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A FEDERAL ANTI-SLAPP LAW WOULD MAKE SECTION 230(c)(1) OF THE COMMUNICATIONS DECENCY ACT MORE EFFECTIVE

Sharp-Wasserman/Mascagni*

INTRODUCTION

Section 230 of the Communications Decency Act1 ("CDA 230") is the legal linchpin of the modern web. CDA 230 shields the operators of websites of the user-driven content model from liability imposed upon them, through litigation or other means, for the unlawful speech or conduct of their users. In application, CDA 230 enables these defendant intermediaries to dismiss such suits before trial. This provision has been applied to various causes of action and criminal charges, including defamation,2 false advertising,3 housing discrimination,4 and a state criminal charge of ticket-scalping.5

A wide variety of website operators benefit from this immunity in their regular operations, from large companies like Twitter and Reddit to thousands of smaller discussion websites, blogs and other sites that host third-party content. CDA 230 immunity enables such defendants to function as hosts of third-party speech, and more broadly, as conduits of internet commerce.

The law is motivated, in part, by the common law theory of collateral censorship.6 This theory is constituted, first, by a judgment of fact: were intermediaries held liable for all illegal content contained within a vast quantity of third-party speech, intermediaries (like bookstores, newsstands, or social media sites) would respond by reducing the amount of speech they transmit and, erring on the side of minimizing litigation costs, by censoring some lawful speech that merely might be tortious. Collateral censorship theory incorporates, second, a judgment of

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4 See, e.g., Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157 (9th Cir. 2008).
6 Several landmark CDA 230 cases have embraced this interpretation. See, e.g., Batzel v. Smith, 333 F.3d 1018, 1027–28 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).
value: in the context of lawsuits that implicate freedom of speech concerns, as the volume of third-party content increases and the practicability of editorial control over content accordingly decreases, the affirmative responsibility of an intermediary to determine the tortious nature of such content should be relaxed.\(^7\) For instance, under the common law, newsstands are liable only for defamatory content of which they have specific notice,\(^8\) while newspaper publishers are subject to the same standard of defamation liability as the authors of articles.\(^9\)

Section 230 of the Communications Decency Act and state anti-SLAPP laws have different scopes of application but serve similar First Amendment-related purposes. Anti-SLAPP laws are designed with the intention of mitigating the speech-chilling effect of litigation costs; but anti-SLAPP laws are not confined in their application to the internet or to intermediary liability.

Anti-SLAPP laws provide for the expedited dismissal of meritless suits that are intended to chill the exercise of speech—“Strategic Lawsuits Against Public Participation,” or “SLAPPs.”\(^10\) The object of such a meritless suit is often to silence someone or to force a defendant to spend money, and not necessarily to obtain a favorable result at trial. A classic example of a SLAPP is a lawsuit by a public figure against a newspaper or blog for a critical opinion article.\(^11\)

Anti-SLAPP laws protect against suits that arise from First Amendment-related activity on the part of the defendant, such as, in the broadest anti-SLAPP statutes, any public statements on matters of public concern.\(^12\) Anti-SLAPP statutes

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\(^9\) Id. § 578 cmt. b.

\(^10\) The term “SLAPP” was coined by Professors George Pring and Penelope Canan in a pair of articles they co-authored in 1988. See Penelope Canan & George W. Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches, 22 L. & SOC’Y REV. 385 (1988); Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation, 35 SOC. PROBS. 506 (1988). They articulated the definition also in their 1996 book, GEORGE W. PRING & PENELope CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT 8–9 (1996).


\(^12\) See, e.g., CAL. CIV. PROC. CODE § 425.16(e) (West 2018) (defining protected activity as “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”); D.C. CODE § 16-5502(b) (2018) (defining protected activity as “an act in furtherance of the right of advocacy on issues of public interest”); TEX. CIV. PRAC. & REM. CODE § 27.001(3) (2018) (defining protected activity as “a communication made in connection with a matter of public concern”); VT. STAT. ANN. tit. 12, § 1041(i)(3)
permit defendants to file a motion for expedited dismissal, upon which a pre-trial hearing must be held within a statutorily defined time period. If the suit is determined at that hearing to be meritless, it is dismissed, with costs imposed on the plaintiff. If one were to draw a Venn diagram of the scope of application of these two laws, the outer circles would contain a substantial number of applications exclusive to each law. Anti-SLAPP laws have, in some senses, a broader application than CDA 230. First, anti-SLAPP protection often applies in both an online and an offline context. Second, anti-SLAPP laws protect defendants of all kinds—including newspapers, activists, and consumer reviewers—and not just intermediaries. Anti-SLAPP cases involving CDA 230 represent only a small subset of anti-SLAPP cases.

But the scope of anti-SLAPP laws is also, in another sense, narrower than that of CDA 230. While CDA 230, with certain exemptions, immunizes intermediaries against any cause of action holding an intermediary liable for any type of third-party conduct, anti-SLAPP laws are intended to protect defendants only from lawsuits that target speech or petitioning activity that implicates First Amendment concerns. Thus, CDA 230 immunity has been applied in the context of liability for housing discrimination, false advertising, and other causes of action that are less likely to fall under the purview of anti-SLAPP statutes. This difference is a reflection of the fact that CDA 230 was drafted, like anti-SLAPP laws, with the narrow intention of protecting freedom of speech, but also, unlike anti-SLAPP laws, with the broader aim of facilitating the growth of internet commerce.

Anti-SLAPP statutes differ from CDA 230 not just in scope, but also in that the former commonly provide certain procedural features that specifically address the problem of pre-trial costs, such as a fee-shifting mechanism that imposes the


13 See Park v. Bd. of Trs. of the Cal. State Univ., 393 P.3d 905, 911 (Cal. 2017) (“[W]hile discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration.”). For a discussion of the commercial speech exemption and its application to false advertising claims, see Part VII(c).

14 47 U.S.C. § 230(b)(2) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]”).
defendant’s costs on the plaintiff upon dismissal,\textsuperscript{15} time limits for scheduling a pre-trial hearing,\textsuperscript{16} and a stay of discovery pending a decision on the anti-SLAPP motion.\textsuperscript{17}

The lack of such mechanisms in CDA 230 partly undermines the law’s intended effect, because as detailed in a 2012 study, intermediaries face significant costs even in litigating a case up to the motion to dismiss stage at which CDA 230 questions are typically adjudicated.\textsuperscript{18} Lawsuits do not have to be successful or even reach trial to set in motion the process of collateral censorship, because the relevant incentives are triggered by aversion to costs, not only by aversion to unfavorable ultimate legal determinations.

But a defendant can apply the laws in concert in some circumstances. California case law illustrates that CDA 230 can be employed in the context of an anti-SLAPP motion, so that the latter’s protections supplement the former’s.\textsuperscript{19} A defendant argues that a suit is meritless due to the applicability of a CDA 230 defense, and thus should be dismissed promptly, with costs. Unfortunately, the absence of a federal anti-SLAPP law allows plaintiffs to avoid this fortified combination of defenses, available in some state courts, in four ways. First, because some state anti-SLAPP laws offer broader protection than others, plaintiffs can engage in forum-shopping among state courts. Second, in cases in which a plaintiff’s state affords narrower anti-SLAPP protection than the defendant’s state, choice-of-law principles for cross-jurisdictional tort actions will tend to favor law of the plaintiff’s state. Third, because state anti-SLAPP rules generally do not apply to federal claims, plaintiffs can plead analogous federal claims. Fourth, plaintiffs can exploit a federal circuit split over the question of whether state anti-SLAPP rules apply in federal diversity cases.

A Federal anti-SLAPP law would largely close these loopholes. But even with the external fortification provided by a federal anti-SLAPP law, there are limitations to this combined defense, rooted both in inherent limitations to CDA 230 immunity and to the imperfect overlap between the two types of immunity. First, the scope of CDA 230 immunity can be narrowed by Congress and the courts, and such judicial and

\textsuperscript{15} See, e.g., CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2018); D.C. CODE § 16-5504(a) (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1) (West 2018).
\textsuperscript{16} CAL. CIV. PROC. CODE § 425.16(f) (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a) (West 2018).
\textsuperscript{17} CAL. CIV. PROC. CODE § 425.16(g) (West 2018); D.C. CODE § 16-5502(c)(1) (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2018).
\textsuperscript{19} See infra Part IV.
legislative reform simultaneously reduces the scope of anti-SLAPP protection in CDA 230 cases. Second, the definition of protected activity in a federal anti-SLAPP statute inevitably would not encompass all situations in which CDA 230 applies. Specifically, while anti-SLAPP statutes with the broadest definitions of protected activity typically protect only speech on “matters of public concern,” CDA 230 applies even to speech concerning matters of interest only to the litigants or to a small subset of the public. Finally, a federal anti-SLAPP law, unlike CDA 230, likely would have a commercial speech exemption, designed to prevent the abuse of anti-SLAPP protection by corporate defendants, primarily in the context of false advertising litigation. This exemption would preclude the use of a federal anti-SLAPP defense in some cases in which CDA 230 would apply.

This Article proceeds in eight parts. Part I details the text, legislative purpose, and prevailing judicial interpretation of CDA 230. Part II explains the relevance of pre-trial costs to the problem of collateral censorship in an online context. Part III details the history and general characteristics of state anti-SLAPP laws. Part IV illustrates how a CDA 230 defense can be employed in the context of an anti-SLAPP motion. Part V examines gaps in state anti-SLAPP coverage. Part VI outlines the features of a hypothetical federal anti-SLAPP law and explains how a federal anti-SLAPP law would close existing gaps in the existing anti-SLAPP regime. Part VII details limitations to a combined CDA 230/anti-SLAPP defense at the federal level. Part VIII briefly discusses the unfeasibility and relative undesirability of the alternative solution of adding a fee-shifting provision to CDA 230 itself.

I. OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. The Text

Section 230(c)(1) of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The category “Interactive Computer Service” in application covers, importantly, websites of the user-generated content model. More broadly, the term is defined to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a

computer server.”22 “Information Content Provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information . . .”23

For instance, while one can sue a Yelp commenter for defamation, although the commenter has provided content to Yelp, one cannot hold Yelp liable for that content unless one can demonstrate that Yelp itself somehow co-authored it. Under existing judicial standards, a plaintiff cannot bypass CDA 230 immunity with an allegation that Yelp has negligently permitted illegal speech or conduct originating with third-parties,24 or with an allegation that Yelp has encouraged third party speech or conduct in some sense short of co-authorship.25 Yelp must be an author or co-author of the content; more precisely, Yelp must have authored the illegal aspect of the content. For example, in a defamation context, Yelp does not lose immunity with respect to certain content by “correcting spelling, removing obscenity or trimming for length,” but it does lose immunity by editing “in a manner that contributes to the alleged illegality,” such as removing the word “not” from a third-party message reading “[Name] did not steal the artwork,”26 because by removing “not,” Yelp potentially transforms a legally permissible statement into a defamatory one.

As courts have interpreted the provision, § 230(c)(1) provides online intermediaries with broad protection against censorship on the basis of the third-party origins of content. Under current judicial doctrine, this immunity applies regardless of whether a defendant has taken any steps to censor objectionable content.27 Defendants also benefit from immunity

22 Id. § 230(f)(2).
23 Id. § 230(f)(3).
24 See, e.g., Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009) (“[A] plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence.”); Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008) (finding that CDA 230 preempted a negligence claim premised on the theory that a social media site had a duty to implement certain safety features to prevent minors from interacting with sexual predators through the platform).
25 See, e.g., Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1174–75 (9th Cir. 2008) (“Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”).
26 Id. at 1169.
even when they have specific notice that third-party content is unlawful. 28

This Article focuses on § 230(c)(1), rather than (c)(2), which has different prerequisites for its application and is a much less significant area of CDA 230 litigation. Section 230(c)(2) states that

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\text{[n]} \text{o provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).} \quad 29
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Sub-section (c)(2) uniquely applies only to defendants who have made an effort to screen out objectionable content. Moreover, unlike § 230(c)(1), sub-section (c)(2) does not limit immunity based on whether the plaintiff's cause of action is premised on the defendant being a “publisher or speaker,” or on whether the defendant is an “information content provider” with respect to the content that is the subject of the suit. 30

B. CDA 230's Narrow and Broad Aims: Freedom of Speech and Freedom of Commerce

CDA 230(c)(1), at least according to the dominant judicial interpretation, is intended to foster an online free marketplace of ideas by preventing collateral censorship. 31 The

30 See IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 37.05(4)(A) (2017).
31 See, e.g., Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099–110 (9th Cir. 2009) (“The statute is designed at once ‘to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.’”); Batzel v. Smith, 333 F.3d 1018, 1027–28 (9th Cir. 2003) (“Consistent with these provisions, courts construing § 230 have recognized as
The common law theory of collateral censorship posits that imposing strict liability for third party speech—that is, liability without a knowledge requirement—on a “distributor,” or an entity that transmits large quantities of third-party speech, will cause that entity to overzealously censor out of caution, catching even lawful content in its net. Under common law doctrine, “distributors” are held liable only for third-party illegality of which they have specific knowledge. For example, bookstores and newsstands are not liable for defamatory content in books and newspapers, except where the plaintiff can show that such intermediaries specifically knew of the defamatory speech at issue. Newspapers, by contrast, are held liable by the same standard as the authors of articles. This logic can be applied to any form of criminal or civil liability in which intermediary liability would cause an intermediary to preemptively censor the speech of third parties, such as liability under obscenity laws or in the context of lawsuits alleging defamation or privacy torts.

In addition to permitting a free market of ideas and preferences for ideas, the statute is supposed to foster internet commerce more broadly. The statute provides a policy objective to “preserve the vibrant and competitive free market that currently exists for . . . interactive computer services, unfettered by Federal or State regulation.” The application of CDA 230 to activities that do not implicate First Amendment Concerns, such as selling goods and services, or that are subject to more limited First Amendment protections, such as advertising goods and services, is justifiable, if at all, in furtherance of this more general aim. In a sense, the mechanics of collateral censorship as an empirical phenomenon may operate similarly with respect to such activity in user-driven internet media, but such “censorship” does not raise the same Constitutional and policy concerns.
The distinction between these narrower and broader aims is crucial to understanding the imperfect overlap, discussed in Part VII, between CDA 230 and a federal anti-SLAPP law. Because anti-SLAPP laws are designed to discourage and mitigate the impact of lawsuits targeting speech and petitioning activity specifically, no anti-SLAPP law can or should apply in all cases in which a CDA 230 defense is available. Anti-SLAPP laws are not general instruments of tort reform and do not serve to facilitate freedom of commerce except where freedom of speech concerns are simultaneously implicated.

II. PRE-TRIAL COSTS AND COLLATERAL CENSORSHIP DESPITE CDA 230 IMMUNITY

Despite the powerful protections CDA 230 provides to defendants on the merits, it has, as a practical matter, only partially fulfilled its promise of preventing collateral censorship by mitigating the litigation costs borne by online intermediaries. CDA 230 immunity is typically adjudicated at the motion to dismiss stage. In an empirical study in 2012, Professor David Ardia at the University of North Carolina determined that the average CDA 230 case terminated on a motion to dismiss takes nearly a year to reach dismissal. Cases in which courts permitted discovery before dismissal tended to last nearly twice as long. Ardia noted, plausibly, that litigating for either length of time entails substantial defense-side costs. Hiring a high-quality defense-side firm to secure dismissal in a CDA 230 case requires significant expense: a single partner at such a firm may charge as much as $1,500 per hour for her services. While this Article does not attempt a precise calculation of such fees spread over the average multi-hundred day period that Ardia calculated, common sense dictates that these costs are significant.

Anti-SLAPP laws are better designed than CDA 230 to address the reality of pre-trial costs. While CDA 230 provides immunity on the merits, anti-SLAPP laws specifically address those meritless lawsuits that accomplish their abusive purpose regardless of success or failure on the merits. The purpose of a SLAPP action is to force a defendant to spend money defending herself rather than to obtain a favorable legal ruling. Accordingly, unlike CDA 230, anti-SLAPP laws often

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37 See Ardia, supra note 18, at 482–83.
38 Id. at 382.
39 Id. at 484.
40 Id.
incorporate a fee-shifting provision, a time limit for scheduling a pre-trial hearing, and a stay of discovery pending the resolution of an anti-SLAPP motion. Thus, state anti-SLAPP protection is a crucial supplement to Section 230 in the context of abusive litigation targeting online speech.

III. OVERVIEW OF STATE ANTI-SLAPP LAWS

A. History of SLAPPs

In 1966, a local branch of the NAACP instituted an economic boycott against white merchants in Claiborne County, Mississippi, to pressure elected officials to adopt several racial justice measures. In response, the merchants sued the NAACP in 1969 for tortious interference with business in what became the landmark civil rights case NAACP v. Claiborne Hardware Co. The trial court found for the merchants and ordered the NAACP to pay $3.5 million in damages, a verdict the Mississippi Supreme Court upheld. However, the U.S. Supreme Court overturned the verdict, holding that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.”

Though not referred to as one at the time, NAACP v. Claiborne Hardware, Co. is a classic example of a ‘Strategic Lawsuit Against Public Participation,’ or SLAPP. SLAPPs are meritless lawsuits that some individuals and businesses use as weapons against those who speak out on public issues or petition the government. SLAPP filers do not file a lawsuit to seek justice, but rather, to silence, intimidate, and harass those who disagree with them. SLAPPs are effective because even a meritless lawsuit can take significant time and money to defend. To end or prevent a SLAPP, those who speak out on issues of public interest frequently agree to muzzle themselves, apologize, or “correct” statements.

42 See infra Part III(c).
44 Id. at 889–91.
45 Id. at 893–94.
46 Id. at 911.
Professors George Pring and Penelope Canan first pioneered the term in a pair of articles they co-wrote in 1988. In their 1996 book, “SLAPPs: Getting Sued for Speaking Out,” the authors explain, “thousands of SLAPPs have been filed in the last two decades, tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat.” SLAPP suits, the authors contented, “have struck thousands of typical, middle-of-the-road Americans in just the last few years. They are found in every state; they erupt at every government level, in every type of political action, and on every issue of public consequence. . . . [T]heir victims are now legion.”

B. Cyber SLAPPs

As the Internet has enabled everyone to don the hat of journalist, editor, town crier, or anonymous pamphleteer, social media and consumer review sites have become cultural fixtures. This rise in popularity brought along with it the phenomenon of Cyber SLAPPs, which may be brought against both Internet users and online intermedia ries.

In 2003, as part of the government-sanctioned California Coastal Records Project, photographer Kenneth Adelman took more than 12,000 photos of California’s coastline to document coastal erosion. The photos were made publicly available online. Unhappy that her beachfront mansion was seen in one of the photos, actress Barbra Streisand filed a $50 million privacy lawsuit against Adelman. California Superior Court Judge Allan Goodman ruled that the photo of Streisand’s estate did not invade her privacy, and that the photo was protected speech concerning a matter of public interest and thus a SLAPP.

Justin Kurtz was a college student when he was the target of a Cyber SLAPP. Kurtz started a Facebook page criticizing the business practices of a towing company in Kalamazoo, Michigan. The towing company responded by filing a $750,000 defamation lawsuit against Kurtz. Kurtz’s Facebook page grew
to over 14,000 supporters and his case was the subject of a front-page article in the New York Times. Kurtz’s suit dragged on for more than eight months before dismissal. Michigan did not have an anti-SLAPP law under which Kurtz could have been rewarded attorney’s fees.

Plaintiffs angered by online posts often choose to target the operator of the website that hosted the allegedly offending third-party content, either instead of or in addition to the author herself. For example, in *Albert v. Yelp*, a consumer lawyer sued Yelp for defamation over negative reviews of her firm. Lenore Albert, the proprietor of a small plaintiff-side firm in Huntington Beach, California, advertised herself as a “consumer advocate” fighting on behalf of “the [p]eople.” An employee of the firm became upset with Albert after she missed a filing deadline in a case brought on behalf of the employee’s friend. This employee organized a campaign among her friends to lower the firm’s Yelp rating by posting reviews characterizing Albert as an incompetent attorney who misses deadlines. Albert brought a defamation suit against the employee, her friends, and, most importantly for the purpose of obtaining a measurable award of damages, against Yelp itself. Luckily for Yelp, California law provides robust anti-SLAPP protections. Yelp’s anti-SLAPP motion was granted, and the suit was dismissed with costs.

In *Nunes v. Twitter et al.*, pending at the time of this article’s publication, a Republican Congressman sued Twitter and political consultant Elizabeth Mair for negligence, defamation, “insulting words,” and common law conspiracy, in connection with statements posted on three satirical accounts. The three user accounts, titled “Devin Nunes’ Cow,” “Devin Nunes’ Mom,” and “Devin Nunes’ Alt-Mom,” posted a variety of mocking comments from the perspective of the fictionalized characters they respectively represented. “Devin Nunes’ Mom,” for instance, in reference to Nunes’ political stance on the Special Counsel’s investigation of the Trump Campaign for collusion.
with the Russian government, tweeted "Are you trying to obstruct a federal investigation again? You come home right this instant or no more Minecraft!"\(^62\)

This is a paradigmatic SLAPP, as it targets protected speech, and all of the claims alleged in the complaint would likely be found meritless. The plaintiff alleges that Twitter’s failure to remove purportedly defamatory content amounts to negligence,\(^63\) but courts have consistently held that CDA 230 preempts common law negligence claims advanced on analogous theories.\(^64\) Nunes’ defamation claims would probably be frustrated by the heightened standard of intentionality for defamation claims by public officials,\(^65\) as well as by protections for satirical speech concerning public officials.\(^66\) The plaintiff’s conspiracy claim is fatally premised on his likely defective defamation claim.\(^67\) The plaintiff also alleged “insulting words,”\(^68\) a state statutory cause of action that mirrors the Constitutional “fighting words” doctrine.\(^69\) This limitation on the First Amendment’s guarantee of freedom of speech only applies when words tend to provoke an immediate physical altercation or “breach of the peace,” which is unlikely in this case, at the very least, due to the physical space between Nunes and the defendant speakers.\(^70\) The defendant’s speech might qualify for protection under Virginia’s anti-SLAPP law, which recognizes speech targeted by defamation allegations as protected activity under some circumstances.\(^71\)

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\(^62\) Id. at ¶ 9.
\(^63\) Id. at ¶¶ 33–48.
\(^64\) See, e.g. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009); Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008). See also text accompanying note 24.
\(^65\) See New York Times Co. v. Sullivan, 376 U.S. 254, 283 (establishing that defamation claims by public officials require a demonstration of “actual malice”).
\(^67\) See Complaint, supra note 61, at ¶¶ 53–57.
\(^68\) See id. at ¶¶ 50–52.
\(^70\) See Volokh, supra note 69; see also Chaplinsky, 315 U.S. at 572 (defining “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).
\(^71\) See VA. CODE ANN. § 8.01-223.2(A) (West 2018) (“A person shall be immune from civil liability for . . . a claim of defamation based solely on statements . . . regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party . . . ”).
C. The Mechanics of Anti-SLAPP Protection

To invoke the protection of an anti-SLAPP law, a defendant typically must go through two steps. First, she must show that a suit is in response to First-Amendment-related protected activity on the part of the defendant. Every anti-SLAPP law is worded differently, but some of the broader ones, like those enacted in California, Texas, and Washington, D.C., specify that they protect statements on “matters of public interest,” “issues of public concern,” or something similar. Second, a defendant must make a prima facie showing in a pre-trial proceeding that the suit is meritless. In California’s terminology, a plaintiff must show the “probability that the plaintiff will prevail on the claim.” Many statutes indicate a specific time period within which this hearing must be held, with the apparent purpose of minimizing the burden of a SLAPP on the defendant. Some statutes also include a stay of discovery, to relieve a defendant of the burden and expense of document productions and depositions until after a plaintiff has shown that her case has merit. Unlike CDA 230, anti-SLAPP laws in many states impose the defendant’s costs on the plaintiff upon dismissal; more precisely, twenty-five states provide this feature.

D. Current State anti-SLAPP Laws

Thirty-four states provide some form of anti-SLAPP protection, with thirty-two states providing such protection by statute, as opposed to case law. State anti-SLAPP protections vary in strength and breadth. They vary, among other ways, both in what sorts of speech or conduct they regard as protected activity, and in whether they provide for attorney’s fees upon dismissal.

Broader anti-SLAPP statutes can be found in Oregon, California, Texas, and D.C., which all provide comprehensive coverage for both speech and petitioning activity. California protects, among other categories of activity, “any written or oral statement or writing made in a place open to the

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72 See State Anti-SLAPP Laws, supra note 12.
76 See State Anti-SLAPP Laws, supra note 12.
77 Id.
public or a public forum in connection with an issue of public interest.82 This capacious definition encompasses a seemingly endless list of activities, from statements about the character of a government official,83 to statements made in a hospital’s peer review proceedings established by state law,84 to statements criticizing the manager of a homeowner’s association.85

Importantly, a public website is regarded as a “public forum” for purposes of California’s anti-SLAPP statute.86 Thus, any statement on an “issue of public interest” made by a user of a website of the user-generated content model is protected activity. By contrast, New York’s anti-SLAPP statute, which protects only petitioning activity,87 is unlikely to apply to online speech.

California’s anti-SLAPP law, in contrast to some other state statutes, also protects petitioning activity involving a wide variety of types of government bodies. Protected activity encompasses “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.”88 Pennsylvania’s anti-SLAPP law, by contrast, protects only statements made about environmental issues to a government agency with jurisdiction over such issues.89

Cases involving New Mexico’s and New York’s narrow anti-SLAPP laws provide illustrations of the operation of weak anti-SLAPP protections. New Mexico’s anti-SLAPP law only protects statements made in “quasi-judicial proceedings,” as opposed to statements made in any “official proceeding,” as several stronger state anti-SLAPP laws protect.90 In 2012, the New Mexico Court of Appeals allowed a $4 million lawsuit to resume after it had previously been ruled a SLAPP by a federal district court judge.91 The district court judge ruled that a lawsuit by a development company against local landowners violated the state’s anti-SLAPP law because it was based on a previous lawsuit that the landowners had filed against the developer. The appellate court reversed this decision, stating that only speech in connection with “quasi-judicial” proceedings qualifies for anti-

87 N.Y. CIV. RIGHTS LAW § 76-a(1) (Consol. 2019).
SLAPP protection, and that the landowners’ lawsuit was “a purely judicial proceeding, not a quasi-judicial proceeding.” By contrast, California’s anti-SLAPP statute is not restricted to statements made before a particular type of government body, but rather includes protections for “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.”

New York’s anti-SLAPP law only offers protection against SLAPPs brought by individuals or entities seeking permits or applications from a government body. To prevail on an anti-SLAPP motion in New York, a SLAPP target must demonstrate two things. First, she must show that the plaintiff suing her is a “public applicant or permittee.” Second, she must show that the plaintiff’s claim against her is an “action involving public petition and participation.”

But even if a defendant can establish that she meets these requirements, the court does not have to award damages. All anti-SLAPP damages, including costs and attorneys’ fees, are awarded at the court’s discretion under New York law. This is sharp contrast to a strong anti-SLAPP law like California’s, which includes a mandatory attorney’s fee provision: “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.”

In 2003, the Northwest Bronx Community and Clergy Coalition ("NWBCCC") was advocating on behalf of tenants in several buildings in Bronx, New York, picketing and posting flyers that highlighted the egregiously substandard conditions in which the tenants were living. Rather than fix the conditions or otherwise address the criticisms, a realty company that owned five of the buildings filed suit against the NWBCCC, claiming trespass, libel and wrongful interference with business relationships. The trial court initially granted a temporary restraining order to prevent the organizers from “trespassing” onto the realty company’s property. Although the court eventually held that the realty firms had failed to submit any evidence in support of its claims, it nonetheless allowed litigation to proceed for years. Meanwhile, the SLAPP was exceedingly

93 Id. at *7.
94 CAL. CIV. PROC. CODE § 425.16(e)(1) (West 2018).
95 N.Y. CIV. RIGHTS LAW § 76-a(1) (LexisNexis 2019).
97 N.Y. CIV. RIGHTS LAW §70A-(1)(a) (LexisNexis 2019) (“[C]osts and attorney’s fees may be recovered . . . .”) (emphasis added).
98 CAL. CIV. PROC. CODE § 425.16(o)(1) (West 2018).
effective at halting the NWBCCC’s advocacy. As one staffer recounted, “we basically stopped working in most of the buildings we were involved in because we were afraid they would be added on [to the lawsuit].” Further, the NWBCCC racked up more than one million dollars in attorney’s fees and costs.

IV. DEPLOYING CDA 230 IMMUNITY THROUGH AN ANTI-SLAPP MOTION

Anti-SLAPP laws can supplement the protection provided by CDA 230 by combining the latter’s substantive immunity with procedural mechanisms that reduce pre-trial costs. The combined application of CDA 230 and anti-SLAPP protection has occurred several times in California state courts. More precisely, California law permits defendants to assert a CDA 230 defense to demonstrate that a suit is meritless for purposes of anti-SLAPP protection. In *Albert v. Yelp*, for instance, discussed above, a plaintiff-side consumer lawyer who advertised herself as a “consumer advocate” fighting on behalf of “the people” sued a Yelp commenter who accused her of missing clients’ filing deadlines, as well as Yelp itself. Yelp disposed of the suit with an anti-SLAPP motion. In the first step of its anti-SLAPP analysis, the court determined that whether a lawyer who presents herself as a crusader for “the people” merits this self-description is a matter of public concern within the purview of anti-SLAPP protection. Second, the court determined that the suit was meritless, as CDA 230 clearly protects Yelp from liability for defamation committed by a third-party consumer reviewer.

Importantly, in California, any publicly accessible website is considered a public forum. Hence, provided that online speech concerns a statement on an “issue of public interest,” it logically must qualify as protected activity. Consequently, the “public forum” requirement is not a bar to anti-SLAPP protection in any CDA 230 cases. In *Cross v. Facebook*, plaintiff rap artist “Mikel Knight” sued Facebook for failing to remove a page titled “Families Against Mikel Knight,” which plaintiff claimed incited violence and death threats against him and interfered with his business deals. Criticism of Knight

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101 Id.


104 See id. at *12–19.


on this page focused on two incidents in which independent contractor drivers of vans featuring Knight’s name and logo fell asleep at the wheel, resulting cumulatively in several injuries and deaths. Facebook filed an anti-SLAPP motion.107 On the first prong of its analysis, the California Court of Appeal noted that the “Families Against Mikel Knight” was accessible by anyone who agreed to Facebook’s terms of service. Thus, as a “web site accessible to the public,” the page was a public forum.108 Additionally, the statements in question concerned an “issue of public interest”: the “danger of trucks on highways driven by sleep-deprived drivers.”109

V. GAPS IN STATE ANTI-SLAPP COVERAGE

The need for a federal anti-SLAPP law arises from loopholes in the existing anti-SLAPP regime. Within the current patchwork of state anti-SLAPP protections, the range of CDA 230 cases in which anti-SLAPP protection is available is limited by a number of factors. First, because states offer varying levels of anti-SLAPP protection, plaintiffs can engage in forum-shopping among state courts. Second, in cases in which a plaintiff in a state with a weak anti-SLAPP law files a defamation action against a defendant in a state with a strong anti-SLAPP law, choice-of-law principles will tend to favor the weaker law of the plaintiff’s home state. Third, because state anti-SLAPP rules generally do not apply to federal claims, plaintiffs can utilize federal analogues to state law claims. Fourth, plaintiffs can exploit a federal circuit split over the question of whether to apply state anti-SLAPP rules in federal diversity cases.

A. Forum-Shopping Among State Courts

A plaintiff can avoid state anti-SLAPP protection by strategically filing a suit in a jurisdiction with a weak anti-SLAPP law. For example, Washington Redskins owner Daniel Snyder responded to an article in a Washington D.C. newspaper criticizing Snyder’s management and ownership practices by threatening to sue a New York hedge fund that owned the paper.110 Washington, D.C. had at the time and continues to have a stronger anti-SLAPP law than New York. In a letter to the hedge fund, Snyder’s attorney candidly admitted the abusive motivation of the suit, writing “[w]e presume that defending such litigation would not be a rational strategy for an investment

107 Id. at 196.
108 Id. at 199.
109 Id. at 200.
fund such as yours. Indeed, the cost of the litigation would presumably quickly outstrip the asset value of the Washington City Paper.” Snyder ultimately dropped the suit.112

B. Choice-of-law Principles in Cross-Jurisdictional Defamation Actions

In cross-jurisdictional defamation actions, a plaintiff in a state with a weak anti-SLAPP law is likely to benefit from her home state’s anti-SLAPP rules and avoid the stronger anti-SLAPP rules of the defendant’s home state. In Ayyadurai v. Floor 64, Inc.,113 a scientist and entrepreneur who ran a company in Massachusetts called CytoSolve, sued the operator of Techdirt.com and one of its writers, in connection with a series of articles they had written casting doubt on the plaintiff’s assertion that he had invented e-mail.114 Ayyadurai filed suit in the Federal District Court for the District of Massachusetts on the basis of diversity jurisdiction.115 One of the defendants, a writer for the site who had posted an article containing hyperlinks to user comments discussing Ayyadurai’s assertions interspersed with the defendant’s own editorial comments, claimed CDA 230 immunity.116 This defendant, who resided in California, sought to apply California’s strong anti-SLAPP statute, while the plaintiff sought to apply Massachusetts’ weak anti-SLAPP statute.117

This defendant succeeded on his CDA 230 defense, because he had essentially republished content provided by others,118 but was denied his preferred anti-SLAPP law on the basis of choice-of-law principles that apply in interstate defamation cases.119 The court cited the Restatement (Second) of the Conflict of Laws § 150 for the proposition that “there is effectively a presumption that the law of the state of the plaintiff’s domicile will apply unless some other state ‘has a greater interest in the determination of the particular issue.’”120 The court found no such overriding interest in the application of California law. Citing factors from Restatement § 6, the court held that “ensuring

111 Id.
113 270 F. Supp. 3d 343, 349 (D. Mass. 2017). This case is currently pending before the United States Court of Appeals for the First Circuit. The Public Participation Projects intends to file an amicus brief related to the anti-SLAPP ruling in this case.
114 Id. at 351.
115 See id. at 349.
116 Id. at 355.
117 Id. at 352.
118 Id. at 368.
119 Id. at 353.
120 Id.
the ‘certainty, predictability, and uniformity of result’ and ‘ease in the determination and application of the applicable law’ favors adhering to the presumption set forth in [Restatement § 150].’

This is not an unlikely situation in cases involving the operators of websites. Many technology companies are based in states with strong anti-SLAPP laws, like California and Texas, while websites themselves are published in every state. Defamation suits thus are likely to involve plaintiffs in states with weak anti-SLAPP statutes allegedly harmed by defamatory statements on web pages whose operators are located in states with strong-anti-SLAPP laws.

C. Artful Pleading of Federal Claims

State anti-SLAPP rules do not apply to federal claims, at least in federal court; thus, a plaintiff bringing a SLAPP can bypass state anti-SLAPP protections by pleading a federal claim rather than a similar state law claim. For example, in 2016, a Canadian logging company brought a lawsuit against Greenpeace in response to a media campaign accusing the company of unsustainable logging practices. Resolute Forest Products alleged, among other claims, that Greenpeace violated both state and federal anti-racketeering laws by “conspiring to spread false reports.” Resolute’s RICO claim was equivalent to its state racketeering claim and overlapped with its state law defamation cause of action, which entailed “knowingly and intentionally publish[ing] false and injurious statements.” The District Court for the Northern District of California dismissed all claims against Greenpeace but only applied the anti-SLAPP law’s fee-shifting feature to the state law claims. Thus,

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121 Id. at 354.
123 Id.
124 Id. at 1013.
125 Id.
126 Id. at 1024–25.
Resolute partly accomplished its intended objective of forcing Greenpeace to spend money defending itself in court.

The same tactic—evading state anti-SLAPP protection by pleading a federal RICO claim parallel to a state law defamation claim—has been deployed successfully in at least one CDA 230 case. In Consumer Cellular, Inc. v. Consumeraffairs.com, a cell phone service provider filed a lawsuit in federal court in Oregon against a consumer review website for defamation and RICO violations, among other claims, in connection with the defendant’s alleged manipulation of customer reviews of the plaintiff’s services. The court found that Oregon’s anti-SLAPP law did not apply to the RICO claim. As a separate matter, the defendant failed to demonstrate a probability of prevailing on its claims, due to the weakness of its CDA 230 defense.

D. Circuit Split on the Applicability of State Anti-SLAPP Rules in Diversity Actions

Currently, Circuit Courts are split as to whether state anti-SLAPP laws should apply in diversity cases in federal court. In the landmark case Erie Railroad Co. v. Tompkins, the Supreme Court held that a federal court in a diversity case must apply the substantive statutory and common law of the state where the court sits. By contrast, in federal court, federal procedural rules must be applied in place of state procedural rules. The First, Second, Fifth, and Ninth Circuits have held, that state anti-SLAPP laws apply in federal diversity actions, under a variety of justifications. The Tenth Circuit and the D.C.

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128 Id. at *19.
129 Id. at *40.
130 304 U.S. 64, 78 (1938).
132 See Godin v. Schencks, 629 F.3d 79, 87–92 (1st Cir. 2010) (holding that Federal Rules of Civil Procedure 12(b)(6) and 56 are not sufficiently broad to control the issues under Maine’s anti-SLAPP law before the court, and that Maine’s anti-SLAPP law “substantively alters Maine-law claims that are based on a defendant’s protected petitioning activity”).
133 See Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014) (finding the application of the immunity and fee-shifting provisions of Nevada’s anti-SLAPP statute in federal court to be “unproblematic,” and holding that the same provisions are “substantive” and do not “squarely conflict with a valid federal rule”).
134 See Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168–69 (5th Cir. 2009) (holding, without explanation, that “Louisiana law, including the nominally-procedural [Louisiana anti-SLAPP law], governs this diversity case”).
135 See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (finding that “important, substantive state interests” are furthered by California’s anti-SLAPP statute).
Circuit, however, have both held that state anti-SLAPP motions are not allowed in federal court because they conflict with the federal rules of civil procedure.

Consequently, plaintiffs in some regions of the country may circumvent state anti-SLAPP laws by establishing federal diversity jurisdiction. One commentator has drawn attention to two instances of such forum-shopping. Following *3M v. Boulter*, in which a D.C. federal district court held that state anti-SLAPP rules are procedural and thus do not apply in federal court, an anti-LGBT preacher alleging several speech torts in a suit against a blogger and an MSNBC commentator who had publicly criticized him, voluntarily dismissed his suit in the D.C. Superior Court with the stated intention of re-filing in federal court to take advantage of the rule established in *Boulter*. More recently, three businessmen who alleged that they were defamed by certain statements contained in the “Steele Dossier,” which compiled research on presidential candidate Donald Trump’s possible ties to the Russian government, filed identical defamation actions in D.C. Superior court and D.C. federal district court. The Superior Court dismissed the defamation claim under D.C.’s anti-SLAPP statute. The federal case is still pending; but given unambiguous precedent on the question, the federal court is likely to find that D.C.’s anti-SLAPP statute is in conflict with federal procedure and thus cannot apply in federal court.

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137 See *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1333 (D.C. Cir. 2015).
VI. THE IMPACT OF A FEDERAL ANTI-SLAPP LAW

A federal anti-SLAPP law would mitigate the problem of pre-trial costs in CDA 230 cases and close many of the gaps in anti-SLAPP coverage discussed in Part V. A federal anti-SLAPP law would provide four related features addressed to pre-trial costs: a fee-shifting mechanism, a time limit for a pre-trial hearing, immediate interlocutory appeal, and a stay of discovery.

A federal anti-SLAPP law would close most of the gaps in existing anti-SLAPP coverage. A federal anti-SLAPP law would apply to federal claims. A removal provision would preclude plaintiffs from strategically filing suit in a state court in a state with a weak anti-SLAPP law or no anti-SLAPP law.

But a federal anti-SLAPP law would only partially preclude strategic filing of diversity actions. In federal circuits that treat state anti-SLAPP laws as substantive for purposes of *Erie* analysis, a less severe form of forum-shopping might persist, in which plaintiffs either seek to establish diversity to benefit from a federal law weaker than their home state’s, to avoid establishing diversity to benefit from a weaker state law. With respect to the obstacle of choice-of-law principles that favor the weaker anti-SLAPP law of a plaintiff’s home state in federal diversity actions, a federal anti-SLAPP law would only preclude forum shopping in circuits in which state anti-SLAPP rules are treated as procedural.

Model language for a federal anti-SLAPP law has been borrowed from the SPEAK FREE Act of 2015, the most recently proposed federal anti-SLAPP bill. Important provisions that are not relevant to the focus of this Article have been noted briefly as well.

A. Features of a Federal Anti-SLAPP Law

A federal anti-SLAPP law should have at least the six following features relevant to CDA 230 immunity in the context of First Amendment-related conduct: (i) a broad definition of protected activity; (ii) a fee-shifting provision; (iii) a time limit for dismissal; (iv) an immediate interlocutory appeal; (v) a stay on discovery; (vi) a removal provision; and (vii) a commercial speech exemption.

First, the definition of protected activity should, as in the California anti-SLAPP law, be worded to encompass speech on a broad spectrum of subjects and in a broad variety of fora, and to cover petitioning activity involving many types of government bodies. The SPEAK FREE Act specifies that a special motion to dismiss may be filed by a party facing a claim that “arises from

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an oral or written statement or other expression by the defendant that was made . . . about a matter of public concern.”\textsuperscript{146} To mitigate uncertainties in judicial interpretation, the law further should specify more specific general categories of issues that qualify as sufficiently “public.” The SPEAK FREE Act, for instance, defines “matter of public concern” to include issues related to “health or safety;” “environmental, economic, or community well-being;” “the government;” “a public official or public figure;” or “a good, product or service in the marketplace.”\textsuperscript{147} Importantly, although largely irrelevant in the context of CDA 230, the SPEAK FREE Act, like some state anti-SLAPP laws,\textsuperscript{148} also protects petitioning activity in broad terms: it protects any “expression by the defendant that was made in connection with an official proceeding.”\textsuperscript{149}

Second, the law should contain a fee-shifting provision providing for the award of costs to a party who prevails on an anti-SLAPP motion. The SPEAK FREE Act provides that “a court shall award a person that files and prevails on a motion to dismiss . . . litigation costs, expert witness fees, and reasonable attorney[’]s fees.”\textsuperscript{150} To prevent SLAPP filers from evading this consequence through voluntary dismissal prior to a pre-trial anti-SLAPP hearing, the fee-shifting provision should impose the same penalty on plaintiffs who voluntarily dismiss their claims after an anti-SLAPP motion is filed.\textsuperscript{151} In order to deter frivolous anti-SLAPP motions, costs should in some circumstances be awarded to the plaintiff. The SPEAK FREE Act thus provides that “if a court finds that [an anti-SLAPP motion] is frivolous or is solely intended to cause unnecessary delay, the court shall award litigation costs, expert witness fees, and reasonable attorney’s fees to the party that responded to the motion or notice.”\textsuperscript{152}

Third, both because wasted time is itself a cost to a defendant and because the more time spent litigating corresponds with greater costs, a federal anti-SLAPP law should include a time limit for a pre-trial hearing. The SPEAK FREE Act requires that a motion be filed within forty-five days of service of the claim,\textsuperscript{153} and requires a hearing within thirty days of the filing of the motion or within 30 days of removal, if the

\textsuperscript{146} Id. § 4202(a).
\textsuperscript{147} Id. § 4208(1).
\textsuperscript{148} See supra Part III(d).
\textsuperscript{149} H.R. 2304 § 4202(a).
\textsuperscript{150} Id. § 4207(a).
\textsuperscript{151} See id.
\textsuperscript{152} Id. § 4207(b).
\textsuperscript{153} Id. § 4202(d)(1).
case is removed to federal court under the statute’s removal provision.\textsuperscript{154}

Fourth, for the same reason that a defendant should be able to schedule a prompt pre-trial hearing, a defendant should be able to appeal a denial of an anti-SLAPP motion promptly. The SPEAK FREE Act provides that an “aggrieved party may take an immediate interlocutory appeal from an order granting or denying in whole or in part a special motion to dismiss.”\textsuperscript{155}

Fifth, because compliance with discovery requests can be time-consuming, expensive, and intrusive, a federal anti-SLAPP law should provide for a stay of discovery upon the filing of an anti-SLAPP motion. The SPEAK FREE Act stipulates that “upon the filing of a special motion to dismiss . . . discovery proceedings in the action shall be stayed until a final and unappealable order is entered on such motion unless good cause is shown for specified discovery.”\textsuperscript{156} The qualifier “unless good cause is shown for specified discovery” allows courts the discretion to permit limited discovery when merited by the circumstances.

Sixth, a federal anti-SLAPP law should contain a removal provision, to prevent forum-shopping of various kinds. The SPEAK FREE Act stipulates that “a civil action in a State court that raises a claim [arising from protected activity] may be removed to the district court of the United States for the judicial district and division embracing the place where the civil action is pending.”\textsuperscript{157}

Seventh, to prevent the application of the anti-SLAPP mechanism in commercial contexts in which the First Amendment would provide more limited protection,\textsuperscript{158} a federal law should contain a commercial speech exemption. The following is the SPEAK FREE Act’s commercial speech exemption:

[T]he court shall not grant a special motion to dismiss . . . if the claim is brought against a person primarily engaged in the business of selling or leasing goods or services where such claim arises from the statement or conduct of such person and such statement or conduct . . . consists of representations of fact

\textsuperscript{154} Id. § 4202(e)(1).
\textsuperscript{155} Id. § 4204.
\textsuperscript{156} Id. § 4203(a).
\textsuperscript{157} Id. § 4206(a).
\textsuperscript{158} See infra Part VII(c).
about such person’s or a business competitor’s goods or services . . . [and] arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.\textsuperscript{159}

Importantly, as is apparent in the wording of the provision, this exemption prevents the use of the anti-SLAPP defense in false advertising cases.

The above provisions and exemptions are specifically relevant to strengthening CDA 230 immunity in the context of First Amendment-related conduct. There are other important provisions and exemptions, however, that should be included in a federal anti-SLAPP law.\textsuperscript{160} These include but are not limited to a special motion to quash\textsuperscript{161} and a public interest exemption.\textsuperscript{162}

\textbf{B. A Federal Anti-SLAPP law Would Mitigate the Problem of Pre-Trial Costs in CDA 230 Litigation}

The combination of a fee-shifting provision, a time limitation for scheduling a pre-trial hearing, and a stay of discovery adequately addresses the problem of pre-trial costs in a CDA 230 context. A fee-shifting provision would both compensate defendants for money wasted defending against SLAPPs and potentially have a deterrent effect as well. A time limitation for scheduling a pre-trial hearing, and the availability of immediate appeal of a negative ruling at that hearing, commonly address both the reality that costs correlate with time spent in litigation, and the expense of wasted time itself. A stay of discovery mitigates the cost in time and money involved in responding to document requests and submitting to depositions, and the inherent cost of submitting to intrusions into one’s private or business affairs. A stay of discovery also is particularly important in light of Ardia’s finding that CDA 230 cases in which immunity is adjudicated after discovery tend to last longer than average.\textsuperscript{163}

\textsuperscript{159} H.R. 2304 § 4202(b)(2).
\textsuperscript{160} For a comprehensive list of important components of federal anti-SLAPP legislation, see generally Samantha Brown & Mark Goldowitz, The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA, 19 REV. EUR. COMPA. & INT’L ENVTL. L. 3 (2010).
\textsuperscript{161} H.R. 2304 § 4205.
\textsuperscript{162} Id. § 4202(b)(3).
\textsuperscript{163} See Ardia, supra note 18, at 484.
C. Federal Anti-SLAPP Rules Would Apply to Federal Claims

A federal anti-SLAPP defense would apply to federal claims. Many courts have held that a state anti-SLAPP defense does not apply to federal claims.\(^{164}\) A federal anti-SLAPP defense would eliminate this gap in anti-SLAPP coverage, including in cases in which state anti-SLAPP rules apply to parallel state claims.

D. Federal Anti-SLAPP Rules Would Apply in Federal Diversity Actions in Some Federal Circuits

A federal anti-SLAPP law would prevent plaintiffs from evading state anti-SLAPP laws by filing diversity actions, only in federal circuits in which state anti-SLAPP rules are regarded as procedural.\(^{165}\) A federal court that regards state anti-SLAPP rules as state procedural rules in conflict with federal procedure, will have no objection to applying federal procedural anti-SLAPP rules to state law claims. And in these circuits, a defendant likely will not be disadvantaged by filing an anti-SLAPP motion under federal rather than state law, because a federal law is modelled after expansive anti-SLAPP laws like California’s.

But a federal court that regards state anti-SLAPP rules as part of the substantive law of the state, and thus currently precludes forum-shopping by applying state anti-SLAPP rules in federal court, will continue to apply those state rules even after a federal anti-SLAPP law is passed. Thus, in these circuits, assuming the current circuit split persists after the passage of federal anti-SLAPP legislation, plaintiffs in diversity actions may benefit from state anti-SLAPP laws that are less expansive than the federal anti-SLAPP law. In short, until this circuit split is resolved, the current forum-shopping problem—that of plaintiffs filing diversity actions to evade anti-SLAPP protection all together—would be replaced by a less severe form of forum-shopping, in which plaintiffs can choose a weaker state anti-SLAPP law over a stronger federal anti-SLAPP law.

E. With the Passage of a Federal Law, Choice of Law Principles Favoring Weaker State Anti-SLAPP laws Would be Undermined in Some Federal Circuits

A federal anti-SLAPP law would partly eliminate the obstacle presented in \textit{Ayyadurai}, discussed above,\(^{166}\) of choice-of-law principles that favor the weaker anti-SLAPP law of a plaintiff’s state. If a federal court in a diversity action regards state anti-SLAPP rules as procedural, it will be inclined to apply


\(^{165}\) See supra Part V(d).

\(^{166}\) See supra Part V(b).
the federal version of that procedural rule, and thus to avoid altogether the question of which state anti-SLAPP law to apply in a cross-jurisdictional tort action. But if the court regards state anti-SLAPP rules as substantive, state anti-SLAPP rules will still apply in federal court, and the question will remain of which state’s anti-SLAPP law to apply.

F. A Removal Provision Would Preclude Forum-Shopping Among State Courts

If a federal law contains a removal provision, defendants will be able to evade weak state anti-SLAPP laws by removing a state suit to federal court. This will prevent plaintiffs from strategically electing to sue in state court in a state with a weak anti-SLAPP law.

VII. LIMITATIONS TO A COMBINED CDA 230-ANTI-SLAPP DEFENSE AT THE FEDERAL LEVEL

Although a federal anti-SLAPP law would undoubtedly enhance CDA 230 by closing many of the loopholes discussed in Part V, this fortified CDA 230-anti-SLAPP defense would have certain limitations in its coverage. Some of these limitations are inherent in CDA 230 immunity, and others are due to an imperfect overlap between CDA 230 immunity and anti-SLAPP protection. First, CDA 230 immunity can be narrowed by statutory amendment or judicial interpretation, and any such development simultaneously reduces the scope of anti-SLAPP protection in a CDA 230 context. Second, state anti-SLAPP jurisprudence suggests that a federal anti-SLAPP law would not apply in all CDA 230 cases—in particular, not all speech by internet users touches on “issues of public interest.” Finally, a federal anti-SLAPP law likely would have certain exemptions—for instance, for commercial speech—that would preclude the use of a federal anti-SLAPP defense in some cases in which CDA 230 would apply. The latter in the combined CDA 230-anti-SLAPP defense reflects the fact that CDA 230 is designed to facilitate the growth of internet commerce as a general matter, and thus immunizes intermediaries from liability in some circumstances in which freedom of speech concerns are not implicated.

A. Judicial and Statutory Limitations to CDA 230 Immunity

A federal anti-SLAPP law would neither add to nor subtract from substantive CDA 230 immunity; the contours of this immunity, however, are defined by Congress and the courts. Succeeding on an anti-SLAPP motion requires a prima facie showing that a suit is meritless, and a complaint that pleads
around the bounds of CDA § 230 immunity potentially has merit. Such limitations come from both case law and statutory law.

*Fair Housing Council of San Fernando Valley v. Roommates.com* established that website operators can be held liable for “materially contributing” to unlawful third-party content. Fair Housing Council of San Fernando Valley v. Roommates.com, an online roommate matching service, by programming design required users to specify their gender preferences for roommates, displayed those preferences in users’ profiles, and limited the results of searches for roommates based on parameters established in this way. The Ninth Circuit Court of Appeals held that because Roommates.com had “materially contributed” to the unlawfulness of the content under the Fair Housing Act, it had “developed” that content within the meaning of CDA § 230(c)(1). The court distinguished types of editing that should not cause a defendant to lose immunity, such as removing obscenity or trimming for length, from editing that “contribute[] to the alleged illegality,” such as removing the word “not” from a third-party message reading “[Name] did not steal the artwork.” Roommates.com authored specifically what was illegal about the content—its discriminatory nature—in requiring third parties to state gender-based preferences for roommates.

This case has had a widespread effect on CDA 230 jurisprudence. In the leading case *Jones v. Dirty World Entertainment*, the Sixth Circuit applied the “material contribution” standard to defamation law. Importantly, various lower courts have denied immunity under this standard. For instance, federal district courts have denied immunity where a website operator posted content herself, conspired with a third-party commenter to defame a plaintiff, incorporated quotes from third parties in her own editorial writing, and made defamatory factual representations about

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168 *Id.* at 1161, 1167.

169 *Id.* at 1167–68.

170 *Id.* at 1169.

171 *Id.*


third-party content.\textsuperscript{177} These limitations on intermediary immunity under CDA 230 simultaneously limit anti-SLAPP protection.

In addition to judicially-created limitations, any legislation creating exceptions to CDA 230 immunity simultaneously limits anti-SLAPP protection. For instance, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 amended CDA 230 to exclude federal civil claims and criminal charges and state criminal charges from the coverage of immunity under CDA 230(c)(1).\textsuperscript{178} This law was enacted largely in reaction to conspicuous sex trafficking on Backpage.com, a classified ads site whose operators some accused of not only neglecting to prevent sex trafficking on the site but actively protecting traffickers from law enforcement scrutiny.\textsuperscript{179} Any criminal charge or civil claim that falls within an exception to CDA 230 immunity obviously would not be found meritless on CDA 230 grounds for purposes of anti-SLAPP protection.

\textbf{B. The “Matter of Public Concern” Limitation on Anti-SLAPP Protection}

Courts sometimes find that claims that lack merit because of a CDA 230 defense nonetheless do not qualify for anti-SLAPP protection because they do not touch on a matter of public concern, as the second prong of anti-SLAPP analysis requires. For instance, California courts sometimes distinguish online consumer reviews that involve simply an individual customer's assessment of a vendor—a purportedly private matter—from reviews that provide additional commentary on issues of interest to the public, such as advice on how to choose a vendor within a certain industry.\textsuperscript{180} While CDA 230 immunity is virtually guaranteed when a plaintiff attempts to hold a consumer review website liable for tortious conduct by a consumer reviewer, anti-SLAPP protection at the state level does not apply in all such cases.


\textsuperscript{179} See \textit{id.} § 2(2) (“It is the sense of Congress that . . . websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion’’); see also Derek Hawkins, \textit{Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities}, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/?utm_term=b0dea3f04ab1.

A comparison of two California state court cases illustrates this phenomenon. In *Dunne v. Lara*, a consumer posted negative reviews of a particular dealership for Ducati motorcycles on an online forum devoted to discussions pertaining to this brand of motorcycles.\(^{181}\) Specifically, this consumer described the dealership’s service as “negligent” and “substandard” and accused the dealership of illegal business practices.\(^{182}\) The owner of the dealership sued the commenter for defamation, and the commenter in turn filed an anti-SLAPP motion.\(^{183}\) The California Court of Appeal denied her motion, finding that she “has not demonstrated the existence of any widespread public debate.” Rather, her comments were “no more than a report about Dunne’s business practices, of interest only to Dunne’s customers and potential customers.”\(^{184}\)

In *Navarro v. Cruz*, by contrast, the California Court of Appeal held that online reviews of a business qualified as protected activity when their content touched on issues whose importance transcended the particular dispute at issue.\(^{185}\) A teacher from the Philippines contracted with a placement agency, UPI, that recruited and placed foreign teachers with school systems in the United States.\(^{186}\) She started a blog targeted toward other Filipino migrants seeking to teach in U.S. Schools.\(^{187}\) She criticized UPI for charging extortionate fees and defrauding foreign teachers, and for otherwise treating them “virtually as modern slaves.”\(^{188}\) UPI sued her for defamation.\(^{189}\) The court found that her comments qualified as protected activity under the anti-SLAPP statute because “the blog addressed issues ranging beyond the specific wrongs and breaches claimed to have been suffered by its writer, on issues such as immigrant exploitation, fraud, and substandard housing.”\(^{190}\) Such issues, the court said, transcended the defendant’s particular conflict with UPI: “[t]hese issues would affect and would be of interest to many present and future immigrant teachers—including not just those who had allegedly been victimized, and not even just those who had actually contracted with UPI, but also those who might be considering becoming immigrant teachers through UPI or other such

\(^{182}\) Id.
\(^{183}\) Id. at *2.
\(^{184}\) Id. at *6.
\(^{186}\) Id. at *1.
\(^{187}\) Id.
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) Id. at *2.
agencies.” The defendant, the court concluded, “encourag[ed] others to stand up to pursue a common goal involving an ongoing controversy.”

In the particular context of consumer reviews, this limitation can be overcome by a provision in the statute specifying that all speech pertaining to goods, products and services constitutes protected activity. The Speak Free Act specifically provides that statements about “a good, product, or service in the marketplace” qualify as protected activity.

C. The Commercial Speech Exemption in a Federal Anti-SLAPP Law

A federal anti-SLAPP law should contain a commercial speech exemption, and this exemption would preclude the application of an anti-SLAPP defense in some cases in which CDA 230 immunity applies. In California, prior to the passage of CCP § 425.17, which added a commercial speech exemption to California’s anti-SLAPP law through subsection (c), anti-SLAPP motions were often filed by defendants in false advertising cases. In a case decided a few years before the passage of the commercial speech exemption, DuPont Merck Pharmaceutical Co. v. Superior Court, a class action against a pharmaceutical company alleging deceptive marketing of a blood-thinning medication, the court found that lobbying efforts directed at legislators and regulators constituted protected activity for purposes of the anti-SLAPP statute. The legislative history of 425.17(c) quotes a statement by Professor of Sociology Penelope Canan, who coined the acronym “SLAPP,” in which she notes the perversity of corporate defendants invoking anti-SLAPP protection in the context of certain types of consumer litigation: “Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out.” In false advertising cases subsequent to the enactment of the commercial speech exemption, California courts have denied corporate defendants the benefit of anti-SLAPP protection.

\[191\] Id. at *4.
\[192\] Id.
\[193\] H.R. 2304 § 4208(1)(E).
\[194\] CAL. CIV. PROC. CODE § 425.17(c) (West 2012).
\[195\] See PRING & CANAN, supra note 10.
\[197\] See, e.g., Physicians Comm. for Responsible Med. v. Tyson Foods, Inc. 119 Cal. App. 4th 120, 130 (2004) (finding that a case involving alleged misrepresentations in advertisements that chicken products are “all natural” and “heart-healthy” falls
Such an exemption is justifiable not only because it prevents the abuse of anti-SLAPP protection by powerful private interests, but also because limited rights attach to commercial speech under the First Amendment, from which anti-SLAPP laws derive their legitimacy. The Supreme Court has held that content-based regulation of non-commercial speech is subject to strict scrutiny—that is, regulation must be the least restrictive means of advancing a compelling governmental interest.\(^\text{198}\) By contrast, the regulation of commercial speech must withstand only intermediate scrutiny, meaning that a substantial government interest must be served by the regulation,\(^\text{199}\) and that there must be only a “reasonable fit” between that purpose and the means by which it is advanced.\(^\text{200}\) While perhaps it is arguable that a correspondingly intermediate level of anti-SLAPP protection should apply to commercial speech, it also seems clear that an equal level of anti-SLAPP protection for both non-commercial and commercial speech is incongruous with the First Amendment.

VIII. Why Not Amend CDA 230 Itself?

The existence of gaps in the combined CDA 230-anti-SLAPP defense might seem to suggest the wisdom of the cleaner alternative of adding anti-SLAPP’s procedural protection to CDA 230 itself. Indeed, one scholar, in confronting the problem of pre-trial costs under CDA 230, has advocated adding a fee-shifting provision to CDA 230.\(^\text{201}\)

But not only is this alternative solution politically unrealistic; it also, even if politically achievable, would have undesirable results. Adding a fee-shifting provision to CDA 230 is unrealistic at this moment in politics because CDA 230 is embroiled in controversy over the phenomenon of online sex trafficking on Backpage.com—a phenomenon thought by proponents of the recently enacted Allow States and Victims to Fight Online Sex Trafficking Act to be preventable but for CDA 230 immunity.\(^\text{202}\) But adding a fee-shifting provision, even if
politically possible in spite of this climate, would be undesirable for a different reason: unlike anti-SLAPP laws, CDA 230 has many applications that advance freedom of commerce broadly speaking, rather than freedom of speech.

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”) created an exception to CDA 230 immunity for civil claims and criminal charges pertaining to sex trafficking.\(^{203}\) CDA 230 has long contained an exception for federal criminal liability,\(^{204}\) but FOSTA added an exception for federal civil claims, as well as civil claims and criminal charges under state law.\(^{205}\) Backpage.com was a classified ads website superficially designed, like Craiglist.com, for a variety of types of commercial exchanges, but in fact widely known as a hub for the purchase and sale of sexual services.\(^{206}\) FOSTA was passed after a barrage of civil suits against Backpage.com alleging that the operators of the site had ignored or encouraged human trafficking by users were defeated by CDA 230 immunity.\(^{207}\) The controversy surrounding Backpage.com and public criticism of CDA 230 from legislators and from within civil society likely has poisoned the well with respect to any reform effort, such as the addition of a fee-shifting provision, that would strengthen CDA 230 immunity in a broad fashion.

But even if adding a fee-shifting provision were politically feasible, doing so would be undesirable, because it would strengthen immunity in a manner that is overbroad from a First Amendment perspective. The legal effect of this reform route differs from that advocated in this Article with respect to two of the three limitations mentioned in Part VII. Statutory and judicial limitations to CDA 230 immunity would limit the application of a fee-shifting provision in CDA 230 just as much as the application of a fee-shifting provision added externally by a federal anti-SLAPP law. The direct amendment of CDA 230, however, would tip the scales in favor of defendants in cases involving commercial speech, such as false advertising class actions against corporate defendants. This would amount to a form of tort reform beyond the purview of the First Amendment

\(^{203}\) 132 Stat. 1253.


\(^{205}\) See id. § 4(a).


because the commercial speech exemption in anti-SLAPP laws has a basis in First Amendment doctrine.  

Admittedly, the “matter of public concern” limitation on anti-SLAPP protection provides for narrower protection than that justified by the First Amendment; and this limitation could be avoided by adding a fee-shifting provision to CDA 230 itself. The First Amendment applies in private tort lawsuits regardless of whether the content of allegedly tortious speech concerns a public or private matter. By contrast, as discussed, speech with purely private significance does not qualify for anti-SLAPP protection.

But a proper balance between two values—access to justice and freedom of speech—counsels in favor of the reform route advocated in this Article. First, as mentioned, in the specific context of consumer reviews, the limiting effect of the “matter of public concern” requirement can be eliminated by specifying that statements about goods and services constitute protected activity. Second, if California case law is any guide, the category of activities that satisfy this requirement is expansive: most online comments can be portrayed as somehow touching on an issue of public importance by a court predisposed to find as much. Adding a fee-shifting provision to CDA 230 itself, in order to preclude the narrow subset of cases in which online speech touches on purely private matters, would come at the significant cost of systematically disadvantaging plaintiffs in a variety lawsuits against intermediaries in which freedom of speech concerns are not implicated.

**CONCLUSION**

A federal anti-SLAPP law would supplement CDA 230’s substantive immunity for online intermediaries with certain procedural mechanisms designed to address the collateral chilling effects of pre-trial costs. Specifically, a federal anti-SLAPP law would provide defendant speech distributors with a fee-shifting mechanism, a guarantee of speedy dismissal, and a means of preventing discovery in meritless cases. Codifying anti-SLAPP protection at the federal level would provide this enhanced protection in a broader range of CDA 230 cases than is covered under the current regime of state anti-SLAPP laws. This antidote to the speech-chilling effect of pre-trial costs in CDA 230 cases is more politically feasible than adding a fee-shifting provision to CDA 230 itself, in the current political climate.
climate. But further, this method of reform is more desirable, because it is more narrowly directed at protecting the rights of speech and petition, as opposed to serving as a broad instrument of tort reform.
IMMIGRANTS ARE “PEOPLE” TOO:  
CONSTITUTIONALIZING FREE SPEECH PROTECTIONS  
FOR UNDOCUMENTED IMMIGRANTS

Vanessa Canuto*

INTRODUCTION

Imagine being a child trapped in a warehouse without your parents, no one to comfort you, and no knowledge of where your family is.¹ Some children are forced to endure this at a young age, but most people cannot fathom the thought. This unfortunate reality is what the U.S. Border Patrol has been ordered to do to hundreds of children who are undocumented or have undocumented parents.² These children are put inside a cage with about twenty other children and are given scattered bottles of water, bags of chips, and foil sheets to use as blankets.³ Further, these children are forced to look out for each other because the Border Patrol officials do not take care of them, not even the youngest children who cannot fend for themselves.⁴ A sixteen-year-old girl described taking care of a younger two-year-old girl for three days, even changing her diaper, despite not being related to her.⁵ As a result of U.S. Border Patrol actions, children are suffering from extreme trauma because they are being torn apart from their parents with no idea if or when they will ever be reconnected.⁶ Although the Obama Administration also deported undocumented immigrants, the separation of these children from their families is a direct result of the “zero

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² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.
tolerance” policy put in place by the Trump Administration. Now who will speak for these children?

The media has had marginal success speaking for these children. After the massive news media coverage and backlash to these children’s circumstances, President Donald Trump signed an executive order reversing the Administration’s policy of separating families. Under Trump’s new policy, families are detained together, meaning that children and parents are kept in the same cage. This new policy does not limit how long these minors are being detained, which completely disregards the legal limits on the detention of minors. Furthermore, the children that were already separated from their families under the earlier policy are not guaranteed to be reunited with their parents, and those who will be reunited will undergo an estimated two-month long process. Also, children are not safe while they remain detained. Two children, as of January 14, 2019, have died while in the custody of the U.S. Border Patrol, due to extensive

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10 Domonoske & Gonzales, supra note 9.

11 Id.

12 Id.
dehydration, shock, and sickness from nausea, vomiting, and fever.  

Meanwhile, the powerful voice of the undocumented immigrant community fears speaking out, out of fear of retaliation. The millions of undocumented immigrants watching these policies unfold have received the message that they should fear detention by Immigration and Customs Enforcement (ICE), and that their own children may suffer these traumatic situations. Undocumented immigrant advocates who want to speak up to stop the caging of children, must weigh their risk of potential deportation. These advocates are prevented from speaking due to their immigration status and fearing Trump’s retaliatory deportations. As a consequence, potential speakers who want to use their voices in protest are chilled from doing so. The public misses out on undocumented immigrants’ unique and valuable viewpoints, which is unconscionable because the First Amendment protects not only a speaker’s rights, but the public’s right to hear speech.

Thus, retaliatory deportations must be barred. Undocumented immigrant speakers must be guaranteed First Amendment protections. Otherwise, the United States will chill undocumented immigrants into silence and hiding in the Land of Opportunity.

This Note will implore the Supreme Court to establish a clear precedent that undocumented immigrants are included within the meaning of “the people” under the First Amendment and guaranteed Free Speech protections. Part I highlights the history of various administrations using deportation to target immigrant communities and chill them into silence. Part II emphasizes that the Trump Administration’s retaliatory deportations targeting undocumented immigrant speakers are far harsher than any administration in history, which results in a silencing effect on undocumented immigrants. Part III

15 Id.
summarizes existing First Amendment speech protections. Part IV reveals that various constitutional amendments already protect undocumented immigrants within the meaning of “the people.” Part V argues that, in light of existing protections under other Amendments and the urgent need for undocumented immigrant advocates, the Court needs to extend Free Speech protections to undocumented immigrants.

I. RETALIATORY DEPORTATIONS DID NOT ORIGINATE WITH PRESIDENT TRUMP

Various administrations have placed limitations upon undocumented immigrants through threats of deportation. Throughout history, retaliatory deportations have been used as a mechanism to silence undocumented immigrants. 18 Predominantly, deportations are used to prevent undocumented immigrants from exercising their First Amendment rights. Deportation is purposefully used to prevent certain ideas from infiltrating the minds of Americans to encourage political change. 19 Limiting undocumented immigrants’ First Amendment rights originated from the fear that imported ideas, such as communist ideologies, would corrupt the United States government. 20 As the United States continued to grow in 1861 and reach international trade markets, there was a corresponding rise in migrant workers entering the country. 21 The government felt a need to regulate the ideas that were entering the country and regulate the border with increased vigilance. 22

Since the Civil War, the United States increased its economy by trading with various regions around the world such as Europe, Mexico, and Asia. 23 The trade relationships with these regions in turn benefitted the sustainability and growth of the industrial, agricultural, and geographic sectors. 24 However, along with the constant trade between these regions came the increased potential of importing the social movements and

19 MOLONEY, supra note 18, at 165.
20 Id. at 163.
21 Id. at 163–65.
22 Id. at 165.
23 Id.
24 Id.
ideologies from these areas. In an effort to prevent political, religious, labor or economic ideologies from other countries around the world from taking hold in the United States, the deportation of immigrant activists became the government’s solution.

As a result, during the post-World War I Red Scare, the United States government vigorously attacked ideas that appealed to any form of communism, socialism, and labor radicalism with immediate deportation. However, these radical ideologies that the federal government perceived as threatening to the democratic ideals of the United States were not the sole reason for the deportation of immigrant activists. Immigrant activists who advocated for economic and racial justice were also viewed as undermining and threatening the ideals of American society. Further, the federal government utilized deportations as a tool to prevent the promotion of a variety of ideals within the United States, including ideals that benefitted the equality of many Americans.

Moreover, ideological beliefs were not the only type of threat that past presidents used to justify enforcing retaliatory deportations. President Herbert Hoover used the rhetoric of “American jobs for real Americans” to deport one million Mexican immigrants and Mexican-Americans. President Hoover emphasized that Mexicans were not “real Americans” based on their nationality and used this rhetoric to enforce their exclusion, with the added component that they were taking jobs away from American citizens. He secured support for these massive deportations because he instilled in the American public the idea that Americans were competing for jobs with people who did not deserve them, were illegally in the country, and were not even American. Mexican immigrants were deported in

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25 Id.
26 Id. ("Deporting immigrant activists became an important capability of the bureaucratic infrastructure to monitor and control immigration.").
27 Id. at 196; see History.com Editors, Palmer Raids, HISTORY, https://www.history.com/topics/red-scare/palmer-raids (last updated Aug. 21, 2018).
28 Moloney, supra note 18, at 196.
29 Id.
30 Id. at 165. See generally Jácome, supra note 18.
32 Bernard, supra note 31.
33 Id.
inhumane ways resembling Holocaust transportation methods. These actions were reinforced by the federal government, which prevented local communities from stopping these deportations. The government decided the individuals most effected by the Great Depression were not going to be Americans, but rather the easiest and most vulnerable targets, Mexican immigrants. Retaliatory deportations of Mexican individuals was deemed a plausible solution enacted by the federal government during the Great Depression.

Deportations created a fear among the immigrant community and showed the power of the federal government to eliminate any type of dissent or backlash against the government. Also, deportations were used to eradicate and remove, in massive numbers, immigrants the government viewed as interfering with the economic success of the American people. The reasoning behind the exile of these immigrant groups and activists varied such that it could be due to simply their presence in the United States or based on sharing their beliefs for political change. Deporting immigrant activists displayed a clear denial of any First Amendment protections because their ability to exercise their free speech was impaired and chilled by the retaliation exercised against them.

Free speech is meant to protect both unpopular speech and speech that is critical of the government without repercussions. While the retaliations and unconstitutional treatment of these immigrant activists was recognized by legal activists such as Louis Post and Carol Weiss King, no effective change resulted because of the established power that Edgar

34 Id. ("[L]ocal law enforcement rounded up people in parks, hospitals, markets and social clubs, crammed them onto chartered trains and deposited them across the border.").
35 Id.
36 Id. ("'Around the country, Mexicans were scapegoated for the bad economy and became victims of cruel dilemmas,' said Francisco Balderrama, professor emeritus of history and Chicano studies at California State University at Los Angeles.").
37 Id.; see also Tuning Wu, Chinese Exclusion Act, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Chinese-Exclusion-Act (last updated May 12, 2017) (highlighting that Mexicans have not been the only nationality to suffer from racialized immigration and detention, and pointing out that "[t]he passage of the [Chinese Exclusion Act of 1882] represented the outcome of years of racist hostility and anti-immigrant agitation . . . [and] set the precedent for later restrictions against immigration of other nationalities, and started a new era in which the United States changed from a country that welcomed almost all immigrants to a gatekeeping one.").
38 MOLONEY, supra note 18.
39 Bernard, supra note 31.
40 See MOLONEY, supra note 18; see also Bernard supra note 31.
41 MOLONEY, supra note 18, at 197.
42 See Know Your Rights, infra note 63.
Hoover set of the federal government. Past presidential actions are an indicator that deportations against undocumented immigrants for their activist efforts has been a trend used to prevent their voices from being heard. The threat to undocumented immigrants’ constitutional rights, specifically their First Amendment rights, did not originate from Trump’s retaliatory deportations. However, Trump is using a similar rhetoric that previous presidents have used when immigrants criticize the government to justify their deportation, but to a more severe scale than before. He has tactfully distinguished the undocumented immigrant population as dangerous criminals that must be deported because they threaten the safety of the American people. This section has demonstrated that the use of the threat of deportation against undocumented immigrants throughout American history is consistent with the current rhetoric used to enforce retaliatory deportations under the Trump Administration. Furthermore, this indicates how deportations serve as a tool for limiting undocumented immigrants’ free speech protections because of the repercussions they can potentially face for criticizing the government.

II. CURRENT EVENTS: A DISTURBING PATTERN OF RETALIATORY DEPORTATIONS

Current events highlight the threat of deportation to undocumented immigrant activists. Since 2016, the beginning of the Trump Administration, undocumented immigrants—even those with no criminal background—have been targeted and deported by ICE at incredibly high levels. The rise in

43 MOLONEY, supra note 18, at 197 (“Edgar Hoover’s determination to eradicate political radicalism, combined with his unchecked use of intimidation and success in increasing the scope and power of the FBI, limited the efficacy [of those who argued against denying the constitutional rights of undocumented immigrants].”).
44 See MOLONEY, supra note 18.
45 Bernard, supra note 31.
47 See Tal Kopan, How Trump Changed the Rules to Arrest More Non-Criminal Immigrants, CNN (Mar. 2, 2018, 9:20 AM), https://www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html (explaining that the Trump Administration’s strict immigration policy is responsible for deporting individuals who have been living in the United States for more than a decade, who have reported to immigration officials regularly, and are of no threat to their community); see also Kristen Bialik, Most Immigrants Arrested by ICE Have Prior Criminal Convictions, A Big Change from 2009, PEW RES. CTR. (Feb. 15, 2018), http://www.pewresearch.org/fact-tank/2018/02/15/most-immigrants-arrested-by-ice-have-prior-criminal-convictions-a-big-change-from-2009/ (“While ICE arrests overall rose from 2016 to 2017, arrests for those without prior convictions drove the increase. The number of arrestees
deportations is a direct result of the tougher and broader enforcement of immigration laws against non-criminal immigrants.\textsuperscript{48} Prior administrations prioritized deporting undocumented immigrants who commit crimes, but the Trump Administration now allows ICE officials to remove any undocumented immigrant.\textsuperscript{49} “In Trump’s first year as president, U.S. Immigration and Customs Enforcement arrested 109,000 criminals and 46,000 people without criminal records—a 171% increase in the number of non-criminal individuals arrested over 2016.”\textsuperscript{50} Hence, with the rise of non-criminal deportations, the Trump Administration has made it clear that every undocumented person in the country is not safe or exempt from deportation enforcement.\textsuperscript{51}

As a result of the rise of massive deportations of undocumented immigrants, arrests and threats of deportation to immigrant activists specifically for their activist efforts have escalated.\textsuperscript{52} According to the American Civil Liberties Union, over two dozen cases have been reported regarding immigrant activists and volunteers being arrested and fined or threatened with deportation for their activist efforts.\textsuperscript{53} The leaders of Migrant Justice, a non-profit organization that advocates for dairy workers in Vermont, reported that six of their primary undocumented immigrant activists were arrested and faced deportation despite not having any criminal records.\textsuperscript{54} The pattern of retaliatory deportations under the Trump Administration as a consequence for undocumented immigrants

\textsuperscript{48} Kopan, \textit{supra} note 47.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Burnett, \textit{supra} note 14.
\textsuperscript{53} Id.
\textsuperscript{54} Id. \textit{See also} Muzzaffar Chishti & Michelle Mittlelstady, \textit{Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?}, MIGRATION POL’Y INST. (Nov. 2016), https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal (undocumented immigrants with criminal records are typically the priority for removal by the Department of Homeland Security but that is dependent upon which crimes are the priority of the President); Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., \textit{Policies for the Apprehension, Detention and Removal of Undocumented Immigrants} (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (memorandum informing government officials under the Obama Administration of the three different levels of priority for immigration enforcement practices, prioritizing those with felony convictions. The undocumented immigrants who were regarded as the “highest priority to which enforcement resources should be directed,” specifically included those “engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; convicted of an offense for which an element was active participation in a criminal street gang . . . convicted of an offense classified as a felony . . . ”).
speaking out against harsh government immigration policies has even resulted in international backlash. The United Nations’ Office of Humans Rights has called attention to the United States government to prevent them from continuing to attack undocumented immigrants through retaliatory deportations.

Maria Mora-Villalpando, an undocumented immigrant activist, is a prime example of an activist being targeted and threatened with retaliatory deportation. Despite living in the United States for twenty-two years and meeting with federal officials under the Obama Administration, she was still threatened with deportation by ICE officials. Throughout her time in the United States she has helped organize various protests and publicize detainees’ hunger strikes across Washington state. Individuals facing deportation at the Northwest Detention Center protested the need for expedited court hearings and access to mental and physical healthcare while being detained in a well-publicized hunger strike organized by Mora-Villalpando. Mora-Villalpando explains that the threat of her deportation was a way for ICE to intimidate her into stopping her advocacy work. Furthermore, Mora-Villalpando has no criminal record to sustain her being threatened with deportation.

The United States, as a democratic society, guarantees free speech protection in the First Amendment as a check on the government’s power to silence unpopular speech. In an attempt

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55 See Burnett, supra note 14 (stating that the deportation threats of highly recognized undocumented immigrant activists have resulted in international attention, including the United Nations Office of Human Rights, whose experts are concerned with the continuation of retaliatory deportations).
56 Id.
57 See David Weigel & Maria Sacchetti, ICE Has Detained or Deported Prominent Immigration Activists, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-1c95-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.71ff1f05af62.
58 Id.
59 Id.
61 Burnett, supra note 14.
62 Id.
63 See Know Your Rights: Free Speech, Protests & Demonstrations, ACLU, https://www.aclunc.org/our-work/know-your-rights/free-speech-protests-demonstrations (last visited May 7, 2019) (“The First Amendment protects your right to express your opinion, even if it’s unpopular. You may criticize the President, the
to bring to the forefront the issue of her retaliatory deportation threat by ICE officials, Mora-Villalpando filed a civil suit against ICE with the help of the National Immigration Project of the National Lawyers Guild.64 To limit the reach of Mora-Villalpando’s suit, ICE filed a motion to strike several paragraphs from the complaint.65 These paragraphs included information on ICE’s past detention of immigrant activists, the public’s mistrust of ICE, and the government punishing individuals for practicing free speech.66 Also, Mora-Villalpando’s Notice to Appear in immigration court specifically stated that the basis of her removability was a direct result of “extensive involvement with anti-ICE protest and Latino advocacy programs.”67 Ultimately, the United States District Court for the Western District of Washington denied ICE’s attempts to strike the paragraphs from the complaint.68 The court found the paragraphs crucial to the “public interest in disclosing alleged government impropriety.”69

The policy moving forward, based on the patterns of arrest under the Trump Administration, is that if an undocumented immigrant chooses to speak out against the current government they will be arrested and threatened with deportation.70 This leaves undocumented immigrant activists who want to remain in the United States with two options. The first option is protest abusive practices of the government, which risks deportation.71 The second option is to silently witness the mistreatment of undocumented immigrants across the country as a result of the fear of deportation and detention of their children.72 This situation shows an urgent need for the Supreme Court to create a clear judicial precedent protecting the free speech rights of undocumented immigrants. Without this constitutional protection, the only two choices that undocumented immigrants have severely deprives them of the opportunity to speak out and demand the government’s attention

65 Id.
66 Id.
67 Id.
68 Id. at 5 (“Because the challenged paragraphs . . . ‘might bear on an issue in the litigation’—specifically the applicability of FOIA exemptions . . . the court denies the Defendants’ motion.”).
69 Id.
70 See Burnett, supra note 14.
71 Weigel & Sacchetti, supra note 57.
72 Id.
to protect their human rights. The current rise in threats of deportation to undocumented immigrants under the Trump Administration have left them more susceptible to human rights violations.

### III. Existing Free Speech Protections

The First Amendment mandates that “Congress shall make no law . . . 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.” The power of the First Amendment is unmatched and carries unprecedented power as the amendment that allows for the marketplace of ideas. A democracy stems from the need to be able to express and vocalize important matters to those one seeks attention from, primarily the government. The First Amendment empowers all those within the United States boundaries to express themselves as long as the expression is done in a peaceful manner, even when that speech is in disagreement with the government.

The marketplace of ideas that Justice Holmes espoused is a foundational concept of First Amendment philosophy in the

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75 U.S. CONST. amend. I.
76 See generally Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 SUP. CT. REV. 1, 46.
77 Stewart Jay, The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century, 34 WILLIAM MITCHELL L. REV. 773, 776 (2008) (explaining that freedom of speech and expression are “the wheels of democracy by providing citizens the knowledge with which to govern themselves; free expression thus checks against government abuse” and “free speech serves the indispensable end of developing self-restraint in society”); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 263 (“[T]he people need free speech because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others.”).
78 See R.A.V. v. City of St. Paul, 505 U.S. 377, 377 (1992) (“Government may not regulate [speech] based on hostility, or favoritism, towards a nonproscribable message they contain.”); Stromberg v. California, 283 U.S. 359, 369–70 (1931) (holding that the California statute that prohibited the display of a red flag as a sign in opposition of the government was unconstitutional because it was too vague and included in it peaceful and legal speech protected by the First Amendment).
United States. It allows people from diverse perspectives, or on opposite sides of the political spectrum, to express their ideas. All ideas, even those criticizing the government, are permitted to be heard unless the ideas pose an imminent threat that in order to “save the country” they are absolutely necessary to interfere with. Justice Holmes expressed that the Constitution was built upon the notion that the ability to express all ideas should not be limited unless under extreme circumstances. Thus, undocumented immigrants peacefully protesting the government to demand better human rights and immigration policies should be able to do so without facing the threat of deportation. This threat chills immigrants’ ability to speak and as a result, immigrants need the protection of the First Amendment.

Further, the Fourteenth Amendment protects undocumented immigrants’ right to a free public education simply by being within the territorial boundaries of the United States, regardless of their legal status, and affords them the equal protection of the laws of the State. Since the First Amendment is incorporated to the States under the Fourteenth Amendment, undocumented immigrants should also be protected under the First Amendment to prevent chilling their speech.

If undocumented immigrants continue to be punished for publicly speaking their truth and demanding to be treated humanely, and not caged like animals, then it goes against the fundamental idea behind the First Amendment that Justice Holmes expressed as the importance of the marketplace of ideas. Retaliatory deportations prevent undocumented immigrants from contributing to the marketplace of ideas and suppress their speech, including speech that would address the injustice of their deportations. Undocumented immigrants will be less likely to speak up and demand that their ideas be heard because of the fear of not only jeopardizing themselves, but also their families.

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79 Blasi, supra note 76, at 46.
81 Id.
82 Id.
84 See Gitlow v. New York, 268 U.S. 652, 666 (1925); Jones v. Parmley, 465 F.3d 46, 56 (2d Cir. 2006) (“The Supreme Court has declared that the First Amendment protects political demonstrations and protests—activities at the heart of what the Bill of Rights was designed to safeguard.”); Katie Egan, Federal Crackdown on Immigration Activists Threatens to Chill Free Speech, ACLU (Jan. 30, 2018, 2:00 PM), https://www.aclu.org/blog/free-speech/rights-protesters/federal-crackdown-immigration-activists-threatens-chill-free (discussing the negative effect of Trump’s policies on immigrant activists right to free speech).
85 See e.g., Vivian Yee, Immigrants Hide, Fearing Capture on ‘Any Corner’, N. Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html (describing the massive amount of fear undocumented immigrants have as a result of the Trump Administration’s immigration policies
Exclusion from First Amendment protection creates an underclass of people not represented within the United States. As a consequence, undocumented immigrants threatened with deportation chills immigrants’ speech because of their legal status. If undocumented immigrants are excluded from constitutional protections then the exclusion condones the abusive mistreatment of millions of people within the territorial boundaries of the United States. By virtue of being within the United States, they deserve protection, especially since criminal punishments do not distinguish individuals based on their legal status. Undocumented immigrants will continue to be exploited if they are not guaranteed the ability to express their ideas with protection from retaliation. Justice Holmes’ dissent in Abrams highlights this idea and pushes forward how important it is for all people to have the opportunity to express their ideas, not just the ideas that the government deems favorable. It is important to prevent the suppression of the voices of undocumented immigrants who bring criticisms to the forefront and request change from the federal government. Since there is no consistent interpretation of the meaning of “the people,” it should be resolved in including undocumented immigrants under the First Amendment because of this amendment’s democratic importance. The political climate created by the Trump Administration has made protection of undocumented immigrant speech especially critical. The following section will analyze the importance of the various aspects of the First Amendment that are crucial to undocumented immigrants. It will also discuss the importance of creating a clear precedent for the inclusion of undocumented

forcing immigrants to remain hidden and silent, as well as having a “real fear that their kids will get put into the foster care system”).

87 Plyler, 457 U.S. at 215.
88 Abrams, 250 U.S. at 630 (Holmes, J., dissenting) (“Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . .”).
90 See Jay, supra note 77.
91 Burnett, supra note 14.
immigrants under this protection in order to avoid an inconsistent application of First Amendment rights due to changes in presidential administrations.

A. Freedom of Speech for Everyone

The Supreme Court, although it has never explicitly ruled on whether undocumented immigrants are protected under the First Amendment, has held that the government cannot restrict speech based on the speaker’s identity. As a result, the government is expressly prohibited from interfering with an individual’s freedom of speech based on who he or she is. This creates a pathway for undocumented individuals’ speech to be protected based on their identity as being undocumented in the United States. Identity can be inferred to encompass one’s legal status and therefore cannot be used to limit what undocumented immigrants say. An individual’s legal status in the United States is part of their identity, as one has to make it clear on various forms whether one is a citizen of the United States, a resident of the United States, or undocumented. Because one’s legal status is an identifying characteristic that is used for a variety of purposes, such as employment and college admissions, legal status is an identity that the government cannot use to interfere with individuals’ freedom of speech.

In Citizens United v. FEC, Justice Kennedy explained that it is crucial to protect corporation’s free speech and that it is a clear violation of the First Amendment to restrict speech based on the identity of the speaker. The importance of allowing free speech is that it is an “essential mechanism of democracy, for it is the means to hold officials accountable to the people.” The ability to hold the government accountable and to provide checks on government officials when the people disagree with, or are hurt by, their practices makes it even more critical for

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92 Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 394 (2010) (Stevens, J., concurring) (“The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity . . . .”).
94 Id. (explaining the Citizens United v. FEC case in upholding the speech of individuals of differing identities and the government’s inability to silence those individuals based on who they are).
95 Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (explaining that “the people” as used in the First, Fifth, and Fourteenth Amendments extends to protect the rights of citizens and resident aliens alike).
96 558 U.S. 310, 394 (2010).
97 Id. at 365.
98 Id. at 339.
undocumented individuals' speech to be protected. Suffering from retaliatory deportations specifically has consequences to undocumented individuals based on their legal status, a part of their identity. This is a clear violation of the “essential mechanisms of democracy” that Justice Kennedy referred to. It is a violation of the ideals of a democracy to not protect undocumented individuals. Lack of protection leaves an entire group of people unable to express their concerns relating to government action or inaction for the protection of their basic human rights.

While various immigration policies have been the subject of much debate, the surrounding dialogue of whether undocumented immigrants are protected under the First Amendment needs to consider the democratic consequence of chilling their right to freedom of speech. Crucially, the analysis of this issue must answer whether undocumented individuals—the group most affected by immigration policy—deserve to have their voices heard and protected when speaking on this matter, regardless of who the president is. As a democratic country, “it is essential that the general public hear directly from those affected by a public policy” in order to make their most informed decision, and keep in mind the consequences that undocumented immigrants will face. It is a constitutional wrong to punish undocumented immigrants for speaking up and using their voices in regard to policy that directly affects their lives in the United States.

99 Kagan, When Immigrants Speak, supra note 93, at 1252 ("[T]he essence of constitutional rights is about limiting the power of government, not about determining the degree of protection owed to different people. This reframing is important because constitutional protection is typically most important for those marginalized from the national community, not those whose membership is most secure.").
100 Id.
101 See Know Your Rights, supra note 63 (advocating that free speech rights are for everyone not just U.S. citizens); Jay, supra note 77 (explaining how the First Amendment is crucial to the upholding of a democracy).
102 Michael Kagan, Do Immigrants Have Freedom of Speech?, 6 CALIF. L. REV. CIR. 84, 95 (2015) (discussing the impact of the broad Supreme Court rulings regarding the speaker discrimination doctrine and the policy rationale for allowing the freedom of speech protection to extend to all people in the United States).
103 Id.
104 Id. See also City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) ("Precisely because of their location, such signs provide information about the identity of the ‘speaker’ . . . the identity of the speaker is an important component of many attempts to persuade. A sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile."); Procunier v. Martinez, 416 U.S. 396, 413 (1974), overruled by Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) ("Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements."); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 296 (1941).
Moreover, the speaker discrimination doctrine that Justice Kennedy established in *Citizens United* states that the government commits “a constitutional wrong when by law it identifies certain preferred speakers” and that if the government does, the law must pass a strict scrutiny analysis.\(^{105}\) This doctrine is designed to protect both free speech and the speaker from discrimination based on the speaker’s identity.\(^{106}\) The speaker discrimination doctrine is favorable to undocumented immigrants and should be embraced to uphold their ability to speak their truth and criticize the government.\(^{107}\) Despite the fact that *Citizens United* specifically applied to corporations involved in political campaigns, the anti-discrimination doctrine should be extended to apply to undocumented immigrants.\(^{108}\) As a result, undocumented immigrants will be protected when using free speech that will not threaten the government.\(^{109}\) They will also bring attention peacefully to their lack of rights by preventing ICE from threatening deportation against immigrants involved in First Amendment protected activity.\(^{110}\) It is crucial right now for the applicability of this case to be expanded, but this will only occur if the Court takes a case that will directly address this issue. Unfortunately, as the Court is currently composed, it may not be likely that these protections will be extended to undocumented immigrants right now.\(^{111}\)

Despite the Court in *District of Columbia v. Heller*\(^{112}\) asserting that “the people” in the Second Amendment is referring only to individuals in the political community,\(^{113}\) it is unrealistic and unfathomable that the First Amendment is also limited to only individuals that can vote.\(^{114}\) The idea that the meaning of “the people” is consistent throughout the Constitution has been widely debated.\(^{115}\) Rather, the meaning varies with the protection

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\(^{105}\) 558 U.S. at 340 (2010).

\(^{106}\) *Id.* at 341.


\(^{108}\) *Citizens United*, 558 U.S. at 394.


\(^{110}\) *Id.*


\(^{112}\) 554 U.S. 570 (2008).

\(^{113}\) *Id.* at 580.


\(^{115}\) *Id.* See also infra Part IV.
that is afforded within each amendment that limits whom it was meant to include.\textsuperscript{116} Specifically, the First Amendment is distinct from the Second Amendment because it has a “mix of individualist rights with a reference to the collective ‘people.’”\textsuperscript{117} The First Amendment is more similar to the Fourth Amendment in that it has a mix of rights.\textsuperscript{118} It would be “impractical, to suggest that only those people registered or eligible to vote for the House of Representatives have a right to security of their persons or freedom from unreasonable searches.”\textsuperscript{119}

Also, the anti-discrimination aspect of the speaker discrimination doctrine is crucial to both citizens and noncitizens because it prohibits the majority from controlling the “ideological hierarchy” that would otherwise allow them to discriminate and create laws that limit the voices of the minority.\textsuperscript{120} The right to freedom of speech has been crucial to protect the “dissent from political suppression [that] offsets the effects of this hierarchy.”\textsuperscript{121} This dire need to protect the minority voice from majority suppression is directly applicable to undocumented immigrants in this moment in history, because they are constantly facing the fear of retaliation if they speak up.\textsuperscript{122} If they choose to speak up, they will be punished for using their minority voice. This is why it is essential to protect their voice and uphold an upright democracy, and the courts must step in to protect this freedom of speech.

While including undocumented immigrants under the meaning of “the people” is preferred, even if they were not to be included in its original meaning, their right to freedom of speech is still likely protected.\textsuperscript{123} The First Amendment does not limit an individual’s right to freedom of speech based on the inclusion of “the people.”\textsuperscript{124} Freedom of speech is referenced in abstract terms and is not directly tied to “the people” because that language specifically applies to the right to petition the government or to freely assemble.\textsuperscript{125} Therefore, undocumented immigrants should be able to exercise their free speech without government retaliation.

\textsuperscript{116} Kagan, When Immigrants Speak, supra note 93, at 1242–53.
\textsuperscript{117} Id. at 1247.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Kathleen Sullivan, Two Concepts of Freedom of Speech, 124 HARV. L. REV. 143, 148–49 (2010) (stating that the freedom speech doctrine is composed of both an equality and liberty right and discussing the consequences of the \textit{Citizens v. FEC} case).
\textsuperscript{121} Id.; see also Edwards v. South Carolina, 372 U.S. 229 (1963).
\textsuperscript{122} Burnett, supra note 14.
\textsuperscript{123} Kagan, When Immigrants Speak, supra note 93, at 1242–53.
\textsuperscript{124} Id. at 1248.
\textsuperscript{125} Id.
B. Freedom to Protest and Petition the Government

Another component of the First Amendment is “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Courts have upheld the importance of the ability to assemble and petition the government when individuals feel the need to demand the attention of the government to initiate change. This is an important and crucial aspect of upholding the democratic ideals upon which the United States was built, furthered by the Supreme Court’s language in its decisions. The Court stated in *Edwards v. South Carolina*:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

The Court recognized the importance of the right to protest in order to uphold a democratic system, similar to the importance of freedom of speech. Protestting the government in a non-threatening manner allows the government to take a second look at the decisions it makes. If individuals such as those in the undocumented community are not able to do so, then the government will not be forced to recognize the rights or actions it has taken that infringe upon undocumented individuals’ ability to live in the United States without constant fear of being separated from their families.

In *Guarnieri*, the Court stressed the importance of the government allowing for free speech and petitioning the

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126 U.S. CONST. amend. I.
127 See Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011); Edwards v. South Carolina, 372 U.S. 229 (1963) (holding that the petitioners’ constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances were infringed upon when they were prosecuted for protesting South Carolina laws in a peaceful manner).
129 Edwards, 372 U.S. at 238 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
130 Edwards, 372 U.S. at 238.
131 See Associated Press, supra note 1.
government because those elements are essential factors that allow for a successful democratic process. The Court declared:

The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.

The basis of the right to petition the government has been vital for minority groups to gain traction and attention of the government to force them to make changes and guarantee them adequate protections such as: the Civil Rights movement or the DACA movement under the Obama Administration. Although the Court has never explicitly declared that undocumented immigrants are protected under the First Amendment, it is clear that the lack of protection has resulted in this community being subject to government silencing strategies, such as retaliatory deportations for activist efforts.

IV. EXTENDING “THE PEOPLE” TO UNDOCUMENTED IMMIGRANTS

Although the Supreme Court has issued inconsistent decisions, on balance, it has leaned towards providing protection to undocumented immigrants under the Constitution’s protective umbrella. Various amendments include the language “the people” and “any person” to specify to whom federal governmental protections are guaranteed. However, the meaning as to whom these two phrases apply has not always been clear, and rather is the subject of much debate throughout the judicial system. The meaning behind “the people” and “any person” has varied based on the United States Supreme Court’s decisions establishing who is protected under each

132 Guarnieri, 564 U.S. at 388.
133 Id.
134 Villazor, supra note 17, at 62.
135 Burnett, supra note 14.
136 U.S. CONST. amends. I, II, IV, V, XIV.
137 Note, The Meaning(s) of “The People” in the Constitution, 126 HARV. L. REV. 1078 (2013) [hereinafter Meaning(s) of “The People”] (discussing the two definitions of “the people” provided by Justice Rehnquist and Justice Brennan, which both could include undocumented immigrants).
amendment.\textsuperscript{138} While some of the Court’s decisions are expansive enough to extend constitutional protection to undocumented immigrants, not all of them are.\textsuperscript{139}

Due to this inconsistency and lack of clarity under the First Amendment, the Court must establish that undocumented immigrants are protected in order to prevent chilling their speech through deportation threats when they speak. If the Court does not step in, then this extremely marginalized group’s ability to speak without fear of retaliatory deportations will be based on any president’s personal preferences.\textsuperscript{140} Such inconsistent protection of First Amendment rights is un-American, as is undocumented immigrants’ fear that changing leadership can also change their human rights.

A. An Early, Outdated Interpretation

Previous Supreme Court decisions have either extended or denied protection to undocumented immigrants under specific amendments. A common inquiry is whether undocumented immigrants are within the meaning of “the people” consistently throughout the Constitution. In 1904, in \textit{U.S. ex rel. Turner v. Williams},\textsuperscript{141} the Supreme Court allowed the federal government to deport an immigrant anarchist and held that the Constitution, as the “supreme law” of the land, had the power to exclude those who did not deserve governmental protections.\textsuperscript{142} The Court held that the Constitution only afforded protections specifically to the citizens of the United States.\textsuperscript{143} But, this case focused on the federal immigration policies that allowed the appellee, John Turner, to be deported based on his anarchist beliefs.\textsuperscript{144} Indeed,

\textsuperscript{138} Id.; see also D.C. v. Heller, 554 U.S. 570, 580 (2008) (“What is more, in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community . . . .”); United States v. Verdugo-Urquidez, 494 U.S. 259, 259–60 (1990) (“This suggests that ‘the people’ refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”); Dred Scott v. Sandford, 60 U.S. 393, 404 (1857), \textit{superseded by constitutional amendment}, U.S. \textsc{const.} amend. XIV (“The words ‘people of the United States’ and ‘citizens’ are synonymous terms and mean the same thing.”).

\textsuperscript{139} See D.C. v. Heller, 554 U.S. 570, 580 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 259–60 (1990); Dred Scott, 60 U.S. at 404. See also \textit{Meaning(s) of “The People”}, supra note 137.

\textsuperscript{140} Kagan, \textit{When Immigrants Speak}, supra note 93, at 1240.

\textsuperscript{141} 194 U.S. 279, 292 (1904).

\textsuperscript{142} Id. (“To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.”).

\textsuperscript{143} Id.

\textsuperscript{144} See Turner, 194 U.S. at 292 (upholding the deportation of anarchist John Turner under the Immigration Act of 1903, which stated “[t]hat the following classes of aliens shall be excluded from admission into the United States: All idiots, insane
the Court explained that the exclusionary power the federal government exercised in Turner's deportation was based upon the fundamental principle “that every sovereign nation has the power as inherent in soverignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions.” The primary rationale was security, not speech. In its reasoning, the Turner Court did not seriously address the free speech implications of the case, especially compared to post-incorporation First Amendment cases. Rather, the Court focused on the definition of an anarchist, which posed a security threat to the United States government. As the Court upheld his deportation they did not find the First Amendment to be implicated at all. This is not surprising since it was not until 1930 that the Court began to give meaningful First Amendment protection to activists.

Still, even if the First Amendment was not implicated in Turner, it could have an impact moving forward for undocumented immigrants because the decision placed improper limitations on their rights. The Turner Court reasoned that when a prohibited immigrant enters the country, they are inherently excluded from the protections of the Constitution. The justices went so far as to state that an immigrant that is prohibited to enter the country is not part of the definition of “the people” by virtue of entering the country illegally.

Yet, despite the early effect that Turner had on immigration control, this decision did not consider free speech protections for undocumented immigrants, and decisions after

persons, epileptics, and persons who have been insane within five years previous; . . . anarchists,” and “[t]hat no person who disbelieves in, or who is opposed to, all organized government, or who is a member of, or affiliated with, any organization entertaining and teaching such disbelief . . . shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof”). See also Ben Harrington, Overview of the Federal Government's Power to Exclude Aliens 3 (Cong. Res. Serv., 2017) (noting that U.S. ex rel. Turner v. Williams did not discuss the implications of the First Amendment despite an immigrant being deported for solely for his political beliefs); John Vile, U.S. ex rel. Turner v. Williams (1904), First Amendment Encyclopedia, https://mtsu.edu/first-amendment/article/453/united-states-ex-rel-turner-v-williams (last visited May 7, 2019).

145 Turner, 194 U.S. at 290.
146 Id. at 294 (“We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations.”).
147 Id. at 293–95.
148 Kagan, When Immigrants Speak, supra note 93, at 1265.
149 Id.
150 Id.
151 Id. at 1239–65.
152 Turner, 194 U.S. at 292.
153 Id.
Turner have better favored immigrants. As the Court evolved its understanding, it began to decipher whether each separate amendment protected undocumented immigrants under the meaning of “the people.” The Court has notably distinguished the meaning of “the people” based on which amendment it is in. Without a definition of “the people” in the First Amendment, these varying definitions impact who the First Amendment free speech doctrine is likely to include and exclude from its protections.

Moreover, in *Dred Scott v. Sandford* the Court held that Blacks were not citizens because they were “regarded as beings of an inferior order” with “no rights which the white man was bound to respect.” However, this decision was overruled by the Fourteenth Amendment. Similarly, Turner at the time did not regard immigrant’s free speech rights as threatened by the deportation of an anarchist, but this decision cannot mean that like *Dred Scott*, immigrants are “beings of an inferior order.” Instead, immigrants should receive free speech rights.

**B. First Amendment Incorporation Post-U.S. ex rel. Turner v. Williams**

In *Turner*, the Court upheld the exclusion of anarchist speech. However, *Turner* was decided prior to the First Amendment being incorporated into the States. In 1925, the First Amendment’s guarantee of freedom of speech was incorporated by the Court:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the

154 Linda Bosniak, *The Citizen and the Alien, Dilemmas of Contemporary Membership* 77–101 (2006) (discussing that undocumented immigrants have been afforded a wide range of constitutional rights due to being entitled to basic protections under the law); see also Kagan, *When Immigrants Speak, supra* note 93, at 1263–65.


156 60 U.S. 393 (1857).

157 Id. at 407.

158 *Turner*, 194 U.S. at 294.

159 *Dred Scott*, 60 U.S. at 407.

160 *Turner*, 194 U.S. at 292.

Following *Gitlow*, the incorporation of the First Amendment to the States continued. The right to freedom of the press was incorporated in 1931\(^{163}\) and the freedom of assembly in 1937.\(^{164}\) Then the protection to the free exercise of religion was incorporated in 1940,\(^{165}\) and the protection against the establishment of religion was incorporated in 1947.\(^{166}\) Lastly, in 1984 the right to freedom of expression was incorporated to the States.\(^ {167}\) Thus, while *Turner* upheld the deportation of an immigrant with anarchist beliefs,\(^{168}\) the impact of this decision needs to be reconsidered, because free speech concerns were not properly assessed by the Court.\(^ {169}\) Now that the First Amendment has been entirely incorporated into the States, the next step is to define who “the people” in the First Amendment is meant to protect, particularly that it applies to both citizens and undocumented immigrants. As will be addressed below, the Second, Fourth, Fifth, and Fourteenth Amendments reveal that undocumented immigrants can be protected by the Constitution.

### C. “The People” Under the Second Amendment

The Courts, States, and Congress have differently interpreted the Second Amendment to exclude or include undocumented immigrants. The Second Amendment specifically includes the phrase “the right of the people to keep

\(^{162}\) *Gitlow*, 268 U.S. at 666.

\(^{163}\) *See* *Near v. Minnesota*, 283 U.S. 697, 723–24 (1931) (holding that a statute suppressing newspapers that published “malicious” material was an “infringement of the liberty of the press guaranteed by the Fourteenth Amendment” through the First Amendment’s Freedom of the Press clause).

\(^{164}\) *See* *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . . For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”).

\(^{165}\) *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the statute “deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment”).

\(^{166}\) *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (applying the First Amendment Establishment Clause in upholding a New Jersey state statute).

\(^{167}\) *See* *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (holding that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”).

\(^{168}\) 194 U.S. at 292.

and bear Arms, shall not be infringed,” which protects the individual right to own firearms.\textsuperscript{170}

The Court in \textit{Heller}\textsuperscript{171} held that the Firearm Control Regulation Act that prevented individuals from possessing a handgun in their homes, and required that any lawful gun in the home must be kept in a trigger lock, was unconstitutional.\textsuperscript{172} Regulations preventing individuals from owning a handgun in their home was a violation of their Second Amendment right because the amendment specifically grants individuals the right to bear arms, even if they are not in the militia.\textsuperscript{173} In reaching this decision the Court analyzed the meaning of “the people” as it is mentioned seven times in the Constitution, including the Second Amendment.\textsuperscript{174}

The Court made clear that the right to bear arms is an individual right based on how the phrase “the people” is used specifically in the Second Amendment.\textsuperscript{175} In specifying the subset of individuals to whom the Second Amendment applies, the Court stated that “in all six other provisions of the Constitution that mention ‘the people’ the term unambiguously refers to all members of the political community, not an unspecified subset.”\textsuperscript{176} However, the Court did not define the meaning of the “political community” to which the right to own guns would include.\textsuperscript{177} Thus, it left courts with the ability to interpret it broadly to possibly include various people such as: all citizens,\textsuperscript{178} registered voters, eligible voters, or to individuals who are able to lawfully contribute to political campaigns.\textsuperscript{179} Due to the lack of a clear definition of who is encompassed in the “political community,” there is a possibility that courts will use this language to exclude certain communities within the United States.\textsuperscript{180} Individuals who could potentially be excluded from the

\begin{footnotesize}
\textsuperscript{170} U.S. CONST. amend. II.
\textsuperscript{171} 554 U.S. 570 (2008).
\textsuperscript{172} \textit{Id.} at 635 (holding that the District’s ban on the possession of handguns in one’s home violated individuals Second Amendment rights because the purpose of the Second Amendment was to allow individuals the opportunity to self-defense and to own guns).
\textsuperscript{173} \textit{Id.} at 621.
\textsuperscript{174} Meaning(s) of “The People”, supra note 137, at 1082.
\textsuperscript{175} \textit{Heller}, 554 U.S. at 579–80 (“Three provisions of the Constitution refer to ‘the people’ in a context other than ‘rights’—the famous preamble . . . § 2 of Article I . . . and the Tenth Amendment . . . . Those provisions arguably refer to ‘the people’ acting collectively . . . . Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).
\textsuperscript{176} \textit{Id.} at 580.
\textsuperscript{177} Meaning(s) of “The People”, supra note 137, at 1087.
\textsuperscript{178} See United States v. Portillo-Munoz, 643 F.3d 439, 440 (2011) (explaining that based on the \textit{Heller} Court the Second Amendment extends to “All Americans,” specifically “law-abiding, responsible citizens”).
\textsuperscript{179} Meaning(s) of “The People”, supra note 137, at 1087.
\textsuperscript{180} \textit{Id.}
\end{footnotesize}
“political community” are minors, previously convicted felons, or those who are not American citizens.

Furthermore, the meaning of “the people” defined in *Heller* was not exclusive to the Second Amendment. The Court specifically stated that its definition of “the people” was consistent with how the phrase was used in other provisions of the Constitution. The limitations of who the “political community” includes is crucial because it can define who other amendments’ protections are guaranteed to. Therefore, by not defining the meaning of “political community,” the Court provided no clarity as to who was included by the phrase “the people” throughout the Constitution.

After *Heller*, courts in thirty-five states have interpreted “the people” to allow only citizens the right to bear arms in contrast with nine states who allow all persons the right to own guns. Also, 18 U.S.C. § 922 (g)(5) prohibits unlawful aliens from owning firearms, as well as those who have renounced their citizenship. Thus, the federal government and the majority of states have not granted every single individual within their borders the right to lawfully own a handgun. Rather, state and federal laws have used “the people” to exclude undocumented immigrants from the individual right declared in the Second Amendment. This exclusion could have a profound impact on undocumented immigrants attaining other protections and rights in the Constitution if courts determine that “the people” has the same definition and thus refers to the same subset of people in every part of the Constitution.

However, in *United States v. Meza-Rodriguez*, a citizen of Mexico was arrested carrying a .22 caliber handgun. The Seventh Circuit court distinguished *Heller* because the Supreme Court did not explicitly address whether undocumented immigrants are among “the people” to who the Second

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181 Medina v. Sessions, 279 F. Supp. 3d 281, 289–90 (D.D.C. 2017) (explaining that the Second Amendment protections do not apply to convicted criminals, specifically felons because they are not considered part of the “political community” as they are not “law-abiding citizens”).

182 *Id.* See also *Portillo-Munoz*, 643 F.3d at 440 (“Illegal aliens are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’ and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”).

183 *Heller*, 554 U.S. at 580.

184 *Id.*

185 Meaning(s) of “The People”, supra note 137, at 1087.

186 *Id.*

187 *Id.* at 1094.

188 *Id.*; see 18 U.S.C. § 922(g)(5).

189 Meaning(s) of “The People”, supra note 137, at 1087.

190 See 18 U.S.C. § 922(g)(5).

191 798 F.3d 664 (7th Cir. 2015).

192 *Id.* at 666.
Amendment applies. Specifically, the court explained that Meza-Rodriguez was both in the United States voluntarily and had extensive ties to the country as he had lived in the United States for over twenty years. In the past, Meza-Rodriguez had attended public schools and worked at various places, which was sufficient to constitute having “substantial connections” with the United States in order to be protected under the Second Amendment’s meaning of “the people.” The court emphasized that “we see no principled way to carve out the Second Amendment to say that unauthorized (or maybe all noncitizens) are excluded. No language in the Amendment supports such a conclusion.” This decision gives hope that undocumented immigrants can receive Second Amendment rights.

D. “The People” Under the Fourth Amendment

There is a lack of clarity in the Court’s determination of who is included within the protections of the Fourth Amendment. The Fourth Amendment protects “the people . . . against unreasonable searches and seizures,” which also includes the protection for individuals’ privacy. Prior to the Heller decision, potentially limiting the scope of the meaning of “the people” regarding the Second Amendment, the Court had already defined “the people” in reference to Fourth Amendment search and seizure. In United States v. Verdugo-Urquidez, the defendant, a Mexican citizen, was arrested by United States agents in Mexico due to the suspicions of the United States Drug Enforcement Agency (DEA) that he was one of the leaders of a dangerous narcotics organization. After the defendant was transported to the United States, a DEA agent arranged for the search of the defendant’s homes in Mexico. The search was conducted because of the belief that it would lead to evidence that the defendant was involved in narcotics trafficking. Nevertheless, no search warrants were issued prior to the searches in which a tally sheet was found. The lack of search warrants resulted in the District Court for the District of California and the Ninth Circuit Court of Appeals holding that

\[193\text{ Id. at 669–71.}\
\[194\text{ Id. at 671.}\
\[195\text{ Id. at 672.}\
\[196\text{ Id.}\
\[197\text{ U.S. CONST. amend. IV; see also The Fourth Amendment, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourth_amendment (last visited May 7, 2019).}\
\[198\text{ United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).}\
\[199\text{ Id. at 262.}\
\[200\text{ Id.}\
\[201\text{ Id.}\
\[202\text{ Id.}\

the evidence found during the unwarranted searches of the defendants' homes must be suppressed.\textsuperscript{203} 

However, the Supreme Court reversed the Ninth Circuit Court of Appeal’s decision because it held that Fourth Amendment protections against unlawful searches and seizures did not apply in this particular situation.\textsuperscript{204} In reaching this decision, the Court analyzed in-depth the meaning of the Fourth Amendment and who the Framers intended it to protect.\textsuperscript{205} The court declared that

‘The people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.\textsuperscript{206}

Also, the Court specified that the Fourth Amendment was intended to only provide protection in domestic matters, not searches conducted abroad.\textsuperscript{207} However, the most crucial and yet unclear portion of the decision was the Court’s test for what constituted as having a “sufficient connection” with the United States to be guaranteed constitutional protections.\textsuperscript{208} The Court stated, “This suggests that ‘the people’ refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”\textsuperscript{209}

\textsuperscript{203} Id. at 263.
\textsuperscript{204} Id. at 274–75 (“At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”).
\textsuperscript{205} Id. at 265.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 259–60 (“The Fourth Amendment phrase ‘the people’ seems to be a term of art used in select parts of the Constitution and contrasts with the words ‘person’ and ‘accused’ used in Articles of the Fifth and Sixth Amendments regulating criminal procedures.”). See also Meaning(s) of “The People”, supra note 137, at 1081 (stating that various legal scholars and courts have refused to apply the test in United States v. Verdugo-Urquidez because of the inconsistent standard and lack of explanation of the Court on how it is to be applied in various legal contexts).
\textsuperscript{209} Verdugo-Urquidez, 494 U.S. at 260.
Potentially this test could pose a threat to the ability of the First Amendment to extend to undocumented immigrants. This decision resulted in courts needing to interpret if undocumented immigrants could establish “substantial connections” with the United States to be protected. Justice Brennan in his dissent instilled hope that the protections of the Fourth Amendment—and therefore potentially the First Amendment—should be extended to undocumented immigrants. This conclusion was based upon the mutuality basis that the Constitution was built upon. If the criminal laws of the United States are extended to undocumented immigrants, then so too should its protections. Otherwise, undocumented immigrants are susceptible to oppressive government practices.

E. “The People” Under the Fifth Amendment

One Supreme Court decision explicitly includes undocumented immigrants within the protection of the Fifth Amendment. The Fifth Amendment guarantees the right to a grand jury, protects against self-incrimination, and double jeopardy. It also provides the protection that a person cannot be deprived of “life, liberty or property” without “due process of the law.” In contrast to the more restrictive interpretations of the Second and Fourth Amendments, the Court has not interpreted the Fifth Amendment to be so limited in its extension to undocumented immigrants. The Supreme Court’s impactful

210 Id.
212 United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (“Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose ‘societal obligations,’ such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment . . . . If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”).
213 Id. at 284–85 (“Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive Government behavior as are United States citizens investigated and prosecuted for the same alleged violations.”).
214 Id.
215 Id.
216 U.S. CONST. amend. V.
217 Id. See also Cornell Law School, The Fifth Amendment, https://www.law.cornell.edu/constitution/fifth_amendment (last visited May 7, 2019).
decision in *Matthew v. Diaz* 218 established Fifth Amendment protections for undocumented immigrants. 219 The Court stated that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of due process].” 220 This statement has had a positive impact in defining the protections undocumented immigrants may obtain through their presence in the United States and providing undocumented immigrants with the right to challenge the United States government in Court. 221 Despite the Court’s distinction between “aliens and citizens” based on Congress’ power over immigration policies, the Court did not detract from the fact that undocumented immigrants are entitled to claim Constitutional protections. 222 This decision was monumental because it established that undocumented immigrants are protected, to some extent, under the Constitution. 223 The Court purposefully specified the Fifth and Fourteenth Amendments as protecting all people within the borders of the United States. 224 Nonetheless, this decision neither includes nor excludes undocumented immigrants from the constitutional protections of the First Amendment.

F. “The People” Under the Fourteenth Amendment

The Supreme Court has established that undocumented immigrants are protected by the Fourteenth Amendment. The Fourteenth Amendment specifically prohibits any state action from the ability to “deny to any person within its jurisdiction the equal protection of the laws.” 225 It is possible for the language of the Fourteenth Amendment to extend to all people residing in and within the jurisdictional boundaries of the United States despite their legal status. There is no explicit exclusion of undocumented immigrants because the amendment does not specifically state who classifies as “any person.” 226 The notion that undocumented immigrants are protected was furthered by *Plyler v. Doe.* 227

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218 426 U.S. 67 (1976)
219 *Id.* at 77 ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").
220 *Id.*
221 *Id.*
222 *See id.* at 76–77.
223 *See id.*
224 *Id.* at 76.
225 U.S. CONST. amend. XIV, § 1.
226 *See id.*
In *Plyler v. Doe*, at issue was a Texas education law declaring that the government would withhold state funding for the education of undocumented immigrants.\(^{228}\) This statute also granted school district officials the authority to refuse academic enrollment to any undocumented child.\(^{229}\) As a result of this law, if an undocumented child wanted to attend a public school they were required to pay tuition.\(^{230}\) A class action lawsuit was filed by these students, arguing that denying a free public education to undocumented immigrants was unconstitutional under the Fourteenth Amendment.\(^{231}\) The Supreme Court agreed, and held that undocumented children are entitled to receive a free public education even if they are not in the United States legally.\(^{232}\) The Court reasoned:

This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.\(^{233}\)

This statement by the Court explicitly recognizes the possibility that undocumented immigrants may be subject to exploitation.\(^{234}\) By expressly acknowledging the risk of potential abuse in the United States, the Court brought to the forefront the need to protect these individuals, and to give them the ability to exercise their rights.\(^{235}\) In *Plyler*, the Court guaranteed undocumented immigrant children the right to a free public education.\(^{236}\) This powerful holding shows that despite being undocumented, these individuals can be granted protection under the Constitution.\(^{237}\)

\(^{228}\) *Id.* at 202.

\(^{229}\) *Id.*

\(^{230}\) *Id.* at 203.

\(^{231}\) *See id.* at 202.

\(^{232}\) *See id.* at 203.

\(^{233}\) *Id.* at 218–19.

\(^{234}\) *See id.*

\(^{235}\) *See id.*

\(^{236}\) *Id.* at 230.

\(^{237}\) *Id.* at 212 (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any state deprive any person of life, liberty,
Furthermore, this decision has resulted in the recognition that undocumented immigrants are no longer just people in the United States with no legal protection. Rather, the Court made it clear that some constitutional protections are guaranteed to them by virtue of being in the United States. In turn, state governments cannot deny constitutional protections to undocumented immigrants simply because of their legal status. Undocumented immigrants being within the jurisdiction of the state entitles them to Fourteenth Amendment protections. An expansive meaning of “person” that includes undocumented immigrants is crucial to moving forward to protect undocumented immigrants’ rights, and to further their inclusion in more constitutional amendments. It is imperative to include undocumented immigrants under the protections of the First Amendment to prevent chilling their speech based on their legal status and allow them to bring to the forefront their criticisms of the government without fearing deportation. Undocumented immigrants can better defend their protection under other constitutional amendments if they have the protection of the First Amendment.

Overall, the Court has mostly granted protection to immigrants by including them as part of “the people.” Therefore, the Court ought to firmly extend “the people” in the First

or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ *These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.*”

238 Villazor, *supra* note 17, at 56.
239 *Id.* (“The State argued that the Equal Protection Clause did not apply to the children because they were undocumented aliens and thus, not ‘persons’ within the state’s jurisdiction. The Court, however, rejected that argument and held that the Equal Protection Clause applies to ‘persons’ and that ‘[a]liens, even whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.’”).
240 *Id.*
241 *Plyler*, 457 U.S. at 215 (“Use of the phrase ‘within its jurisdiction’ thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.”).
242 *Id.*
243 *See* *Palko v. State of Connecticut*, 302 U.S. 319, 326–27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969) (“This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”); *see also* Villazor, *supra* note 17, at 59–65 (showing how the ability to use free speech strengthened the impact of the DACA movement). *See generally Freedom of Expression, ACLU, https://www.aclu.org/other/freedom-expression (last visited May 7, 2019).
Amendment to include undocumented immigrants. This would not overrule *Turner* but distinguish that case as being decided on federal power grounds, not First Amendment grounds.

V. THE NEED FOR CLARITY: MOVING FORWARD WITH UNDOCUMENTED IMMIGRANTS BEING PROTECTED UNDER THE FIRST AMENDMENT

Because of conflicting case law, it is necessary for the Court to create a precedent that specifically includes undocumented immigrants within the scope of First Amendment protection. By creating clear case law of undocumented immigrant’s protections under the First Amendment, the ability for any president to threaten deportation against this vulnerable community for their activist efforts will be limited as it will erode political discretion. This will prevent the deportation threats to immigrants not violating criminal laws who choose to speak. How undocumented immigrant activists are treated should not be subjected to the complete control of the president such that these rights are never permanently secured.\(^{244}\) Politics should not be the controlling factor of the rights of undocumented immigrants. Rather, undocumented immigrants should receive constant and consistent protections by courts, especially the Supreme Court, to prevent violations of their human rights.

An undocumented immigrant’s ability to engage in speech, peacefully protest, and petition the government has been predominately based upon who the president is.\(^{245}\) The Court has not clearly stepped in to protect undocumented immigrants’ rights in accordance with the First Amendment.\(^{246}\) Rather, the Court left it up to dangerous and inconsistent political discretion.\(^{247}\) The uncertainty that undocumented immigrants face threatens their daily lives and the ability to protect their human rights lies in the ability to speak up against the exploitative treatment they are forced to face. The ability to speak up being limited based on one individual who can change every four or eight years is incredibly daunting to undocumented immigrant communities.\(^{248}\)

\(^{244}\) See Kagan, *When Immigrants Speak*, supra note 93, at 1237–38.

\(^{245}\) See id.

\(^{246}\) Id. at 1284–85; see also Kagan, supra note 102, at 96.

\(^{247}\) Kagan, *When Immigrants Speak*, supra note 93, at 1237 (arguing that the ability for “unauthorized” immigrants to speak out for immigration reform is based primarily upon political discretion rather than on constitutional protections).

\(^{248}\) Id. at 1237–38 (“If the White House were to be occupied by a president who is hostile to immigrants and intolerant of dissent, immigrant activists could not be confident that the courts would protect their expressive liberty.”).
A direct comparison of the Trump and Obama Administrations shows the inconsistent treatment undocumented immigrants have in being granted First Amendment rights. Under the Obama Administration, undocumented immigrant activism increased as a result of Obama’s policy regarding which undocumented immigrants would be subject to deportation, specifically focusing on those with criminal records. Under the Obama Administration, an undocumented immigrant activist was not likely to be targeted or subject to deportation based on their activist efforts, which encouraged activism among this community. As a result of not being in fear of facing deportation for speaking up, the undocumented immigrant community was able to petition the government successfully. The Obama Administration encouraged and aided in the protesting of immigration reform because unless the undocumented immigrants were “national security threats, gang members, convicted felons” they were protected from deportation.

Additionally, under the Obama Administration undocumented immigrants, specifically children, who had been brought to the United States at a young age, protested and brought to the forefront the need to be protected. They became known as DREAMers. President Obama was sympathetic to their cause as children who were raised in the United States but lacked legal status. He stated “[t]hey are Americans in their heart, in their minds, in every single way but one: on paper.” This sympathetic rhetoric during his Administration allowed DREAMers to increase their activist efforts and step out of hiding to “push for legal recognition of their identity.”

A. Other Amendments Provide Support that Undocumented Immigrants are Protected by the Meaning of the “the people”

While the First Amendment has never been expressly guaranteed to undocumented immigrants, other Amendments

249 See id.; Burnett, supra note 14; Kopan, supra note 47.
250 Kagan, supra note 102, at 1279.
251 Id.
252 Id.
253 Id.
255 Villazor, supra note 17, at 62.
256 Id. (discussing the impact of the DACA movement under the Obama Administration and the ability immigrant activists had to be vocal under that Administration, which resulted in the passage of DACA itself).
257 Id.
258 Id.
have, such as the Fourteenth Amendment. 259 This is in contrast to the Second Amendment, which has interpreted by some courts to not include undocumented immigrants. 260 The inconsistency in the Constitution’s application to undocumented immigrants demonstrates that undocumented immigrants can still be protected under the First Amendment. 261 The Supreme Court’s decision to extend the protection of the Fourteenth Amendment to undocumented immigrants by allowing them to attend primary and secondary schools and prevent states from imposing tuition on public education, demonstrates that legal status is not an impediment to equal protection of undocumented immigrants. 262 Instead, these protections show the Court taking necessary measures to prevent the continued exploitation of an underclass in the United States. 263 It should then follow that these protections should be expanded to also include First Amendment rights to undocumented immigrants. This will allow the undocumented immigrant community to freely demand their human rights be upheld because of the fundamental democratic ideals built into the free speech and equal protection clauses. 264

B. Importance of the Visibility that Free Speech, Ability to Protest, and Petition the Government Allows for Undocumented Immigrants

The visibility of undocumented immigrants and their ability to exercise their free speech rights without fearing deportation is essential for them to initiate change in matters important to their daily lives. Until undocumented immigrants are seen and have the ability to demand the government’s attention, the government will not change or reform immigration laws. 265 Through the tactical use of speech, protest, and

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261 Kagan, supra note 102, at 96–97; see also Gretchen Frazee, What Constitutional Rights Do Undocumented Immigrants Have?, PBS NEWS HOUR (June 25, 2018) https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have (“[M]any of the basic rights, such as the freedom of religion and speech, the right to due process and equal protection under the law apply to citizens and noncitizens.”); Raoul Lowery Conteras, Yes, Illegal Aliens Have Constitutional Rights, THE HILL (Sept. 29, 2015), https://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights (“‘Aliens,’ legal and illegal, have the full panoply of constitutional protections American citizens have with three exceptions: voting, some government jobs and gun ownership (and that is now in doubt).”)
262 Villazor, supra note 17, at 56–67.
263 Id. at 30.
264 See Jay, supra note 77 (explaining how the First Amendment is crucial to upholding a democracy); Know Your Rights, supra note 63 (stating that without First Amendment protections all other fundamental rights would “wither away”).
265 Villazor, supra note 17, at 6 (“[T]he undocumented closet facilitates a deeper appreciation of the relationships between law, visibility, political mobilization, and
petitioning the government, minority and marginalized groups have been able to put pressure on the government to demand protection and equal protection of their rights.266 The strategic use of speech and demanding protections is possible through the protections granted by the First Amendment.

However, retaliatory deportations are forcing undocumented immigrants to remain silent and not demand change, forcing them to remain hidden.267 Retaliatory deportations under the Trump Administration result in the continued forced silence of undocumented immigrants and cause this community “to be invisible, which makes them vulnerable to legal and social subordination in various forms.”268 Leaving such a large number of people in the United States subject to abuse without the ability to demand protection directly undermines the democratic foundation of this country by allowing the government to silence the most vulnerable group.269 Cases not being brought before the Court presents the issue of undocumented immigrants not being included under the First Amendment’s protection. The Trump Administration, and possibly any future administrations, will continue to enforce retaliatory deportations. Until there is a clear precedent established by the Court that undocumented immigrants are encompassed by the First Amendment, there is no legal incentive for the Trump Administration or any subsequent Administration to respect their activists’ efforts.

The threat of deportation has been firmly established in the undocumented immigrant community, which has continuously prevented them from speaking out against the
injustice and abuse they constantly face. This fear has left them without a consistent right to criticize and demand change in the government. The ability for the undocumented immigrant community to be visible is essential as it is “about political empowerment.” “Critically, visibility functions as an important tool for getting those in power to see them and create legal change.” However, the fear of facing a retaliatory deportation under the Trump Administration will inevitably result in limiting the ability of undocumented immigrants to be visible in the United States. The constant fear of ICE identifying undocumented immigrants during protest and activist efforts will limit the attention brought to immigration issues. Further, it will deter the United States from truly functioning as a democratic society if the Court does not create a clear precedent that states that undocumented immigrants have First Amendment constitutional protection.

Due to an unclear precedent and threats to undocumented immigrants throughout history as to whether they are protected under the First Amendment, it is now crucial for the Court to establish that they are. Right now, undocumented immigrants are being targeted for speaking up and fighting for better treatment in the United States under the Trump Administration, which is vastly different from how they were treated under the Obama Administration. The inconsistency in how undocumented immigrants have been treated throughout history creates a constant back and forth,
with immigrants unsure of when First Amendment rights are applicable to them. The Court making it clear that undocumented immigrants are protected under the First Amendment will remove the ambiguity that currently exists. By specifically granting undocumented immigrants First Amendment rights, the Court would remove the silencing effect currently being created by the Trump Administration. First Amendment rights must be guaranteed in order to protect the human rights of a growing undocumented immigrant population in the United States. This will allow undocumented immigrants, who are the most affected by immigration laws in the United States, to have the ability to speak up and demand the attention of the government.

**CONCLUSION**

History has demonstrated a trend that undocumented immigrants are threatened based on those in power and no consistent law exists to uphold their First Amendment rights. Currently under the Trump Administration, undocumented immigrants’ First Amendment rights are being threatened by retaliatory deportations. This has now resulted in prominent immigrant activists being forced into silence or facing deportation. However, this is not the first time in history that undocumented immigrant activists have been threatened for speaking out for their rights and beliefs.

First Amendment rights have never been explicitly denied or granted to undocumented immigrants, where other amendments in the Constitution have been determined to include or not include undocumented immigrants. It is possible for undocumented immigrants to be included within the protections of the First Amendment, because the Court has held that in reference to other amendments they are protected, such as in *Matthew v. Diaz*. The Court stated, “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.” This statement laid

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277 *Id.* at 29.
278 See MOLONEY, supra note 18, at 198.
279 Burnett, supra note 14.
280 See Villazor, supra note 17, at 62.
282 Domonoske & Gonzales, supra note 9.
283 MOLONEY, supra note 18.
285 *Matthews*, 426 U.S. at 76.
286 *Id.* at 77.
the foundation for the importance of ensuring Constitutional protections for undocumented immigrants.

Due to undocumented immigrants' human rights being constantly threatened, it is necessary for them to be encompassed in the definition of “the people” to be protected under the First Amendment. This needs to be achieved by the Supreme Court specifically granting this right through a case of an undocumented immigrant activist facing deportation on the basis of their activism. It may not be plausible that the Court would create this precedent right now due to the current makeup of the Court. However, it is at least possible to make this assertion in the Federal District Courts and Federal Circuit Courts and to push the Supreme Court to decide that undocumented immigrants should be protected by the First Amendment.

Without the ability to speak up against the injustices happening to undocumented immigrants every day, undocumented immigrants are forced into the shadows of America, where the violation of their human rights persist, which changes with each president. Allowing undocumented immigrants to be vocal about the change they seek as part of their everyday existence in the United States is crucial and necessary to uphold the democratic ideals of this country.
A “SLAPP” IN THE FACE OF FREE SPEECH: PROTECTING SURVIVORS’ RIGHTS TO SPEAK UP IN THE “ME TOO” ERA

Alyssa R. Leader∗

INTRODUCTION

Kristen Vander-Plas was a second-year law student at Texas Tech University when she encountered the legal system in a way that most students never anticipate: she was named by local politician, Donald May, as the defendant in a defamation suit.1 For Kristen, this was only the latest in a long line of unwanted encounters with May.2 May sexually assaulted Kristen on multiple occasions a few years prior to the defamation claim.3 When Kristen became a law student at Texas Tech, he showed up repeatedly outside of her classrooms and in spaces Kristen frequented.4 Fearing for her safety, Kristen reported May’s behavior, including the prior assaults, to administrators of Texas Tech.5 Ultimately, the university reached out to May to request that he refrain from coming to the law school campus.6

In response to the university’s request, May filed a defamation suit against Kristen, claiming that her allegations had negatively impacted him personally and professionally.7 The suit dragged on through the end of Kristen’s third year of law school and continued to impact her life in major ways.8 She studied for and took the bar exam not knowing whether or not May’s suit would prevent her from being accepted by the Texas

∗ J.D. Candidate, Class of 2020, University of North Carolina School of Law; Staff Member, First Amendment Law Review Vol. 17; Editor-in-Chief, First Amendment Law Review Vol. 18. I would like to extend special thanks to End Rape on Campus, where I served as a Legal Fellow in the Summer of 2018, for lending their resources and support to my early research of anti-SLAPP law. I am grateful to my friends and family for their patient, fervent support of my work. Finally, I extend my warmest gratitude to my dear friend Kristen Vander-Plas for lending me her story, her strength, and her mentorship.

2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
8 E-mail from Kristin Vander-Plas to author (Jan 6, 2019, 04:01 CST) (on file with author).
Eventually, right before she received her bar exam results, Kristen heard another piece of news that brought her relief. The Texas Appeals Court in Amarillo dismissed the claim against her and awarded her attorneys’ fees, citing a state statute protecting individuals speaking out about matters of public interest from frivolous litigation.

Retaliatory defamation lawsuits against people speaking up about sexual violence are not unusual. In the age of “Me Too,” survivors have been emboldened to come forward and speak up about experiences with sexual violence and harassment.不幸地，他们的言论可能伴随着被起诉的代价。由那些被指控的人发起的诉讼。有些人，比如克里斯汀，是幸运的；他们的州有保护性法律，允许幸存者对诽谤诉状作出特别动议，以便迅速和容易地被驳回。然而，许多司法管辖区缺乏这些法律或其

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9. Id.
10. Id.
11. This Note specifically refers to civil defamation suits, including claims of libel and slander. There are a minority of states which maintain rarely-used criminal defamation statutes. The Supreme Court has discouraged such statutes, and their constitutionality has been called into question. This Note does not address the question of remedies for claims and questions under these criminal statutes. For more on criminal libel, see generally Gregory C. Lisby, No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 COMM. L. & POL’Y 433 (2004).
12. This Note uses the term “survivors” to refer to individuals who report having experienced sexual assault or harassment. The use of this term is not intended to reflect a formal determination of guilt or innocence of the accused party; rather, it is intended to reflect language those who have reported sexual violence are likely to use to describe themselves. See Alexandra Brodsky, “Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal, 32 COLUM. J. GENDER & L. 183, 184 n.3 (2017).
13. The “Me Too” movement (further described infra Part I.B.) is a social movement that began in 2017, largely online and in popular culture. The goal of the movement is to bring awareness to women’s experiences of sexual assault and harassment by encouraging those who have experienced sexual violence to speak up and say, “Me, too.” The movement has been wildly successful with young women and is largely considered to have ushered in an age of awareness and openness about sexual violence in American culture. Tarana Burke, History and Vision, ME TOO, https://metoomvmt.org/about/ (last visited May 7, 2019).
15. Defamation is a broad term used to describe claims of both libel and slander and other similarly damaging false claims. See 28 U.S.C.A. § 4101 (West 2018) (defining a defamation claim as “any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person”); see Vander-Plas v. May, No. 07-15-00454-CV, 2016 WL 5851913, at *3 (Tex. App. Oct. 4, 2016).
statutes lack the specificity necessary to best serve survivors of violence.\textsuperscript{16}

This Note explores the current state of protections for those speaking about sexual violence and recommends improvements to ensure that survivors’ First Amendment right of free speech is protected. In Part I, this Note explores the scope of the problem by drawing on media interviews with survivors who have experienced frivolous defamation claims, stories shared on social media, and resolved cases.\textsuperscript{17} These stories illustrate that fear of legal action is chilling to survivors who may come forward with their experiences of sexual violence. Part I further discusses the potential far-reaching consequences if survivors remain afraid of facing frivolous lawsuits for speaking up, including chilling free expression and fostering less safe work, home, and public environments for women and vulnerable individuals.\textsuperscript{18} Next, Part II explores the state of current anti-SLAPP law.\textsuperscript{19} It describes the variations of anti-SLAPP statutes by jurisdiction and divides states’ laws into three categories based on the protections they provide. Part III discusses how these differing protections may serve or fail survivors who are sued for speaking up.\textsuperscript{20} Part IV discusses how applicability of some anti-SLAPP statutes may shift in the “Me Too” era.\textsuperscript{21} Finally, Part V makes recommendations for protecting survivors’ rights to speak up about sexual violence going forward.\textsuperscript{22} These recommendations include improving existing anti-SLAPP statutes to ensure they protect survivors’ free speech rights and creating additional anti-SLAPP statutes.\textsuperscript{23}

\section*{I. The Problem}

Some context is important to show how SLAPPs impact survivors of sexual assault. First, the pervasiveness of sexual assault and harassment make this an ever-present issue for survivors. Second, the rise of the “Me Too” movement is a response to the overwhelming amount of often hidden sexual abuse. Third, experiences abound of those who, like Kristen Vander-Plas, faced SLAPP suits after speaking out about sexual violence. Finally, important First Amendment values are at stake

\begin{footnotesize}
\begin{enumerate}
\item See infra Part II.
\item See infra Part I.
\item See infra Part I.
\item SLAPPs are Strategic Lawsuits Against Public Participation. See infra Part II.
\item See infra Part III.
\item See infra Part IV.
\item See infra Part V.
\item See infra Part V.
\end{enumerate}
\end{footnotesize}
in ensuring that survivors maintain their rights to free speech in the “Me Too” era.

A. The Scope of Sexual Assault and Harassment

Sexual violence and sexual harassment are pervasive problems. An estimated one in five women and one in seventy-one men experience rape. Prevalence of non-penetrative sexual assault is even higher, with nearly one in three women and one in ten men reporting experiencing unwanted sexual contact. Half of all transgender and gender-expansive individuals experience sexual violence in their lifetimes.

At least one-fourth of women experience sexual harassment in the workplace. Despite the prevalence of these experiences, only about twenty percent of experiences of sexual violence are formally reported. Victims of sexual violence cite a variety of reasons for not reporting including fear of retaliation, a belief that an assault was not serious enough to warrant reporting, or concern that law enforcement could not or would not help.

25 Id. at 18.
26 Id. at 19. Estimates of experiences of rape and sexual violence among men and boys vary widely. This number, from the Department of Justice, is among the more conservative estimates. Other estimates place numbers of male victimization for general sexual abuse of men as high as one in six. Id. But see Shanta R. Dube et al. & R.F Whitfield, Long-term Consequences of Childhood Sexual Abuse by Gender of Victim, 28 AM. J. PREVENTIVE MED. 430, 433 (2005).
27 Gender-expansive is a term used throughout this paper to capture the full range of gender expressions and identities. See Resources on Gender Expansive Children and Youth, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/resources-on-gender-expansive-children-and-youth (last visited May 7, 2019).
B. The “Me Too” Movement

“If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” In the fall of 2017, this was the tweet heard and shared around the world. The request, based off a movement founded by anti-sexual violence activist Tarana Burke, caught fire when shared by actress and activist Alyssa Milano. Milano’s tweet came in the wake of the discovery that Harvey Weinstein and other powerful Hollywood men had sexually harassed and abused women across the entertainment industry for many years. The massive response to the tweet revealed to the world what many women already knew: This was not just a Hollywood problem. Thousands of women stated, “Me too,” on their own social media pages, shocking male friends and family members who had previously failed to grasp the extent to which women suffered from harassment.

Women and gender-expansive folks had been organizing around sexual violence for years, and this moment energized, centralized, and brought attention to their work. The “Me Too” movement, as it came to be called, took off fiercely and quickly. Survivors began implicating, naming, and shaming abusers from a variety of backgrounds.

Sexual harassers in the public eye were ousted from power and faced social consequences.
Of course, significant backlash met the rise of this movement. Critics, primarily men, expressed concern that the movement had gone “too far” in its attempt to hold harassers and abusers accountable. An often-voiced concern was that sexual violence allegations could irreparably damage careers. Others voiced concerns that the movement failed to distinguish between what they described as “low-level” offenses (such as lewd comments) and “serious” misconduct (such as serial rape), instead painting everyone named as a harasser as an irredeemable villain. Some expressed concern that the movement could disrupt the standards of behavior between men and women and place men in a position where they would be afraid of saying or doing something inadvertently offensive. An overarching theme was concern about the defamation of potentially faultless people and assertions about their right to have their innocence presumed. Concerns about reputations and false accusations have begun to play out in litigation seeking to stem the tide of reports.

C. SLAPP Suits and the Silencing of Survivors

Even prior to the start of the “Me Too” movement, civil litigation was used as a tool to silence individuals who spoke up about sexual violence. Defamation actions can be important

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Donald Trump, Supreme Court Justice Brett Kavanaugh—have seen few concrete consequences.
41 See id.
42 See id.
44 See Jenna Amatulli, Henry Cavill’s Me Too Comments Spark Strong Reactions on Twitter, HUFFINGTON POST (July 12, 2018, 10:06 AM), https://www.huffingtonpost.com/entry/henry-cavills-me-too-comments-spark-controversy-on-twitter_us_5b475159e4b022fdcc56a47a.
45 See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), https://twitter.com/realdonaldtrump/status/962348831789797381. Of course, the right to presumed innocence is granted by the Constitution to protect defendants from the presumption of guilt in a criminal trial. The Constitution does not grant individuals the right to be believed innocent of any misconduct by family, friends, or their society at large without a criminal conviction. See Coffin v. United States, 156 U.S. 432, 453–54 (1895); see generally Terese L. Fitzpatrick, Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in A Criminal Prosecution for Child Sexual Abuse, 12 UNIV. BRIDGEPORT L. REV. 175 (1991).
46 Ellen M. Bublick, Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies, 59 SMU L. REV. 55, 58 n.10 (2006) (citing the common problem of individuals sued for assault filing counterclaims for defamation).
tools in protecting the reputations of individuals, organizations, and businesses. However, these sorts of claims can threaten free speech when used in bad faith. Such suits are often referred to as Strategic Lawsuits Against Public Participation or “SLAPPs.”

Put simply, a SLAPP is filed with the intention of stopping someone from exercising his or her right to speak. These suits are generally filed without regard for whether the litigation will be successful. Instead, they seek to silence speech through the inconvenience and cost of litigation. These suits also have a chilling effect by preventing others from making similar statements in the future for fear of facing a lawsuit. In interviews given to Buzzfeed, both victims’ rights advocates and defense attorneys noted that their own experiences serving clients reflect an uptick in these claims being filed against individuals expressing that they have experienced sexual violence. Public discourse also reflects an uptick in concern about defamation suits related to assault or harassment, with people taking to social media and other online platforms to offer one another support around defamation claims.

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47 For example, the families of children murdered in a mass shooting filed a defamation suit against Alex Jones. The shooting took place on December 14, 2012 at Sandy Hook Elementary School. The gunman killed twenty children (between the ages of five and ten years old) and six educators. In the wake of the shooting Jones, an extremist commentator and well-known conspiracy theorist, repeatedly stated that the shooting had been staged and that the families of the victims were paid actors. See James Barron, Nation Reels After Gunman Massacres 20 Children at School in Connecticut, N.Y. TIMES (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html; Elizabeth Williamson, Judge Rules Against Infowars and Alex Jones in Sandy Hook Lawsuit, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/politics/alex-jones-infowars-sandy-hook-lawsuit.html.

48 This term was coined by George Pring, professor at University of Denver College of Law. When he coined the term, SLAPP suits were generally only those defamation suits which targeted individuals seeking to petition the government; now, SLAPP suits are understood to target more broad speech on matters of public interest, including allegations of sexual violence or harassment. George W. Pring & Penelope Canan, Strategic Lawsuits Against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders, 12 UNIV. BRIDGEPORT L. REV. 937, 962 (1992) at 937–38; Sexual Assault and Domestic Violence SLAPPs, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/slapps-against-sexual-assault-and-domestic-violence-survivors/ (last visited May 7, 2019).

49 Pring & Canan, supra note 48, at 937–38.

50 Id.

51 Id.

52 Id.


54 Alisha Grauso (@alishagrauso), TWITTER (June 18, 2018, 6:49 PM), https://twitter.com/AlishaGrauso/status/1008889359909548032; TIME’S UP DEFENSE FUND, https://www.timesupnow.com/ (last visited May 7, 2019); Bruce
For survivors of sexual violence, SLAPPs can be especially chilling. For most SLAPP defendants, defending against a defamation suit is financially burdensome and time consuming. While the costs of defending a defamation suit for an individual can vary depending on the circumstance, they are likely the same as other types of civil claims, ranging from $43,000 (for an automobile claim) to $91,000 (for a contract claim). Coupled with the reality that lower-income individuals typically face higher rates of sexual violence, the financial burdens of defending against a SLAPP are particularly threatening for survivors.

Furthermore, survivors of sexual violence may face a greater emotional and mental health burden than other SLAPP defendants. Defending against a defamation suit may require frequent retelling of the assault or harassment and the frequent reliving of any associated trauma. If victims’ personal information, details of the violence, or their response to it is revealed through the discovery process, they may face embarrassment or shame. Survivors are likely to face stress and trauma from the continued interaction with an abuser required by the process of litigation.

One woman, “Jane,” reported to the student conduct office at Washington University at St. Louis that her ex-husband...
had raped her. After being found responsible by the conduct board, Jane’s ex-husband sued her for defamation. The cost of defending herself against this claim was twice her monthly income, reaching $20,000 even in the early stages of the lawsuit. The suit also had an emotional impact on Jane, who lamented, “I thought I was done suffering at the hand of this person. I thought he was done making my life miserable. All of a sudden I’m being sued.”

Recent high-profile cases reflect a similar story. Musical artist, Taylor Swift, was unsuccessfully sued for defamation by a man whom she accused of touching her inappropriately during a meet and greet. In her testimony at the jury trial, she expressed a sentiment common among SLAPP-ed survivors. When asked about damage to the plaintiff’s reputation, Taylor stated “I am being blamed for the unfortunate events of his life that are a product of his decisions and not mine.”

D. First Amendment Rights At Stake

This use of the legal system to silence survivors negatively impacts survivors and may have negative impacts for society at large. Generally, SLAPPs threaten citizens’ First Amendment rights to free speech and to petition the government, which are “principal pillar[s] of a free government.” Today, freedom of expression is more than a principal of a free government—it is a promise of American society that has taken on a nearly legendary quality. What was instituted initially as a tool to prevent political tyranny is seen today as the sacred birthright of all citizens.

As the “Me Too” movement has demonstrated, free speech at its best can point out wrongs, demand accountability,
and encourage change. 70 Speech holds the power to teach and share. However, due to historic oppression and limitations on the speech of women and people of color, the speech of those most vulnerable to social oppression has often gone unheard. 71 The impact has been that social norms, policies, and attitudes which contribute to oppression have thrived, unchallenged. 72 While the tides of free expression appear to be turning towards more freedom for all, these deeply engrained historic and social dynamics mean that speech of those at the margins is still vulnerable to being chilled or silenced completely. 73

In discussing sexual violence, the rights of speech and petition are especially important. Speaking out about sexual violence can have the practical effect of holding perpetrators accountable for their actions within their social, personal, and professional circles. 74 Over time, this level of accountability may have a deterrent effect on individuals who would otherwise engage in violence and harassment. 75 For example, sharing information about predatory individuals through “whisper networks” is a method that non-male individuals have historically used to protect one another from known abusers and harassers. 76

Free expression is an important tool that, when wielded effectively by survivors, can have the impact of shifting social attitudes and dynamics around sexual violence. The silencing of survivors and victims through SLAPP suits threatens to turn back the hard-won progress oppressed people have made in exercising their right to free expression. Silencing survivors speaking up threatens the safety of those who may be harassed and the ability of society to hold harassers accountable. It threatens the free speech rights of those most vulnerable.

II. The State of Anti-SLAPP Law

A survivor who exercises their First Amendment right and speaks up truthfully about their experience of sexual assault

70 See Chicago Tribune Staff & Hawbaker, supra note 35.
71 Mary Anne Franks, Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment, RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366, 366–370 (Robin West & Cynthia Bowman eds., 2019).
72 Id.
73 Id. at 384.
74 See Chicago Tribune Staff & Hawbaker, supra note 35.
75 Id.
76 One such whisper network was contained in an online spreadsheet entitled “SHITTY MEDIA MEN” and was distributed among individuals who regularly work with members of the media. Alex Press, It’s Time to Weaponize the Whisper Network, Vox News (Oct. 17, 2017, 10:02 AM), https://www.vox.com/first-person/2017/10/16/16482800/harvey-weinstein-sexual-harassment-workplace.
has done nothing legally wrong. It may come as a shock to many, then, to suddenly find themselves a defendant in a legal action. Often, a survivor’s immediate concern might be how to make the legal action go away as quickly as possible. If the survivor is fortunate enough to live in a jurisdiction with strong Anti-SLAPP protections, they may have an opportunity to see the case dismissed.

Anti-SLAPP statutes are laws that provide a special protection for individuals facing SLAPPs. These statutes allow defendants—for our purposes, sexual assault survivors—in potential SLAPP actions to file a special motion to dismiss in response to the complaint. The purpose of such a motion is to provide the defendant an opportunity to have a nuisance suit dismissed quickly and easily prior to the discovery phase, saving them significant time, expense, and emotional energy. When defendants file a traditional motion to dismiss a suit filed against them, the defendant is responsible for demonstrating that the suit is without merit. However, if a defendant prevails on an anti-SLAPP motion, the burden shifts to the plaintiff, who must then prove that their case has merit to avoid dismissal. Furthermore, many anti-SLAPP laws also include provisions requiring the plaintiff to pay costs and attorneys’ fees to the person they sued when an anti-SLAPP motion is successful. Unfortunately, only thirty-one states and the District of Columbia have anti-SLAPP statutes, and anti-SLAPP laws vary significantly by jurisdiction. There is no federal anti-SLAPP statute, though in

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77 Michael C. Denison, SLAPP Happy Courts Continued to Refine the Reach of the Anti-SLAPP Law in Numerous Decisions in 2010, L.A. LAW, 21, 21–22 (June 2011).
78 Id.
79 Id.
81 Id.
82 Id.
83 States which do not have anti-SLAPP statutes or case law establishing an anti-SLAPP motion include Alabama, Alaska, Idaho, Iowa, Kentucky, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Wisconsin, and Wyoming. State Anti-SLAPP Laws, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/ (last visited May 7, 2019). Both Colorado and West Virginia have established a special anti-SLAPP motion in case law, but it has not been recorded as a statute. See generally Harris v. Adkins, 432 S.E.2d 549, 551 (1993) (establishing anti-SLAPP protections in West Virginia for speech related to petitioning activities such as testifying before the government, seeking redress from courts, requesting services from administrative bodies); Protect Our Mountain Env’t, Inc. v. Dist. Court in & for Jefferson Cty., 677 P.2d 1361 (Colo. 1984) (establishing anti-SLAPP protections in Colorado for speech related to petitioning activities such as testifying before the government, seeking redress from courts, requesting services from administrative bodies).
the past, courts have generally held that state anti-SLAPP statutes can be applied in diversity cases applying state law. \(^{84}\)

In analyzing an anti-SLAPP motion, the court considers (a) whether the speech in question is protected under the statute and (b) if the speech is protected, whether the plaintiff can make a showing that they have a probability of prevailing on a defamation claim. \(^{85}\) If the defendant can demonstrate that their speech was protected under the statute, the burden shifts to the plaintiff to prove they have a probability of prevailing on their claim in order to prevent the claim from being dismissed as a SLAPP suit. \(^{86}\)

A. Protected Speech

The types of speech protected under anti-SLAPP statutes vary widely by state but can generally be delineated into three categories: Formal Petition Protections, Political Participant Protections, and Broad Anti-SLAPP Protections. \(^{87}\)

First, some anti-SLAPP statutes, Formal Petition Protections, protect speech made only as part of “petitioning the government” and only when made before an official government body. \(^{88}\) Anti-SLAPP statutes that are protections for formal petitions seek to protect First Amendment rights to petition without disturbing individual rights to seek damages for defamatory statements. \(^{89}\) For instance, Hawaii’s anti-SLAPP statute limits application to “lawsuit[s] . . . that [are] solely based

\(^{84}\) See generally Katelyn E. Saner, *Getting SLAPP-ED in Federal Court: Applying State-Anti-SLAPP Special Motions To Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013). Recently, there has been a departure from the general acceptance of applying state anti-SLAPP statutes in federal court. The D.C. Circuit has held that D.C.’s anti-SLAPP law conflicts with the Federal Rules of Civil Procedure and thus cannot be applied in diversity cases. See Abbas v. Foreign Policy Grp., 783 F.3d 1328 (D.C. Cir. 2015). The 9th Circuit has held that the broad idea that state anti-SLAPP statutes ought to be applied in all federal cases is incorrect; instead, such statutes should only be applied when they attack the legal—rather than the factual—sufficiency of the plaintiff’s complaint. See Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress, 890 F.3d 828, 834 (9th Cir. 2018). For now, whether courts will continue to apply state anti-SLAPP statutes in federal cases remains a somewhat open question. See generally Saner, supra note 84.

\(^{85}\) Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010). Which speech is covered as well as the burden the plaintiff must meet to make their case also varies by jurisdiction. *State Anti-SLAPP Laws*, supra note 83.

\(^{86}\) Id.

\(^{87}\) To my knowledge, no other authors have similarly categorized Anti-SLAPP statutes.

\(^{88}\) States in this category include: Hawaii (HAW. REV. STAT. ANN. § 634F-1 (West 2019)), Missouri (MO. ANN. STAT. § 537.528 (West 2019)), New Mexico (N.M. STAT. ANN. § 38-2-9.1 (West 2019)), Oklahoma (OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2019)), Tennessee (TENN. CODE ANN. § 4-21-1003 (West 2019)), and Washington (WASH. REV. CODE ANN. § 4.24.510 (West 2019)). See also *State Anti-SLAPP Laws*, supra note 83.

\(^{89}\) Id.
on the party's public participation before a governmental body. 90 Under this and similar statutes, statements such as those made in a legislative hearing, formal statements made to encourage a change in laws or law enforcement, or statements requesting government action are protected as long as they are made and submitted through formal channels, like a petition or testimony. 91 For example, in Cordova, the Supreme Court of New Mexico found that statements made in the course of participation in a formal recall petition against a school board representative were protected under the anti-SLAPP law. 92

The second category of statutes, Political Participant Protections, provide protections for people who speak in any forum as long as the speech touches on specific public interest issues, generally those under consideration by a government body. 93 Utah's statute protects speech made in any forum by broadly protecting “participat[ion] in the process of government” rather than speech made before a government body. 94 This statute and others like it protect statements made on social media, at public gatherings, or in other public spaces as long as the comments pertain to a matter currently under consideration by a government body. 95 Such statutes seek to protect the rights

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92 Interestingly, in this case, the court upheld that plaintiff's right to petition was protected under the anti-SLAPP statute even though the petition itself was largely baseless. Cordova v. Cline, 396 P.3d 159, 161 (N.M. 2017). But see Perry v. Perez-Wendt, 294 P.3d 1081, 1087 (Haw. Ct. App. 2013) (holding that "an individual's unsolicited and informal communication with a government official, when there is no formal process or procedure in progress" does not constitute sufficient petitioning activity to trigger the protection of Hawaii’s anti-SLAPP statute).
94 Utah Code Ann. § 78B-6-1403 (West 2018).
of citizens to petition the government and speak freely about issues under consideration by the government while still protecting individuals’ rights to seek damages for defamatory statements. For example, in Blanchard, a hospital president’s statement to the media related to an ongoing Department of Mental Health investigation was protected.

The final category of statutes, Broad Anti-SLAPP Protections, are the least restrictive. Broad Protections protect any speech that is made in any forum in connection with any issue of public interest. California’s anti-SLAPP law protects “any act . . . in furtherance of the . . . right of petition or free speech . . . in connection with a public issue.” This statute and others in this category protect statements made on social media, at public gatherings, or in other public spaces even when the comments are not under consideration by the government as long as the comments pertain to an issue of public interest. These statutes protect free speech rights of individuals while providing opportunities for individuals to seek damages when speech is truly defamatory. For example, in Deaver, a defendant created a website on which he wrote extensively about plaintiff, an attorney’s, supposed racist and sexist beliefs and their impact on his work. Because the public had an interest in

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97 Blanchard v. Steward Carney Hosp., Inc., 75 N.E.3d 21, 31–32 (Mass. 2017). But see id. at 32–33 (noting that the same administrator’s emails to staff were not protected because they specifically dealt with staffing issues rather than the investigation itself and because, by virtue of being internal, was not made in a public forum).
100 See e.g., CAL. CIV. PROC. CODE § 425.16 (West 2019); CONN. GEN. STAT. ANN. § 52-196a (West 2019); D.C. CODE ANN. § 16-5501 (West 2019); 735 ILL. COMP. STAT. ANN. 110/15 (West 2019); IND. CODE ANN. § 34-7-7-1 (West 2019); KAN. STAT. ANN. § 60-5320 (West 2019); LA. CODE CIV. PROC. ANN. art. 971 (2019); ME. REV. STAT. tit. 14, § 556 (West 2019); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2019); OR. REV. STAT. ANN. § 31.150 (West 2019); R.I. GEN. LAWS ANN. § 9-33-2 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019); VT. STAT. ANN. tit. 12, § 1041 (West 2019); State Anti-SLAPP Laws, supra note 83.
101 Id.
statements about an attorney’s fitness to represent clients, the anti-SLAPP statute protected the defendant’s statements.\textsuperscript{103}

\textbf{B. Probability of Prevailing}

If a defendant successfully shows that the speech in question is protected under a state’s anti-SLAPP statute, the burden shifts to the plaintiff to establish a reasonable probability of prevailing on their defamation claim.\textsuperscript{104} Essentially, the plaintiff must establish that “the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”\textsuperscript{105} Generally, the court may look to the pleadings and any supporting affidavits to determine whether the plaintiff has demonstrated a reasonable probability of prevailing.\textsuperscript{106}

Though defamation laws vary by jurisdiction, pleading a defamation claim generally requires the plaintiff to demonstrate a probability of prevailing on three elements: (a) the defendant made a false or defamatory statement, (b) the statement was published to a third party, (c) the plaintiff was damaged by defendant’s statement, (d) the requisite mental state.\textsuperscript{107}

These elements are subject to exceptions. In some cases, the defendant’s statement may be protected or privileged under another statute.\textsuperscript{108} Often, states consider police reports, misconduct reports to an administrative agency, and similar statements to be protected.\textsuperscript{109} In the case of protected statements, the plaintiff must generally demonstrate that the defendant made the statement with malice—that they made the statement when they had reason to doubt that it was true.\textsuperscript{110} The malice requirement also applies when the plaintiff is a person of public interest, such as a celebrity or a politician.\textsuperscript{111} If a showing of actual malice is required, to overcome an anti-SLAPP motion
the plaintiff must also demonstrate a probability of prevailing on the claim that statements were made with malice.¹¹²

III. SEXUAL ASSAULT ALLEGATIONS AND ANTI-SLAPP MOTIONS

At first glance, anti-SLAPP statutes seem like a promising tool for ensuring free expression and protecting individuals who make sexual assault allegations. However, when applied, survivor-defendants¹¹³ in these cases face significant challenges on the path to having an anti-SLAPP motion granted. First, the survivor-defendant must show that the assault allegations themselves are the sort of speech protected by the anti-SLAPP statute. Even if the survivor-defendant is successful in showing that the anti-SLAPP statute applies, their motion will still fail if the accused-plaintiff can establish a reasonable likelihood of prevailing on their case.

A. Protections for Allegations Under Anti-SLAPP Statutes

In an ideal circumstance, a survivor sued for defamation would be protected by a statute that allowed them to file an anti-SLAPP motion in response to the suit. A successful anti-SLAPP motion would shift the burden from the survivor-defendant to the accused-plaintiff.¹¹⁴ Instead of the survivor-defendant having to demonstrate that the suit is without merit to have it dismissed, the accused-plaintiff would have to prove that their suit had merit in order to prevail.¹¹⁵ Unfortunately, even in jurisdictions that have anti-SLAPP statutes, survivors aren’t always protected.

Whether an anti-SLAPP statute protects allegations of sexual assault is highly dependent on both the facts of the case and the jurisdiction in which the speech was made.¹¹⁶ The degree of protection anti-SLAPP statutes offer survivors is largely based on whether the statute is a formal petition protection, a political participant protection, or a broad anti-SLAPP protection.¹¹⁷

¹¹³ Overwhelmingly, when the facts of a case involve a sexual assault, the person accused of sexual assault is the defendant. SLAPPs flip the familiar formula on its head, instead positioning the accused person as the plaintiff and the survivor as the defendant. Because the arrangement of the parties in these cases is counterintuitive, I have adopted special terms to provide greater clarity. “Accused-Plaintiff” refers to the person accused of sexual assault who has now initiated a lawsuit for defamation. “Survivor-Defendant” refers to the person who made an accusation of sexual assault and is now facing a lawsuit.
¹¹⁴ Denison, supra note 77, at 21–22.
¹¹⁵ Id.
¹¹⁶ State Anti-SLAPP Laws, supra note 83.
¹¹⁷ See infra Part II.A.
1. Formal Petition Protections

Anti-SLAPP statutes that protect formal petitioners limit the speech which is protected by the statute in both forum and subject. In these jurisdictions, the statutes generally do not protect survivors of sexual violence who choose to speak up about abuse unless the speech is made in connection with an official petition in some way, relating to a matter in which they are seeking intervention or help from the government. In the seven states with restrictions on both forum and topic of protected speech, there is a noticeable lack of case law interpreting how speech protections may be applied, if at all, to allegations of sexual violence. Although it is difficult to state a definitive reason, this may be because the requirements of the anti-SLAPP statutes are so strict that survivors sued in SLAPPs realize the futility of attempting to apply the anti-SLAPP statute.

Saldivar v. Momah, a Washington Supreme Court case, demonstrates how strictly courts interpret petitioning activity. In this case, the anti-SLAPP statute protected a patient’s reports of sexual abuse by multiple doctors to the police and the Medical Quality Assurance Commission because they were petitioning activity-seeking redress from the government. The


120 See e.g., Bruce Johnson & Antoinette Bonsignore, Protect #MeToo Victims from Retaliatory Lawsuits, SEATTLE TIMES (Jan. 23, 2018), https://www.seattletimes.com/opinion/protect-metoo-victims-from-retaliatory-lawsuits/ (describing the futility of applying Washington’s anti-SLAPP law to most cases raised in the context of #MeToo).

121 In Davis v. Cox, the Washington Supreme Court held that a newer anti-SLAPP statute, RCW 4.24.525, was unconstitutional on its face because it required plaintiff to meet a “clear and convincing” standard in demonstrating their prima facie claim, thus interfering with the right to jury trial. WASH. REV. CODE § 4.24.525 (2010); Davis v. Cox, 351 P.3d 862, 864 (2015). Saldivar v. Momah was decided under RCW 4.24.510, which does not employ the clear and convincing standard and which is the anti-SLAPP law currently used in Washington. See generally WASH. REV. CODE. § 4.24.510 (West 2019). See also Saldivar, 186 P.3d. at 1117.

122 Interestingly, in Saldivar the trial court’s finding that the patient was not a credible witness was not alone sufficient to support the claims brought against her. See Saldivar, 186 P.3d. at 1129.

123 Id. (citing Reid v. Dalton, 100 P.3d at 356 (2004) (noting in particular that litigation that does not bring a bona fide complaint does not receive protection under the anti-SLAPP statute)).
statute, however, did not protect the claims made in the patient’s civil suit, because “[a] plaintiff who brings a private lawsuit for private relief is not seeking official governmental action, but rather redress from the court.”

However, another case indicates that complaints to administrative bodies regarding sexually abusive behavior constitute petitioning the government for the purposes of the anti-SLAPP statute.

In effect, these laws protect allegations of sexual violence only when they are made to a law enforcement or administrative body with the purpose of seeking intervention. In most cases, laws that limit anti-SLAPP protections to petitioning activity are unlikely to sufficiently protect individuals who speak out about sexual violence. Given that the majority of survivors do not make a formal report, statements about abusers often cannot be tied to a petition of the government. For that reason, laws that fall into this category are unlikely to establish sufficient protections for an individual speaking publicly about sexual violence.

2. Political Participant Protections

Anti-SLAPP statutes that shield political participants protect speech made in any forum but require the speech to be related to a matter in which there is a petition for government redress. In these jurisdictions, individuals have significantly more flexibility in where and how they discuss allegations of sexual violence; however, the requirement that their speech is related to ongoing government action remains. Courts applying these statutes generally take a broader view of what

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126 Id.; Saldivar, 186 P.3d at 1129.

127 Plante et al., supra note 31, at 6–7.


129 Id.
constitutes petitioning activity than courts have when interpreting anti-SLAPP statutes that are only protections for petitioners. Generally, filing a civil lawsuit or an administrative complaint is sufficient to establish petitioning activity for purposes of statutes that protect political participants.

For example, in Rogers v. Dupree, a Georgia case, a housekeeper experiencing sexual harassment by her employer recorded a video of a sexual encounter with him. The housekeeper’s attorneys used this video along with a demand letter to try to negotiate a settlement with the employer before filing an official complaint. Soon after, the employer who had been accused of sexual harassment filed suit against the housekeeper’s attorneys. The lawsuit solely dealt with the demand letter and communications taking place before the attorneys filed suit. The attorneys’ attempt to use the anti-SLAPP statute to have the suit dismissed was unsuccessful because their actions before the claim was filed were not connected to petitioning activity or an issue under consideration by a government body at the time.

This category of laws is similar in effect to laws that limit protection both by forum and type of speech in that they require an allegation of sexual violence to be made to some government or administrative body. Even though these statutes tend to interpret what qualifies as petitioning activity more broadly, they do not address the major problem of the laws which limit protection by forum and topic, that many survivors do not make a formal report. Laws which fall into this category offer increased protections to survivors speaking up about sexual violence, but they are still unlikely to protect survivors in most cases.

3. Broad Anti-SLAPP Protections

Broad anti-SLAPP statutes do not limit the speech protected by the statute by either forum or subject. In these

131 See, e.g., id. (holding that an administrative complaint filed with the Massachusetts Commission Against Discrimination was petitioning activity protected under the statute.).
133 Id. at 6.
134 Id.
135 Id. at 5.
136 PLANTY ET AL, supra note 31.
137 Jurisdictions in this category include: California (CAL. CIV. PROC. CODE § 425.16 (West 2019)), Connecticut (CONN. GEN. STAT. ANN. § 52-196a (West 2019)), D.C. (D.C. CODE ANN. § 16-5501 (West 2019)), Illinois (735 ILL. COMP. STAT. ANN.
julusions, anti-SLAPP statutes protect any statement made in
any forum on any topic of public interest. 138 In litigation, whether
statutes in this category protect a sexual assault allegation often
depends on whether or not it is of public interest. 139 Generally,
allegations which relate to ongoing petitioning activity or which
are against a public figure will always be a topic of public
interest. 140 When made against a person not in the public eye, an
allegation of sexual assault may still be a matter of public interest
if it is connected to some larger conversation or controversy. 141
When the issue concerns systemic abuse or others at future risk
for abuse, the speech is more likely to be of interest to the
public. 142

In Steep Hill Laboratories v. Moore, a accused-plaintiff’s
allegation that her employer, who was not a public figure, had
sexually harassed her was determined to not be of public interest
because it only involved the survivor, the accused person, and
others within the office. 143 On the other hand, in a case where
the survivor-defendant made allegations that Conroy, a
politician running for office, had sexually abused former
employees, the allegations were deemed to be of public interest. 144
Conroy was a public figure, and thus the public had an interest in weighing this information to determine his fitness

110/15 (West 2019)), Indiana (IND. CODE ANN. § 34-7-7-1 (West 2019)), Kansas
(KAN. STAT. ANN. § 60-5320 (West 2019)), Louisiana (LA. CODE CIV. PROC. ANN.
art. 971 (2019)), Maine (ME. REV. STAT. tit. 14, § 556 (2019)), Maryland (MD. CODE
ANN., CTS. & JUD. PROC. § 5-807 (West 2019)), Oregon (OR. REV. STAT. ANN. §
Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019)), and Vermont
(VT. STAT. ANN. tit. 12, § 1041 (West 2019)). See also State Anti-SLAPP Laws, supra
note 83.
138 Id.
(holding that while the eradication of workplace sexual harassment constitutes an
issue of public interest, and individual report of workplace harassment does not
invoke that interest).
140 See Schwern v. Plunkett, 845 F.3d 1241, 1245 (9th Cir. 2017) (accepting both
parties’ stipulation that a wife’s comment on her husband’s rape arrest was
connected to an issue of public interest); Conroy v. Spitzer, 83 Cal. Rptr. 2d 443, 446
141 Steep Hill Labs., Inc. v. Moore, No. 18-CV-00373-LB, 2018 WL 1242182, at *7
(N.D. Cal. Mar. 8, 2018); Eli Rosenberg & Christine Phillips, Accused of Rape, Former
Baylor Fraternity President Gets No Jail Time After Plea Deal, WASH. POST (Dec. 11,
former-frat-president-gets-no-jail-time-after-plea-deal-da/?noredirect=on&utm_term=.8f9ba9be6795 (demonstrating how an isolated
allegation can garner public interest if connected to a larger controversy, such as
lenient sentencing of campus rapists or the Baylor rape scandal.).
2017) (holding that allegations of systemic issues of sexual violence or harassment
impacting a community or industry at large are issues of public interest).
143 Steep Hill, 2018 WL 1242182, at *7. But see Olaes, 38 Cal. Rptr. 3d at 474.
for office.\(^{145}\) In *Brenner v. Hill*, allegations of industry professionals’ sexual abuse of models contained in a “blacklist” distributed among the modeling community were of public interest because they tied into a larger conversation about how workplace sexual violence impacted women in the modeling industry.\(^{146}\)

This category of laws provides the most expansive protections for individuals making complaints of sexual violence. An individual’s speech is not required to be related to petitioning activity or to be made in a particular forum.\(^{147}\) As a result, informal allegations and conversations may be protected.\(^{148}\) However, the requirement of proving that the allegations are of public interest still means that an allegation made in isolation, without clear public purpose, often does not trigger the law’s protection.\(^{149}\) Even when survivor-defendants can establish that their allegations are protected by the statute, accused-plaintiffs may still defeat the motion by demonstrating a likelihood that they will prevail on a case of defamation.\(^{150}\)

**B. Likelihood of Prevailing on a Defamation Claim against Allegations of Sexual Violence**

When a court finds that a sexual assault allegation is protected under the anti-SLAPP statute, the burden shifts to the accused-plaintiff to establish a reasonable probability of prevailing on their defamation case.\(^{151}\) To prevail, the accused-plaintiff must technically do more than establish a *prima facie* case. Still, the bar for prevailing is quite low.\(^{152}\) In determining the strength of the accused-plaintiff’s case, the court will consider only the complaint and facts alleged in signed affidavits.\(^{153}\) Because anti-SLAPP motions are filed at the motion to dismiss stage, the court must interpret all facts in the light most favorable to the accused-plaintiff.\(^{154}\) The court generally will not “weigh evidence or resolve conflicting factual claims.”\(^{155}\) In most cases, as long as the accused-plaintiff successfully pleads all elements of

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\(^{145}\) Id.


\(^{147}\) *See* *Conroy*, 83 Cal. Rptr. 2d at 446–47.

\(^{148}\) Id.

\(^{149}\) *See* *Olaes v. Nationwide Mut. Ins.*, 38 Cal. Rptr. 3d 467, 474 (Cal. Ct. App. 2006).

\(^{150}\) Denison, *supra* note 77, at 21–22.

\(^{151}\) Id.

\(^{152}\) Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 598–99 (9th Cir. 2010).

\(^{153}\) Id. at 598.


\(^{155}\) *See, e.g.*, Baral v. Schnitt, 376 P.3d 604, 608 (Cal. 2016).
a defamation claim and claims facts supporting these elements, they will have established a sufficient probability of prevailing.\textsuperscript{156}

1. False Statement

The accused-plaintiff must establish that the survivor-defendant has made a false statement.\textsuperscript{157} Who has the burden of demonstrating truth or falsehood varies widely based on jurisdiction, whether the parties are public figures, and whether the issue is one of public interest. The theory behind having standards that differ by scenario is that the less public the parties and the topic of the speech, the less value the speech has.\textsuperscript{158} Lower value speech can be regulated more significantly with less concerns that those regulations might violate the First Amendment.\textsuperscript{159} More public speech, however, has higher value under the First Amendment, and is generally provided higher protections from interference.\textsuperscript{160}

In scenarios where both the plaintiff and the defendant are private figures and the information shared is not of public interest, states may apply common law standards and presumptions.\textsuperscript{161} The common law standard places no burden on plaintiffs to demonstrate that the statements are false and assume falsity instead.\textsuperscript{162} Defendants can overcome this presumption by proving falsity as a defense.\textsuperscript{163} On the other hand, in some scenarios, the burden of demonstrating that the statement is false falls to the plaintiff.\textsuperscript{164} When the plaintiff is a public figure, they carry the burden of proving that statements are false.\textsuperscript{165} When the claims are about private figures but are of public interest, the plaintiff also must demonstrate that the statement is false.\textsuperscript{166}

For the purposes of defeating an anti-SLAPP motion related to claims of sexual violence, the accused-plaintiff’s unequivocal denial of the allegation is typically sufficient to establish that the statement is false.\textsuperscript{167} For example, in Heineke, a federal district court applying California’s anti-SLAPP statute, a professor was accused of having sexually harassed a student.\textsuperscript{168}

\textsuperscript{156} \textit{See e.g.}, Mindys, 611 F.3d at 599.
\textsuperscript{157} Cweklinsky v. Mobil Chem. Co., 364 F.3d 68, 73 (2d Cir. 2004).
\textsuperscript{159} \textit{Id}.
\textsuperscript{160} \textit{Id}.
\textsuperscript{162} \textit{Id}.
\textsuperscript{163} \textit{Id}.
\textsuperscript{165} \textit{New York Times}, 376 U.S. at 279.
\textsuperscript{166} \textit{Philadelphia Newspapers}, 475 U.S. at 776.
\textsuperscript{168} \textit{Id}.
The professor’s complaint alleging that the survivor-defendant’s sexual assault accusations were false combined with his wife’s affidavit supporting that claim were enough to establish his likelihood of prevailing on the claim. However, failure to completely deny the truth of the allegations or failure to deny the allegations at all can be fatal to the accused-plaintiff’s attempt to establish that they have a probability of prevailing. In *Spelling*, the accused-plaintiff filed a defamation claim after being accused of sexually harassing his home health aide. Sessions, the woman who had accused Spelling, filed an anti-SLAPP motion in response to his defamation claim. Spelling failed to establish a probability of prevailing on the claim because he did not state that the harassment had not occurred, but rather, that he could not recall whether it had.

2. Publication

For the purposes of showing the probability of prevailing against an anti-SLAPP motion, the accused-plaintiff must only allege that the survivor-defendant made their statement to someone else and identified the accused-plaintiff. If the survivor-defendant makes an allegation or multiple allegations of sexual violence without actually identifying the accused-plaintiff by name, the accused-plaintiff can still satisfy the publication element by meeting a low bar. The accused-plaintiff must show that, taken as a whole, the survivor-defendant’s statements are likely to identify him. In *Bayhi*, the accused-plaintiff, a priest, had been accused of having knowledge of the sexual abuse of a child and failing to report it. A news program reported on the story and incorrectly included a graphic stating that the accused-plaintiff was a priest. In a voiceover paired with the graphic, the program correctly stated that Friar Bayhi was only accused of failing to report the abuse. Despite the conflicts between the two statements, taken as a whole, the broadcast was

169 Id.
171 See generally id. (holding that the plaintiff did not establish a probability of prevailing because he did not deny the allegations of sexual assault).
172 Id. at *5.
175 Id.
176 Id.
177 Id.
178 Id.
deemed to be sufficient to have potentially identified Friar Bayhi as the abuser.\footnote{Id.}

3. Damage

Generally, in order to prove a probability of prevailing on a defamation claim, the accused-plaintiff must show that the statement in question had a damaging impact.\footnote{See Cweklinsky v. Mobil Chem. Co., 364 F.3d 68, 73 (2d Cir. 2004).} In most jurisdictions, allegations that an individual has committed a serious or violent crime constitute \textit{per se} defamation;\footnote{New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).} when this kind of crime is falsely alleged, it is presumed to be damaging to an accused-plaintiff’s reputation.\footnote{Id.} Allegations of sexual violence are generally considered defamatory \textit{per se}, so the accused-plaintiff does not need to show any other damages to defeat an anti-SLAPP motion.\footnote{Id.} In \textit{Miranda}, Miranda accused the plaintiff, Byles, of sexually abusing his granddaughter.\footnote{Miranda v. Byles, 390 S.W.3d 543, 552 (Tex. App. 2012).} Because Miranda’s statements constituted defamation \textit{per se}, Byles was not required to demonstrate that the statements had been damaging.\footnote{Id.}

4. Fault

Finally, in order to prevail on a defamation claim, the accused-plaintiff must show that the survivor-defendant had a particular mental state. Generally, he accused-plaintiff must show that the speaker spoke negligently, or without regard for the truth or falsehood of the statement.\footnote{Cweklinsky v. Mobil Chem. Co., 364 F.3d 68, 73 (2d Cir. 2004).} An accused-plaintiff’s claim that the survivor-defendant knew or ought to have known that the allegations of sexual assault were not true is enough to satisfy this element for purposes of defeating an anti-SLAPP motion.\footnote{See Heineke v. Santa Clara Univ., 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).} For example, in \textit{Heineke}, a student accused a professor of sexually harassing her. Heineke, the professor, claimed that the student knowingly made a false accusation. This was enough to demonstrate a likelihood of prevailing on this element for the purposes of surviving the anti-SLAPP motion.\footnote{Id.} In some special cases, the accused-plaintiff must reach a higher burden to establish the mental state needed for a...
defamation claim.\textsuperscript{189} When these cases are implicated in an anti-SLAPP motion, the accused-plaintiff must also show a likelihood of prevailing on an additional element or burden in order to show a likelihood of prevailing in their case.\textsuperscript{190} The most common additional burden accused-plaintiffs must overcome is demonstrating that the defendant acted in malice. The malice requirement is not, as it sounds, a requirement that the speaker act in bad faith.\textsuperscript{191} Instead, it simply requires that the speaker had reason to seriously doubt the truth of the statements they made and, nevertheless, they made those statements anyway.\textsuperscript{192} Though jurisdictions vary, the requirement for malice is generally triggered when the accused-plaintiff is a person of public interest (such as a celebrity or politician) or the survivor-defendant was exercising a right that is otherwise privileged under the law (like filing a police report or making a complaint to human resources).\textsuperscript{193}

Unlike asserting that the survivor-defendant’s allegations are false, simply asserting that the survivor-defendant acted with malice is generally not sufficient to establish a probability of prevailing.\textsuperscript{194} The accused-plaintiff must generally provide support or corroboration for the claim that the allegation was made with malice.\textsuperscript{195} For example, in *Vander-Plas*, the plaintiff, May, was a politician accused of sexual assault and harassment.\textsuperscript{196} Because May was a public figure, he was required to show that Vander-Plas’s claim of sexual violence had been made with malice.\textsuperscript{197} His statement in his complaint that he believed her claims to be made with malice was not sufficient to establish a probability of prevailing.\textsuperscript{198} However, in *Picozzi*, an plaintiff was accused of sexual harassment in a privileged report made to an employer.\textsuperscript{199} The accused-plaintiff established a probability of prevailing on the element of actual malice by

\textsuperscript{190} It is important to note that “malice,” as it is used in this area of the law, does not simply mean that the speaker acted with ill will. In order to have acted with malice, the speaker must have entertained serious doubts about the truth of their statement and made the statement anyway. See Cuba v. Pylant, 814 F.3d 701, 715 (5th Cir. 2016).
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{196} Vander-Plas, 2016 WL 5851913, at *5.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
demonstrating that the survivor-defendant’s story of assault contained several inconsistencies and that she had a motive for filing a false report.\textsuperscript{200}

IV. APPlicABILITY OF ANTI-SLAPP IN THE AGE OF “ME Too”

In theory, anti-SLAPP statutes bolster the promise of the First Amendment. In practice, their promise to survivors of sexual assault seems somewhat empty. Although anti-SLAPP statutes might offer some protection for survivors alleging assault in certain circumstances, on the whole, anti-SLAPP law seems unlikely to protect the free speech rights of survivors. However, shifting social norms in the “Me Too” era may also shift legal interpretations of these statutes, making them more accessible to survivors who seek their protection.

A. Limitations of Anti-SLAPP Protections

The above survey of the law indicates that the protections anti-SLAPP motions offer “Me Too” survivors are unfortunately quite limited in most jurisdictions.\textsuperscript{201} Of the jurisdictions that have anti-SLAPP statutes, nineteen require that speech be connected to formal petitioning activity.\textsuperscript{202} The complaints of the “Me Too” era are largely made informally via social media and technology and are not connected to any government petitioning.\textsuperscript{203} As a result, in the current landscape, most survivor-defendants would not even be able to use an anti-SLAPP statute to successfully shift the burden of establishing a viable case to the accused-plaintiff.

That said, even when survivor-defendants are able to successfully shift the burden to the accused-plaintiff, the accused-

\textsuperscript{200} Id.

\textsuperscript{201} See infra Part III.


\textsuperscript{203} Parker, \textit{supra} note 33.
plaintiff can easily establish a probability of prevailing in their case by effectively pleading all of the allegations of a defamation claim.\textsuperscript{204} Even if an accused-plaintiff is responsible for the sexual violence alleged by the survivor-defendant, they can successfully defeat an anti-SLAPP motion by saying that the allegation is not true.\textsuperscript{205} Although a survivor-defendant may ultimately present evidence to prove the truth of their claim at summary judgment or trial, they are not protected from the costs, both emotional and financial, of litigation or choosing to settle the case, and the SLAPP has still achieved its harassing purpose.\textsuperscript{206}

The exception to this rule in cases of informal survivor speech, however, is cases like Kristen’s in which the plaintiff is a public figure.\textsuperscript{207} Though this is likely not the general case, it does have important implications in the “Me Too” era, where many allegations have been against well-known artists, politicians, and other public figures.\textsuperscript{208} In these cases, the accused-plaintiff is required to make a showing that the speaker acted with malice.\textsuperscript{209} This standard is more difficult to meet than the standard that generally required establishing a likelihood of prevailing on a defamation claim.\textsuperscript{210} The heightened requirement could provide greater protections for survivors who make allegations against public figures.

Finally, even when a survivor-defendant successfully uses an anti-SLAPP motion to have a case dismissed, they are not entirely protected from the impacts of litigation. Several states offer the accused-plaintiff an opportunity to overcome what would otherwise be a successful anti-SLAPP motion by amending their complaint, either while the motion is pending or after it is granted. Even when accused-plaintiffs cannot amend or re-file a complaint, they often may appeal the decision to grant the anti-SLAPP motion.\textsuperscript{211} Even in the best-case scenario, where

\textsuperscript{206} Denison, supra note 77, at 21–22.
\textsuperscript{208} Leight, supra note 34.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
a survivor-defendant's motion is successful and survives both the amendment of the complaint and an appeal, they still face the financial and emotional costs of litigation until the motion to dismiss stage.\textsuperscript{212} Median estimates for costs of defending against general civil litigation in the initial stage range from about $2,000 (for an automobile case)\textsuperscript{213} to $9,000 (for a contract case).\textsuperscript{214} Because defending against a SLAPP requires specialized legal knowledge, the initial fees in these cases are likely even higher.\textsuperscript{215} Many anti-SLAPP statutes account for this by requiring a grant of costs and fees to successful anti-SLAPP defendants; however, a few do not.\textsuperscript{216} Even so, no anti-SLAPP statute contains a

\textsuperscript{212} Denison, \textit{supra} note 77, at 21–22.

\textsuperscript{213} HANNAFORD-AGOR \& WATERS, \textit{supra} note 57, at 7.

\textsuperscript{214} Id.

\textsuperscript{215} Denison, \textit{supra} note 77, at 21–22.

\textsuperscript{216} Arizona (ARIZ. REV. STAT. ANN. § 12-752 (2019)), Arkansas (ARK. CODE ANN. § 16-63-504 (West 2019)), California (CAL. CIV. PROC. CODE § 425.16 (West 2019)), Connecticut (CONN. GEN. STAT. ANN. § 52-196a (West 2019)), D.C. (D.C. CODE ANN. § 16-5501 (West 2019)), Florida (FLA. STAT. ANN. § 768.295 (West 2019)), Georgia (GA. CODE ANN. § 9-11-1.1 (West 2019)), Hawaii (HAW. REV. STAT. ANN. § 634F-1 (West 2019)), Illinois (735 ILL. COMP. STAT. ANN. 110/15 (West 2019)), Kansas (KAN. STAT. ANN. § 60-5320 (West 2019)), Louisiana (LA. CODE CIV. PROC. ANN. art. 971 (2019)), Maine (ME. REV. STAT. tit. 14, § 556 (2019)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), Minnesota (MINN. STAT. ANN. § 554.02 (West 2019)), Pennsylvania (27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2019)), Texas (TEX. CIV. PRAC. \& REM. CODE ANN. § 27.002 (West 2019)), Utah (UTAH CODE ANN. § 78B-6-1403 (West 2019)), and Vermont (VT. STAT. ANN. tit. 12, § 1041 (West 2019)), decisions to grant anti-SLAPP motions are immediately appealable. See also \textit{State Anti-SLAPP Laws, supra} note 83.

\textsuperscript{212} Denison, \textit{supra} note 77, at 21–22.

\textsuperscript{213} HANNAFORD-AGOR \& WATERS, \textit{supra} note 57, at 7.

\textsuperscript{214} Id.

\textsuperscript{215} Denison, \textit{supra} note 77, at 21–22.
provision sufficient to repair the emotional trauma survivors face when being unfairly sued by an abuser for speaking out. 217

B. Shifting Norms and the “Me Too” Movement

In the age of “Me Too,” social norms and attitudes about sexual violence and those who choose to speak up about it have shifted dramatically. Whether those impacts will seep into interpretation of anti-SLAPP law remains to be seen. In this context, it is possible that the impact of the “Me Too” movement will lead courts to reinterpret both what constitutes petitioning activity and what is an issue of public interest more broadly when considering SLAPP suits involving sexual violence.

1. Petitioning Activity

The power of “Me Too” has encouraged activists, advocates, and survivors to leverage their own experiences to demand change. 218 As a result, survivors have begun telling their stories to demand better treatment from the government and, more specifically from the legal system. 219 With this in mind, it is possible that the context of survivors’ statements may impact whether they are interpreted as petitioning activity.

For example, during recent congressional hearings, then Supreme Court nominee Brett Kavanaugh stood accused of multiple sexual assaults. 220 Survivors used the power of their stories to fight the nomination. 221 Hundreds of survivors and activists descended on the Senate before the confirmation vote, sharing stories and encouragements among one another. 222 Phoebe Suva, a woman from Maine, bravely stood in Senator Susan Collins’ office and shared her own experience of sexual assault to encourage the Senator to vote against Kavanaugh’s confirmation. 223 Phoebe was not petitioning the government for

217 Kingkade, supra note 53.
218 See Chicago Tribune Staff & Hawbaker, supra note 35.
219 Id.
222 Id.
223 Despite the efforts of Phoebe and other activists, Susan Collins ultimately voted to confirm Brett Kavanaugh to the Supreme Court. Because she initially hesitated in her support of Kavanaugh and because she was one of the last Republican Senators to commit to voting to confirm him, her vote was largely perceived as the deciding vote. Carl Hulse, Susan Collins, Standing Alone, Makes Her Case for Kavanaugh, N.Y.
a response to her experience of sexual violence. However, she was petitioning the government for a response to sexual violence broadly, and she was speaking about her own experience to do so.\textsuperscript{224} Perhaps for purposes of anti-SLAPP law, Phoebe and the hundreds of other activists who shared their stories in the senate building would be considered petitioners or connected to petitioning activity.

In other cases, what counts as petitioning activity for the purpose of anti-SLAPP law may be even blurrier. During the same hearing and confirmation process, survivors took to Twitter and other social media to share their own stories, both to persuade politicians and to commiserate with others impacted by the hearings.\textsuperscript{225} Whether survivors sharing their own experiences of sexual assault in this way would count as petitioning or being connected to an issue before a government body is uncertain.

Increasing discussion about sexual violence and survivors’ experiences in the context of demanding change may ultimately have the impact of shifting how petitioning and petitioning activity is seen in SLAPP suits that involve sexual violence. Perhaps even in states which limit anti-SLAPP laws to protections for petitioners and protections for political participants, survivors who speak will begin to benefit from broader approaches.

2. Public Interest

Due to the “Me Too” movement, conversations about sexual violence seem to be of public interest now more than ever before.\textsuperscript{226} In this context, it is possible that what might have been considered an isolated allegation in the past might instead be interpreted as contributing to a larger conversation.\textsuperscript{227} If this is true, one survivor’s speech about their own experience may be sufficiently related to a topic of public interest to trigger an anti-SLAPP statute’s protections.\textsuperscript{228}

It is uncertain whether the speaker would have to explicitly state their intent to be a part of the larger conversation or whether any sexual assault allegation would automatically be considered part of this ongoing conversation. A potential shift is

\textsuperscript{224} Scott, supra note 221.


\textsuperscript{226} Parker, supra note 33.

\textsuperscript{227} See id.

that allegations of sexual assault, given their recent social impact and importance, might be considered to be of per se public interest. Even if the statements are not considered public interest per se, survivors may find that it is easier now than ever to connect their own experience to a larger issue of public interest. It is possible that a speaker could come under an anti-SLAPP statute’s protection simply by saying or hash-tagging “Me Too,” in conjunction with their statement.

One recent case, *T.S. Media*, sparks particular hope that courts may begin to consider sexual assault allegations broadly to be of public interest.229 In this case, talk show host Tavis Smiley sued the Public Broadcasting Service (PBS) for their public statement in response to multiple reports that Smiley sexually harassed colleagues.230 PBS responded with an anti-SLAPP motion. The court held that because Smiley was a public figure, the allegations were of public interest.231 More importantly, the court went on to explain that PBS’s comments were related to an issue of public interest specifically because they were made during the height of the “Me Too” movement and that public interest in allegations of sexual harassment was especially high.232

**V. A WAY FORWARD**

Because bringing to light accusations of sexual violence generally serves a public good, and because survivors face significant barriers in coming forward, there is a public interest in protecting their First Amendment right to this speech.233 The question is how best to achieve this goal. Solutions include improving existing anti-SLAPP laws or creating additional anti-SLAPP statutes.

**A. Improving Existing Anti-SLAPP law**

Survivor speech could be offered better First Amendment protections by making minor, specific changes to existing anti-SLAPP laws. These recommendations must be weighed against

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230 Id.
231 Id.
232 Id.
233 The Florida Star v. B.J.F., 491 U.S. 524, 537 (1989) (stating that the government has heightened interest in encouraging sexual assault reporting, though ultimately issuing a finding against the victim on other grounds); David Haxton, Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence, 1985 Wis. L. Rev. 1219, 1264–65 (1985) (describing public policy reasons to encourage reporting of sexual assault).
countervailing concerns, specifically that a relaxation of standards might make individuals falsely accused of sexual violence vulnerable to an unfair dismissal of a defamation claim. However, a thoughtful implementation of measured protections for speech about sexual violence could balance free speech and false speech concerns. Such protections might include an exemption from any requirement that the statement be made in the context of petitioning activity; a presumption that the speech is on a subject in which there is public interest; and a requirement that the plaintiff must establish a likelihood of prevailing on the element of actual malice in all sexual violence cases.

1. Exemption from Requirements of Petitioning Activity

Anti-SLAPP laws in jurisdictions with petitioning requirements should explicitly exempt individuals speaking out with allegations of sexual violence from any requirement of government petition. This exemption is warranted because sexual violence has historically been underreported through traditional methods such as police reporting. Survivors face many barriers, including a lack of knowledge, a lack of resources, or a lack of accessible reporting mechanisms. These barriers are particularly high in communities in which people are already disenfranchised, including communities of color, immigrant communities, and LGBTQIA communities, among others. Survivors often do not turn to the justice system because they know the futility of doing so. Given that underreporting is largely a problem produced by the system, it is unfair for survivors to be punished for resorting to alternative, non-violent means of justice (such as speech.) This would ensure that survivors who chose to seek justice or accountability by speaking

234 See generally Pring & Canan, supra note 48.
236 Id.
238 See generally NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, supra note 235.
about their experiences in other forums would not be exposed to unfair liability.

2. Presumption of Public Interest

The success of an anti-SLAPP claim may often hinge on whether a survivor-defendant’s claims are of public interest. Every jurisdiction requires a showing that statements are of public-interest in order to benefit from the protection of anti-SLAPP laws. Additionally, many jurisdictions continue to presume the falsity of defamatory statements in cases that don’t involve any public figure or public interest, making it significantly easier for accused-plaintiffs to prevail. Presuming that allegations of sexual assault would help survivor-defendants overcome these barriers.

The “Me Too” movement has provided a framework that demonstrates the overall social impact of allegations of sexual violence. In the context of this movement, even when survivors have spoken up about an experience of sexual violence with a perpetrator who is not explicitly named or especially well known, the public has reacted with a high level of interest and concern. Because of the general interest society has routinely expressed in statements about incidents of sexual violence, these statements should be presumed to be of public interest.

Furthermore, speech about sexual violence itself has broad social and public impacts. Perhaps most importantly, this speech has important public safety implications. For example, an allegation of sexually harassing behavior by one individual in an organization may impact how the public chooses to engage

240 See infra Part II.A.
241 See infra Part III.B(1).
242 See, e.g., Milano, supra note 32.
244 See generally Banyard et al., Sexual Violence Prevention Through Bystander Education: An Experimental Evaluation, 35 J. CM’TY PSYCH. 463 (2007) (explaining that awareness of the dynamics around sexual violence can encourage individuals to intervene in ways that prevent assault.).
not only with that person, but also that organization.245 This kind of allegation might impact where community members travel, learn, conduct business, and invest their money. With this in mind, the public has an important reason to want access to this information.

If a presumption like this were enforced, the rule could allow the plaintiff to rebut the presumption in cases where he or she could demonstrate that the only interests impacted are truly private. Shifting this burden to the accused-plaintiff would protect his or her ability to bring a valid suit while also requiring him or her to show that the allegations were definitively not of public interest at an earlier stage. This would ensure that survivor-defendants are less likely to face harassing litigation for speaking about a topic in which the public has expressed a legitimate interest.

3. Requirement of Demonstration of Actual Malice

A final recommendation may require anti-SLAPP law to establish a change in how defamation law itself is applied in cases of sexual violence. Typically, to demonstrate a probability of prevailing on a case of defamation, accused-plaintiffs are only required to make a showing of actual malice if the survivor-defendant’s statement is privileged (like a police report) or if the accused-plaintiff is a person of public interest.246 In defamation suits in which a survivor is the defendant, the same actual malice standard should also be applied.

Requiring a showing of the probability to prevail on an actual malice standard is warranted because this standard has been applied previously in cases where speech was deemed to be of high value.247 Conversations about sexual violence are not only high value speech, they are particularly vulnerable to being suppressed.248 With that in mind, a heightened standard for punishing survivor-defendants who speak out is warranted. Applying the actual malice standard to these cases as a general rule would protect survivor-defendants’ First Amendment rights while still allowing any accused-plaintiff who is falsely accused an opportunity to bring a successful claim by meeting this additional element.

245 Johnson, supra note 54 (demonstrating how allegations of sexual assault and violence lead to firing, social ousting, and general reputational harm).
247 See infra Part III.B(4).
248 The Florida Star v. B.J.F., 491 U.S. 524, 537 (1989) (stating that the government has heightened interest in encouraging sexual assault reporting, though ultimately issuing a finding against the victim on other grounds); Haxton, supra note 233, at 1264–65.
B. Creating Additional Anti-SLAPP Statutes

Currently, nineteen states do not have any anti-SLAPP statute.\footnote{States which do not have anti-SLAPP statutes or case law establishing an anti-SLAPP motion include Alabama, Alaska, Idaho, Iowa, Kentucky, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Wisconsin, and Wyoming. See State Anti-SLAPP Laws, supra note 83. Both Colorado and West Virginia have established a special anti-SLAPP motion in case law, but it has not been recorded as a statute. See generally Harris v. Adkins, 432 S.E.2d 549, 551 (1993) (establishing anti-SLAPP protections in West Virginia for speech related to petitioning activities such as testifying before the government, seeking redress from courts, requesting services from administrative bodies); Protect Our Mountain Env’t, Inc. v. Dist. Court In & For Jefferson Cty., 677 P.2d 1361 (Colo. 1984) (establishing anti-SLAPP protections in Colorado for speech related to petitioning activities such as testifying before the government, seeking redress from courts, requesting services from administrative bodies).} No federal anti-SLAPP statute exists, and in diversity cases applying state law in federal court, the application of the state’s anti-SLAPP statute is not guaranteed.\footnote{See generally Saner, supra note 84.} This lack of existing statutes means that, in many parts of the country, survivors who choose to speak up about their experiences of sexual violence cannot access even the minimal protections anti-SLAPP statutes provide. To provide increased protection for survivors, legislators and advocates should push for increased legislation. In particular, a federal statute would guarantee survivor-defendants facing defamation claims in federal court the protection of an anti-SLAPP statute. A call for such a statute would not come completely out of left field; in 2015, Congress considered the bi-partisan SPEAK FREE Act, an anti-SLAPP statute that garnered wide support among public interest groups and legislators from all parties.\footnote{See generally Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts (SPEAK FREE) Act of 2015, H.R. 2304, 114th Cong. (2014); Speak Free Act of 2015, PUB. PARTICIPATION PROJECT, https://antislapp.org/speak-free-act/ (last visited May 7, 2019).} Though the bill was not brought to a vote when originally introduced, the moment may be ripe for a re-introduction. A federal anti-SLAPP statute could draw supporters from all political camps in the name of protecting one of American citizens’ most valuable rights: free speech.\footnote{Id.}

CONCLUSION

Despite her harrowing experience with a SLAPP, Kristen Vander-Plas finished law school, passed the bar exam, and practices law in Texas. But SLAPP suits continue to threaten survivors who speak up about violence, and most are not so
fortunate. Jessica Corbett, who spoke up about her experience of being abused by a White House staff member, was recently sued by her abuser for $4 million dollars.253 The suit is still pending, but Jessica already reports a list of devastating impacts including the loss of her car, her ability to be employed, and her relationship with her fiancé.254 Her legal costs have begun to overwhelm her, and she has been told they may rise into six figures. She was sued in Massachusetts, a state with an anti-SLAPP statute that may not provide her protection.255 Discussing her experience of being SLAPP-ed, she says, “My life has been destroyed. I have sacrificed more than I ever imagined.”256 She sums up the threat of SLAPPs in only a few words: “This is why abuse victims stay silent.”257

In the age of “Me Too,” unprecedented numbers of survivors are changing the conversation about sexual violence by speaking up. Still, SLAPP lawsuits silence many. Survivors’ speech may be chilled by fear of being SLAPP-ed with defamation suits by those they have accused of abuse. Because this speech serves such an important protective and deterrent role in preventing sexual violence, protecting it is essential.

Some anti-SLAPP statutes may provide avenues for protecting survivor speech; however, most jurisdictions currently lack anti-SLAPP statutes or have statutes that employ strict standards that they are largely unhelpful to survivors. Moving forward, an increase in anti-SLAPP statutes and changes in existing statutes to make them more applicable to survivor speech will ensure that victims and survivors of sexual violence are able to fully exercise their First Amendment rights to speak up about their experiences. Furthermore, advocates and legislators should consider options outside of the anti-SLAPP space, including educating victims and survivors about their speech rights, advocating for a more accessible petitioning system, and working towards the end of sexual violence. Combined with thoughtful legislation and application of anti-SLAPP statutes, these efforts will ensure that defamation law is not another SLAPP in the face to vulnerable individuals seeking to exercise their First Amendment rights.

254 Id.
255 See infra Part III.A(2).
256 Corbett, supra note 253.
257 Id.
LEARNING TO DISCRIMINATE:
VOUCHERS AND PRIVATE SCHOOL POLICIES’
IMPACT ON HOMOSEXUAL STUDENTS

Olivia Perry*

INTRODUCTION

What is public education today? With the rise of charter schools, magnet schools, open enrollment systems, and voucher programs, the makeup of public education has greatly changed in the last thirty years. Twenty-eight states currently have some form of private school choice, and fifteen states today have voucher programs,¹ which provide students tuition aid so that they may attend private schools.² Particularly, states choose to enact voucher programs so that more students are able to attend private schools, regardless of economic status, and any private school, generally including religious schools, may opt to participate and enroll students receiving vouchers.³

Although proponents of voucher programs argue that these initiatives give children of low-income families more options and ensure more students receive access to high-quality education, critics respond that these initiatives funnel students away from public schools to private schools.⁴ Many also oppose voucher programs because they pose separation of church and state issues, allowing religious schools to receive money from state governments.⁵ Unambiguously, recent news headlines show that participating religious private schools have the ability to discriminate against students receiving vouchers based on sexual orientation in their admissions policies and more generally in their student handbooks, exposing a critical flaw in state voucher programs.⁶

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³ See id.


⁵ Id.

⁶ Lindsay Wagner, Private Christian Schools Receiving Taxpayer-funded School Vouchers Continue to Exclude Students on the Basis of Religion and Sexual Identity, A.J. FLETCHER FOUND. (Jan. 27, 2017), https://www.wral.com/private-christian-schools-receiving-
Similar to recent news, this Note will evaluate discriminatory impacts of North Carolina’s Opportunity Scholarship voucher program, particularly where participating religious private schools are permitted to deny admission to homosexual students or take a stance against homosexuality. Part I describes the components of the Opportunity Scholarship program and the breadth of discrimination against homosexual students. Part II compares North Carolina’s Opportunity Scholarship program to voucher programs in other states and explores how other states deal with potential discriminatory effects based on homosexuality. Part III examines judicial precedents that view the policies of private schools as government speech. The remainder of Part III then argues that courts should not allow private schools to discriminate based on sexual orientation.

I. VOUCHER PROGRAMS: BACKGROUND, COMPONENTS, AND DISCRIMINATION

A. State Voucher Programs

State voucher programs each have their own unique provisions and approaches to handling discrimination. Most invoke Title VI of the Civil Rights Act and only provide specific protections to students based on race, color, and national origin, but ignoring sexual orientation. Many states, like Georgia, have provisions in their statutes that actually prohibit participating schools from altering or not complying with their student admissions policies, even when those schools may have discriminatory admissions policies described in their student handbooks. Two states, Maine and Vermont, have opted to exclude religious schools altogether from participating in their


7 42 U.S.C. § 2000d (enacted as part of the Civil Rights Act of 1964, stating that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance”)

8 FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2014); WIS. STAT. § 118.60(2)(a)(4) (2018).

9 Suzanne E. Eckes et al., Dollars to Discriminate: The (Un)Intended Consequences of School Vouchers, 91 PEABODY J. ED. 537, 550 (2016).
On the other hand, Florida has recently enacted a voucher program with the mission of aiding students that have been victims of bullying in public schools. Wisconsin is unique in that it allows students to refuse to participate in religious activities at their private schools. Maryland’s policy demonstrates the state’s recognition that voucher programs can have discriminatory effects on LGBT students; the state requires participating private schools to sign a pledge stating that they will not discriminate in their admissions policies on the ground of sexual orientation. Some states do not have any antidiscrimination provision in their voucher program statutes. Yet, despite the many variations in each state’s voucher program, one aspect remains the same: None of them contain specific language in their antidiscrimination provisions prohibiting discrimination based on sexual orientation.

The Constitution guarantees the separation of church and state, mandating that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” But, vouchers can be used for private, religious schools because the Supreme Court upheld Ohio’s voucher program in *Zelman v. Simmons-Harris*. There, the Court upheld voucher programs generally, by ruling that where a government aid program, such as school voucher programs, is neutral, and the aid goes to religious schools as a result of parents’ private choice, the program is not readily subject to challenge under the Establishment Clause. That said, this ruling was not unanimous. Justice Stevens argued in his dissent that a state’s education crisis, a state’s range of educational choices, and the voluntary character of school choice should not have factored into the Court’s decision. More importantly, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued in his dissent that “[t]he applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing,*” where the Supreme Court unanimously ruled that “[n]o tax in any amount, large or small, can be levied to support any religious activities, whatever they may be called, or whatever form they may adopt to teach or

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13 *Md. Code, Ann.*, EDUC. § R00A03.05 (2018).
14 *Eckes et al.*, supra note 9, at 548.
15 U.S. CONST. amend. I.
17 *See generally id.*
18 *Id.* at 685–86 (Stevens, J., dissenting).
19 *Id.* at 686 (Souter, J., dissenting).
practice religion.” Zelman’s 5-4 decision already puts vouchers on shaky footing.

Although vouchers have been upheld, critics and policy experts continue to have different theories of how well vouchers intersect with separating church and state. Staunch opponents of vouchers argue that any state money paid to a religious school thereby aids a religion and expresses a governmental preference. Voucher proponents, on the other hand, believe that state money paid to a religious school is simply a purchase of educational services and is similar to the loaning of secular textbooks to nonpublic students, which has been upheld. Others agree with Justice O’Connor that vouchers are consistent with the Establishment Clause because “’parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools,’ and it is only through these choices that government monies reach religious schools.”

Statutes may provide separate protections. Although Title IX of the Education Amendments of 1972 may be enough to prove that voucher schools may not discriminate against homosexual students, its applicability is questionable. Title IX prohibits the discrimination based on sex from any school receiving federal assistance. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .” However, it does not explicitly prohibit discrimination based on sexuality, and the clause has an exemption for practices that would be inconsistent with an organization’s religious beliefs. Also, Title IX does not apply “to an educational institution which is controlled by a religious organization if the application . . . would not be consistent with the religious tenets of such organization.” Lastly, with regard to school admission policies, Title IX only applies to vocational and higher education institutions.

Because voucher schools are receiving public tax dollars, one would think that they would be barred from discrimination

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21 See Marks, supra note 4, at 354–55.
22 Id. at 355.
24 Marks, supra note 4, at 357 (quoting 536 U.S. 639, 672 (2002) (O’Connor, J., concurring)).
26 Id.
27 Id.
29 Id. § 1681(a)(1).
based on sexual orientation in the way that public schools are barred. So why are they not?

Because voucher programs have very few accountability requirements for private schools when compared to public schools, they still have the freedom to maintain their prior student handbooks’ acceptance and expulsion policies. Research shows that this autonomy may lead to insufficient protection from discrimination; a 2016 study found that no school voucher program nationwide sufficiently protects LGBT students from discrimination from participating private schools. Specifically, many participating religious schools have student handbook provisions stating that homosexuality is a sin or explicitly prohibiting homosexual students and family members of homosexual individuals from attending, creating backlash among the public. In addition, some schools have also faced public pressure to no longer accept voucher funds due to their stances on homosexuality.

B. North Carolina’s Voucher Programs

In 2013, North Carolina’s Opportunity Scholarship Program was enacted by the North Carolina General Assembly. It provides that students in kindergarten through twelfth grade are eligible to receive “free or reduced-price lunch” with funding of up to $4,200 per year to attend a participating private school. To participate, private schools must (1) report documentation to the State Education Assistance Authority of tuition and fees charged; (2) conduct a background check of the staff member with the highest authority; (3) provide parents of students receiving vouchers with reports on students’ academic progress; (4) administer a standardized test to students receiving vouchers; and (5) provide the Authority graduation rates for students receiving vouchers, and conduct a financial review. Additionally, they must not discriminate based on race, color, or

30 See FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2014); WIS. STAT. § 118.60(2)(a)(4) (2018).
31 Eckes et al., supra note 9, at 537.
34 N.C. GEN. STAT. § 115C-562.2 (2016).
35 Id. § 115C-562.2(b) (2016).
36 Id. § 115C-562.5 (2016).
Despite this litany of mandates, there is no non-discrimination requirement based on sexual orientation. Despite this litany of mandates, there is no non-discrimination requirement based on sexual orientation. Two years after its enactment, the North Carolina Supreme Court upheld the constitutionality of the Opportunity Scholarship Program in Hart v. State. In Hart, voucher opponents alleged that state funds were being given to voucher schools that discriminate in their admissions policies based on religion, including schools that had students sign a pledge that they fully agreed with the school’s religious views and practices. Established in Zelman v Simmons-Harris, the U.S. Supreme Court uses the following inquiry to decide whether vouchers are constitutional: “whether the program nonetheless has the forbidden effect of advancing or inhibiting religion.” Although the answer to that question should be in the affirmative, the Court reasoned that the program should not be subject to challenge by the Establishment Clause because the program itself is neutral regarding religion and because the program aids “a broad class of citizens who, in turn, direct aid to religious schools” by their own choice.

In Hart, the North Carolina Supreme Court held that the program did not violate constitutional requirements for school funding, did not violate the state’s Uniformity Clause, and was for a “public purpose.” However, the Court added that the issue of whether voucher schools discriminate based on religion should be decided later.

Here plaintiffs are taxpayers of the state, not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the Opportunity Scholarship Program. Because eligible students are capable of raising an Article I, Section 19 discrimination claim on their own behalf should the circumstances warrant such action, plaintiffs have no standing to assert

38 See N.C. GEN. STAT. § 115C-562 (2016).
39 774 S.E.2d 281 (N. C. 2015).
40 Eckes et al., supra note 9, at 541.
42 Hart, 774 S.E.2d at 290.
43 Id. at 141.
a direct discrimination claim on the students’ behalf.\textsuperscript{44}

In a short but strongly-worded dissent, Justice Wynn argued that the Opportunity Scholarship Program is a “cruel illusion” that appears to be a solution to education inequities but instead only exacerbates these inequities.\textsuperscript{45} Justice Wynn concluded his dissent by stating “[i]n time, public schools may be left only with the students that private schools refuse to admit based on . . . religious affiliation [or] sexual orientation . . . .”\textsuperscript{46} Since the \textit{Hart} decision, no allegations of discrimination from voucher schools have returned to the North Carolina Supreme Court, making the Court’s approach to deciding discrimination cases against voucher schools a little unclear. As shown by recent discrimination incidents at voucher schools nationwide based on sexual orientation, however, Justice Wynn seems to have foreseen what was to come.

North Carolina’s Opportunity Scholarship Program has grown immensely since its initial implementation in 2014–15, as shown by the increasing numbers of students receiving vouchers and participating private schools.\textsuperscript{47} The number of participating schools with enrolled voucher recipients has almost doubled, and seven times as many students received a voucher in 2017–18 as in the program’s initial year.\textsuperscript{48} In 2017–18, 7,371 students received funding through the Opportunity Scholarship program, and over $28 million was granted to students attending participating schools.\textsuperscript{49} 457 private schools participated in the program from 2017–18, and 405 of those schools enrolled funding recipients.\textsuperscript{50} The majority of voucher funds have gone to religious schools. In 2015–16, out of the $12 million spent on Opportunity Scholarship Program vouchers, $11 million went to religious schools, and religious schools today remain a key portion of participating private schools, as shown by the fact that each of the top twenty participating private schools based on enrollment numbers in 2017–18 has a religious affiliation.\textsuperscript{51}

Since the initial implementation of North Carolina’s Opportunity Scholarship Program in 2014–15, participating religious private schools have made the news numerous times

\textsuperscript{44} Id.
\textsuperscript{45} Id. at 156–57.
\textsuperscript{46} Id. at 157.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
due to controversial stances and actions regarding homosexuality. Even participating schools' websites that state they do not discriminate in their admissions policies may still have student handbook provisions that treat homosexuality negatively. In 2013, Myrtle Grove Christian School dropped out of the Opportunity Scholarship Program due to public backlash over its policy requiring families to sign a statement claiming that they would not engage in any homosexual activity. Additionally, many of the participating Christian schools have statements in their schools' handbooks that disparage or explicitly state that they will not admit homosexual students. Fayetteville Christian School, which received the fifth greatest number of vouchers in 2017–18, states in its school handbook that the school “will not admit families that engage in illicit drug use, sexual promiscuity, homosexuality (LGBT) or other behaviors that Scripture defines as deviate and perverted.”

Likewise, Liberty Christian Academy in Richlands, which ranked the fourth highest in schools receiving vouchers in 2016–17, has a similar policy banning homosexuality. One of the school’s policies states that grounds for expulsion include:

“living in, practicing, condoning, or supporting sexual immorality, including but not limited to, sex outside of marriage, homosexual acts, bi-sexual acts; gender identity different than the birth sex at the chromosomal level; promoting such practices; or otherwise the inability to support the moral principles of the school (Leviticus, 20:13a, Romans 1:27, Matthew 19:4-6).”

52 Baird, supra note 33; Wagner, supra note 6.
53 See Klein, Schools Get Millions, supra note 6.
54 Baird, supra note 33.
55 Wagner, supra note 6; Fayetteville Christian School Student Handbook, supra note 32; Fitzsimon, supra note 32.
56 Opportunity Scholarship Program Summary of Data, supra note 47.
57 Wagner, supra note 6; Fayetteville Christian School Student Handbook, supra note 32.
58 Opportunity Scholarship Program Summary of Data, supra note 47.
59 Wagner, supra note 6.
60 Id.
Raleigh Christian Academy, which ranked twelfth in most vouchers received from 2017–18, also has a student handbook policy stating that homosexuality is a ground for expulsion. Similarly, Bible Baptist Christian School has a student handbook provision banning homosexual students and students with homosexual family members. Page 76 of the school’s student handbook states, “[t]he school reserves the right, in its sole discretion, to refuse admission to an applicant or to discontinue enrollment of a current student [on this basis]. This includes, but is not limited to, living in, condoning, or supporting any form of sexual immorality; practicing or promoting a homosexual lifestyle or alternative gender identity.”

A number of North Carolina voucher schools now have religious student handbooks that discriminate against students based on sexual orientation. How do other states with voucher programs solve this issue? Part Two compares how other states protect students based on sexual orientation from voucher school policies.

II. COMPARING NORTH CAROLINA’S OPPORTUNITY SCHOLARSHIP PROGRAM TO OTHER PROGRAMS

Similar to North Carolina, other states with voucher programs have had issues regarding public funds going to religious schools that discourage or prohibit homosexuality. Most states incorporate Title VI into their voucher statutes, so by law, they only protect students from discrimination based on race, color, and national origin. Those insufficient protections from discrimination are not solely present in these states. In a 2017 national investigation of private religious schools participating in state voucher programs, Huffington Post found that at least 700 religious private schools receiving vouchers either openly oppose LGBT issues or have policies discouraging

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61 Opportunity Scholarship Program Summary of Data, supra note 47.
62 Wagner, supra note 6.
63 Fitzsimon, supra note 32.
64 Id.
66 See FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2016); WIS. STAT. § 118.60(2)(a)(4).
or prohibiting homosexuality. The study found that of all voucher schools nationwide, 76 percent are religious, and 14 percent have specific policies against LGBT students, employees, or both. Currently, only two states with voucher programs have provisions in their statutes prohibiting religious schools from participating: Maine and Vermont. However, no state currently has specific language in their antidiscrimination statutes prohibiting discrimination based on sexual orientation.

In Indiana, the state with the largest school voucher program in the country, participating religious school Lighthouse Christian Academy has received public backlash due to a statement in its admissions brochure stating that the school may refuse admission or expel students based on their homosexuality. The school has not yet refused admission based on homosexuality, but the school’s attorney has defended the policy, stating “parents are free to choose which school best comports with their religious convictions. For a real choice and thus real liberty to exist, the government may not impose its own orthodoxy and homogenize all schools to conform to politically correct attitudes and ideologies.”

An investigation conducted by Chalkbeat found that ten percent of Indiana’s private schools participating in the state voucher program in 2016–17 had policies that discouraged or prohibited homosexuality, and ten percent of these schools received over $16 million in public funds. Additionally, because twenty percent of the participating schools did not publicize their admissions policies, it is likely that ten percent is a low estimate. Indiana’s voucher statute requires that participating private schools “abide by the school’s written admission policy fairly and without discrimination.” However, as Eckes argues, this provision does not prevent schools from discriminating because participating schools are allowed to

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67 Klein, Schools Get Millions, supra note 6.
68 Id.
70 Eckes et al., supra note 9, at 553.
72 Slodysko & Danilova, supra note 65.
73 Id.
74 Donheiser, supra note 6.
75 Id.
76 IND. CODE § 20-51-4-3(b) (2017).
enforce their admissions policies, which may be discriminatory themselves.\footnote{Eckes et al., \textit{supra} note 9, at 550.}

In Georgia, where individuals and corporations receive state tax credits for donations to nonprofit groups that provide money to participating private schools,\footnote{GA. CODE ANN. § 20-2A-1 (2017).} as many as a third of all participating private schools have strict policies against homosexuality.\footnote{\textit{A Failed Experiment: Georgia’s Tax Credit Scholarships for Private Schools}, SOUTHERN EDUC. FOUND., https://www.southerneducation.org/publications/afailedexperiment/ (last visited May 7, 2019). \textit{See also} Severson, \textit{supra} note 65.} A 2013 study by the Southern Education Foundation found that 115 Georgia private schools have these student handbook policies opposing homosexuality or hold a religious philosophy that sees homosexuality as a sin.\footnote{Id.} However, because public information about the program is limited by state law, the percentage of participating schools that discriminate or hold hostile policies regarding homosexuality may be much higher.\footnote{Id.} One reason why discrimination may be such an issue in Georgia is that the state’s Department of Education has advised that a participating private school need not “alter its curriculum or program of instruction.”\footnote{Eckes et al., \textit{supra} note 9, at 550.} This statement encourages participating schools with policies opposing homosexuality to enforce those policies.\footnote{Id.} Furthermore, participating schools are not required by state law to accept student program applicants.\footnote{Id.}

In Virginia, which has a tax credit program to enable low-income students to attend private schools, Timberlake Christian Schools emerged in the headlines in 2014 after expelling a student that had attended the school for five years because she wore her hair short and wore pants instead of skirts, thereby not acting “Christlike.”\footnote{Klein, \textit{Schools Get Millions}, \textit{supra} note 6.} Although the student did not attend the school as a result of the tax credit program, this incident shows that this school, as well as other state schools, are free to expel or deny admission to students receiving state assistance based on their gender identity and sexual preference.\footnote{Id.}

Beginning Autumn 2018, Florida launched a unique voucher-like program that is aimed at assisting bullied students attend private schools.\footnote{See FLA. STAT. § 1002.40 (2018).} Florida’s Hope Scholarship Program allows purchasers of motor vehicles to contribute their vehicle...
sales tax to fund private school scholarships amounting to up to $7,000 for students that have been bullied or physically beaten in a public school.\textsuperscript{88} As of August 1, about 70 schools had signed up to participate in the program.\textsuperscript{89} Of these 70 participating schools, about 10 percent either claimed in their student handbooks and mission statements that they refused to accept homosexual students or detailed forms of discipline for students in same-sex relationships.\textsuperscript{90}

In Maryland, which has a voucher program that requires participating schools to sign a pledge promising to not reject students based on homosexuality,\textsuperscript{91} a state education panel voted to prohibit a private school from participating in the voucher program because the school stated that it reserved the right to refuse admission to homosexual and transgender students.\textsuperscript{92} After learning that Trinity Lutheran Christian School’s handbook included discriminatory language based on sexual orientation, the panel ultimately decided that the school would no longer receive voucher funds.\textsuperscript{93} The school’s handbook stated that the school may expel or deny enrollment to any student “who is living in, condoning or practicing homosexual lifestyle or alternative gender identity; promoting such practices or otherwise having the inability to support the moral principals [sic] of the school.”\textsuperscript{94} The policy also stated that the school had the right “to refuse admission of an applicant or to discontinue enrollment of a student of a same sex marriage or relationship.”\textsuperscript{95} Private schools participating in the voucher program must sign a pledge stating that they will not discriminate against students based on race, color, national origin, or sexual orientation.\textsuperscript{96} Since Maryland’s enactment of the voucher program and pledge requirement, at least twelve schools have decided not to take vouchers because they did not want to sign the anti-discrimination pledge.\textsuperscript{97}

Although Wisconsin does not have an explicit antidiscrimination provision for participating voucher schools, it does have a number of statutes that may sufficiently eliminate

\textsuperscript{88} Id.
\textsuperscript{89} Klein, \textit{Bullied Kids}, supra note 65.
\textsuperscript{90} F LA. STAT. § 1002.40(13) (2018).
\textsuperscript{91} S.B. 190 § R00A03.05, 2016 Leg. (Md. 2016), available at http://mgaleg.maryland.gov/2016RS/bills/sb/sb0190E.pdf#page=128 (last visited May 7, 2019).
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} M D. CODE. ANN., EDUC. § R00A03.05 (2018).
\textsuperscript{97} Bowie, supra note 92.
discrimination through other means. For instance, “a private school may reject an applicant only if it has reached its maximum general capacity or seating capacity,” 98 must randomly select students if applicants exceed the space available 99 and must permit voucher students to opt out of any religious activity.” 100 Wisconsin is the only state with a provision in its voucher statute that allows students to opt out of religious activities. 101

Although the programs in Maryland and Wisconsin seem to be more progressive in protecting students based on sexual orientation than other programs, there is still room to ask whether voucher programs remain a viable option, especially because school policies promoting discrimination are not the only form. Other forms of discrimination against sexual orientation are much subtler and harder to identify. 102 Because voucher schools, including mostly religious schools, receive public school dollars, should vouchers be deemed unconstitutional? Are school voucher policies a form of government speech? Part III examines the reasons why voucher school religious policies are governmental speech and discriminate against homosexual students.

III. CONSTITUTIONAL ARGUMENT AGAINST VOUCHERS GOING TO DISCRIMINATORY SCHOOLS

Even though voucher programs consist of state funds, speech from participating voucher schools cannot be considered government speech because these schools are private and vary in their focuses. In Rust v. Sullivan, the Supreme Court ruled that a federal regulation prohibiting private family-planning services that received federal funds from referring to abortion as a valid form of family planning did not violate the First Amendment. 103 The Court stated that “the government may ‘make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.’” 104 The Court continued that the government’s restriction did not discriminate because it instead “merely chose[] to fund one activity to the exclusion of the other.” 105

98 WIS. STAT. §§ 118.60(3)(a), 119.23(3)(a) (2017).
100 WIS. STAT. §§ 118.60(7)(c), 119.23(7)(c) (2017). See also Eckes et al., supra note 9, at 548.
101 Eckes et al., supra note 9, at 548.
102 Klein, Schools Get Millions, supra note 6.
104 Id. at 192–93 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).
105 Id. at 193.
The Court later clarified Rust in *Rosenberger v. Rector and Visitors of University of Virginia* where it struck down a university’s denial of funding to a student organization that wrote a Christian newspaper. 106 The Court explained that its Rust ruling described a specific category of government speech cases where a different First Amendment analysis should be applied due to a distinction between government messages and private messages.107 There, the Court stated that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”108 The issues in *Rosenberger* were categorically different from the ones in Rust because in *Rosenberger*, “the University was not itself ‘speak[ing] or subsidiz[ing] transmittal of a message it favor[ed] but instead expend[ing] funds to encourage a diversity of views from private speakers.’”109

Voucher programs are more similar to the government funding described in Rosenburger than to the refusal of funding in Rust, because voucher schools individually transmit their own messages. Like the university funding in Rosenberger, the purpose of voucher programs is to create a “free and robust marketplace of ideas”110; one of the main justifications for voucher programs is that they give more students access to schools with different viewpoints and curriculum focuses. Even though the vast majority of voucher schools nationwide are religious schools, these schools have stances based on different religions, and they have different curriculum. In Rosenberger, on the other hand, the university funded a wide variety of messages by giving funds to student groups like the Gandhi Peace Center, Students for Animal Rights, and the Lesbian and Gay Student Union.111 Scholars suggest that “the provision of public services – even if they have an expressive component – is conceptually distinct from the creation of a forum for debate,” where “the state provides resources for the very purpose of association and expression . . . .”112 Here, the breadth in voucher schools likewise helps demonstrate that voucher school policies should not be viewed as government speech.

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107 Id. at 833.
108 Id. (citing Rust, 500 U.S. at 196–200).
110 Rosenberger, 515 U.S. at 850 (O’Connor, J., concurring).
Additionally, precedential authority outside of the education field shows that LGBT discrimination automatically deserves a closer look constitutionally. The Supreme Court has ruled that laws that discriminate based on sexual orientation should be given a higher level of scrutiny, and this higher level of scrutiny helps show why discrimination against homosexual individuals should not be facilitated through government funding. 113 In Romer v. Evans, the Court struck down a Colorado constitutional amendment that denied homosexual individuals special protection. 114 It found that even though proponents of the amendment claimed that it treated homosexual individuals the same as everyone else, the amendment essentially repealed all existing statutes, regulations, ordinances, and policies of the state that ban discrimination based on sexual orientation. 115 Using a heightened rational basis test, the Court found that the amendment violated equal protection under the Fourteenth Amendment because it placed homosexuals into a solitary class in both the private and governmental sphere. 116 The Court reasoned that “a law declaring that in general it should be more difficult for one group of citizens than for all others to seek aid from government is itself a denial of equal protection of the laws in the most literal sense.” 117

The Court in Romer concluded that the real reason behind the amendment was animus against homosexuals and that the amendment was too broad to be a legitimate means to a legitimate end. 118 Specifically, the amendment was too broad because it imposes “a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation.” 119 Also, the amendment’s reach was too narrow because “its breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.” 120 “[I]f ‘equal protection under the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” 121 The Court’s ruling was not unanimous; Justice Scalia, joined by Justices Rehnquist and Thomas, dissented, arguing that states should be allowed to show their moral disapproval through legislation and

114 Id. at 621.
115 Id. at 629.
116 Id.
117 Id. at 633.
118 Id. at 621.
119 Id. at 632.
120 Id.
121 Id. at 634–35 (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
that the holding would damage the role of states as laboratories.\(^{122}\)

On the other hand, the Supreme Court has ruled that groups sometimes have the First Amendment right to exclude individuals based on homosexuality, though this ruling was not in the context of education or of the rights of schools.\(^{123}\) In *Boy Scouts of America v. Dale*, the Court held that New Jersey’s public accommodations law could not be used to force Boy Scouts to admit a homosexual individual because groups have the First Amendment right of expressive association.\(^{124}\) The Court held that applying the state statute at issue here would significantly burden the Boy Scouts’ desire to not “promote homosexual conduct as a legitimate form of behavior.”\(^{125}\) The *Boy Scouts* holding has not yet been applied to private schools, and it should not be applied to voucher schools because voucher school policies best fit categorically as government speech.

The unique role of schools in society and the Court’s particular treatment of education in its rulings also serve as a compelling argument against applying the *Boy Scouts* ruling to voucher schools. In *Brown v. Board of Education*, the Court referred to education as “the very foundation of good citizenship.”\(^{126}\) The Court further emphasized the importance and uniqueness of education in *Plyler v. Doe*, when it stated that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”\(^{127}\) Even though *Plyler* states that education is not a “fundamental right,”\(^{128}\) the Court went on to stress “the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”\(^{129}\)

Another factor that distinguishes *Boy Scouts* from voucher school policies is that unlike the Boy Scouts, private schools are free to drop out from participating in voucher programs if they would prefer to keep their admissions and student handbook stances on homosexuality. Private schools cannot really claim that their First Amendment rights have been burdened because they are not being forced outright to change their policies.\(^{130}\) As shown in instances in North Carolina, private schools have in

\(^{122}\) Id. at 644–53 (Scalia, J., dissenting).
\(^{124}\) Id. at 656.
\(^{125}\) Id. at 651.
\(^{128}\) Id.
\(^{129}\) Id.
\(^{130}\) Kavey, *supra* note 109, at 770.
fact chosen to drop out of voucher programs where administrators would prefer to keep their stances and policies.\footnote{131} This “easy escape from governmental regulation” was not available to the Boy Scouts.\footnote{132}

Although the \textit{Brown} and \textit{Plyler} opinions both discuss public rather than private schools, their reasoning should apply to voucher schools, especially in light of the Court’s discussion of discrimination in both public and private schools. The Court has stated that “discriminatory treatment exerts a pervasive influence on the entire educational process”\footnote{133} and that “legitimate educational function cannot be isolated from discriminatory practices.”\footnote{134}

Even though private schools have much more autonomy and are not subject to as much government regulation as public schools, they are not immune to governmental intervention.\footnote{135} The Supreme Court ruled in \textit{Runyon v. McCrary} that private schools could not discriminate against African-American students.\footnote{136} The Court found that Section 1981, which prohibits private schools from denying admission to prospective students because they are African-American, does not violate the First Amendment rights of free association and privacy, or of a parent’s right to make choices regarding their children’s education.\footnote{137} Although the First Amendment protects one’s right “to engage in association for the advancement of beliefs and ideas,”\footnote{138} private schools do not have the affirmative right to exclude against racial minorities.\footnote{139} Even though parents have the right to send their children to private schools offering a form of specialized education, they do not have the right to send their children to schools “unfettered by reasonable governmental regulation.”\footnote{140}

Although the \textit{Runyon} case explicitly states that the ruling only applies to the exclusion of black students and does not apply to any other form of discrimination,\footnote{141} the same principles underlying the Court’s \textit{Runyon} decision apply to the exclusion of homosexual students at private schools participating in voucher programs. Eight years after \textit{Runyon}, the Court ruled that “[t]here
is no constitutional right . . . to discriminate in the selection of who may attend a private school or join a labor union," further demonstrating that private schools do not have an absolute right to discriminate in who attends. Runyon was decided in 1976, about 20 years before the Court recognized homosexuals as a suspect class for the purposes of equal protection under the laws. Also, the Court decided the Runyon case before the introduction of school vouchers and certainly before instances of discrimination against homosexuals occurred at participating voucher schools. Runyon applied to a strictly private school, and it naturally follows that the standards for schools receiving public assistance regarding discrimination should be stricter than those for private schools not receiving governmental funding.

IV. OTHER STATES’ INSUFFICIENT ATTEMPTS TO PREVENT PRIVATE SCHOOL DISCRIMINATION AGAINST HOMOSEXUAL STUDENTS

Although Maryland, Florida, and Wisconsin have attempted reforms to negate ongoing or potential discrimination, their efforts are not enough. Maryland has given a valiant effort at achieving this goal by requiring participating private schools to sign a pledge that they will not discriminate against students based on homosexuality. A state panel also has the right to prohibit a school from receiving voucher funds where a participating school has a discriminatory policy, and the state panel has rightfully exercised this power. However, this effort ultimately falls short for three reasons.

First, private schools may still discriminate based on homosexuality even if their mission statements and student handbooks may not describe a specific stance on the topic. Participating private schools may still deny admission to students, and schools could easily articulate a different reason for denying admission to a particular student. The only incidents of discrimination against homosexual students to make the news involve mission statements and school policies with stances against homosexuality because those are the easiest incidents of discrimination to identify; a school could more easily not have a public stance and then deny admission for another reason. Second, the pledge requirement does not hold schools accountable for discrimination, and the state panel may be too late to actually prevent discrimination from happening. Finally, allowing a state panel to make decisions regarding whether a particular school should be allowed to participate effectively

makes the decision a political one. The decision will depend on the political makeup of the panel, and this mechanism will not be sufficient where a majority of the panel members have their own political or religious beliefs about homosexuality. While the Maryland panel should be praised for taking action against a discriminatory school, it could just as easily decide not to take action, and there is no check on the panel’s power.

Florida’s voucher program aimed at assisting bullied students is also insufficient to prevent discrimination against students based on homosexuality. While a voucher program targeted at helping bullied students would seem to prevent such discrimination, the program’s mission is not enough to achieve the goal. This flaw is shown in the Huffington Post’s findings that 10 percent of participating schools have stances in their mission statements or student handbooks that reserve the right to refuse admission to homosexual students. Because there is no accountability measure aimed to ensure that participating private schools do not discriminate based on homosexuality, any participating school may still do so, even when such discrimination would seem to go against the program’s mission. Simply stating that the state wants to prevent bullying does not prevent a private school from discriminating, and Florida’s Scholarship for Hope program should not be viewed as a sound option.

CONCLUSION

Although the Supreme Court ruled that school voucher programs are constitutional and do not pose a sufficient issue regarding separation of church and state, today’s current headlines regarding discrimination against LGBT students in student handbook policies suggest that voucher programs giving public funds to religious schools should be reevaluated. Numerous North Carolina private schools participating in the voucher program have statements in their student handbooks detailing discriminative policies on admission and expulsion of homosexual students and students with homosexual family members.

So, out of the many approaches used in different states’ voucher program, which components are most ideal to prevent instances of discrimination against students based on sexual orientation? As shown in the logistics of Florida’s program focused on aiding bullied students and the many participating schools with policies aimed against homosexual students, a mission statement targeted to assist bullied students is not

144 Klein, Schools Get Millions, supra note 6.
sufficient. Additionally, states like Georgia that advise participating private schools to stick to their admissions policies and not alter them are actively encouraging schools to discriminate based on sexual orientation because many of these schools have discriminatory admissions policies.

So what works? First, state voucher programs should include specific language in their antidiscrimination provisions pertaining to sexual orientation. This way, in the case of an incident of discrimination, students and their families know that they have a legal remedy. Additionally, although Maryland’s voucher program is not perfect and has had its own controversies regarding anti-gay discrimination headlines, requiring participating schools to sign a pledge that they will not discriminate in their admissions policies based on sexual orientation also seems to be a step in the right direction. Having participating schools promise that they will not engage in anti-gay discrimination will educate participating schools of their obligations of participating and will encourage those not willing to alter their discriminatory policies to drop out of the program altogether, as has already happened. A provision such as Wisconsin’s that prohibits participating schools from denying admission to students and that allows students to opt out of religious activities also seem to be strong steps. But, these provisions offer no protection to students expelled after opting out of those religious activities or due to sexual orientation in general.

These steps are likely not enough. Identifying the potential for discrimination is much easier when a school has an explicit policy against admitting homosexual students. A clear policy is easy to find on the school’s website and in itself describes discrimination based on sexual orientation. But what is to stop a participating private school having a stance against homosexuality but exclude it from the student handbook? Unhelpfully, estimates of discriminatory instances are likely to be low because voucher statutes enable schools to expel or refuse to admit students based on sexual orientation. Additionally, because state accountability requirements are generally low for participating private schools, schools may not have to disclose why they opted to expel a student. Even if there was a disclosure requirement, schools could easily provide a different reason and remain off the hook from discriminating.

Although a story has not yet emerged in North Carolina detailing the expulsion or refusal of admittance of a student voucher recipient, one could emerge at any time, as shown by other states with voucher programs. Even though there are a number of valid rationales for voucher programs, such as the lack
of strong educational options for students of low-income families, recent headlines describing LGBT discrimination have exposed a large flaw in these programs that should be addressed. Like all other states with vouchers, North Carolina does not sufficiently protect students from discrimination based on homosexuality, and North Carolina and other states should rethink the unintentional consequences of public funds going to religious private schools.