

RULE 11'S BIG-MOUTHED LITTLE BROTHER:
HOW A FEDERAL ANTI-SLAPP STATUTE
WOULD REPRODUCE RULE 11'S GROWING PAINS

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"A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group."¹

INTRODUCTION

Jan Cole, an elementary school teacher in suburban Denver, never thought her classroom lessons could cause such a stir. Wishing to cultivate new perspectives among her students at Malley Elementary School, Cole began teaching progressive and innovative lessons with Vivaldi flute compositions and cultural discussions including topics of meditation and firewalking.² While Cole was a respected veteran teacher in the community, in 1984 the lessons soon became unpopular among families that disagreed with using such "occult," "New Age" philosophy, and "instruments of the Devil" in the classroom.³ The Lehmann family soon pulled their child out of the school and began a campaign to oust Cole's teaching and methods from the local school.⁴ The protests began with phone call campaigns and later led to letter writing and door-to-door organizing among local

[†] Ave Maria School of Law, J.D. 2011. The author would like to thank God and Country for allowing the creation of a place that protects his speech and petition rights, Professor Patrick T. Gillen, and Ave Maria Law Review editors for not slapping him after reading any draft of this Note, and he would like to especially thank his parents for teaching him that even though he has a right to say something it is sometimes more effective to say nothing at all. This will not be one of those times.

1. Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1015 (N.H. 1994).

2. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 63 (1996).

3. *Id.*

4. *Id.* at 64.

parents.⁵ Accusations of “New Age” ideology soon stretched to witchcraft and Satanism before there was any consideration of a possible slander lawsuit.⁶

“If I ran for President of the United States, I would expect criticism . . . but as a teacher you’re usually sensitive, caring And this hurts a lot,” Cole told interviewers following the experience.⁷ “I mean, we aren’t set up politically to take this sort of thing I mean, all of my belief systems were challenged, and I’m still in limbo about a lot of things.”⁸

Although Cole never intended to sue anyone it soon became clear to her that the harassment would not stop unless she did something.⁹ As the pressure mounted, Cole considered suicide and began attending counseling sessions and realized a lawsuit against the offending parents could be the only answer.¹⁰ Finally after a long trial, a jury awarded Cole with \$110,500 in 1987 against two families that had led organizational efforts against her.¹¹

While it would appear that in this instance the good guys won, or at least a teacher who played nice and fair finally got her day in court against those intending to harm her, the outcome of litigation would likely be very different if it occurred today.¹² Currently a strong

5. *Id.*

6. *Id.*

7. *Id.* at 68.

8. *Id.*

9. *Id.* at 66. Cole explained what finally pushed her to sue the harassing families in an interview:

There was a series of events, they just wouldn’t stop, and the stuff in the classroom . . . every day I dealt with something about it. . . . My principal said, “You’ve got a lawsuit on your hands.” And I said, “I don’t want to sue anybody.” And then he told me what was happening then to him because of it. I called my brother, who is an attorney in California, and he quietly said, “Sue.”

Id.

10. *Id.* (citing *Cole v. Lehmann*, No. 85CV2187 (Colo. Dist. Ct. Adams County filed Sept. 1985); William P. Bethke, *Cole v. Lehmann: Practical Reflections on a Teacher Slander Suit Against Parents*, in SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT, at 85, 90 (1994)).

11. *Id.* at 67. An \$83,000 judgment was entered against the Lehmann family and \$27,500 was entered against the Montoya family for the defamation claims. While the Montoya family soon brought up an appeal that raised the right to petition as a defense, the insurance company handling the family’s defense pushed the Montoyas to settle at a sum of \$10,000. *Id.*

12. Even the appearance of winning came at a cost for Cole who has described the entire ordeal as:

[T]he most painful experience of my life, and the most draining, just because it’s gone on for years. And the hard thing, it took me a whole year just to accept what was

likelihood exists that Cole's lawsuit would be considered a SLAPP,¹³ or a Strategic Lawsuit Against Public Participation, meant specifically to deter parental petitioning involvement in the schools. Such a designation would likely defeat her claim at the pleading stage without the aid of discovery and would likely force her to pay all attorney costs. Depending on the jurisdiction of the controversy, Cole's rights to pursue her career quietly could take an entirely back-seat priority to parental rights to pursue protest activity lacking all forms of civility. If the same events happened today, a lawyer may actually be less inclined to take such a case in some jurisdictions out of fear of a fierce anti-SLAPP statute. The anti-SLAPP statute operates to prevent frivolous lawsuits against people for political and petitioning actions in the community in an effort to prevent a "chill" on petitioning rights. This chill on a plaintiff's claim reoccurs as a side effect to the court's attempts to police frivolous claims without knowing how to protect valid claims.

The problem anti-SLAPP statutes are meant to solve is not a new one. Since courts were first opened to offer relief to those suffering losses in civil matters, they have faced the challenge of trying to screen frivolous claims that clog dockets and waste time. Solutions to bar these claims are often sought, but the law of unintended consequences often makes the solution more unbearable than the problem first addressed.

The anti-SLAPP statute is one such provision designed to restrict frivolous lawsuits meant to discourage free speech, public participation, and discussion over public issues. Such lawsuits often interfere with the administration of an open and honest government working with a goal of citizen involvement.¹⁴ While the anti-SLAPP statutes of varied jurisdictions respond to the rise in litigation known as SLAPPs, they too bring side effects. While the statutes are well intentioned in that they mean to protect vocal parties from cumbersome litigation, the

happening. I didn't understand. I just didn't understand. And it's like the death of yourself. I was suicidal for a while. . . .

Id. at 68. Pring and Canan are quick to point out that the community experienced a loss as well in that the involvement of parents voicing concerns dropped off dramatically according to interviews with others within the Glendale community. *Id.*

13. Strategic Litigation Against Public Participation. This litigation phenomenon has been studied closely in the scholarship of PRING & CANAN, *supra* note 2.

14. *Id.* at 17. Pring and Canan allude to one of the earliest SLAPPs in *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802), where five citizens petitioned the state legislature to prevent the reappointment of a public official with a "wicked heart." *Id.* at 130. Recognizing the need to keep petition channels open, the court dismissed the claim as a mere intimidation tactic. *Id.* at 146-47.

broadened scope of the statute in some jurisdictions has caused abuse at odds with their benign purpose.

Federal Rule 11 is another restriction on frivolous claims and could be seen as a general precursor to the anti-SLAPP statute.¹⁵ Congress created Rule 11 among the Federal Rules in 1938 as a way for the private bar to prevent attorneys from filing lawsuits and claims “for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” in federal courts.¹⁶ As the rule has evolved through the decades, its effectiveness and importance has ebbed and flowed over time as well. When Rule 11 was amended for a broader application against frivolous claims,¹⁷ it carried a nasty side effect that brought a lack of civility in the legal profession as well as a duplication of issues to litigate.¹⁸ While intending to reduce frivolous claims, it actually expanded filings.

Currently, the statutes engender abuse by affording broad application at the expense of the very activity it was designed to protect: the right to petition the government to redress grievances. While there is no constitutional right to bring a frivolous claim to a court, this restriction brings its own chill on First Amendment rights as valid claims brought to court are barred, penalized, and punished by an anti-SLAPP motion, or worse, would-be plaintiffs never assert claims for fear of penalties of having to pay opposing party’s attorney fees.

Such issues could be experienced nationally in the not so distant future since Tennessee Congressman Steven Cohen introduced the Citizen Participation Act of 2009.¹⁹ As a federal anti-SLAPP statute, it would likely have broad implications if any similar bill passes as Cohen initially proposed it to protect both citizen rights of petitioning the government and free speech.²⁰ Cohen’s proposal gives good cause

15. Compare PRING & CANAN, *supra* note 2, at 202 (“SLAPPs,’ are typically dismissed as unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.”), with FED. R. CIV. P. 11(b)(1) (“[A]n attorney . . . certifies that to the best of the person’s knowledge, information, and belief . . . it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”).

16. FED. R. CIV. P. 11(b)(1).

17. See GEORGENE M. VAIRO, *RULE 11 SANCTIONS* 13 (Richard G. Johnson ed., 3d ed. 2004).

18. *Id.* at 45.

19. H.R. 4364, 111th Cong. (2009).

20. *Id.* § 4 (“Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act.”). The bill has expired in committee with the end of the second session of the 111th Congress,

to take a special look at the development of the statute within many jurisdictions and consider the intended and unintended consequences of such statutes.

This Note evaluates the intent, effects, and evolution of the anti-SLAPP statute and its prospective application as a federal law that would shield public speech and participation from litigation primarily meant to chill First Amendment rights. Part I discusses the origins of anti-SLAPP statutes and their development over time as jurisdictions chose to implement them. Part II provides an overview of Rule 11's history and the successes and failures in policing frivolous claims. Part III compares Rule 11 and the anti-SLAPP statute by examining the effectiveness of each while also evaluating the risk of duplicating litigation issues and the inadvertent creation of barriers closing out valid claims at the courthouse door. Finally, Part IV focuses on the effects a broad interpretation of a federal anti-SLAPP statute would have in reproducing Rule 11's growing pains and discouraging valid claims—claims the First Amendment should protect.

I. THE ANTI-SLAPP STATUTE'S BIRTH AND EARLY YEARS

The archetypal SLAPP lawsuit usually involves a defendant petitioning the government in some manner, which causes a corporate plaintiff to sue them in retaliation.²¹ Suppose Tom, a local resident, attends the local planning board meeting to criticize a mini-mall proposal that SLAPP Co. submitted for approval to build in Tom's neighborhood. While Tom may have legitimate concerns with the project that SLAPP Co. proposed for his neighborhood, the company might sue Tom for several frivolous claims such as defamation, tortious interference with contract, or civil conspiracy to intimidate Tom into silence, while also deterring others from speaking out. The archetypal SLAPP suit is a frivolous claim that is never filed for the purpose of succeeding on the merits in a courtroom. The real objective of the lawsuit is to achieve political success by silencing opponents or spitefully attack a successful protestor who managed to prevent a project.²² Lawsuits like these

but Cohen's reelection makes the introduction of a new Anti-SLAPP bill likely. See Kevin Holmes, *Steve Cohen Re-Elected to Third Term*, ABC24 (Nov. 2, 2010, 10:02 PM), <http://www.abc24.com/news/local/story/Steve-Cohen-Re-Elected-To-Third-Term/yx7i99m9-0ShsVtrfrNjA.csp>.

21. PRING & CANAN, *supra* note 2, at 8–10.

22. See *id.* at 8. Pring and Canan go to great lengths to categorize different types of SLAPPs filed by different plaintiffs varying from police officers, teachers, and politicians to

proliferated in the 1970s and 1980s, and experts in law and sociology believe a heightened citizen involvement in government during that period of time caused a litigious explosion, which created the need for anti-SLAPP statutory protections.²³

A. *The Pring-Canan SLAPP Solution*

In reaction to SLAPP lawsuits that often scared defendants into silence, professors George Pring and Penelope Canan developed a procedural mechanism to dismiss frivolous SLAPP claims in a way that would not cause any excessive cost to the victimized defendant.²⁴ By this model statute, if an unwitting defendant were SLAPPED with a frivolous lawsuit, she would be able to present a special motion to strike the complaint on grounds that the action against her arose from speech that the First Amendment protects.²⁵ The effect of the motion shifted the burden for the plaintiff to prove he would likely succeed in his action by clear and convincing evidence.²⁶ The plaintiff must meet the burden without any aid of discovery since the statute providing the motion specifically stays discovery while it is noticed and considered.²⁷ If the plaintiff could not meet the burden, the action would be dismissed and the plaintiff would be ordered to pay the defendant's attorney fees in answering the lawsuit.²⁸

The statute was designed to protect what Pring and Canan considered the most time-honored right among citizens in the Western world: the right to assemble and petition the government for redress of grievances, a right anecdotal with the cornering of King John at Runnymede.²⁹

corporations and nonprofit organizations. *See generally id.* In the most egregious instances, mere letters or phone calls complaining to supervisors of public workers can be the cause of such lawsuits. *Id.* at 46–50.

23. *See* George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937 (1992); PRING & CANAN, *supra* note 2, at 3–8.

24. *See* PRING & CANAN, *supra* note 2, at 201–05.

25. *Id.* at 203–04.

26. *Id.* at 203.

27. *Id.* Several jurisdictions have written in an allowance for discovery by leave of continuance, but Pring and Canan argue that such measures merely lengthen the SLAPP experience needlessly when dismissal is warranted. *Id.* at 157–63.

28. *Id.* at 204. Pring and Canan refer to other compensatory measures resulting from the SLAPP as "SLAPPback damages." *Id.* at 143.

29. *Id.* at 16–17. Pring and Canan suggest the signing of the Magna Carta in 1215 as the first instance of petitioning government and instilling it as a right in democratic governments. *Id.* at 15.

While the Petition Clause is rarely cited and often overlooked, Pring and Canan argue that it is essential and suggest that petitioning rights are more important than bringing certain claims to court.³⁰ Pring and Canan claim that their anti-SLAPP statute can be reconciled with the right to petition despite the burden their statute places on certain lawsuits in light of Supreme Court decisions that establish that “[b]aseless litigation is not immunized by the First Amendment right to petition.”³¹ Pring and Canan argue that protecting public discourse is more important than any valid individual claim and that each must clear the same hurdles required of frivolous lawsuits.³² Essentially they argue that political discussion and the petitioning process is important and worthy of protection but they appear to marginalize petitioning brought through the avenue of the court system.³³ This argument comes at a time when political speech and discourse has become more charged as opposing sides typically take a more belligerent and biased posture in the public arena and media.³⁴ While courts may offer a more civil arena to solve public issues, Pring and Canan argue for an extended protection beyond those innocently voicing concerns to their local government, but also to bad-faith petitioners intending to slander projects and officials where a merited claim for defamation is not far-fetched.³⁵

New Hampshire decided an anti-SLAPP statute would be unconstitutional under its own state constitution.³⁶ In 1994, the court answered a legislative inquiry when it considered the adoption of the anti-SLAPP statute proposed by lobbyists.³⁷ While the court considered the growing concern of SLAPP lawsuits as a message to silence and intimidate political opposition, it found that the language of the statute and its process in routing out SLAPPs with a special motion to strike amounted to a direct collision with the New

30. *See id.* at 18.

31. *Id.* at 21 (quoting *Bill Johnson's Restaurants v. N.L.R.B.*, 461 U.S. 731, 743 (1983)).

32. *Id.* at 11–14.

33. *See id.* at 13–14.

34. *See, e.g.*, Ellen P. Goodman, *No Time For Equal Time: A Comment on Professor Magarian's Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 897 (2008) (looking at proposals and problems related to reinstating the Fairness Doctrine as it relates to balanced reporting of news); Sasha Leonhardt, *The Future of "Fair and Balanced": The Fairness Doctrine, Net Neutrality, and the Internet*, 2009 DUKE L. & TECH. REV. 1, 8–12 (2009) (analyzing the theoretical rationale of the Fairness Doctrine regarding Internet media and concluding that it would not be appropriate in its present form).

35. PRING & CANAN, *supra* note 2, at 13–14.

36. Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1014 (N.H. 1994).

37. *Id.* at 1012.

Hampshire Constitution.³⁸ Since the recommended statute asked that the court rule on the “probability” of the plaintiff’s success rather than a summary judgment or failure to state a claim analysis, the New Hampshire Supreme Court found that the statute would run counter to the state constitution’s guarantee of a jury trial on civil matters.³⁹

Now if Jan Cole brought her claim against parents protected by the Pring-Canan statute she may or may not have had success in pursuing her claim. In their book, Pring and Canan identify Cole as a “sympathetic filer” who likely had reason to file a lawsuit against community members who treated her unfairly, but the authors say that the defendant families lost due to selecting a strategy of fighting the veracity of their statements against Cole rather than resorting to their right to petition local school officials and other citizens as a defense.⁴⁰ The authors predict that had they done that the Lehmanns and Montoyas likely would have succeeded through a litigation defense that the author’s recommend to SLAPP targets, who live in jurisdictions without SLAPP protections.⁴¹ While Cole would have a chance to recover, there’s a strong chance she could lose her claim to the family’s petitioning rights—SLAPPback awards mandating payment of attorney’s fees, as the Pring-Canan statute allows, would merely add to a chilling effect on Cole’s own claim.

B. *The California SLAPP Solution*

In 1992, California led jurisdictions adopting anti-SLAPP statutes. CAL. CIV. PROC. CODE § 425.16 protects “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”⁴² The statute, the model for anti-SLAPP statutes across the

38. *Id.* at 1014–15.

39. *Id.* (citing N.H. CONST. pt. I, art. 20). It is worth noting that “probability” is not a standard used in the Pring-Canan statute; however, it is included in the California statute and was routinely included in an anti-SLAPP statute that was pushed for passage among many states during the Anti-SLAPP Project that sought passage of statutes across the country. While California passed a statute that judged a plaintiff’s complaint by a probability standard, some states like Massachusetts and Rhode Island instead passed statutes that required a focus on the petitioning activity rather than the lawsuit complaint itself. Compare these differences with the clear and convincing evidence standard of the Pring-Canan statute. PRING & CANAN, *supra* note 2, at 203.

40. PRING & CANAN, *supra* note 2, at 66–67.

41. *See id.* Pring and Canan write an entire chapter on the appropriate filing of a 12(b)(6) motion citing the inability of SLAPP filers to overcome the necessary elements of a cause of action that would show the defendant was using petitioning rights in bad faith. *Id.* at 143–67.

42. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004).

country, is meant "to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."⁴³ California courts follow the statutory mandate to define protected activity broadly.⁴⁴

The California statute departs significantly from Pring-Canan's anti-SLAPP model.⁴⁵ While California's statute protects petitioning and speech rights, the Pring-Canan statute simply offers expressed immunity for those exercising their constitutional right to petition "regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result, or outcome."⁴⁶ Another key difference exists if the California courts view the plaintiff's lawsuit as a potential SLAPP, then the plaintiff must establish "a probability that he or she will prevail on the claim."⁴⁷ In comparison, the Pring-Canan model says the court should dismiss the SLAPP unless the plaintiff provides "clear and convincing evidence that the acts of the moving party are not immunized from liability" under the statute's petitioning definition.⁴⁸ California sets a high yet undefined presumptive hurdle for plaintiffs while the Pring-Canan statute allows for a plaintiff to attack the defendant's grounds for a presumption.

California's SLAPP statute would probably affect Jan Cole's defamation claim the most as it would offer broad protections on the words and actions of the Lehmann and Montoya families that campaigned and petitioned within the community to remove Cole from the classroom.⁴⁹ If Cole is unable to satisfy the "probability" requirement in the California statute, she would have no hope of actually surviving the dismissal motion.⁵⁰ It would also give the

43. *Id.* § 425.16(a).

44. *Id.*

45. Compare *id.* § 425.16, with PRING & CANAN, *supra* note 2, at 201–05.

46. Compare CIV. PROC. § 425.16(b)(1), with PRING & CANAN, *supra* note 2, at 203.

47. CIV. PROC. § 425.16(b)(3).

48. PRING & CANAN, *supra* note 2, at 203. While Pring and Canan both recognize that this standard would apply itself leniently to bad-faith petitioners who intentionally act to cause harm to another's reputation in a public political debate, they suggest that the standard is most consistent with the Supreme Court's opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). PRING & CANAN, *supra* note 2, at 201. "The 'sham' exception . . . encompasses situations in which persons use the governmental *process* . . . as an anticompetitive weapon. A classic example is the 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." *City of Columbia*, 499 U.S. at 380 (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)).

49. See CAL. CIV. PROC. CODE § 425.16 (West 2004).

50. *Id.*

most advantages to the Lehmann and Montoya families to pursue retaliatory action and have Cole fund their legal fees in their defense.⁵¹ This would likely cause the greatest chill on Cole's claim, to the point where she may not even be able to find an attorney willing to take the risk of paying attorney's fees.

C. *Varying Jurisdictional SLAPP Solutions*

Since the passage of the California statute, nearly 30 states and territories enacted some form of protection for public participation and First Amendment interests.⁵² While many passed statutes with more limited anti-SLAPP protections, the statutes remain focused on the petitioner's right. Jurisdictions typically fall within three categories: (1) narrow protections for petitioning activity, (2) jurisdictions which have extended broader specific extensions of protection to petitioning activity, and (3) most broadly construed statutes that protect all activity within the definitions of petitioning and free speech.⁵³ Colorado actually addressed an anti-SLAPP solution via its common law in a 1984 state supreme court case that created a First Amendment basis to allow dismissal of a SLAPP lawsuit filed against an environmental protection group.⁵⁴

In jurisdictions with narrow anti-SLAPP statute protections, defendants generally must be participating in an actual petitioning activity. In some of these jurisdictions dismissal motions are granted

51. *Id.*

52. States and territories with an Anti-SLAPP statute of some kind include: Arizona, ARIZ. REV. STAT. ANN. §§ 12-751 to 752 (2007); Arkansas, ARK. CODE ANN. §§ 16-63-501 to 508 (2010); California, CAL. CIV. PROC. CODE § 425.16 (West 2004); Delaware, DEL. CODE ANN. tit. 10, §§ 8136-8138 (2010); Florida, FLA. STAT. ANN. § 768.295 (West 2005); Georgia, GA. CODE ANN. § 9-11-11.1 (2006); Guam, GUAM CODE ANN. tit. 7, §§ 17101-17109 (2010); Hawaii, HAW. REV. STAT. §§ 634F-1 to 4 (2010); Illinois, 735 ILL. COMP. STAT. 110/1-99 (2007); Indiana, IND. CODE §§ 34-7-7-1 to 10 (2010); Louisiana, LA. CODE CIV. PROC. ANN. art. 971 (2005); Maine, ME. REV. STAT. tit. 14, § 556 (2010); Maryland, MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2010); Massachusetts, MASS. GEN. LAWS ch. 231, § 59H (2010); Minnesota, MINN. STAT. §§ 554.01-05 (2010); Missouri, MO. REV. STAT. § 537.528 (2010); Nebraska, NEB. REV. STAT. §§ 25-21,241 to 21,246 (2010); Nevada, NEV. REV. STAT. §§ 41.635-670 (2010); New Mexico, N.M. STAT. ANN. §§ 38-2-9.1 to 9.2 (2010); New York, N.Y. CIV. RIGHTS §§ 70-a, 76-a, C.P.L.R. 3211 (Consol. 2010); Oklahoma, OKLA. STAT. tit. 12, § 1443.1 (2010); Oregon, OR. REV. STAT. §§ 31.150-155 (2009); Pennsylvania, 27 PA. CONS. STAT. §§ 7707, 8301-8303 (2010); Rhode Island, R.I. GEN. LAWS §§ 9-33-1 to 4 (2010); Tennessee, TENN. CODE ANN. §§ 4-21-1001 to 1004 (2010); Utah, UTAH CODE ANN. §§ 78B-6-1401 to 1405 (LexisNexis 2010); Vermont, VT. STAT. ANN. tit. 12, § 1041 (2009); Washington, WASH. REV. CODE §§ 4.24.500-520 (2011).

53. Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1248 (2007).

54. *Protect Our Mountain Environment, Inc. v. Dist. Court*, 677 P.2d 1361 (Colo. 1984).

only when the plaintiff is a public applicant or is a permittee for a matter that a local board or government is considering.⁵⁵ While the intent is to protect petitioners who may speak out against an applicant's plan, it also limits the particular type of plaintiff who may file a SLAPP, and in this way, automatically restricts the use (and overuse) of an anti-SLAPP special motion to strike a complaint.⁵⁶

Some of these jurisdictions have also been known to restrict SLAPP status to times where the defendant's conduct has been oral or written testimony to a government body in its proceedings.⁵⁷ In this context First Amendment protections are at their strongest, particularly in a forum where a privilege exists to make a citizen immune from defamation lawsuits and the risks of chilling legitimate petitioning activity via litigation seems marginal.⁵⁸ While lobbying legislators and contacting officials is all protected in the same spirit, campaigning among the general public on a specific topic will not always allow the defendant the benefit of a special motion to dismiss the lawsuit claim against them.⁵⁹

In moderately protective jurisdictions, courts have read additional broadened protections into the statute.⁶⁰ Here, legislators and courts extended the statute's protection to communications made in whole or in part to cause a government action.⁶¹ Some states extend the protection for citizens communicating over issues under government consideration; others carve out niches or deny protection to journalists or First Amendment activities.⁶²

55. Hartzler, *supra* note 53, at 1248–49 (citing DEL. CODE ANN. tit. 10, § 8136(a)(1)–(2)). For an example of restricting the application of the anti-SLAPP protection to petitioners rather than extending it to journalistic activity, see *Fustolo v. Hollander*, 920 N.E.2d 837 (Mass. 2010).

56. Hartzler, *supra* note 53, at 1249.

57. *Id.*

58. See DAN B. DOBBS, *THE LAW OF TORTS* 1157 (2000).

59. See Hartzler, *supra* note 53, at 1249 (citing FLA. STAT. §§ 720.304(4)(b) (2005), 768.295(4) (2005); TENN. CODE ANN. § 4-21-1003(a) (2010); and WASH. REV. CODE § 4.24.510 (2011)).

60. Hartzler, *supra* note 53, at 1254–60.

61. *Id.* at 1253.

62. *Id.* at 1254–59; See, e.g., *Fustolo v. Hollander*, 920 N.E.2d 837, 840–43 (Mass. 2010) (holding that the Massachusetts anti-SLAPP Statute could not be extended to protect journalists in light of protections afforded in constitutional overlay such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). “There is no reason to stretch the anti-SLAPP statute beyond its appropriate boundaries in order to create a level of protection for reporters beyond that to which they are currently entitled under the existing defamation law.” *Fustolo*, 920 N.E.2d at 844 (noting that the difference between MASS. GEN. LAWS ch. 231, § 59H (2010) and CAL. CIV. PROC. CODE § 425.16 (West 2004) is that California included “free speech” within statutory protection while Massachusetts had not).

California's anti-SLAPP statute, the most broadly written version of anti-SLAPP statutes, protects news media moguls and production companies so long as the activity involves a matter of "public issue."⁶³ Under this interpretation, anything from unusual news stories on private citizens to satirical performances discussing racism in America can be interpreted to be a public issue.⁶⁴ By extending the SLAPP definition to apply to these instances, the California statute shields a wide range of media defendants so long as public significance exists in its work.⁶⁵

Media defendants have begun to regularly use anti-SLAPP motions to shield and immunize their own questionable activity while reporting or broadcasting matters that are of little or no concern to the public. In 2004, an elderly former housekeeper of famous actor Marlon Brando sued Time Warner for invasion of privacy and elder abuse when a news crew allegedly barged into her nursing home room.⁶⁶ A well-strategized anti-SLAPP motion dismissed her claim, however, because the news media had a supposed First Amendment interest in seeking the plaintiff out as a peculiar beneficiary of Brando's will.⁶⁷ In 2007, the film production company that released the film *Borat* received a glut of lawsuits related to the fake documentary style that cast film participants off guard and in bad lights.⁶⁸ When two embarrassed South Carolina fraternity brothers sued the company for fraudulent misrepresentation in the film's appearance consent forms, the film company received a free pass when it successfully argued for the court to dismiss the lawsuit against them with an anti-SLAPP motion emphasizing the need to protect the First Amendment rights of the filmmakers. Finding that the "gravamen or principle thrust goes to [the First Amendment concerns of] the exhibition of the

63. CIV. PROC. § 425.16(b)(1).

64. *Hall v. Time Warner*, 63 Cal. Rptr. 3d 798 (Cal. Ct. App. 2007); *Doe v. One Am. Prods., Inc.*, No. SC091723, slip op. (L.A. County Super. Ct. Feb. 15, 2007).

65. See, e.g., *Hall*, 63 Cal. Rptr. 3d 798; *Bernardo v. Planned Parenthood*, 9 Cal. Rptr. 3d 197 (Cal. Ct. App. 2004); *Scheidler v. Trombley*, No. 07 L 513, slip op. (Ill. Cir. Ct. Kane Co. Sept. 2, 2008); *One Am. Prods., Inc.*, No. SC091723.

66. *Hall*, 63 Cal. Rptr. 3d at 802.

67. *Id.* at 801; cf. Sewell Chan, *Judge Dismisses Suit Over 'Borat'*, N.Y. TIMES CITY ROOM (Apr. 2, 2008, 6:22 PM), <http://cityroom.blogs.nytimes.com/2008/04/02/federal-judge-dismisses-suit-over-borat/> (describing a lawsuit involving an individual against Twentieth Century Fox, wherein a United States District Court Judge in New York dismissed the individual's claim that Fox's nonconsensual use of his image violated an old civil rights law because the law was deemed inapplicable to matters of public interest).

68. *One Am. Prods., Inc.*, No. SC091723.

movie," the court said the lawsuit infringed on the moviemaker's right to raise racist and bigoted points of view as part of social commentary.⁶⁹

When anti-abortion advocate Agnes Bernardo filed a claim of false advertising and unfair competition against Planned Parenthood, she argued that the clinic misrepresented scientific studies on the connection between abortion and breast cancer on its web site.⁷⁰ When Planned Parenthood filed an anti-SLAPP motion to protect its commercial speech rights, the court dismissed Bernardo's claim despite a wide variety of scientific evidence offered to show Planned Parenthood was manipulating studies.⁷¹ The court then awarded costs to Planned Parenthood under the anti-SLAPP statute on grounds that the clinic was entitled to First Amendment protected commercial speech while recognizing that the clinic's business of providing abortions was not the kind that the advertising laws were meant to extend the consumer protections asserted in Bernardo's lawsuit.⁷²

Each of these cases fall outside the archetypal SLAPP lawsuit. In none of the above instances were individual private citizens targeted for statements made in furtherance of a petitioner's right to speak freely of a public concern. The broad interpretation of the statute allows more media activities to qualify for anti-SLAPP protection, but it also hinders claims meant to improve or overturn existing law because the positions are not favored by the statute.

The broader statutes protect corporations, media moguls and companies, which have been given a procedural means to deflect suits without having to address claims fully. A significant justification for the anti-SLAPP statute is to allow people of moderate or low-income to avoid costly litigation that would risk their financial stability as a means to chill speech,⁷³ but when anti-SLAPP statutes are construed to protect corporate and other defendants it contradicts that justification. It is noteworthy that expansion of application of anti-SLAPP statutes is not surprising considering that this sort of broad application is seen more in jurisdictions with larger media markets.⁷⁴ This broadened application may need to be reconciled with the anti-SLAPP statute's original purpose.⁷⁵

69. *Id.*

70. *Bernardo*, 9 Cal. Rptr. 3d at 203.

71. *Id.* at 208–11.

72. *Id.* at 211–22.

73. *See* Pring & Canan, *supra* note 23, at 940–41.

74. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2004); 735 ILL. COMP. STAT. 110/1 (2007).

75. One example of a broadened application having an effect on recent litigation can be seen in Seattle, where Washington's anti-SLAPP law was broadened legislatively in the summer

Courts have simply received a new tool to dismiss claims brought with intent to bring reform on public issues where a point of view is outside mainstream acceptance. This restricts public discourse, as there is no clear way of knowing whether good faith claims may be brought and it shuts out trials meant to decide clear questions of fact. The motion, as it is applied, is a premature motion for summary judgment, and its nature allows it to be executed in such a way that more claims may be rejected on technical grounds rather than merit—a result not wanted in the most accepted views of civil procedure.⁷⁶

In relation to Cole's claim, the varying jurisdictions would have likewise varying impacts. Jurisdictions that only reprimand permittees would likely allow Cole to proceed with her claim, as they would also likely see the petitioning action as less intended toward government action and more towards harassing an individual. Moderately protective statutes may or may not allow Cole's action to continue—this depends largely on how expansive courts have been in granting protections to categories such as parents with a sincere interest in lessons brought forward in schools. In the broadest protection statute, Cole would face the greatest chill. When the Lehmanns and Montoyas present their special motions to strike Cole's claim, she would be pressed to offer proof that their intentions were not aimed at governmental action and that she would have a probability of succeeding on the merits.

D. *The Federal Anti-SLAPP Solution*

The most recent progress of anti-SLAPP proponents is a push to pass a federal statute modeled much like the California anti-SLAPP

2010 session to protect the media interests in exercise of the First Amendment. Mike Carter, *Judge Tosses Out Privacy Claim Against Michael Moore over 'Sicko' Segment*, SEATTLE TIMES, Sept. 5, 2010, http://seattletimes.nwsourc.com/html/localnews/2012821051_slappruling06m.html. A federal magistrate judge dismissed several claims brought against Michael Moore for use of footage without permission in his 2007 film *Sicko*. *Id.* The initial claim of copyright infringement was allowed to remain, but Moore's attorney Bruce Johnson, who helped draft the expansive provisions of Washington's anti-SLAPP law, was able to successfully dismiss misappropriation of likeness and invasion of privacy claims. *Id.* The dismissal may not have eliminated the entire lawsuit, but it managed to shift attorney costs against the plaintiff. *Id.* A revision may be warranted in these jurisdictions, not to abolish entirely the broadened application but to at least mitigate the effect on the private petitioner suing a larger organization with more resources. Perhaps compensation provisions of the attorney's fee awards for successful anti-SLAPP motions should only apply to defendants who are not engaging in First Amendment related activity that produces a profit or income.

76. See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 453 (3d ed. 1999) (citing 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2712 (3d ed. 1998)).

statute.⁷⁷ While past efforts to bring a federal measure through Congress failed in 1995, the Federal Anti-SLAPP Project renewed the measure and drafted a bill titled The Citizen Participation in Government and Society Act of 2009.⁷⁸

Congressman Steve Cohen, who modeled his own state's anti-SLAPP statute as a state official, introduced a bill to offer federal anti-SLAPP protection.⁷⁹ The bill, which would have allowed defendants to remove state court actions to federal court to take advantage of a special motion to dismiss, proposed to protect any petitioning or free speech activity in furtherance of First Amendment rights.⁸⁰ While Cohen's bill departed from the language proposed by the Federal Anti-SLAPP Project, it hardly narrowed the broad scope compared with the California statute. Under the proposed language, "[a]ny act of petitioning the government made without knowledge of falsity or reckless disregard of falsity shall be immune from civil liability."⁸¹

This language appears to strictly protect petitioning activity somewhat similar to the Pring-Canan statute; however, under the section defining the procedural steps to the special motion to dismiss, it allows a defendant to file the motion "to dismiss any claim arising from an act or alleged act in furtherance of the constitutional right of petition or free speech"⁸² By allowing the motion to be filed in relation to speech protected by the First Amendment, it appears to extend the statute's reach far beyond petitioning activity, but it

77. See *The Citizen Participation Act (H.R. 4364)*, THE PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/?q=node/16> (last visited May. 2, 2011).

78. FEDERAL ANTI-SLAPP PROJECT, THE CITIZEN PARTICIPATION IN GOVERNMENT AND SOCIETY ACT OF 2009 (on file with Ave Maria Law Review); Jeremiah A. Ho, *I'll Huff and I'll Puff—But Then You'll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California's Anti-SLAPP Statute*, 30 WHITTIER L. REV. 533, 620 (2009).

79. David Hudson, Jr., *Congressman Introduces Federal Anti-SLAPP Bill*, FIRST AMENDMENT CENTER (Dec. 24, 2009), <http://www.firstamendmentcenter.org/news.aspx?id=22437>. See also *The Need for H.R. 4364*, THE PUBLIC PARTICIPATION PROJECT (Dec. 17, 2009), <http://www.anti-slapp.org/?q=node/71> (indicating Rep. Cohen's sponsorship of the bill while outlining SLAPP litigation with a brief reference to Pring and Canan).

80. H.R. 4364, 111th Cong. (2009). While the bill has expired in committee it will likely be reintroduced in the next legislative session. Since the introduction of the 2009 bill, there has been a growing sentiment among media outlets to publicize a need for a nationalized Anti-SLAPP law with substantial support from the Anti-SLAPP Project. See, e.g., Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES, June 1, 2010, at A1; Editorial, *Want to Complain Online? Look Out. You Might Be Sued.*, USA TODAY, June 9, 2010, at A8; Ashby Jones, *Online Venters Rejoice: Federal Anti-SLAPP Law Taking Shape*, WALL ST. J. L. BLOG (June 1, 2010, 9:48 AM), <http://blogs.wsj.com/law/2010/06/01/online-venters-rejoice-federal-anti-slapp-law-taking-shape/?KEYWORDS=online+venters+rejoice>.

81. H.R. 4364, § 3(a).

82. H.R. 4364, § 5(a).

correctly aims a review of whether the defendant's activity deserves protection rather than the supposed frivolity of the plaintiff's complaint. Maintaining this language could likely allow courts to construe the protection broadly, however, and even allow frivolous filings of anti-SLAPP motions that inherently do not qualify for protection.

In an attempt to extend anti-SLAPP protections to each state without a statute, the Citizen Participation Act allows for removal of state law claims that may be defended through an anti-SLAPP motion.⁸³ Now if this bill were passed, every claim that someone like Jan Cole files would have the potential of being removed to a federal court for an anti-SLAPP motion to be considered. While proponents may rationalize that such a measure could help curb frivolous defamation actions, states with large media outlets that are likely targets of frequent defamation suits have already solved the problem by instituting their own anti-SLAPP provisions.

Finally, simply filing the anti-SLAPP motion could manipulate settlement negotiations and strategies as plaintiffs threatened with anti-SLAPP motions may feel pressure from the possibility of paying the defendant's attorney fees. These new strategies and effects bear a strong resemblance to revised Rule 11, which reportedly chilled plaintiff attorneys to a point where plaintiff and defense attorney relationships deteriorated in the 1980s as sanctions motions were used as leverage to manipulate settlements.⁸⁴

II. RULE 11'S GROWING PAINS WHILE TARGETING FRIVOLOUS LAWSUITS

In 1973, Alan Bakke scored above the 90th percentile on the MCAT exam while applying to the Medical School of University of California at Davis.⁸⁵ Bakke could not take advantage of his high MCAT score that year, because he applied so late, and was rejected from the school. The following year, however, he was denied admission a second time, despite his high score and GPA, while the

83. H.R. 4364, § 6(a). Such a provision appears to be an unprecedented statutory circumvention of the Well-Pleaded Complaint Rule that is integral to jurisdictional traditions and principles that allow for a plaintiff to be the master of his complaint. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). While it is an unusual manner to circumvent the Well-Pleaded Complaint Rule, it would not be the first time that the principle would be reviewed. This issue is a significant one, but this topic falls outside the scope of this Note and perhaps further proves that the legislative solution to the SLAPP problem is likely not the best solution, particularly at the federal level.

84. VAIRO, *supra* note 17, at 44–45.

85. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 n.7 (1978).

school kept a separate admissions program that accepted less qualified candidates solely because they were under-privileged minorities.⁸⁶ Upon this second rejection, Bakke filed an action in the Superior Court of California.⁸⁷ Citing that the school rejected him based on a special admissions program that was called “reverse discrimination,”⁸⁸ Bakke received a judgment from the court declaring the school’s practice illegal and unconstitutional and the higher courts ordered the school to accept him as a student during subsequent appeals that reached the U.S. Supreme Court.⁸⁹

While opinions may have varied about the case at the time, Bakke benefited from the fact that his litigation was pursued prior to 1983, when a stricter Rule 11 took effect that may have had stark consequences on his claims for relief.⁹⁰ Opposing counsel would likely have called his claim frivolous and would have had the opportunity to lengthen litigation through Rule 11 motions that could have intimidated Bakke’s attorney with sanctions to the point where the claim would settle early, or worse yet, never be filed.⁹¹ Since Bakke had good ground to support his claim with a belief it could improve or overturn existing law, Rule 11 at that time protected his petition rights in going to court as an avenue for governmental redress of grievances.

Rule 11 has policed frivolous claims filed in federal courts since it was adopted in 1938.⁹² Initially the rule only required the attorney to have “good ground to support” to sign court documents, motions, and pleadings, and the courts seldom took action against offending attorneys and often used vague subjective standards to enforce misconduct.⁹³ The inability to apply a discernable standard over time spurred revision of Rule 11. Yet it seems that the only certain consequence

86. *Id.* at 276–77. In the prior year, Bakke wrote to the dean of admissions at the medical school and discussed that it was unfair that openings left for a special admissions program for underprivileged minorities were used as a racial and ethnic quota. *Id.* at 276. This only appeared to hamper Bakke’s application the following year, however, when he was asked to interview for admission to the school with the very same Dean who authored Bakke’s lowest rating on his evaluation based on Bakke’s being “rather limited in his approach” and his “very definite opinions which were based more on his personal viewpoints than upon a study of the total problem.” *Id.* at 277.

87. *Id.* at 277.

88. *Id.* at 413 (Stevens, J., concurring in the judgment in part and dissenting in part).

89. *Id.* at 279–81, 320.

90. Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 *FORDHAM L. REV.* 475, 475–76 (1991).

91. *See id.*

92. VAIRO, *supra* note 17, at 5–6.

93. *Id.* at 7.

of the revisions were unintended (and negative) consequences,⁹⁴ including interference with lawyer independence from sanctions while advocating claims for plaintiff clients, frivolous filings of satellite litigation, and a general decay of professionalism among attorneys. In the end, these aggregate effects simply led to more Rule 11 filings.⁹⁵

A. *Rule 11 Grows Up Too Fast with 1983 Amendments*

In an effort to curb frivolous suits, Rule 11 was amended in 1983 to require a "reasonable inquiry" from the attorney concerning his client's claims and defenses.⁹⁶ The amendment had two principle features: first, the rule's scope was broadened so that it applied to a greater range of pleadings; second, sanctions were made mandatory once a violation was found.⁹⁷ While the changes were intended to discourage frivolous filings, many thought that it had the exact opposite effect. The character of the additions often brought a more adversarial nature between opposing counsel as it broadened the situations where Rule 11 motions could be filed and accordingly provoked more vicious contention among attorneys seeking to affect the outcome of litigation.⁹⁸

As the amendments were under consideration, Professor Arthur R. Miller predicted that the revisions, while a good idea in principle, would likely cause a duplication of issues to litigate as attorneys find a way to settle claims out of court while having to return to court to evaluate Rule 11 sanctions.⁹⁹ As Miller predicted, Rule 11's broader scope, when coupled with its new strength and fee-shifting for successful motions, had a principal effect of adding litigation rather than lessening it.¹⁰⁰

The 1983 amendments' adverse consequences were all the more disappointing given that few judges said the revised rule appeared very effective to actually stop frivolous lawsuits.¹⁰¹ While it decreased

94. *See id.* at 8-17.

95. *See id.* at 45; Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 47-53 (1994); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598-99 (1998).

96. VAIRO, *supra* note 17, at 13.

97. Georgene M. Vairo, *Rule 11: A Critical Analysis*, in 118 FED. RULES DECISIONS 189, 190, 193 (1988).

98. VAIRO, *supra* note 17, at 45.

99. *Id.* at 399.

100. *Id.*; Vairo, *Rule 11 and the Profession*, *supra* note 95, at 598.

101. *See* VAIRO, *supra* note 17, at 48.

boilerplate pleadings and appeared to discourage “questionable cases,” it actually brought on other problems in litigation. Many concluded that Rule 11 was actually allowing parties to cause difficulties in settling cases as satellite litigation increased to determine Rule 11 motion outcomes.¹⁰² Lifting or withdrawing sanctions motions became bargaining leverage against attorneys without any return to clients.¹⁰³ These adverse consequences were all the more troubling given that surveyed judges considered groundless litigation only a small problem.¹⁰⁴

More generally, many came to the conclusion that Rule 11 was actually contributing to the breakdown of civility in the profession.¹⁰⁵ Many lawyers were too quick to file Rule 11 motions based on any arguable manipulation of facts or suspected lack of “reasonable inquiry.”¹⁰⁶ The Plaintiffs bar also complained that in practice Rule 11 operated as a chill on their ability to represent clients.¹⁰⁷ One argument has stated that had Rule 11 been as restrictive in the 1950s as it was after 1983, important cases such as *Brown v. Board of Education*,¹⁰⁸ which had a huge impact in overturning overwhelming judicial precedent that allowed segregation, may have never been filed if the risk of sanctions had been as strong.¹⁰⁹ Even Alan Bakke would feel a chill from revised Rule 11 if he chose federal courts as the avenue of petitioning government for his admission to medical school.¹¹⁰ As a practical matter, the revised rule required attorneys to anticipate Rule 11 motions and prepare to defend motions that became a part of the costs of bringing a lawsuit. Critics also argued that Rule 11 was applied unevenly, the Judge subjecting plaintiff’s claims to rigorous scrutiny while allowing defendant attorneys to file *pro forma* answers and motions to dismiss without repercussions when they clearly violated the rule.¹¹¹ Since much of plaintiff attorneys’ cases subjected to Rule 11 motions were civil rights or worker

102. *Id.* at 45.

103. *See id.*

104. *Id.* at 48.

105. *Id.* at 45, 48–49.

106. *See id.* at 49–50.

107. *Id.* at 50–51.

108. 347 U.S. 483 (1954).

109. Vairo, *supra* note 90, at 475–76.

110. *Id.*

111. VAIRO, *supra* note 17, at 16–17, 49–50.

discrimination cases, a significant chill spurred plaintiff attorneys to become vocal toward the rule's unfair application against plaintiffs.¹¹²

B. *Disciplining Rule 11's Side Effects with 1993 Amendments*

The 1983 changes to Rule 11 brought enough questions and concerns among the practicing bar that officials considered further revisions to the rule which came into effect in 1993.¹¹³ The most notable change, a 21-day safe harbor period, allowed parties to amend complaints following notice of a Rule 11 motion.¹¹⁴ This removed much of the hostility between attorneys after the 1983 amendments; however, this change was not without its own criticism.¹¹⁵ So long as the lawsuit is withdrawn within the safe harbor period following a Rule 11 motion nothing will come of the motion.¹¹⁶ While the change has made Rule 11 arguably less effective, the debates and criticism show how difficult it is to legislate or dictate rules that would appropriately remove frivolous claims.

C. *The Anti-SLAPP Statute Following Rule 11's Footsteps*

Since Rule 11 and the anti-SLAPP statute both exist primarily to curb frivolous lawsuits, it is worthwhile to compare the two in terms of applicability and susceptibility to abuse. Proponents of the anti-SLAPP statute would say the anti-SLAPP statute's purpose sets itself apart from Rule 11 since the statute is premised primarily on the concern of protecting First Amendment rights to participate with government.¹¹⁷ To some extent this is true, but it protects the defendant's right to free speech against a filer's right to bring his claim to court.¹¹⁸ While the statutes tend to protect defendant's rights,

112. *See id.* at 50–51.

113. *Id.* at 14–15.

114. *Id.* at 23–24.

115. Vairo, *The New Rule 11: Past as Prologue?*, *supra* note 95, at 63–64. Justice Scalia, among the most vocal opponents of the safe harbor amendment, argued that the 21-day period gave an extra buffer for litigators to bring frivolous claims causing a defendant emotional angst and distress. ANTONIN SCALIA, DISSENTING STATEMENT OF JUSTICE SCALIA, SUPREME COURT OF THE UNITED STATES, AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1993), *reprinted in* VAIRO, *supra* note 17, at 842–43.

116. SCALIA, *supra* note 115, *reprinted in* VAIRO, *supra* note 17, at 842.

117. *See* PRING & CANAN, *supra* note 2, at 10.

118. *Id.* at 11–12. This is a proposition that the New Hampshire Supreme Court openly refuted when it issued an advisory opinion at the request of the state's legislature considering an anti-SLAPP statute. Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012 (N.H. 1994).

this preference can be justified—at least as a general matter—when the statutes are tightly focused on the defendant’s petitioning activity because democratic governments function on citizen input.¹¹⁹

The statute’s fee-shifting provision presents a more serious concern. The anti-SLAPP statute’s fee-shifting provision is much like the 1983 Rule 11 amendments. While intended to protect defendants from harm caused by the need to pay fees to secure dismissal of suits that are improper in light of the anti-SLAPP statute, it remains true that it was the fee-shifting provision of the 1983 version of Rule 11 that was believed to account for the abuse of that rule.¹²⁰ Given that the 1993 amendments changed the fee-shifting provision, there is good reason to question whether this provision belongs in the anti-SLAPP statute.¹²¹ This change was meant to reduce the number of attorney-filed Rule 11 motions made simply to seek awards covering their own fees,¹²² and a similar provision may be required to curb frivolous anti-SLAPP motions.

Another similarity between the two measures includes their inability to deter frivolous lawsuits. Just as the 1983 revised Rule 11’s effectiveness in eliminating frivolous litigation was questionable, there is good reason to believe that the anti-SLAPP statute will not necessarily prevent SLAPP suits’ ability to harass and annoy.¹²³ While the anti-SLAPP statute allows a quicker disposition of the claim and even offers an ability to shift the defendant’s costs toward the plaintiff, defendants will still be able to file frivolous claims and continue to harass SLAPP targets through an extensive appellate battle on anti-SLAPP dispositions.¹²⁴ As long as the offending lawsuits

“A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.” *Id.* at 1015.

119. See PRING & CANAN, *supra* note 2, at 21 (citing *Bill Johnson’s Restaurants v. N.L.R.B.*, 461 U.S. 741, 743 (1983)).

120. VAIRO, *supra* note 17, at 55.

121. See *id.* at 56.

122. *Id.* at 55.

123. See *id.* at 48; PRING & CANAN, *supra* note 2, at 190–91.

124. Pring and Canan repeatedly suggest that SLAPPs are generally last ditch moves by individuals and corporations that are already subjected to bad press in front of the general public and SLAPP filers hardly believe they could win in any capacity other than to intimidate opponents. See PRING & CANAN, *supra* note 2, at 145–51. One author joked about the statute’s ineffectiveness in policing SLAPPs by defining a SLAPP as:

A lawsuit, usually asserting defamation or a related tort, initiated to intimidate opponents of a project or activity from expressing their views. . . . Some jurisdictions have passed anti-SLAPP statutes. However, the legislatures were concerned about denying people the right to sue if they really were defamed, and therefore most anti-SLAPP statutes are weak and require protracted litigation to enforce. Because SLAPP

continue to cause stress and silence opponents, they will remain effective in influencing community political discussions. Legislators could likely eliminate this effect by drafting broad statutes, but this would come at the cost of Jan Cole and other plaintiffs' constitutional rights and this further demonstrates that a legislated solution is not ideal.¹²⁵

Moreover, there is reason to believe that just as the filing of frivolous Rule 11 motions plagued court dockets in the 1980s, so too the anti-SLAPP statutes have spurred the filing of frivolous anti-SLAPP motions.¹²⁶ While Pring and Canan justified the anti-SLAPP statute with reference to its tight focus on the oldest of constitutional rights, such as, the right to petition,¹²⁷ the expanded scope typical of many statutes greatly increases the potential for abuse.¹²⁸

The purpose of the anti-SLAPP motion to dismiss is to quickly eliminate defendant's concerns of frivolous lawsuits, but the right to appeal immediately upon the disposition of the SLAPP motion hearing brings an inevitably long procedural course that neither brings the claim to a close nor likely restores the defendant's ability to speak freely in local political discourse and discussions.¹²⁹ At this point the legislation has only expanded an area of litigation

suits are usually filed by businesses who have bushels of cash and a pack of ravenous lawyers on retainer, and the defendants are individuals without much excess income to spend on lawyers, anti-SLAPP statutes are a bit like handing grandma a pea-shooter and asking her to stave off a company of Marines.

RANDALL C. YOUNG, *THE DICTIONARY OF LEGAL BULLSHIT* 122–23 (2007). While some may see Young's quip as a reason to advance stronger anti-SLAPP statutes to allow grandma to stave off the Marines with more than just a pea-shooter, it also shows that legislating this procedural solution merely introduces more issues for lawyers to litigate—and possibly extending litigation when the statute was created to bring a quick dismissal.

125. The most effective way to police these issues is through litigation itself. Pring and Canan wrote out a litigation strategy for defendants in jurisdictions without anti-SLAPP protections to seek dismissal through what would be a traditional 12(b)(6) motion that seeks dismissal based on the idea that no set of facts could be proven to show that the defendant's actions were not protected petitioning activities. PRING & CANAN, *supra* note 2, at 157–63. Since Pring and Canan's book was published before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), overturned the "no set of facts" standard of *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), arguably a 12(b)(6) motion may be more effective in asking a judge to dismiss a claim because the SLAPPING plaintiff has "not nudged [his] claims across the line from conceivable to plausible . . ." *Twombly*, 550 U.S. at 570.

126. Compare VAIRO, *supra* note 17, at 399, and M. Dylan McClelland, *SLAPPlash: The Courts Finally Turn on California's Anti-SLAPP Motion*, BERKELEY ELEC. PRESS SELECTED WORKS (2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=m_dylan_mcclelland.

127. PRING & CANAN, *supra* note 2, at 15–19.

128. McClelland, *supra* note 126.

129. See PRING & CANAN, *supra* note 2, at 159.

for lawyers to offer services when a dispositive motion to dismiss could have done the job without an anti-SLAPP statutory motion. In California, the increased incidence of anti-SLAPP motions and dismissals has actually caused law firms to take up a specialty in anti-SLAPP and its appeals.¹³⁰

Without a doubt, the anti-SLAPP statute has progressed similarly to Rule 11's use once revised in 1983. While it may in fact lessen the amount of SLAPP litigation, the broadening of its applicability has inextricably provided additional ways for the statute's motion to be abused and misused. Such abuse could be lessened through measures similar to Rule 11's safe harbor provision to provide a disincentive to filing an anti-SLAPP motion purely to seek a fee-shifting benefit.

III. LEARNING FROM RULE 11 AND PREVENTING ANTI-SLAPP ABUSE

While the Cohen bill may have good intentions, the ramifications and effects of a broadly construed federal statute could bring the law to states that have specifically chosen not to adopt it.¹³¹ Also, such a nationalized approach would likely cause Rule 11's history to repeat itself as a measure meant to curb frivolous litigation could cause litigation to multiply upon itself as special motions to strike are considered in any context where a defendant could stretch his conduct into the definition of "participation in matters of public significance."¹³²

Similar to Rule 11 motions between 1983 and 1993, it is likely that essentially meritless special motions to strike will be filed against opposing parties to gain leverage or manipulate settlement.¹³³ In

130. See, e.g., HORVITZ&LEVY LLP, <http://horvitzlevy.com/practiceareas/practicearea.cfm?id=14> (last visited May 11, 2011) (showing how this particular law firm specializes in anti-SLAPP cases in California). This is comparable to a trend that occurred in the 1980s when Rule 11 motion practice became a cottage industry among defendant attorneys seeking fee-shifting as a lucrative funding source. VAIRO, *supra* note 17, at 46-48.

131. States without anti-SLAPP statutes include: Alabama, Alaska, Connecticut, Kentucky, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming. Two foreseeable discussions are particularly noteworthy while considering the federal bill. The first is a nationalization of legislation that may be better left to individual states, which would be more appropriately addressed in a paper discussing federalism. The second discussion point is the potential for abuse and negative consequences that have been seen in individual anti-SLAPP jurisdictions to expand nationwide similar to how negative consequences were seen in the 1983 revisions to Rule 11.

132. CAL. CIV. PROC. CODE § 425.16(a) (West 2004).

133. See Vairo, *Rule 11 and the Profession*, *supra* note 95, at 598-602. For cases where California has already reprimanded defense attorneys for bringing anti-SLAPP motions frivolously, see McClelland, *supra* note 126 (citing Flatley v. Mauro, 39 Cal. 4th 299 (Cal. 2006));

addition to settlement manipulation, the motion would be subject to over-filing in actions where it does not apply, adding to a lack of civility among attorneys and it may not even stop frivolous lawsuits meant to silence critics.¹³⁴ Since filing the motion automatically stays discovery during its notice and consideration, an anti-SLAPP motion will be used to delay depositions and discovery obligations regardless of whether it would prevail. Further, the availability of the motion may exacerbate decline in attorney civility among litigators in the same way a strengthened Rule 11 did after 1983 revisions.¹³⁵ If legislators learn from the evolution and transformation of Rule 11, they will see that any broad-based application of a law that polices frivolous lawsuits has the potential for abuse while also multiplying litigation of issues that could be settled quicker without it.¹³⁶

By adopting a measure that would broadly protect any matter of petition and speech rights, the federal anti-SLAPP statute would overreach into the legislative discretion of the states that have already passed statutes of varying degrees of strength and narrowness.¹³⁷ This process would usurp the role of local legislators that have deliberated over the Pring-Canan statute and have decided to amend or remodel it to best serve their state or commonwealth. Adopting the bill as it currently stands engenders procedural gamesmanship as it allows defendants to remove the action to federal courts to assert the anti-SLAPP motion defense.¹³⁸ While the current version of the anti-SLAPP bill in Congress would not require it to be applied in state courts, it does not closely detail what would happen if the federal court determines that the defendant's actions were not in furtherance of First Amendment rights.¹³⁹ Does the immediate right to appeal allow the defendant to take their defense to a circuit court? Or is a remand back to state court the only route for the denied motion on

Beach v. Harco Nat'l Ins. Co., 110 Cal. App. 4th 82 (Cal. Ct. App. 2003)). McClelland writes that the broad interpretations of the California statute have been extended so far that defense attorneys have filed anti-SLAPP motions in response to complaints suing on allegedly fraudulent documents. McClelland, *supra* note 126 (citing *People ex rel. 20th Century Ins. Co. v. Bldg. Permit Consultants, Inc.*, 86 Cal. App. 4th 280 (Cal. Ct. App. 2000)). *See also* Olsen v. Harbison, 35 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2005) (noting that the anti-SLAPP motion was a tactic specifically prone to abuse).

134. *See* VAIRO, *supra* note 17, at 44–45; Vairo, *Rule 11 and the Profession*, *supra* note 95, at 598–99.

135. Vairo, *Rule 11 and the Profession*, *supra* note 95, at 627–28.

136. *See* McClelland, *supra* note 126.

137. For examples of varying degrees of statutes see Hartzler, *supra* note 53, at 1248.

138. H.R. 4364, § 6(a), 111th Cong. (2009).

139. *See id.*

the claim to go? These questions are unanswered while it remains to be seen how determinative the federal statute will be at relieving the chill on the petitioning defendant.

Worse still, it would chill valid claims from being brought to courts (a form of petitioning the government that the First Amendment guarantees) and may actually bar claims in court, particularly if a plaintiff could not prove a probability of success on the claim without the aid of discovery. While the statute would admirably protect any private citizen who found a litigious opponent in the public arena, it would likely overwhelm or bar that same private citizen if she sought her redress in the court.

Finally, perhaps what needs to be considered more closely are the specific words of the First Amendment and what it actually protects. Looking closely, it simply states "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances."¹⁴⁰ While to many this is understood as ultimate rights to say whatever one wants, even Pring and Canan recognize these rights are far from absolute.¹⁴¹

Essentially, if a federal anti-SLAPP law is passed it causes Congress to make a law abridging rights to petition government through the courts. While the statute is intended to prevent frivolous filings, its passage will undoubtedly bring a chilling effect against plaintiff attorneys as actionable offenses may be left unresolved. To protect the free speech rights of citizens chilled from private actions through the courts, Congress has essentially made a law abridging the right to petition, or at least it has chilled that right in the process.

Congress should avoid these foreseeable adverse consequences by applying the lessons learned from the 1993 amendments to Rule 11 and reviewing the appropriate scope of anti-SLAPP statutes. The most effective way to limit abuse of the statute would be to narrow the definition of SLAPP filers to those like applicants or permittees within the political process. This would protect political participants as well as victims of overzealous harassment like Jan Cole. By restricting those entitled to use the special motion in a way similar to

140. U.S. CONST. amend. I.

141. Pring and Canan acknowledge that in many circumstances a sympathetic filer may have a justifiable case against a defendant who has actively pursued defamatory conduct by lying and deceptive petitioning in the local community. PRING & CANAN, *supra* note 2, at 11–14. While common sensibilities would like to allow the filer to have a civil recourse to defamation, Pring and Canan suggest that the petition rights are more important and thus deserving of protection in accordance with *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). PRING & CANAN, *supra* note 2, at 26–28.

jurisdictions that only permit anti-SLAPP motions to a narrow class of individuals, this would protect the most absolute right to petition without broadening speech rights with indefinable immunity. Similar to Rule 11 amendments, safe harbor periods, limits on fee-shifting, or even restrictions on fee awards for corporate defendants that make profits on their "petitioning" conduct could all be amenable ways to maintain a level playing field that could stave off the chill from both sides.

IV. CONCLUSION

As the New Hampshire Supreme Court wisely observed, constitutional rights cannot be strengthened for one citizen at the expense of another's.¹⁴² By dismissing any claim that would create a "chilling effect" on First Amendment related activity, it inherently chills one's propensity to bring an opposing action to court when the result may simply require paying the opposing party's attorney fees.

In the same way a more strict Rule 11 could have chilled Oliver Brown and other parents from proceeding in *Brown v. Board of Education*,¹⁴³ the anti-SLAPP statute should not be allowed to create a chill that would disallow a citizen from petitioning its government through a lawsuit.¹⁴⁴ While an anti-SLAPP statute will not likely chill plaintiffs from bringing civil rights issues of the magnitude of *Brown*, the Jan Coles and Agnes Bernardos of the world should not have a courthouse door shut on them when considering the court system as an avenue to petition for reform.

In the end, the goal both Rule 11 and the anti-SLAPP statute seek can be drawn from the commonly used civil procedure metaphor of the sword and shield. While shields are necessary to protect individual's rights, the moment those same devices are manipulated into a sword attacking others' rights, revision becomes necessary. Legislators should be aware that a broad anti-SLAPP statute might do more harm than good.

The side effects of Rule 11's strict enforcement in the 1980s will likely have a strikingly similar effect to an overly broad federal anti-SLAPP statute if adopted as Congressman Cohen introduced it. As congressional officials consider the use of a federal anti-SLAPP

142. Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1015 (N.H. 1994).

143. 347 U.S. 483 (1954).

144. Cf. Vairo, *supra* note 90, at 475-76 (suggesting that different outcomes of some landmark cases would have been reached if a more strict Rule 11 had been in place at those times).

statute, they should consider the growing pains of applying Rule 11 in an effective manner and perhaps allow safe harbor periods or other measures to prevent such a chill from developing in jurisdictions where anti-SLAPP measures were never taken. The most effective way to prevent such a chill may likely be a strict adherence of the statute to petitioning activity. While courts would be required to define the extent of petitioning activity that would be protected, it would prevent a broadened application of the law beyond the scope of individual jurisdictions with restrictive application. The petitioning activity definition may be restricted to actions that are not privately profitable or perhaps matters related to a specific government action pending consideration on a legislative schedule. Without some mechanism to prevent corporate and media abuse of anti-SLAPP protections the federal statute will cause more litigation than any particular good that framers of the statute originally intended.

Considering these side effects and the probable similarities between the operation of this statute and Rule 11, lawmakers may very well be left better off not enacting such a law if it cannot frame it in a particular way to tame abuse that is likely to occur. One citizen's constitutional right does not tacitly deserve a fast track in consideration over another's right. The appropriate focus should step away from undercutting an individual's day in court, but maintain that open door to the courthouse. Without keeping public forums open for citizens to petition government for redress of grievances, even for those allegedly offended within the public forum, free speech cannot win within the emergence of the SLAPP phenomenon or its anti-SLAPP solution.