Congress Needs To Enact A Federal Anti-SLAPP Statute

By **Jason Russell, Adam Lloyd and Or-el Vaknin** (June 2, 2023)

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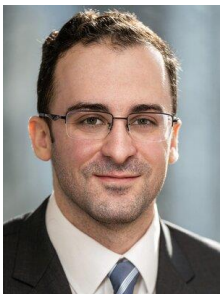

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Although many states have passed statutes meant to prevent individuals or entities from filing strategic lawsuits against public participation, or SLAPPs, no similar provision currently exists at the federal level.

And numerous other states do not have any anti-SLAPP statutes on the books, leaving litigants there with insufficient protection against meritless lawsuits intended to chill speech or petitioning activity. This lack of uniformity inevitably leads to varying levels of protection for fundamental freedom of speech and petitioning rights that are essential to a vibrant democracy.

A bill proposed by U.S. Rep. Jamie Raskin — titled the SLAPP Protection Act of 2022 — would have codified several important protections for these rights in a federal anti-SLAPP statute. The bill was introduced in September 2022 but did not receive a vote, although it could be reintroduced in the current congressional session. Whether or not Raskin's bill is reintroduced — or something even more robust is proposed in the future — Congress should act now to pass federal anti-SLAPP legislation.

As noted in the 2021 Lone Star Ladies Investment Club v. Schlotzsky's Inc. decision from the U.S. District Court for the Western District of Texas, a SLAPP is a lawsuit "in which the plaintiff's alleged injury results from petitioning or free speech activities by a defendant that are protected by the federal or state constitutions."[1] SLAPPs generally target acts in furtherance of a person's right of petition or free speech and force a litigant to spend money to defend against baseless causes of action.[2]

These are effective because although a defendant might eventually defeat the SLAPP, they and others may be discouraged from further exercising their rights to free speech and petition because "even a meritless lawsuit can take years and many thousands of dollars" to defend, according to the Public Participation Project.[3] Many will instead choose to self-censor or settle the lawsuits to avoid this costly and protracted litigation. Indeed, one of the defining features of a SLAPP suit is that it is brought to obtain an economic advantage over a defendant by tying up its resources, rather than to vindicate a plaintiff's legally cognizable rights.

Anti-SLAPP statutes seek to level the playing field by providing procedural safeguards against these groundless suits that attack a defendant's protected activity. Anti-SLAPP statutes typically freeze litigation at an early stage, often by limiting amendment of the pleadings and imposing a discovery stay while the motion is pending, which helps keep costs low for the litigants until the motion is adjudicated.

They also usually provide for recovery of attorney fees and costs for only a prevailing defendant and a right to immediately appeal the denial of an anti-SLAPP, all in an effort to deter would-be SLAPPs from being filed in the first place, thus ensuring First Amendment

rights are not being unduly attacked.

Once a defendant has shown that its protected activity forms the basis of the plaintiff's claims by comprising one or more elements of the causes of action at issue, a plaintiff then must make a prima facie evidentiary showing — often before any discovery has occurred — that it has a probability of prevailing on its claims to avoid being stricken under the anti-SLAPP statute.

The upshot is that these provisions help vindicate free speech and petitioning rights by ensuring that causes of action based on such conduct have at least minimal merit before a defendant is forced to incur the significant costs of defense attendant to modern litigation.

While the majority of states have some form of an anti-SLAPP law on the books, 18 states have none. And the protection offered by the 32 states that do have an anti-SLAPP statute can vary significantly from state to state.

California, for example, offers strong anti-SLAPP protections — including all of those discussed above — and is modeled on the Uniform Law Commission's Uniform Public Expression Act. In contrast, although Florida's anti-SLAPP provision is similar in some respects, it does not suspend discovery while the motion is pending, does not provide a right of immediate appeal, and covers only statements made to a government entity about an issue the entity is considering, or statements made in a public forum like a magazine article or television program.[4]

And as mentioned above, other states like Michigan and Alabama do not have any anti-SLAPP provisions at all, leaving SLAPP plaintiffs there free to weaponize the judicial system to try to stifle the exercise of free speech and petitioning rights that they view as undesirable.

This variability encourages forum-shopping from SLAPP plaintiffs, who often attempt to file their complaints in forums that have tenuous connection to the underlying suit and have weak or no anti-SLAPP statutes. The lack of a federal anti-SLAPP law also leads to variable application of state anti-SLAPP law in federal courts, as they must determine whether a given state's anti-SLAPP law conflicts with the Federal Rules of Civil Procedure or can apply to federal causes of action.[5]

This lack of uniformity means that SLAPP plaintiffs often make strategic forum choices to capitalize on legal variations across different states and federal circuits, and can lead to conflicting results in different forums.

A federal anti-SLAPP statute would create a consistent set of rules for federal courts hearing anti-SLAPP motions.

For example, Raskin's proposed bill included provisions that would: (1) freeze court proceedings, including discovery, while the motion was pending; (2) require the responding party to present evidence establishing a prima facie case as to each element of the action; (3) provide attorney fees and costs to the moving party if it prevails; and (4) instruct courts to construe and apply its provisions broadly to "protect the exercise" of First Amendment speech rights.[6]

While this is a good start, a more effective bill would be modeled on a state anti-SLAPP law like California's that offers even more robust protections, such as an immediate appellate right.[7] These provisions address the disparity created by a permissive environment in

some states and federal courts for inappropriate lawsuits filed only to punish and censor protected speech, and would ensure that federal courts are uniformly protecting free speech and petitioning rights.

While previous federal anti-SLAPP bills have not advanced out of committee, the problem of anti-SLAPP forum shopping persists.

However, there is reason to believe that even with a newly reconstituted Congress, there will be sufficient interest in solving the significant burdens that SLAPP lawsuits impose on defendants and the legal system generally. This is doubly true given that previous federal anti-SLAPP proposals have garnered bipartisan support.

It is hard to predict when Congress will return to this issue given its expansive legislative agenda. What is clear is the need for federal action — the majority of states have spoken, and it is time for Congress to enact a federal anti-SLAPP statute to ensure that free speech and petitioning rights are uniformly protected nationwide in federal court.

After all, can such core rights to democracy truly be said to be guaranteed to all citizens if their efficacy effectively depends on where state lines are drawn? To ask the question is to answer it.

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[1] Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003).

[2] See, e.g., Cal. Civ. Proc. Code § 425.16(e).

[3] See "What Is A SLAPP?," Public Participation Project, https://anti-slapp.org/what-is-a-slapp.

[4] Fla. Stat. Ann. § 768.295 (2022).

[5] See, e.g., CoreCivic, Inc. v. Candide Grp., LLC, 46 F.4th 1136, 1138, 1140 (9th Cir. 2022) (declining to overrule court's "long line of precedents holding that California anti-SLAPP statute applies in federal court," but noting that the court has "weed[ed] out" specific provisions and "fine-tun[ed]" others so as not to conflict with federal rules).

[6] See SLAPP Protection Act of 2022, H.R. 8864, 117th Cong. (2022).

[7] See DC Comics v. Pac. Pictures Corp., 706 F.3d 1009, 1015-16 (9th Cir. 2013) (concluding that "[i]t would be difficult to find a value of a 'high[er] order' than the constitutionally protected rights to free speech and petition that are at the heart of California's anti-SLAPP statute," and "[t]he California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect").