the statute do clearly support the distinction.²⁶⁰ Principles of statutory construction require the courts to infer a difference of meaning from a difference of wording.²⁶¹ The 1997 amendment mandated broad construction of the statute's reach.²⁶² And public policy favors both anti-SLAPP protection and bright-line tests for clarity of application.

The Eden Council's statements were protected because they were made in "connection with issues under consideration or review by official bodies or proceedings, specifically HUD or the civil courts."²⁶³ It did not matter that the Council was speaking on behalf of others rather than its own interests.²⁶⁴ "Insofar as they hold to the contrary," the *Briggs* court disapproved of *Zhao* and three other cases.²⁶⁵

meaning. In its opinion the court applied the venerable principle of statutory construction that "where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." *Id.* at 1108, 969 P.2d at 571 (citing *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 21, 201 Cal. Rptr. 207, 213 (Ct. App. 1984)). But it applied this principle only to the distinction between subparts 1-2 and 3-4 of subsection (e). The application of the same principle to distinguish subparts 3 and 4 from each other did not arise in the case.

²⁶⁰ *See id.* at 1113-17, 969 P.2d at 568-71.

²⁶¹ *See id.* at 1117-19, 969 P.2d at 570-72; *supra* note 259.

²⁶² *See id.* at 1119-21, 969 P.2d at 572-73.

²⁶³ *Id.* at 1115, 969 P.2d at 569.

²⁶⁴ *See id.* at 1116-17, 969 P.2d at 570-71.

²⁶⁵ *See id.* at 1123 n.10, 969 P.2d at 575 n.10. In *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers*, Orange County engaged a consulting firm ("CSI") to advise on competing bids for a governmental communications system. *See* 49 Cal. App. 4th 1591, 1592, 57 Cal. Rptr. 2d 491, 492 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th at 1123 n.10, 969 P.2d at 575 n.10. CSI's report favored Ericsson's competitor Motorola, and Ericsson sued CSI for interference with prospective advantage. The trial court granted CSI's motion to strike under the anti-SLAPP law, but the court of appeal reversed, holding that CSI's comments against Ericsson did not involve free speech rights as the comments were made while performing a contractual duty. By the same analysis, the court stated, the subject was CSI's private interest and not a public issue even though it concerned a matter of county procurement. *See Ericsson*, 49 Cal. App. 4th at 1601-03, 57 Cal. Rptr. 2d at 496-98.

In *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.*, a securities broker sued a company ("IAS") specializing in representing complainants in securities arbitration proceedings held under the auspices of the National Association of Securities Dealers. *See* 50 Cal. App. 4th 1633, 1635, 58 Cal. Rptr. 2d 613, 614 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th at 1123 n.10, 969 P.2d at 575 n.10. IAS's activity was proper under the securities industry's *Arbitrators' Manual*, but could be considered unlicensed practice of law under state bar rules. The brokers sought to enjoin IAS from engaging in this practice; IAS moved to strike on the ground that the quasi-judicial nature of the arbitration proceedings in which they operated gave them the protection of the anti-SLAPP law. The court of appeal reversed the trial court's granting of this motion, holding that the right to petition (both that of IAS and that of its clients) was unaffected by the controversy, that the brokers were challenging IAS's conduct rather than its speech, and public issues were not involved. Although the case

Some other cases on the public/private aspect of the statutory coverage remain good law after *Briggs*. In *Braun v. Chronicle Publishing Co.*,²⁶⁶ a physician sued the *San Francisco Chronicle* and one of its reporters (as well as the University of California at San Francisco and other institutional and personal defendants) “for defamation and a multitude of other torts.”²⁶⁷ Dr. Braun based her action on articles published in the *San Francisco Chronicle* criticizing an organization (within the medical school at the state-run university) of which she had been medical director. The articles focused on an investigation by the State Auditor of financial improprieties at her center, and on events leading up to the scandal. The defendants moved successfully to strike the complaint under the anti-SLAPP law, and were sustained on appeal.

Braun claimed that under *Church of Scientology v. Wollersheim*²⁶⁸

seems correctly decided, the *Linsco* court explicitly relied on the “narrow interpretation” laid down in *Zhao v. Wong*, and the continuing validity of that narrow view came open to question because the 1997 amendment mandated broad construction. See *Zhao v. Wang*, 48 Cal. App. 4th 1114, 1128, 55 Cal. Rptr. 2d 909, 918 (Ct. App. 1996) cited in *Linsco*, 50 Cal. App. 4th at 1638, 58 Cal. Rptr. 2d at 616.

In *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, a developer sued an environmental consultant who gave an unfavorable report to a county agency. See 65 Cal. App. 4th 713, 718, 77 Cal. Rptr. 2d 1, 4 (Ct. App. 1998). Upon the consultant’s motion the trial court issued a strike order, which was subsequently upheld. The court distinguished *Ericsson* on the ground that the contracts at issue

directly concern[ed] the preparation of an [Environmental Impact Report] for required public hearings concerning the potential development of projects. *Ericsson* merely involved private concerns regarding the sale of a telecommunications system sans public hearings or interests. The [*Mission Oaks*] case involve[d] approval of a tentative map which is a matter of public interest requiring public hearings.

Id. at 728-29, Cal. Rptr. 2d at 10-11.

The court held *Mission Oaks’* suit was intended “to coerce the County and the consultants to change their views on its development proposal.” *Id.* at 729, 77 Cal. Rptr. 2d at 11. The anti-SLAPP law is designed to end suits like this. See *id.* The developer could not meet its burden of showing a reasonable probability of success on the merits because (among other reasons) the statements sued on were privileged under Civil Code section 47. See *id.* at 726-27, 77 Cal. Rptr. 2d at 9. The strike order was held justified. Although the outcome favored the target, that part of the court’s reasoning appearing to apply an “issue of public concern” test for speech made before a legislative body was disapproved. In a footnote, the Supreme Court specified it was disapproving “that part” of *Mission Oaks* found in 65 Cal. App. 4th at 728, 77 Cal. Rptr. 2d at 10. See *Briggs*, 19 Cal. 4th at 1123 n.10, 969 P.2d at 575 n.10.

A fourth case, *Los Carneros Community Associates, Inc. v. Penfield & Smith Engineers, Inc.*, 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396 (Ct. App. 1998), was settled pending review. See *supra* note 190.

²⁶⁶ 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1997).

²⁶⁷ *Id.* at 1040, 61 Cal. Rptr. 2d at 59.

²⁶⁸ 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996).

and *Zhao v. Wong*,²⁶⁹ the first two areas specified under subsection (e) — statements made before, or in connection with an issue under consideration by, a public body — only applied to the petition right and not the right of free speech. The *Braun* court rejected that interpretation and held that all the sections of the law apply to free speech, whether or not the speech was in connection with petitioning.²⁷⁰ The *Braun* court also disagreed with a reading of *Zhao* restricting the term “public issue” to lofty questions “pertaining to the heart of self-government.”²⁷¹ The statute makes no such demand; moreover, newspaper reporting “is” free speech.²⁷² The court said that

Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters [under subsections (e)(1) and (e)(2)] is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.

. . . [A] matter has public meaning or significance within the language of section 425.16, subdivision (a) because and solely because (1) it occurs within the context of the proceedings delineated in clause one (i.e. “any statement or writing made before . . .”); or (2) it occurs in connection with an issue under consideration or review by one of the bodies or proceedings delineated in clause two, or; (3) it is an issue of public interest that is aired to the public or in a public forum.²⁷³

Braun also held that the confidential status of the auditor’s review did not make the issue any less “public.”²⁷⁴ And it held that *Braun* was unlikely to prevail against the newspaper and the reporter because the statutory reporter’s privilege would defeat her claims.²⁷⁵

²⁶⁹ 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996).

²⁷⁰ See *Braun*, 52 Cal. App. 4th at 1044-45, 61 Cal. Rptr. 2d at 62.

²⁷¹ *Id.* at 1046-47, 61 Cal. Rptr. 2d at 63.

²⁷² See *id.* at 1045, 61 Cal. Rptr. 2d at 62 (citing *More I*, 37 Cal. App. 4th 855, 863, 44 Cal. Rptr. 2d 46, 51 (Ct. App. 1995)).

²⁷³ *Id.* at 1047-48, 61 Cal. Rptr. 2d at 64-65. The new subsection (e)(4) appears to have removed any requirement that a public agency be involved.

²⁷⁴ *Id.* at 1048-49, 61 Cal. Rptr. 2d at 65.

²⁷⁵ See *id.* at 1049-52, 61 Cal. Rptr. 2d at 65-67; see also CAL. CIV. CODE § 47(d) (West 1997). The court rested its decision to a large extent on the parallel protection of Civil Code section 47, giving it as the main reason *Braun* could not show a probability of prevail-

Another case unaffected by *Briggs* is *Foothills Townhome Association v. Christiansen*.²⁷⁶ Here a homeowner association assessed a homeowner, who paid under protest but won a refund in small claims court. The same thing happened two years later, but after the second small claims action the association sued in municipal court, demanding the assessment and declaratory relief.²⁷⁷ The homeowner moved to strike under the anti-SLAPP law, claiming the latest action to be retaliatory. The trial court denied the motion, and the court of appeal affirmed the denial, holding the association's action not to be a SLAPP suit. The case is notable only because the appellate court stated (on the authority of *Averill* but without explaining its reasoning) that despite the private nature of the dispute, it "involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16."²⁷⁸ Because the denial of the motion to strike was upheld on other grounds, the statement should be considered dictum.

In *Sipple v. Foundation for National Progress*,²⁷⁹ the first case explicitly relying on *Briggs*, the court of appeal upheld a strike order against a claim that the public issue requirement was not met. The court considered a newspaper article in which a prominent political consultant, who had framed statewide campaigns on morality and domestic violence issues, was himself accused of spousal abuse. The court followed *Briggs* (and the 1997 amendment to the law which mandated broad construction) and held that a public issue was not required where the article was based on court records in an earlier custody case. Because the article was also based in part on interviews not part of any record, the court also held the public issue requirement satisfied because "[d]omestic violence is an extremely important public issue in our society."²⁸⁰ The materials being privileged under Civil Code section 47, there was little prospect of the plaintiff succeeding, and the strike order was justified.²⁸¹

ing. See *Braun*, 52 Cal. App. 4th at 1049-52, 61 Cal. Rptr. 2d at 65-67.

²⁷⁶ 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516 (Ct. App. 1998).

²⁷⁷ The demand for declaratory relief required that the action be transferred to superior court. See *id.*

²⁷⁸ *Id.* at 695-96, 76 Cal. Rptr. 2d at 520.

²⁷⁹ 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999).

²⁸⁰ *Id.* at 238, 83 Cal. Rptr. 2d at 684.

²⁸¹ The court also reaffirmed the holding of *More I* that the anti-SLAPP law can be used for self-protection by the media. See *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 863-64, 44 Cal. Rptr. 2d 46, 50-51 (Ct. App. 1995). Justice Zebrowski dissented from the majority holding, see *Sipple*, 71 Cal. App. 4th at 250, 83 Cal. Rptr. 2d at 692, first on the protection given material derived from reporter interviews rather than from

C. Breadth of Application

Several cases have explored the breadth of the anti-SLAPP law. In *Beilenson v. Superior Court*²⁸² a court of appeals held that the anti-SLAPP law protects campaign comments made by a candidate for public office and the candidate's supporters. The court held that the trial court should have stricken a libel complaint based on allegations in campaign literature for a congressional election, saying "[o]ur Constitution protects everyone — even politicians."²⁸³ The court of appeal reached the same conclusion in *Conroy v. Spitzer*, upholding an order striking a defamation action by one candidate for the legislature against another.²⁸⁴

In *Macias v. Hartwell*²⁸⁵ the court held that the anti-SLAPP statute covered campaign statements made in a union election.²⁸⁶ Union elections are covered by the free speech guarantee.²⁸⁷ The union had ten thousand members, and the court found its election concerned a public issue. It based its finding on a passage in *Church of Scientology v. Wollersheim*, stating that "[a]lthough matters of public interest include legislative and governmental activities, they may include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals."²⁸⁸ *Macias* also confirmed that "speech by mail" qualifies under the "public forum" test of subsection (e).²⁸⁹

a court file, and also on the denial of permissive discovery under section 425.16(g) for the purpose of demonstrating "constitutional malice" to overcome the special defamation standard for public figures. On "constitutional malice," see *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 745, 771 P.2d 406, 428 (1989).

²⁸² 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357 (Ct. App. 1996).

²⁸³ *Id.* at 946, 52 Cal. Rptr. 2d at 359. But the court of appeal discharged its alternative writ as moot. See *id.* at 956, 52 Cal. Rptr. 2d at 365. Previous cases had applied section 425.16 to election statements without challenge. See *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1493, 45 Cal. Rptr. 2d 624, 626 (Ct. App. 1995) (concerning recall of East Palo Alto Sanitary District director); *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 352, 42 Cal. Rptr. 2d 464, 466 (Ct. App. 1995) (concerning recall of councilman).

²⁸⁴ See *Conroy v. Spitzer*, 70 Cal. App. 4th 1448, 83 Cal. Rptr. 2d 443 (Ct. App. 1999).

²⁸⁵ 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (Ct. App. 1997).

²⁸⁶ See *id.* at 672, 64 Cal. Rptr. 2d at 224 (noting that "[s]ection 425.16 applies to suits involving statements made during a political campaign, statements made in connection with a recall election, statements made in a political flyer concerning a candidate, and statements made in a recall petition") (citations omitted).

²⁸⁷ See *id.* at 673, 64 Cal. Rptr. 2d at 225 (citing *Warren v. Herndon*, 115 Cal. App. 3d 141, 147, 171 Cal. Rptr. 220, 223 (Ct. App. 1981)).

²⁸⁸ *Id.* at 673-74, 64 Cal. Rptr. 2d at 225 (quoting *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 650, 49 Cal. Rptr. 2d 620, 633 (1996)).

²⁸⁹ See *id.* at 674, 64 Cal. Rptr. 2d at 225 (recognizing that speech by mail is public forum). The California Code of Civil Procedure now lists the subsection (e) test as subsection (e)(3). See CAL. CIV. PROC. CODE § 425.16(e)(3) (West Supp. 1999).

*Bradbury v. Superior Court*²⁹⁰ involved a homicide. While executing a search warrant a deputy sheriff killed a man he suspected of growing marijuana. A district attorney's investigation exonerated the killer, but the district attorney himself nevertheless speculated in a public report that the deputy had obtained the search warrant without proper foundation so the county could seize the victim's land by civil forfeiture.²⁹¹ The officer sued for three kinds of defamation, two kinds of civil rights violations, violation of the California Information Practices Act of 1977,²⁹² invasion of privacy, abuse of process, and intentional infliction of emotional distress.²⁹³ The trial court denied a special motion to strike on the ground that the government, whose speech was at issue, had no free speech rights. The court of appeal rejected this argument, noting that "[g]overnment can only speak through its representatives A public entity is vicariously liable for the conduct of its employees acting within the scope of their employment, but only to the extent that the employees are liable."²⁹⁴ Based on prior authority that the government and its officials have First Amendment rights,²⁹⁵ the court held that the anti-SLAPP law covers public employees who comment on "issues of public interest relating to their official duties."²⁹⁶ In such a case the anti-SLAPP law covers both the governmental entity and the individual public employee.

Because the District Attorney's comments were made in a public forum and related to a public issue, the court of appeal held the motion to strike should have been granted. The court also held that the state anti-SLAPP law governed the filers' claims under the federal civil rights law.²⁹⁷

²⁹⁰ 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (Ct. App. 1996).

²⁹¹ See *id.* at 1112, 57 Cal. Rptr. 2d at 209.

²⁹² CAL. CIV. CODE § 1798 (West 1998).

²⁹³ See *Bradbury*, 49 Cal. App. 4th at 1112, 57 Cal. Rptr. 2d at 210 (listing officer's causes of action). The Kern County Superior Court sustained a demurrer on some counts. See *id.* at 1113 n.2, 57 Cal. Rptr. 2d at 210 n.2.

²⁹⁴ *Id.* at 1114, 57 Cal. Rptr. 2d at 211 (citing California Government Code section 815.2(a) and *Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d 814, 819, 131 Cal. Rptr. 854, 857 (Ct. App. 1976)).

²⁹⁵ See *Nadel v. Regents of the University of California*, 28 Cal. App. 4th 1251, 34 Cal. Rptr. 2d 188 (Ct. App. 1994), *cert. denied*, 516 U.S. 1028 (1995) (holding requirement in defamation action against public official or figure to prove knowledge or reckless disregard for truth applies to actions against government defendants).

²⁹⁶ *Bradbury*, 49 Cal. App. 4th at 1115, 57 Cal. Rptr. 2d at 211-12 (discussing appropriateness of extending First Amendment standard to governmental speech, so government is held liable for defamations by public figures or officials). The *Bradbury* court discussed the application of the standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁹⁷ See *Bradbury*, 49 Cal. App. 4th at 1118, 57 Cal. Rptr. 2d at 213 ("Where the action is

D. Other Issues

Other cases have decided important but less sweeping issues under the anti-SLAPP law. In *Robertson v. Rodriguez*²⁹⁸ the court of appeal determined that section 425.16 could be applied to actions begun before its effective date. It “does not change the legal effect of past conduct. It merely is a procedural screening mechanism for determining whether a plaintiff can . . . establish a prima facie case to permit the matter to go to a trier of fact.”²⁹⁹

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, the court held that the anti-SLAPP law, like the statutory litigation privilege, applies to communications preliminary to the actual proceeding.³⁰⁰ *Dove Audio* concerned the proceeds of a recording made by a number of Hollywood celebrities, supposedly for the benefit of animal protection charities. The heirs of the actress Audrey Hepburn, one of the celebrities involved, were preparing to complain to the state Attorney General about possible misapplication of royalties from the recording, and their law firm contacted other participating celebrities to confirm their support for the heirs’ action.

In *Evans v. Unkow*³⁰¹ the court held that averments on information and belief, being inadmissible at trial, may not be relied on in considering a special motion to strike. As in *Dixon*, the court relied on *College Hospital, Inc. v. Superior Court*,³⁰² where the Supreme Court considered Code of Civil Procedure section 425.13. That section requires a plaintiff demanding punitive damages from a health care provider to “set forth *competent admissible* evidence within the personal knowledge of the declarant.” The *Evans* court held that “if an averment on information and belief is inadequate under Code of Civil Procedure section 425.13, it must likewise be

founded on a federal statute and brought in state court, state procedure controls unless the federal statute provides otherwise.”) (citing *Chavez v. Keat*, 34 Cal. App. 4th 1406, 1413-14, 41 Cal. Rptr. 2d 72, 78 (1995)); see also *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F.3d 1208 (9th Cir. 1999) (finding no conflict with federal rules in allowing California anti-SLAPP remedy in state law counterclaim to federal action in federal court).

²⁹⁸ 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464 (Ct. App. 1995) (upholding grant of motion to strike pursuant to California Code of Civil Procedure section 425.16).

²⁹⁹ *Id.* at 356, 42 Cal. Rptr. 2d at 469.

³⁰⁰ See *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 781, 54 Cal. Rptr. 2d 830, 833 (Ct. App. 1996); see also, e.g., *Rubin v. Green*, 4 Cal. 4th 1187, 847 P.2d 1044 (1993) (holding that communications related to anticipated lawsuit fall within privilege of section 47(b)).

³⁰¹ 38 Cal. App. 4th 1490, 1493, 45 Cal. Rptr. 2d 624, 626 (Ct. App. 1995) (upholding grant of motion to strike).

³⁰² 8 Cal. 4th 704, 882 P.2d 894 (1994).

inadequate under section 425.16, for the two statutes are substantially similar."³⁰³

In a potentially important opinion, the court of appeal held in *Coltrain v. Shewalter* that where a filer responded to an anti-SLAPP motion by voluntarily dismissing its action without prejudice, it was within the trial court's discretion to regard the targets as "prevailing" parties for the purpose court indicated that in such a situation "a presumption arose" that the of awarding attorney fees under section 425.15(c).³⁰⁴ The defendants were the prevailing parties because they got what they wanted,³⁰⁵ although a plaintiff could theoretically show that it dismissed its case because it gained its objectives through settlement or otherwise, or that the dismissal was unrelated to the probability of success on the merits.³⁰⁶

E. Federal Case

The California statute (even without the changes suggested in the following pages)³⁰⁷ could serve as a useful model not only for other states, but also for the federal system, which still has no anti-

³⁰³ *Evans*, 38 Cal. App. 4th at 1498, 45 Cal. Rptr. 2d at 629. Affidavits on information and belief are ordinarily permitted "where the facts to be established are incapable of positive averment." *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 87, 776 P.2d 222, 229 (1989).

³⁰⁴ 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600, 608 (Ct. App. 1998).

³⁰⁵ *See id.* at 107, 77 Cal. Rptr. 2d at 608 (stating that presumption arose that defendants were prevailing parties upon plaintiff's voluntary dismissal).

³⁰⁶ *See id.* (stating that voluntary dismissal is not automatic because no judicial determination occurred to show action was SLAPP suit). The statute has been mentioned in some other cases without precedential holdings. *See generally* *Matson v. Dvorak*, 40 Cal. App. 4th 539, 542, 46 Cal. Rptr. 2d 880, 882-83 (Ct. App. 1995) (upholding grant of motion to strike). The court decided *Matson* primarily on substantive defenses. *See id.*; *Pinnacle Holdings, Inc. v. Simon*, 31 Cal. App. 4th 1430, 1437, 37 Cal. Rptr. 2d 778, 782 (Ct. App. 1995) (failing to construe statute, but mentioning obiter dictum that unsuccessful litigant might have done better in proceeding under SLAPP statute).

The California Supreme Court ordered two other cases, *Lucas v. Swanson & Dowdall*, 53 Cal. App. 4th 98, 61 Cal. Rptr. 2d 507 (Ct. App. 1997), and *Peters v. Saunders*, 53 Cal. App. 4th 98, 58 Cal. Rptr. 2d 690 (Ct. App. 1996), not published, and a third case, *Taylor v. National Broadcasting Co., Inc.*, BC110922, 1994 WL 762226, at *7-8 (Cal. Super. Sept. 29, 1994), is unpublished. These cases thus have no precedential value. *See* CAL. CT. R. 976 (West 1996); CAL. CT. R. 977 (West Supp. 1999). Other mentions of the statute in California cases are purely tangential. *See, e.g.*, *Braun v. Bureau of State Audits*, 67 Cal. App. 4th 1382, 1388, 79 Cal. Rptr. 2d 791, 795 (Ct. App. 1998) (concluding that State Auditor's investigative audit under Reporting Act was authorized official legal proceeding within anti-SLAPP statute); *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 412, 926 P.2d 1061, 1071 (1996) (noting that California Supreme Court and courts of appeal read section 425.16 as requiring court to determine if plaintiff had discussed or substantiated legally sufficient claim).

³⁰⁷ *See* discussion *infra* Part VII.

SLAPP statute. Under the *Erie* doctrine,³⁰⁸ even the procedural remedies of state anti-SLAPP laws could well not apply in actions prosecuted in (or removed to) federal court. At the moment, in this respect, state courts have greater flexibility to protect exercise of federal constitutional rights than do federal courts. A federal anti-SLAPP statute would go far toward remedying this anomalous situation.

In a decision that may change the availability of the California anti-SLAPP law in federal court, the Ninth Circuit recently held that section 425.16 can be applied to a *state law counterclaim* to a federal action in federal court. In *United States ex. rel. Newsham v. Lockheed Missiles & Space Co.*,³⁰⁹ the court reversed a contrary district court decision on this question of first impression.³¹⁰ The underlying federal claim was a *qui tam* action under the False Claims Act,³¹¹ alleging improper action by Lockheed, a large defense contractor. Lockheed's state law counterclaims included alleged breaches of fiduciary obligations, duties of loyalty, and an implied covenant of good faith. The *qui tam* plaintiffs regarded these counterclaims as retaliatory and moved to strike them under section 425.16; they also asked fees and costs under the same section.

The trial court denied the motions, holding that the anti-SLAPP remedy "collided" with the Federal Rules of Civil Procedure and so could not be used in federal court.³¹² But the court of appeals held there was no collision because those federal rules were not intended to "occupy the field with respect to pretrial procedures aimed at weeding out meritless claims."³¹³ Balancing federal and state interests in the remedy, and considering also that barring application of the anti-SLAPP law would encourage SLAPP filers to shop for a federal forum, the court of appeals remanded the cause to the district court for a ruling on the merits of the motion to strike.³¹⁴

³⁰⁸ See *Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938).

³⁰⁹ 171 F.3d 1208 (9th Cir. 1999).

³¹⁰ See 1995 WL 470218 (N.D. Cal. Aug. 2, 1995). A slightly earlier Ninth Circuit case allowing fees under the California anti-SLAPP statute, *Frias v. Los Angeles County Metropolitan Transportation Authority*, 176 F.3d 482 (Table), 1999 WL 273152 (9th Cir.), is unpublished and has no precedential force. See Ninth Circuit Rule 36-3.

³¹¹ 31 U.S.C. §§ 3729-3733 (1999).

³¹² The court specified Rule 8 (requiring specificity in pleading), Rule 12(b)(6) (providing for motion to dismiss for failure to state claim), and Rule 56 (providing for motions for summary judgment). See 1995 WL 470218 at *2.

³¹³ *Newsham*, 171 F.3d at 1217 (internal quotation marks omitted).

³¹⁴ See *id.* at 1218. On the "direct collision" rule, see *Hanna v. Plumer*, 380 U.S. 460, 472

It is uncertain at this writing whether this pathfinding recognition of the California remedy will survive. On the day of the Ninth Circuit ruling, Lockheed vice president and general counsel Les Schiefelbein said the company "intend[ed] to continue the appeal process to affirm" the district court's disposition of the motion to strike.³¹⁵ It was unclear from his statement whether Lockheed intended to invoke en banc procedures in the Ninth Circuit or seek certiorari in the United States Supreme Court. But even if *Newsham* does survive, and even if the Supreme Court ultimately accepts it as governing federal law generally, it will still have no application to federal causes in federal court, or even to state causes in federal court in most states (where there is no corresponding anti-SLAPP law to be applied). Whatever the ultimate disposition of the *Newsham* case, it will scarcely affect the need for a federal anti-SLAPP statute.³¹⁶

VI. SISTER STATE AND ACADEMIC MODELS

California is, of course, not the only state to have faced the SLAPP problem. Many states have considered, and some have even enacted, anti-SLAPP statutes. But the statutes in the other states are usually significantly narrower than California's, and usually less procedurally flexible as well.³¹⁷ In 1994, New Hampshire nearly adopted a statute modeled very closely on the California law, down to the preamble. But under a special local procedure the state Senate requested an advisory opinion from the state Supreme Court as to whether the proposed procedure was constitutional. In their reply, contrary to the position of the California courts, the New Hampshire Supreme Court held that the procedure would violate the state constitutional right to trial by jury.³¹⁸

(1965), and *Walker v. Armco Steel*, 446 U.S. 740 (1980). See also *Olympic Sports Prods. Inc., v. Universal Athletic Sales Co.*, 760 F.2d 901 (9th Cir. 1985).

³¹⁵ Pamela A. MacLean, *State Anti-SLAPP Law Is Expanded*, SAN FRANCISCO DAILY J., Mar. 25, 1999, at 7.

³¹⁶ The *Newsham* case has already attracted notice in the legal press. See, e.g., *California's Anti-SLAPP Law Survives Challenge in Federal Court*, LIABILITY WEEK, Mar. 29, 1999, 1999 WL 1360458; Gail Diane Cox, *Pushing the SLAPP Envelope*, NATIONAL L.J., Apr. 19, 1999; Paul Elias, *Anti-SLAPP Debuts in Federal Court*, NATIONAL L.J., Apr. 5, 1999, at A6; Paul Elias, *Circuit OKs SLAPP Law, Revives Lockheed Case*, THE RECORDER, Mar. 15, 1999, at 1; MacLean, *supra* note 315 at 1; Howard Mintz, *Federal Appeals Court Revives 12-Year-Old Fraud Case Against Lockheed*, SAN JOSE MERCURY-NEWS, Mar. 25, 1999, 1999 WL 14821318.

³¹⁷ For a thoughtful review of laws in other states, see PRING & CANAN, *supra* note 8, at 188-207.

³¹⁸ *Compare* Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1015 (N.H.

Unlike California's statute, which covers statements "made in a place open to the public or a public forum in connection with an issue of public interest"³¹⁹ and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest,"³²⁰ the anti-SLAPP laws of some other states are limited to representations and petitions made to public agencies and tribunals. In New York (and in Nebraska and Delaware, which have adopted nearly identical statutes)³²¹ the statute applies only to an "action involving public petition and participation," which it defines as

an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.³²²

A "public applicant or permittee" is in turn defined as

any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.³²³

New York's narrow definition is well suited to the paradigmatic situation where, for example, a developer applies for a permit and retaliates against citizen opponents, but it fails to provide any broader protection for the right of petition.³²⁴

1994) (holding that because plaintiff otherwise entitled to jury trial has right to have jury resolve all factual issues, SLAPP procedure violates state constitution), *with Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 823-25, 33 Cal. Rptr. 2d 446, 454-55 (Ct. App. 1994) (presuming that legislature intended constitutional statute; therefore, SLAPP scheme did not violate filers' jury right if deciding strike motion did not involve weighing of evidence).

³¹⁹ CAL. CIV. PROC. CODE § 425.16(e)(3) (West Supp. 1999).

³²⁰ *Id.* § 425.16(e)(4).

³²¹ See DEL. CODE ANN. tit. 10, §§ 8136-8138 (1998); NEB. REV. STAT. §§ 25-21,241 to 21,246 (1997); N.Y. CIV. RIGHTS LAW § 76-a (McKinney Supp. 1999).

³²² N.Y. CIV. RIGHTS LAW § 76-a(1)(a); see DEL. CODE ANN. tit. 10, § 8136(a)(1); NEB. REV. STAT. § 25-21,242(1).

³²³ N.Y. CIV. RIGHTS LAW § 76-a(1)(b). The New York law is very similar to the ones in Delaware and Nebraska. See DEL. CODE ANN. tit. 10, § 8136(a)(2); NEB. REV. STAT. § 25-21,242(4).

³²⁴ It appears so far that the New York courts will apply a strict interpretation of this

Georgia's statute applies, by its terms, to any case "arising from an act . . . which could reasonably be construed as . . . in furtherance of the right of free speech or the right to petition government for a redress of grievances" under either the state or federal constitutions "in connection with an issue of public interest or concern."³²⁵ But this is defined as including

any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.³²⁶

Whether the word "including" will be interpreted to mean that the statute is not *limited* to petitioning activity in connection with official proceedings, but can be extended to cover more generally free speech on public issues, has yet to be determined as of this writing.³²⁷

Similarly, Nevada's statute only protects "good faith communication in furtherance of the right to petition," which it defines as

any communication that is aimed at procuring any governmental or electoral action, result or outcome; communication of information or a complaint to a legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is truthful or is made without knowledge of its falsehood.³²⁸

narrow application. See *Harfenes v. Sea Gate Ass'n*, 647 N.Y.S.2d 329, 332-33 (Sup. Ct. 1995); *James H. Rambo, Inc. v. Genovese*, 671 N.Y.S.2d 1005, 1005-06 (App. Div. 1998); see also *Gill Farms, Inc. v. Darrow*, 682 N.Y.S.2d 306, 308-09 (App. Div. 1998).

³²⁵ G.A. CODE ANN. § 9-11-11.1(c) (Harrison 1998).

³²⁶ *Id.*

³²⁷ As of this writing (January 1, 1999), only one reported appellate case has interpreted the Georgia statute, and the SLAPP issue was not presented there. See *Providence Constr. Co. v. Bauer*, 494 S.E.2d 527 (Ga. Ct. App. 1997).

³²⁸ NEV. REV. STAT. § 41.637 (1997). The phrase "direct connection" would seem intended to inhibit an expansive view of the statute to include extra-statutory statements intended to influence public opinion on an issue under consideration, even though such

Minnesota's law³²⁹ contains a definition which seems to have been taken from *Noerr-Pennington* jurisprudence: it protects "public participation," defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action."³³⁰

Massachusetts law does not mention free speech, and limits its scope to

any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.³³¹

The Massachusetts Supreme Judicial Court has interpreted the statute to mean that a movant must show that "the claims against it are based on the petitioning activities *alone* and have no substantial basis other than or in addition to the petitioning activities."³³² The

statements are commonly understood to be protected by the Petition Clause. As of this writing, the Nevada courts have not yet interpreted the statute.

³²⁹ See MINN. STAT. §§ 554.01-02 (West Supp. 1999).

³³⁰ MINN. STAT. § 554.01(6) (1994). For a case interpreting this statute, see *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998).

³³¹ MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1998). The final clause, which appears to widen the scope of the statute to the extent of the Petition Clause, may make the rest of the formula surplusage; or it may not. See *Zoppo v. Foster*, 1997 WL 197025, at *1 (Mass. Super. Apr. 22, 1997). In *Zoppo*, the court stated, "[t]he broad definition of exercising the 'right to petition' protects a citizen virtually every time he or she speaks out on matters of 'public interest' or participates in 'governmental proceedings implicating matters of public concern.'" *Id.* (citation, footnote, and internal quotation marks omitted); see also *Lee v. Whalen*, 1998 WL 156993, at *3 (Mass. Super. Mar. 25, 1998) (stating that anti-SLAPP statute sought to protect people from lawsuits designed to discourage citizens from petitioning government). For an analysis of the legislative history of the Massachusetts law, see *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935 (Mass. 1998).

³³² *Duracraft*, 691 N.E.2d at 943 (emphasis added) (footnote and internal quotation marks omitted). For a case denying anti-SLAPP protection on this basis, see *O'Neil v. Gilvey*, 1998 WL 792424 (Mass. Super. Oct. 28, 1998). By alleging that arguably defamatory statements, made about a public official in an official proceeding, were made with malice, the plaintiff was able to avoid the anti-SLAPP statute on the ground that "[i]t is not the petitioning but the defamation that drives [his] law suit." *Id.* at *4. Of course, if under *Duracraft*

Maine law is identical to that of Massachusetts in every material respect.³³³

Rhode Island's statute comes closest to the broad reach of California's law. It covers "a party's exercise of its right of petition or of free speech," defined to mean

any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; *or any written or oral statement made in connection with an issue of public concern.*³³⁴

It is not yet known how broadly the courts will interpret the emphasized provision, as the only appellate cases reported so far³³⁵ under the anti-SLAPP provision arose in the context of petitioning through government channels.³³⁶

Some mechanism for early resolution of claims based on constitutionally privileged activity is sine qua non for an effective anti-SLAPP law, and such a procedure is a feature of the law in most of the states mentioned.³³⁷ Massachusetts provides for a special motion to dismiss;³³⁸ the motion triggers a stay of discovery and mandatory procedural preference. Nevada also provides for a special motion to dismiss,³³⁹ to be treated as a motion for summary judgment and to be decided within thirty days; it too stays discovery pending disposition of the motion.³⁴⁰ New York provides a choice between an accelerated motion to dismiss³⁴¹ and an accelerated

such an allegation in a complaint is all it takes to avoid the statute, the statute will soon become a dead letter.

³³³ See ME. REV. STAT. ANN. tit. 14, § 556 (West 1997).

³³⁴ R.I. GEN. LAWS § 9-33-2(e) (1997) (emphasis added).

³³⁵ As of January 1, 1999.

³³⁶ See *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 58-59 (R.I. 1996) (holding Rhode Island anti-SLAPP statute constitutional in context of letter to state environmental authorities); cf. *Cove Rd. Dev. v. Western Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1235 (R.I. 1996) (discussing zoning appeal).

³³⁷ Tennessee's statute, being really only an immunity statute, does not provide for early resolution. See TENN. CODE ANN. §§ 4-21-1001 to -1004 (Supp. 1997); see also *infra* text accompanying notes 359-62.

³³⁸ See MASS. GEN. LAWS ANN. ch. 231, § 59H (added 1994).

³³⁹ See NEV. REV. STAT. § 41.660(1)(a) (1997).

³⁴⁰ See *id.* § 41.360(3).

³⁴¹ See N.Y. C.P.L.R. 3211(g) (McKinney 1998).

summary judgment procedure,³⁴² each with a stay of discovery and mandatory procedural preference. Rhode Island prescribes that the statutory immunity is to be asserted by motion "or by other appropriate means under the applicable rules of civil procedure."³⁴³ The statute provides for a discovery stay but no priority, although it is clearly contemplated that the motion will be heard before the rest of the case proceeds. In the *Hometown Properties* case the Rhode Island Supreme Court granted certiorari to review denial of a motion to dismiss under the statute, before the rest of the case was heard.³⁴⁴

In Minnesota when a party claims in limine that an action (or "judicial claim")³⁴⁵ "materially relates to an act of the [complaining] party that involves public participation," it may move to "dispose" of the claim on that ground.³⁴⁶ Such a motion stays discovery,³⁴⁷ and is to be granted "unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immun[e] from liability" under the related immunity statute.³⁴⁸ Although the responding party "has the burden of proof, of going forward with the evidence, and of persuasion on the motion,"³⁴⁹ the referenced immunity statute contains a startling feature. It provides that "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, *unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.*"³⁵⁰ As the entire focus of a SLAPP suit is to characterize such speech or conduct as tortious, this provision has the potential to make the entire statutory scheme unusable for SLAPP defense. As of this writing³⁵¹ the Minnesota statute, added to the law in 1994, has not been interpreted by any appellate court.

Georgia's procedure is novel. It approaches the problem by encouraging self-screening by filers.³⁵² In a case arising from an act

³⁴² See *id.* 3212(h).

³⁴³ R.I. GEN. LAWS § 9-33-2(c) (1997).

³⁴⁴ See *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 58 (R.I. 1996).

³⁴⁵ MINN. STAT. § 554.01(3) (1998).

³⁴⁶ *Id.* § 554.02(1).

³⁴⁷ See *id.* § 554.02(2)(1).

³⁴⁸ *Id.* § 554.02(2)(3). The related immunity statute is MINN. STAT. § 554.03 (West Supp. 1999).

³⁴⁹ *Id.* § 554.02(2)(2).

³⁵⁰ *Id.* § 554.03 (West Supp. 1999) (emphasis added).

³⁵¹ January 1, 1999.

³⁵² See GA. CODE ANN. § 9-11-11.1(b) (Harrison Supp. 1998).

within the statutory coverage, both the filing party and the filer's attorney must include a "written verification under oath" that "to the best of their knowledge, information, and belief formed after reasonable inquiry [the claim] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,"³⁵³ that the act complained of is not privileged free speech or petitioning, and that it "is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation."³⁵⁴ A claim without such a verification is subject to a motion to strike, which triggers a stay of discovery and an accelerated hearing; if the action is found to have been verified in violation of the section, sanctions (including dismissal and assessment of costs and fees) can follow.³⁵⁵

The Massachusetts and Maine laws have an unfortunate feature: the filer may show in defense that "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party."³⁵⁶ This qualification of the protection of the right of petition is unfortunate because it requires a petitioner to justify the beliefs expressed in her petition, and removes protection from expressions which can be factually disproved.³⁵⁷

Despite its name, the Tennessee Anti-SLAPP Act of 1997³⁵⁸ only protects "individuals who make good faith reports of wrongdoing to appropriate governmental bodies."³⁵⁹ It is therefore really no more than a whistle-blower law, derived from and sharing a large portion of its language with the 1989 Washington "Brenda Hill" whistleblower immunity statute.³⁶⁰ The law provides limited immu-

³⁵³ *Id.*; see also FED. R. CIV. P. 11(b)(2) (establishing similar good faith standard).

³⁵⁴ GA. CODE ANN. § 9-11-11.1(b).

³⁵⁵ See *id.*

³⁵⁶ MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1999); see ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 1998).

³⁵⁷ For an example of this part of the Massachusetts law in practice, see *Margolis v. Gaselin*, No. CIV.A.95-03837-A, 1996 WL 293481, at *3-4 (Mass. Super. 1996), which held that a developer's action was dismissed against an opponent even though the opponent's petitioning activity was motivated by commercial considerations, because the opposition activity "had some basis in law and fact."

³⁵⁸ TENN. CODE ANN. §§ 4-21-1001 to -1004 (Supp. 1997).

³⁵⁹ *Id.* § 4-21-1002(a).

³⁶⁰ See WASH. REV. CODE § 4.24.500-520 (Supp. 1999); see *supra* text accompanying notes

nity in such situations, and allows for recovery of fees and costs to a prevailing defendant.³⁶¹ But there is no protection for groups; and even in the classic situation where a developer sues an activist who opposes its permit application, the target would have no recourse under this statute unless her opposition had been based on an accusation of wrongdoing. This makes the statute of very limited use in the usual SLAPP context.³⁶²

Most of the states provides for recovery of costs and fees. New York's scheme is unusually complex: a target can recover fees and costs if the filer's action "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."³⁶³ A target can recover further compensatory damages on a showing that the filer commenced or continued the action "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights."³⁶⁴ Punitive damages become available if these illegitimate designs can be shown to have been the filer's "sole" purpose.³⁶⁵ Rhode Island also provides for compensatory and punitive damages on a showing by the prevailing party that the responding party's actions were taken with intent to harass or inhibit the rights of speech or petition.³⁶⁶

Rhode Island,³⁶⁷ Massachusetts,³⁶⁸ Maine,³⁶⁹ Nevada,³⁷⁰

97-100 (discussing "Brenda Hill" statute).

³⁶¹ See TENN. CODE ANN. § 4-21-1003(c).

³⁶² Other states also have immunity or privilege statutes that do no more than provide a defense to a SLAPP suit which the First Amendment or state constitutional counterpart would also provide. See, e.g., OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1993).

³⁶³ N.Y. CIV. RIGHTS LAW § 70-a(1)(a) (McKinney Supp. 1999).

³⁶⁴ *Id.* § 70-a(1)(b).

³⁶⁵ See *id.* § 70-a(1)(c). Based on the New York model, the Nebraska statute omits the provision for punitive damages, merely allowing "other compensatory damages" under these conditions. See NEB. REV. STAT. § 25-21,243(1) (Supp. 1998). The Delaware statute allows punitive damages under the same conditions for which New York and Nebraska allow other compensatory damages. See DEL. CODE ANN. tit. 10, § 8136(b) (Supp. 1998). Neither Nebraska nor Delaware adds a third tier for "sole purpose." See NEB. REV. STAT. § 25-21,243(1); DEL. CODE ANN. tit. 10, § 8136(b). Except for a slightly different list of government bodies subsumed in the definition, and the presence of a legislative preamble in Nebraska, these are the only significant differences among the statutes of the three states.

The New York statute preserves rights of recovery based on other statutes or rules or the common law, and indeed awards were made on this basis before the anti-SLAPP legislation went into effect. See N.Y. CIV. RIGHTS LAW § 70-a(3); see also, e.g., Entertainment Partners Group, Inc. v. Davis, 590 N.Y.S.2d 979, 982 (Sup. Ct. 1992) (applying tort statute to award damages for frivolous suit).

³⁶⁶ See R.I. GEN. LAWS § 9-33-2(d) (1997).

³⁶⁷ See *id.* § 9-33-3 (providing for intervention by attorney general or "[a]ny government-

Minnesota,³⁷¹ and even Tennessee³⁷² provide for intervention by the state attorney general and sometimes local agencies. At this writing³⁷³ anti-SLAPP laws have been introduced in the legislatures of several other states, including Florida, Indiana, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Pennsylvania, and Texas.³⁷⁴

There have been a few model statutes proposed in academic circles, but they are of limited use in improving California's own law. The academic model which will probably have the most influence is that proposed by Pring and Canan themselves, in their 1996 book *SLAPPs: Getting Sued for Speaking Out*.³⁷⁵ But it is designed primarily for use in states which, unlike California, have no anti-SLAPP law, and therefore most of its useful features (such as a detailed preamble and a mechanism for early resolution) parallel the California provisions in differing form. Another proposal, that of Jennifer Sills, is based largely on the New York statute and retains many of its undesirable qualities, such as its exclusive focus on those qualifying as a "public applicant or permittee."³⁷⁶ Appropriate acknowledgment is made wherever attractive features of the laws of sister states, or of academic proposals have been included in the draft amendments set out in Part VII below.

tal agency or subdivision to which the party's petition or free speech were directed").

³⁶⁸ See MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1999) (allowing intervention by attorney general "on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed").

³⁶⁹ See ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 1998) (permitting intervention by attorney general on behalf of government agency).

³⁷⁰ See NEV. REV. STAT. § 41.660(1)(b) (1997) (providing for intervention by attorney general "or the chief legal officer or attorney of a political subdivision").

³⁷¹ See MINN. STAT. § 554.02(4) (West Supp. 1999) (providing for intervention by "any governmental body to which the moving party's acts were directed or the attorney general's office").

³⁷² See TENN. CODE ANN. § 4-21-1004 (Supp. 1997) (providing for intervention by local agency receiving complaint, and alternatively by attorney general if agency does not intervene).

³⁷³ January 1, 1999.

³⁷⁴ See *California Anti-SLAPP Project* (visited Jan. 1, 1999) <<http://www.sirius.com/~casp/menstate.html>>. Pring & Canan add Guam to the list. See PRING & CANAN, *supra* note 8, at 189.

³⁷⁵ PRING & CANAN, *supra* note 8, at 201-05 (setting out model anti-SLAPP bill).

³⁷⁶ See Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal*, 25 CONN. L. REV. 547, 594 (1993); see also, e.g., Laura J. Ericson-Siegel, *Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a 'Solution' for Florida*, 20 FLA. ST. U. L. REV. 487, 512 (1992) (discussing use of term "public applicant or permittee").

VII. PROPOSAL FOR CALIFORNIA STATUTORY REFORMS

The following proposed legislation has been designed to strengthen California's anti-SLAPP law, to shore it up in areas where it is deficient, to correct some of the shortcomings it has shown in practice, and to add some of the best ideas suggested in academic commentary or found in other jurisdictions.

As will be seen more fully in Part VIII below, the proposed changes and additions to the California anti-SLAPP law strengthen it substantially as an instrument for targets. While these proposals keep the protections offered to filers under existing law, and have been carefully drawn to protect filers from unfair advantage, it is undeniable that the net result of these reforms would be to augment the benefits to targets without corresponding benefits to filers.

But this apparent imbalance is neither unfair nor the result of bias, because the moral and legal positions of SLAPP filers and SLAPP targets are not equivalent. The sternest of these provisions are those that allow sanctions against SLAPP filers and their attorneys³⁷⁷ and those that permit malicious prosecution to be raised by cross-claim.³⁷⁸ These provisions come into play *only after* a court has determined that the filing is a SLAPP suit — that the cause of action arises from an act in furtherance of the constitutional right of petition or free speech *and* that the filer has been unable to show a reasonable probability of success on the merits (as provided in the existing statute). This determination is made immediately appealable (and a stay provided pending appeal) by any affected filer. The same is true of the reform of the tax treatment of SLAPP litigation costs. The new tax provisions only affect parties whose actions *have already been stricken* under existing legislation, and the striking has become final.³⁷⁹ Only parties whose actions have been formally adjudicated to be SLAPP suits are subject to these three reforms.

As for the other proposed reforms, the provision permitting intervention to assist a target can only be invoked by the state Attorney General.³⁸⁰ The interlocutory appeal provision and entitlement

³⁷⁷ See discussion *infra* Part VIII.D.

³⁷⁸ See discussion *infra* Part VIII.F.

³⁷⁹ See discussion *infra* Part VIII.J.

³⁸⁰ See discussion *infra* Part VIII.H.

to stay pending appeal apply to both sides equally.³⁸¹ The new immunity statute³⁸² merely reinforces long-established constitutional rights without affecting SLAPP procedure at all. The notice provision³⁸³ and the provision construing the government exemption narrowly³⁸⁴ are purely technical adjustments. Only the modification of the public interest and public issue requirements really extends the reach of the statute to the benefit of targets. This change is not extensive and serves primarily to protect constitutional liberties where their practice is threatened by SLAPP filings.³⁸⁵

As the proposed legislation would alter several different codes it is presented in the form of a bill. Changes to California Code of Civil Procedure section 425.16 (in section 1 of the proposed bill) and section 904.1 (in section 1.3) are indicated by setting material to be deleted in ~~strikeout~~ font, and by underscoring material to be added. Further changes would add one provision each to the Civil Code, Code of Civil Procedure, and Government Code, and two to the Revenue and Taxation Code; *these provisions, being wholly new, are presented in ordinary type.*

The people of the State of California do enact as follows:

An Act to amend Sections 425.16 and 904.1 and to add Section 425.17 to the Code of Civil Procedure, to amend Section 47 of the Civil Code, relating to civil immunity, and to add Section 12511.7 to the Government Code (all relating to civil actions), and to add Sections 17263 and 24343.1 to the Revenue and Taxation Code, relating to tax deductions for litigation expenses, and declaring the urgency thereof, to take effect immediately.

SECTION 1. Section 425.16 of the Code of Civil Procedure is amended to read:

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech, political expression, and petition for the redress of griev-

³⁸¹ See discussion *infra* Part VIII.C.

³⁸² See discussion *infra* Part VIII.G.

³⁸³ See discussion *infra* Part VIII.E.

³⁸⁴ See discussion *infra* Part VIII.B.

³⁸⁵ See discussion *infra* Part VIII.A.

ances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's rights, under the California or United States Constitutions, of petition, or of free speech in connection with an issue of public interest or significance, or of political expression as broadly defined, ~~under the United States or California Constitution in connection with a public issue~~ shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.³⁸⁶

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination, except as provided in Section 425.17.³⁸⁷

(c) In any action subject to subsection (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike (or opposition to the motion) is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to the party prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. This restriction shall be narrowly

³⁸⁶ See discussion *infra* Part VIII.A.

³⁸⁷ The proposed new section 425.17 permits malicious prosecution to be raised by cross-claim within an on-going SLAPP suit. See discussion *infra* Part VIII.F (discussing section 425.17).

construed.³⁸⁸

(e) As used in this section, an act “in furtherance of the person’s rights, under the California or United States Constitutions, of petition, or of free speech in connection with an issue of public interest or significance, under the United States or California Constitution in connection with a public issue, or of the right of political expression as broadly defined,” includes, but is not limited to:³⁸⁹

(1) any written or oral statement or writing made before a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing in connection with an issue of public interest or significance made in a place open to the public or a public forum ~~in connection with an issue of public interest;~~³⁹⁰

(4) or any other conduct in furtherance of the exercise of the constitutional rights of petition, or of the constitutional right of free speech in connection with a public issue or an issue of public interest or significance, or of political expression as broadly defined;³⁹¹

(5) Provided, however, that this section shall not extend to claims for physical damage resulting from political expression other than by words.³⁹²

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper.

(g) (1) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

³⁸⁸ See discussion *infra* Part VIII.B (discussing added language).

³⁸⁹ See discussion *infra* Part VIII.A (discussing altered language).

³⁹⁰ See discussion *infra* Part VIII.A (discussing altered language).

³⁹¹ See discussion *infra* Part VIII.A (discussing altered language).

³⁹² See discussion *infra* Part VIII.B (discussing added language).

(2) (a) An order granting or denying a special motion to strike under this section shall be immediately appealable. The order will become final unless appealed within ten days, provided that the trial court may extend this period by up to twenty additional days for good cause. Any affected party is entitled to a stay of proceedings in trial court pending the decision of the point by the Court of Appeal.³⁹³

(b) The Judicial Council may adopt rules providing for such mandatory or discretionary priority in appellate review of grant or denial of strike orders under this section as may serve the interests of justice. Pending adoption of such rules, appellate courts may grant discretionary priority in individual cases.

(h) For purposes of this section and section 425.17, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

~~(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.~~³⁹⁴

~~(i) Reserved.~~³⁹⁵

(j) (1)³⁹⁶ For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the constitutionally protected rights of free speech, protected political expression, or petition to government for a redress of grievances, both the party asserting the claim and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath. Such written verification shall certify:

(A) that the party and his or her attorney of record (if any) have read the claim;

³⁹³ The new provisions relating to appeal and stay of proceedings are discussed in Part VIII.C below.

³⁹⁴ Obsolete; replaced by new subsection (m). See *infra* note 399.

³⁹⁵ The letter "i" is not used, so as to avoid confusion with the lower-case Roman numeral.

³⁹⁶ The proposed new section 425.16(j), dealing with verification and sanctions, is discussed in detail in the commentary following in Part VIII.D.

(B) that to the best of their knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(C) that the act forming the basis for the claim is not a privileged communication under the United States or California Constitutions or under Civil Code sections 47 or 47.1; and

(D) that the claim is not interposed for any improper purpose such as to suppress or deter a person's or entity's right of free speech or right to petition government, or to retaliate for exercise thereof, or to harass or intimidate, or to cause unnecessary delay or needless increase in the cost of litigation.

(2) (A) If the claim is not verified as required by this subsection, it shall be stricken unless so verified within ten days after (1) the omission is called to the attention of the party asserting the claim, or (2) the court so directs.

(B) If a verification made under this section is found to be inaccurate in any material particular, the court (upon motion or upon its own initiative) may impose upon the persons who signed the verification, a represented party, or both, in its discretion, an appropriate sanction, which may include dismissal of the claim, an order to pay the other party's attorney fees, costs of litigation, other costs resulting from the filing of the offending pleading, and such additional sanctions as may further the policy of this section.

(C) A sanction imposed under this section need not be monetary. A monetary sanction may be paid to the offended party or parties, or to the court as a fine, or otherwise, as the court may direct.

(k)³⁹⁷ A special motion to strike under this section shall be accompanied by a separate notice directed to the clerk of the court in which the motion is made, stating that the provisions of this section have been invoked. No such motion shall be accepted for filing without this notice. The clerk of each court shall maintain a public register of actions in which special motions to strike have been made under this section.

(l) Reserved.³⁹⁸

(m) On or before the fifth anniversary of the effective date of this act, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.³⁹⁹

SECTION 2.⁴⁰⁰ Section 425.17 is added to the Code of Civil Procedure, to read:

425.17 (1) When an order to strike granted under Code of Civil Procedure section 425.16 becomes final, or when such a motion is granted by the trial court at the direction of an appellate court which has reviewed an earlier denial of such motion by writ or appeal, that:

(a) constitutes a favorable conclusion for the purpose of accrual of an action for malicious prosecution based on the claim; and

(b) creates a rebuttable presumption, in any proceeding for malicious prosecution based on the claim, that the underlying action complained of was brought without probable cause.

(2) Such an action for malicious prosecution may, but need not, be raised by a cross-complaint within the same action, and may proceed as to the stricken claims even if unstricken claims remain in the plaintiff's action.

³⁹⁷ See discussion *infra* Part VIII.E (discussing this new section, requiring reporting, and providing for a public register).

³⁹⁸ The letter "l" is not used, so as to avoid confusion with the numeral "1".

³⁹⁹ This replaces former subsection (i), which required a report by January 1, 1998. Because of the notice and public register provisions of new subsection (k), this requirement should prove much easier to meet than was the original reporting requirement. See discussion *infra* Part VIII.E.

⁴⁰⁰ This new section permits malicious prosecution to be raised by cross-claim within an on-going SLAPP suit. See discussion *infra* Part VIII.F (discussing this section).

(3) The denial (or interlocutory or appellate reversal) of an order to strike under section 425.16 shall not affect the right of a party to bring an action for malicious prosecution or other tort in the ordinary fashion, after favorable conclusion of the underlying action, and shall not erect any presumption or effect of res judicata in such subsequent action; except that when such denial or reversal becomes final, that creates a rebuttable presumption, in any proceeding for malicious prosecution based on the claim, that the underlying action complained of was brought with probable cause.

(4) If the defendant's action for malicious prosecution is not raised within the same action as the claim or claims on which it is based, the granting of a motion to strike under section 425.16 shall not affect the limitations period for bringing such action.

(5) An action for constitutional tort, based on impairment of or burden upon the defendant's rights of petition, free speech or political expression, in connection with a claim stricken under section 425.16, may be brought under the same conditions, at the same time, and with the same limitations period and entitlement to punitive damages, as an action for malicious prosecution based on the same claim.

(6) Where a claim for malicious prosecution or other tort arises from a claim or claims stricken under section 425.16, all claims for all torts arising from all claims stricken in the same action must be sued upon together, either by cross-complaint or subsequent complaint, or the tort not sued upon will be deemed waived.

(7) The plaintiff in a proceeding for malicious prosecution and/or constitutional or other tort, arising from a claim or claims stricken under section 425.16, may be awarded damages for emotional distress proved to have been caused by the filing or prosecution of such stricken claims.

(8) No fee shall be required to file a cross-complaint for malicious prosecution or constitutional or other tort under this section; provided that inclusion of such cross-complaint shall not avoid payment of a filing or appearance fee for a pleading containing other claims where such a fee would otherwise be due.

SECTION 3.⁴⁰¹ Section 904.1 of the Code of Civil Procedure is

⁴⁰¹ This amendment adds orders on anti-SLAPP motions to the statutory list of appeal-

amended to read:

(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt that is made final and conclusive by section 1222, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or the superior court in a county in which there is no municipal court or the judge or judges thereof that relates to a matter pending in the municipal or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order, or

able orders.

decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(13) From an order granting or denying a special motion to strike under Section 425.16.

(b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

SECTION 4.⁴⁰² Section 47.1 is added to the Civil Code, to read:

47.1 Acts in furtherance of the constitutional right to petition, including but not limited to seeking relief, influencing action, informing, communicating, or otherwise participating in the processes of government (including communications to the public, the electorate, or other constituency concerning an issue subject to the right of petition) shall be immune from civil liability regardless of intent or purpose, except where procuring govern-

⁴⁰² The proposed new Civil Code section 47.1 further defines civil immunity. See discussion *infra* Part VIII.G (discussing this section).

mental or electoral action forms no genuine objective of the activity.

SECTION 5.⁴⁰³ Section 12511.7 is added to the Government Code, to read:

12511.7 (a) The California Attorney General may, in his or her discretion, and with the consent of the court, intervene on behalf of the defendant in any civil action (or cross-claim) arising from any act in furtherance of the right of petition or free speech under the United States or California Constitutions, for the purpose of bringing a special motion to strike under Code of Civil Procedure section 425.16, and may, with the consent of the defendant, assume the cost and conduct of litigation thereof, including discovery. The Attorney General may seek indemnity for costs and attorney fees in the same way as any other litigant, attorney fees to be computed at the customary rate for private practitioners, and any such costs or fees recovered may be used to supplement the Attorney General's budget rather than applied to the general fund.

(b) Once having intervened, the Attorney General may seek from the court such supplemental equitable or other relief as may be needed:

(1) to resolve the underlying conflict in whose context the dispute arose, and

(2) to bring justice to the parties at whose expressive or petitioning conduct the plaintiff's action was originally directed.

(3) Granting supplementary relief under subsection (b)(2) lies in the sole discretion of the trial court, and this section shall be liberally construed to permit such relief, where the trial court in its discretion finds such relief to be in the interest of justice; provided, that failure of the trial court to grant relief under this section shall not affect later or parallel attempts to seek the same or similar relief through other methods.

⁴⁰³ The proposed new Government Code section 12511.7 permits the Attorney General to intervene in SLAPP suits. See discussion *infra* Part VIII.H (discussing this section)

SECTION 6⁴⁰⁴: Section 17263 is added to the Revenue and Taxation Code, to read:

17263. Any person or entity named as a defendant or cross-defendant in a legal action in which a claim is subsequently stricken under Code of Civil Procedure section 425.16 may claim the costs of defense, including motions, writs and appeals, as well as reasonable attorney fees, as a deduction from taxable income for purposes of income taxation. If some claims in the action are stricken and others are not, the deduction applies only to the stricken claims. A stricken claim finally restored by a higher court is not considered stricken for purposes of this section. Attorney fees and expenses for defense of a claim subject to being stricken under Code of Civil Procedure section 425.16, but which was withdrawn or dismissed before being stricken by court action, may likewise be claimed, subject to a later determination by a state revenue officer that it is reasonably likely the claim would have been stricken under that section.

SECTION 7.⁴⁰⁵ Section 24343.1 is added to the Revenue and Taxation Code, to read:

24343.1. Any provision of law to the contrary notwithstanding, no expense, disbursement or other expenditure will qualify as a tax deductible business expense if made:

(a) for prosecution of any claim stricken under Code of Civil Procedure section 425.16, or for any legal activity associated with such stricken claim, including but not limited to defense of a special motion to strike, proceedings for fees and costs, writs or appeals, or sanctions or damages therefor;

(b) for the unsuccessful defense of any tort action arising from such stricken claim, or any legal activity associated with the unsuccessful defense thereof, or payment of any tort recovery or associated fees, costs, or damages or sanctions in connection therewith;

(c) provided, that if some claims within an action are stricken and others are not, this section applies only to the stricken claims; and

⁴⁰⁴ See discussion *infra* Part VIII.J (discussing tax reform elements in proposed statutory changes).

⁴⁰⁵ See discussion *infra* Part VIII.J.

that stricken claims finally restored on appeal or by writ shall not be considered stricken for this purpose;

(d) and provided further that if some tort actions are successfully defended and others are not this section applies only to those unsuccessfully defended, *pro rata*; and for purposes of this section "unsuccessful defense" does not include settlement even if such settlement is reduced to judgment.

VIII. COMMENTARY ON THE PROPOSED REFORMS

A. *Public Interest and Issue Requirement*

In *Briggs v. Eden Council for Hope and Opportunity*⁴⁰⁶ the California Supreme Court made it clear that, in order to take advantage of the anti-SLAPP statute, a target need not prove that a public interest or public issue was involved where the advocacy or speech was performed before (or "in connection with an issue under consideration by") an official body. But where the speech in question is made under other circumstances, the law still requires that it be "in connection with a public issue or an issue of public interest."⁴⁰⁷ This has been troublesome to litigants. Sometimes it has kept the courts from giving them the relief the equities clearly warranted, and where relief has nevertheless been afforded it has sometimes required some contortion to get there. The proposed amendment reduces the need for public interest or public issue analysis for expression not having a link to an official body.

For example, in *Averill v. Superior Court*⁴⁰⁸ the plaintiff had petitioned and advocated against placing a women's shelter in her neighborhood. The shelter threatened suit but did not sue until Averill asked her employer not to include the shelter on its Christmas charity list. Then the shelter sued on the basis of this private conversation. The trial court denied the motion to strike because it was thought not to be a matter of public interest; the court of appeal granted mandate because it viewed the suit as re-

⁴⁰⁶ 19 Cal. 4th 1106, 969 P.2d 564 (1999).

⁴⁰⁷ CAL. CIV. PROC. CODE § 425.16(e)(4) (West Supp. 1999). Subsection (e)(3) requires that a "written or oral statement or writing made in a place open to the public or a public forum [be] in connection with an issue of public interest." *Id.* § 425.16(e)(3). The significance of the omission in (e)(3) of the seemingly redundant phrase "public issue," found in (e)(4), is so far unexplained, although accepted canons of statutory interpretation require that the difference in expression be given effect. *See supra* note 84.

⁴⁰⁸ 42 Cal. App. 4th 1170, 1172-73, 50 Cal. Rptr. 2d 62, 63 (Ct. App. 1996).

taliation for Averill's *prior* public advocacy and because the shelter only had a year's permit and the issue was therefore still theoretically open to governmental action. Why should this have mattered to the outcome? Similarly in *Braun v. Chronicle Publishing Co.*,⁴⁰⁹ why should it have mattered that Braun's research center was affiliated with a public university subject to audit by a state official,⁴¹⁰ rather than with a private nonprofit or religious university with its own auditors? In *Macias v. Hartwell*,⁴¹¹ why should it have mattered that Marcias's union election affected ten thousand members⁴¹² rather than fifty? In the action against the residents of Freedom Homes,⁴¹³ should it have mattered that their housing project was not public housing but only a publicly subsidized cooperative?⁴¹⁴

There should be no need to go through this sort of analysis. When Averill asked her company not to contribute to the shelter, her action was political expression similar to advocacy of a boycott. It should not have made any difference how long the shelter's permit was for, or how many other people were concerned about it, and it should not have been necessary for her to have previously petitioned the government in order for her political speech to be protected. That is not to say that her conduct might not have been actionable (if for example her statements were knowingly and maliciously false), only that when legal action is brought in response to political advocacy the need for the plaintiff to make a threshold showing of likely success should not depend on adventitious factors. All political expression should have the same *prima facie* protection from retaliation.

On the other hand, a case like *Zhao v. Wong*,⁴¹⁵ where Zhao sued for slander based on Wong's having told a newspaper that Zhao had committed murder, would remain unaffected by the change in

⁴⁰⁹ 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1997).

⁴¹⁰ See *id.* at 1048-49, 61 Cal. Rptr. 2d at 65 (stating that audit was official state proceeding and was thus "in connection with a public issue").

⁴¹¹ 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (Ct. App. 1997).

⁴¹² See *id.* at 673-74, 64 Cal. Rptr. 2d at 225 (noting that activities of large private entities may involve public issue).

⁴¹³ See *supra* text accompanying note 5.

⁴¹⁴ In the event, the management company dropped the *Freedom Homes* case after adverse publicity. See *Libel Lawsuit Is Dropped*, S.F. EXAMINER, Nov. 20, 1997, at B7. But if it had persisted, the private ownership of the project might well have disqualified the targets from use of the anti-SLAPP law.

⁴¹⁵ 48 Cal. App. 4th 1114, 1131, 55 Cal. Rptr. 2d 909, 920 (Ct. App. 1996), *disapproved by* *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1124 n.10, 969 P.2d 564, 575 n.10 (1998).

the law. The reason is not that the issue was a private one, as the court held — it may indeed be doubted whether a public accusation of murder can ever be strictly private, as prosecution for murder is brought in the name of the People. The reason is that, in publicizing her accusation, Wong was not engaging in political action, and so the action against her was not a retaliatory burden on her First Amendment rights.⁴¹⁶

Some commentators have urged that the public issue or interest requirement be deleted from anti-SLAPP protections. As Victor Cosentino has written: “Petitioning a zoning board to deny a variance because it will affect the property value of one’s home or to avoid increased traffic and congestion in one’s neighborhood is just as valid as petitioning to save the scenic beauty of the surrounding hillsides.”⁴¹⁷ And the right to do so unimpeded and unthreatened is just as valuable a liberty.⁴¹⁸

For these reasons, and because it seems unwise to have SLAPP protection depend on the *content* of constitutionally protected expression, the public issue and public interest limitations have been more broadly defined in subsections (a), (b)(1), (e), (e)(3), and (e)(4).

- The phrase “public interest” has been replaced by “public interest or significance,” and the additional phrase “or of the right of political expression as broadly defined” has been introduced.
- The phrase “right of petition” has been set off by commas from the phrase “free speech,” to emphasize that while the public interest or significance requirement affects the stat-

⁴¹⁶ Claiming her statements were in connection with an official proceeding, Zhao stated:

The statements I have made in the past to Mr. Dorgan, the reporter for the *San Jose Mercury News*, and to various officials who were looking into the matter of my brother’s death and to others were all made by me in an effort to aid my father’s will contest litigation and, more importantly, flowed from my desire that the investigation into my brother’s death be continued to some meaningful conclusion.

Zhao, 48 Cal. App. 4th at 1131, 55 Cal. Rptr. 2d at 920. The court of appeal did not believe this brought her statement within the protection of section 425.16, as “[i]t cannot be seriously contended that every comment on a lawsuit involves a public issue.” *Id.* After *Briggs* a connection such as Zhao suggested may indeed be enough to invoke the anti-SLAPP law.

⁴¹⁷ Victor Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 421 (1991).

⁴¹⁸ See, e.g., Barker, *supra* note 15, at 452 (“[T]he public interest element [of the California statute] should be eliminated in order to avoid excluding self-interested but legitimate petitioning activity by a SLAPP defendant.”).

ute's protection for speech, its protection for petitioning activity is not so limited.

- To avoid confusing inconsistency the phrase "political expression" has also been added to the preamble in subsection (a), and the phrase "public issue" removed from subsection (e)(4).
- The phrase "but not limited to" has also been added to subsection (e), before the list of covered activities.⁴¹⁹

These additions, along with the existing requirement of broad construction added to subsection (a) in 1997, should be sufficient to ensure that all political expression is protected from SLAPP retaliation without regard to irrelevant circumstances such as the length of the permit in *Averill*.

In another change, the phrase "political expression" is added to subsection (a), and used elsewhere in the revised section. An actual definition of "political expression" has not been attempted. It seems better to leave this to the courts to apply in particular factual circumstances, assisted by the added statutory requirement of broad definition. Because "political expression" can include actions other than verbal ones, and because there is no intention to extend the protection of the anti-SLAPP statute to cover tortious property damage done, for example, as part of a demonstration or protest, a new subsection (e)(5) specifically exempts "claims for physical damage resulting from political expression other than by words" from the statute's application.

B. Government Exemption

Government SLAPPING citizens for opposing policy is not an occasional outrage. Pring and Canan estimate that fully seven percent of the SLAPPs nationwide are filed by official government

⁴¹⁹ This is a natural by-product of the word "includes," which has reasonably been held in connection with this very statute not to exclude other items not specified in the examples. See *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1175-76, 50 Cal. Rptr. 2d 62, 65 (Ct. App. 1996) (extending statutory coverage to private conversations). The court stated:

The acts in furtherance of a person's right to free speech specified by the statute is preceded by the word "includes." The word "includes" is ordinarily a term of enlargement rather than limitation. The use of "includes" implies that other acts which are not mentioned are also protected under the statute.

Id. at 1175, 50 Cal. Rptr. 2d at 65.

bodies (not counting those filed by individual public officials, for example police officers retaliating against complainants).⁴²⁰ California has had its share of these, although they have not generally been reflected in the appellate cases.⁴²¹

California's exclusion in section 425.16(d), however, is limited to "enforcement actions." Although this provision has not been litigated, it appears to protect actions for enforcement of existing laws while not protecting tort actions of the usual SLAPP variety. This seems a reasonable distinction to make, at least in the absence of genuine abuse. The suggested addition, requiring that the government exemption be narrowly construed, is intended to keep it confined to genuine enforcement actions, and except it from the 1997 amendment requiring the statute as a whole to be broadly construed. The present exemption (dating from 1992) could lead to pernicious results if combined with the later-added requirement of broad application.

C. *Appealable Order and Automatic Stay*

At present the only path to interlocutory review of a grant or denial of an anti-SLAPP motion is by writ. This has become a common method of review.⁴²² The proposed new section

⁴²⁰ See PRING & CANAN, *supra* note 8, at 216.

⁴²¹ A notorious and well-publicized example is *LaPointe v. West Contra Costa Sanitary District*, No. C89-0710 (N.D. Cal. filed May 2, 1988). A local activist opposed a waste-disposal plant at agency meetings and elsewhere, and eventually filed a taxpayer's action against the agency. See Chapman, *supra* note 3, at 157. The agency cross-claimed against him and 490 Doe defendants for \$42 million, for interference with economic advantage. See *id.* at 157-58. The agency said in a news release, "We anticipate obtaining a financial contribution from LaPointe to make up for the lost revenue in a small way Those people [named as Doe defendants and] identified later as the litigation unfolds may be forced to participate in substantially larger amounts. We have a good idea who they are and we expect to be able to identify them later." *Id.* at 158. This action was the subject of a pioneer SLAPP-back in federal court, under the civil rights law 42 U.S.C. § 1983, by which LaPointe won a judgment of \$865,000. See *id.* at 158-59 (citing *LaPointe v. West Contra Costa Sanitary District*, No. C89-0710 (N.D. Cal. 1992)); see also, e.g., *California Dep't. of Fish and Game v. Mountain Lion Preservation Found.*, No. 501627 (Sacramento Super. Ct. filed 1988) (discussing suit, later dropped, against nonprofit group for testifying against lifting hunting ban, by Department of Fish and Game); *County of San Luis Obispo v. Abalone Alliance*, No. 55664 (San Luis Obispo Super. Ct. filed Nov. 25, 1981) (finding against demonstrators opposing nuclear power plant), *dismissal aff'd.*, 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (Ct. App. 1986); *San Joaquin Hills Transp. Corridor Agency v. Laguna Greenbelt, Inc.*, No. CV 92-4156 (S.D. Cal. dismissed Oct. 1992) (finding that environmental impact report was needed and dismissing suit). The above local examples have been gathered from Pring and Canan. See PRING & CANAN, *supra* note 8, at 80-81.

⁴²² See, e.g., *supra* notes 185-88 and accompanying text (citing cases involving interlocu-

425.16(g)(2) would regularize this situation by permitting an interlocutory appeal if taken within ten days of the order. It would also provide that any party affected by an order, either granting or denying the motion to strike, would be entitled to a stay of further proceedings until one level of review had been completed. An additional stay pending Supreme Court review would remain discretionary, but could be granted at any of the three levels of court. The Judicial Council would be permitted (but not required) to adopt rules concerning priority for appellate review of grant or denial of strike orders; in the meantime priority could be granted on an individual basis. Because the reformed law would allow a stay of the action pending interlocutory review, and because the new cross-action for malicious prosecution would not mature until a strike order became final, the ten-day appeal period and the provision for priority on interlocutory appeal would minimize delay in moving forward the underlying action (and malicious prosecution cross-action, if available).⁴²³

D. Sanctions Against Filers and Their Attorneys

Proposed new California Civil Procedure section 425.16(j) would add additional fees where a court imposes sanctions for bringing SLAPP suits. It builds on the provision of the Georgia statute⁴²⁴ which requires a complaint based on an action within the statutory coverage to contain an attorney's sworn verification that the action is properly grounded, that the acts complained of were not privileged, and that the action is not brought for improper purpose. This is an attractive idea, as it forces the attorney (and the filer as well, in the proposed California version), on pain of personal responsibility, to confront these issues *in advance of filing* rather than only at the end (if at all), as a matter of self-defense, after the harm has been done. The terms of the verification echo those of Federal Rule 11.⁴²⁵ Requiring a statement showing good faith in advance of

tory writs).

⁴²³ A similar measure is included in Assembly Bill 1675, pending in the California legislature as this Article goes to press. See *supra* note 175. A provision permitting appeal from denial of a strike order was number 4 of Canan and Pring's recommendations to the California Judicial Council, see *supra* note 181, but was rejected by the Council, see *supra* note 180.

⁴²⁴ See GA. CODE ANN. § 9-11-11.1(b) (Harrison 1998).

⁴²⁵ See FED. R. CIV. P. 11(b). Section 11(b) states:

filing a complaint is not unexampled in California.⁴²⁶

The proposed section 425.16(j) would permit the court to sanction parties *and their attorneys* for “initiating or maintaining meritless legal actions in response to constitutionally protected speech or conduct, based on motives of harassment, intimidation or retaliation.” The sanction is explicitly laid in the court’s discretion, so as to foreclose any idea of (or litigation premised on) *entitlement* to such sanctions; review would be on the basis of abuse of discretion. The court would be permitted to impose sanctions of a kind and magnitude sufficient to deter these parties and lawyers, and others, from similar conduct.⁴²⁷ The court would be free, therefore, to apply traditional (or even untraditional) professional sanctions as well as monetary fines.⁴²⁸ The deterrent effect of these

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Id.

⁴²⁶ See, for example, CAL. CIV. PROC. CODE § 411.35(a)-(b)(1) (West Supp. 1999), which provides that before filing a malpractice action or cross-action against an architect, engineer, or surveyor, the attorney must submit a certificate of review and consultation stating that a disinterested consultant agreed that the action had merit. However, if no such consultant can be found, the attorney may file the action anyway. *See id.* § 411.35(b)(3). For a professional negligence action against a health care provider, California Code of Civil Procedure section 364(a) requires a 90-day notice to the defendant. *See id.* § 364(a) (West 1994); *see also id.* § 364.1 (requiring same notice to medical board for professional negligence action against physician). In an action charging an attorney and the attorney’s client with civil conspiracy, the Civil Code requires that the plaintiff obtain a pre-filing court determination of a reasonable probability of success. *See CAL. CIV. CODE* § 1714.10(a) (West 1994). For this purpose, a plaintiff may submit a verified petition. *See id.*

⁴²⁷ This language was adapted from the model statute proposed by Pring and Canan. *See PRING & CANAN, supra* note 8, at 204. A sanctions provision was number 7 of Canan and Pring’s recommendations to the California Judicial Council, *see supra* note 181, but was rejected by the Council, *see supra* note 180.

⁴²⁸ Nonmonetary Rule 11 sanctions have included the following: public censure, *see Pony Express Courier Corp. of America v. Pony Express Delivery Serv.*, 872 F.2d 317, 319 (9th Cir. 1989), compulsory legal education, *see LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 437 (S.D.N.Y. 1995), requiring leave of court before filing additional papers, *see Fariello v. Campbell*, 860 F. Supp. 54, 72 (E.D.N.Y. 1995), mandatory pro bono representation, *see Bleckner v. General Accident Ins. Co.*, 713 F. Supp. 642, 653 (S.D.N.Y. 1989), and even

sanctions (which could at the court's option be paid as a fine rather than to the defendant)⁴²⁹ is deliberately separated from possible damages so as not to interfere with the target's ability to obtain punitive damages where permitted and appropriate.⁴³⁰

Existing procedures for enforcing professional conduct have not been completely successful in preventing attorneys from filing or prosecuting SLAPP suits based on conduct clearly subject to constitutional privilege. Perhaps this provision will be more effective in this regard. Attorneys who refuse to assist such schemes have nothing to fear from this new measure, and those who do assist them plainly need to feel more threatened than they do at present. The proposed reform, confiding sanctions as it does to the court's discretion, should prove both a more effective deterrent and more efficient to operate than existing procedures.⁴³¹

E. Notice Provision; Register of Actions

It has been very difficult in practice to do empirical research on SLAPP suits because they are not distinguished at the filing stage from other civil actions. This problem substantially delayed preparation of the Judicial Council report mandated in existing section 425.16(i).⁴³² The proposed section 425.16(k) would permit and

requiring an attorney to "copy out, legibly, in his own handwriting" a section of Wright, Miller & Cooper's *Federal Practice & Procedure* (with supplement but omitting footnotes), see *Curran v. Price*, 150 F.R.D. 85, 87 (D. Md. 1993).

⁴²⁹ See *Lavigna*, 159 F.R.D. at 437 (ordering plaintiff's counsel to pay \$250 to court).

⁴³⁰ For example, without this provision a party against whom punitive sanctions had been assessed in an accelerated malicious prosecution cross-claim, in an amount sufficient "for the sake of example and by way of punishing," could argue that having been deterred already, it could be punished no further. See CAL CIV. CODE § 3294(a) (West 1997). Under proposed section 425.16(j), the court could accept this argument, but need not do so, or could impose further nonmonetary sanctions.

⁴³¹ A trial judge who determines that an action was filed or prosecuted in violation of this proposed section 425.16(j) may report the attorney of record to the State Bar for investigation of possible violation of rule 3-200 of the California Rules of Professional Conduct. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT 3-200 (1998). It seems unnecessary to provide for this explicitly in the proposed statute.

⁴³² See Communication from James Brighton, Research Analyst, Judicial Council of California, to Jerome I. Braun (June 8, 1998) (on file with author).

In their August 1998 draft report to the California Judicial Council, which was commissioned by the Council to help provide the report to the legislature required in California Civil Procedure Code section 425.16(i), Canan and Pring note that the

effort to "determine statistically the frequency . . . of special motions to strike SLAPPs" was doomed to failure. It is simply not feasible to do this with any scientifically sound method. Among the reasons for this situation is the fact that court management criteria, not research categories, dominate court records and report-

require clerks of court to maintain a public register of actions in which a motion to strike has been made under section 425.16, based on a simple form notice which would accompany the motion at time of filing. This would provide a preselected database for future research on the efficacy of the statute.⁴³³

Assembly Bill 1675, discussed *supra* in text at note 175 would accomplish the same purposes, but has the weakness of depending on counsel's cooperation in forwarding copies of documents to the Judicial Council, which would have no way of measuring compliance. The present proposal would ensure that all anti-SLAPP motions are recorded by making documentation a prerequisite to filing. It would also avoid some of the burdens on the Judicial Council, about which the Council has complained in committee.⁴³⁴

The present proposal would also meet the Council's objections to Canan and Pring's recommendation, number 1 on the list they sent the Judicial Council in 1998, that an informational form should be required when an anti-SLAPP motion is filed.⁴³⁵ The Council took the position that "[f]urther tracking of section 425.16 would be burdensome and costly and should not be required."⁴³⁶ Under the present proposal, information would be gathered by county clerks in the course of their ordinary filing duties, and would impose no immediate burden on the Judicial Council. If the legislature should again decide to request a report, this time

ing procedures. To be able to get an adequate number of anti-SLAPP cases to serve as a representative sample, parties need to be required to submit a notice to the courts that is then entered as a retrievable case identifier.

Penelope Canan and George W. Pring, *Anti-SLAPP Motions: A Report to the Legislature Pursuant to CCP 425.16(2) Under Contract to the Administrative Office of the Courts[,] Judicial Council of California* (August 1998), at 2.

⁴³³ It should be remembered that one of the major goals of the statutory scheme — deterrence of SLAPP suits — cannot be measured by filings, or at all, except in the most indirect ways.

⁴³⁴ See, e.g., Assembly Judiciary Committee Report on A.B. 1675 (April 20, 1999):

While the Judicial Council has not submitted formal opposition to the bill, it has raised a concern about the information gathering provisions of the bill. These provisions could potentially be burdensome and contain no time limits on how long the records must be kept. Although the parties have the burden of submitting the documents, if the documents are not transmitted electronically the Judicial Council staff will have to digitize them in order to place them on the Internet. In addition, the Judicial Council does not have the facilities to maintain records permanently.

⁴³⁵ See CONTRACT REPORT, *supra* note 181, at 12.

⁴³⁶ LEGISLATIVE REPORT, *supra* note 180, at 4.

the materials would be easily available. The Council's view that anti-SLAPP motions are "uncommon" and that no further no further data are necessary cannot be accepted on the spotty and anecdotal evidence available to it so far, without benefit of the systematic record keeping proposed here.

F. *Cross-action for Malicious Prosecution*

At present, as noted in Part III above, a target must wait until the conclusion of a SLAPP suit to bring an action for malicious prosecution. This allows the filer to gain the benefit of the SLAPP suit because by the time its action is concluded, however unsuccessfully, its tactical goals of distraction, intimidation and expense may have already been accomplished. Passage of the basic California anti-SLAPP law mitigated this circumstance by permitting an earlier disposition of the underlying action. But problems remain. For example, by including a legitimate cause of action with the SLAPP suit, the action itself can be kept alive long after the SLAPP elements have been purged, thus postponing accrual of the malicious prosecution action.

The proposed new section 425.17 would permit granting of a special motion to strike to be considered (upon its becoming final) a favorable conclusion for purposes of an action for malicious prosecution, also including constitutional tort at the target's option.⁴³⁷ It would permit the target to raise a cross-complaint as part of the filer's action without significant additional expense. Expense, delay, and threat of recovery being the principal weapons of the SLAPP filer, this reform would permit a target to turn the tables and bring the filer to book promptly, with relatively little expense or delay.

The risks of a punitive damage award would be a powerful disincentive for the filer inclined to sue despite an obvious defense of constitutional privilege. The effects of a SLAPP suit — intima-

⁴³⁷ Constitutional tort, a remedy to compensate for infringement of constitutionally guaranteed political rights, is particularly appropriate in this context, as granting the strike motion amounts under the statute to a finding that the filer's cause of action arose from an act of the target in furtherance of the person's right of petition or free speech under the United States or California Constitutions. In this way it has much in common with malicious prosecution for constitutionally protected activity. This section does not change existing law on constitutional tort, but merely permits joining a complaint for it to a complaint for malicious prosecution based on essentially the same set of facts. For a discussion of constitutional tort, see *supra* text accompanying notes 112-14.

tion or distraction — would be turned back upon the filer.⁴³⁸ Early accrual of the cross-action should not disadvantage the target by requiring faster action than the present limitations period imposes. Therefore, the target would still have the option of waiting until after the action was concluded and using the existing limitations period.⁴³⁹ The proposed revision would also specifically authorize recovery for emotional distress, often an element of the target's damage and sometimes deliberately caused by the filer as a means of intimidation.

A successful strike motion would erect a rebuttable presumption that the underlying action was brought without probable cause. Because a cause of action may only be stricken under section 425.16(b)(1) if it is based on the target's exercise of protected constitutional rights, granting this motion fairly implies a lack of probable cause. Denial of a strike motion would have a similar presumptive effect against the target, in the target's subsequent malicious prosecution (or constitutional tort) action brought after favorable termination in the customary way. The presumption resulting from disposition of the strike motion would extend only to the element of probable cause, not to the element of malice.

Some additional protections for the filer are also included. First, the target's malicious prosecution cross-action would not mature until the filer had had the opportunity to seek interlocutory review of the strike order, and it would be entitled to a stay for this purpose pending review by the court of appeal. Second, while claims for malicious prosecution and constitutional tort could both be brought either by cross-complaint or in a subsequent action, they could not be split and sued upon separately. As noted above,⁴⁴⁰ consideration was given to permitting abuse of process as well as malicious prosecution to be sued upon by cross-claim. But this appears insufficiently SLAPP-specific to warrant inclusion in the proposed reform.

⁴³⁸ This is part of the "scorpion strategy" mentioned *supra* note 110. The ability of the Attorney General to seek supplemental relief is another important element of the scorpion strategy. See *infra* Part VIII.H.

⁴³⁹ "A plaintiff has one year from the date of accrual in which to file a malicious prosecution action." *Bob Baker Enters., Inc. v. Chrysler Corp.*, 30 Cal. App. 4th 678, 683, 36 Cal. Rptr. 2d 12, 14 (Ct. App. 1994) (citing CAL. CIV. PROC. CODE § 340 (West Supp. 1998)). "A cause of action for malicious prosecution accrues at the time of entry of judgment on the underlying action in the trial court; i.e., at the time of successful termination of the prior proceeding." *Id.*

⁴⁴⁰ See *supra* text accompanying note 111.

G. Revised Immunity Statute

The language of the proposed new Civil Code section 47.1 is based on that proposed by Pring and Canan in their model law.⁴⁴¹ Their exception is derived from *City of Columbia v. Omni Outdoor Advertising, Inc.*⁴⁴² The parenthetical addition covering communications in aid of petition is new to the text but not new to the law.⁴⁴³ This should help clarify the extent of statutory immunity, and hence the extent to which filers will lose strike motions as a matter of law.

H. Intervention by Attorney General

A new Government Code section would permit the Attorney General, as a discretionary matter, to intervene and assume the cost of defending a SLAPP suit. This follows provisions in the laws of New York and other states.⁴⁴⁴ The availability of this provision would mean a SLAPP filer would have to risk engagement not just against a weaker opponent paying its own expenses, but also against a powerful government agency with relatively deep pockets. The government may not only be prepared to fight the filers' case, but also able and perhaps willing, once its interest is aroused, to investigate (and perhaps affect in unwelcome ways) other aspects of the project in question.

For example, in the *Freedom West Homes* case a landlord sued in retaliation against tenants' publicizing the allegedly excessive size of management fees.⁴⁴⁵ If the Attorney General, after intervening, could have sought a result which not only indemnified the targets but instituted some form of accounting or fee oversight to protect the targets *in their original concerns*, the filers might have thought more than twice about making an issue of dissent in such a heavy-handed way. The court would have broad powers to forge a remedy, and the participation of the Attorney General would help keep the public welfare a strong consideration.

Seeking supplementary relief is a matter deliberately left within

⁴⁴¹ See PRING & CANAN, *supra* note 8, at 203.

⁴⁴² 499 U.S. 365, 380 (1991).

⁴⁴³ It goes back at least as far as *Noerr*, where the Supreme Court protected "an attempt . . . to influence legislation by a campaign of publicity." *Eastern R.R. President's Conference v. Noerr Motor Freight*, 365 U.S. 127, 143 (1961).

⁴⁴⁴ See *supra* notes 367-74 and accompanying text (citing statutes).

⁴⁴⁵ See *supra* text accompanying note 5.

the joint discretion of the Attorney General (who must decide whether to ask for it) and the trial judge (who must decide whether to permit it), in the expectation that this device will be used only sparingly, in cases of particular importance, or where justified by unusual circumstances. But its potential availability would make it a powerful deterrent to abuse of the judicial process. Where used it could actually simplify litigation, foster fairness, and permit application of the maxim "equity delights to do complete justice, and not by halves."⁴⁴⁶

⁴⁴⁶ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 892 n.5 (1981). A companion provision (also modeled on similar provisions in the laws of other states) might have read as follows:

In a case involving the right of petition to any governmental body within the state (including but not limited to counties, cities, school boards, zoning boards, and special governmental districts), the chief legal officer of the body before which the relevant petitioning activity was made may intervene in like manner.

See, e.g., MINN. STAT. § 544.02(4) (West Supp. 1999); R.I. GEN. LAWS § 9-33-3 (1995). This would have permitted agencies that had been specifically aggrieved (by having the right to petition them burdened) to assist in the vindication of access. But intervention on one side by the very agency before which the underlying dispute is pending would have the effect of further polarizing the dispute and compromising the impartiality of the agency itself. It therefore seemed best to restrict this remedy to the Attorney General, subject to a later showing of a broader need.

Another companion provision would have permitted intervention by a private attorney general. It might have read as follows:

(b)(4) Where circumstances would permit intervention by the Attorney General, a private party may (with the consent of the defendant) likewise intervene as a private attorney general, and may recover costs and fees and seek supplementary relief in the same fashion.

See, e.g., id. This would have allowed the target to get help in the same way as by official intervention, but without expenditure of public money. But allowing private persons to intervene in quarrels not their own risks officious and even champertous intermeddling, and heightens the problem of permitting intervention on the side of defendants but not of plaintiffs. On the whole it seemed prudent to confine the intervention procedure to the Attorney General, at least at first, and reserve expansion until there is a body of experience with the procedure.

Some years ago Suffolk County, New York (a suburb of New York City) instituted a "citizens' legal defense fund" to finance SLAPP defense. *See* Pring, *supra* note 9, at 16 n.46 (quoting N.Y. TIMES, Nov. 18, 1987, at Long Island Weekly 1); *see also* Robert Abrams, *Strategic Lawsuits Against Public Participation (SLAPP)*, 7 PACE ENVTL. L. REV. 33, 43 (1989). This accomplished many of the purposes of board intervention while maintaining the neutrality of the board itself. But it sets an unhealthy precedent to permit a direct government subsidy to a litigant. It seems the better approach to have this subsidy, where appropriate, remain indirect and capable of accomplishing wider public objectives, and to place the financial burden ultimately on the SLAPP filer rather than on the public wherever possible.

*I. [Reserved]*⁴⁴⁷*J. Tax Reform*

The present tax laws favor SLAPP filers and foster inequities in the SLAPP context. The developer who sues neighborhood activists is allowed to deduct his litigation costs as a business expense, which amounts to a substantial subsidy.⁴⁴⁸ But the activists, whether sued as individuals or as a (typically unincorporated and non-profit) group, receive no subsidy. Similarly if the target manages to obtain a recovery from the developer, the developer typically (although not always) can write that off as a business expense, which amounts to a subsidy of the developer's risk.

The proposed new Revenue and Taxation Code sections 17263 and 24343.1 would remove the tax deduction from SLAPP-related plaintiff's actions, and permit individuals to deduct the costs of SLAPP defense. This would not only help with deterrence but correct the anomaly of having the government subsidize interference with constitutional rights (and indeed interference with the very avenues of redress its laws provide for).

The affected expenses (both for filers and targets) need to be clearly identified. The proposal keys the suspension of benefit to a court finding. Such a finding could either be explicit (that certain causes of action constitute a SLAPP suit) or implied by dismissal or striking under the anti-SLAPP statute. While there is perhaps no need to restrict tax benefits for winning litigation, making this the key to the benefit discourages settlement and invites tax disputes about the meaning of settlement. Instead the key should be the nature of the claim and the court's treatment of the claim. For SLAPP suits which did not get as far as a formal finding, this determination could be made by a revenue officer if necessary.

Unlike most anti-SLAPP measures, the primary reform in the tax area would need to be at the federal level where the major bite would be. But as noted, changing the California tax law would be a good start and could provide a model for later federal action. The tax treatment of SLAPP recoveries by targets should also be reconsidered.⁴⁴⁹

⁴⁴⁷ The letter "I" is not used, to avoid confusion with the Roman numeral "I".

⁴⁴⁸ See CAL. REV. & TAX. CODE § 24343 (West Supp. 1999) (explaining business deduction).

⁴⁴⁹ The author is pleased to acknowledge the assistance of R. Frederick Caspersen and Brian P. Donnelly, of Farella Braun & Martel LLP, in preparing the taxation section of the

K. Roads Not Taken

Several other potentially useful additional proposals for reform, current in the literature or found in the laws of other states, have been considered but rejected as unnecessarily radical or complicating to what will already be a difficult reform to pass. Some (such as a cross-action for abuse of process, or a private attorney general provision to assist targets) have been noticed earlier. For completeness some others deserve to be mentioned briefly as well.

1. Rights of Assembly and Association

The California anti-SLAPP law expressly protects the rights of petition and free speech.⁴⁵⁰ But the related rights of assembly and association have been omitted from all versions of the law. Consideration was given to adding them in this revision. The freedoms of speech, petition, assembly and association often overlap in their expression. All of them are vital and all deserve protection. There seems no reason why a court should be required, in considering a lawsuit filed in retaliation for exercise of the right of assembly, to parse the delicate distinctions among these rights, denying protection if (for example) assembly is threatened but not speech. These additional rights would have been added wherever the first two are mentioned.

It was decided on balance, however, that because the anti-SLAPP mechanisms have been devised and developed with the constitutional immunities of speech and petition in mind, to extend the reach of the statute beyond speech and petition (and "political expression as broadly defined") would unnecessarily complicate the proposed reform. Extension to assembly and association remains a worthwhile idea, but one to be taken up at a later time. In the meantime actions in retaliation for exercise of the rights of assembly and association can be defended by motion for summary judgment, and compensation later sought on theories of malicious prosecution or constitutional tort. Infringements of the right of association in a political context, without implication of the corre-

proposed statutory reform.

⁴⁵⁰ Professor Pring noted that he and his associate, Professor Canan, "advised the California advocates" of SLAPP reform "not to cover too much territory. What Californians decided to do, bless their hearts, was to cover not only the right to petition but all free speech." *Cox, supra* note 316, at 11. This feature of the California law does not appear to have attracted much attention in the legislative process.

sponding rights of petition and free speech, are in any event exceedingly rare.⁴⁵¹

2. Unofficial Instruments of Self-Government

Consideration was given to changing the words “matters of public significance” in the present subsection (a) to “matters of public or group significance, whether or not related to government,” as a way of extending the statutory coverage to matters affecting groups with institutional self-government while continuing to exclude matters of truly private concern. The extension would have been limited to nonprofit institutions by a new subsection (e)(5), which would have read:

This section shall also apply to activities connected with labor unions, employee organizations, homeowner associations, credit unions, public benefit organizations, and other lawful non-profit associations of all types whether or not organized under provisions of the Corporations Code, and shall include without limitation activities connected to their internal governance, and elections and voting related thereto.

The reason for this change would have been to bring within the reach of the anti-SLAPP statute participation in the institutions of self-government outside the three official branches. Consider the case of someone who participates in a contested election for a the board of a neighborhood association. Even though the issues would probably be considered private under current law, and would affect very few people, this person is engaging in political activity which deserves protection from retaliation or chilling by the judicial process. The state is not the only organ of self-government in a free society. As Justice Douglas wrote in *Griswold v. Connecticut*, “[t]he right to freely associate is not limited to ‘political’ assemblies, but includes those that ‘pertain to the social,

⁴⁵¹ See *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110, 929 P.2d 596, 608 (1997). Neither federal nor California jurisprudence recognizes a “generalized right of social association.” *Id.* Only two kinds of constitutionally protected association are recognized: those with an “intrinsic” or “intimate” value, such as marriage and raising of children, and those “instrumental to forms of religious and political expression and activity.” *Id.* (internal quotation marks omitted). In *Gallo*, the California Supreme Court upheld an injunctive ban on certain forms of public association by members of a so-called “criminal street gang” as outside First Amendment protection. See *id.* at 1126, 929 P.2d at 618-19.

legal, and economic benefit' of the members."⁴⁵² As the Court later noted, "*Griswold* recognizes . . . that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics."⁴⁵³ The California Supreme Court agrees that these unofficial associations are of great importance and properly considered under the Petition Clause.

The second kind of association that merits First Amendment protection is composed of groups whose members join together for the purpose of pursuing a wide variety of political, social, economic, educational, religious, and cultural ends. This instrumental right of protected association is directly related to the individual's freedom to speak, to worship, and to petition the government for the redress of grievances because, without it, these liberties themselves could scarcely exist, much less thrive.⁴⁵⁴

All the areas in which people combine to govern themselves should be considered protected fora — not in the sense of an absolute privilege, although that might ultimately be considered also — but in the sense that attempts to chill expression related to organs of "private" self-government should have to meet the same threshold requirements as if they were directed toward more orthodox governmental institutions. If critical comments made at a meeting of a public school board qualify for anti-SLAPP protection against a retaliatory action for slander, it makes no sense to deny the same protection for the same comments made at a meeting of the governing body of a private or even a parochial school. If the proceedings of a public housing authority are a protected forum, why should the proceedings of a private homeowner's association be less protected?⁴⁵⁵ Why should it matter, from the perspective of unofficial self-government, whether the issue in a private school board election concerns racial discrimination or the performance of the basketball team? The right to free political expression is

⁴⁵² 381 U.S. 479, 483 (1965).

⁴⁵³ *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

⁴⁵⁴ *Gallo*, 14 Cal. 4th at 1110-11, 929 P.2d at 608 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

⁴⁵⁵ *Cf. Foothills Townhome Ass'n v. Christiansen*, 65 Cal. App. 4th 688, 695-696, 76 Cal. Rptr. 2d 516, 520 (Ct. App. 1998), where the court stated in dictum, without a convincing explanation of its reasoning, that litigation about a homeowner assessment "involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16."

precious whatever the context, and all attempts to chill or penalize or retaliate for its exercise are pernicious. Therefore an ideal anti-SLAPP law would protect political expression in a group context whatever the forum or issue.

But such a broad expansion of the law, and the complexity of the discriminations that would have to be made, suggest leaving to another time its extension to unofficial instruments of self-government. The reforms already suggested are extensive enough, and will be difficult enough to pass through the legislature. It seems prudent to await experience under such parts of the existing proposal as may be enacted before extending it further; and also to await further judicial developments.⁴⁵⁶

3. Substantial Probability Test

Consideration was given to returning to the "substantial probability" test advocated in earlier versions of the Lockyer bill.⁴⁵⁷ In the abstract this would probably be preferable, and some commentators have favored it.⁴⁵⁸ But the experience of the three years it took to get the bill passed at all, and the explicit insistence both of its opponents and of the governor that the word "substantial" be deleted, make it unlikely that the word would be accepted now. Indeed, an attempt to restore the word "substantial" to the probability test would likely make passage of the other suggested reforms significantly less likely. The decision in *Ludwig v. Superior Court*,⁴⁵⁹ applying the Supreme Court's reasoning in *College Hospital, Inc. v. Superior Court*⁴⁶⁰ to smooth out the differences between interpretations of similar statutory phrasings, has gone a long way toward making the existing language more acceptable.

4. Discovery by Right

As part of its effort to prepare the report to the legislature required by section 425.16(i), the Judicial Council wrote to attorneys of record in all reported appellate SLAPP cases, asking for their

⁴⁵⁶ Note that under *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675, 64 Cal. Rptr. 2d 222, 227 (Ct. App. 1997), union elections are already covered by the anti-SLAPP law.

⁴⁵⁷ See *supra* text accompanying note 141.

⁴⁵⁸ See, e.g., Barker, *supra* note 15, at 452.

⁴⁵⁹ 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995) (upholding grant of motion to strike).

⁴⁶⁰ 8 Cal. 4th 704, 882 P.2d 894 (1994).

experience and suggestions.⁴⁶¹ They got only 16 responses.⁴⁶² Based on the suggestions of these attorneys, Canan and Pring recommended to the Judicial Council that the procedures and standards regarding the discovery stay be substantially elaborated.⁴⁶³ The Judicial Council rejected their recommendation,⁴⁶⁴ and were probably right that the need for it is not now evident.

On balance this seems unwise. It is true that a filer may sometimes need discovery to establish its likelihood of success. But the statute does not forbid discovery during the stay period. It merely requires leave of court by noticed motion. Under this provision the court may permit discovery by a filer when (and to the extent that) it is fairly needed for the filer's response. But it does not permit it routinely, because a large corporate filer with deep pockets can overwhelm a small individual or nonprofit target almost as easily with discovery demands as with the rest of the lawsuit. And no amount of discovery is apt to establish a likelihood of success where the acts or statements complained of are privileged. Therefore discovery is best left to the court's discretion, as it is now, to be allowed only when necessary and fair.

5. Damages by Motion

Minnesota provides that damages arising from a SLAPP suit may be granted by motion, without the need for a formal action (or cross-action) for malicious prosecution.⁴⁶⁵ This procedure would greatly simplify the path to indemnity for SLAPP targets by elimi-

⁴⁶¹ See LEGISLATIVE REPORT, *supra* note 180, at 3-4.

⁴⁶² *Id.* The author is grateful to Barry Lynch, Supervising Research Analyst at the Judicial Council of California, for making the replies available in redacted form while the Council's report was in preparation.

⁴⁶³ See their Recommendation 6, CONTRACT REPORT, *supra* note 181, at 12. The attorneys' letters are reproduced as Attachment 8 to the LEGISLATIVE REPORT, *supra* note 180.

⁴⁶⁴ See LEGISLATIVE REPORT, *supra* note 180, at 5-6.

⁴⁶⁵ The Minnesota statute reads:

If a motion under this chapter is granted and the moving party demonstrates that the respondent brought the cause of action in the underlying lawsuit for the purpose of harassment, to inhibit the moving party's public participation, to interfere with the moving party's exercise of protected constitutional rights, or otherwise wrongfully injure the moving party, the court shall award the moving party actual damages. The court may award the moving party punitive damages under section 549.20. A motion to amend the pleadings under section 529.191 is not required under this section, but the claim for punitive damages must meet all other requirements of section 549.191.

MINN. STAT. § 554.04(2)(b) (West Supp. 1999).

nating the need for a formal cross-claim, an especially useful result in view of the fact that the targets' very embroilment in litigation is one of the filer's illicit objectives. With such a provision, not only damages for litigation expenses but also damages for emotional distress, damages consequent on distraction from the ordinary pursuits of life, constitutional tort damages, and even punitive damages, could be obtained in a greatly streamlined way; and the court could use a jury to assess damages even under this procedure.⁴⁶⁶

But a cross-claim for malicious prosecution accomplishes the same purposes, if less easily. As even the unreformed anti-SLAPP statute is already seen by some as an abridgment of filers' rights it seemed unnecessarily provocative to add this somewhat radical procedure as well. Accordingly it was decided to limit innovation and accomplish the same purpose by channeling claims through the existing cause of action for malicious prosecution, with associated long-established procedures and body of caselaw, altering only the successful termination requirement for accrual.

6. Reformed Defamation Standard

The common law or statutory defenses to the torts which filers ordinarily allege in SLAPP suits are rarely of much interest for anti-SLAPP purposes. But defamation is an exception. It is a frequent claim of filers, is a common-law limitation on freedom of speech, and has peculiarities which can be adapted to prevent its misuse by SLAPP filers. It is well established that when a defamation plaintiff is a "public figure," he or she has a higher burden of proof and must prove "with convincing clarity" that the offending statements were made with knowledge of their falsity or with reckless disregard for their truth.⁴⁶⁷ This provides powerful insulation against defamation actions against public figures, including politicians and office-holders.

Some courts have held that "land developers involved in public approval processes such as rezoning and permit applications have attained the status of public figures."⁴⁶⁸ A statutory broadening of

⁴⁶⁶ A provision revising section 425.16(c) to extend the costs provision to cover expenses "reasonably incurred in defending against the action" was number 2 of Canan and Pring's recommendations to the California Judicial Council, *see supra* note 181, but was rejected by the Council, *see supra* note 180.

⁴⁶⁷ *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁴⁶⁸ Darrell F. Cook & Dwight H. Merriam, *Recognizing a SLAPP Suit and Understanding Its Consequences*, ZONING & PLANNING LAW REPORT, May 1996, at 33, 35. Cook and Merriam cite

the *New York Times* standard might (as far as constitutionally possible) cover land developers, those whose proposed actions would materially affect the environment, and others whose activities would have sufficient public impact to justify the change. This would help targets meet their burden of showing SLAPP suits are unlikely to succeed.⁴⁶⁹

Defense to defamation could be strengthened further by including an explicit opinion privilege in California law.⁴⁷⁰ While the United States Supreme Court has denied that the First Amendment contains such a privilege,⁴⁷¹ it is still open to California to recognize such a privilege as a defense to defamation, either by statute or by case law.⁴⁷²

But while these changes to the defamation law would be useful to SLAPP targets, they would go well beyond what is needed to respond to the SLAPP problem itself, and so it seems wisest to omit them from the proposed reform.

CONCLUSION

The present California anti-SLAPP law is a notable advance in protecting the rights of speech and petition, but it could be strengthened. If adopted, the suggested proposals would help

as examples *Mount Juneau Enterprises v. Juneau Empire, Inc.*, 891 P.2d 829, 837 (Ala. 1995), *Walters v. Linhof*, 559 F. Supp. 1231, 1235 (D. Colo. 1983), and *Okun v. Superior Court of Los Angeles*, 29 Cal. 3d 442, 451, 629 P.2d 1369, 1374 (1981). See also *Greenbelt Coop. Publ'g Co. v. Bresler*, 398 U.S. 6, 9 (1970).

⁴⁶⁹ New York Civil Rights Law section 76-a provides a good example of this approach. It provides that "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission" is a "public applicant or permittee" and the *New York Times* standard applies in a suit for damages brought against anyone "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." See N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney 1999). In *Harfenes v. Sea Gate Ass'n., Inc.*, 647 N.Y.S.2d 329, 333 (Sup. Ct. 1995), the court held that a loan application was not sufficient to make a party a "public applicant" for purposes of section 76-a.

⁴⁷⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). The *Gertz* Court stated: "[T]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not upon the conscience of judges and juries but on the competition of other ideas." *Id.*

⁴⁷¹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, (1990). The Court specifically held that the language of *Gertz*, quoted above, see *supra* note 470, did not imply an opinion privilege in the federal Constitution. See *id.* at 18.

⁴⁷² See discussion in *Jackson v. Paramount Pictures Corp.*, 68 Cal. App. 4th 10, 28-30, 80 Cal. Rptr. 1, 10-12 (Ct. App. 1998).

make California's law a stronger shield for these precious rights, by making the SLAPP suit not only a futile tactic but a dangerous one for those who wish to use the legal system to retaliate for, or inhibit, their exercise. These proposals warrant the prompt attention of the California legislature.